

Equity and trusts

[Law](#), [Common Law](#)



EQUITY AND TRUSTS ' The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree." Per Lord Macnaghten in *William Brandt's & Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, 461 Discuss critically the above statement with regard to the Malaysian legal position. Before receiving his title deed, a person may obtain a loan from a financier by assigning the rights to the property to the financier. Similarly, a creditor may obtain a loan from a factor by assigning in his favor all his rights over a debt. These type of assigned rights are called ' choses in action', which are intangible rights as opposed to ' choses in possession' (a right to tangible objects). Channell J defined the expression ' choses in action' in *Torkington v Magee* , to mean " all personal rights of property which can only be claimed or enforced by action, and not by taking possession." When a right in the nature of a chose in action is transferred from an assignor to an assignee, an assignment is made. Assignment is commonly used in Malaysia to transfer rights to book debts, securitisable assets, goods, and other receivables. An assignment is not itself a contract between assignor and debtor: its legal nature is that of a direction amounting to the transfer of a right. There are two types of assignment, namely legal and equitable; with the main distinction between the two being the degree of legal right being transferred. Since legal and equitable assignments have different requirements, a pertinent issue arising is whether or not an assignee has the right to take action against the debtor without involving the assignor, or vice versa. The rules governing this area have been settled after the Civil Law Act 1956 (CLA) came into force on 7 April 1956 for West Malaysia and 1 April 1972 for East Malaysia. According to

S4(3) CLA, if the assignment fulfils the criteria of a statutory assignment provided in that section, the assignee may sue the debtor directly. However, if the assignment cannot constitute a statutory assignment, it may stand as an equitable assignment, whereby the assignee needs to enjoin the assignor in order to take action. Since s4(3) CLA is similar to the s25(6) of the English Supreme Court of Judicature Act 1873 (CJA), it would be relevant to examine the English position on assignment. s3 CLA provides for courts in West Malaysia to apply the common law and rules of equity administered in England on 7 April 1956; for Sabah as administered in England on 1 December 1951 and for Sarawak as administered in England on 12 December 1949. In England prior to the CJA, there existed a dual system of separate courts which operated on different rules, causing some cases where dissimilar administration in the courts of common law and equity led to inconsistent remedies. For example, the old common law rule forbade assignment of any choses in action (whether legal or equitable). This was on the grounds of its "intensely personal character", and the fear that it would lead to "multiplying of contentions and suits, of great oppression of the people". Following the common law doctrine of privity of contract, an assignee of a legal assignment of rights could not sue the debtor, for lack of privity. Since the common law did not recognize assignments of choses in action, such assignment had to be made under equity, in order to be valid. The Federal Court elaborates in the case of *Nouvau Mont Dor (M) Sdn Bhd*, "As is well known, an ordinary debt or chose in action before the Judicature Act 1873 was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity

the assignee of a debt... had to make his assignor... party in order primarily to bind him and prevent his suing at law..." According to Buller J. , " the Courts of Equity from the earliest times thought the doctrine too absurd... to adopt." Hence, equity formulated its own rules regarding the validity of assignments by recognizing the assignment of equitable as well as legal things in action. For equitable assignments, an assignee could bring action in his own name; whereas for legal assignments, proceedings needed to be in the name of the assignor, since the assignment was not recognized at law. If the assignor refused to allow the assignee the use of his name, an injunction could be used to compel him. As a result, an assignee had to go to two courts in order to enforce a legal assignment. Before he went to the common law court to take action, he first had to go to the court of equity to compel the assignor to lend his name. " With the introduction of the CJA, the dual system was abolished and the legislature became fused. The reorganization of the courts produced one Supreme Court administering both law and equity. S24 of CJA gave the power and conferred the duty to every judge to recognize and give effect to both legal and equitable claims. Further, s25 provided that in case of conflict between the rules of common law and the rules of equity, the rules of equity should prevail. This transformed the position of an assignee, who could now seek enforcement of an equitable assignment from any court where previously he could only have done so at the Court of Chancery. As for legal assignment, the assignee needed only go to one court, provided he joined the assignor as co-plaintiff. If the assignor refused assent, equitable jurisdiction could be evoked to oblige him to do so. Besides merging the two streams, CJA also introduced statutory assignment.

S25(6) of the 1873 Act has now been replaced by s136 of the Law of Property Act 1925 which resembles Malaysia's s4(3) CLA. Accordingly, an assignee of a valid statutory assignment may bring action in his own name. The concurrence of the assignor is not needed as the legal right is transferred to the assignee from the date the notice is given. In order to fulfil the criteria of statutory assignment, the following requirements must be met: (1) The subject of the assignment must be debts or other legal choses in action. The phrase "legal chose in action" has been interpreted to mean "lawfully assignable chose in action". So, even traditionally equitable choses in action can be assigned under statute. But future choses in action cannot be assigned by statute. (2) The assignment must be absolute and unconditional. Partial assignment, conditional assignment or an assignment by way of charge is not sufficient. Whether or not a particular assignment is absolute or merely by way of charge depends on what "can be gathered from the four corners of the document". The test of an absolute assignment has been laid down in the case of *Khaw Poh Chhuan v. Ng Gaik Peng (f) & Yap Wan Chuan & 9 Ors* namely that "The test of an absolute assignment should normally be whether the interest as claimed had been transferred unconditionally to the assignee and placed completely under the assignee's control." (3) The assignment must be made in writing and signed by the assignor. Formal notice is not required and it is sufficient if information relative to the assignment is conveyed to the debtor so that he has notice of the assignment. If an agent signs the assignment, this would not be allowed. The assignment need not be by deed, nor need it be for value. An assignee's assent is not required for an assignment to be effectual in law. (4) Express

notice in writing must be given to the debtor, though it need not be given by the assignor. Notice need not be in formal language, as long as the meaning is sufficiently clear. Notice is not invalidated by omitting to specify the date of assignment or by adding inaccurate information. Notice in writing must be given even if the debtor was illiterate and oral notice had been given. The debtor after receiving notice, must direct future payments to the assignee. If he pays the assignor without the consent of the assignee, he may have to pay the assignee all over again. An assignment, complying with these requirements and being completed when notice has been received by the debtor, has the effect (subject to equities having priority) of transferring to the assignee the legal right to the debt; all legal and other remedies for the debt; and the power to give a good discharge for the debt without the concurrence of the assignor. That is to say, such assignment " shall be... effectual in law ... to pass and transfer not only the legal right to the debt or chose in action but also the right to sue upon it in the assignee's own name" If there is a failure to comply with these criteria, the assignment is not void. It is void as a statutory assignment but it still stands as a perfectly good equitable assignment. In *William Brandt's Sons & Co. v Dunlop Rubber Co. Ltd.* (1905) A. C 454 at page 461 Lord Mac Naghten had occasion to opine: ' The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree." Hence, in many cases, an assignment which does not comply with the statutory requirements may not be ineffectual but instead may operate as an equitable assignment. In a Malaysian case, the explanation by Abdul Malek Ahmad J of which is reproduced as follows: " The statute has in no way detracted from the efficacy of equitable assignments

and the position in relation to them remains exactly as it was before 1873. The difference is purely procedural: the assignee has the right to sue in his own name alone for recovery from the debtor only if the assignment is legal. Otherwise proceedings should be in the joint names of the assignor and the assignee." In the words of Peh Swee Chin J in the case of *Khaw Poh Chhuan v. Ng Gaik Peng (f) & Yap Wan Chuan & 9 Ors* , " Section 4(3) has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperate, to join the assignor as a co-defendant." It has also been held that " where the assignment is absolute, then the assignee can sue in its own name, without joining the assignor." Also worth consideration is the obiter dicta in the case of *Public Finance v Scotch Leasing* which states that " the validity of an equitable assignment... is not affected by any failure to comply with the requirements as laid down in s 4(3) of the Civil Law Act 1956, in particular the failure by the assignee to give notice to the debtor of the assignment." Based on the above cases, I submit that the validity of an equitable assignment is not affected by the existence the category of statutory assignment defined in s4(3) CLA; as an assignment which does not fit in the latter category may still be classified as the former. Interestingly, in the 2004 case of *Wong Kim Wah v The Government Of The State Of Pahang & Anor* , the learned judge, after discussing in detail the criteria of equitable assignment and decided cases, concluded that the assignment in question was not an absolute assignment within the provision of s. 4(3) of the Act, and while it was an equitable assignment, it still did not entitle the plaintiff to

bring an action against the defendant without the need of joining the third party. An equitable assignment does not always on its face purport to be an assignment, or use the language of assignment. No particular form is required, in accordance with the equitable maxim that "equity looks to intent rather than form". Instead, sufficient expression of intention to assign is necessary. Mohammed Dzaiddin SCJ put it this way, "The correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always be beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance." In the case of *Malaysian International Merchant Bankers Bhd v Malaysian Airlines System Bhd*, it was held that for an equitable assignment, no particular form of words is required. The only thing that is necessary is to make the meaning plain. The words used must clearly show an intention that the assignee is to have the benefit of the chose in action. This followed the decision in *William Brandt's Sons & Co. v Dunlop Rubber Co. Ltd* which stated that "the language contained in the purported assignment is immaterial if the meaning is plain." Thus, the assignment is enforceable so long as there exists sufficient expression of intention to assign that bundle of rights. The learned judge in the *MIMB v MAS* case also held that an assignment may be addressed either to the debtor or to the assignee. In fact, theoretically, such an equitable assignment need not even be in writing; although in practice, clarity of intention would be difficult to prove without written documentation. An equitable assignment may be of part of a debt only or by way of a charge. Notice to the debtor is not a necessary prerequisite for validity of assignment. So long as there was a

prior arrangement of the assignment between the assignor and the assignee, a good assignment would materialise, regardless of whether the debtor had no notice of it, had not given consent or even disagreed with that arrangement. However, notice is important in relation to competing interests. Until notice is received, a third party is not bound by the assignment and may continue to pay the assignor. Notice to the person liable has consistently been regarded as necessary to give the assignee title to claim the benefit of the chose in action against that person. Despite the lack of formal requirements, some form of transaction must be proven in each case, " some distinct indication of intention to make over, to part with control over, the thing alleged to be assigned." Having fulfilled all the requirements, the effect of an equitable assignment is as follows: For an equitable assignment where the whole interest has been vested in the assignee, he may sue in his own name. While for an equitable assignment which leaves some interest outstanding, or an equitable assignment of a legal chose, neither the assignee nor the original creditor can sue for the chose without joining the other. To conclude, the addition of S4(3) CLA is a mere procedural difference which lays down clear elements to aid the process of proving intention sufficient to enforce an assignment. The validity of an equitable assignment is not rendered ineffective by the requirements of the statute. Instead, the category of statutory assignment advances expediency by allowing parties fulfilling the requirements to sue directly using their own name.