

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

Master File No. 09-cv-118 (VM)

This Document Relates To: All Actions

Affidavit of Mark A C Diel

Tab 16

argument was rejected in *Offer-Hoar v Larkstore Ltd*.²⁷⁵ The Court of Appeal said that, in applying the principle that the assignee cannot recover more than the assignor, one should be asking what damages the assignor could itself have recovered had there been no assignment and *had there been no transfer of the land* to the assignee. Substantial damages were, therefore, recoverable where an assignor had sold its land to an assignee along with, or prior to, the assignment of the relevant cause of action relating to the land.

19-076 The problem has, in any event, normally been circumvented because of the courts' recognition that, where a third party is, or will become, owner of the defective or damaged property, there is an exception to the general rule that a contracting party can recover damages only for its own loss and not the loss of the third party.²⁷⁶ Where the exception applies, the contracting party (the assignor) is entitled to substantial damages for the loss suffered by the third party (the assignee); by the same token, there is no question of an award of substantial damages to the assignee infringing the principle that the assignee cannot recover more than the assignor.

(V) *No Assignment of Liabilities*

19-077 **Consent of other party required for release of contracting party.** Every-body has a right to choose with whom he will contract and no-one is obliged without his consent to accept the liability of a person other than him with whom he made his contract. Consequently, the burden of a contract cannot in principle be transferred without the consent of the other party, so as to discharge the original contractor. As Sir R. Collins M.R. said in *Tolhurst v Associated Portland Cement Manufacturers Ltd*²⁷⁷:

"Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee."

Benefit and burden. The principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party means that, as a general rule, the assignee of the benefit of a contract involving mutual rights and obligations does not acquire the assignor's contractual obligations. Thus, where goods are purchased, and the seller assigns the right to the price to a credit factor, the factor is under no liability to the purchaser if the goods are defective although, in an action by the factor, the principle that assignments are subject to equities means that the purchaser will generally be

able to rely on any defence or claim which he could raise against the seller.²⁷⁸ Similarly in *Pan Ocean Shipping Ltd v Creditcorp Ltd*²⁷⁹ it was held by the House of Lords that an assignee of the payment of hire under a charterparty is not liable to the debtor (the charterer), whether in contract or restitution, to repay the hire paid for a period when the ship turned out to be off-hire: rather the liability to repay the unearned hire, which on the facts was contained in an express term of the charterparty, remained exclusively with the assignor. This was so irrespective of whether the debtor would have had a defence to an action for non-payment of hire by the assignee.

Conditional benefits. However, where contractual rights are assigned, the extent of those rights will be defined by the original contract. This means that (for example) an exemption clause in the original contract may be binding on the assignee.²⁸⁰ Again, a patentee who assigned his patent by a contract which provided that certain payments were to be made to him was permitted to sue a company to which the assignees had later assigned their rights.²⁸¹ In *Tolhurst's case*,²⁸² the assignee acquired the benefit of a contract to supply chalk for the manufacture of Portland cement on a particular piece of land. The assignee was not bound by the duty to take chalk from Tolhurst,²⁸³ but if it did take chalk, it was bound to obtain all its requirements for the manufacture of cement on that piece of land from him. Although these cases have sometimes been seen as applications of the principle that he who takes the benefit of a transaction must also bear the burden, it appears that they are examples of another principle: the conditional benefit principle.²⁸⁴ The conditional benefit principle arises where the right assigned is only conditional or qualified, the condition being that certain restrictions shall be observed or certain burdens assumed. The restrictions or qualifications are an intrinsic part of the right which the assignee has to take as it stands.²⁸⁵ The question whether a contract creates a conditional benefit is one of construction.²⁸⁶

"Pure" benefit and burden principle. In *Tito v Waddell (No.2)* Megarry J V.C. distinguished the conditional benefit principle from what he termed the "pure principle of benefit and burden".²⁸⁷ By a series of contracts, a mining

²⁷⁸ Above, paras 20-068—20-069.

²⁷⁹ [1994] 1 W.L.R. 161.

²⁸⁰ See *Britain & Overseas Trading Ltd v Brooks Wharf Ltd* [1967] 2 Lloyd's Rep. 51; *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 R.P.C. 41, 57 et seq. See also *Aspiden v Seddon* (No.2) (1876) 1 Ex.D. 496, 509. In *Glencore International AG v Metro Trading International Inc* [1999] 2 All E.R. (Comm) 899, the assignee of the obligation to pay the price under a contract of sale was held "bound" by the exclusive jurisdiction clause in that contract (and such an assignment was held to fall within art.17 of the Brussels Convention, given effect to in the UK by the Civil Jurisdiction and Judgments Act 1982).

²⁸¹ *Wendman v Societe Générale d'Electricité* (1881) 19 Ch.D. 246.

²⁸² [1903] A.C. 414, above, para.19-055.

²⁸³ *National Carbonising Co Ltd v British Coal Distillation Ltd* (1936) 54 R.P.C. 41.

²⁸⁴ See generally *Tito v Waddell* (No.2) [1977] Ch. 106, 290 et seq. See also *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*, *The Trident Beauty* [1994] 1 W.L.R. 161, 171.

²⁸⁵ [1977] Ch. 106, 290, 302.

²⁸⁷ [1977] Ch. 106, 290, 302.

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²⁷⁵ [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926. See also *G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd* (1982) S.L.T. 533 (a Scottish delict case); *Linden Gardens Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 B.L.R. 57, 80-81, per Staughton L.J.

²⁷⁶ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85; *Durington BC v Wilshier Northern Ltd* [1995] 1 W.L.R. 68; *Alyed McAlpine Construction Ltd v Pantowen Ltd* [2001] 1 A.C. 518. The exception is based on *Dunlop v Lambert* (1839) 6 Cl. & F. 600 and *The Albazero* [1977] A.C. 774. For detailed discussion, see above, paras 18-050—18-063.

²⁷⁷ [1902] 2 K.B. 660, 668 C.A.; *C.B. Peacock Land Co Ltd v Hamilton Milk Products Co Ltd* [1963] N.Z.L.R. 576; *Hirachand Punamchand v Temple* [1911] 2 K.B. 330, 80 L.J.K.B. 1155. See also *Gandens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 103. See also *Birks and Beaton* (1976) 92 L.Q.R. 188-202.