JEB Recoveries LLP v Binstock

[2015] EWHC 1063 (Ch)

Chancery Division

Judge Simon Barker QC (Sitting as a Judge of the High Court)

21 April 2015

Mr Mark Hardy, a limited partner in the Claimant, with the permission of the Court for the Claimant / Respondent

Mr Nicholas Vineall QC and Mr Caley Wright instructed by Harcus Sinclair for the Defendant / Applicant

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

HHJ SIMON BARKER QC:

This Application

1. This application concerns the surviving claim of JEB Recoveries LLP (respectively ‘the Claim’ and ‘JEB’) against Mr Judah Eleazar Binstock. On 18 March 2015, I upheld Mr Binstock’s jurisdictional challenge to three other claims raised within the same action, which had been commenced on 28 October 2014, and declared that the court has no jurisdiction to try those claims. I also held that the Claim is justiciable in this jurisdiction.

2. The Claim concerns an alleged debt said to be due under an alleged contract for services said to have been made in late February 2010, as part of Mr Binstock’s arrangements to put his affairs in order in view of his age (then 81 years), and performed, at least in part and in so far as possible, over the period March to October 2010. The essence of the alleged contract is that Mr Binstock engaged Mr Peter Frederick Wilson to identify and acquire a listed company with no trading history but with cash into which Mr Binstock could transfer his business interests by way of reverse takeover. Work is said to have been done by Mr Wilson pursuant to the contract but, through no failure on Mr Wilson’s part, no reverse takeover occurred.

3. The consideration is alleged to have been agreed and quantified in part by acknowledgment of an alleged existing debt of £10million said to have been due under a different alleged contract (which I have held is not justiciable in this jurisdiction) and in part as a monthly retainer of €10,000 plus reimbursement of expenses. There is also a claim for £2million or such sum as the court thinks just as aggravated damages; as to this, and contrary to CPR 16.4(1)(c), there is no particularisation of the grounds on which such damages are claimed. By the Particulars of Claim, JEB alleges and acknowledges that €50,000 and a further €7,000 has been paid to Mr Wilson, whether relating to the retainer or to expenses is not stated. The relief sought under the Particulars of Claim is damages of £10million plus €131,513.90 (presumably after giving credit for €57,000) as allegedly invoiced plus aggravated damages of up to £2million.

4. The Claim is or, in the events which have happened, was actionable at the suit of Mr Wilson.

5. In March 2014, Mr Wilson, Mr Mark Gregory Hardy and Mr Michael Richard Stannard formed JEB. On 30 April 2014, Mr Wilson, Mr Hardy and Mr Stannard executed individual assignments of rights as defined therein (‘the Rights’) for £1. The assignments are in common form. Focussing on the assignment executed by Mr Wilson as assignor (‘the Assignment’), the Rights are defined as meaning :

“… any and all causes of action, whether previously asserted or not, debts claimed or unclaimed, and any and all other rights which the Assignor may have

(a) generally against [Mr Binstock] … and any company, trust or other separate legal personae with which [Mr Binstock] has at any time represented to the Assignor, his agents and assigns, that he is and/or was connected to, in relation to any and all matters that involved or may have involved dealings directly or indirectly.

(b) generally against Josianne Rinaldo Binstock1 … and any company, trust or other separate legal personae with which [Mr Binstock] has at any time represented to the Assignor, his agents and assigns, that she is and/or was connected to, in relation to any and all matters that involved or may have involved dealings directly or indirectly, with the Assignor”.

As is apparent, the Assignment includes debts of Mr Binstock and his wife to Mr Wilson.

6. As with the other assignors, Mr Wilson undertook to pass any monies received directly or indirectly from Mr Binstock or his wife to JEB. He also undertook to assist JEB in pursuing recovery of monies due in respect of the Rights by providing information upon request. JEB’s sole obligation is an undertaking :

“ …to report at reasonable intervals to [Mr Wilson] as to the progress of [JEB’s] attempts to claim in respect of the Rights in such reasonable form as may be agreed between [Mr Wilson and JEB]”.

7. In a witness statement dated 19 March 2015, Mr Hardy states that Mr Wilson asked for his help in relation to Mr Binstock’s failure to pay invoices and other breaches of contract; that Mr Stannard had approached him in relation to challenging the fees of insolvency practitioners and interference by Mr Binstock in his, Mr Stannard’s, family’s interest under a trust; and, that they had agreed that joint or collaborative action was :

“the only way that we could see to protect ourselves against [Mr Binstock’s] further threats against us and members of our families if any one of us tried to ‘go it alone’.

Agreement was reached that we should form a UK llp and assign to it the unpaid debts that had been invoiced to [Mr Binstock], and all other claims for damage he had caused us …”.

8. By this application, Mr Binstock contends that the Claim should be struck out as an abuse of the process on the grounds that it is champertous.

Champerty

9. Champerty is the support of litigation by a stranger to the litigation for a financial interest in the outcome, usually a share thereof. The financial interest results in champerty being referred to as an aggravated form of maintenance.

10. In a lecture entitled “From Barretry, Maitenance and Champerty to Litigation Funding”, delivered on 8 May 2013, Lord Neuberger of Abbotsbury traced the history of objections to all forms of maintenance of suit back to ancient times and considered the changing attitude of the state and the courts as third party funding of litigation has evolved in recent times.

11. Until 50 years ago champerty was a crime and a tort. Since 1967, the prohibition of champerty has survived, as a matter of public policy, in order to aid the protection of the rule of law and the due administration of justice. Lord Neuberger identified as the broad policy rationale for the prohibition of maintenance protection of the integrity of the legal process, a primary ingredient of which is equality before the law.

12. Equality before the law is a fundamental tenet of the English legal system which, in this century, has been expressly recognised as a procedural obligation of the courts by incorporation as an element of the overriding objective (“ensuring that the parties are on an equal footing”, CPR 1.1(2)(a)); in other words, it is at the core of and governs the approach of the courts to civil litigation.

13. Lord Neuberger observed that public policy, which is the bedrock of maintenance, is never static. He revived a question raised by Jeremy Bentham : why should individuals have to bring claims at their own expense? Lord Neuberger’s answer included the observations that one of the fundamental principles underpinning any self-respecting legal system is that rights must be capable of enforcement, and that it is ironic that the original medieval rationale for the prohibition (protecting the weak and the poor from exploitation by the rich and powerful) now has the opposite effect of affording wealth a monopoly of justice against poverty.

14. Notable developments referred to by Lord Neuberger as making inroads into the prohibition against maintenance include : the introduction and development of legal aid after World War II and over the latter half of the last century, albeit that, in this century, the restrictions to the scope of legal aid have been significant; the advances since the 1990s made by lawyer driven funding arrangements, specifically through conditional fee agreements (‘CFAs’) which have been subject to curtailment or reform in this century; the impact on access to justice resulting from the adoption, in this century, through statute of the European Convention on Human Rights; and, most recently, by statutory instrument in 2013, damage-based agreements (‘DBAs’) i.e. contingency fee agreements which enable lawyers to share in the fruits of litigation with their clients as the reward for successful representation.

15. Lord Neuberger also drew attention to the decision of the Court of Appeal in *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, where, at paragraph 36, giving the judgment of the court, Lord Phillips MR (as he then was) said :

“Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress the evidence, to suborn the witnesses, or otherwise undermine the ends of justice”.

Thus, the vice or concern underlying the prohibition of champerty is that the allegedly champertous maintainer might be tempted to corrupt or undermine the legal process.

16. It is also relevant to bear in mind, as Lord Neuberger pointed out by reference to *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055, that a natural consequence of opening the doors to maintenance may be that a professional litigation funder could potentially be liable for the opposing party’s costs of the litigation.

17. In his conclusion, Lord Neuberger noted that the public policy rationale regarding maintenance and champerty has turned full circle so that relaxation of the policy against maintenance and champerty may be justified to help safeguard the rule of law; and that, given the retreat from legal aid, the development of litigation funding as a means of securing access to justice may well gain more traction.

18. All of that being said and borne in mind, it is also important to keep in mind that when considering the facts of the particular case and the risk to the integrity of the legal process, the focus is on protection of the party confronted with the maintained litigation, not the claimant (*Factortame (No. 8)* paragraph 38).

The Applicant’s submissions

19. Mr Vineall QC, who appears for Mr Binstock, submits that (1) bare assignments of a cause of action, such as the Assignment, are a class of arrangements about litigation long recognised as champertous and invalid; (2) the Assignment is a bare assignment of a cause of action; (3) viewed in context, JEB and its partners have engaged in what is, or is on the brink of, litigation trafficking; and, (4) to permit the Claim to continue would be to allow Mr Wilson, as the subject of the Claim, to ‘cost-proof’ his litigation.

20. By way of background, Mr Vineall QC submits that the formation of JEB and the assignments are a scheme to cause maximum litigation inconvenience to Mr Binstock and to shield the members of the limited partnership from adverse costs orders. Mr Vineall submits that Mr Hardy’s evidence that JEB was formed as a joint collaboration to protect the members from threats that they would otherwise be likely to face as individual litigants is not credible. To make that good, Mr Vineall draws attention to documents exhibited to Mr Binstock’s first witness statement which, he submits, point to Mr Hardy attempting to apply pressure to Mr Binstock.

21. Mr Vineall also draws attention to correspondence and emails, principally from Mr Hardy, which, he submits, reveal Mr Hardy to be a serial litigator and to be antipathetic to Mr Binstock. This is relevant to the purpose of the public policy including the prevention of trafficking in litigation. Mr Vineall further submits that the addressees, subject matter and tone of the correspondence, the emails and the extracts from Mr Hardy’s blog included in the evidence also point to conflicts of interest and raise the prospect of the ends of justice being undermined.

22. Focussing on the Assignment in the context of the Claim, Mr Vineall observes that Mr Wilson, via his partnership in JEB, has in effect retained a one third share in any net proceeds of the Claim but has surrendered a two thirds share for no more than updating reports on progress if any. Mr Hardy, on the other hand, stands to receive a one third share in any net proceeds of the Claim for no correlative obligation; Mr Hardy may undertake work in advancing the Claim but he is under no obligation under the Assignment so to do. The potential benefits to Mr Stannard are pure windfall.

23. Turning to the law, Mr Vineall refers to an extract from Blackstone’s Civil Practice 2015 at paragraph 14.7 :

“There are two circumstances in which the rule against champerty and maintenance continues to be of relevance :

(a) The rule may still invalidate agreements whereby a stranger to litigation provides funding to enable a party to bring or continue a claim …

(b) The rule may invalidate some assignments of causes of action”.

Mr Vineall submits that both circumstances are relevant to this case with the result that the Claim falls foul of the policy against champerty.

24. Mr Vineall places particular reliance on the Court of Appeal decision in *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] QB 640 and states that researches have not revealed a subsequent authority which casts doubt on that decision or modifies the tests therein set out.

25. The claimant, Mrs Simpson, was the assignee of a claim in tort for personal injury; the assignor alleged in the claim that he had developed a serious infection while in the care of the hospital and had commenced proceedings limiting his damages to £5,000. The claim in tort for damages was assigned for £1. Mrs Simpson increased the value of the claim by amendment to £15,000. Mrs Simpson was a widow. Her husband had died while in the care of the hospital from the same infection. The claim relating to Mrs Simpson’s late husband had been compromised without any admission of liability. The Court of Appeal upheld decisions below which had struck out the claim as being contrary to public policy.

26. Turning to the leading judgment, that of Moore-Bick LJ, Mr Vineall refers to paragraphs 13-19 and 22-24.

27. Mr Vineall draws attention first to paragraphs 13-15 at which Moore-Bick LJ cites from and considers the speeches of Lord Wilberforce and Lord Roskill (with which Lords Edmund-Davies, Fraser and Keith agreed) in *Trendtex Trading Corpn v Credit Suisse* [1982] AC 679. *Trendtex* concerned a cause of action in contract against a Nigerian bank which Trendtex had assigned to Credit Suisse. The agreement by which the assignment was effected contemplated the sale of the claim by Credit Suisse for US$800,000; in the event the claim was settled for US$8million. Mr Vineall refers to Lord Wiberforce’s reference to the arrangement contemplating a profit being made out of the cause of action by a third party and possibly also by Credit Suisse, which led him to opine that it savoured of champerty since it involved trafficking in litigation.

28. Mr Vineall also refers to the citation in *Simpson* from Lord Roskill’s speech in *Trendtex* where Lord Roskill (1) observed that the prohibition against assignments of bare causes of action in tort as savouring of maintenance had been tempered by recognition of assignments of causes of action in tort where the object was not to obtain a cause of action but to protect property which had been acquired or to support or enlarge a pre-existing acquisition; (2) disapproved in terms of the statement by the Master of the Rolls (then Lord Denning) in the Court of Appeal below when he said that : “The old saying that you cannot assign a ‘bare right to litigate’ is gone” and expressed his conclusion that it still remains a fundamental principle of English law; and, (3) observed that an assignee who can demonstrate that he has a genuine commercial interest in enforcement of the assigned claim of another is entitled to enforce the assignment unless its own terms offend the public policy.

29. Mr Vineall draws attention to Moore-Bick LJ’s conclusion drawn from *Trendtex* that an assignment of a bare right to litigate, that is a right unsupported by an interest of a kind sufficient to justify the assignee’s pursuit of proceedings for his own benefit, will fall foul of the public policy prohibition against champerty.

30. Mr Vineall next refers to paragraphs 16-19 of Moore-Bick LJ’s judgment at which he considered the House of Lords decision *Giles v Thompson* [1941] 1 AC 142, and noted that the purpose underlying the public policy as identified by Lord Mustill is to :

“ … protect the purity of justice and the interests of vulnerable litigants”.

Moore-Bick LJ summarised Lord Mustill’s view of the correct approach to be taken in relation to an assignment of tortious claims as :

“ … first … consider whether the transaction bears the marks of unlawful champerty and then … inquire whether it is validated by the existence of a legitimate interest in the person supporting the action distinct from the benefit which he seeks to derive from it”.

31. Mr Vineall refers to paragraphs 22-24 of the judgment in *Simpson* where Moore-Bick LJ acknowledged that Mrs Simpson’s motive (to force the hospital to confront its failure to implement adequate procedures to control infection) was honourable but irrelevant; and, he held that the assignment involved “wanton and officious intermeddling in the disputes of others”2 in that Mrs Simpson did not have a sufficient interest in the outcome of the claim to justify taking an assignment. Moore-Bick LJ considered it undesirable to attempt to define what constitutes a sufficient interest, not least because perceptions of the public interest change over time. However, it would be contrary to the public interest to encourage litigation not aimed principally at obtaining a remedy for a legal wrong but to pursue an object of a different kind altogether; so to do would damage the administration of justice and be unfair to the defendant.

32. Addressing the facts and circumstances in *Simpson*, Moore-Bick LJ considered the questions raised to be comparable to those raised in *Trendtex* and distinguishable from the facts of *Factortame (No. 8)*, *Giles* and *Morris v Southwark LBC and Sibthorpe v Southwark LBC* [2011] EWCA Civ 25 (see paragraph 37 below for the circumstances). The critical factor in *Simpson* was that the case concerned a straightforward bare assignment of a cause of action. Mrs Simpson did not have an interest in the assignor’s claim of a kind recognised in law as sufficient to support an assignment of what was otherwise a bare right of action. In addition, her real aim was to pursue her own independent objective, namely a campaign against the hospital for improvement of its infection control.

33. Mr Vineall submits that the decision and grounds for the decision in *Simpson* are directly comparable to this case. First, JEB is the bare assignee of Mr Wilson’s cause of action as formulated in the Claim; secondly, JEB is a special purpose vehicle formed for the real objective of putting improper pressure on Mr Binstock.

34. For completeness, Mr Vineall refers to the judgment of Arnold J in *Hurst and Hurst v Glentree Estates and others* [2012] EWHC 4024 (Ch) in which *Simpson* was relied on by an assignee for the proposition that it is not necessary, in order for the assignee validly to take an assignment of a cause of action, to have a commercial interest in pursuing the claim, rather it is sufficient for the putative assignee to have some other interest. The other interest in that case was being a spouse. Arnold J, applying *Blake v Bromley* [1912] 3 KB 474 rejected that proposition. Mr Vineall submits that there is no authority casting doubt on the test as formulated in *Simpson*.

The Repondent’s submissions

35. Mr Hardy, who is not a lawyer but is also no novice in the courtroom, applied for and was given permission to make submissions on behalf of JEB. Mr Vineall did not oppose the application and it seemed to me that it would be inappropriate to deny a principal in a limited liability partnership the right to represent that entity given that employees as well as directors are generally permitted to represent their company.

36. By his skeleton argument for JEB, Mr Hardy identifies as the issue for decision : whether the assignment in question tends to corrupt public justice, which issue requires close attention to be paid to the nature and surrounding circumstances of the particular arrangement.

37. Mr Hardy refers to *Morris* and *Sibthorpe* and, in particular, to the judgment of Lord Neuberger MR, as he then was. On the facts, *Morris* and *Sibthorpe* raised a novel point because the arrangements challenged as champertous concerned the claimant’s solicitors, who were acting on a CFA, also agreeing to provide an indemnity in relation to the local authority’s costs in the event that the claims failed; on analysis, the arrangements fell outside the established definition of champerty as applied consistently in case law. Lord Neuberger held that to find the arrangements champertous would have involved extending the law of champerty which would be to go against the established flow of the authorities. Lord Neuberger expressed his conclusion at paragraph 51 of the judgment :

“In my view, we should accede to the argument that it would be inappropriate in the 21st century to extend the law of champerty. There is some force in the argument that economic logic supports the case for condemning the indemnity as champertous. However, the rule against champerty is not entirely logical in its extent or limits, judicial observations strongly suggest that champerty should be curtailed not expanded, and, given that champerty is based on public policy, it is hard to see how arrangements such as the indemnity, at the very least in connection with litigation such as that in these cases, are against the public interest or undermine justice”.

38. Mr Hardy also draws attention to the extract from Blackstone’s Civil Procedure referred to by Mr Vineall QC. Mr Hardy observes that paragraph 14.7 refers to only some assignments of causes of action being invalidated. He submits that Mr Vineall pulled up short in his reference to Blackstone by omitting to refer also to paragraph 14.8 :

“The scope of the rule against champerty and maintenance, in so far as it affects both funding and assignments of causes of action, has been progressively narrowed. The current position can be summarised as follows:

(a) Liquidated claims in contract, such as the right to sue for the price of goods sold and delivered for which the defendant has failed to pay, can be assigned …

(b) The fruits of litigation can be validly assigned …”.

Mr Hardy submits that the Assignment was of a debt and a liquidated claim in contract and / or is of the fruits of litigation.

39. Mr Hardy submits that when having regard to the circumstances of this case, there are a number of features which distinguish it from *Simpson* : (1) the element of the Assignment giving rise to Claim is a debt and the cause of action that flows with it, whereas the assignment in *Simpson* was of an existing or ongoing action founded in tort; (2) the purpose of JEB’s litigation is to recover an alleged debt which Mr Binstock has refused to honour, whereas the purpose of the litigation in *Simpson* was an altogether different purpose relating to improvement of the hospital’s procedures; and, (3) the Assignment is not properly characterised as a bare assignment or an assignment for nominal consideration because the substance of the arrangement is that Mr Wilson retains a one third interest in any recovery of the debt from Mr Binstock, whereas in *Simpson* the assignor received £1 under the assignment but retained no interest in the outcome of his claim.

40. Mr Hardy further submits that Mr Binstock has made payments on account or in respect of the alleged debt, which payments evidence the existence of both a contract and a debt. He also submits that this litigation in relation to the debt is taken as the last resort because Mr Binstock has succeeded in setting aside a statutory demand on the basis that there is a genuine dispute as to the debt. Mr Hardy submits that the only course left open to JEB was and is to litigate the Claim in order to establish the terms of the alleged contract and the right to payment. The thrust of Mr Hardy’s submission is that the Claim only arose because Mr Binstock has chosen to dispute the debt assigned by Mr Wilson when payment was demanded by JEB.

41. Mr Hardy makes a further submission that by issuing a winding up petition against JEB based on the adverse costs order made at the hearing when JEB’s statutory demand was set aside, Mr Binstock has chosen insolvency law as the governing legal regime and cannot now complain of the Assignment because of or by analogy with the statutory power of liquidators and administrators to assign any cause of action.

42. Mr Hardy refers to Lord Neuberger’s May 2013 lecture, at paragraph 47 :

“ … In order for a state to remain inclusive it must not just express a commitment to the rule of law: it must provide effective mechanisms through which citizens have genuine access to the courts. Only then can they begin to have equality before the law; …”.

and submits that a fundamental element of the rule of law is genuine access to the courts.

43. Referring to DBAs, which became lawful in the context of litigation with effect from 1 April 2013, Mr Hardy draws attention to Lord Neuberger’s recognition of such arrangements, at paragraph 44 of his lecture, as marking a further shift in the perception of the public policy background. Mr Hardy submits that permitting lawyers to share in the fruits of litigation with their clients is no different in substance from the arrangement between Mr Wilson and JEB.

44. In conclusion, and in relation to using JEB to shield Mr Wilson from an adverse order in costs, Mr Hardy submits that the solution is to make an order for security for costs. In the same breath, however, he submits that that is for another day as there is no such application before the court.

Decision

45. I should, at the outset of my reasoning, make clear that Mr Hardy’s submissions that the Assignment is of the fruits of litigation and that Mr Binstock has brought himself within the regime of insolvency law for the purposes of the Claim with the result that the Assignment is akin to an assignment by a liquidator (or, for that matter, an administrator or trustee in bankruptcy) are misconceived.

46. I do not accept Mr Vineall QC’s submissions about JEB’s and Mr Hardy’s conduct being intended to maximise inconvenience to Mr Binstock and to use litigation to undermine the ends of justice. First, I do not regard the correspondence, emails and blog referred to by Mr Vineall as raising a serious prospect that the ends of justice might be undermined by JEB or by Mr Hardy having a hand in the conduct of a claim based on Mr Wilson’s alleged contract. Secondly, taking into account the evidence, and accepting for this purpose Mr Vineall’s assertions as to Mr Binstock’s poor health, I do not regard Mr Binstock as a vulnerable defendant; rather, he is a seasoned businessman who has built up a substantial business empire, who owns properties in a number of jurisdictions, who is alive to the subtleties of complex legal issues such as domicile, and who has volunteered Spain as the jurisdiction in which he is domiciled and his forum of choice if he is to be sued by JEB or its members.

47. Nor do I accept Mr Hardy’s submission that it was necessary to form JEB in order to protect the partners from threats that they would be likely to face should they attempt to ‘go it alone’ in litigation against Mr Binstock. I observe that (1) if threats really were considered to be likely, the interposition of a shield such as an LLP would be likely to inflame rather than mollify or deter; and, (2) it is difficult to see why joint action through an LLP should provide a greater measure of protection than simultaneous co-ordinated action by the partners individually and, in so far as appropriate, their families. It is not as if Mr Binstock does not know who is behind JEB.

48. The starting point is access to justice. I am not aware of any real impediment to Mr Wilson having access to justice in order to litigate the Claim. I recognise that he sees advantages to litigation through JEB, including access to the resource of Mr Hardy as an advocate rather than as a McKenzie friend. I also recognise that he may be seeking to shield himself from the risk of an adverse costs order and the likely consequences if such an order is made but not paid in full.

49. As to the underlying facts, on the available material, it is realistically arguable that there was a contract for services which was performed by Mr Wilson in so far as he could and which failed to achieve the intended objective through no fault on the part of Mr Wilson. Agreement as to consideration in the form of a monthly retainer plus reimbursement of expenses payable over the duration of the alleged contract is entirely logical and inherently credible. Revival by acknowledgment of an alleged debt of £10million, which, on the material previously before me, seemed arguably to be both long since time barred under English law and a high price for the services allegedly rendered, is less logical and less inherently likely. However, on an application such as this, I am not in a position or entitled to reject that element of the Claim as unarguable or take it into account other than at face value.

50. The position is different in relation to the claim for up to £2million as aggravated damages. There is no pleading to support this element of the Claim and the alleged contract - being for the provision of business services - simply cannot, as a matter of English law, give rise to such a head of damage. Subject to affording Mr Hardy an opportunity to make submissions when giving judgment and before making an order, I am provisionally minded to invoke the power of the court to act on its own initiative under CPR 3.3 and to exercise the power under CPR 3.4(2)(a) by striking out the claim for aggravated damages as having no underlying reasonable cause of action and being groundless.

51. Moving on to Mr Vineall’s four main submissions (see paragraph 19 above), it is, as he submits, well established that a bare assignment of a cause of action has long been recognised as champertous. Without more, an assignment of the Claim (as a claim against Mr Binstock in contract for damages) for the nominal sum of £1 would be likely to offend the public policy against maintenance and champerty.

52. In this case, however, there is more.

53. First, the Rights assigned under the Assignment were not confined to a cause of action; they included debts. Although the statutory demand is not in evidence or, if it is, I was not referred to it, JEB’s first step was to demand payment of the liquidated sums the subject of the Claim as a debt. Thus, the Assignment was neither confined to nor of a cause of action the subject of ongoing litigation.

54. Next, although Mr Hardy is not strictly correct in submitting that Mr Wilson has “retained” a one third interest in his debt and any recovery from Mr Binstock, the effect or substance of the arrangement is, as Mr Vineall acknowledges, that Mr Wilson is entitled to one third of the net fruits the Claim, if JEB succeeds. The correct analysis is that (1) JEB is a special purpose vehicle having as its commercial objective recovery of debts and claims of its partners and their families against Mr Binstock and his family; (2) in relation to JEB, its principals have agreed to share the profits derived from the fruits of any litigation or other recovery (including payment of debts); (3) all such fruits have been assigned to JEB; and, (4) in consequence, Mr Wilson is entitled to a one third share of such profits, if any.

55. Further, I regard the position of Mr Wilson and JEB in relation to the Claim as very different from that of the assignor and Mrs Simpson in *Simpson*. In this case, JEB has no separate purpose unconnected with Mr Wilson’s claim against Mr Binstock; the claim for damages is not incidental or collateral to another objective, it is central to the Claim. The purpose of the Claim is to establish a disputed debt. By contrast, the purpose of Mrs Simpson’s claim was to use the assigned cause of action as a platform from which to carry on a campaign aimed at changing the hospital’s operational practices.

56. As to Mr Vineall’s submission that Mr Wilson’s assignment and the Claim is or is on the brink of trafficking in litigation, I disagree. That phrase, as used in *Trendtex*, was attributed to a cause of action which was expected to be traded commercially between unconnected third parties as a commodity or, in the language the financial services industry, a product. In this case, the assignors are all connected with JEB; they all have a direct or indirect (through family) interest in rights equivalent or similar to the Rights; and, there is no evidence to suggest that JEB has attempted or will attempt to trade in the Rights or the Claim by further assignment. The conduct under attack in this case is a far cry from trafficking in litigation.

57. As to Mr Wilson cost-proofing himself in litigation against Mr Binstock, Mr Vineall and Mr Hardy both acknowledge that, if this action is not struck out as champertous, it will be open to Mr Binstock to make an application for security for costs.

58. That is so, and, if anything, the consequence of Mr Wilson’s assignment is likely to have the opposite effect to cost-proofing his position. There is no evidence to suggest that, had Mr Wilson not assigned his claim and were he personally the claimant, he would come within the categories of persons vulnerable to an order for security for costs. However, by assigning his claimed debt and related cause of action to JEB, Mr Wilson has exposed himself to the risk of an application for security for costs pursuant to CPR 25.14, the provisions of which include that a person who has assigned the right to a claim with a view to avoiding the possibility of a costs order being made against him and is a person against whom a costs order may be made (which would involve Mr Wilson being added as a party for the purposes of costs only) may be ordered to give security for costs if, having regard to all the circumstances of the case, the court is satisfied that it is just to make such an order.

59. In addition, with the Claim being brought by an apparently impecunious limited liability partnership, Mr Binstock may also apply for security for costs against JEB on the basis that JEB falls within the terms of CPR 25.13(2)(c) as a body other than a company in respect of which there is reason to believe that it will be unable to pay the defendant’s costs if ordered so to do. On an application by Mr Binstock, the court will make an order for security for costs if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order (CPR 25.13(1)(a)).

60. Mr Hardy submits that security for costs is a future question. That is so. However, I am entitled on this application to have regard to the likely outcome of such an application. In my view, it is not likely that an argument that a reasonable and proportionate order for security for costs would stifle this litigation would carry the day on a security for costs application in circumstances where the litigation could properly have been brought and run by Mr Wilson personally without exposing himself to the risk of giving any security for costs. From the point of view of the party confronted with the litigation an assignment for a purpose which includes side-stepping exposure to personal liability in costs would put the integrity of the legal process at risk and bring about an inequality to the detriment of the defendant. No doubt that is the injustice targeted by CPR 25.14. Thus, it seems to me that the law provides a procedure which, depending upon the court’s view of all the circumstances of the case, affords a defendant confronted with maintained litigation adequate protection against such abuse of the legal process, and which might even work to the defendant’s advantage. Accordingly, this should not be a matter weighing against JEB.

61. Apart from the facts that (1) access to justice on the part of Mr Wilson was not under threat, and (2) a claim for aggravated damages appears to be unsustainable, what else is there that would or might be likely to undermine the ends of justice?

62. The Assignment requires Mr Wilson to provide information to JEB about the Rights; in consequence, there is no apparent reason for concern that documentary evidence will or may be suppressed. Mr Wilson and his wife would be the claimant’s witnesses whether the action be brought by Mr Wilson or JEB. The Assignment also provides for Mr Wilson to account to JEB for monies received from Mr Binstock. Accordingly, it is improbable that the evidence will be suppressed or exaggerated or that the sum claimed will be exaggerated because the Claim is brought by JEB rather than by Mr Wilson.

63. Moreover, and as Mr Hardy submits, it is reasonably arguable that Mr Wilson and Mr Binstock made an oral contract for the provision of services and that the liquidated sum claimed, or at least part of it, is owing by Mr Binstock. Mr Hardy’s observation that it is Mr Binstock’s reaction to the statutory demand and the court’s decision that the debt is disputed that has led to these proceedings is not unfair.

64. I also bear in mind that (1) in *Simpson*, the Court of Appeal observed, per curiam, that the law on maintenance and champerty is open to further development as perceptions of the public interest change; (2) before, but almost contemporaneously with, *Simpson*, a differently constituted Court of Appeal (a) rejected the proposition that an indemnity against an adverse order in costs was champertous and (b) noted that champerty is to be curtailed not expanded; (3) more recently, and after *Simpson*, the rules relating to litigation funding have changed to permit DBAs by which lawyers sharing in the fruits of litigation; (4) the curtailment of public funding for civil litigation has correspondingly exposed impecunious claimants to greater risks in costs; and, (5) the provisions of CPR 25.13 and CPR 25.14 also work to the advantage of a defendant confronted with maintained litigation and, depending on the circumstances, may well place such a defendant in a better position than would have been the case if confronted by a legally aided or an impecunious claimant.

65. In a litigation climate where legal representatives can both share in the fruits of the claim they advance and underwrite their client’s costs risk of the claim and thereby enable an impecunious client to pursue a just claim, why should the court decline to hear, on grounds of public policy, the claim of an impecunious litigant which has been assigned to an entity in which he has an interest and which assignment creates the opportunity to open an otherwise closed door to reasonable and proportionate protection in costs on the application and for the benefit of the defendant (which, if not complied with will bring about the termination of the litigation at much less potentially irrecoverable expense to the defendant than would have been the case had the claim not been assigned)?

66. Permitting the Claim to proceed (probably stripped of the claim for aggravated damages) would not, in my judgment, put the integrity of the legal process at risk or otherwise undermine the ends of justice.

67. In my judgment, having regard to the circumstances of this case, the Claim, based as it is on the Assignment, does not offend the public policy aimed at protecting the integrity of the legal process including the principle of equality before the law. I therefore dismiss Mr Binstock’s application to strike out the Claim as an abuse of the process of the court.

68. I recognise that, irrespective of whether my decision be favourable or adverse to Mr Binstock’s application, this application raises a point of law of some importance. It is therefore appropriate to grant permission to appeal if requested.

1 Mr Binstock’s wife

2 An expression taken from the judgment of Fletcher Moulton LJ in *British Cash and parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, at p.1014 and cited at paragraph 22 of *Simpson*.