David Bowden Law®

ideas are always in credit

Is a pure legal assignment of a debt champertous?

JEB Recoveries LLP v. Judah Elezear Binstock
Court of Appeal Case number - A3/2015/1702

Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

Is a pure legal assignment of a debt champertous?

JEB Recoveries LLP v. Binstock – Court of Appeal case number A3/2015/1702

The Court of Appeal will hand down its reserved judgment on Wednesday 19 October 2016. It will have to review the limits of champerty and its judgement will need to be analysed with some care for its effects – particularly those businesses that buy consumer debts or are engaged in litigation funding. In the High Court, Judge Simon Barker QC had ruled that there was no illegal champerty or maintenance. Mr Wilson had assigned to a special purpose vehicle company the debts he claimed were owed by Mr Binstock. The SPV had no assets other than these alleged debts. The SPC was owned in 3 equal shares by Mr Wilson and 2 other businessmen. Mr Binstock disputed any liability and also denied English courts had jurisdiction over him because he claimed a domicile of choice in Spain. The judge below held that English courts had jurisdiction in relation to 1 of the 4 claims. The judge below struck out an unparticularised claim for £2m aggravated damages. Mr Binstock said there was champerty because the SPV was splitting the fruits of the litigation and it also provided costs protection to Mr Wilson if his speculative claims failed.

JEB Recoveries LLP v. Judah Eleazar Binstock
A3/2015/1702 *22 June 2016*
Court of Appeal, Civil Division (Moore-Bick, Tomlinson and Kitchin LJJ)

What are the facts?
In February 2010 Mr Binstock engaged Mr Wilson to identify and acquire a listed company with no trading history but with cash into which Mr Binstock could transfer his business interests by way of reverse takeover. Work was done from March to October 2010 by Mr Wilson pursuant to the contract but no reverse takeover occurred. Mr Binstock was then 81 and wanted to put his affairs in order. Mr Wilson claims that Mr Binstock owes him:

- £10million,
- €10,000 per month for his monthly retainer and expenses,
- £2million aggravated damages.

The £10million claim was found not to be justiciable in an English court. Mr Wilson assigned Mr Binstock's debts to him for £1 to JEB. JEB accepts that €50,000 and a further €7,000 has already been paid to Mr Wilson.

What is the business model of JEB Recoveries LLP?
JEB Recoveries LLP ('JEB') is a special purpose vehicle. It has consists of 3 members who each have equal shares namely Peter Wilson (a Bermuda resident), Mark Hardy and Michael Stannard (a resident of Switzerland). HHJ Simon Barker QC noted that Mr Hardy was '*no novice in the courtroom'* and acted in effect as a professional MacKenzie friend in the litigation for Mr Wilson. JEB was incorporated on 21 March 2014. The notes to JEB's abbreviated financial accounts for the year ending 15 September 2016 state that its principal activity is the recovery of unpaid invoices due on invoices rendered to Mr Binstock,

Who acted in this case in the Court of Appeal?
Before Judge Barker QC, Mr Hardy was permitted to address the court on behalf of JEB. Below Mr Nicholas Vineall QC of 4 Pump Court (who edits the Lloyds Financial Crime Law Reports) and Mr Caley Wright of New Square Chambers were instructed by Harcus Sinclair for Mr Binstock.

What did the judge below go on to rule on the jurisdiction issue?
Mr Binstock submitted that the action should be stayed or the claim struck out on the basis that the English courts do not have or should decline to exercise jurisdiction. Mr Binstock claims that his domicile of choice is now Spain where he is resident for 5 months a year. He claimed to spend his time in either Argentina or France for most of the rest of the year with only a limited time in England. He claims that his business interests are now centred in Spain. Mr Binstock wanted the case to be tried in a Spanish court.

On 18 March 2015 HHJ Simon Barker QC handed down his judgement on Mr Binstock's application to strike out all claims for want of jurisdiction in England – **[2015] EWHC 1168 (Ch).** The judge ruled that 3 of the 4 claims were not justiciable within the jurisdiction of an English court. However he ruled that one claim did have a sufficient connection for it to proceed in the jurisdiction of an English Court.

What did the judge below rule on the strike out application?
HHJ Simon Barker QC handed down a further written reserved judgment on 21 April 2015 on Mr Binstock's application to strike out the remaining claim – **[2015] EWHC 1063 (Ch).** Mr Binstock had

applied to strike out on the basis that the claim was an abuse of process because it was champertous. The judge ruled that:

- It was not champertous for Mr Wilson to assign his cause of action to JEP,
- It was not champertous for JEP to pursue Mr Binstock,
- As JEP was a SPV, Mr Binstock could apply for security for costs order against JEP if he remained concerned that his legal costs (if he were successful) would not be paid, and
- The claim for £2million aggravated damages was unparticularised and would be struck out

Judge Barker also granted permission to appeal of his own motion noting that the application '*raises a point of law of some importance*'.

What other litigation is in train between the parties?
The notes to JEB's abbreviated financial accounts for the year ending 15 September 2016 state that:

- JEB was ordered to pay the costs of Mr Binstock's successful application to set aside a statutory demand,
- Mr Binstock had issued a petition to wind up JEB as a result of this unpaid costs order, and
- All matters pending before the High Court including the application to wind up JEB have been ordered to be stayed pending the handing down of judgment by the Court of Appeal on 19 October 2016.

What view did Lord Neuberger of Abbotsbury PSC express on champerty in his 2013 lecture?
On 8 May 2013 Lord Neuberger delivered the Harbour Litigation Funding 1st annual lecture in Gray's Inn www.supremecourt.uk/docs/speech-130508.pdf. This was entitled '*From barretry, maintenance and champerty to litigation funding*'. He noted that until 50 years ago champerty was a crime and a tort and that '*since 1967 the prohibition on champerty has survived as a matter of public policy*'. Lord Neuberger said that '*rights must be capable of enforcement*' and that it was '*ironic that the original medieval rationale for the prohibition ..now has the opposite effect of affording the wealthy a monopoly of justice against poverty*'.

Lord Neuberger noted developments making inroads into the prohibition against maintenance such as legal aid, CFAs, human rights and damages based agreements. He said that the '*vice or concern underlying the prohibition of champerty is that the allegedly champertous maintainer might be tempted to corrupt or undermine the legal process*'.

Neuberger concluded that '*the public policy rationale regarding maintenance and champerty has turned full circle so that relaxation of the policy against maintenance and champerty may be justified to help safeguard the rule of law; and that, given the retreat from legal aid, the development of litigation funding as a means of securing access to justice may well gain more traction'*.

What were the grounds of appeal? What issue(s) were before the court?
Mr Binstock appealed on the grounds that Judge Barker was wrong. Mr Binstock submitted that the arrangement Mr Wilson had entered into with JEP was indeed champertous because the consideration was only £1. Mr Binstock submitted also that the agreement gave Mr Wilson costs protection as the litigation against him was brought by JEP which was a non-trading company with its only asset being whatever it could recover from him.

What does the Law of Property Act 1925 say?
Section 136 deals with legal assignments of debts. It provides:

> **'136. Legal assignments of things in action.**
> *(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—*
> *(a) the legal right to such debt or thing in action;*
> *(b) all legal and other remedies for the same; and*
> *(c) the power to give a good discharge for the same without the concurrence of the assignor.'*

What had the Court of Appeal previously decided in *Simpson v. Norwich & Norfolk NHS Trust*?
In *Simpson* **[2011] EWCA Civ 1149**, Mrs Simpson's husband died of an infection in a hospital run by the Trust. She settled her claim against the trust. Mrs Simpson wanted to highlight poor infection control at the hospital. She bought a similar claim from another patient (Mr Catchpole) for £1 and sought to pursue

the hospital for damages. Lord Justice Moore-Bick upheld the striking out of the claim concluding that '*the assignment in this case plainly savours of champerty, given that it involves the outright purchase by Mrs. Simpson of a claim which, if it is successful, would lead to her recovering damages in respect of an injury that she has not suffered*.' His reason for this conclusion was that he felt there was '*a real risk that to regard a collateral interest of this kind as sufficient to support the assignment of a cause of action for personal injury would encourage the purchase of such claims by those who wished to make use of them to pursue their own ends*.'

Are there any other prior authorities of relevance?
These authorities are relevant in this case:

Trendtex Trading Corporation v. Credit Suisse **[1982] AC 679** (House of Lords – Lords Wilberforce, Roskill, Edmund-Davies, Fraser and Keith)
Trendtex assigned a cause of action in contract against a Nigerian bank to Credit Suisse. The agreement by which the assignment was effected contemplated the sale of the claim by Credit Suisse for $800,000 which was settled for $8million. The arrangement contemplating a profit being made out of the cause of action by a third party savoured of champerty since it involved trafficking in litigation.

Reg (Factortame Ltd) v. SS for Transport (No 8) **[2002] EWCA Civ 932** (Court of Appeal – Lord Phillips MR, Robert Walker and Clarke LJJ)
You must look at the facts of the particular case and consider whether they suggest that the agreement might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress the evidence, to suborn the witnesses, or otherwise undermine the ends of justice.

Morris v. Southwark LBC & Sibthorpe **[2011] EWCA Civ 25** (Court of Appeal – Lord Neuberger MR, Lloyd and Gross LJJ)
It would be inappropriate in the 21st century to extend the law of champerty. There is some force in the argument that economic logic supports the case for condemning the indemnity as champertous. However, the rule against champerty is not entirely logical in its extent or limits, judicial observations strongly suggest that champerty should be curtailed not expanded.

What does the commentary in Blackstone's Civil Procedure say on this issue?
Below both sides drew Judge Barker's attention to the commentary in this work at paragraphs 14.7 and 14.8. These provide as follows:

'**14.7**. *There are two circumstances in which the rule against champerty and maintenance continues to be of relevance:*
(a) The rule may still invalidate agreements whereby a stranger to litigation provides funding to enable a party to bring or continue a claim …
(b) The rule may invalidate some assignments of causes of action.
14.8. *The scope of the rule against champerty and maintenance, in so far as it affects both funding and assignments of causes of action, has been progressively narrowed. The current position can be summarised as follows:*
(a) Liquidated claims in contract, such as the right to sue for the price of goods sold and delivered for which the defendant has failed to pay, can be assigned …
(b) The fruits of litigation can be validly assigned …'.

When will judgement be handed down in this case?
The reserved judgement of the court will be handed down in Court 75 of the Court of Appeal on Wednesday 19 October 2016 at 9.45am.

What will be the significance of this case for litigation funders and debt purchasing businesses?
We will have to see what ruling the Court of Appeal gives and digest its impact after it has been handed down. Debt purchasers rely on LPA section 136 and usually give the debtors in a purchased portfolio legal notice of assignment that their debts have been bought shortly after completion. Debt purchasers require authorisation from the FCA to collect these debts and the view had been that this was far removed from trafficking in litigation to be regarded as champertous.

11 October 2016

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.