SUPREME COURT OF QUEENSLAND

CITATION:	*Geroff & Ors v CAPD Enterprises P/L & Ors* [2003] QCA 187
PARTIES:	**PETER GEROFF & GREGORY MOLONEY** (first plaintiffs/first respondents) **ON TIME BUSINESS SOLUTIONS PTY LTD (IN LIQUIDATION)** ACN 079 123 676 (second plaintiff/second respondent) **v** **CAPD ENTERPRISES PTY LTD** ACN 078 403 317 (first defendant/first appellant) **CHRIS CHRYSOSTOMOU** (second defendant/second appellant) **AUSDOC ON TIME PTY LTD** ACN 092 717 729 (third party/third respondent)
FILE NO/S:	Appeal No 9031 of 2002 SC No 7636 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	7 April 2003
JUDGES:	McPherson and Jerrard JJA, Muir J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CONTRACT – GENERAL CONTRACUTUAL PRINCIPLES – PARTIES – RIGHTS AND LIABILITIES OF THIRD PARTIES – where deed of assignment and notice of assignment of a franchise agreement and a business were entered into – whether the deed of assignment effected an assignment of interests in debts and estopped a claim against the appellants for monies owed or gave rise to an indemnity against money allegedly owed CONTRACT – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – where monies were allegedly owing by the appellants under a franchise agreement – whether monies claimed amounted to book debts – whether

the deed of assignment or notice of assignment assigned an interest in a guarantee

Property Law Act 1974 (Qld), s 199
Trade Practices Act 1974 (Cth), s 51A, s 52

Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, considered
Charter Reinsurance Co Ltd v Fagan (in liq) [1997] AC 313, considered
Coast Securities No 9 Pty Ltd v Alabac Pty Ltd [1984] 2 Qd R 25, considered
Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] 149 CLR 337, applied
Flight v Bentley (1835) 7 Sim 149, considered
Hart v Barnes [1983] 2 VR 517, considered
Hutchens v Deauville Investments Pty Ltd (1986) 61 ALJR 65, considered
Independent Automatic Sales Ltd v Knowles and Foster (1962) 1 WLR 974, considered
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, considered
Legione v Hateley (1983) 152 CLR 406, applied
London County Ltd v Wilfred Sportsman Ltd [1971] Ch 764, considered
Manufacturers Mutual Insurance Ltd v Withers (1988) 5 ANZ Ins Cases 60-853, considered
Re King deceased [1963] Ch 459, considered
Re Rex Developments Pty Ltd (in liq) (1994) 13 ACSR 485, applied
Shepherd v Federal Commissioner of Taxation (1965) 113 CLR 385, considered
Sola Basic Australia Ltd v Morganite Ceramic Fibres Pty Ltd (NSWCA 11 May 1989, unreported), considered
Van Lynn Developments Ltd v Pelias Constructions Co Ltd [1969] QB 607, considered
Wickman Machine Tool Sales Ltd v L Schuler AG [1974] AC 235, considered
Young v Queensland Trustees Ltd (1956) 99 CLR 560, applied

COUNSEL: P W Hackett for the first and second appellants
P O'Neill for the first and second respondents
A J Greinke for the third respondent

SOLICITORS: Bain Gasteen for the first and second appellants
Lees Marshall & Warnick for the first and second respondents
Deacons Lawyers for the third respondent

[1] **McPHERSON JA:** In dismissing this appeal, I agree with the reasons of Muir J, in which the facts and the relevant documents are set out in detail.

[2] There are two ways of approaching the question in the case. My preference is for the direct route. The franchise agreement between On Time and CAPD Enterprises provided for payments to be made by the latter on specified occasions, at stated intervals or in certain events, as well as conferring or imposing various other continuing rights and obligations on the parties. By cl 3.1 of the deed of assignment dated 20 September 2000, On Time agreed to assign to Ausdoc "all of the Assignor's obligations, rights, title and interest in the franchise agreements on and from the assignment date". At that date a number of debts and liabilities had already matured or accrued due from CAPD Enterprises to On Time. Their details do not matter, but, according to On Time's amended statement of claim, they totalled some $65,782.59 on which an amount of $6,393.58 had accrued by way of interest under the franchise. That indebtedness was vested in On Time, which was a company in liquidation when the proceedings were begun. The liquidators, who are the first two plaintiffs, need not have been joined.

[3] In the proceedings by On Time as plaintiff to recover those sums, the defendants, CAPD Enterprises and Mr Chrysostomou as guarantor, submitted that the deed of assignment had transferred those sums to Ausdoc, with the result that On Time no longer had any right to recover those sums nor any title to sue for them. Why should that be so? Even without adverting to the business agreement between On Time and Ausdoc, which looked forward to the assignment by the former of the latter, there is nothing in the deed of assignment itself to suggest that existing debts and liabilities already accrued and due to On Time were being transferred. The subject matter of the assignment was "the assignor's rights, title and interest in the franchise agreement …". The language makes no reference anywhere to debts that have already arisen under it. A debt once accrued has in law an independent existence and enforceability of its own apart from the transaction that gave rise to it. As was said in *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 567:

> "The common law does not and never did conceive of indebtedness in a sum certain for an executed consideration as a mere breach of contract: it is rather the detention of a sum of money and that was so whether the creditor enforced his demand by an action of debt or by *indebitatus assumpeit*".

[4] There is no reason to interpret cl 3.1 of the deed of assignment as transferring from On Time to Ausdoc the debts that had accrued due but were unpaid before 20 September 2000 any more than there is to construe it as transferring the proceeds of debts which had already been paid and banked to the account of On Time. What cl 3.1 of the assignment did was to transfer only rights of On Time "in" the franchise agreements, as it specifies, "on and from the assignment date". There is no justification for ignoring those words or for refusing to give effect to them. Quite apart from that, the implication at common law is rather against such a conclusion. Even after the Grantees of Reversions Act in 1540, the assignment of the reversion on a lease did not at law carry the right to rent already due: see *Flight v Bentley* (1835) 7 Sim 149, 151 58 ER 793, 794. There Shadwell V-C described the antecedent rent as severed from the reversion and so "a mere chose in action", which at that time would have required assignment in equity to transfer it. When more than a century later the question arose again in *Re King deceased* [1963] Ch

459, 488, Upjohn LJ said he regarded *Flight v Bentley* as a "rather unsatisfactory authority"; but the question at issue there was the right to sue for breaches of covenants to repair and to reinstate that had accrued before the assignment. As to them, s 141(1) of the Law of Property Act 1925 in England now provides that "rent … and the benefit of every covenant … shall go with the reversionary estate …". Even in the face of that express provision, Lord Denning MR continued to maintain the old rule that the assignee of the reversion had no right against the lessee for arrears of rent due before the assignment: see *Re King* [1963] Ch 459, 477-481. Admittedly, when the question arose in *London County Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, 784, the Court of Appeal held that *Flight v Bentley* had been displaced by the uncompromising language of the Law of Property Act 1925, s 141(1).

[5] What is implicit in all this is that, in the absence of an explicit statutory provision, there is no presumption or expectation at law that the assignment of the benefit of an agreement has the effect of transferring debts that have already arisen or accrued before the assignment takes place. Whether the assignment has such an effect depends on its terms and the intention of the parties to it, to be gathered from its language. Whether that may legitimately include reference to the terms of a preceding agreement to which the assignment is intended to give effect may possibly be another matter. The assignment here stands in the same relation to the sale of business agreement in this case as does a conveyance or transfer to contract of purchase. One would expect to be able to look back to the contract in order to ascertain the parties' intention and so resolve ambiguities in the terms of the transfer. Here the deed of assignment itself expressly incorporated references to the contract of a sale from which it took its genesis.

[6] My only reason for being cautious about the matter is that the assignment, if effective, altered the identity of the person to whom CAPD Enterprises was, after the assignment, bound to render performance of its obligations under the franchise agreement. One would therefore expect the assignment to be in a form that would leave CAPD in no doubt about the entity to whom or to which those obligations were afterwards due. Otherwise it might pay or tender performance to the wrong person. On one view, it is the notice in writing of the assignment that, in the case of a statutory assignment is called for by s 199(1) of the *Property Law Act* 1974, is designed to achieve that step. But, as the learned judge below and as counsel on this appeal accepted, the statutory notice cannot effectively transfer more than the assignment of which notice is given. To guard against possible discrepancies between the two, Lord Denning MR in *Van Lynn Developments Ltd v Pelias Constructions Co Ltd* [1969] 1 QB 607, 613, said that "of course" the debtor is entitled to require a sight of the assignment "so as to be satisfied that it is valid and that the assignee can give him a good discharge". On the same reasoning, the debtor would, if the assignment were ambiguous, be entitled to call for and inspect the agreement to assign to which the assignment as such was intended to give effect.

[7] Something like the perils of old system conveyancing may therefore be involved in the case of some assignments. Here CAPD Enterprises was provided on request with a copy of the deed of assignment of 20 September 2000. If, after perusal, it was left in doubt whether or not its pre-assignment indebtedness to On Time was being transferred to Ausdoc, it could have sought clarification by requesting a sight of the sale of business agreement to which the assignment referred and gave effect. It did not do so, but preferred instead then or later to place its own interpretation on the

deed and in particular cl 3.1 of it. For the reasons I have given, it was not justified in concluding that the pre-assignment debts were being transferred, nor in acting on the assumption it claims then to have formed by entering into the deed of settlement with Ausdoc on 22 October 2001 on the faith of that assumption.

[8] To adopt or adapt the analogy employed in some of the decided cases, what was assigned here was the tree represented by the franchise agreement with CAPD Enterprises, without the fruit, in the form of the accrued debts, which had already matured and fallen from the tree before the assignment. Those debts belonged to and remained with the assignor On Time, and nothing that CAPD or Ausdoc could do with respect to them was capable of affecting their status as debts due to and recoverable by On Time. It was therefore entitled to judgment in the action against CAPD Enterprises for the amount claimed.

[9] The only remaining question I propose to deal with is whether the liability of the second defendant Mr Chrysostomou as guarantor of those debts was also enforceable by On Time. The debts having been guaranteed by Chrysostomou, his liability to pay them arose as soon as CAPD Enterprises failed to do so. It is true that under the old law the remedy of a creditor against a guarantor who failed to pay the indebtedness of the principal debtor was regarded as lying in damages rather than in debt. The reason is explained in two 19th century decisions that are discussed in *Coast Securities No 9 Pty Ltd v Alabac Pty Ltd* [1984] 2 Qd R 25, 29, in which, however, it was also held, in circumstances similar to these here, that the claim to the indebtedness nevertheless had the character of a liquidated demand. The reason for the old law was not specifically adverted to in *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 255-257, where, however, the judgment of Mason CJ sanctions the practice of suing the guarantor for the accrued but unpaid indebtedness as a liquidated sum rather than as damages for breach of contract. That is what was done by the plaintiff here.

[10] The suggestion that the assignment impermissibly transferred the benefit of the guarantee without assigning the guaranteed debts is in my opinion readily capable of being met. On any view of it, the guarantee was operative and effective at the time the pre-assignment indebtedness from CAPD Enterprises to On Time arose. As such it served immediately to guarantee payment of that indebtedness to On Time as it fell due. It was then that the cause of action, whether in debt or damages, accrued against Mr Chrysostomou. Nothing has happened since then to alter that state of affairs, or to destroy that cause of action, unless one accepts that the pre-existing indebtedness of CAPD Enterprises was transferred to Ausdoc by force of the assignment. From what I have said on that subject, it follows that the assignment had no such effect.

[11] In my opinion the appeal should be dismissed with costs.

[12] **JERRARD JA:** I have read the reasons for judgment of McPherson JA and Muir J and respectfully agree with those and the order proposed. On the critical issue of whether On Time's interest in the guarantee was assigned by the Sale of Business Agreement or Deed of Assignment, with the consequence that it lost the right to enforce the guarantee in respect of the excepted debts, I particularly agree with the reasoning of the trial judge. This was, and I quote:

> "[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 principle debt. That difficulty is identified in this passage from *Hutchens v Deauville Investments Pty Ltd*.[1]
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> > '….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 the principal debtor to the creditor and the other owing by the grantor to the assignee.'
>
> The conclusion must be that no effectual assignment of the right under the guarantee has taken place."

[13] The judgment of the court in *Hutchens* explains that the described impossibility as a matter of basic principle derives from the fact that the debt owed by a guarantor upon default by the principal debtor is and remains the same debt as that owing by the principal debtor. Here that debt was not assigned; and so the sale of the benefit (subject to the burden) of the franchise agreement, containing within it the guarantee and indemnity, did not assign On Time's existing right of action against the second appellant[2] given by that guarantee.

[14] **MUIR J:**

The proceedings and the matters in issue before the primary judge

The first appellant, CAPD Enterprises Pty Ltd, was the franchisee under a franchise agreement entered into between it and the second respondent, On Time Business Solutions Pty Ltd (In liquidation). The first respondents are the liquidators of the second respondent. The third respondent, Ausdoc on Time Pty Ltd, is the assignee of On Time's interest in the franchise agreement and of On Time's business under a sale agreement dated 31 May 2000 Ausdoc was joined as a third party by the appellants.

[15] The second appellant, Mr Chryostomou, is a director of CAPD and a guarantor of its obligations under the franchise agreement under a deed of guarantee and indemnity between On Time and him contained in the document which contains the franchise agreement.

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[1] (1986) 61 ALJR 65

[2] Which arose at the moment of default by CAPD (*Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 255)

[16] Prior to the assignment, the liquidators and On Time had commenced proceedings against CAPD and Chryostomou claiming $63,386 for moneys due and owing under the franchise agreement. Although the liquidators are parties to the proceedings they appear to have been joined out of an abundance of caution and unless it is necessary to make specific reference to them, their position is not discussed any further.

[17] In their defence and counterclaim, CAPD and Mr Chryostomou allege that –

(a) They were inducted to enter into the franchise agreement and guarantee respectively by negligent misrepresentations and/or fraudulent misrepresentation and/or misleading conduct on the part of On Time;

(b) In reliance on representations in a notice of assignment provided by On Time and Ausdoc to CAPD and Mr Chryostomou, the appellants entered into a deed of settlement with Ausdoc under which they paid $15,000 to Ausdoc;

(c) The deed of settlement released and discharged CAPD and Mr Chryostomou from On Time's claims;

(d) In the alternative to (c), On Time is estopped from "prosecuting the within claim against" CAPD and Mr Chryostomou";

(e) The conduct on the part of On Time referred to in (a) was in breach of sections 51A and 52 of the *Trade Practices Act* 1974 and gave rise to loss and damage;

(f) Some of the alleged misrepresentations were oral terms of the franchise agreement or collateral oral warranties and were breached, causing loss and damage.

[18] In addition to the claims for damages, CAPD and Mr Chryostomou seek orders that the franchise agreement and guarantee "are void ab initio".

[19] In their claim against Ausdoc, CAPD and Mr Chryostomou assert that if, contrary to their contentions, the effect of the deed of settlement was not to release and discharge them from On Time's claims, Ausdoc is in breach of its obligation under the deed to "release and discharge" CAPD and Mr Chryostomou "in relation to all obligations … contained in or arising out of the franchise agreement".

[20] On 26 April 2002 it was ordered that there be a separate trial of the "issues involving the construction of the deed of assignment and notice of assignment and any alleged estoppel argument arising as a result of the delivery of those documents and the third party proceeding". This is an appeal from the judgement given after that trial.

Did the Deed of Assignment effect an assignment of On Time's interests in the debts the subject of its claims against CAPD?

[21] It is convenient to consider first the contention that the deed of assignment was effective to assign On Time's interest in the moneys alleged to be owing by CAPD to On Time.

[22] Clause 3 of the sale agreement, which was not mentioned in On Time's reply and answer, provides –

> "The Vendor sells to the Purchaser and the Purchaser purchases from the Vendor, the Assets and the Business, free from Encumbrances effective from the opening of business on the Completion Date."

[23] "Business" is defined as the business carried on by On Time under certain business names and trademarks "of operating On Time Copy Centres and franchising the rights to others to do so". There is a definition of "assets" which includes within the meaning of that word a number of listed items such as plant and equipment, goodwill, stock and "the benefit (subject to the burden) of the Franchise Agreements" but which excludes "the Excluded Assets". The definition of "Excluded Assets" includes within the meaning of that expression "book debts of the vendor". Consequently, debts which are "book debts" are not included in the property agreed to be sold and purchased by clause 3.

[24] Clause 9.2 provides that On Time is entitled to the income of the business "in respect of the period prior to the Completion Date" and that Ausdoc is entitled to such income "and must pay the liabilities and outgoings of the Business in respect of the period on or after the Completion Date". Furthermore, clause 12.1 requires Ausdoc, if it receives payment for any debt due to On Time to account to On Time for it within 14 days of receipt.

[25] It may be seen from the foregoing that it would have been difficult for the author of the sale agreement to make it plainer that the sale did not include book debts. Nevertheless, it was argued on behalf of the appellants that the sale agreement contemplated "an absolute assignment" of the subject franchise agreements which carried with it On Time's interest in the subject debts. This result was said to come about because of the provisions in the sale agreement requiring, on completion, the provision by On Time to CAPD of a duly executed deed of assignment of the franchise agreement in a particular form, a notice of assignment for each franchisee and the original and copies of the franchise agreements.

[26] The point was argued but faintly and is without substance. It relies on the provisions of clause 8 without reference to other parts of the agreement which specifically exclude book debts from the property to be sold and purchased.

[27] The main thrust of the appellant's argument though, centred on the perceived effect of the deed of assignment.

[28] As has just been mentioned, clause 8 of the sale agreement required the delivery of an executed deed of assignment on settlement. The sale agreement did not in fact contain a copy of the proposed deed but the parties accept that the document actually signed by the parties was in the form of that contemplated by them at the time of entering into the sale agreement.

[29] Recitals D and E of the deed respectively provide –

> "D. The Assignee has agreed to purchase the Business from the Assignor pursuant to the Sale of Business Agreement.

> E. 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 this Deed."

[30] Clause 3 of the deed provides –

> "3.1 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 Agreements on and from the Assignment Date.
>
> 3.2 Subject to clause 4.1, on and from the Assignment Date, the Assignee agrees to:
>
> (1) perform and be responsible for all obligations and liabilities of the Assignor under the Franchise Agreements and to be bound by the terms of the Franchise Agreements in every way as if the Assignee were a party to the Franchise Agreements in place of the Assignor; and
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> (2) indemnify the Assignor and the Liquidators and keep the Assignor and the Liquidators indemnified from and against all damages, costs, losses and expenses which the Assignor and the Liquidators or any of them may suffer or incur arising out of or in relation to any act or omission relating to the Franchise Agreements occurring on or after the Assignment Date.
>
> 3.3 The Assignor and the Assignee must give notice of this assignment to each of the Franchisees as soon as practicable on and from the Assignment Date in the form set out in Annexure 2 to this Deed."

[31] It is argued that the deed is self-contained and must be construed solely by reference to its contents. That is said to result from clause 6.3(1) which provides –

> "This is the entire agreement of the parties concerning the subject matter of this Deed".

[32] The object of such a clause is to ensure the application of the parol evidence rule but the application of that rule does not exclude evidence of "the factual background known to the parties at or before the date of the contract including the 'genesis' and objectively of the aim of the transaction".[3]

[33] Even if the deed of assignment is required to be construed in a factual vacuum, the appellant's arguments would not succeed. Under clause 3.1, On Time assigns its "obligations, rights, title and interest in the Franchise Agreements on and from the

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[3] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] 149 CLR 337 at 348. See also *Johnson Matthey Ltd v AC Rochester Overseas* (1990) 23 NSWLR 190 at 194, 195.

Assignment Date". It does not expressly or implicitly assign any debts or other benefits which may have accrued to the assignor prior to the Assignment Date.

[34] There is nothing in clause 3.2 which assists the appellant's argument. Clause 3.2(1) relates to obligations and liabilities of the assignor. Clause 3.2(2) relates only to acts or omissions which occur on or after the assignment date.

[35] If clause 3.1 on its face was capable of assigning book debts coming into existence prior to the *Assignment Date*, it would be permissible to have regard to the terms of the sale agreement in order to understand the meaning of the subject words in clause 3.1. After all, the deed of assignment is a document executed pursuant to the sale agreement to give effect to some of its terms.

[36] Commercial documents should be construed so as to make commercial sense of them. eg, *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* [4]; *Antaios Compania Naviera SA v Salen Rederierna AB;*[5] *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [6]; *Wickman Machine Tool Sales Ltd v L Schuler AG.*[7]

[37] In *Wickman Machine Tool Sales v Schuler*, Lord Reid said –

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

[38] In *Antaios*, Lord Diplock expressed even stronger views concerning the imperative to make business sense of commercial contracts, stating -

> "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

[39] The appellant's approach to construction treats it as a purely semantic or linguistic exercise directed to the ascertainment of the meaning of the relevant words but, as Steyn LJ pointed out in the unreported Court of Appeal decision of *Arbuthnott v Fagan* referred to Mance J, at first instance, in *Charter Reinsurance Co Ltd v Fagan,*[8] -

> "That is wrong. Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision. In the field of statutory interpretation the speeches of the House of Lords in *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 showed that the purpose of a statute, or part of a stature, is something to be taken into account in ascertaining the ordinary meaning of words in the statute: see Viscount Simonds's

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4 (1990) 20 NSWLR 310 at 313-314.
5 [1985] AC 191 at 201.
6 [1997] AC 749 at 771.
7 [1974] AC 235 at 251.
8 [1997] AC 313 at 326.

> speech, at p 461, and Lord Somervell of Harrow's speech, at p 473. It is true that such a purpose may also be called in aid at a later stage in the process of interpretation if the language of the statute is ambiguous but it is important to bear in mind that the purpose of the statute is a permissible aid at all stages in the process of interpretation. In this respect a similar approach is applicable to the interpretation of a contractual text."

[40] His Lordship later observed that in construing a commercial contract the court should take into account the commercial purpose of the contract "and that presupposes an appreciation of the contextual scene of the contract".

[41] In *Manufacturers Mutual Insurance Ltd v Withers*,[9] McHugh JA, in a passage referred to with approval in later decision of the New South Wales Court of Appeal,[10] drew attention to the need to go beyond purely linguistic considerations when considering the meaning of words in contracts. He said -

> "… few, if any, English words are unambiguous or not susceptible of more than one meaning or have a plain meaning. Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means. In my view evidence of surrounding circumstances will generally be admissible if it is known to both parties or sufficiently notorious to be presumed to be within their knowledge."

[42] Lord Hoffmann, in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[11] also drew attention in the following terms to the necessity to construe words in a document by reference to the background against which the document was made

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749."

[43] These expressions of principle apply with particular force where the document under consideration is one brought into existence to give effect to rights and obligations created by another contractual document. It would defy commonsense to ignore the provisions of the sale agreement in determining the construction of clause 3 of the deed of assignment. The law neither requires nor countenances such a restrictive and formalised approach to construction. Moreover, as the primary judge

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9 (1988) 5 ANZ Ins Cases 60-853 at 75,343.

10 *Trawl Industries of Australia Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 358 and *Sola Basic Australia Ltd v Morganite Ceramic Fibres Pty Ltd* (NSWCA 11 May 1989, unreported).

11 [1998] 1 WLR 896 at 912.

pointed out in her reasons, the deed of assignment makes reference to the sale agreement in a number of places including in clause 6.3(ii) which provides –

> "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."

[44] If the appellant's construction of clause 3.1 of the Deed is open on a literal reading of the words of the clause, permissible recourse to extrinsic evidence demonstrates its improbability.

Is On Time estopped from prosecuting its money claim against the appellants?

[45] The appellants plead that on or about 20 September 2000 On Time and Ausdoc, by means of a notice of assignment signed by both of them, represented to the appellants that On Time had assigned to Ausdoc "absolutely its right title and interest in, and the benefits, burdens and liabilities under, the Franchise Agreement" and that "Ausdoc agrees to be bound by the Franchise Agreement in every way as if Ausdoc were a party" to it in place of On Time.

[46] It is further alleged that in reliance on the "assignment and the notice" the appellants entered into the deed of settlement and, pursuant thereto, paid $15,000 to Ausdoc.

[47] The primary judge found that there was no evidence of reliance by the appellants on the notice of assignment. Her findings, in substance, were that the guarantor and through him, CAPD, entered into the deed of settlement in reliance on the advice of their solicitor. The solicitor did not have a copy of the notice of assignment and based his opinion on the content of the deed of assignment. It was further found that although the guarantor had received a copy of the notice of assignment he did not rely on its content but on the advice he obtained from the solicitor.

[48] Those findings were not challenged and the appellants' estoppel case necessarily fails as reliance on no other conduct was alleged.

[49] The primary judge, however, went on to consider whether the appellants could draw comfort from any reliance by the appellants' solicitor (and consequent on his advice) the appellants, on the wording of the deed of assignment. Her finding was that the appellants could not benefit from any representations in the deed because it was provided to the appellants by Ausdoc. Furthermore, she concluded that it was doubtful that reliance on the deed of assignment "could be said to have been reasonable without reference to the sale of business agreement". Furthermore she expressed doubt that the entering into of the settlement agreement constituted detriment to the appellants.

[50] Having regard to the conclusions expressed above, it is unnecessary to pursue those matters and I will content myself with the following brief observations.

[51] The representations relied on are words extracted from the notice of assignment. They differ in significant respects from the deed of assignment which, as has been seen, contains the words upon which the appellants would need to rely in order to establish an estoppel. There are obvious difficulties in establishing that an instrument entered into between A and B which takes effect according to its terms

represents to C something different to those terms. As has been observed previously, the deed on its face does not purport to assign property such as book debts coming into existence prior to "the Assignment Date".

[52] It was contended on behalf of the appellants that their reliance on the notice of Assignment was reasonable in the circumstances. If it is accepted that there was reliance on the deed of assignment and it represented (somehow) that the subject debts had been assigned, I agree with the primary judge that it would be difficult to regard the appellants' conduct as reasonable. It was apparent that the role of the deed of assignment was to give effect to a transaction of sale and purchase, the terms of which were recorded in a sale agreement. In those circumstances one would think that perusal of the sale agreement would be an obvious enough step in the process of forming a definitive view on the construction of the deed for relevant purposes. Furthermore, the reasonableness or otherwise of the appellants' conduct in any event is probably irrelevant. What the appellants must show in order to succeed on their estoppel argument, in addition to relevant detriment, is that there was a clear representation which was acted on. [12]

Is Ausdoc in breach of its obligations under the deed of settlement?

[53] The appellants' central contention is that the terms of the deed of settlement require Ausdoc to indemnify the appellants against On Time's claims in the action. Their argument centres around the construction of clause 4.1 which provides –

> "4.1 Subject to clause 4.3, in consideration of the Franchisee paying to Ausdoc On Time the Settlement Amount, each Party to this Deed agrees to release and discharge each other in relation to all obligations (including accrued obligations) contained in or arising out of the Franchise Agreement and from compliance with any provisions contained in it."

[54] The clause uses the words "release and discharge" and not "indemnify against". On Time is not a party to the Deed and, plainly, it is beyond the capability of On Time or, for that matter, the appellants, to release and discharge another party to the deed from obligations owing by such party to On Time. Clause 5 does contain an indemnity. It requires each party to indemnify the others against losses liabilities, legal costs and other expenses incurred but only where they arise "as a result of or in connection with a breach or non-performance of the terms" of the deed of assignment.

[55] It would be rather surprising, in the light of the wording of clause 5, if the parties had intended clause 4 to operate as a general indemnity and used the words "release and discharge each other" in order to achieve that objective.

[56] Clause 4.2 reinforces this impression. It provides that the deed may be pleaded in bar to claims relating to the franchise agreement "which could be brought by any party to this Deed against any one or more of the other Parties to this Deed". Not surprisingly, it appears to assume that clause 4.1 takes effect as between the parties in respect of claims which a party may have against another party or other parties.

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12 *Legione v Hateley* (1983) 152 CLR 406 at 435-6 per Mason and Deane JJ.

[57] Moreover, there is nothing elsewhere in the deed of settlement which supports the appellants' strained construction. The recitals offer another indication that, as tends to be the way with compromise agreements, the parties had in mind the resolution of matters in dispute between them. Accordingly, this ground of appeal fails.

Were the moneys claimed in On Times' statement of claim book debts?

[58] In their outline of submissions the appellants asserted that there was no "evidence or disclosure by (On Time) to establish that the claim (or the basis of the claim) was a book debt of" On Time. The point was not pursued in oral submissions and is lacking in merit. The items, the subject of On Time's claim, are described in its statement of claim as –

> "(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
>
> …
>
> | | | |
> |---|---|---|
> | (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" |

[59] A book debt has been described as "an entitlement to payment".[13] At best for the appellants the expression "book debts" means such debts as are commonly entered in the books of a company[14] or such debt as would or could in the ordinary course of such business be entered in well-kept books relating to that business.[15].

[60] The subject debts are ones which would or could in the ordinary course of the business of a franchisor be entered in its book whether well kept or not so well kept. Disclosure on the point by On Time, although revealing, perhaps, its practices in relation to the recording of such debts would have shed no light on the question for determination.

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13 *Re Rex Developments Pty Ltd (in liq)* (1994) 13 ACSR 485 at 490.

14 *Shipley v Marshall* (1863) 14 CBNS 566 at 571, 572 per Williams J and 573 per Byles J, *Paul & Frank Ltd v Discount Bank (Overseas) Ltd and the Board of Trade* [1967] Ch 348 at 361, *Hart v Barnes* [1983] 2 VR 517.

15 *Independent Automatic Sales Ltd v Knowles and Foster* (1962) 1 WLR 974, 983 and *Perrins v State Bank of Victoria* [1991] 1 VR 749.

Was On Time's interest in the guarantee assigned by the sale agreement or deed of assignment with the consequence that On Time lost the right to enforce the guarantee in respect of the subject debts?

[61] The sale agreement makes no specific reference to the guarantee. If it is included in the property sold and purchased it must be because it comes within the description of "the benefit (subject to the burden) of the Franchise Agreements in the definition of "assets".

[62] There remains another matter to be considered. The appellants allege that the deed of assignment effected an assignment by On Time of its right title and interest in the guarantee and that On Time then became incapable of enforcing any rights under the guarantee. On Time, in its reply, denied that it "assigned all its right, title and interest in this claim (i.e. the claims in the action) to the assignee". The point which the reply, somewhat obscurely, seems to be making is that clause 3.1 effected an assignment only of rights arising after the *Assignment Date*.

[63] The primary judge, in reliance on *Hutchens v Deauville Investments Pty Ltd*[16] concluded that as the assignment purported to assign the benefit of the guarantee without also assigning the guaranteed debt, the assignment was ineffective and, inferentially, that On Time retained its rights under the guarantee. Argument before her Honour seems to have proceeded on the basis that there was some assignment of On Time's interests in the guarantee effected by the deed of assignment. That is consistent with the approach taken in the reply and it is probably correct.

[64] Reference to a franchise agreement would not ordinarily include reference to a guarantee of the obligations of the franchisee by a third party guarantor. In this case the form of guarantee, headed *Guarantee and Indemnity*, appears in the franchise agreement immediately before the execution clause. It is dated, as is the franchise agreement, 11 March 1999 and has its own execution clause. The guarantor was not a party to the franchise agreement proper.

[65] Although neither the sale agreement nor the deed of assignment specifically provide for, or even mention the guarantee, they provide for the assignment of the assignor's interest in the franchise agreements. Clause 11.1 of the franchise agreement provides –

> "The Franchisee, where required by On Time, must obtain the execution of the Guarantee by the Guarantors, which when executed forms part of this agreement."

This and the comprehensive nature of the sale agreement with its carefully stated exclusions lends support to the view that Ausdoc was intended to acquire some rights in relation to the guarantee.

[66] Counsel for the appellants did not challenge the primary judge's application of the principle she extracted from *Hutchens v Deauville Investments* or, for that matter, address the consequences of an assignment of a guarantee of a debt without the assignment of the debt as well and it is unnecessary for me to do so either. The point can be disposed of shortly.

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16 (1986) 61 ALJR 65 at 68.

[67] Prior to the date of the deed of assignment, On Time had rights under the guarantee in respect of the subject debts. Under clause 3.2 of the guarantee, Mr Chrysostomou assumed the obligation to pay as if he was the principle debtor. At the time of the sale agreement and the deed of assignment, to the knowledge of Ausdoc, On Time was proceeding to enforce its rights under the guarantee by action. It had no intention of relinquishing those rights and Ausdoc had no intention of acquiring them. There was no clear or express assignment of rights in the guarantee. In those circumstances, if there was an assignment by On Time of interests in the guarantee, it did not include any rights in relation to the subject debts which had accrued prior to the date on which the assignment took effect. Also, there is no objection in principle to the equitable assignment of part of an existing chose in action.[17]

Conclusion

[68] For the above reasons, I would dismiss the appeal, with costs.

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[17] *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385.