SUPREME COURT OF QUEENSLAND

CITATION:	*Geroff & Ors v Card Enterprises Pty Ltd & Ors* [2002] QSC 269
PARTIES:	**PETER GEROFF and GREGORY MOLONEY** (first plaintiffs) **ON TIME BUSINESS SOLUTIONS PTY LTD (IN LIQUIDATION) ACN 079 123 676** (second plaintiff) **v** **CAPD ENTERPRISES PTY LTD ACN 078 403 317** (first defendant) **CHRIS CHRYSOSTOMOU** (second defendant) **AUSDOC ON TIME PTY LTD ACN 092 717 729** (third party)
FILE NO/S:	S 7636 of 2001
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	5 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2002
JUDGE:	Holmes J
ORDER:	**1. Summary judgment entered for the third party against the defendants.** **3. Plaintiffs to have the costs of the trial of the separate issue.** **4. Third party to file materials relating to costs by the close of business today.** **5. The defendants to submit materials relating to costs by the close of business next Tuesday.** **6. Costs as between the defendants and third party reserved.**
CATCHWORDS:	CONSTRUCTION OF INSTRUMENTS – INTENTION OF PARTIES - ASSIGNMENT OF CHOSES IN ACTION – WHAT AMOUNTS TO ASSIGNMENT – BOOK DEBTS - ESTOPPEL – REPRESENTATION – INDUCEMENT - DETRIMENT Where preliminary trial of separate issues arising out of the first and second plaintiffs claim against both the first

defendant for fees owing under a franchise agreement, and the second defendant as guarantor of the first defendant's obligations as franchisee – whether there was an assignment by the plaintiffs to the third party of the former's rights against the defendants – whether the sums claimed by the plaintiffs in the action were book debts excluded from the sale – whether the benefit of the second defendant's obligations under the guarantee transferred to the third party – whether the plaintiffs are estopped from pursuing their claims against the defendants.

Property Law Act 1974, s199

BP Refinery (Western Port) v Shire of Hastings (1977) 10 CLR 266, followed
Hutchens v Deauville Investments Pty Ltd (1986) 61 ALJR 65, considered
Rex Developments Pty Ltd (in liquidation) 13 ACSR 485, considered
Thomas v National Australia Bank [2002] 2 Qd R 448, considered

COUNSEL: Mr O'Neill for the first and second plaintiffs
Mr Hackett for the first and second defendants
Mr Grenke for the third party

SOLICITORS: Lees Marshall Warneck for the first and second plaintiffs
Bain Gasteen Lawyers for the first and second defendants
Deacons for the third party

[1] This preliminary trial of separate issues arises out of claims by the first and second plaintiffs (respectively, liquidators and company in liquidation) against the first defendant for fees, advertising contributions and services owed under a franchise agreement, and against the second defendant as guarantor of the first defendant's obligations as franchisee. By their amended defence the first and second defendants pleaded, *inter alia*, that the second plaintiff's rights as franchisor had been assigned to the third party, with whom the defendants had reached a settlement, so that the plaintiffs' claim had been extinguished. In the alternative, it was pleaded, the plaintiffs were estopped from prosecuting the claim. As against the third party the defendants claimed an indemnity pursuant to the settlement agreement. An order was made that:

> "The issues involving the construction of the deed of assignment and notice of assignment and any alleged estoppel argument arising as the result of the delivery of those documents and the third party proceeding be set down for trial as a separate issue".

Background

[2] The history of events as it emerges from the documents tendered on the trial is as follows. In March 1999 the second plaintiff, On Time Business Solutions Pty Ltd, entered a franchise agreement with the first defendant, CAPD Enterprises Pty Ltd, in relation to the operation of a copy centre. The second defendant, Mr Chrysostomou, director and shareholder of CAPD Enterprises Pty Ltd,

guaranteed its obligations under the agreement. In May 2000 the second plaintiff, On Time Business Solutions Pty Ltd, went into liquidation, with the first plaintiffs being appointed liquidators. This action was brought against the first and second defendants, and now claims against each of them (by an amended statement of claim) the sum of $65,782.59 with interest.

The sale of business agreement

[3] On 31 May 2000, the liquidators, in the course of realising the assets of the second plaintiff, entered a sale of business agreement with the third party, Ausdoc On Time Pty Ltd, the relevant business being defined as:

> "The business carried on by the Vendor under the Business Names and Trade Mark, of operating On Time Copy Centres and franchising the rights to others to do so".

By the agreement the vendor (the second plaintiff here) sold to the purchaser the assets and the business. The assets sold were defined as including, among other items, the "benefit (subject to the burden) of the Franchise Agreements" but excluding the "Excluded Assets". "Excluded Assets" were, in turn, defined to include, *inter alia*, "book debts of the Vendor". The completion date for the agreement was dependent on fulfilment of a condition precedent, but there was no dispute here that the relevant date was 20 September 2000. The sale of business agreement included an "entire agreement" clause expressing the agreement to be:

> "The entire agreement and understanding between the parties on everything connected with the subject matter of [the] Agreement".

[4] It was a term of the agreement that at completion the vendor would deliver to the purchaser a deed of assignment of the franchise agreements in a form contained in a schedule to the agreement, and a notice of assignment for each franchisee. However, the document which was tendered to the court as constituting the sale of business agreement contained no form of deed of assignment. Since the copy document tendered was said to represent the agreement, and there was no suggestion that anything had been omitted from it, I assume that the original agreement equally contained no such annexure.

The deed of assignment

[5] Although the sale of business agreement contained no form of deed of assignment, the plaintiffs and the third party signed such a deed in September 2000. The introduction to the deed recites that:

> "Subject to the Completion of the Sale of Business Agreement, the Assignor has agreed to assign to the Assignee and the Assignee has agreed to accept from the Assignor an assignment of the Franchise Agreements on the terms and conditions [of] this Deed".

Clause 3.1 of the deed is in the following terms:

> "In consideration for the covenants of the Assignee in this Deed, the Assignor **ASSIGNS** to the Assignee all of the Assignor's obligations, rights, title and interest in the Franchise Agreement on and from the Assignment Date."

[6] "Assignment Date" is defined elsewhere in the deed to mean the completion date under the sale of business agreement. An "entire agreement" clause is in the following terms:

> "**6.3 This is the entire Deed**
>
> (1) This is the entire agreement to the parties concerning the subject matter of this Deed.
>
> (2) There is no other agreement, understanding, warranty or representation, whether oral or written, binding the parties concerning any aspect of this Deed except for the Sale of Business Agreement."

The deed of assignment defines the expression "Sale of Business Agreement" as meaning the agreement of 31 May 2000 and ascribes to any terms bearing capitals undefined in the deed the meanings given them in the sale of business agreement.

The notice of assignment

[7] Section 199 of the *Property Law Act* 1974 applies to the assignment of a chose in action. It is in the following terms:

> "**199**. (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice -.
>
> (a) the legal right to such debt or thing in action; and
>
> (b) all legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor."

[8] It was common ground that in September 2000 a notice of assignment was sent to all franchisees including the first defendant. The notice, having identified by its heading the parties to it, was in the following terms:

> "1. That with effect on and from the day of 2000 ("Assignment Date"), the Assignor assigned to the Assignee absolutely its right, title and interest in and the benefits, burdens and liabilities under the franchise agreement specified in Annexure A ("**Franchise Agreement**") by a Deed of Assignment made the day of 2000.
>
> 2. That the Assignee agrees to:

(a) perform and be responsible for all obligations of the Assignor under the Franchise Agreement on and from the Assignment Date; and

(b) be bound by the franchise Agreement in every way as if the Assignee were a party to the Franchise Agreement in place of the Assignor.

3. That the Assignee is not responsible for any liabilities under the Franchise Agreement relating to the period prior to the Assignment Date."

The notice of assignment contained provision for signature by the franchisee to whom it was sent acknowledging receipt of it.

The witnesses

[9] The communication of these documents to these defendants was, of course, crucial to the estoppel argument. The second defendant, Mr Chrysostomou and his solicitor, Mr Kleidon of Bain Gasteen Solicitors, gave evidence for the defendants. Mr Moloney, one of the first plaintiffs, and Mr Kirk, general manager of the third party, gave evidence in the plaintiffs' case. All four gentlemen were entirely credible; I had no impression, as one sometimes gets in such cases, of any of the witnesses trying to improve his case by recasting events in a more favourable light.

Notice to the defendants of the sale and the assignment

[10] Franchisees were advised of the progress of the liquidation and the intended sale of the business. Mr Chrysostomou was shown a copy of a facsimile dated 19 May 2000 from the liquidators, which he said he could recall having seen. That document was tendered. It deals with the contract of sale entered by the liquidators with the third party. It contains the following statement relevant to the status of debts owed to the franchisor:

> "From a practical point of view the administration of royalty invoicing and collection will all be handled by Iain and Katie, for both myself (prior to 15 May) and Ausdoc (from 15 May). I would add that the temporary moratorium on collection of administration and pre-administration debts has now lapsed, and I will be contacting those of you with outstanding balances in the near future to discuss the various options available to us."

[11] Subsequently, of course, the deed of assignment was executed and notices of assignment were sent to franchisees. Mr Chrysostomou said that while he had received a notice of assignment,

> "it paled in significance in some context in that the notice was referring to an assignment of the franchise and we were at the same time questioning the validity of the franchise agreement."

He did not recognise a copy of the notice of assignment put to him in cross-examination, although it was accepted that it was indeed the one sent to franchisees. Mr Chrysostomou's recollection was that there was also a press release issued by the liquidators; and both notice of assignment and press release advised

that the franchise-franchisor rights and the nominated franchise agreements had been transferred to the third party. When asked whether the press release confirmed that "rights regarding pre-existing outstanding funds were to remain with the liquidator", he said that it had not suggested that.

[12] Mr Chrysostomou said he had advised his solicitor, Mr Kleidon, that he had received a notice of assignment in relation to the franchise agreement, and that he had not signed it. Mr Kleidon had confirmed that he was correct in not signing. Mr Chrysostomou had not seen the deed of assignment, and although, in the witness box, he thought that he recognised the sale of business agreement, the evidence on the whole suggests that he had not in fact received a copy of it prior to the settlement agreement with the third party.

The provision of the deed of assignment to the defendants' solicitor

[13] Correspondence tendered shows that in June 2001 the defendants' solicitor, Mr Kleidon, was seeking to establish the terms of the agreement between the plaintiffs and the third party. On 13 June 2001 Mr Kleidon wrote to the third party in the following terms:

> "Our client has understood that there has been an arrangement between you and On Time Business Solutions Pty Ltd which has authorised and governed your management of the group, but has not been formally notified as to the nature and terms of it.
>
> As it appears that you now assert rights as franchisor under the Franchise Agreement, we request, on behalf of our client, that you provide us with a copy of the documentation which establishes your entitlement to do so."

On 6 August 2001 the solicitors for the third party replied as follows:

> "On 20 September 2000 my client completed the acquisition of the On Time franchise network.
>
> I attach deed of assignment dated 20 September 2000 whereby the various franchise agreements were assigned to my client. On my instructions, notification of that assignment was formally given to your client on or around 13 October 2000."

The letter goes on to point out alleged breaches by the first defendant of its obligations under the agreement.

[14] Mr Kleidon said that he had sought the documentation to deal with a specific issue that had arisen, but since the matter was no longer pressing by the time he received it, he did not trouble to look at the deed when it first arrived.

[15] Some context is needed for the request for and receipt of the deed of assignment. The present action by the plaintiffs against the defendants had been on foot for some time. It is not clear when it was commenced, but it is apparent from correspondence that it was transferred from the District Court to this court in May 2001. In July and August 2001 disclosure and inspection were taking place in that action. Meanwhile the first defendant had for some months in 2001 failed to make payments under the franchise agreement to the third party. A demand was made in May 2001 for the

amounts outstanding. On the other hand, Mr Chrysostomou considered that the third party had failed to meet the obligations of the franchisor under the agreement.

The settlement negotiations with the third party

[16] On 7 September 2001 the third party's solicitors wrote to Mr Chrysostomou advising him that an amount of $74,847.17 was outstanding in franchise service fees. Mr Chrysostomou and Mr John Kirk, the general manager of the third party, then engaged in some discussions of the situation. Mr Chrysostomou agreed that the two developed a framework for an agreement which entailed a payment of $15,000 by him and an end of the franchisee/franchisor relationship. He said that he was not aware of any discussion with Mr Kirk of the defendants' litigation with the plaintiffs. Mr Kirk explained that he arrived at the figure of $15,000 as being the advertising fees owed by the first defendant.

[17] Mr Kirk said that in the course of his discussions with Mr Chrysostomou the latter asked him whether the third party could assist with dealing with the liquidator in order to resolve the litigation. That conversation was not put to Mr Chrysostomou by Mr O'Neill, counsel for the plaintiffs, because at the time of his cross-examination it was not anticipated that Mr Kirk would be his witness rather than the third party's and he had not yet spoken to him. However, in the light of Mr Chrysostomou's evidence as to when he came to a view about resolving the litigation by settlement with the third party itself, I do not think this piece of evidence is of any moment.

The settlement with the third party

[18] On 13 September 2001, the solicitors for the third party wrote to Mr Chrysostomou advising that they had been instructed that settlement had been reached between the third party and him "in relation to amounts currently outstanding under the franchise agreement". They forwarded a deed of settlement.

[19] Mr Chrysostomou said that he was in some doubt as to whether to execute the deed of settlement and consulted Mr Kleidon. Mr Kleidon then reviewed the deed of assignment already in his possession and came to the conclusion that by virtue of its provisions, the discharge offered was in respect of all the first defendant's obligations under the franchise agreement, including those the subject of the plaintiffs' action. On 17th October 2001, he advised Mr Chrysostomou to that effect. Mr Kleidon did not have, and had not sought, a copy of the sale of business agreement; nor had he seen the notice of assignment. He had asked Mr Chrysostomou for it, but he had been unable to locate it.

[20] Having received Mr Kleidon's advice as to the effect of the deed of assignment, Mr Chrysostomou decided to execute the deed of settlement for the first defendant as franchisee and for himself as guarantor, and did so on 22nd October. There was one alteration made to the deed on his behalf: cl 4.1 of the draft settlement agreement contained agreement by the parties to release each other from "all obligations contained in the franchise agreement" in consideration of the first defendant paying $15,000. In the document as executed by Mr Chrysostomou this expression was altered to "in relation to all obligations (including accrued obligations)".

Was there an assignment by the plaintiffs to the third party of the former's rights against the defendants?

[21] Mr Hackett pointed out that both the deed of assignment and the notice of assignment were unqualified by any exclusion from, or limitation, on the rights under the franchise agreements being assigned. He relied on the notice of assignment as relevant to construction of the agreement between the parties on the basis that s 199 of the *Property Law Act* 1974 required such notice in order to render the assignment effectual. But while notice of assignment may be necessary before it takes effect in law as against the person liable for any obligations the benefit of which is assigned, the notice itself plays no part in determining the terms of the assignment. Indeed, there may be an equitable assignment of rights notwithstanding that no notice has been given.[1] I do not think, therefore, that the notice of assignment can assist in construction of the agreement as between the plaintiffs and the third party.

[22] Mr O'Neill, for the plaintiffs, advanced an argument that cl 3.1 of the deed of assignment should be read as passing only the obligations, rights, title and interests arising on and from the assignment date; that is to say, excluding those benefits or liabilities accrued prior to the assignment date. Essentially he proposed that the phrase "on and from the assignment date" be read as qualifying the nouns "obligations, rights, title and interest" rather than the verb "assigns".

[23] The difficulty with that proposed construction is that if the assignor were to transfer only such title and interest in the franchise agreements as might inure to it on and from the assignment date, it would have nothing to transfer; the relevant interest to be transferred plainly had come into being well before the proposed assignment. If it had not, the agreement to assign would be a pointless exercise. Such a reading makes no sense at all. I conclude that the phrase "on and from the assignment date" simply designates the date on which the assignment becomes effective. The question then is whether there is any exclusion of the rights the subject of the plaintiffs' action from the assignment, which on its face, as set out in cl 3.1 of the deed, is unqualified.

[24] Mr O'Neill sought to lead evidence from one of the first plaintiffs, Mr Maloney, as to their intention in relation to the assets to be sold to the third party. At best the evidence was of unilateral subjective intention and could not assist in construction of the documents. In any event, as it seems to me, the question is not so much one of ambiguity justifying receipt of extrinsic evidence, but rather whether the terms of cl 3.1 of the deed of assignment should be read as subject to the sale of business agreement. It was not a matter of ambiguity on the face of either document.

[25] The terms of the agreement between the plaintiffs and the third party cannot, in my view, be determined by a reading of the deed of assignment in isolation from the sale of business agreement. The actual terms of the agreement between the parties for the sale of the first plaintiff's business and assets, including the benefit of the franchise agreements, were set out in the sale of business agreement. Clause 8.1 of the business sale agreement required delivery of the assets and business to be effected by, inter alia, provision of an executed deed of assignment. The deed which is before the court clearly was entered and executed to give effect to that

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1 *Thomas v National Australia Bank* [2000] 2 Qd R 448.

clause. It was conditional upon completion of the sale of business agreement. It specifically excepted the sale of business agreement from the "entire agreement" clause, and referred back to it for definition of any undefined terms.

[26] The business sale agreement plainly contemplated the execution of the deed of assignment. The deed of assignment on its face refers back to the business sale agreement. The two documents, in my view, implement a single agreement; one term of which, as clearly expressed in the sale of business agreement, was that book debts would be excluded from the sale of assets. Clause 3.1 of the deed of assignment must be read subject to that exclusion, that is, as referring to the obligations, rights, title and interest passed by the business sale agreement. There is nothing in the terms of the deed of assignment which suggests that it is intended to vary the sale of business agreement. Those conclusions are reinforced by cl 6.3 (2), which specifies that no other agreement binds the parties "concerning any aspect of this deed except for the sale of business agreement". By inference the sale of business agreement does bind the parties concerning aspects of the deed. That can only reasonably be read as an acknowledgement that the assignment is subject to the sale of business agreement.

[27] An alternative way of approaching the matter would be to imply into the deed of assignment a term limiting the obligations, rights, title and interest in the franchise agreements assigned by cl 3.1 to those passed by the business sale agreement. The requirements for an implied term are set out in *BP Refinery (Western Port) v Shire of Hastings*[2]:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

All of those requirements would, in my view, be met in the present case, in the light of the existence of the sale of business agreement. It would be reasonable to imply the term. It would be necessary to give business efficacy to the contract; if one were to read the deed of assignment without such a term it would produce the result that a valuable asset, the book debts of the second plaintiff, was assigned for no additional monetary consideration. Taken in the context of the sale of business agreement, the term seems to me so obvious as to go without saying; and it is capable of clear expression. Nor does it contradict any express term of the deed of assignment. However, because of my view that the deed of assignment must be read with the sale of business agreement, it is unnecessary to imply such a term, it being express in the latter document.

Were the sums claimed by the plaintiffs in the action book debts excluded from sale?

[28] Mr Hackett argued that there was no evidence to establish that the amounts claimed were indeed book debts of the second plaintiff. The amounts claimed are set out in the statement of claim as follows:

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2 (1977) 10 CLR 266 at 282-3.

"10. The First Defendant, in breach of its obligations pursuant to the Franchise Agreement, has failed or neglected to pay:

(a) continuing franchise fees in the sum of $~~34,136.60~~ 35,253.61

(b) advertising contributions in the sum of $~~6,369.86~~ 7,649.10

11. From time to time, during the operation of the franchised business, the First Defendant requested from the Plaintiffs, and the Plaintiffs provided, services as follows:

(a)	Clicks	$ 17,610.73
(b)	Wages	$ 3,035.33
(c)	Production	$ 2,199.83
(d)	Stock	$ 25.09
(e)	Courier	$ 8.90
		$ 22,879.88"

I was informed from the bar table that a "Click" was the making of a copy by a photocopier.

[29] Given that I am asked to make a determination as to the continuing availability to the plaintiffs of their cause of action as pleaded, I think it proper to proceed for present purposes on the basis that the pleading accurately reflects what is claimed; that is to say, amounts owed by the first defendant by way of fees, advertising contributions and the costs of services provided. I do not think it would have advanced matters for Mr Maloney to purport to characterise those claims as book debts.

[30] The sale of business agreement does not define the term "book debts". Mr Hackett provided copies of the entries in *Strouds Judicial Dictionary* (5th edition) and *Words and Phrases Legally Defined* (3rd edition). The former gives the following:

> "All such debts as, in the ordinary course of carrying on business, would be entered in books, although not actually entered";

The latter provides a quote from *Robertson v Grigg*[3]*:*

> "[The phrase 'book debts] points to debts owing to a business, of a kind usually entered in books of account of the business and in fact so entered".

Gallop J, considering the nature of a book debt in *Rex Developments Pty Ltd (in liquidation)*[4] was even more succinct: "surely it is an entitlement to payment". Whatever definition one adopts, I have no doubt that the amounts as itemised in the statement of claim are properly characterised as book debts.

Was the benefit of the second defendant's obligations under the guarantee transferred to the third party?

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3 (1932) 46 CLR 257 at 266 per Gavan Duffy CJ and Starke J.

4 13 ACSR 485 at 490.

[31] Mr Hackett argued that as the benefit of the second defendant's obligations under the guarantee he had given was not excluded from the assets to be transferred, that benefit and, correspondingly, the obligations, had been assigned to the third party. But quite apart from the problem that without notice to the second defendant under s 199 of the *Property Law Act* there could be no effective legal assignment, there is the conceptual difficulty inherent in the notion of assigning a guarantee independent of the principal debt. That difficulty is identified in this passage from *Hutchens v Deauville Investments Pty Ltd*[5]*:*

> "… it would seem to be simply impossible, as a matter of basic principle, to assign the benefit of the guarantee or the security for it (as distinct from the property secured) while retaining the benefit of the guaranteed debt and thereby to convert the one debt owing by both principal debtor and guarantor to the one creditor into two debts, one owing by the principal debtor to the creditor and the other owing by the guarantor to the assignee. If it were otherwise, the position would seem to be that, by assigning the benefit of a guarantee and the guarantor's security and retaining the benefit of a principal debtor's indebtedness and the principal debtor's security a creditor could effectively divorce the guarantor's liability from that of the principal debtor and effectively deprive the guarantor of the rights which flowed from his position as such including (where available) his rights of subrogation".

The conclusion must be that no effectual assignment of the rights under the guarantee has taken place.

[32] I conclude therefore that neither the second plaintiff's claims against the first defendant made in the amended statement of claim nor any rights under the guarantee asserted against the second defendant were transferred to the third party. Those claims were not, therefore, capable of being comprehended in the deed of settlement between the defendants and the third party.

Are the plaintiffs estopped from pursuing their claims against the defendants?

[33] Relevantly to the estoppel claim, the defendants pleaded to the following effect in the third further amended defence:

1. That about 20 September 2000 the plaintiffs and the third party notified the defendants in writing and represented that the second plaintiff had assigned to the third party "absolutely its right, title and interest in and the benefits burden and liabilities under, the franchise agreement" and that the third party had agreed to be bound by the franchise agreement in place of the second plaintiff.

2. That in reliance on the assignment and notice the first and second defendants had entered the settlement deed with the third party.

3. That the defendants had paid the third party $15,000 pursuant to the deed of settlement.

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5 (1986) 61 ALJR 65 at 68.

[34] Paragraph 10A of the third further amended defence pleads that "the plaintiffs are estopped from prosecuting the within claim against the defendant". Mr Hackett first made the point that this paragraph of the amended defence had not been the subject of any pleading in the plaintiffs' amended reply; thus, he said, it must be taken as admitted. Rule 166(1) of the *Uniform Civil Procedure Rules* provides that an allegation of fact is taken to be admitted if it is not denied or stated to be not admitted unless the pleading in which it is contained is the last. However, I do not consider that the bare allegation of estoppel made in this paragraph of the defence is an allegation of fact. Accordingly I do not think there is anything in this contention which would prevent the plaintiffs from resisting the estoppel.

[35] To establish estoppel against the plaintiff the defendants must, of course, establish a representation made by the plaintiffs to them. The deed of assignment was in fact provided to the defendants by the solicitors for the third party, not by the plaintiffs. There was therefore no representation by the plaintiffs to the defendants in terms of its contents. The mere execution of a deed can hardly constitute a representation to someone not a party to it; and there is nothing to suggest that the plaintiffs had any reason to know that the deed of assignment had been provided to the defendants or that there might be reliance placed on its terms.

[36] The notice of assignment on the other hand did emanate from the plaintiffs, and was capable of constituting a representation in its terms; that is, that there had been an absolute assignment. But the plea of reliance on the notice of assignment was negated by the evidence. Mr Kleidon said that he had not been provided with a copy of the notice of assignment, and made it clear in his evidence that the opinion provided by him to his client was based on his construction of the terms of the deed of assignment only. The second defendant did not suggest any reliance on the notice of assignment for the purposes of entering the settlement agreement; indeed his evidence contradicted any such notion. He said that he acted on the advice of Mr Kleidon in entering the settlement agreement. Although he had received a copy of the notice of assignment, it had left him in a state of uncertainty as to what was precisely was involved in the assignment, leading in turn to the inquiries made by Mr Kleidon of the third party's solicitors. It is quite clear from that course of conduct that the second defendant was not prepared to rely on the notice of assignment and required further elaboration of the terms of the transaction between the plaintiffs and the third party.

[37] I find therefore that if reliance was placed on any document, it was the deed of assignment, which had led Mr Kleidon to the conclusion that the plaintiff's rights of action against the defendants had been passed to the third party. But, as already noted, the deed of assignment was not provided to the defendants by the plaintiffs.

[38] Even had the deed of assignment passed from the plaintiffs to the defendants, I think there is some doubt that reliance on the deed of assignment could be said to have been reasonable without reference to the sale of business agreement to which there were the allusions I have earlier outlined, including the exception of the sale of business agreement from the "entire agreement" clause. I might say, too, that it was by no means clear that the defendants had suffered detriment in entering the settlement agreement. Mr Chrysostomou had already arrived at an appropriate figure of $15,000 for settlement with Mr Kirk, without any suggestion that the matters to be settled included the plaintiffs' cause of action. While it seems plain that it was the perception of an additional advantage, the resolution of the present

litigation, which convinced him to sign, it does not follow, and there was no clear evidence, that the entering of the settlement agreement in fact constituted any detriment to the defendants.

[39] The fundamental difficulty for the defendants however, is that actual reliance was placed on the deed of assignment, not on the notice of assignment. Its provision to the defendants had nothing to do with the plaintiffs and could not constitute any representation by them. The elements of estoppel are not therefore made out

[40] The net effect, then, is that I find against the defendants in respect of the separate issue set down for preliminary trial. It follows that the defendants have no maintainable action against the third party; and while I will hear counsel on what order should be made to reflect that state of affairs, it seems to me that the third party is entitled to summary judgment against the defendants. My provisional view is that the third party should have the costs of the proceedings against it, and that the plaintiffs should have the costs of the trial of the separate issue; but again I will hear the parties.