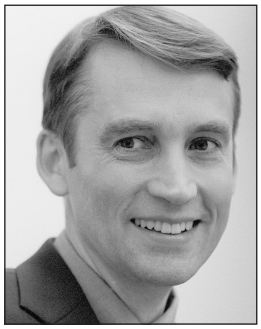
Your flexible friend

Can the right to sue for a breach of contract be effectively assigned? Ian Pease examines a case which doesn't sit too comfortably with previous authority on the matter, but provides further evidence of the court's flexible approach



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It was perhaps not an unusual scenario. If you are involved in buying and selling property or are in charge of your company's property portfolio, it may happen to you one day soon. You acquire land but it is worth considerably less than you paid for it. Your only recourse is to sue under a contract, but presently that contract is in someone else's hands. You need the assignment of that right. The recent Court of Appeal case of *Technotrade v Larkstore* [2006] is but the most recent example of the law's flexible attitude to the otherwise problematic concept of assignment of rights.

The facts

Larkstore (L) had purchased some development land after seeing a report that Technotrade (T) had prepared for the vendor, Starglade (S). This report related to the soil conditions on the site. At that stage all seemed well. It is important to note that, although the report had been a key aspect of the decision to buy the land, L was not the contracting party, and if the report proved inaccurate it would not have had any direct remedy against T.

With the land purchase complete, L commenced development. However, the land slipped, damaging both L's development and that of its neighbours. Remedying the problem caused it considerable expense and it was also sued by its neighbours.

How could L seek recourse? It had to acquire a right to sue under the contract S had with T. This L duly did by entering into an assignment with S (for a small consideration) whereby S assigned all benefits and interests in (including the right to sue) its contract with T. Notice of the assignment was given as required by the Law of Property Act **[check 1]**

L then started an action against T claiming breach of contract (along with other claims in tort). However, that was not the end of the matter.

T claimed that the law limited L's damages pursuant to the assignment to those suffered by the assignee (S) at the date of the assignment. S had of course sold the land in an arm's length transaction to L before the landslip for its full market value. It had no loss, therefore T could claim no loss via its assigned cause of action.

This 'black hole' question was set out by Ian Duncan Wallace in a Note in the *Law Quarterly Review* (Vol 110 LQR 42) as:

> ... whether... a contract-breaker can avoid an otherwise inescapable liability in damages as a result of the accident of the transfer of the property and assignment of the benefit of the relevant... contract to a third party, either by arguing that the original contracting party or assignor, having parted with the property at full value, has suffered no loss and that the assignee cannot be in a better position, or conversely that an assignee, in a case where he alone can sue, has paid a reduced price, equally suffering no loss. In other words, does the accident of transfer and assignment create a 'legal black hole' into which the right to damages disappears, leaving the contract-breaker with an uncovenanted immunity?

[CHECK 2] That technical legal argument is built on the back of previous cases, so let's reprise.

The assignee cannot recover more than the assignor

The case of *Dawson v Great Northern & City Railway* [1905] decided that the assignment of a statutory claim to

'Once the cause of action has arisen, the contract-breaker will be liable for whatever damages flow therefrom, subject to rules of causation and remoteness.'

compensation for damage to land did not entitle the assignee to recover extra loss suffered by reason of a trade carried on by it, but not the assignor, that the assignor would not have suffered. The assignee was a draper and claimed damage to her trade stock caused by the defendant's railway works. The court held that as this was not a head of damage that the assignor could have recovered, it was not available to the assignee after the assignment just because she suffered it as a result of the defendant's acts. In other words, the assignee stands in the shoes of the assignor and cannot, by its own actions or circumstances, increase the liability that the defendant incurs.

Can we have our loss back?

Run forward three quarters of a century and we come to the case of *GUS Property Management v Littlewoods Mail Order Stores* [1982] – an object lesson in what can go wrong. Here the damage happens early on when the property is in the hands of the future assignor (Rest). Rest was a wholly owned subsidiary of GUS which, a few years later, decided to reorganise its property portfolio, whereupon the property was transferred to GUS Property Management (Management) **CHECK 3**. It was conveyed at 'book value', that took no account of the damage that had been occasioned. Management then undertook the repairs. A year later the rights of action were also assigned from Rest to Management.

Management commenced an action in damages (in tort) against Littlewoods (*inter alios*). The claim was put on the basis either of diminution in value or the costs of repairs incurred by Management between conveyance and assignment. **CHECK 4**

Littlewoods retorted that there was no right to sue. It said that:

(1) Management was really seeking to pursue a claim which Rest itself could have pursued at the date of the assignation;

(2) the only relevant loss which the pursuers could claim title to recover was loss suffered by Rest, and recoverable by Rest at the date of the assignation [check 'assignment'];

(3) accordingly, sums spent on repairs by Management were irrecoverable;

The assignee stands in the shoes of the assignor and cannot, by its own actions or circumstances, increase the liability that the defendant incurs.

(4) the alternative claim for diminution of the building's value was irrelevant since the cost of the repairs, being all that was necessary to achieve *restitutio in integrum*, represented the proper measure of loss; and

(5) in any event, since the property had been transferred at book value

Dawson v Great Northern & City Railway Co
[1905] 1 KB 260
GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd
[1982] SLT 533
Linden Gardens v Lenesta Sludge Disposals
[1993] Vol 63 BLR 1
St Martin's Property Corporation Ltd v Sir Robert McAlpine Ltd
[1994] 1 AC 85
Technotrade Ltd v Larkstore Ltd
[2006] All ER (D) 419 (Jul)

without any regard for the fact that the building had been damaged, Rest had suffered no loss and accordingly had no claim to assign to Management.

The Scottish Court of Appeal agreed with these arguments and dismissed the case. Management appealed to the House of Lords, which agreed that the basic question was whether, in the action, Management was really seeking to pursue against Littlewoods claims which Rest itself could have pursued at the date of the assignation to Management. It also agreed that the only relevant loss Management could claim under the assignation was loss suffered by Rest for which Rest could, at the date of the assignation, have sought reparation.

The reasoning of the House went as follows:

(1) An owner claiming (in tort) for damage to its property does not lose that right merely by disposing of the property. Hence Rest retained the right even after the transfer of the property.

(2) The measure of the damage suffered by Rest was not (where there is a non-arm's length transaction) the diminution in value (as the Scottish Court had held) **CHECK 5** but rather the cost of reinstatement **CHECK 6**:

> I am of opinion that the price for which, in pursuance of group policy, Rest conveyed the damaged building to [Management] is entirely irrelevant for the purpose of measuring the loss suffered by Rest through [Littlewood's] negligence, and is quite incapable of founding an argument that Rest suffered no loss at all. The figure of price was fixed, in an internal group transaction and for accounting purposes only, without any reference to the true value of the building.

(3) Management, as Rest's assignees, are suing to recover, not their own loss, but the loss suffered by Rest.

(4) On the facts it was evident that Rest had suffered loss and the pleadings could be amended to make it clear that the loss being sought was that of Rest and not Management.

Overall, therefore, the House concluded that the Scottish Court had taken an 'unduly strict and narrow view' of the Management's pleadings, which was 'not conducive to the aim of doing justice between the parties'.

Dawson and GUS demonstrate that the loss that is being sought under an assignment is that of the assignor as at the date of the assignment.

What is difficult to comprehend with these assignment cases is this concept of suing on account of someone else's losses, ie a claim in tort (where loss is part of the cause of action) but where that loss is not suffered by the party who has the other parts of the cause of action (duty of care and its breach).

However, both the preceding two cases demonstrate that the loss that is being sought under an assignment is that of the assignor as at the date of the assignment.

But what happens if the claimant cannot have that right assigned to it?

The black hole beckons

We had to wait another decade for the next act in the saga. Two co-related cases got to the House of Lords. They generated the article from Ian Duncan Wallace referred to above.

In *Linden Gardens v Lenesta Sludge Disposals* [1993] a company called Stock Conversion owned leasehold premises that were blighted by asbestos. Two remedial contracts failed to effect a proper clean up. Both contracts were under JCT forms that incorporate a prohibition on assignment without consent. Stock started the action but later withdrew in substitution for Linden Gardens, to whom it had assigned its leasehold interests and attempted to assign the building contracts. This withdrawal, as we will see, was a big mistake. Most of the costs of remedying the problem were borne by Linden (the assignee).

The Court of Appeal had found that the assignment of the building contracts was valid, hence Linden got a good cause of action, but the House of Lords overruled this, concluding that the prohibition clause was clearly effective.

The bombshell in this case, however, is set out in the following passage from the speech of Lord Browne-Wilkinson:

> In my judgement the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which to the knowledge of both [the original employer] and [the contractor] was going to be occupied, and possibly purchased, by third parties and not by [the original employer] itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party...
>
> As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against [the contractor]. On the contrary, [the contractor] had specifically contracted that the rights of action under the building contract could not without [its] consent be transferred to third parties who became owners or occupiers and might suffer loss.
>
> In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that [the original employer] would be entitled to enforce contractual rights for the benefit of those who suffered from

> defective performance but who, under the terms of the contract, could not acquire any right to hold [the contractor] liable for breach. It is truly a case in which the rule provides 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it' [Per Lord Diplock in *The Albazero* [1977]].

However, in the *Linden Gardens* case the original contracting party, Stock, had dropped out of the action. Therefore the action failed totally.

In the co-related case of *St Martin's Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] both the assignor and the assignee had remained as co-claimants and as such there was a channel through which relief could flow.

Lawyers say hard cases make bad law and this House of Lords decision is an example of that saying. How can the House hold that the parties must be taken to have contracted on the basis that the original contracting party would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance of that contract but who were not able to acquire any rights under it because of the prohibition, when that has precisely the effect that the prohibition was there to avoid?

A reprise

Both *Dawson* and *GUS* are authority that the assignee sues not for its own losses but for those that the assignor would have sustained as at the date of the assignment; as *Dawson* said, the assignment cannot be a way of making any greater claims. The assignee does not merely take over an existing cause of action but also takes over the assignor's losses. However, the court will be loath to allow the wrongdoer to 'escape scot-free' by arguing that the transfer was for full value, particularly where it takes place (as happened in *GUS*) otherwise than at arm's length. The courts, therefore, showed a flexibility when it came to providing a basis upon which damages would be calculated.

In the *Linden Gardens* and *St Martins* cases further flexibility was found most particularly in the concept that (quite contrarily) in spite of a prohibition against assignment, the cause of action thereby remaining with the original contracting party, that party could sue on behalf of a third party's losses. This stands on its head the concept of who is suing for who's losses.

Technotrade – revisited

The closest case on the facts to *Technotrade* was *GUS*, that is: valid assignment and the assignee suing not for its own losses but for those of the assignor as at the date of the assignment. But, of course, at that time L had no losses. What it did have was a technical breach of contract (a bare cause of action that gave purely nominal damages). The damages that were suffered were of two kinds. First, damages to L's development, and secondly damages that it would owe its neighbours for damage to their properties because of the land slip – a crucial distinction, but one that does not appear to have been taken up by the Court of Appeal (para 34 aside **[check 7]**. Crucial, because under the rule in *Dawson* the extra 'private' losses that L suffers (but S would not have suffered) should not be recoverable.

The court's reasoning ran like this:

(1) The answer to the argument as to a limit on the damages which L, as assignee, is entitled to recover from T is to be found in an analysis of the cause of action.

(2) The cause of action is the right to sue T for breach of contract in respect of the preparation of its report.

(3) That cause of action was complete when T produced the report for S.

(4) The damages are not limited to the loss that could have been proved at the date when the breach occurred and the cause of action first arose. The contract-breaker is still liable for the substantial damages that occur after the initial breach of contract (subject to the normal rules on causation and remoteness).

(5) The principle that the assignee cannot recover more than the assignor is there to protect the contract-breaker/debtor from being *prejudiced* by the assignment – that does not apply in this case. T's arguments were, in the words of Mummery J, a 'conjuring trick worthy of Houdini' that would free T from its contractual liability.

The net effect therefore is that, once the cause of action has arisen, the contract-breaker will be liable for whatever damages flow therefrom subject to rules of causation and remoteness.

Both Dawson and GUS are authority that the assignee sues not for its own losses but for those that the assignor would have sustained as at the date of the assignment; as Dawson said, the assignment cannot be a way of making any greater claims.

But this 'liberal' reasoning, although obviously driven by the court's desire to punish the guilty, seems hard to square with the decision in *GUS*, where it was said:

> ... the only relevant loss which, by virtue of the assignation, the pursuers could claim title to recover *is loss suffered by [the assignor]*, for which [the assignor] *could at the date of the assignation have sought reparation* [emphasis supplied]

Nevertheless, it must now be acknowledged that the assignment black hole has been 'stopped up' by the courts… or has it?

The *Technotrade* case concentrated specifically on the assignment of a cause of action for breach of contract. In contract the cause of action is complete as soon as the breach occurs – S had a complete cause that it could assign to L. In tort the cause of action is not complete until the damage occurs. So if the assignment occurs before the damage and the only claim is in tort, the position could be different. But that's for another day. **[CHECK 8]** ■