

Liquidators' ability to sell a cause of action

The ILA Technical Committee wish to draw member's attention to the recent decision in *Ruttle Plant Hire v The Secretary of State for the Environment And Rural Affairs* [2008] EWHC 238 in which the High Court held that a liquidator may not assign his personal right to prosecute and carry on legal proceedings in the name and on behalf of the company.

Background. A liquidator may sell any of the company's property and bring a claim or other legal proceedings in the name and on behalf of the company (Section 167 and Schedule 4 to the IA 1986).

The power of sale includes: (i) the sale of a bare cause of action on terms that the assignees will pay over a share of the recovery; and (ii) a sale of the fruits of proceedings which the company was entitled to bring against a third party. However, a liquidator cannot surrender his fiduciary power to control proceedings commenced in the name of the company (*Glegg v Bromley* [1912] 3 KB 474 and *Grovewood Holdings v James Capel* [1995] Ch 80).

The Australian Federal Court has considered issues of maintenance and champerty in relation to a liquidator's power of sale in the context of assignments of causes of action. It concluded that the statutory power of sale authorises the sale of a bare cause of action or the fruits of the action which would otherwise involve maintenance or champerty provided that the subject matter of the sale is property of the company (*In re Movitor Pty Ltd v Sims* (1996) ACSR 440).

Facts. Farm Assist Limited (FAL) entered into a contract with DEFRA to perform emergency work to contain and eradicate an outbreak of foot and mouth disease. A dispute over payment under the contract was settled between the parties. FAL subsequently argued (and DEFRA denied) that it had agreed to the settlement under economic duress and was entitled to further payment (the **Action**).

Subsequently, FAL entered into voluntary winding-up proceedings and FAL's liquidator purported to assign the Action to a third party, Ruttle. The assignment transferred FAL's liquidator's rights: (i) to recover and receive from DEFRA all such sums of money, property and benefits as shall be awarded in the Action; and (ii) all the rights of the liquidator to prosecute and carry on the Action and all proceedings consequent thereon in as full a manner as FAL or the liquidator could have done, free from all control or any interference by the liquidator. FAL was not a party to the assignment.

Ruttle subsequently brought the Action against DEFRA and the High Court held that that the assignment did not entitle Ruttle to commence the proceedings as the proper claimant remained FAL (*Ruttle Plant Hire v The Secretary of State for the Environment and Rural Affairs* [2007] EWHC 2870). In applications by Ruttle to amend its pleadings, by DEFRA to strike out Ruttle's claim and by the liquidator to add FAL as a claimant the court was asked to consider further issues including, *inter alia*: (i) the effect of FAL not being a party to the assignment; and (ii) the liquidator's ability to assign the Action on the terms that he had.

Decision. The assignment could not be objected to on the ground that FAL was not a party to it. The power of sale of FAL's property and the power to commence proceedings in the name of and on behalf of FAL were within the liquidator's powers which he could exercise without FAL being party to the assignment.

While the assignment of the fruits of the Action by the liquidator was valid, the assignment of the rights of the Liquidator to prosecute and carry on the Action was objectionable on two grounds.

- First, the assignment deprived the liquidator of any control of the Action. This resulted in the liquidator assigning his personal right to commence and control legal proceedings in the name of the company. This right was a fiduciary power which the liquidator must exercise in his discretion and could not sell or surrender to a third party. The court contrasted the situation where a liquidator assigns the fruits of any action and surrenders his personal right to commence and control any

proceedings, to a situation where a liquidator assigns a bare cause of action as part of a sale of the property of a company. The latter case would not be objectionable as the liquidator would be exercising his statutory power of sale, an intrinsic part of which would be the right to commence or continue the proceedings [see paragraphs 40 to 56].

- Secondly, any assignment of the liquidator's right to prosecute and carry on the Action fell outside of his statutory power of sale, which made the assignment champertous. The fact that Ruttle would have been entitled to prosecute the action free from all control or any interference by the liquidator added a further element of champerty to the assignment.

Any funding that Ruttle provided for the action would not have made any otherwise valid assignment invalid or objectionable on public policy grounds. There will necessarily be a price to be paid where there is a sale of the fruits of the action and an assignee who funds the action or provides other funds to the liquidator will generally be paying a sum which is inherent in the concept of a sale.

Comment. The assignment of the fruits of an action by a liquidator can give rise to tricky issues, particularly as to how much control the assignee is given and whether any funding of the action would make the assignment objectionable on public policy grounds. Given the absolute nature of control surrendered in this case, no comment was made as to how much control of an action may be validly surrendered by a liquidator. This is something that will need to be judged on a case by case basis (and no consideration was given to a vesting of the action in the liquidator under s145 IA 1986 as an preliminary to assignment). What is clear is that a liquidator will not be able to surrender total control of the action. The guidance given on the ability of the assignee to fund the action will be useful for practitioners and largely corresponds with previous case law on this subject.