Cambridge Law Journal, **73(2)**, July 2014, pp. 405–434
doi:10.1017/S0008197314000440

PROHIBITIONS ON ASSIGNMENT: A CHOICE TO BE MADE

G.J. TOLHURST* AND J.W. CARTER**

ABSTRACT. *In recent years two views have developed as to the efficacy of prohibitions on the assignment of contractual rights. One view, "the property view", dictates that such prohibitions characterise contractual rights as choses in action and robs them of their transferable nature. Another view, "the contract view", dictates that such prohibitions operate only at the level of contract and cannot prevent the equitable assignment of the benefit of a contract. Both views have judicial and academic support. The view that is ultimately adopted will have important implications for contract drafting and the law of assignment. This paper explains both views and puts forward an argument for adopting the property view.*

KEYWORDS: *Assignment, prohibitions on assignment, equitable assignment, declarations of trust, commercial construction.*

I. INTRODUCTION

In Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd.,[1] the House of Lords decided that a contractual prohibition on the assignment of the benefit of a contract is not contrary to public policy.[2] Prohibitions are therefore enforceable. Such clauses are very common in modern commercial contracts, often drafted for the benefit of both parties. Although various forms of prohibition are in use, there are four main categories.

First, and perhaps most commonly, the contract may simply state that (the benefit of) the contract is not assignable by either party (or one of the parties).

Second, the clause may impose a restriction on assignment. For example, it may provide that the contract is not assignable except to an entity which

* Professor of Commercial Law, Faculty of Law, University of Sydney, Consultant, Herbert, Smith Freehills. Address for correspondence: University of Sydney, Sydney Law School, Eastern Avenue, Camperdown Campus, NSW 2006, Australia. Email: greg.tolhurst@sydney.edu.au.
** Professor Emeritus, University of Sydney, Consultant, Herbert, Smith Freehills, General Editor, *Journal of Contract Law*. The authors would like to thank Dr P.G. Turner for commenting on an earlier draft of this paper.

[1] [1994] 1 A.C. 85.

[2] See also, *Mulkerrins v PricewaterhouseCoopers* [2003] UKHL 41 at [13], [2003] 1 W.L.R. 1937, 1941.

satisfies certain criteria, such as being a related body corporate of the assignor.[3]

Third, the prohibition may take the form of a promise not to assign (the benefit of) the contract.

Fourth, the clause may simply say that the contract is personal to the parties.

Prohibitions on assignment derive from a concern that the promisor ("obligor") should not be required to perform the contract for anyone other than the promisee-counterparty under the contract (the "assignor"). That is their commercial objective. In other words, the parties have agreed that neither party (or one party) should have power to bring about the situation where a third person ("assignee") has direct rights against the obligor.

The meaning, legal effect and scope of application of a prohibition have been held to be questions of construction. However, two quite different views about the legal effect of such clauses have emerged in recent years. These different views impact markedly on the assumed scope of application of prohibitions on assignment. One view, for which we argue in this article, is that the impact of the clause is to define the attributes of the chose in action which is the benefit of the contract. Since the effect is to define property rights, we term this the "property view".

The other view, which we term the "contract view", is that a prohibition on assignment does not impact on the assignor's rights which remain assignable. However, it does have an impact on the obligor's obligation such that, despite the assignment, the obligor need only perform the contract for or account to the assignor. The commercial purpose of the prohibition is seemingly achieved as the assignee, despite having title to the chose, has no direct rights against the obligor. In practice, however, as will be discussed, the prohibition can be avoided by a declaration of trust, the ultimate result of which will be for the assignee to stand in the shoes of the assignor to enforce the contract directly against the obligor. It is difficult to imagine a more blatant example of achieving by indirect means what cannot be done directly. Indeed, as also discussed, it is difficult to see why, under the contract view, an attempted legal assignment in contravention of the clause should not take effect as an equitable assignment, thus negating the prohibition entirely. It seems to be implicit in the contract view that it is not open to the parties by express provisions to define the property interests which are created when they enter into the contract. In our view this is out of step with the nature of assignment itself.

[3] Another often used restriction is an express requirement of consent to an assignment. Usually consent is expressed as "not to be unreasonably withheld". Based on the property view put forward in this paper, a unilateral waiver of a prohibition cannot of itself change the nature of a chose in action and give it the character of transferability although it may operate as a form of estoppel. Hence the importance of an express or implied provision for assignment with consent to be incorporated into the contract from the moment of formation.

Since a prohibition on assignment has been held not to be contrary to public policy, the parties are free to create such restrictions on assignment as they deem fit. There is no reason why full recognition should not be given to this. The position is unarguable in relation to tangible property. For example, if B receives goods from A under a contract, the parties may stipulate that B has custody but not possession. It would be absurd to suggest that in such a situation B can create a sub-bailment, albeit in breach of contract. Similarly, the fact that C occupies D's land pursuant to a contract for a period of 12 months does not mean that C is a tenant of D. Accordingly, in relation to ordinary contracts, the fact that the property at issue is intangible should make no difference. It similarly follows that the contract view does not reflect the accepted position that the legal effect of a prohibition on assignment is dependent on construction as it places an institutional limitation on what can be achieved by such clauses. Nevertheless, on the contract view the parties must still pay special attention to drafting. For example, a prohibition in the form of the first category above will not prevent the assignor declaring a trust, and the breach of a promise not to assign (third category) merely exposes the assignor to a claim for damages.

Both the property and contract views now have judicial support making it difficult to provide clear legal advice on the effectiveness of these provisions. This difficulty makes problematic the structuring (or restructuring) of sophisticated financing transactions. At some point in the near future a decision needs to be made as to which way the law both in England and Australia will proceed. Recently, Professor Goode made the case for the contract view.[4] This article puts the case for the property view, which, it is suggested, is in line with the principles governing assignment and reflects the history of this area of law and protects freedom of contract. It is not denied that policy-based limitations may be placed on the freedom of the parties to a contract to control its assignment. This is particularly the case in relation to certain debts and personal property securities. These exceptions have a degree of universal acceptance such that, if not already reflected in statute, a court would be well within its power to adopt them. In addition, the property view satisfies the commercial needs of commercial contracting parties.

The contract view appears to suffer from an internal inconsistency and is also inconsistent with the principles of law that currently govern the assignment of contractual rights. Unless it is to stand alone as a principle limited to prohibitions, its adoption will require a reworking of the principles of assignment. That reworking is necessary not only to have consistent doctrine but to give effect to the policy considerations that apparently underpin the

[4] Roy Goode, "Contractual Prohibitions against Assignment" [2009] L.M.C.L.Q. 300.

contract view. These policy considerations raise a separate dilemma; to be persuasive – which they might be – requires proper empirical research to be carried out. A court is not in the position to do such research and it is difficult to see how a court could adopt these considerations prior to such research being carried out.

II. The Property View

In *Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd.*,[5] Lord Browne-Wilkinson (with whom the other Law Lords agreed) recognised that the legal effect of a prohibition on assignment depends on construction;[6] he then went on to say:

> [A] prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent the transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and the assignee and even then it may be ineffective on the grounds of public policy … [T]he existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights … If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz to ensure that the original parties to the contract are not brought into direct contractual relations with third parties.[7]

Prior to this decision there were differing views as to whether a court would uphold such provisions. However, they were regularly incorporated into contracts for a number of reasons which included: the hope that they would be upheld if the party subject to the clause ever attempted to assign the subject right; to provide protection to the obligor from receipt of notice which would, if the assignment and notice were effective, limit the equities available to the obligor; and to ensure that the obligor maintained its ability to agree variations to the contract with the promisee. The decision in *Linden Gardens* put the efficacy of prohibitions on assignment beyond doubt.

The statement set out above from the speech of Lord Browne-Wilkinson raises numerous issues but for the purposes of this article the important points are these. First, the effect of a prohibition depends on construction. It follows that such a clause could have various intended meanings and

[5] [1994] 1 A.C. 85.
[6] Ibid., p. 105.
[7] Ibid., p. 108. In *Parmalat Australia Ltd. v Pauls Ice Cream & Milk Pty Ltd.* [2006] QCA 129 at [14], Williams J.A. suggested that Lord Browne-Wilkinson only upheld prohibitions where there was a "genuine commercial interest in ensuring that the contractual relations with the party selected were preserved". It is not clear that that was the intention of Lord Browne-Wilkinson. That formulation is one used to determine whether an assignment savours of maintenance or champerty and appears at the end of that section of his speech dealing with prohibitions and public policy generally, see [1994] 1 A.C. 85, 107. He did not introduce it into the statement quoted in the text as to the operation of such clauses.

legal effects, but as Lord Browne-Wilkinson acknowledged, normally prohibitions are intended to render ineffective any attempted "transfer" of the benefit of the contract.[8] Second, any contract between the assignor and assignee is valid, with the result that the assignor may be liable in damages for breach of its promise to assign and, whether or not there is such a contract, may have to account to the assignee for the fruits of its contract with the obligor on the basis that there is a valid assignment as between the assignor and assignee.[9] Third, there is a recognition that the concern is to prevent the obligor being brought into a direct legal relationship with a third party not of its choosing. One puzzling feature of the statement is Lord Browne-Wilkinson's reference to the effect of an assignment being to place the obligor and assignee "into direct contractual relations". Literally applied, an assignment would be a true exception to privity of contract. Perhaps it could be argued that, by expressing himself in this way, he was suggesting that a prohibition on assignment is only concerned with ensuring that no third party could directly enforce the contract as an assignee and that said nothing about enforcing other rights such as those of a beneficiary of a trust over the benefit of the contract. Whatever may have been his intent, as will be seen this third point has become the focus of much attention and has allowed courts to uphold certain dealings in the face of a prohibition even if they place the obligor at the whim of a third party, so long as the obligor is not placed in a formal legal relationship with a third party. This is surprising as the clauses expressly

[8] See also, [1994] 1 A.C. 85, 104, where Lord Browne-Wilkinson suggests that rarely would a prohibition be intended to operate as a mere promise not to assign. Usually prohibitions are drafted in such a way as to negate the power to assign. Logically, it would follow in the case of a promise not to assign that an assignment would be valid but result in a breach of contract, cf., *R v Chester and North Wales Legal Aid Area Office (No. 12)* [1998] 1 W.L.R. 1496, 1501 per Millett L.J. However, the case law suggests that a mere promise not to assign will usually be construed as intended to have the effect of negating the power to assign, e.g., *Devefi Pty Ltd. v Mateffy Pearl Nagy Pty Ltd.* (1993) 113 A.L.R. 225. Indeed, *Linden Gardens* was itself an example. An example of where the law gives effect to a promise not to assign is a pre-emptive right. A transfer of property to a third party in the face of a pre-emptive right is effective, leaving the grantee with a remedy for damages, *Pata Nominees Pty Ltd. v Durnsford Pty Ltd.* [1988] W.A.R. 36. This assumes the third party is not guilty of some fraud or other misconduct, and that the interest of the grantee does not become a proprietary interest when triggered so that the dispute becomes one of priority. Prior to the transfer, the grantee may obtain injunctive relief and there will be situations, such as a sale of shares in the face of a pre-emptive right, where the grantee can prevent the registration of the transfer, see *Rathner v Lindholm* [2005] VSC 399, (2005) 194 F.L.R. 291. Another example would be a clause drafted as a promise not to assign which has an express right to terminate for breach of *that* promise as opposed to a general right to terminate for any breach of the contract.

[9] This is an important point. If Lord Browne-Wilkinson was adopting the contract view so that the assignment was effective, it would be necessary to explain in some detail how the assignor was nevertheless liable in damages to the assignee for failing in its obligation to assign. It could be based on the promise being one to put the assignee into a direct legal relationship with the obligor, such as a legal assignment. It could also be a failure to assign in equity if one takes the view that today an equitable assignment is a true transfer and does not simply provide the assignee with rights against the assignor. However, if the position is that equitable assignments of contractual rights only ever operate as between the assignor and assignee, it is difficult to see how the assignor will breach its promise to assign as most commercial assignments are grounded in a simple intention to assign (often without notice). Commercial people generally do not hold an intention to assign "at law" or "in equity"; these are just the legal effects of their intentions.

prohibit assignment. If intention counts for anything, the primary purpose is to prohibit assignment. Whether a prohibition on assignment is meant to operate more broadly and capture other forms of alienation will depend on construction. But it must be kept in mind that modern commercial construction leans against drawing subtle distinctions in drafting, so that any dealing in the contractual rights that could result in a legal relationship between the obligor and a third party is presumably caught if the prevention of such relationships is the intent of the clause. The important point to make here for what follows is that it would be at odds with the express language of such a prohibition to allow an assignment whether it did or did not create a direct legal relationship between the assignee and obligor.

In order to determine which of the above stated views of prohibitions Lord Browne-Wilkinson was adopting – the "contract view" or the "property view" – it is necessary to consider the above passage as a whole. When that is done, it is suggested that he was giving primacy to the freedom of the parties to fashion the rights they bring into existence both as contractual rights and as choses in action. This reflects the cautious approach which English law has taken to the recognition of the assignment of choses in action.[10] The doctrinal basis that has underpinned the law of assignment of choses in action is property. On a traditional analysis a right must be legally characterised as property to be the subject of a transfer.[11] Thus, the principles and policies that inform our legal concept of "property" from time to time have allowed for contractual rights to be characterised as personal rights of property for the purposes of transfer. They may not be property rights for other purposes. Moreover, although a contractual right is capable of being perceived as property for the purposes of transfer, it is a right that comes into existence by the agreement of the parties and the satisfaction of the requirements needed for an enforceable contract together with compliance with formalities imposed by law. Unlike land or tangible personal property, the "property" here does not exist until the parties bring a contract into existence and would not exist without their agreement.

There is a logical argument that it follows from what has been said above that the parties may fashion the characteristics of contractual rights and, if they wish, extinguish the inherent transferability that the characterisation of them as property will normally entail. However, property is not an all or nothing institution, it exists to do our bidding, the obligor is generally not concerned with the relationship between the assignor and assignee and so the right is still a chose in action and may still be "assignable" as between these parties; that is, it is still property for a certain purpose affecting

[10] [1994] 1 A.C. 85, 109 per Lord Browne-Wilkinson.
[11] Cf., *Pacific Brands Sport & Leisure Pty Ltd. v Underworks Pty Ltd.* [2006] FCAFC 40 at [41], (2006) 230 A.L.R. 56, 67.

certain persons, namely the assignor and assignee. The obligor will usually have no concern as to how the assignor deals with the fruits of the contract and generally no legitimate concern once those fruits are in the hands of the assignor.[12] Hence the assignor can assign the fruits of the contract or agree to assign the benefit of the contract which, because of the prohibition, will be interpreted as an assignment of the fruits of the contract.[13] This is a true assignment between the assignor and assignee; it does not merely operate at the level of contract and attracts the maxim that equity considers as done that which ought to be done as it takes effect upon the fruits coming into the possession of the assignor without any further assurance. The assignor must account for the fruits of the contract when received. However, the assignee obtains no interest in the contract between the obligor and assignor because the benefit of that contract cannot be assigned in the face of the prohibition. If the assignee obtained an interest in the contract then the assignment is "effective" which Lord Browne-Wilkinson said is not the case; and if it is effective then as a matter of doctrine the assignee must have rights against the obligor. Importantly, in our view, all these different legal effects are a result of the property view. That view recognises the freedom of the parties to fashion their contractual rights as they see fit. It follows that even if the intention of the parties is that a prohibition is to operate as a mere promise not to assign and have a legal effect similar to that which would flow from the contract view, it is our argument that that too is an application of the property view. It follows that we do not see the property view as only allowing for the parties to negate the power to assign: it also provides the basis for a clause that does not seek to go so far. The property view does not sit side by side with the contract view. Each view ousts the other and therefore a choice must be made.

It is submitted that this is the point that Lord Browne-Wilkinson was getting at when he commented that the commercial reason for inserting these clauses was to ensure the obligor is not placed into "direct contractual relations with third parties", that is, the modification of the contractual right as property only goes so far as to ensure that result and an agreement to assign that is only operable as between assignor and assignee is consistent with that intent. Accordingly, it is only on this doctrinal basis – the property view – that all the points made by Lord Browne-Wilkinson in the above

[12] A prohibition on assignment is for the benefit of the obligor and generally cannot be raised by anyone else to defeat an assignment, e.g., as between competing assignees. In theory an obligor could inhibit assignability for all purposes, but the circumstances in which an obligor would have an interest in doing so are rare and even then there is a policy issue as to whether that interest should be recognised, see further, *Burck v Taylor* (1894) 152 U.S. 634; *Fortunato v Patten* (1895) 41 N.E. 572. However, an assignment even as between the assignor and assignee that had the effect of upsetting the allocation of agreed risk between the obligor and assignor may be void for being at odds with the rule preventing the assignment from varying the agreed burden between the assignor and obligor.

[13] There are situations where an obligor will be concerned to prevent the promisee assigning accrued rights under a contract, see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 106 per Lord Browne-Wilkinson; *Explora Group plc v Hesco Bastion Ltd.* [2005] EWCA (Civ) 646.

passage can be made to sit together. It is not possible to read the first sentence on its own and ignore the sentence in which he states that the assignment is not effective. Indeed, although Lord Browne-Wilkinson said he was not ruling on the efficacy of a prohibition that attempted to regulate dealings between the assignor and assignee,[14] since he considered the efficacy of such a prohibition would only be limited by overriding public policy concerns,[15] he must have viewed prohibitions on assignment as operating according to the property view, as it would not be possible for a contract between the obligor and assignor to regulate an assignment operating only between the assignor and assignee. To deliver that result requires the obligor and assignor to be able to regulate the proprietary characteristics of rights arising under the contract. In short, it is suggested that it is not possible to read his statement as authority for the contract view of prohibitions to be discussed next.[16]

III. The Contract View

The alternative view was, perhaps, suggested by Untermyer J. in the New York Court of Appeal in *Sacks v Neptune Meter Co*.[17] Arguably, he put the contract view forward in the context of discussing whether a prohibition on assignment was ineffective as an invalid restraint on alienation. He said:

> We think both upon principle and upon authority … a covenant against assignment, which in substance provides that the obligation shall be unenforceable in the hands of the assignee, is available to the obligor as a defense …
>
> In so holding we do not sanction unlimited restraint upon the alienation of property within the accurate definition of that term. There is a perceptible distinction between the right of a contracting party to impose conditions upon the exercise of a contractual right and the imposition on the owner in fee of undue restraint in respect to the alienation of his property. A grantor cannot transfer complete ownership of tangible property and still control its devolution, because such control is repugnant to the absolute character of the grant … But that rule does not apply where the restraint is upon the alienation of an estate for years and the grantor has received a reversionary interest in the property. Even more conspicuously would the rule seem to be inapplicable where no transfer of title has occurred and the restraint is only of contractual rights.

[14] [1994] 1 A.C. 85, 107.
[15] Ibid., p. 108.
[16] Lord Browne-Wilkinson explained away the one English case that stood in the way of recognising the efficacy of prohibitions on assignment, *Tom Shaw and Co v Moss Empires Ltd.* (1908) 25 T.L.R. 190, on the basis that it was either an example of how a prohibition cannot prevent an accounting between assignor and assignee when the fruits of the contract are in the hands of the assignor or was wrongly decided.
[17] (1932) 258 N.Y.S. 254.

> I have been unable to discover that the rule against restraints on alienation has ever been applied to choses in action . . . . [W]here the subject-matter is a chose in action, neither public policy nor consistency requires that it be enforceable against the promisor except in accordance with the terms on which his promise was made. *The limitation is not so much imposed on the obligee's right of alienation as on the obligor's duty to perform. The restraint then becomes a condition of acquisition*.[18]

Whether in making this statement Untermyer J. intended to suggest a comprehensive theory for explaining the operation of prohibitions on assignment is not clear. Moreover, whether the final two sentences were intended to put forward the "contract view" may be doubted. The case involved an assignment of wages earned. The fact it was a dealing in the fruits of the contract was enough for Frankenthaler J. to conclude that the prohibition could not void the assignment.[19] The prohibition was drafted in the form of a promise not to assign rather than a clause drafted to negate the power to assign. Untermyer J. clearly saw a difference between the two, and recognised a difference in legal effect. He said:

> If, then, the prohibition against assignment of the salary in the contract here were in terms such as to render the salary nonassignable, it would constitute a defense which might be asserted by the defendant against the plaintiff under subdivision 3 of section 41 of the Personal Property Law[20] . . . The assignee's only recourse would then have been against his assignor, since as between the parties to the transfer the assignment would not be invalidated . . .
>
> But the agreement here between the defendant and its employee is not of such a character . . . It does not provide that an assignment of the wages, if attempted, shall vest no interest in the assignee. On the contrary, it consists merely of a stipulation that "the employee will make no assignment of any kind or nature of the wages" . . . It is one thing to agree that a chose in action shall not be assignable and that if assigned no right of action shall vest in the assignee. It is another and different thing if the owner of the chose in action merely covenants with the obligor that he will not assign.[21]

It would appear that his statement as to the mechanics of a prohibition was intended to answer the restraint on alienation issue. In that regard Untermyer J. appeared to be making two points. First, where the prohibition is merely a "promise not to assign", no improper restraint issue arises as the chose remains assignable albeit that the assignment is a breach of contract. Second, where the prohibition negates the power to assign, again there is no

[18] Ibid., pp. 261–62 (emphasis added).
[19] Ibid., p. 264.
[20] As quoted, that provision stated: "Where a claim or demand can be transferred, the transfer thereof passed [sic] an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defense or counterclaim, in his own name, as the transferrer might have done; subject to any defense or counterclaim, existing against the transferrer, before notice of the transfer, or against the transferee."
[21] (1932) 258 N.Y.S. 262–63.

improper restraint on alienation because the restraint is imposed on the obligor's obligation and becomes a "condition of acquisition", that is, a condition attached to the right acquired by the promisee; there is no improper restraint on alienation because the right taken by the promisee was never alienable to begin with. All that can be assigned are the fruits of the contract once received by the assignor. Thus, when construed in context his statement appears to be more in line with the property view than the contract view.

Despite this, Untermyer J.'s statement has been influential and has been put forward for the contract view. Indeed, if one takes his statement at face value without regard to its context, the result is that, despite a prohibition on assignment, a contractual right remains assignable but the existence of the prohibition conditions the right taken by the assignee so that the obligor need only ever account to the assignor. Such an assignment must be equitable because if the assignee were permitted to give notice and satisfy the requirements for a legal assignment then statute would dictate that the obligor must account to the assignee.[22] The existence of such an equitable assignment has important ramifications. If the assignment is effective as an equitable assignment and a breach of contract were to occur after the assignment, then general principle would dictate that damages must be assessed by reference to the loss of the assignee. Usually, but not always, the loss of the assignor would act as a cap on that liability.[23] Such a result would completely circumvent the prohibition. Presumably, the answer to this would be that, despite the assignee's ownership of the chose, if the obligor breaches the contract (whether before or after the assignment), damages would be assessed by reference to the loss of the assignor on the basis that the obligor need only account to the assignor by virtue of the prohibition. But this adds another rule to the law of assignment that is already a complex area of law and which is not necessary if the property view is adopted.

Returning to the restraints on alienation point, if the contract view of Untermyer J.'s statement is adopted, then clearly a prohibition will not result in an improper restraint on alienation. But it is important to be clear as to the reason why that is so on this interpretation of Untermyer J.'s statement. On the property view there is no improper restraint on alienation either because the right was never alienable (which is, in our view, Untermyer J.'s conclusion) or because there is no initial grant on which the repugnancy principle could operate. However, on the contract view there is no improper restraint not merely because the right remains alienable

[22] Property Law Act 1925 (UK), s. 136. See also Roy Goode, "Contractual Prohibitions against Assignment" [2009] L.M.C.L.Q. 300, 305.
[23] G.J. Tolhurst, *The Assignment of Contractual Rights* (Oxford 2006), paras. [8.14]–[8.15].

but because implicit in the contract view is a principle that the parties cannot use contract to modify those attributes of contractual rights that the law of property gives to them. One of those attributes is that they are transferable. We would add that on neither the property nor the contract view is a prohibition on assignment an invalid restraint on alienation: unlike a seller who absolutely conveys land or sells goods to a buyer, the obligor under a contract remains interested in the contract the benefit of which is assigned and has a legitimate interest in who it performs for. More generally, since it is the contract that creates the property, there is no initial transfer of property between the parties to the contract.[24]

IV. Support for the Contract View

The contract view seems to be gaining support. In Australia, the Full Federal Court in *Devefi Pty Ltd. v Mateffy Pearl Nagy Pty Ltd*.,[25] endorsed the statement of Untermyer J., not as a matter of doctrine but rather as a possible construction of the prohibition. That must be correct: if the legal effect of a prohibition is an issue of construction, then the legal effect that would flow from the contract view must remain a possibility. However, such a result does not require the adoption of the contract view. Indeed, the court did not limit its analysis to the contract view and concluded in that case that the assignment was ineffective because "there was no subject matter to which the purported assignment … could attach".[26] The case is interesting as, although the clause in question was in the form of a promise not to assign, the court, despite recognising the difference between a true prohibition and a promise not to assign,[27] seemed to conclude on construction that in this case the intended effect was that of a true prohibition. The fact that the contract involved the performance of various personal obligations appeared to be an important factor in this conclusion.[28]

The view is also gaining academic support. Recently Sir Roy Goode expressed agreement with the analysis made by Untermyer J., taking the view that a prohibition operates to "condition the debtor's duty to perform,

[24] At a theoretical level there is a view that a contract is created by a transfer of promises such that the parties own the promise made to them. The law is then required to protect that ownership and this is one way of explaining why a simple exchange of promises without reliance is enforceable, see E. Weinrib, "The Juridical Classification of Obligations", in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), 52–3; P. Benson, "The Unity of Contract Law", in P. Benson (ed.), *The Theory of Contract Law* (Cambridge 2001), ch. 4. Cf., *The Commissioner of Stamp Duties (New South Wales) v Yeend* (1929) 43 C.L.R. 235, 241.

[25] (1993) 113 A.L.R. 225, 234–7. Cf., *Pacific Brands Sport & Leisure Pty Ltd. v Underworks Pty Ltd.* [2006] FCAFC 40 at [32]; (2006) 230 A.L.R. 56, 64.

[26] (1993) 113 A.L.R. 225, at p. 239.

[27] Ibid., p. 236.

[28] Ibid., pp. 237, 239.

not as a delimitation of the contract right as an alienable asset".[29] In explaining his reasons for adopting that view he states:

> The first point to make is that an assignment of a contract right in breach of a no-assignment clause takes effect only in equity...
>
> The second point, though one which became apparent only in light of [*Don King Productions Inc. v Warren*,[30] and *Barbados Trust Company Ltd. v Bank of Zambia*[31]] is that the absence of legitimate grounds for the debtor to seek to negate a transfer of ownership of the contract right from assignor to assignee applies as much before performance of the contract as it does to the fruits of performance. The debtor is entitled to say that he will not give performance to an assignee, but what legitimate interest can he have in saying that not even equitable ownership can be transferred, with the result that, where an assignor who has been paid for the contract right becomes insolvent, the intended assignee is merely an unsecured creditor? ... So, whether we are looking at the fruits of performance or at the right to performance, a no-assignment clause is valid only so far as it operates as a matter of contract, conditioning the duty to perform, not as a restraint on alienation.[32]

Following this assessment Goode makes a statement that might suggest he is not adopting the contract view as a matter of doctrine. He states that a no-assignment clause "is almost invariably intended to operate only as a contractual provision absolving the debtor from any duty to the assignee, not as an invalidation of the transfer".[33] On its face this might suggest he sees the issue as one of construction, the "contract view" being what the obligor normally intends. This is based on treating the primary purpose of these provisions to be that of preventing the obligor being forced into a legal relationship with a third party. Two issues arise from this. First, on its face this statement does not deny that the parties could go further and seek to extinguish the assignability of the right. However, his earlier comment that the obligor has no legitimate interest in preventing an equitable assignment of the benefit of the contract would seem to deny that the issue solely turns on construction.[34] Second, it is important to note that the construction of the prohibition as being intended to prevent a legal relationship with a third party – which is adopted in the cases that are discussed below – is based not on meaning but legal effect. In any construction exercise there are three components: they are meaning; legal effect; and application. It cannot be correct to conclude that when parties incorporate

[29] See note 22 above, at p. 304.
[30] [2000] Ch. 291 (affirmed [2000] Ch. 291, 324).
[31] [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep. 495.
[32] Ibid., at pp. 305–6.
[33] See note 22 above, at p. 305.
[34] This is based on the view that an equitable assignment only operates as between the assignor and assignee. It necessarily follows on this view that it is not possible to prohibit equitable assignments, cf., *Friary Holroyd and Healey's Breweries Ltd. v Singleton* [1899] 1 Ch. 86 (reversed on the facts [1899] 2 Ch. 261, (1899) 81 L.T. 101).

a clause that expressly prohibits assignment they do not really mean that. Clearly they do. To say that a prohibition on assignment is not intended "as an invalidation of the transfer" seems to us to be a rewriting of the contract unless this was intended to be limited to the position as between assignor and assignee. It also appears to be at odds with Lord Browne-Wilkinson's view expressed in *Linden Gardens* that the intention usually informing such clauses is to prevent assignment, hence the line of cases construing "promises" not to assign as prohibitions. Nevertheless, if the contract view is adopted, then, as a matter of doctrine, it is not possible to prevent assignment. Therefore, the legal effect of the prohibition when applied to the facts cannot be to prevent the assignment. Even so, the prohibition is not void and a court must give it some effect and so it ensures that the assignment does not place the obligor in a position where it must account to the assignee. This is done on the basis that this is the legal effect of what they agreed if the contract view is adopted. It follows that this alleged legal effect of a prohibition is intimately tied up with the contract view. If that all sounds a little convoluted that is because it is and it all flows from not giving effect to the words used by the parties which were to prohibit "assignment". On the property view the prohibition on assignment expressly prevents assignment and must, as a matter of construction, prohibit any other form of alienation that would put the obligor into a legal relationship with a third party. In the result it seems to us to make more sense to say that the assignee does not have the right because the "property" (the chose) does not have the attribute of assignability.

As noted by Goode, some judicial support in England may also be seen in the Court of Appeal decision in *Barbados Trust Company Ltd. v Bank of Zambia*,[35] particularly in the judgment of Waller L.J. This case involved complicated facts and a number of issues. One issue concerned the efficacy of a declaration of trust in the face of a prohibition on assignment. Both Waller L.J and Rix L.J expressed detailed and similar views on this issue although it was only crucial for Waller L.J, who ultimately was in the minority. Prior to this case, in *Don King Productions Inc. v Warren*,[36] it was held that a promisee could validly declare itself a trustee over the benefit of a contract despite a prohibition on assignment and that such a declaration could be made even if the contract involved personal skill or confidence. This decision was affirmed by the Court of Appeal in *Barbados Trust Company Ltd. v Bank of Zambia*.[37] In supporting this view Waller L.J. did distinguish an equitable assignment from a declaration of trust which might suggest he was of the view that a prohibition on

[35] [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep. 495.
[36] [2000] Ch. 291 (affirmed [2000] Ch. 291, 324).
[37] [2007] EWCA Civ 148, [2007] 1 Lloyd's Rep. 495. See also *Secure Parking (WA) Pty Ltd. v Wilson* [2008] WASCA 268 at [101]. Cf., *Australian Zircon NL v Austpac Resources NL (No 2)* [2011] WASC 186 at [192]–[199]. See further *Atwell v Roberts (No 3)* [2009] WASC 96 at [79].

assignment would prevent there being an equitable assignment.[38] Whether that distinction can be maintained as a matter of doctrine is discussed below. His conclusion was reached primarily by construction: the prohibition on assignment did not extend to a declaration of trust. He thought that if the parties had concerns over a declaration of trust they might have sought to prohibit it expressly. However, even if he was wrong on the construction point and even if the parties did expressly deal with declarations of trust, he did not think that this was a complete answer because in any case the obligor was not accountable to the beneficiary.[39] He went on to express a view that a complete prohibition on alienation would not prohibit a declaration of trust as between the parties. Again, the reason for this was that the purpose of the prohibition was to prevent the promisor being placed into a relationship with a third party and that intent would not be contravened because only the trustee could enforce the contract. He then added that the promisor could not complain if the promisee chose to enforce the contract and so the promisor could not complain if a procedure allowed a beneficiary to bring an action in its own name where the trustee refused to act.[40] This procedure is a mere procedure; the beneficiary would not be bringing an action based on a substantive right, the procedure merely prevents the beneficiary from having to sue the trustee to force it to sue the promisor. The action, albeit in the name of the beneficiary, operates as if it was brought by the trustee.[41]

Rix L.J. agreed that as a matter of construction the prohibition did not extend to a declaration of trust[42] but doubted, on policy grounds, the efficacy of a prohibition that attempted to end all alienability.[43] It would then seem to follow that he would not view a clause making rights personal as necessarily intended to end all alienability. He too would have allowed the beneficiary access to procedure that allowed it to sue in its own name where the trustee refused to act,[44] saying that the procedure was "necessary to get the legal claim before the court, through the party who owned it".[45]

Hooper L.J. agreed that the prohibition on assignment did not prevent the declaration of trust as a matter of construction, but did not think that the procedure to allow the beneficiary to bring the action when the trustee refused to act should be available as it circumvented the intent of the

[38] [2007] EWCA Civ 148 at [43], [2007] 1 Lloyd's Rep. 495, 506.
[39] Ibid., at [44], and at p. 506.
[40] *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] A.C. 70.
[41] [2007] EWCA Civ 148 at [45], [47], [2007] 1 Lloyd's Rep. 495, 506–507. See generally on this procedure, Marcus Smith, "Locus Standi and the Enforcement of Legal Claims by *Cestuis Que Trust* and Assignees", (2008) 22 Trust Law International 140.
[42] [2007] EWCA Civ 148 at [89], 1 Lloyd's Rep. 495, at p. 513.
[43] Ibid., at [112], and p. 516.
[44] Ibid., at [118], and p. 518.
[45] Ibid., at [102], and p. 515.

prohibition which was to ensure that the promisor was not placed into a relationship with a third party.[46]

The trust that was envisaged here was not a mere trust over the fruits of the contract. It will be recalled that Waller L.J. and Rix L.J. envisaged that the beneficiary could enforce unperformed accrued rights under the contract if the trustee refused to act. Thus, even though the beneficiary's ability to enforce its interest in its own name depends on a procedural device, that device would be irrelevant if the court was not recognising that the beneficiary has an interest in the contract and not just in the fruits of the contract when they are in the hands of the trustee.[47] There was no suggestion made that the beneficiary's interest was akin to that of a beneficiary under a discretionary trust – who may compel performance of a trust[48] – the interest envisaged appears to be vested rather than contingent; it would appear to be a bare trust. Waller L.J. said the procedure enabled the beneficiary "to obtain what he is beneficially entitled to".[49]

If the court had simply stated that the trust was effective because, on construction, the prohibition on assignment did not capture a trust, it would be difficult to have any complaint. One might suggest, as we do and Lord Browne-Wilkinson did, that such a prohibition contained a further implied intent to inhibit any form of alienation that gave rise to a legal relationship between the obligor and a third party, but clearly that is a matter on which opinions can differ. For Waller L.J. and Rix L.J. the real or primary intention that informs a prohibition on assignment is to ensure that the promisee is not thrust into a legal relationship with a third party without its choosing. For Waller L.J. despite what the parties may expressly prohibit – be it assignment, declaration or alienation – the court will construe the prohibition as only intended to prohibit legal relationships between an obligor and third party rather than this being an intent that is additional to the express words used. A declaration of trust did not have this effect as it was only enforceable by the trustee and the beneficiary's rights were against the trustee. It was not thought to be at odds with that purpose to allow the beneficiary to resort to a procedure that allowed it to bring an action against the promisor in its own name if the circumstances required this.

[46] Ibid., at [139], and pp. 520–21.

[47] A possible alternative that may not be at odds with the property view is to interpret the assignment as an assignment of the "right" to the fruits of the contract. Where that right is future property it will take effect when the fruits are received by the assignor. However, it is not a simple assignment of the fruits but an agreement to assign the right to the fruits and so the interest of the assignee is more than merely contractual, see R.P. Meagher, J.D. Heydon and M.J. Leeming, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies*, 4th ed., (Sydney 2002), paras 6.275–6.330. This will not work where the "right" is not future property, see G.J. Tolhurst, *The Assignment of Contractual Rights* (Oxford 2006), paras 6.33–6.47. See further, Marcus Smith and Nico Leslie, *The Law of Assignment*, 2nd ed., (Oxford, 2013), p. 532, para. 25.32, point (6).

[48] See J.D. Heydon and M.J. Leeming, *Jacob's Law of Trusts in Australia*, 7th ed., (Sydney 2006), at [23.03].

[49] [2007] EWCA Civ 148 at [29], [2007] 1 Lloyd's Rep. 495, 503.

It would seem to follow that once you sideline the express words of the clause, and adopt the view that the primary purpose of the clause is to prevent the obligor being thrust into a legal relationship with a third party not of its choosing and conclude that that purpose is not circumvented in allowing a beneficiary of a trust access to procedures to enforce certain contractual rights against the obligor, then you open the door to other transactions that have the same effect. That is even more so if you accept, as Waller L.J. seemed to accept, that a general prohibition on alienation or an express prohibition on declarations of trust could not prohibit a declaration of trust operating between the trustee and beneficiary because the beneficiary's rights are against the trustee. This result seems to be achieved because the prohibition does not impact on the proprietary character of the right which is the subject of the trust but merely the obligation. Given that, and given that the trust is over the benefit of the contract and not just its fruits, it would appear that the basis of this reasoning is the contract view.

It must follow from what has been said that other transactions may be similarly dealt with where the obligor has the same procedural protection. Such transactions include equitable assignments of legal rights. If the decision in *Barbados Trust* now represents the effect of a declaration of trust in the face of a prohibition on assignment, then despite statements that a declaration of trust is different from an assignment, it is difficult to see how the same reasoning would not apply to an equitable assignment of a contractual right in the face of a prohibition on assignment.[50] This is because if the prohibition merely impacts on the right and not the obligation then, as a matter of doctrine, an assignment must still be possible subject to protecting the obligor's concern about being forced into a relationship with a third party. That concern is upheld in the case of an equitable assignment as there is still much modern authority that takes the view that such an assignment only operates as between the parties, so as to give the assignee rights against the assignor.[51] The obligor is protected in the same way that it is protected in the case of a declaration of trust, although, in the case of an assignment, the assignee may commence an action and join the assignor without the need for the exceptional circumstances generally required in the case of a beneficiary under a trust.

A different result would flow from the property view because that approach allows for the property characteristics of a right to be modified

[50] See Roy Goode, "Contractual Prohibitions Against Assignment" [2009] L.M.C.L.Q. 300, 305.

[51] E.g., *Re General Horticultural Company* (1886) 32 Ch. D. 512, 515 per Chitty J.; *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 Ch. D. 128, 132 per Cotton L.J.; *Anning v Anning* (1907) 4 C.L.R. 1049, 1064 per Isaacs J.; *Re Westerton* [1919] 2 Ch. 104, 111 per Sargant J.; *Re City Life Assurance Co Ltd.* [1926] Ch. 191, 215 per Pollock M.R., at 220 per Warrington L.J.; *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 C.L.R. 614, 622 per Dixon J.; *Holt v Heatherfield Trust Ltd.* [1942] 2 K.B. 1, 4 per Atkinson J.; *Corin v Patton* (1990) 169 C.L.R. 540, 577 per Deane J.; *Showi Shoji Australia Pty Ltd. v Oceanic Life Ltd.* (1994) 34 N.S.W.L.R. 548, 561; *Mid-City Skin Cancer & Laser Centre v Zahedi-Anarak* (2006) 67 N.S.W.L.R. 569, 607–8.

for certain purposes. Thus, an assignment may be prohibited but there may be no intention to modify the right as property for the purposes of a declaration of trust. Of course, whether or not such a demarcation is intended depends on the construction of the clause in question which is discussed further below. But the possibility of such a result flows from property not being an all or nothing institution, and it does not follow that anything that can be assigned can be the subject of a declaration of trust and vice versa. Rix L.J., who restricted his remarks to the effect of a prohibition on assignment on a declaration of trust – being of the view that a prohibition on alienation generally may not be effective – may have been in favour of this analysis because at one point he did say that the effectiveness of a prohibition does not merely depend on contract but on property. Here he thought the promisee lacked the power to assign but still had power to declare a trust.[52]

In the result, the effect of the decision is that where such a declaration of trust is upheld then the beneficiary is in a legal relationship with the obligor and subject to the possibility of an action being brought in the name of the beneficiary, being an action that is funded by the beneficiary, planned and put into action by the beneficiary and an action that would not have been brought by the trustee. In such a case it is difficult to see how the obligor's concern over being forced into a legal relationship with a third party is being protected. To explain the result by seeking refuge in the notion that the beneficiary is merely having access to a procedure must be too legalistic to modern commercial parties and fictional. Clearly, a commitment to the view that a prohibition on assignment need not extend to a declaration of trust necessarily results also in a commitment to the application of the long-standing principle that if a trustee refuses to sue, the beneficiary may do so – in its own name. But at that point any concern to give effect to the commercial position agreed between the parties to the contract goes out of the window. Why would the assignor commit its own resources to a suit for the benefit of the assignee? A trustee in bankruptcy of the assignor is likely to disclaim the interest unless by carrying out some performance it can obtain the full benefit of the right.[53] And if the assignee has not obtained a promise to that effect from the assignor, why should a court come to its aid when the end result is contrary to the express agreement between the obligor and the assignor? Since the trust is a bare trust, the beneficiary-assignee has an immediate right to call for the trust property. So it seems trite to say that, as a matter of substance, the assignee has a direct right against the obligor. Commercial reality must count for something in contract construction and the logical construction of these provisions is the one alluded to by Lord Browne-Wilkinson in *Linden*

[52] [2007] EWCA Civ 148 at [88], [2007] 1 Lloyd's Rep. 495, 513.
[53] See, *Drew & Co v Josolyne* (1887) 18 Q.B.D. 590; *Tooth v Hallett* (1869) L.R. 4 Ch. App. 242.

Gardens, namely that a prohibition on assignment has the purpose of preventing an assignment and any other form of dealing that would result in the obligor being placed in a legal relationship with a third party.

V. Making the Choice

A. Introduction

It is important that the courts at some point make a clear choice as to what explanation governs the efficacy of these provisions. As noted above, in our view the court in *Linden Gardens* chose the property view; however, also as noted, Goode suggests that that decision supports the contract view. In making the choice it is necessary to consider whether each explanation is internally consistent and that there is consistency with the other principles that govern the assignment of contractual rights. Together these raise issues of doctrinal consistency. In addition to doctrine, it is important that the view adopted gives effect to legitimate commercial expectations.

B. The Doctrinal Issues

The property view is internally consistent, it simply allows the parties to fashion the characteristics of the rights they bring into existence both as a matter of contract and as a matter of property. Clearly, decisions need to be made as to how far such freedom should extend. That issue is now well understood. There are strong policy arguments that receivables and payment obligations, particularly those often traded in the market place – such as book debts and credit card receivables – should not be subject to prohibitions on assignment[54] and parties should be free to use their property as security despite a prohibition on the assignment of that property.[55] There is no problem in adopting these as policy-based exceptions to such freedom whether mandated by legislation or not. However, there are also commercial transactions that depend on a prohibition on assignment being given full effect. Typical examples are the set-off and close-out netting provisions in the master agreements published by ISDA.[56] Hence the importance placed in personal property securities legislation on ensuring that securities lending and repurchase arrangements are exempted from

[54] E.g., Unidroit Principles of International Commercial Contracts, 2010, Art. 9.1.9. See also Unidroit Convention on International Factoring, 1988, Art. 6; United Nations Convention on Assignment of Receivables in International Finance, 2001, Art. 9; Personal Property Securities Act 2009 (Cth), s. 81; *UNCITRAL Legislative Guide on Secured Transactions* (U.N. New York 2010), paras. [106]–[110]. See further Orkun Akseli, "Contractual Prohibitions on Assignment of Receivables: An English and UN Perspective" [2009] J.B.L. 650. Cf., Gerard McCormack, "Debts and non-assignable clauses" [2000] J.B.L. 422.

[55] E.g., Personal Property Securities Act, 2009 (Cth) s. 79. See also, The Law Commission, *Company Security Interests* (Law Com., No. 296, 2005), at 4.35–4.40.

[56] International Swaps and Derivatives Association, Inc.

such schemes as the legislation will usually have provisions that override any prohibition on assignment.

The property view is consistent with the way in which assignment is conceived in the modern law, at least as administered in England and Australia. An effective legal assignment does not make the assignee a contracting party. Its rights lie in property not contract. The rule *nemo dat quod non habet* is therefore part and parcel of the law of assignment. There is no difficulty in saying that if B has custody of A's goods, B cannot create a possessory interest in favour of C. Accordingly, if an assignor has no right to assign, the assignor can have no ability to transfer to an assignee the property interest which the assignor might otherwise enjoy under the contract. Even if the prohibition is no more than a promise not to assign, the idea that any assignment is merely a breach of contract is manifestly uncompelling and most of the cases seem to have recognised this point by taking the view that Lord Browne-Wilkinson took in *Linden Gardens*, that no matter how the clause is drafted the intention is generally to prevent an assignment.[57] Of course there are situations in which the law recognises that a wrongful act, such as the revocation of a licence or authority, may be effective even though wrongful.[58] But it would be nonsense to think of the ability of an obligor to rely on a prohibition as being coextensive with the obligor's ability to restrain the assignor's conduct by injunction.[59]

There is also an interesting synergy between the property view and the operation of section 2(3) of the Contracts (Rights of Third Parties) Act 1999 (UK), which allows the parties to a contract which confers a benefit on a third party and which is enforceable by the third party to rely on an express provision in the contract to rescind or vary the contract. The operation of that contract provision leaves the third party with no rights against the parties. If the right of a third party under such a contract is a chose in action (which is still to be determined), then presumably it can be assigned. Although such an assignment may not be an assignment of a contractual right, nevertheless the express contractual provision is recognised by the statute as being capable of extinguishing the interest of the third party. That provision gives effect to a policy concern underpinning the legislation.

The contract view does seem to contain an internal inconsistency. As noted, it is a view based around a construction point, namely, that the primary intention of the provision is to prevent the obligor being placed into a relationship with a third party; and a doctrinal point, to the effect

[57] See further, *Sacks v Neptune Meter Co* (1932) 258 N.Y.S. 254, 268 per Frankenthaler J. See above note 8.

[58] E.g., *Cowell v Rosehill Racecourse Co Ltd.* (1936) 56 C.L.R. 605; *Hounslow London Borough Council v Twickenham Garden Developments Ltd.* [1971] 1 Ch. 233; *Decro-Wall International SA v Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361, [1971] 2 All ER 216. Cf., the position with options even if drafted in the form of an irrevocable offer as opposed to a conditional contract, see generally, *Goldsbrough Mort & Co Ltd. v Quinn* (1910) 10 C.L.R. 674.

[59] Cf., the treatment of pre-emptive rights, see note 8 above.

that the parties can vary their contractual rights as a matter of contract but not as a matter of property. The doctrinal point allows the right to remain transferable and the assignee becomes the owner in equity. However, the assignee is subject to the prohibition and cannot directly enforce the right. How can that be?[60] If the parties cannot modify the proprietary characteristics of the right, how is it that this contractual prohibition binds the assignee-owner? If it defines and delimits the right of the assignee, then it is fashioning that right in its character as a chose in action. So too if it is classified as an equity the assignee takes subject to, unless the assignee is merely subject to it because it would be unconscionable to deny it. Many examples can be cited of where a contract fashions the right taken by the assignee. For example, the conditional benefit principle is premised on a burden defining a right. When determining whether a contractual right is personal, one asks as a matter of construction whether the parties intended that the promisor was only to perform its obligation for and to the promisee. Similarly, whether contractual rights can be separated and individually assigned turns on construction and where they cannot be separated any attempted assignment is void.[61] It is not possible to characterise the right without characterising the correlative obligation: one informs the nature of the other. It is therefore not possible to distinguish contract and property in the way suggested by the contract view and, as noted, in any case, it appears to be inherent in the contract view that the parties can modify their contractual rights both as personal and proprietary rights. So the result of the contract view cannot be based on doctrine as there are too many examples of contract being able to fashion rights in their nature as property rights.[62] To be upheld it must be based on a principle of policy that dictates that one aspect of a contractual right the parties cannot modify is its transferability. But that all or nothing view is incapable of walking the fine line between the opinion expressed in *Linden Gardens* that such clauses are not at odds with public policy and the view that in the case of certain debts and personal property securities prohibitions on assignment should not be upheld.

Another doctrinal hurdle concerns the idea that an equitable assignment is only effective as between the assignor and assignee. This is often linked to the statement that the assignee only has rights against the assignor.

[60] One might answer this by saying that the transaction which results, an equitable assignment, does not give the assignee rights against the obligor and so the obligor continues to account to the assignor. Apart from whether that is a correct understanding of an equitable assignment of a contractual right, there are two problems with this answer. First, it is an answer that is not based on the contract view. Second, upon receipt of notice of an equitable assignment the obligor cannot obtain a discharge by accounting to the assignor.

[61] This is distinct from partially assigning an assignable right which is effective in equity to constitute the assignor and assignee co-owners.

[62] See also *Rhone v Stephens* [1994] 2 A.C. 310, 317 per Lord Templeman; *Bahr v Nicolay [No. 2]* (1988) 164 C.L.R. 604, 648 per Brennan J. See further *Owners of Strata Plan 5290 v C.G.S. & Co Pty Ltd.* [2011] NSWCA 168, (2011) 281 A.L.R. 575.

However, the effectiveness of a transaction as an assignment and its enforcement are distinct[63] and for the purposes of this paper it is not necessary to engage in the debate over the remedies available to the equitable assignee.[64] The concern here is with the notion that an equitable assignment of a legal right is only effective as between the assignor and assignee. Such statements tend to ignore the fact that today these transactions are given effect to as assignments. That is, once the consideration for the assignment is executed, or specific performance otherwise available, the assignee becomes the owner in equity of the chose in action. Whatever might be the law in relation to trusts, and despite modern courts occasionally still using the language that an equitable assignment is valid only as between assignor and assignee, it has long been the law that equitable assignments of legal choses in action are true assignments with the assignee being the owner in equity of the assigned right.[65] Equitable assignments may not have originally been viewed in that way, but equity today views choses in action as property for the purposes of transfer.[66] It follows that, to the

[63] See further, *Performing Right Society Ltd. v London Theatre of Varieties Ltd.* [1924] A.C. 1, 29 per Lord Sumner.

[64] That debate is linked to whether the joinder of the assignor in an action is a matter of procedure or a matter of substantive law and whether that varies with whether the assignee claims a common law remedy, an equitable remedy to protect legal rights or an equitable remedy to protect equitable rights. There are also issues around whether there is an incongruity in the law between when the assignee calls for performance as opposed to commencing an action for non-performance. A similar incongruity arises with the notion that upon notice the obligor cannot obtain a discharge from the assignor but the assignee cannot obtain a remedy in its own name against the obligor. Related issues concern differences to approaches to enforcement when the assignment is of a legal interest not assignable at law. Despite strong doctrinal arguments for joinder being substantive where the assignee seeks a common law remedy, in the context of assignment the weight of modern English authority is that the joinder of the assignor is procedural, it is to ensure the assignor is bound by the decision and has his or her chance to contest the assignment rather than to have the legal title holder before the court, see *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 A.C. 240, 263 per Lord Collins, at 278 per Lord Clarke, cf., *Barbados Trust Company Ltd. v Bank of Zambia* [2007] EWCA Civ 148 at [102], [2007] 1 Lloyd's Rep. 495, 515 per Rix L.J.; *Long Leys Co Pty Ltd. v Silkdale Pty Ltd.* (1991) 5 B.P.R. 11,512, 11,518; *Jennings v Credit Corp Australia Pty Ltd.* (2000) 48 N.S.W.L.R. 709; *Hazard Systems Pty Ltd. v Car-Tech Services Pty Ltd.* [2013] NSWCA 314 at [16]. Although rarely departed from, the fact that a departure is possible shows that joinder is not a substantive requirement under the present law and that assignment operates in a fused system. Although the substantive need for joinder appeared in early cases it disappeared and interestingly only resurfaced in recent years, see Marcus Smith, "Locus Standi and the Enforcement of Legal Claims by *Cestuis Que Trust* and Assignees" (2008) 22 Trust Law International 140, 144ff. It was during this intervening period that not only did the procedural view of joinder come to the fore but also equity began to recognise that these transactions are true assignments and not merely binding between the assignor and assignee. These are related events. The result is commercially sensitive and avoids the complexity that one must engage in to provide that result through a strict doctrinal route, see G.J. Tolhurst, "Equitable Assignment of Legal Rights: A Resolution to a Conundrum" (2002) 118 L.Q.R. 98. It reflects the impact of a gradual development of the law of assignment over many decades. This is not a case of lost knowledge. Care must therefore be taken before characterising the approach of equity to assignment by reference to old decisions.

[65] *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 A.C. 240, 263 per Lord Collins.

[66] *Fitzroy v Cave* [1905] 2 K.B. 364, 372–3 per Cozens-Hardy L.J. Indeed even when equity merely intervened to hold the assignor to his or her promise, it is possible to find statements that the court considered this to be a method of conveying title, see *Wright v Wright* (1749) 1 Ves. Sen. 410, 412, 27 E.R. 1111, 1112. To insist there is no transfer on the basis that equitable assignments of legal rights merely create rights puts too high a premium on doctrine, or an aspect of doctrine, at the expense of the intention and expectation of the parties of the parties and the legal effect of the transaction.

extent that the contract view is based around the notion that the assignment is only effective as between the assignor and assignee, it reflects a dated view of such assignments.

Finally, if the assignment between the assignor and assignee is to be effective in equity, it is important that an explanation should exist for how that occurs. Initially, the approach which equity took to assignments was to hold the assignor to its promise to assign rather than necessarily recognising the assignment. It did this by forcing the assignor to lend its name to any suit brought by the assignee so that the action appeared as one brought by the assignor. In time, equity's approach became more sophisticated to the point of giving effect to the transaction as an assignment. In equity a right may be considered property by reference to the degree of protection equity provides.[67] This has been the traditional way that equity has recognised "assignments" of choses in action.[68] The assignment was effective between the assignor and assignee because equity would hold the assignor to its promise and force the assignor to lend its name to any suit. However, the availability of specific performance justified the interest of the assignee being recognised as property. The transaction was therefore more than merely effective as a contract: a right vested in the assignee and the value of the right now held by the assignor was a bare legal right. The assignor would hold the fruits of the contract on trust for the assignee. That approach may no longer represent the full extent of equity's approach to assignments: equity now recognises a contractual right as property for the purposes of transfer and the existence of executed valuable consideration replaces the need for specific performance.[69] Nevertheless, it is an approach that has never been displaced and has certainly been important in assignments that are said to be effective as between the assignor and assignee. However, there is an incongruity in suggesting that an assignment in the face of a prohibition is effective in equity to vest in the assignee an interest in an executory contract, when to give that assignment effect

[67] *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] A.C. 694, 712; *Cooney v Burns* (1922) 30 C.L.R. 216, 232–3 per Isaacs J. See also, *Smith Kline & French Laboratories (Australia) Ltd. v Secretary, Department of Community Services and Health* (1990) 95 A.L.R. 87, 135–6 per Gummow J. (affirmed (1991) 99 A.L.R. 679).

[68] *Norman v Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, 33–4 per Windeyer J.

[69] The need to recognise a trust in order to give effect to equitable doctrine in such circumstances is relevant in a small number of situations and generally not necessary even when this traditional approach is resorted to, e.g. *FCT v Everett* (1980) 143 C.L.R. 440. Statements can be found that equitable assignments took effect by way of trust. Such an approach made perfect sense in a period where equity did not recognise the chose as property for the purposes of transfer and instead was at a stage of using its remedies and institutions to hold the assignor to its promise. However, equity has long passed that point and, as noted, rarely has to resort to a trust to give effect to an assignment. It is a totally different thing for equity to require the assignor to hold the fruits of a contract on trust for the benefit of an assignee: that merely protects the assignee, the trust is not giving effect to the assignment. Cf., James Edleman and Steven Elliot, "Two Conceptions of Equitable Assignment" (a paper delivered at the TC Beirne School of Law Current Legal Issues Seminar Series, 2013: http://www.law.uq.edu.au/cli-2013-program).

would require equity to enforce a contract of assignment that is in breach of another contract.[70]

C. Consistency with the Rules of Assignment

1. The personal rights rule

Turning to consistency with the law of assignment more generally, what seems to get lost in discussions of prohibitions on assignment is that there is another related but important rule governing the assignment of contractual rights, namely, the personal rights rule. It is not possible to assign a personal contractual right.[71] The conception of a personal contractual right has changed over time. Initially it was not possible to assign the benefit of a contract at all because contracts were considered personal.[72] It is also still common to see courts refer to certain contractual rights as inherently personal and not assignable.[73] However, under the modern law, construction determines whether or not a contractual right is personal.[74] And it has been held that even a right that might otherwise be considered inherently personal can be made assignable by an express provision.[75] Thus, even the notion of an inherently personal right is merely a presumption with which a court begins in the construction exercise. Moreover, it has always been held that an attempted assignment of a personal contractual right is ineffective. The writers know of no authoritative case in Anglo-Australian law that has held that an assignment of a personal contractual right is still effective as between the parties in the sense of giving the assignee a right in the executory contract.[76] The property view of prohibitions on assignment is consistent with the current approach to the personal rights rule. Indeed, if it were otherwise, then presumably the attempted assignment of such rights would have always been upheld in

[70] *R v Chester and North Wales Legal Aid Area Office (No 12)* [1998] 1 W.L.R. 1496, 1501 per Millett L.J. In theory if the efficacy of an assignment is not dependent on specific performance then an assignment in the face of a promise not to assign might be effective, but whether equity would enforce it at the suit of the assignee is a distinct issue. Much depends on the circumstances, as noted in note 8 above, in the case of a transfer in breach of a pre-emptive right the transferee will obtain good title to the subject property if it was not involved in any wrongdoing.

[71] Being a matter of construction the extent to which a right is personal depends on the facts; it may be assignable to a certain group or it might be personal for the purposes of ensuring some counter-performance or position and when that performance is received or the position obtained it can then be assigned.

[72] J.B. Ames, *Lectures on Legal History* (Cambridge, Mass. 1913), 210 pp. 211–12. See also S.J. Bailey, "Assignments of Debts in England from the Twelfth to the Twentieth Century" (1932) 48 L.Q.R. 248 at p. 257 and 547 at pp. 549–50.

[73] *Peters v General Accident Fire & Life Assurance Corporation Ltd.* [1938] 2 All E.R. 267, 269, 270 per Sir Wilfred Greene M.R. See also, *Mid-City Skin Cancer & Laser Centre v Zahedi-Anarak* (2006) 67 N.S.W.L.R. 569, 604.

[74] *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd.* [1903] A.C. 414.

[75] *Devefi Pty Ltd. v Mateffy Pearl Nagy Pty Ltd.* (1993) 113 A.L.R. 225, 235; *Pacific Brands Sport & Leisure Pty Ltd. v Underworks Pty Ltd.* [2006] FCAFC 40 at [32]; (2006) 230 A.L.R. 56, 64.

[76] For an academic argument see A.L. Corbin, *Corbin on Contracts* (St Paul, Minn, West Publishing 1951), vol. 4, para. 865.

equity when the view that an equitable assignment only operated between the parties held sway. Yet it has been the case from equity's early recognition of assignments of choses in action that it would not recognise assignments of personal rights.[77] Only one judge that the writers are aware of, Campbell J. in *Mid-City Skin Cancer & Laser Centre v Zahedi-Anarak*,[78] suggested otherwise on the basis that an equitable assignment only operated as between the assignor and assignee. In that case a submission was made that a certain right was personal because on breach the assignee would suffer more loss than the assignor. Campbell J. thought the submission was flawed because the assignment was equitable and was only effective as between the assignor and assignee. It followed that the assignee only had rights against the assignor and so damages would be assessed by reference to the loss of the assignor. If the contract view carries the day in relation to prohibitions on assignment, but the personal rights rule remains intact, then lawyers drafting prohibitions will easily circumvent whatever policy is informing the approach to prohibitions by simply insisting that the benefit of the contract be made personal. There is an inconsistency here and in order to give effect to the policy of the contract view it would appear necessary to modify the personal rights rule. Moreover, going back to a point that has been made earlier, modern commercial construction is less inclined to draw fine distinctions and it is difficult to see what real difference there could be intended by the parties expressing a right as personal or stating that the right is not assignable.[79]

2. Varying the burden of the obligor

An assignment that is said to be only effective as between the assignor and assignee will not be effective if it contravenes the rule that an assignment may not vary the legal burden agreed to under the contract. One such burden concerns the level of risk to which an obligor agrees: if an assignment varies the risk of the obligor receiving its counter-performance, then there would be a contravention of the *nemo dat* rule as the assignor would have vested in the assignee a different right from the one vested in the assignor. When dealing only in the fruits of a contract such a variation would be rare. However, the contract view gives the assignee an interest in the executory contract and so the risk of such variation is possible. Yet it would appear under the contract view that such an assignment is still effective.

[77] R.P. Meagher, J.D. Heydon and M.J. Leeming, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies*, 4th ed., (Sydney 2002), para. 6.445. See also, W.S. Holdsworth, "The History of the Treatment of Choses in Action by the Common Law" (1920) 33 Harv. L. Rev. 997, 1022–3 (reprinted with minor amendments in W.S. Holdsworth, *A History of English Law*, 2nd ed., (London 1937), vol. 7, 515 pp 538–9).

[78] (2006) 67 N.S.W.L.R. 569, 606–608.

[79] See further as to whether a prohibition on assignment and a clause that seeks to make the benefit of a contract personal are analogous, distinct or whether the latter encompasses the former and is broader, P.G. Turner, "Charges of Unassignable Rights" (2004) 20 J.C.L. 97, 111–116.

3. The "subject to equities" rule

It is a rule of assignment that an assignee takes subject to the equities. Some aspects of this rule flow from the *nemo dat* rule that governs the transfer and some aspects – generally the pre-notice equities – from equity preventing unconscionable conduct as between the assignee and obligor. However, if an assignment in the face of a prohibition is only valid as between the assignor and assignee, then, as a rule, this principle seems to have no place and is no more than a statement of fact. Of course the assignee is subject to the equities as only the assignor's rights are enforceable against the obligor. Yet this has been a rule that has always been applied to equitable assignments as a matter of principle.

4. Notice and variation

An obligor who has received notice of an assignment cannot agree with the assignor to vary or discharge the contract without the consent of the assignee. This is a rule that has always applied to equitable assignments of legal rights.[80] At present, the law in England would appear to be that no such variation or discharge is possible without consent.[81] It is certainly arguable that variations should be possible in certain circumstances.[82] The more important issue here is why the obligor should be bound by this rule at all if the assignment is valid only as between the assignor and assignee. Why would it be unconscionable to agree a variation or discharge with the assignor without obtaining the assignee's consent when the obligor bargained for a prohibition on assignment? One answer might flow from how the contract view is said to operate: thus, although the assignee has only remedies against the assignor, this does not deny the fact that the assignee has an interest in the executory contract and not just the fruits of the contract once in the hands of the assignor. However, that answer is based on the assignee's ownership of the chose, and the rule preventing variation and discharge has never been triggered by ownership but rather by notice. It is a rule based on unconscionable conduct: an equitable assignment is valid prior to receipt of notice but it is only upon receipt of notice that the conscience of the obligor is bound. But such notice seems incapable of grounding unconscionable conduct when the obligor bargained for the prohibition. The obligor should be able to ignore it in all cases. The result would seem to be on principle that the obligor can agree any change and thus, with the consent of the assignor or by relying on a term allowing for unilateral variation, defeat the assignment which is a risk which the assignee must accept when taking an assignment in the face of a prohibition

[80] Indeed the fact the conscience of the obligor is bound upon notice suggests that such assignments are not merely operative as between the assignor and assignee.
[81] *Brice v Bannister* (1888) 3 Q.B.D. 569.
[82] G.J. Tolhurst, *The Assignment of Contractual Rights* (Oxford 2006), paras 8.38–8.48.

whether it has notice of the prohibition or not. To hold that the obligor may not agree such a variation would seem to recognise that the assignment is not merely valid as between the assignor and assignee; indeed that formula appears only relevant to enforcement as the assignment is valid and the obligor has been put into a formal legal relationship with the assignee.

It follows that the need to enhance the assignability of debts and the use of intangibles as personal property security cannot be achieved by the contract view and courts would still need to recognise policy-based exceptions or legislation would need to be in place recognising such exceptions. It achieves no more than the property view but creates more uncertainty at the level of principle.

5. Notice and discharge

Once an obligor receives notice of an assignment it cannot obtain a discharge by performing for the assignor. This rule governs both legal and equitable assignments. If the assignment in the face of a prohibition is effective in equity, then prima facie this rule must apply. However, it seems totally at odds with the prohibition and would require either a discrete exception to be formulated if the contract view is to carry the day, or the recognition of a distinct form of equitable assignment unknown to equity until now. How can it be unconscionable for the obligor to refuse to recognise a duty to perform for the benefit of the assignee when the assignee has, or ought to have, notice that the benefit of the contract was not assignable?

D. Commercial Considerations

The first point to make is that the contract view seems to be out of touch with modern principles of commercial construction. Since, as the House of Lords recognised in *Linden Gardens*, the objective of the prohibition is to prevent a third party (assignee) having direct rights against an obligor, any dealing between assignor and assignee which has that effect (as a matter of substance) is within the scope of the clause. Prohibitions are not exclusion clauses. There is no reason to give them a restrictive construction. Accordingly, just as the relationship of bailor–bailee may be negated indirectly as well as directly,[83] there is no warrant for making fine distinctions according to the choice of words. Any such approach is inconsistent with the objectives of commercial construction.[84] The position outside the context of assignment is also illustrated by cases dealing with no reliance clauses, and similar provisions. English courts have held these to be effective to prevent rights arising under the Misrepresentation Act 1967 (UK) on the ground that their effect is to define what is capable of being relied on as

[83] See *Ashby v Tolhurst* [1937] 2 K.B. 242.
[84] See e.g., *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40, [2007] Bus. L.R. 1719.

a representation.[85] On that basis, it is arguable that although only in the fourth of the categories of prohibition referred to in Section I above have the parties expressly defined the nature of the subject matter of the contract, each is in our view to the same effect. That is, each category is an instance of the parties exercising their power under the property view to define their contractual rights as property rights. Accordingly, the right to receive performance is in each case personal to the assignor. Similarly, any transaction that would create such a relationship between the assignor and obligor would be caught by such a provision whether it be an assignment, trust or charge.

Second, prohibitions on assignment are intended to provide an element of certainty – something which the construction of commercial contracts always seeks to achieve. Even where there is no express prohibition, the benefit of a contract is not necessarily assignable. As the cases illustrate only too clearly,[86] whether the benefit of a contract is personal to the assignor may be a very difficult question of construction. The construction question does not arise if the parties have agreed in advance the circumstances in which (if ever) assignment can occur. Moreover, if a contract is, as a matter of construction, personal to the obligor it would not be assignable even to a related body corporate of the assignor. Accordingly, restrictions on assignment (the second category referred to in Section I above) may in some cases play a positive role. Such clauses have the effect of defining transferability. In the example given, the contract is personal to the group of companies of which the assignor is a member. Again, this shows that there is no real distinction between prohibitions on assignment and clauses that make rights personal. If it is correct to say that the commercial objective of a prohibition on assignment is to prevent a situation arising in which the obligor must perform for the benefit of an assignee, the commercial construction of the contract is that the scope of the prohibition extends to any conduct by which the assignor can bring about that result. In order for the assignee to have an interest in the obligor's performance, that performance must be in the hands of the assignor. There is an analogy with the fundamental idea that if A purports to assign immediately to B property which it does not own at the time of the assignment, the transaction can only take effect as a promise to assign. Therefore, assuming there is valuable consideration for the assignment, once the benefit of performance is received, it is held for the assignee. But the assignee has no right to call for performance from the obligor.

[85] See, *Watford Electronics Ltd. v Sanderson CFL Ltd*. [2001] EWCA Civ 317 at [41], [2001] 1 All E.R. (Comm) 696, 711; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) at [316], [2011] 1 Lloyd's Rep. 123, 177.

[86] See e.g., *Pacific Brands Sport & Leisure Pty Ltd. v Underworks Pty Ltd.* [2006] FCAFC 40, (2006) 230 A.L.R. 56.

Third, a point made by Goode concerns the extent to which an assignee who takes an assignment in the face of a prohibition should be protected against the assignor's insolvency. Goode argues that the assignee should be protected otherwise the estate of the assignor is unjustly enriched and this is a reason for adopting the contract view as the assignee obtains an interest in the executory contract.[87] Thus, the protection against insolvency flows from a doctrinal point, namely, the assignee's interest. But if as a matter of policy the assignee should be so protected, then perhaps the assignee should also be protected from an agreed variation and discharge. However, one should query whether, as a matter of policy, third party creditors should be subject to such an assignment which is not publicly discoverable. There is an argument that even if the assignee does not take the assignment by way of security it should not be protected unless that interest is publicly declared and the law should have systems in place to allow for such declarations.[88] In any case, why should the law not protect the obligor? One can imagine a case where the obligor performs first and then the assignor becomes insolvent: the assignee will have the benefit of the obligor's performance which is not an asset of the assignor available to the obligor in the insolvency.

Fourth, one of the difficulties facing a court when these matters come before it is that most assignment cases concern debts or payment obligations and in that context it is easy to take the view that the debtor is required to pay, so it should not matter who it pays so long as it is discharged upon payment. It follows that the doctrinal analysis of the prohibition does not matter much and the contract view seems to promote assignability, so why not adopt it? However, the analysis adopted will affect all assignments. Take a simple example. Consider a ticketing company that uses prohibitions on assignment for all the theatre tickets it issues as one of its methods for combating scalping. On the contract view such a ticket remains assignable. You might think that that does not mean much as the theatre need only account to the assignor. But it is not hard to start adding on complexity. What if the assignor decides not to go to the show, can the assignee bring an action to force him or her to go? If not, can the assignee obtain damages for the loss of enjoyment they would have received in knowing they financed the assignor to go to the theatre? What if the assignor fronts up to the theatre on the night of the show with the assignee and insists that the theatre allows the assignee to take the assignor's place? If the theatre can refuse that request, then what does it mean to say that the assignor holds the benefit of the contract on trust for the assignee in

[87] Roy Goode, "Contractual Prohibitions against Assignment" [2009] L.M.C.L.Q. 300, 306.

[88] Thus, modern personal property securities legislation deems some non-security assignments to be security interests in order to ensure that they are perfected by registration and subject to the legislative priorities regime, see e.g., Personal Property Securities Act 2009 (Cth), s. 12(3).

that circumstance? That is but the start of the issues which a lawyer could put forward in such circumstances with a lot of people needlessly in court over a trivial matter. All this is avoided by adhering to the property view.[89]

Fifth, if we put aside the technical doctrinal analysis, perhaps the choice is between, on the one hand, allowing freedom of contract to operate subject to a few public policy exceptions and, on the other hand, not recognising any prohibitions on assignment on policy grounds except where there are good commercial reasons for doing so. Interestingly, the latter would bring assignment to the opposite position in which it was originally, because it makes everything prima facie assignable. Has society changed that much? The law was originally cautious about recognising assignments. As a matter of logic, the contract view seems to result in all contractual rights being assignable so long as there are not good objective reasons for refusing the assignment.[90] If that is correct it is difficult to see why it would stop at assignment: why would the same policy not extend to delegations of contractual duties? That is, unless a party has a good commercial reason for requiring personal performance, why should the other side not be allowed to delegate? This would suggest that services have become in a sense "fungible" and the community is accepting of this. That might be correct but it is a position that should be adopted only after proper empirical research and it is difficult to see how a court is in the position to adopt a view on assignment that has such far-reaching ramifications. The current approach does promote assignability and no doubt that is giving effect to market expectation; thus for a contract to be assignable there is no requirement of a positive intention to assign. Rather, the benefit of the contract will be personal if there is evidenced an intention to only perform for the benefit of the promisee. If that is not the case the benefit of the contract will be considered to be transferable. Of course some rights are considered inherently personal and the court here begins with a rebuttable presumption that the right is not intended to be assigned. At present the position after *Linden Gardens* is that prohibitions on assignment are not at odds with public policy and so an approach that promotes assignability in the face of such prohibitions is at odds with the decision. An approach that allows for exceptions based on a competing and overriding public policy principle necessarily fits better with the decision in *Linden Gardens*.

[89] See, *eBay International A.G. v Creative Festival Entertainment Pty Ltd.* [2006] FCA 1768 at [36]–[37], (2006) 170 F.C.R. 450, 461. Another approach to limit scalping is to draft the provision as a promise not to assign with an express right to terminate where there has been an assignment, see *Hospitality Group Pty Ltd. v Australian Rugby Union* [2001] FCA 1040 at [98]–[105], (2001) 110 F.C.R. 157 at 183–84.

[90] That view has been forcefully argued, see L.A. Di Matteo, "Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability" (1994) 27 Akron L. Rev. 407. Cf., G.J. Tolhurst, "Assignment of Contractual Rights: The Apparent Reformulation of the Personal Rights Rule" (2007) 29(1) Australian Bar Review 4.

VI. Conclusions

The above analysis has attempted to show that it is necessary to make a clear informed choice as to the operation of provisions which prohibit assignment. That choice is not a simple one as it goes to the very heart of the law of assignment and personal property. At present the leading decision is that of the House of Lords in *Linden Gardens*. All other courts in England and Wales are bound by that decision and, as suggested, that case appears to adopt the property view and is in line with the other rules that govern the assignment of contractual rights. That is, the legal effect of a prohibition depends on construction and the parties are free to bring into existence contractual rights that by agreement do not have the characteristic that they would otherwise carry, namely, the ability to be transferred and that this legal effect will usually represent the intention of the parties. Any legal advice at the moment must follow the analysis in *Linden Gardens*. However, it is necessary to consider whether some policy limitations need to be placed on the powers of parties to prohibit assignments in all cases. These have already been mentioned above and it would be well within the power of the courts to accept such limitations as they have been broadly accepted in other jurisdictions and international instruments; there is universal agreement on them.

If the contract view is to be adopted, careful consideration needs to be given as to how it will fit into the current principles of assignment. One approach might be to rewrite those principles that are at odds with or irrelevant to the type of assignment that is thought to result from a transfer in the face of a prohibition. The other alternative is to recognise a distinct form of equitable assignment that arises when there is an assignment is the face of a prohibition. The form of assignment may not technically be new but reflects an earlier equitable approach to recognising assignment. However, the recognition of the assignee's interest in the executory contract is new on this approach. Moreover, there would need to be some statement as to how the other rules of assignment impact on this form of assignment.