a duty of care will exist for pure financial loss contains, at its heart, the circular paradox of defining duty by reference to breach – surely the claimant can only "properly expect to be *entitled to* rely on the defendant to safeguard him from economic harm likely to result from want of care on the part of the defendant" (emphasis added) if there is a duty to start with.

JANET O'SULLIVAN

MAY THE ASSIGNEE OF PART OF A DEBT VOTE AT A CREDITORS' MEETING?

IN deciding that the assignee of part of a debt may vote at a creditors' meeting, the Court of Appeal in *Kapoor v National Westminster Bank plc* [2011] EWCA Civ 1083, [2012] 1 All E.R. 1201 restated certain rules of assignment in unconventional terms. Conventional understanding is that a debt cannot be recovered piecemeal at law. The Law of Property Act 1925, s.136 therefore does not allow legal title to part of a debt to be assigned. An assignment of part of a debt can only occur in equity. Accordingly, the assignee may enforce the debt only in equity, and must join the assignor and any assignees of other parts of the debt to the suit: *Norman v Federal Commissioner of Taxation* (1963) 109 C.L.R. 9, 29. Such an assignee has valuable but not unlimited rights: she cannot give a good receipt for the debt unless expressly empowered to do so by the assignor: *Durham Bros v Robertson* [1898] 1 Q.B. 765, 770 (C.A.). After the assignment of part of a debt, the debtor thus remains in different ways liable to both assignor and assignee: *Deposit Protection Board v Dalia* [1994] 2 A.C. 367, 385 (C.A.). Each has substantive rights with distinctive qualities. Although the court in *Kapoor* stated this body of judge-made law differently, it was unnecessary to do so. Another source of law – statute – empowered the partial assignee in *Kapoor* to vote.

Mr Kapoor owed sums to four creditors. One creditor, the bank, wished to bankrupt him. Mr Kapoor sought to avoid bankruptcy by proposing an individual voluntary arrangement ("IVA") which, he said, would yield a greater dividend than bankruptcy for his creditors. The law of assignment was then engaged. Another creditor, Crosswood Ltd., assigned to Mr Chouhen part of its right to be paid £8.5m by Mr Kapoor. The aim was to assemble enough votes to approve the IVA. Though Crosswood would have voted in favour, it was an "associate" of Mr Kapoor, and thus disqualified from voting (Insolvency Act 1986 ("IA") s.435(7); Insolvency Rules 1986 ("IR"), r.5.23(4)). Mr Chouhen was not so disqualified, and his favourable vote at a creditors' meeting caused the proposal to be approved.

The trial judge held that this meeting was "materially irregular" (IA s.262(1)(b)): the assignment was only made to enable Mr Chouhen to vote; had his vote been excluded the proposal would have failed. The Court of Appeal agreed. Though the appeal was dismissed, the court deliberately went on to hold that the trial judge had been incorrect also to hold that Mr Chouhen was disqualified to vote *merely* because he was an equitable assignee of part of a debt: such a person is not a "creditor" (the judge held) whom the IR r.5.21(1) entitles to vote.

As the Court of Appeal held, that is not so. But while the point should have been decided on straightforward grounds of statutory construction, it was decided on a confused version of the rules of assignment instead. One example of the confusion is the court's statement that Mr Chouhen was a "creditor" because there was a "consistent line of authority", binding upon the court, "that the equitable assignee of [part of] a debt, and not the equitable assignor, has the substantive legal right to sue for the [part of the] assigned debt". According to the conventional understanding, most of that statement is erroneous. Each of the assignor and the assignee of part of a debt has different substantive rights thereto. Greater confusion appears in another example. Contradicting the statement just quoted, the court said that Mr Chouhen was entitled to vote not because he, rather than Crosswood, had the substantive right to sue for the relevant part of the debt, but because the court could "recognise" or "ignore" each party's substantive rights if it saw "a good reason of policy or principle" to do so. What can this mean? One cannot be sure, but this second passage envisages that a litigant with substantive rights to a debt may have those ignored despite the absence of any ground (*e.g.* illegality or estoppel) hitherto known to the law. Any merit in this approach remains obscure. Such confusion is the price of ignoring how statute and general law interact in situations such as that in *Kapoor*.

The Court of Appeal may have thought it was advancing the law of assignment by eschewing "technical" rules in favour of perceived notions of practical and economic "substance". Whether it did so or not, *Kapoor* illustrates the perils that lie along that path. First, a full assessment of practical and economic "substance" can reveal inconvenient truths. The entitlement to give a good receipt is a practically and economically useful right: it is an incentive to the debtor to pay. Yet the *assignor* of part of a debt is the one whose power it is to give a good receipt. He retains something of practical and economic substance after the assignment. The Court of Appeal did not say how this analysis squares with the views expressed in the case. Secondly, logic tends to break down when attempts are made to substitute notions of practical and economic substance for "technical" rules of assignment. The Court of Appeal thought those rare occasions where an equitable

assignee is permitted to recover the debt without the assignor being made party to the suit (*e.g.* where a corporate assignor is dissolved) were proof that the assignor of part of a debt ceases to have a substantive right to that part of the debt. But on that logic, cases where an equitable assignor has been allowed to enforce the assigned right to judgment without the assignee being made a party (*e.g. Hyde v White* (1832) 5 Sim. 524) would show that "the substantive right" to the debt in truth lies with the assignor and not the assignee. The reasoning collapses because the starting assumption is wrong. A third "peril" for the Court of Appeal, if it was advancing this altered approach to assignment, comprises decisions of the House of Lords and earlier decisions of the Court of Appeal whose *rationes decidendi* directly contradict what was said in *Kapoor*: *Performing Right Society Ltd. v London Theatre of Varieties Ltd.* [1924] A.C. 1, 14, 19, 20, 29, 32 (H.L.); *Williams v Atlantic Assurance Co. Ltd.* [1932] 1 K.B. 81, 100–101, 104–105 (C.A.); *Walter & Sullivan Ltd. v J. Murphy & Sons* [1955] 2 Q.B. 584, 588–589 (C.A.). The failure to address these decisions in *Kapoor* intensifies all the difficulties so far mentioned.

Had the question of Mr Chouhen's entitlement to vote been addressed as a matter of construction of the Insolvency Act and the Insolvency Rules, then, how should the court have reasoned? Historically, the different purposes of different provisions in the insolvency legislation have led the word "creditor" to be defined differently for the purpose of eligibility to petition for bankruptcy (or a company's winding up); to prove in a bankruptcy (or insolvency) for a dividend; and to vote at a creditors' meeting: *Anon.* (1949) 208 L.T. 302. For example, whereas the equitable assignor *or* the equitable assignee of part of a debt may petition for bankruptcy or a winding up, a statutory demand is only valid in respect of an assigned part of a debt if the assignor *and* all assignees of other parts of the debt join in the demand: *In re Steel Wing Co.* [1921] 1 Ch. 349, 356–357; *Parmalat Capital Finance Ltd. v Food Holdings Ltd.* [2008] UKPC 23, [2009] 1 B.C.L.C. 274, [6]–[8].

As to the meaning of "creditor" for the purpose of voting at creditors' meetings under IR r.5.21, the following appears to be the case. In respect of any part of a debt that has been assigned, either the assignor or the assignee, but not both, is entitled to vote. Entitlement to vote is calculated by reference to "the amount of the debt". That entitlement is not narrowed to legal creditors or equitable creditors. Nor is it narrowed to those who can give a good receipt. If the assignor and assignee each lodge a claim to vote severally, then whose vote the chairman should accept will depend on the circumstances. It would seem "materially irregular" (IR r.5.22(5)) for the chairman to accept voting claims by both the assignor and the assignee in respect of the same part

of a debt. On the other hand, claims in respect of different parts of the one debt may well be proper. Subject to the apparent ban on double counting, it should also be proper in some cases to admit an assignor's claim to vote in respect of an assigned part of a debt – notwithstanding the reasoning in *Kapoor*. Such an assignor remains a "creditor" in any ordinary sense. He may propose to vote according to the assignee's wishes. The assignee could procure an injunction to prevent him from doing otherwise: *Howden v Cock* (1915) 20 C.L.R. 201, 210–211, 229. The rules of assignment are relevant to whether the assignee of part of a debt is entitled to vote at a creditors' meeting but only as the backdrop against which the statutory voting provisions operate.

P. G. TURNER

ANTI-SUIT INJUNCTIONS – COMITY REDUX?

IT is easy to take anti-suit injunctions for granted. They have become legitimised by familiarity, so often do English courts restrain claimants from suing abroad where foreign proceedings would be unjust to the defendant. The courts have also done much to build the conceptual defences of such relief. Most significantly, in *Airbus Industrie v Patel* [1999] 1 A.C. 119, Lord Goff parried a potentially decisive objection to restraining foreign proceedings. Such relief need entail no disrespect to the foreign court, and so complies with the principle of comity, provided that the English court has an "interest in, or connection with" the substantive dispute (typically because the injunction is ancillary to pending English proceedings). But the *Airbus* principle is problematic. Is it a necessary or sufficient condition for compliance with comity? Is there more to comity than jurisdictional connection? If so, what does comity require? And what of the Supreme Court of Canada's earlier decision in *Amchem v Workers Compensation Board* (1993) 102 D.L.R. (4th) 96, which promotes a stronger conception of comity in which foreign proceedings should be restrained only if the foreign court's jurisdiction is exorbitant? Such uncertainties recur in the English authorities. Some courts regard comity as more than jurisdictional connection, if only to signal caution in granting relief. And others apparently favour the narrower Canadian approach: *Highland Crusader LP v Deutsche Bank AG* [2009] EWCA Civ 725.

The problem of comity's role arose again in *Star Reefers Pool Inc v JFC Group Co.Ltd.* [2012] EWCA Civ 14, with potentially important consequences. *Star Reefers* concerned disputed guarantees given by JFC, a Russian charterer, to Star, a Cayman ship owner. JFC began the inevitable battle for venue by seeking a declaration in Russian