Neutral Citation: [2014] IEHC 301

THE HIGH COURT

[2009 No. 6228 P]

BETWEEN/

ANN STEWART

PLAINTIFF

AND

KARL McKENNA AND WENDY McKENNA AND KAPADA LIMITED TRADING AS HOMEBUILDER

DEFENDANTS

AND

ALLIANZ PLC

THIRD PARTY

JUDGMENT of Mr. Justice Barrett delivered on the 30th day of May, 2014

1. Mr and Mrs. McKenna are the purported assignees of the benefit of a particular insurance policy and the entitlement to receive and/or recover any, if any, sums payable by the insurer thereunder. This case is concerned with whether the relevant assignment is valid and good against the insurer and what the McKennas' rights as assignees are.

Facts

2. In August 2008, Mr. and Mrs. McKenna had building works carried out to their house at 50 Upper Grand Canal Street, Dublin 2, by the third named defendant, Kapada Limited t/a Homebuilder, a company of which Mr. McKenna was a director and shareholder. At all material times both the McKennas and Kapada were insured by Allianz plc., the former pursuant to a standard household policy and the latter pursuant to a standard building contractor's policy. In September 2008, Mrs. Stewart, the next-door neighbour of the McKennas, alleged that Kapada had caused damage to her property at 52, Upper Grand Canal Street, in the course of carrying out the building works and intimated that she intended to maintain a claim against the McKennas and Kapada. Allianz plc was notified by the McKennas and Kapada of this pending claim and commenced handling the claim in the usual way, appointing loss adjustors to liaise with the loss adjustors appointed by Mrs. Stewart's insurers and also instructing engineers to inspect Mrs. Stewart's property and to provide advice in relation to the pending claim. On 9th July, 2009, Mrs. Stewart commenced her proceedings. In a letter of 26th March, 2010, Allianz advised the McKennas and Kapada, then in liquidation, that it was not providing an indemnity in respect of Mrs. Stewart's claim against them. In summary, the grounds given for this repudiation of liability were threefold: (1) that under paragraph 6 of the policy exclusions set out at the beginning of the insurance policy with Kapada, Allianz was not obliged to indemnify the insured party in respect of any liability assumed by it under any contract or agreement unless such liability would have attached to it in the absence of such contract or agreement and that the liability in respect of which Kapada had sought indemnity was a liability which had been assumed by it under a contract or agreement with Mrs. Stewart in circumstances where liability would not have attached to it in the absence of such contract or agreement; (2) that under exclusion 9 of the Public Liability section of the policy, Allianz was not obliged to indemnify Kapada in respect of any liability for costs and expenses incurred in replacing or making good faulty, defective or incorrect workmanship, design or specification, material goods or other property supplied or installed or erected by or on behalf of Kapada, and that the liability in respect of which Kapada had sought indemnity was a liability arising out of allegedly faulty, defective or incorrect workmanship so that this exclusion was operative; and (3) that Allianz had not been given immediate notification of the claim in respect of which the indemnity had been sought.

3. On 23rd March, 2011, Kapada, acting by its liquidator, assigned to Mr. and Mrs. McKenna the benefit of the insurance policy and the entitlement to receive any sums payable thereunder. This assignment referred at the first recital to *'a policy of insurance number DN CPD 3544665 ('the Policy') made between Allianz Corporate Ireland plc (the 'Insurer') and the Company the Insurer agreed to indemnify and insure the Company in the manner therein provided for the period 1st June 2006 to 31st May 2007'*. A second purported assignment was entered into by the same parties on 14th October, 2011 in which the first recital refers to *'a policy of insurance number DN CPD 3544665 ('the Policy') made between Allianz Corporate Ireland plc ('the Insurer') and the Company the Insurer agreed to indemnify and insure the Company in the manner provided therein for the period 1st June 2008 to 31st May 2009'*. The version of the second assignment supplied to the court has been executed by Kapada only. Regardless, the court does not consider that this second assignment was necessary. The policy is clearly defined in the first assignment as meaning the "*policy of insurance number DN CPD 3544665*" and the court considers that the timeframe that is mentioned thereafter is superfluous detail, the policy being already clearly identified.

4. Mr. and Mrs. McKenna dispute that Allianz was entitled to avoid the policy and have called upon Allianz to submit that dispute to arbitration. However, Allianz has refused to do so and has asserted that under the terms of the policy such a dispute must be referred to arbitration within 12 months and that, since the dispute in issue was not referred to arbitration within this timeframe, it is to be deemed to be abandoned. Mr. and Mrs. McKenna further assert that the effect of s.62 of the Civil Liability Act, 1961, is to confer on them, and on Mrs. Stewart, an entitlement to seek to be indemnified by Allianz in respect of any loss or damage suffered by them where (i) they have a valid claim against Kapada in respect of that loss or damage, and (ii) Kapada is entitled under the policy to be indemnified in respect of its liability on foot of such claim.

5. By an order of the court made on 14th January, 2013, it was directed that the following preliminary issues of law be determined as between the defendants and Allianz: (1) whether Mr. and Mrs. McKenna have a legal entitlement to seek and/or obtain an indemnity pursuant to the applicable insurance policy made between Allianz Corporate Ireland plc of the one part and Kapada of the other part; (2) if Mr. and Mrs McKenna have a legal entitlement to seek and/or obtain an indemnity pursuant to the policy, whether such claim has been abandoned pursuant to clause 11 of the policy by not having been referred to arbitration within 12 calendar months from the 26th March, 2010 and/or whether Mr. and Mrs. McKenna are entitled to an extension of time under s.45 of the Arbitration Act, 1954; and (3) if Mr. and Mrs. McKenna have a legal entitlement to seek and/or obtain an indemnity pursuant to the policy and if such claim has not been abandoned pursuant to clause 11 of the policy conditions, whether such claim must be brought by arbitration

pursuant to clause 11.

The first preliminary issue
6. The first preliminary issue is whether Mr. and Mrs. McKenna have a legal entitlement to seek and/or obtain an indemnity pursuant to the applicable insurance policy made between Allianz Corporate Ireland plc of the one part and Kapada of the other part. Whether Mr. and Mrs. McKenna are entitled to seek indemnity raises the issue of whether the assignment was valid and what their rights are under s.62 of the Civil Liability Act, 1961.

7. *Validity of assignment*: Notably, the assignment is not an assignment of the contract of insurance per se but an assignment of the benefit of the policy and the entitlement to receive and/or recover sums which are payable by the insurer thereunder. There is in the form of policy supplied to the court no prohibition on the assignment thereof. Nor are there any requirements within the policy as to the form that an assignment such as that in issue in this case should take. Moreover it does not appear from case-law that any consent of the insurer is required as there is no change in the scope or contents of the policy. In the decision of the New Zealand Supreme Court in *Schneideman v. Barnett* [1951] N.Z.L.R. 301, a case concerned with the question of who was entitled to the proceeds of a fire insurance policy that was the subject of a purported assignment, Adams J., in finding that the relevant assignment was good, stated, at 306, that:

> *"There is no evidence to suggest that there was any provision in the policy making consent necessary to an assignment of this character, and such a provision would, I think, be both unusual and improper. There is ample authority for the view that, at any rate in the absence of such a provision, consent is not necessary to an assignment of proceeds. For instance, in Bank of Toronto v. St. Lawrence Fire Insurance Co. ([1903] A.C. 59), an assignment after a fire of all the insurances on their stock, including the moneys payable under the policy effected with the St. Lawrence Company"…was upheld by the Privy Council as against the insurance company, although the company instead of consenting had 'systematically disregarded all communications'".*

8. In the *Bank of Toronto* case to which Adams J. refers, it was not disputed that there had been a transfer of the debt, that notice of the transfer had been given to the respondent insurer, and that even a copy of the transfer had been furnished to it. However, the insurer contended that under the provisions of the Civil Code of Lower Canada there needed to be "*signification*" to the debtor of the act of sale of his debt, that this ought to have been done by a notary, that the copy of the transfer ought to have been authenticated or certified, and that for want of these formalities the notification of the transfer was without legal effect. The Privy Council did not consider these formalities to arise under the Civil Code, nor was it satisfied to find that they arose by implication. Moreover, insofar as a "*signification*" was concerned, Lord Macnaghten, giving judgment for the Privy Council, stated, at 67, that:

> *"It appears to their Lordships that the institution of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale..."*

9. In short, even a belated act of "*signification*", which was in truth a type of notice, was more important than its form. As to whether an assignment must be notified to be effective, MacGillivray on *Insurance Law* (12th edition), at 639, cites *Schneideman* in support of the contention that notice must be provided. This is a point that is worth examining in further detail. In Schneideman, Adams J., at 307, quotes with approval from the judgment of Lord Macnaghten in the prominent banking-law case of *William Brandt's Sons and Co. v. Dunlop Rubber Co. Ltd.* [1905] A.C. 454. In that earlier case, Kramrisch & Co., who were rubber merchants, agreed with Brandts, their bankers, that goods sold by Kramrisch would be paid for by a remittance to the bank direct from the purchasers, in this instance the Dunlop Rubber Company. Goods having been sold by Kramrisch, Brandts forwarded to Dunlop notice in writing that Kramrisch had made over to the bank the right to receive the purchase-money and requested Dunlop to sign an undertaking to remit the purchase-money to the bank. The House of Lords held on these facts that there was an equitable assignment of debt with notice to Dunlop, and that Brandts could recover the debt from Dunlop, Lord Macnaghten stating, at 462, that:

> *"All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor."*

10. This Court does not consider that the above quote or the decision in Schneideman necessarily support the conclusion that notice is mandatory as a matter of law. If that were the case, Adams J. could hardly have found in *Schneideman*, as he did, at 305, that the assignment in issue in that case was in and of itself "*a valid assignment, entitling plaintiff to the moneys payable under the policy*". What this Court considers these cases to reflect is merely the practical necessity of giving notice if an assignee is to avoid the danger to assignees that has been apparent since at least the time of *Stocks v. Dobson* (1853) 43 E.R. 411, that unless and until written notice is given to a debtor he is entitled to continue treating an assignor-creditor as his creditor and to discharge his debt by payment to same.

11. What form of notice will suffice assuming the relevant insurance policy remains silent on the issue and, there is no relevant statutory provision arising? As the *Bank of Toronto* case indicates, the fact of notice, there a 'signification', is more important than its form. While the most typical form of notice would simply be a letter of notification, perhaps with the form of assigmment appended, it is difficult to see how Allianz could reasonably contend on the facts of this case that it is not now on notice of the assignment. Thus the court finds that the assignment of 23rd March 2011 was a valid assignment on its terms of Allianz Policy No. DN CPD 3544665, that Allianz is on notice of same, and that Allianz, if required to make a payment under that policy, is now entitled, and would be bound in the event of payment thereunder, to make such payment to Mr. and Mrs. McKenna. Were Allianz to do otherwise, it would, to paraphrase the terminology of Lord Macnaghten in *Dunlop Rubber*, 'do so at its peril'.

12. *Section 62 of the Civil Liability Act, 1961*: Perhaps the most innovative of the points made for Mr. and Mrs. McKenna concerns s.62 of the 1961 Act. This provides that:

> *"Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability for a wrong, if an individual, becomes a bankrupt or dies, or if a corporate body, is wound up or, if a partnership or other unincorporated association, is dissolved, moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured in the bankruptcy or in the administration of the estate of the insured or in the winding-up or dissolution, and no such claim shall be provable in the bankruptcy or in the administration of the estate of the insured or in the winding-up or dissolution."*

13. Insofar as the provision applies in the instant proceedings, it can perhaps be expressed as follows:

'Where a person [Kapada] (hereinafter referred to as the insured) who has effected a policy of insurance…is wound up…moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and [shall not be moneys that go towards disappointed creditors of the liquidated entity].'

14. The attractions for the McKennas of s.62 as so expressed are obvious. They claim that independently of any rights that they enjoy as assignees of Allianz Policy No. DN CPD 3544665, s.62 in effect entitles them to procure payment to themselves of any insurance monies that may be paid by Allianz to Kapada. This, they claim, is because in the event of Mrs. Stewart's claim against the McKennas succeeding, the McKennas will have a valid claim for indemnity against Kapada and, assuming that Allianz is not entitled to repudiate the policy, monies will be payable by Allianz to Kapada, and those monies will be ring-fenced from the creditors of Kapada and available to Mr. and Mrs. McKenna pursuant to s.62. In this regard, counsel for Mr. and Mrs. McKenna has prayed in aid the Supreme Court decision in *Dunne v. P.J. White Construction Co. Limited (In Liquidation)* [1989] I.L.R.M. 803. In that case Mr. Dunne had obtained judgment in default of defence against a company that had gone into liquidation prior to judgment being issued. As part of his appeal the plaintiff invoked his rights under s.62 of the 1961 Act to any insurance monies in preference to the company and, ultimately, in preference to its disappointed creditors. In the course of giving judgment for the Supreme Court, Finlay C.J. stated, at 805, that:

> *"[S]ome debate took place in this Court as to whether the plaintiff had a right to bring an action by reason of s.62 against the insurers…I would express the view…notwithstanding the fact that a full debate has not taken place on this issue, that it seems to me that an inevitable consequence of the terms of s.62 itself is that such a right of action is created by it.*
>
> *S.62 of the Act of 1961 is specifically designed to protect an injured plaintiff in the precise position of Mr. Dunne".*

15. Are Mr. and Mrs McKenna in the precise position as Mr. Dunne, i.e. have they secured judgment against Kapada at this time in respect of such liabilities as they claim arise between them and Kapada? The answer to this is 'no'. Thus, having regard to the decision of the Supreme Court in *Dunne*, it does not appear that Mr. and Mrs. McKenna at this time come within and can avail of s.62. It is perhaps worth noting in passing that, contrary to the contention made at the hearings for Allianz, neither does it appear to the court that Mrs. Stewart is in the precise position of Mr. Dunne in his proceedings. On 4th April, 2011, Mrs. Stewart was granted judgment in default of defence against Kapada. However, because of the assignment of 23rd March, 2011, no moneys are, or were at the time of judgment, payable, *i.e.* capable of being paid, to Kapada by Allianz; they must go to the McKennas. Thus, unlike the position in *Dunne*, Mrs. Stewart, when it comes to Kapada, is confronted by an insured to whom no moneys are payable.

The second preliminary issue

16. The second preliminary issue is whether, if Mr. and Mrs McKenna have a legal entitlement to seek and/or obtain an indemnity pursuant to the policy, such claim has been abandoned pursuant to clause 11 of the policy by not having been referred to arbitration within 12 calendar months from the 26th March, 2010 and/or whether Mr. and Mrs. McKenna are entitled to an extension of time under s.45 of the Arbitration Act, 1954.

17. *Abandonment of claim*: In a clause of the insurance policy headed "*Arbitration*", it is stated that:

> *"All differences arising out of this Policy shall be referred to the decision of an arbitrator to be appointed by the parties or failing agreement by the President for the time being of the Incorporated Law Society of Ireland. Where any difference is referred to arbitration the making of an award shall be a condition precedent to any right of action against the Company. Claims not referred to arbitration within 12 calendar months from the date of disclaimer of the liability shall be deemed to have been abandoned."*

18. It will be recalled that it was in a letter of 26th March, 2010, that Kapada, then in liquidation, was advised that Allianz was not providing an indemnity to Kapada with respect to the proceedings brought by Mrs. Stewart. Whether Allianz were entitled to do so is of course disputed between the parties. Regardless of where the truth in this dispute lies, the date of 26th March, 2010, is clearly the key date for determining the 12-month period referred to in the above provision. By letter dated 13th October, 2010, well within the 12-month period, Orpen Franks, Solicitors, wrote to the solicitors for Allianz. In that letter, Orpen Franks advised that they were acting, and the court has no reason to doubt that they were acting in this regard, for all three defendants, including Kapada, then in liquidation. Their letter contained a referral to arbitration, stating in the penultimate paragraph that:

> *"We are now putting you on notice that if insurers maintain their position as set out in their letter of the 26th March the Liquidator requires the issue of indemnity to be arbitrated upon.*
>
> *Please let us hear from you by return in order that the necessary arrangements may be made to agree to the appointment of an arbitrator and to proceed with the arbitration as soon as speedily as possible."*

19. An immediate issue that arises with this referral is that it is not clear that it was done with the sanction required under s.231(1)(a) of the Companies Act, 1963, which provides that:

> *"The liquidator in a winding up by the court shall have power, with the sanction of the court or the committee of inspection–*
>
> *(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company".*

The court considers that arbitration proceedings are a "*legal proceeding*" caught by this provision. However, even if sanction has not to this time been sought, this fact will not be of avail to Allianz for at least two reasons. First, it appears from the decisions of the English courts in *Gresham International Limited v. Moonie* [2010] 2 W.L.R. 362 and the much earlier case of *Re London Metallurgical Co.* [1897] 2 Ch. 262 that such sanction can be granted retrospectively. In *Gresham*, Peter Smith J., in the English High Court, held that the court had power by virtue of its supervisory role in compulsory winding ups and bankruptcy to make an order which granted a liquidator retrospective sanction to the commencement of certain court proceedings, which sanction was then required under the United Kingdom's Insolvency Act 1986. In *London Metallurgical,* Vaughan Williams J., at 270, contemplated that retrospective sanction would generally be granted "*in case of urgency*" and then, as Peter Smith J. notes in Gresham at 372, granted retrospective sanction in a case where no urgency presented. A second reason why s.231(1)(a) would appear to be of no avail to Allianz in the instant proceedings is that the decision of the House of Lords in *Dublin City Distillery Ltd. v. Doherty* [1914] A.C. 823, suggests that a defendant to such a form of proceedings cannot object to same on the ground that the required sanction to the bringing of those

proceedings has not been obtained. In his judgment in that case, Lord Parker states simply, at 859, that:

> *"[I]n my opinion s.151 of the Companies (Consolidation) Act, 1908, which enables a liquidator in the case of a winding-up in Ireland to bring or defend legal proceedings with the sanction of the Court, was not intended to confer, and does not confer, on third parties any right to object to proceedings brought by a liquidator in the name of the company, on the ground that no such sanction has been obtained."*

20. There is no good reason why the same should not apply in respect of s.231(1)(a) and the court notes that Mr. McCann in his learned annotation of the Companies Acts (2012), at 490, relies on *Dublin City Distillery* in support of the contention that the defendant to proceedings brought by a liquidator in the name of a company cannot object to those proceedings on the ground that the sanction required under section 231(1)(a) of the Act of 1963 has not been obtained.

21. Subject to the foregoing, it appears to the court that the referral to arbitration made by Orpen Franks for the liquidator in the letter of 13th October, 2010, was good and valid and within time, even if it featured the reasonable and logical caveat that the referral was only to proceed if, in effect, Allianz continued to adopt the stance that it was repudiating liability under the policy. Does this mean that the McKennas as assignees of the benefit of the policy could or can become party to the arbitration? The court considers that the answer to this question is 'yes'. The benefit of the insurance policy, including the arbitration clause, could be and was validly assigned to Mr. and Mrs. McKenna on 23rd March, 2011. The McKennas thereupon became assignees of the benefit of Kapada's claim against Allianz. For the reasons given above, notice to Allianz, although both prudent and a practical necessity, was not legally required to complete the McKennas' title. As assignees of a chose in action, they were entitled to commence an arbitration in their own name. The court is not aware of any Irish authority that precludes an assignee from joining in a pending arbitration and is aware of at least one English case where this was expressly allowed, namely *The Jordan Nicolov* [1990] 2 Lloyds' Rep. 11.

22. The fact that the McKennas might have applied to become a party to the arbitration consequent upon the execution of the assignment does not mean that they were automatically a party to the arbitration which commenced with the valid referral to arbitration made by Orpen Franks for the liquidator on 13th October, 2010. To put matters in common parlance, in paying their €1.00 consideration for the assignment the McKennas bought a ticket for, but did not climb aboard, the arbitration 'train'. Or, to put matters more formally, as Lloyd L.J. stated in *Baytur S.A. v. Finagro Holding S.A.* [1991] 4 All E.R. 129 at 133:

> *"An assignee does not automatically become party to a pending arbitration on the assignment taking effect in equity. Something more is required. He must at least give notice to the other side and submit to the jurisdiction of the arbitrator."*

It seems implicit from a letter of Orpen Franks to the solicitors for Allianz on 23rd May, 2011, enquiring on behalf of the McKennas as to whether Allianz *"are obliged to provide indemnity to arbitration"* that, either via that letter or previously, a form of notice, as contemplated by Baytur, had and has been given. However, the tripartite contractual nature of arbitration requires that there also be submission to the arbitrator. This issue also arose in *The Jordan Nicolov*, Hobhouse J. stating, at 16, that:

> *"[F]or the assignment to take full legal effect notice must be given not only to the other party to the dispute but also to the arbitrator or arbitrators as well."*

Hobhouse J. attributed this requirement to the fact that in an arbitration there is a tripartite contractual relationship between the claimant, the respondent and the arbitrator(s). This is quite unlike the position in *Schneideman, Bank of Toronto*, and indeed this case, in which there is a bipartite contractual relationship between insurer and insured, a separate bipartite contractual relationship between assignor and assignee, and a cause of action between assignee and insurer grounded on a chose in action that is the subject of the assignment. In these proceedings, as no arbitrator has yet been appointed, any submission to such arbitrator has, to date, been impossible. Thus the court finds that the McKennas are not at this time a party to the live arbitration that was commenced by the letter of 13th October, 2010, and which has remained live, albeit in a state of stasis ever since, given the continuing failure to this time to appoint an arbitrator, thanks to the ongoing but mistaken view of Allianz that the referral to arbitration in these proceedings was out of time.

23. *Extension of time under s.45 of the Arbitration Act, 1954*. One of the issues raised for the court to address is whether Mr. and Mrs. McKenna may seek an extension of time under s.45 of the Arbitration Act, 1954. This issue has been rather overtaken by the court's findings in the preceding paragraphs. However, for the sake of completeness the court addresses the issue raised. It appears to the court that the notion that any such application might be brought is entirely misfounded. The assignment of the Allianz policy took place on 23rd March, 2011. So the rights of the McKennas, including their rights *vis-à-vis* the arbitration only took effect on that date. Under s.4(2) of the Arbitration Act 2010:

> *"Subject to section 3 , the repeal of the Acts referred to in subsection (1) shall not prejudice or affect any proceedings, whether or not pending at the time of the repeal, in respect of any right, privilege, obligation or liability and any proceedings taken under those Acts in respect of any such right, privilege, obligation or liability acquired, accrued or incurred under the Acts may be instituted, continued or enforced as if the Acts concerned had not been repealed."*

24. This is expressly subject to s.3(1) of the Act which provides that:

> *"This Act shall not apply to an arbitration under an arbitration agreement concerning an arbitration which has commenced before the operative date but shall apply to an arbitration commenced on or after the operative date [i.e. 8th June, 2010]."*

25. As the referral to arbitration in this case took place on 13th October, 2010, the court concludes that this fact, in tandem with s.3(1), is the 'kiss of death' to any argument that might be made for the McKennas under s.4(2) of the 2010 Act. However, even assuming for a moment that they could invoke s.4(2), it would stand them to no avail: neither a literal nor a purposive reading of s.4(2) supports the notion that the transitional provisions therein contained can, should or do benefit persons such as the McKennas whose rights in respect of the arbitration only became extant on the date of the assignment of 23rd March, 2011, over nine months after the 2010 Act commenced in force, and who have not yet submitted to the jurisdiction of the arbitrator in the arbitration.

The third preliminary issue

26. The third preliminary issue is whether, if Mr. and Mrs. McKenna have a legal entitlement to seek and/or obtain an indemnity pursuant to the policy and if such claim has not been abandoned pursuant to clause 11 of the policy conditions, such claim must be brought by arbitration pursuant to clause 11. The court considers that the McKennas are eligible to submit to the jurisdiction of such arbitrator as may be appointed in the arbitration proceedings that commenced with the referral of 13th October, 2010. However, the

court does not consider that they are obliged to do so. They need not join the arbitration 'train'. In fact there is an altogether different train that the McKennas may wish to board. As was mentioned above, the benefit of the insurance policy has been validly assigned to Mr. and Mrs. McKenna. Thus they are assignees of Kapada's claim against Allianz in respect of the payment claimed under the insurance policy. As assignees of this chose in action, they may litigate their claim, much as the assignees in *Schneideman* and *Bank of Toronto* did. However, they will bring any such claim in their own right. They are not party to, and would not be suing as parties to, the insurance policy. Nor would they be suing in the place of the insured party. They are the beneficiaries of an assignment agreement, not a novation agreement. Consequently, unless they elect to submit to such arbitrator as may be appointed in the still-live arbitration that commenced on 13th October, 2010, it does not appear to the court that they would be precluded by the arbitration clause or the fact that there has been a valid referral to arbitration, from suing Allianz by way of court proceedings. It may be, it will be, that in any such litigation the issue as to whether Allianz is liable to make payment under the policy will be a key matter for determination. However, this does not alter the fact that the dispute between the McKennas, as assignees, and Allianz, as putative debtor, arises outside the parameters of the insurance policy and involves persons, Mr. and Mrs. McKenna, who are not party to that policy and thus not bound by any of its terms. Nor until such time as they may submit to a duly appointed arbitrator in the manner described above, and they may elect not to do so, are they precluded from bringing court proceedings by virtue of the arbitration arising. It might be that the McKennas may wish to join Kapada in any litigation that they may commence against Allianz, given that Kapada, as the insured party, would appear to retain some interest in the subject-matter of the dispute. However, this is a procedural concern. The McKennas are the assignees of certain choses in action arising under Allianz Policy No. DN CPD 3544665 and thus, the court concludes, they can at this time sue Allianz in its capacity as purported debtor. What they cannot do, of course, is join the existing arbitration through submission to the arbitrator in the manner contemplated above and then litigate their dispute with Allianz in court proceedings. To paraphrase Frost, they have reached a point where two roads diverge and cannot travel both.

Conclusion

27. For the reasons stated above, the court finds that the assignment of 23rd March, 2011, was a valid assignment of Allianz Policy No. DN CPD 3544665, that Allianz is on notice of same, and that Allianz, if required to make a payment under that policy, is now entitled, and would be bound in the event of payment thereunder, to make such payment to Mr. and Mrs. McKenna. It does not appear to the court that Mr. and Mrs. McKenna at this time can avail of s.62 of the Civil Liability Act, 1961. The court does not consider that an order under s.45 of the Arbitration Act, 1954 is available to the McKennas. The court considers that the McKennas can elect at this time, through submission to such arbitrator as may be appointed, to join the arbitration proceedings that, the court concludes, were validly commenced on 23rd October, 2010, but they may also elect not to do so. Lastly, the court considers that the McKennas, as the assignees of certain choses in action under Allianz Policy No. DN CPD 3544665, can sue Allianz in its alleged capacity as debtor provided they have not previously proceeded to arbitration in the manner considered above.