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Chee Ho THAM
Singapore Management University, chtham@smu.edu.sg

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In defense of the no discharge after notice rule: A reply

By THAM Chee Ho

Associate Professor, School of Law, Singapore Management University.

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Mr Trukhtanov[1] has made his own summary of and response to my own account[2] of equitable (and statutory) assignment, and how notice of assignment operates within them. Having been reminded of how the cases on the topic are usually understood, readers will have to make up their own minds. While there is, always, room for further thought, it is important not to lose sight of two fairly important distinctions. Where A is the debtor,[3] B is the creditor, and C is an assignee to whom B has assigned the chose in action arising from A's debt obligation, a distinction should be drawn between: the question to whom the debtor is liable; and what the debtor is obliged to do to be discharged from that debt obligation.[4] A distinction should also be drawn between cases where A has paid B in satisfaction of the contractual promise (thus discharging the contractual obligation by precise performance) and cases where A has not.[5]

Mr Trukhtanov observes[6] that in William Brandt's Sons & Co v. Dunlop Rubber Co Ltd,[7] Kramrisch had previously given Dunlop a general direction to make payments to Kleinwort. Relying on the authority of Page v. Meek,[8] Mr Trukhtanov concludes that payment by Dunlop to Kleinwort pursuant to such general direction from Kramrisch must have resulted in a discharge of Dunlop's debt obligation to Kramrisch.

While not denying that an earlier general direction had been made, there is no rule of law that such directions are irrevocable. If one asks the question "how is it that a payment to a third party at the direction of the creditor results in a discharge of the obligation?", Cockburn CJ would have answered that such discharge could have arisen as a matter of an accord and satisfaction or, as was actually held to be the case in Page v. Meek, where the parties had agreed to vary the manner of payment to some other form, compliance with that varied manner of payment would entitle the debtor to make a special plea of payment.[9] In either case, the discharge arises because of mutual agreement. And, if that is the case, obviously, the parties are free to enter into further modifications of their mutual obligations.

On the facts of Brandt's, there is nothing to indicate that parties might have intended the directions in that case to have been irrevocable: indeed, the tenor of the speeches in Brandt's indicates otherwise. Had the special direction by Kramrisch to Paterson (the employee of Dunlop in Birmingham authorised to handle such correspondence) been forwarded to Dunlop's head office in London (as ought to have been done), and had the head office acted upon such direction and effected payment to Brandt's notwithstanding the earlier general direction to pay

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[1] A Trukhtanov, "In defence of the 'no discharge after notice' rule" [2010] LMCLQ 551 (hereafter "Trukhtanov").
[2] C H Tham, "Notice of assignment and discharge by performance" [2010] LMCLQ 38 (hereafter "Tham").
[3] For convenience, in line with the usage in my earlier paper, the debtor will be referred to as being feminine, whereas the creditor-assignor and the assignee are referred to as being masculine.
[4] Tham, 41.
[5] Tham, 59 and 72.
[6] Under the heading, "Authority for the rule"
[7] [1905] AC 454.
[8] (1862) 3 B & S 259; 122 ER 98.
[9] (1862) 3 B & S 259, 262–263; 122 ER 98, 99–100.

Kleinwort, there is little in their Lordships' speeches that suggests that they would have held such payment to be ineffective to discharge Dunlop from their obligations in relation to the shipment in question. Consequently, their Lordships must have taken the view that the general direction was revocable or, at least, capable of being suspended, and had been revoked/suspended in relation to the shipment specified in the special direction.

As Lord Macnaghten put it: "[Paterson] did not think it worth while to send to the head office Brandt's letter of January 7, 1903 and its inclosures [ie, the special direction]. The head office, therefore, knew nothing of this equitable assignment, and they paid the money to the wrong man because Kramrisch on a former occasion had given them a general direction to pay Kleinwort & Co. The difficulty … was 'owing to the neglect of duty at Birmingham'. It would be unreasonable to make Brandt's suffer for that".[10] It seems reasonably clear that their Lordships were of the view that the earlier general direction to pay Kramrisch was not applicable in relation to the payments due for the packages specified in the subsequent special direction to pay Brandt's. That special direction had been communicated to the authorised representative of Dunlop; but for an internal misunderstanding arising from the failure to transmit that information to Dunlop's head office, Dunlop would have acted upon it, and there is no reason why compliance with that special direction would have been ineffective as a form of discharge. In paying the wrong entity in relation to the particular shipment as a result of its internal mismanagement, Dunlop could not successfully claim to have discharged its obligation to make payment for the shipment.

Mr Trukhtanov and I will have to agree to disagree over our very different readings of Brice v. Bannister.[11] But Mr Trukhtanov's reading of Jones v. Farrell[12] may require a little clarification. For argument's sake, Mr Trukhtanov seems willing to accept my view that, in light of the indorsement by the debtor (Moore) upon the written notice of assignment originating from his creditor (Farrell) that he would pay the assignee (Jones), Farrell had reached an accord and satisfaction with Moore as to the debt obligation between them, replacing it with an obligation whereby Moore was to pay Jones instead.[13] Mr Trukhtanov also appears to be prepared to accept that the subject matter of the assignment to Jones would then be the chose in action arising out of the accord, and not the original debt obligation. However, he goes on to say that, "even on this rather generous view of the notice, Jones would have had to be non-suited in equity. Equity leaves an equitable assignee to pursue his action at law in the name of the assignor and does not give relief unless the assignor obstructs recovery at law".[14] Support for this is found in Hammond v. Messenger;[15] and the conclusion is that "Jones' proper recourse would have been to sue Moore at law in the name of Farrell; and, since Farrell's own action at law on the new promise could only result in payment to Jones, there was no occasion for equity to assist".[16]

Hammond v. Messenger was a decision of the Vice-Chancellor upholding a general demurrer.[17] In the course of dismissing the plaintiff's inadequately pleaded bill, the Vice-Chancellor observed as follows: "if the creditor will not allow the matter to be tried at law in his name, this Court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the Plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor".[18]

It is unclear whether this supports the contention that Jones would have been non-suited in Equity in light of the two concessions noted above. First, Mr Trukhtanov's reading of the rule in Hammond v. Messenger may go too

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[10] [1905] AC 454, 463. See also Lord James' speech, at 464–465.
[11] Trukhtanov, text following n 21; Tham, 59–60.
[12] (1857) 1 De G & J 208; 44 ER 703.
[13] Trukhtanov, text following n 28.
[14] Trukhtanov, text following n 31.
[15] (1838) 9 Sim 327; 59 ER 383.
[16] Trukhtanov, text following n 31.
[17] See Sir Jack Jacob and IS Goldrein, Pleadings: Principles and Practice (Sweet & Maxwell, London, 1990), 65 n 60.
[18] (1838) 9 Sim 327, 332–333; 59 ER 383, 385–386 (emphasis added).

far. The Vice-Chancellor merely set out one example where Equity would not step in. Second, even taking that rule to be exhaustive, accepting that the debt obligation to pay Farrell had been replaced by an obligation to pay Jones, the most appropriate remedy for such a breach would have been the equitable remedy of specific performance[19] and not the common law remedies of an action for a fixed sum[20] or damages.[21] Farrell's own action before the common law courts on Moore's obligations under the accord (and any action at law brought by Jones in Farrell's name on the same) would likely have resulted in the award of inadequate remedies. Accordingly, Jones v. Farrell presents a perfectly reasonable set of facts upon which equity's auxiliary jurisdiction might justifiably be resorted to.[22]

Mr Trukhtanov supports[23] a more traditional view as to how equity, common law and notice play their parts in the assignment of a debt.[24] Apart from what follows, most of these views have already been discussed at some length in my paper.[25] Mr Trukhtanov observes that "notice … was perfectly well explained at common law as the debtor's authority to pay the assignee by way of proper discharge. When things went their normal course, and the debtor paid the assignee as assignor's attorney under that authority, no further common law explanations were needed. If difficulties arose and either the assignor or the debtor became obstructive, the convolutions of variation by accord and satisfaction could not assist because they only created a contract for the benefit of a third party which was useless to the assignee".[26]

Mr Trukhtanov is content to rely on case authority which states that, when a debtor pays a third party at the direction of her creditor, the debtor is discharged from her debt obligation. But what doctrine underlies such discharge? The cases cited do not say, though I have suggested some possibilities, one of which involves reliance on discharge of the contractual obligation by way of an accord and satisfaction—that is, a variation of the original contract.[27] That may be what prompts Mr Trukhtanov's reference to the futility of the accord and satisfaction analysis. But that mistakes the context in which the accord and satisfaction reasoning was proposed. As I sought to explain, where the contract is incapable of being construed as permitting unilateral variation of the content of the debtor's contractual obligation by the creditor, should the debtor pay the assignee as directed by the creditor, the common law may protect the debtor from being sued by the creditor (for not having discharged the obligations under the debt contract through precise performance) by concluding that there had, in effect, been a mutually agreed variation of that prior obligation, which variation had then been fully performed.[28] If so, although the assignee would be a third-party beneficiary to the contract arising out of the accord and would, as a matter of privity, be powerless to bring proceedings at common law against the debtor upon it, that is irrelevant. Where the obligation in the accord to pay to the assignee has been performed, the assignee has no call to bring any proceedings against the erstwhile debtor.[29]

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[19] Cf Beswick v. Beswick [1968] AC 58.
[20] There being no common law debt between Moore and Farrell.
[21] Which would most likely have resulted only in an award of nominal damages since Moore had bound himself to Farrell under the accord to pay Jones. Whether the court would have been open to considering the plausibility of Farrell's having sustained substantial loss in light of his performance interest is a moot question.
[22] This is not to say that there are no conceptual difficulties: infra, n 29.
[23] Under the heading "Equity does follow the law".
[24] Trukhtanov, text between nn 38 and 47.
[25] Tham, 55–59.
[26] Trukhtanov, text from nn 44–46.
[27] Tham, 55–59.
[28] Tham, 57–59. Equity may also provide some protection through estoppel.
[29] Indeed, were the erstwhile debtor in breach of the accord, as has been pointed out above in relation to Jones v. Farrell, the equitable assignment may only have been of the chose in action arising out of the obligations set out in the accord. As suggested above, there seems no obvious reason why an equitable assignee in such a case ought to be precluded from seeking a remedy in equity to compel the obligor from performing the outstanding obligations set out in the accord, if any.

Mr Trukhtanov also appears to accept that, notwithstanding receipt of notice of an assignment of the debt to the assignee, precise performance by a debtor in paying the creditor "thereby destroyed the cause of action at law that was the medium through which the assignee was to realise his beneficial interest. [But e]quity compensated the assignee by ordering the debtor to pay again. In so doing, it imposed a liability on the debtor, who knowingly involved himself in defeating the beneficial interest of the assignee".[30] Row v. Dawson[31] is then cited in support of this proposition.

Acceptance that precise performance by the debtor discharges the contractual obligation requires acceptance, too, that the subject matter of any assignment of the debt must be the chose in action arising from the contract agreed upon between the debtor, A, and the creditor, B:[32] the chose in action is not the medium by which an assignee is to realise his beneficial interest, but its very subject matter. But, on either view, the effect of payment to the creditor is to destroy the assignee's interest. So is Mr Trukhtanov right to say that equity then provides a remedy for such destruction?

Mr Trukhtanov refers to Row v. Dawson, which addressed the question whether an equitable assignment[33] had been effected of a fund in the hands of an officer of the Exchequer (S) standing to the credit of the assignor (G) in favour of two assignees (T and C), prior to the assignor's bankruptcy, so as to ring-fence that fund (or at least so much of it as would satisfy the claims of the two assignees) from the bankrupt assignor's ordinary creditors. The Lord Chancellor held that that was certainly the case. On the facts of Row v. Dawson, there was no question as to what might be the case had S actually paid G, despite having received notice of the assignments to T and C. Consequently, the Lord Chancellor's observation that, "[S] could not have paid this money to [G], supposing he had not been bankrupt, without making himself liable to the defendants [T and C]; because he would have paid it with full notice of this assignment, for valuable consideration"[34] is an obiter dictum.

Given the nature of the dispute, the equitable interests of T and C arising out of the equitable assignments to them by G would have taken precedence over the interests of his debtors in bankruptcy, regardless of notice. Row v. Dawson is a case involving a dispute between an assignee and the assignor's trustee-in-bankruptcy. Given that the trustee-in-bankruptcy takes no better interest in the bankrupt's assets than the bankrupt himself, the Lord Chancellor would still have been bound to uphold the claims of the equitable assignees even if no notice had been given at all. On these facts, the reference by the Lord Chancellor to notice adds nothing to the reasoning underlying the court's actual decision.

Drawing upon the observations made by the Vice-Chancellor in Hammond v. Messenger, however, had S colluded with G to deprive the assignees of their interest, matters might have been different: knowing assistance liability might then have arisen, although mere notice ought not be sufficient.[35] My analysis would suggest that, if anything, where the debtor is merely notified of the assignment but chooses to precisely perform her part of the contractual bargain despite that notice, the equities are tipped in favour of the debtor.[36]

Mr Trukhtanov also dismisses possible difficulties with the doctrine of tender by applying the "conditional benefit" principle. That view, however, is not inconsistent with my analysis. If at all, the conditional benefit

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Admittedly, there is a conceptual problem with this approach—but that is shared with any application of the Vandepitte procedure proper. For a discussion of the conceptual problem with the Vandepitte procedure and some suggested solutions, see M Smith, The Law of Assignment (OUP, Oxford, 2007), §§ 6.14–6.32.

[30] Trukhtanov, text to n 49.

[31] (1749) 1 Ves Sen 331; 27 ER 1064.

[32] Tham, 45–51.

[33] The assignment in Row v. Dawson must have been equitable, since that case was decided in 1749.

[34] (1749) 4 Ves Sen 331, 333; 27 ER 1064, 1065.

[35] Tham, 52.

[36] Tham, 52–55.

principle is inconsistent with the proposition that notice of an assignment precludes a debtor from making or tendering payment to the assignor. As Megarry V-C made clear, where that principle applies, the conditional benefit principle is additive.[37] Application of the conditional benefit principle merely ensures that the assignee, too, must accept a conforming tender. That principle accepts, however, that such obligations are not transferred from the assignor.

Finally, with a view to demonstrating how inequitable the "no discharge after notice" rule may be, I posed an example in my paper involving an assignee who was out of the jurisdiction. The purpose of the example was to show how the identity of the creditor is just as much a term of the contract as any other. The importance of such terms as to the creditor's entire identity was then underscored by the rule that, in the usual case, it is for the debtor to seek out her creditor so as to tender payment when the debt becomes due and payable. Mr Trukhtanov points out[38] that, as a matter of common law, Fessard v. Mugnier[39] holds that this rule is suspended when the creditor goes overseas after having entered into a contract with the debtor. The difficulties with the rule that a debtor must find her creditor are therefore mitigated. Or so it seems.

First, the exception applies only to cases where the contract in question had been entered into in England. As on the facts of Fessard v. Mugnier itself, where the parties had entered into the contract while they were beyond English shores, the debtor would still be bound to seek the creditor to tender payment wherever the creditor might be. But, even where the contract had been entered into in England, the debtor must still track the movements of her creditor to determine whether her creditor remained in England, had moved overseas, or had returned to England. That practical problem of locating the creditor remains, whether to effect payment, or to take advantage of the exception in Fessard v. Mugnier. That problem would then be magnified if it is right that, following notice of an assignment, it is not possible for such debtor to rely on precise performance by payment to the creditor (as contractually stipulated) to discharge her from further liability on the chose in action arising from her contractual obligations. If that is correct, the debtor would then have to track the movements and location of a stranger to that contract.

It is generally agreed that the modern law of assignment has moved towards the greater transferability of debts. My paper was an attempt to clarify the subject matter of the transfer effected by equitable and statutory assignment, and to explain how such transfer is effected without contravening fundamental principles of common law and equity. Even if this may be considered an "outdated" point of view, it can hardly be defunct.

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[37] Tito v. Waddell [1977] Ch 106, 290. Lord Woolf of Barnes (with whom Lords Keith of Kinkel, Slynn of Hadley and Lowry concurred) cited this passage with approval in Pan Ocean Shipping Ltd v. Creditocorp Ltd (The Trident Beauty) [1994] 1 WLR 161, 171.

[38] Under the heading, "Debt is nothing personal".

[39] (1865) 18 CB (NS) 286; 141 ER 453.