

THE *TRENDTEX* PRINCIPLE IN AUSTRALIAN LAW: CONTEXT AND RECENT DEVELOPMENTS

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The Trendtex principle provides that a right to litigate can be assigned when the assignee has a genuine commercial interest in the litigation. The principle finds its origins in the English decision of Trendtex Trading Corporation v Credit Suisse¹ and its application in Australia has recently been affirmed by the High Court decision in Equuscorp Pty Ltd v Haxton.² There are, however, some uncertain aspects of the Trendtex principle, such as (1) exactly what constitutes a genuine commercial interest (2), whether an assignee must have a pre-existing enforceable right against the assignor (3), whether the Trendtex principle can include the assignment of a cause of action in tort, and if so (4), whether personal torts are assignable. The article resolves these uncertainties and concludes that the Trendtex principle has a wide scope, allowing for the assignment of causes of action in contract, restitution and tort – the latter extending to personal torts under appropriate conditions. It is contended that the principle’s wide scope appropriately mirrors the relaxation of judicial attitudes towards maintenance and champerty in the latter half of the last century. It also represents a suitably flexible policy response to the upsurge in diversified commercial litigation in the late twentieth and early twenty-first centuries.

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¹ [1982] AC 679; [1981] 3 All ER 520.

² (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon JJ).

I INTRODUCTION

The *Trendtex* principle provides that a right to litigate can be assigned when the assignee has a genuine commercial interest in the litigation. The principle finds its origins in the English decision of *Trendtex Trading Corporation v Credit Suisse*³ and its application in Australia has recently been affirmed by the High Court decision in *Equuscorp Pty Ltd v Haxton*.⁴ There are, however, some uncertain aspects of the *Trendtex* principle, such as (1) exactly what constitutes a genuine commercial interest (2), whether an assignee must have a pre-existing enforceable right against the assignor (3), whether the *Trendtex* principle can include the assignment of a cause of action in tort, and if so (4), whether personal torts are assignable.

The article is divided into three principal sections. Section II begins by briefly discussing the concepts of maintenance, champerty and their interrelationship with the assignment of rights to litigate. Section III places the *Trendtex* principle into legal context, juxtaposing it with other exceptions to the prohibition on the assignment of rights to litigate. Section IV specifically explores the *Trendtex* principle, examining its origins, the scope of the genuine commercial interest criterion, whether an assignee must have a pre-existing enforceable right against the assignor, whether the principle extends to causes of action in tort, and whether personal torts are assignable.

The conclusion condenses all aspects of the preceding discussion and argues that the *Trendtex* principle has a wide scope, allowing for the assignment of causes of action in contract, restitution and tort – the latter extending to personal torts under appropriate conditions. It is contended that the principle's wide scope appropriately mirrors the relaxation of judicial attitudes towards maintenance and champerty in the latter half of the last century. It also represents a suitably flexible policy response to the upsurge in diversified commercial litigation in the late twentieth and early twenty-first centuries.

³ [1982] AC 679; [1981] 3 All ER 520.

⁴ (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon JJ).

II MAINTENANCE, CHAMPERTY AND THE ASSIGNMENT OF RIGHTS TO LITIGATE

Common law rules have developed over time preventing people who have rights to sue in contract, tort and equity from assigning those rights to people with no genuine interest in the litigation.⁵ These rules were based upon public policy considerations designed to prevent maintenance and champerty.⁶ But to what do these terms refer? Maintenance is the support of an action by a person who has no interest in the cause of action. Champerty is a more extreme (aggravated) form of maintenance, consisting of the support of an action on the basis that the person receives part of the verdict on completion.⁷ The concepts of maintenance and champerty are therefore interrelated: “[m]aintenance is the genus and champerty a species of maintenance.”⁸

The origins of the prohibition on maintenance and champerty lay in medieval concerns with the manipulation of witnesses, encouragement of unviable litigation, and corruption of the legal system’s integrity by men of means and influence.⁹ Over time, as the courts became more standardised in their approach and function, these concerns became less acute.¹⁰

⁵ *Prosser v Edmonds* (1835) 160 ER 196, 203 (Lord Abinger); *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297, 311 (Brennan J); *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261; 142 ALR 198, 205 (Lockhart, Cooper and Kiefel JJ); *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386, 484 (Callinan and Heydon JJ).

⁶ *Alabaster v Harness* [1895] 1 QB 339, 342 (Lord Esher MR); *Glegg v Bromley* [1912] 3 KB 474, 489-490 (Parker J); *Stevens v Keogh* (1946) 72 CLR 1, 28 (Dixon J); *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386, 425 (Gummow, Hayne and Crennan JJ), 480 (Callinan and Heydon JJ); We should note, however, that the prohibitions on maintenance and champerty were not absolute. There were exceptions. In *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261; 142 ALR 198 at 205 Lockhart, Cooper and Kiefel JJ intimated as much: “[w]hat maintained actions were thought likely to produce, and which was inimical to the public interest, altered over the course of time and with changing social conditions, as did the recognition of interests which were sufficient to justify interference in another’s litigation by supporting it: see *Hill v Archbold* [[1968] 1 QB 686] at 694; *Trendtex [Trading Corp v Credit Suisse* [1980] QB 629]; *Condliffe v Hislop* [1996] 1 WLR 753 at 759; [1996] 1 All ER 431 at 437 and *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 607. It may now be observed, for example, that concerns expressed earlier this century, as to the potential for the maintenance of actions to give rise to an increase in litigation, might now be considered of lesser importance than the problems which face the ordinary litigant in funding litigation and gaining access to the Courts. In the latter respect, by the time *Martell v Consett Iron Co Ltd* [1955] 1 Ch 363 came before Danckwerts J, his Honour was able to observe that support of legal proceedings based upon a bona fide common interest, financial or philosophical, must be permitted if the law itself was not to operate as oppressive. The Courts today, in our view, are likely to take an even wider view of what might be acceptable, particularly if procedural safeguards are present or able to be applied.” These comments were endorsed by McClelland J in *Smits v Roach* [2002] NSWSC 241 [240].

⁷ In *Giles v Thompson* [1994] AC 142; [1993] 3 All ER 321, Steyn LJ similarly stated: “[i]n modern idiom, maintenance is the support of litigation without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds.” See also *Jeb Recoveries LLP v Judah Eleazar Binstock* [2015] EWHC 1063 (Ch) [9] (Simon Barker QC); *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 [274] (Gilbert J).

⁸ As was eloquently expressed by counsel in *In re Trepeca Mines Ltd (No 2)* [1963] 1 Ch 199, 210.

⁹ W. J. V. Windeyer, *Lectures in Legal History* (2nd ed, 1957), 151-152; Damian Reichel “The Law of Maintenance and Champerty and the Assignment of Choses in Action” (1983) 10 *Sydney Law Review*, 166; *Saunders v Houghton*

In Australia, legislation has progressively abolished criminal and tortious offences associated with maintenance and champerty.¹¹ This abolition is commensurate with the view which rose to prominence in the second half of the twentieth century questioning the vigorous prohibition on maintenance and champerty.¹² Legitimate concerns have thus been expressed regarding the inability of potential litigants to fund proceedings, this having a greater deleterious impact on the cause of justice in contemporary times than concerns relating to maintenance and champerty. As articulated by Lockhart, Cooper and Kiefel JJ in *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd*:¹³

What maintained actions were thought likely to produce, and which was inimical to the public interest, altered over the course of time and with changing social conditions, as did the recognition of interests which were sufficient to justify interference in another's litigation by supporting it... It may now be observed, for example, that concerns expressed earlier this century, as to the potential for the maintenance of actions to give rise to an increase in litigation, might now be considered of lesser importance than the problems which face the ordinary litigant in funding litigation and gaining access to the courts.¹⁴

[2009] NZCA 610; [2010] 3 NZLR 331 at [24] (Baragwanath J (with whom Glazebrook and O'Regan JJ agreed)); *Walker v Forbes* [2015] NZHC 1730 [22] (Brown J).

¹⁰ *In re Treppca Mines Ltd [No 2]* [1963] Ch 199, 220 (Lord Denning MR); *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261; 142 ALR 198, 205 (Lockhart, Cooper and Kiefel JJ); *Re Daniel Efrat Consulting Services Pty Ltd (rec apt) (in liq); Ex parte Hawke* (1999) 91 FCR 154; 162 ALR 429 [19]-[21] (Branson J); *Smits v Roach* [2002] NSWSC 241 [225]-[240] (McClelland J); *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386, 426-432 (Gummow, Hayne and Crennan JJ), 481 (Callinan and Heydon JJ); *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838, 841-842 (Heath J); See also Max Radin, "Maintenance by Champerty" (1935-36) 48 *California Law Review*, 51-52; Winfield, "The History of Maintenance and Champerty" (1919) 35 *Law Quarterly Review* 50.

¹¹ In New South Wales, for example, criminal and tortious offences associated with maintenance and champerty were abolished by sections 3 and 4 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW). These sections, repealed by the *Statute Law (Miscellaneous Provisions) Act 2011* (NSW), are now incorporated in Schedule 3, sections 5 and 6 of the *Crimes Act 1900* (NSW), and Schedule 2, section 2(1) of the *Civil Liability Act 2002* (NSW).

¹² *Martell v Consett Iron Co Ltd* [1955] Ch 363, 382 (Dankwerts J); *Hill v Archbold* [1967] 3 All ER 110; [1968] 1 QB 686, All ER 112; QB 694-695 (Lord Denning MR); *Halliday v High Performance Personnel Pty Ltd (in liq) (formerly SACS Group Pty Ltd)* (1993) 113 ALR 637, 640 (Mason CJ); *South Australian Management Corporation v Sheahan* (1995) 16 ACSR 45, 54 (DeBelle J); *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261; 142 ALR 198, 205-206 (Lockhart, Cooper and Kiefel JJ); *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710, 755 (Gault J); *Elfic Ltd v Macks* [2000] QSC 18 [65]-[66] (Williams J); *Smits v Roach* [2002] NSWSC 241 [225]-[240] (McClelland J); *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381; [2002] 3 WLR 1104; [2002] 4 All ER 97, QB 414 (Lord Phillips MR); *Equiscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 524-525 (French CJ, Crennan and Kiefel JJ). In *Martell v Consett Iron Co Ltd* [1955] Ch 363, 382 Dankwerts J stated, "unless the law of maintenance is capable of keeping up with modern thought, it must die in a lingering and discredited old age." In *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381, 414 Lord Phillips MR remarked that courts are now in "the vestigial remnants of the law of champerty".

¹³ (1997) 72 FCR 261; 142 ALR 198.

¹⁴ *Ibid.*, ALR 205.

Nonetheless, courts still retain an inherent discretion to find maintenance illegal on public policy grounds.¹⁵

Importantly, there is a distinction between maintenance, champerty and the assignment of the right to litigate.¹⁶ In the case of maintenance and champerty, no assignment of the right to litigate need take place. Instead maintenance and champerty may merely involve litigation funding, which as indicated in *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*¹⁷ and *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*¹⁸ is permissible under Australian law.¹⁹ Having said this, where a right to litigate is assigned, then under certain circumstances it may be invalid if it does not fall within one of the recognized exceptions to the prohibition on the assignment of rights to litigate.

Finally, a distinction can be drawn between the prohibition on the assignment of rights to litigate and the assignment of future property arising as the result of litigation.²⁰ In *Glegg v Bromley*,²¹ for example, the future results of litigation were assigned. Vaughan Williams LJ stated that:

I know of no rule of law which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. The assignee has no right to insist on the action being carried on... There is in my opinion nothing resembling maintenance or champerty in the deed of assignment.²²

This is because there is no assignment of a right to litigate, only the future property which might arise as a result thereof. So long as valuable consideration is provided for such an assignment, the assignor's conscience will be bound and

¹⁵ *Singleton & Anor v Freehill Hollingdale & Page* [2000] SASC 278 [25] (Olsson J); In New South Wales, this discretion was legislatively acknowledged in section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW). This section, repealed by the *Statute Law (Miscellaneous Provisions) Act 2011* (NSW), has now been replaced by Schedule 2, section 2(2) of the *Civil Liability Act 2002* (NSW).

¹⁶ Anthony J. Sebok, "Betting on Tort Suits After the Event: From Champerty to Insurance" (2011) 60 *DePaul Law Review*, 453-545.

¹⁷ (2006) 229 CLR 386, 412 (Gleeson CJ), 432-436 (Gummow, Hayne and Crennan JJ), 451-452 (Kirby J), 486 (Callinan and Heydon JJ).

¹⁸ (2009) 239 CLR 75, 92-94 (French CJ, Gummow, Hayne and Crennan JJ).

¹⁹ For various types of litigation funding which were permitted even in the era of a strict prohibition on maintenance, see *South Australian Management Corporation v Sheahan* (1995) 16 ACSR 45, 54 (DeBelle J); For litigation funding in New Zealand, especially the importance of funding agreement disclosure, see *Waterhouse v Contractors Bonding* [2013] NZSC 89; See generally, Lee Atkin "Litigation Lending" After *Fostif*: An Advance in Consumer Protection, or a License to "Bottomfeeders"?" (2006) 28, *Sydney Law Review*, 171.

²⁰ *Glegg v Bromley* [1912] 3 KB 474, 484 (Vaughan Williams LJ); *Cummings v Claremont Petroleum NL* (1996) 184 CLR 124, 145 (Dawson and Toohey JJ); *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386, 427 (Gummow, Hayne and Crennan JJ).

²¹ [1912] 3 KB 474.

²² *Ibid.*, 484. See also *ibid.*, 489 (Fletcher Moulton LJ), 490 (Parker J).

equity will make the assignment effective, as it would for any other future property transaction.²³

III THE *TRENDTEX* PRINCIPLE IN LEGAL CONTEXT

It is useful to situate the *Trendtex* principle in legal context. The task is complicated by the fact that the broader area of law – exceptions to the prohibition on the assignment of rights to litigate – is unsystematic and conceptually confused. To begin with, there are two classes of interests – debts and the benefit under a contract prior to any breach – which are exceptions to the prohibition on the assignment of rights to litigate, but which *anomalously*, are not classified as such. Second, there are various recognised exceptions to the prohibition on the assignment of rights to litigate, among which the *Trendtex* principle is included.

A *Debts and the Benefit Under a Contract Prior to Any Breach*

The assignability of a debt, even if overdue for payment, was established in *Comfort v Betts*.²⁴ The logic of excluding this particular assignment type from the category of recognised exceptions to the prohibition on the assignment of rights to litigate seems to stem from two interrelated factors. First, the legal assignment of debts was made possible by section 25(6) of the *Supreme Court of Judicature Act 1873* (UK).²⁵ Prior to this legislative intervention, a debt was only assignable in equity because the common law courts traditionally considered the right to be personal to the creditor.²⁶ Second, in light of the statutory intervention and accompanying decisions, a debt was

²³ *Chancery v Graydon* (1743) 2 Atk 616, 621 (Lord Hardwicke LC); *Grey v Kentish* (1749) 1 Atk 280, 280 (Lord Hardwicke LC); *Meek v Kettlewell* (1843) 1 Ph 342, 347 (Lord Lyndhurst); *Re Lind; Industrials Finance Syndicate Limited v Lind* [1915] 2 Ch 345, 359-360 (Swinfen Eady LJ), 370 (Bankes LJ); *Williams v Commissioner of Inland Revenue* [1965] NZLR 395, 399 (Turner J).

²⁴ [1891] 1 QB 737, 740 (Lord Esher), 740 (Fry LJ), 741 (Lopes LJ); Lord Esher MR, 740 noted his unease with the result: contributing to the growth of the new business of debt collecting and the removal of debt claims from the jurisdiction of the county court. For subsequent cases: *Fitzroy v Cave* [1905] 2 KB 364, 370 (Collins MR), 374, (Cozens-Hardy LJ (with whom Mathew LJ agreed)); *County Hotel and Wine Co Ltd v London and North Western Railway Co* [1918] 2 KB 251, 261 (McCardie J); *Ellis v Torrington* [1920] 1 KB 399, 411 (Scrutton LJ); *Re Daley; Ex parte National Australia Bank Ltd* (1992) 8 ACSR 395; 37 FCR 390, ACSR 400 (Heerey J); *Camdex International Ltd v Bank of Zambia* [1998] 1 QB 22, 30-31 (Hobhouse LJ); *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 1041 [42] (McDougall J).

²⁵ See s 12 of the *Conveyancing Act 1919* (NSW); s 134 of the *Property Law Act 1958* (Vic); s 199 of the *Property Law Act 1974* (Qld); s 15 of the *Law of Property Act 1936* (SA); s 20 of the *Property Law Act 1969* (WA); s 86 of the *Conveyancing and Law of Property Act 1884* (Tas); s 205 of the *Civil Law (Property) Act 2006* (ACT); s 182 of the *Law of Property Act 2000* (NT).

²⁶ *Master v Miller* (1791) 4 Durn & E 320, 340 (Buller J); *Camdex International Ltd v Bank of Zambia* [1998] 1 QB 22, 30 (Hobhouse LJ), 39-40 (Peter Gibson LJ), 40-41 (Neil LJ).

henceforth regarded as “property,” and *ergo*, the legal assignment of a debt was not the assignment of a right to litigate.²⁷ Although this may appear conceptually anomalous, it is the traditional and well-established characterisation used to justify the legal assignment of debts.²⁸

The second interest which would fit into the same category is the assignment of a benefit under a contract, whether a claim to which that benefit gives rise is liquidated or unliquidated, *before* a breach of contract occurs. This was established in *Torkington v Magee*²⁹ which concerned an assignment, prior to any breach, of an executory contract for purchase. Channell J (with whom Lord Alverstone CJ and Darling J agreed) upheld the right of the assignee to sue for damages on the grounds that a court of equity would have acted analogously prior to the passage of section 25(6) of the *Supreme Court of Judicature Act 1873* (UK).³⁰ The rule has been applied by subsequent cases³¹ and is explicable by the fact that there is no assignment of a right to litigate at the time the assignment occurs, even though such a right may subsequently accrue to the assignee.³²

The merit of maintaining a distinction between the assignment of a benefit under a contract before and after breach, with only the latter impugned for maintenance, has been subject to criticism. Oliver LJ, for example, in *Trendtex Trading Corporation v Credit Suisse*³³ has framed the issue thus:

What is it (if anything) that distinguishes the assignment of the benefit of a subsisting contract from the assignment of a right to enforce a contract the performance of which has been withheld? What logical dividing line is there between the innocent assignee of a contract and the champertous assignee of the right to sue for damages for its breach? Why is it to be assumed that the former will

²⁷ See for example, *Fitzroy v Cave* [1905] 2 KB 364, 373 (Cozens-Hardy LJ (with whom Mathew LJ agreed)); *Camdex International Ltd v Bank of Zambia* [1998] 1 QB 22, 32 (Hobhouse LJ), 39-40 (Peter Gibson LJ), 40-41 (Neil LJ); *Zabihi v Janzemini* [2009] EWHC 3471 (Ch) [20] (Sales J); *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 207 [82] (Elliott J).

²⁸ See J. D. Heydon, M. J. Leeming and P. G. Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (Butterworths LexisNexis, 5th ed., 2015), 294. The learned authors note that, “[t]he case of an overdue debt merely points up the problem inherent in the distinctions drawn in this breach of the law: for what is a debt but a right to sue to recover a sum certain?” Similar observations were made by McCardie J in *County Hotel and Wine Co Ltd v London and North Western Railway Co* [1918] 2 KB 251, 260: “[t]he whole law upon the matter requires broad juristic consideration and decision by an appellate tribunal in the light of modern circumstances.”

²⁹ [1902] 2 KB 427.

³⁰ *Ibid.*, 431.

³¹ *Rickard Constructions v Rickard Hails Moretti* [2004] NSWSC 1041 [42] (McDougall J); *Rio Tinto Exploration Pty Ltd v Graphite Holdings Pty Ltd* [2007] WASC 276 [18] (McLure JA).

³² J. D. Heydon, M. J. Leeming and P. G. Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (Butterworths LexisNexis, 5th ed., 2015), 295.

³³ [1980] 1 QB 629.

behave with total rectitude whilst the latter may suppress evidence, suborn witnesses and advance inflated and unsustainable claims? Authority gives no certain answer.³⁴

Despite these valid criticisms, the distinction between the assignment of a benefit under a contract before and after breach endures.

B *Recognised Exceptions to the Prohibition on the Assignment of Rights to Litigate*

In addition to the *Trendtex* principle,³⁵ recognised exceptions to the prohibition on the assignment of rights to litigate include an assignment by an insurer to an insured,³⁶ an assignment by a trustee to beneficiaries,³⁷ an assignment by a trustee in bankruptcy,³⁸ an assignment by a company liquidator,³⁹ an assignment by a company administrator⁴⁰ and an assignment of property with an incidental right to litigate.⁴¹ These exceptions share disparate origins: equity, common law, legislative direction, and commercial expediency.

The *Trendtex* principle can perhaps be characterised as a conflation of various recognised exceptions, such as the assignment by a trustee in bankruptcy, assignment by a company liquidator and the assignment of

³⁴ *Ibid.*, 671.

³⁵ Discussed in more detail *infra*.

³⁶ *King v Victoria Insurance Co Ltd* [1896] AC 250; *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, 122 (Roskill J); *Morris v Ford Motor Company Co Ltd* [1973] 1 QB 792, 801 (Lord Denning MR).

³⁷ *Empire Resolution Ltd v Mpw Insurance Brokers Ltd* [1999] EWHC J0218-4, 6 (Thornton J).

³⁸ *Seear v Lawson* (1880) 15 Ch D 426, 433 (Jessel MR); *Guy v Churchill* (1889) 40 Ch D 481, 488 (Chitty J); *Ramsay v Hartley* [1977] 2 All ER 673; 1 WLR 686, 693-694 (Megaw LJ); *Re Nguyen; Ex parte Official Trustee in Bankruptcy* (1992) 35 FCR 320; 107 ALR 424, 430 (French J); *Stone v Angus* [1994] 2 NZLR 202, 204 (Henry J); *Cotterill v Bank of Singapore (Australia) Ltd* (1995) 37 NSWLR 238, 254 (Bainton J); *Grovedwood Holdings Plc v James Capel & Co Ltd* (1995) Ch 80, 86 (Lightman J); *Re Daniel Efrat Consulting Services Pty Ltd (in liq)* (1999) 91 FCR 154 [26] (Branson J); *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386, 428 (Gummow, Hayne and Crennan JJ).

³⁹ *Re Park Gate Waggon Works Company* (1881) 17 ChD 234; *Grovedwood Holdings Plc v James Capel & Co Ltd* (1995) Ch 80, 86 (Lightman J); *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [1997] 1 VR 667, 681-682, 685 (Hansen J); *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* (1996) 21 ACSR 457, 463-464 (Hayne JA); *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380; (1996) 136 ALR 643, 651 (Drummond J); *Brookfield v Davey Products Pty Ltd* [1996] 14 ACLC 303, 307 (Branson J); *Bank of Melbourne Ltd v HPM Pty Ltd (in liq)* (1997) 26 ACSR 110, 112 (Lee J); *Re Addstone Pty Ltd (in liq)* (1997) 25 ACSR 357, 362 (Mansfield J); *Re Daniel Efrat Consulting Services Pty Ltd (in liq)* (1999) 91 FCR 154 [27] (Branson J); *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211, 214-219 (Bryson J); *Krishell Pty Ltd v Nilant* [2006] WASC 223; (2006) 32 WAR 540 [101] (Buss JA); *CGS & Co Pty Ltd v Owners Strata Plan No 5290* [2010] NSWSC 1173 [43]-[61] (Bryson AJ); *E C Dawson Investments Pty Ltd v Crystal Finance Pty Ltd (No 3)* [2013] WASC 183 [895] (Beech J); *In the matter of Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789 [344]-[345] (Black J).

⁴⁰ *Prosperity Advisers Pty Ltd v Secure Enterprises Pty Ltd T/As Strathearn Insurance Brokers Pty Ltd* [2011] NSWSC 35 [47] (Ball J); *Re Bacchus Distillery Pty Ltd (CAN 065 961 711) (admins apptd)* (2014) 98 ACSR 539 [64]-[67] (Judd J).

⁴¹ *E C Dawson Investments Pty Ltd v Crystal Finance Pty Ltd (No 3)* [2013] WASC 183 [895] (Beech J).

property with an incidental right to litigate.⁴² This is because the assignment of a cause of action on the grounds of a genuine commercial interest can be used to stave off the final plunge into bankruptcy or liquidation whereupon legislatures have authorised wholesale assignments. Moreover, the assignment of property with an incidental right to litigate has long been regarded as permitting the assignment of causes of action not only in contract but also tort.⁴³ In *Williams v Protheroe*,⁴⁴ for example, Williams took an assignment of an estate in land along with an action for arrears in rent and breach of covenants by Protheroe to repair the premises. Best CJ stated that the assignment was not champertous, stemming from “antient times, when it was necessary for the then existing state of society.”⁴⁵ A similar outcome occurred in *Dawson v Great Northern and City Railway Co*⁴⁶ in which Stirling LJ (with whom Collins MR and Mathew LJ agreed) upheld the assignment to a land purchaser of a statutory claim of compensation against a railway company: “[a]n assignment of a mere right of litigation is bad... but an assignment of property is valid, even although that property may be incapable of being recovered without litigation.”⁴⁷ More recently, in *Re Kenneth Wright Distributors Pty Ltd (in liq); W J Vines Pty Ltd v Hall*,⁴⁸ an assignment of a right to sue a bailee for damages caused by the bailor’s negligence was upheld by Kaye J on the basis that the assignment was incidental to the assignment of the chattels themselves.⁴⁹

It is also arguable that the *Trendtex* principle draws support from the unrecognised exception of the assignment of a debt. This is because the assignability of a debt can oftentimes be justified on the grounds of a genuine

⁴² See subtle discussion in *Trendtex Trading Corporation v Credit Suisse* [1982] AC 676, 703 (Lord Roskill).

⁴³ *Williams v Protheroe* (1829) 2 Moo & P 779, 787 (Best CJ); *Dickinson v Burrell* (1865-66) LR 1 Eq 337, 342 (Romilly MR); *Re Kenneth Wright Distributors Pty Ltd (in liq); W J Vines Pty Ltd v Hall* [1973] VR 161, 166-167 (Kaye J); *First City Corporation Ltd v Downsvieview Nominees Ltd* [1989] 3 NZLR 710, 754 (Gault J); *Camdex International Ltd v Bank of Zambia* [1998] 1 QB 22, 34 (Hobhouse LJ), 40 (Peter Gibson LJ); *Krishell Pty Ltd v Nilant* [2006] WASC 223; (2006) 32 WAR 540 [77] (Wheeler JA); *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386 [258] (Kirby J).

⁴⁴ (1829) 2 Moo & P 779.

⁴⁵ *Ibid.*, 787.

⁴⁶ [1905] 1 KB 260.

⁴⁷ *Ibid.*, 271.

⁴⁸ [1973] VR 161.

⁴⁹ *Ibid.*, 166-167; See also *Sartori v BM2008 Pty Ltd (No 2)* [2010] FCA 1160 [57] (McKerracher J); Daine Skapinker, “Equitable Assignments”, in Patrick Parkinson (ed.), *Principles of Equity* (Lawbook Co., 2nd ed., 2003), 538, footnote 201.

commercial interest, as demonstrated by *Re Daley; Ex Parte National Australia Bank Ltd*.⁵⁰

It thus emerges that the *Trendtex* principle – which is predicated upon a genuine commercial interest – did not arise *in vacuo*. Rather, it represents a conflation of other recognised and unrecognised exceptions to the prohibition on the assignment of rights to litigate, tailored to modern commercial realities.

IV THE *TRENDTEX* PRINCIPLE

Before moving to consider the controversial aspects of the *Trendtex* principle in Australian law, it is first useful to outline the principle's origins.

A *Origins*

In *Trendtex Trading Corporation v Credit Suisse*⁵¹ a Swiss Corporation, Trendtex, had contracted to sell 240,000 tons of cement to an English company for shipment to Nigeria. The deal was to be financed by a letter of credit issued by the Central Bank of Nigeria (CBN), which subsequently reneged upon the deal. Trendtex claimed damages of US \$14,000,000 in England against the CBN. Credit Suisse was a creditor of Trendtex and offered to guarantee the legal costs and fees incurred by Trendtex's English solicitors in the action against the CBN. Trendtex's claim failed at first instance, with the CBN pleading sovereign immunity, but this was successfully appealed to the Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria*.⁵² While a further appeal to the House of Lords was pending, Credit Suisse pressed Trendtex for an assignment of the cause of action against the CBN under the threat of bankruptcy. Trendtex agreed. The assignment stated that an offer of US \$800,000 had been received from an anonymous third party to purchase Trendtex's cause of action against the CBN. The cause of action was eventually assigned to the anonymous third party for US \$1,100,000 and was settled by the payment of US \$8,000,000. Trendtex subsequently decided to take action

⁵⁰ (1992) 8 ACSR 395; 37 FCR 390 (facts discussed in the following section).

⁵¹ [1982] AC 679; [1981] 3 All ER 520. It might be noted that the decision borrowed somewhat from the language in *Martell v Consett Iron Co Ltd* [1955] Ch 363, where Danckwerts J followed a "genuine interest in the litigation" test when allowing maintenance (but not an assignment) by an association of an action brought by owners and occupiers of fisheries for the prevention of pollution to rivers. On *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679; [1981] 3 All ER 520 generally see Reichel, *supra* 166-179.

⁵² [1977] 1 QB 529; [1976] 3 All ER 437; [1976] 1 WLR 868.

against Credit Suisse, arguing that the assignment of the cause of action was invalid as it savoured of maintenance. On the application of Credit Suisse, Robert Goff J, in the exercise of the Court's inherent jurisdiction, ordered that the action be stayed with reference to the assignment's exclusive jurisdiction clause which required disputes between Trendtex and Credit Suisse to be decided by a Swiss court. Trendtex appealed to the Court of Appeal which decided that Credit Suisse had a genuine and legitimate interest in maintaining Trendtex's cause of action against the CBN and this was sufficient to allow it to take an assignment of the whole cause of action.⁵³ Both Lord Denning MR and Oliver LJ (with whom Bridge LJ agreed) failed to discuss the effect of the introduction of the anonymous third party to the agreement due to the exclusive jurisdiction clause. On appeal to the House of Lords, it was unanimously decided that although the assignment of the cause of action to Credit Suisse did not savour of maintenance, the subsequent assignment by Credit Suisse to the anonymous third party did.⁵⁴ This was because there was "no genuine commercial interest"⁵⁵ in the assignment. It was further held that the exclusive jurisdiction clause required the dispute should be decided in a Swiss court with reference to the assignment's invalidity under English law.⁵⁶ The House of Lords thus held that the prohibition on maintenance and champerty is suspended in circumstances where an assignee can demonstrate a "genuine commercial interest" in the assignment. The House thereby ushered in a new ground upon which a right to litigate could be assigned.⁵⁷

B *Initial Australian Applications*

The *Trendtex* principle first fell for application in the Australian context in *Re Timothy's Pty Ltd*.⁵⁸ In that case Timothy's Pty Ltd (TPL) had taken proceedings against Affiliated Holdings Ltd (AHL) regarding a breach of lease.

⁵³ *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629, 658 (Lord Denning MR), 675 (Oliver LJ (with whom Bridge LJ agreed)).

⁵⁴ *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679; [1981] 3 All ER 520, AC 694 (Lord Wilberforce with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed), 703-704 (Lord Roskill with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed).

⁵⁵ *Ibid.*, AC 702 (Lord Roskill (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)).

⁵⁶ *Ibid.*, AC 695-697 (Lord Wilberforce (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)), 704-705 (Lord Roskill (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)).

⁵⁷ The *Trendtex* principle was subsequently applied by the Court of Appeal in *Brownston Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499 (discussed *infra* with respect to the assignment of causes of action in tort).

⁵⁸ [1981] 2 NSWLR 706.

TPL was indebted to Bronze Lamp Pty Ltd (BLPL) to the amount of \$25,000 and assigned its cause of action against AHL to BLPL, in consideration that BLPL would release TPL of its indebtedness. Needham J upheld the assignment's validity on the grounds of a genuine commercial interest:

[W]ithout the assignment of the cause of action, [BLPL] would not be able to obtain payment of its debt. I think, in the light of the decisions of the Court of Appeal and of the House of Lords in the *Trendtex* case, that [BLPL] had a sufficient commercial interest in the proceedings to entitle it to accept an assignment of them.⁵⁹

The *Trendtex* principle was reapplied in Australia in *Re Daley; Ex Parte National Australia Bank Ltd*.⁶⁰ The facts were that the assignee of a debt, Daley, was the sole shareholder and guarantor of the assignor company, Opal Hotel Group Pty Ltd (OHGPL) which owned all the shares in Dewmask Pty Ltd (DPL). The two companies were formed with a view to purchasing the Opal Cove Resort at Coffs Harbour and another in Surfers Paradise. Whilst Daley was overseas, the National Australia Bank (NAB) had honoured cheques on the DPL account in the sum of \$138,199.70 and on the OHGPL account in the sum of \$45,811.28. The cheques were signed by Raffin, who Daley alleged had been added to the NAB's signing mandate without his knowledge or approval or the proper authority of the companies. Whilst the matter was being investigated, and to allow OHGPL and DPL to continue trading, the NAB's Crow's Nest bank manager provided a \$50,000 overdraft to the companies on the condition that Daley was guarantor. OHGPL subsequently assigned its cause of action to recover the money owing from the disputed cheques to Daley. Heerey J noted that, "[a]pplying [the *Trendtex* principle], it can hardly be denied that Mr Daley has a genuine commercial interest in the enforcement of the claims by [OHGPL] and [DPL] against the Bank. He is the sole beneficial shareholder of the companies and has also guaranteed their liability of some \$48,000 to the Bank."⁶¹ His Honour continued that in any event the relationship between the OHGPL, DPL and the NAB was one of a debt owed, and that debts are regarded as property and are capable of assignment: "[t]he rule prohibiting assignments of bare rights of action does not extend to the assignments of debts".⁶²

⁵⁹ *Ibid.*, 829.

⁶⁰ (1992) 8 ACSR 395; 37 FCR 390.

⁶¹ *Ibid.*, ACSR 400.

⁶² *Ibid.*, ACSR 400. On this point see also *Rickard Constructions and Anor v Rickard Hails Moretti and Ors* [2004] NSWSC 1041 [42] (McDougall J): "[a] debt arising under a contract is regarded as property, and is assignable; and

C *The Trendtex Principle in the High Court*

The *Trendtex* principle has been discussed by two High Court decisions: *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*⁶³ and *Equuscorp Pty Ltd v Haxton*.⁶⁴ In *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*,⁶⁵ the issue was primarily one of litigation funding, as opposed to the assignment of a cause of action. The facts were that a tobacco retailer began a representative action to recover amounts paid to tobacco wholesalers for the purposes of a licence fee pursuant to the *Business Franchise Licenses (Tobacco Act) 1987* (NSW) and equivalent legislation in other states and the Australian Capital Territory. This was made possible by *Ha v New South Wales*⁶⁶ in which the High Court decided that the licence fees were invalid excise duties under section 90 of the Australian Constitution. A litigation funder, Firmstones Pty Ltd, had financed the representative action and was entitled to one-third of any money received by the tobacco retailers, as well as all costs awarded from the tobacco wholesalers. The High Court indicated that the funding agreement was not contrary to public policy, thereby providing a green light to litigation funding. In the course of its decision, however, the High Court indicated obtuse support for the *Trendtex* principle, but stopped short of explicitly approving it.⁶⁷ This is perhaps unsurprising as the case did not concern the assignment of a cause of action. The High Court's obtuse support for the *Trendtex* principle spawned divergent judicial divinations in lower courts. In cases such as *TS and B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3)*⁶⁸ and *Toisch v Tasman Investment Management Ltd*⁶⁹ a more liberal interpretation was made,

this is so even if the debt is overdue for payment: *Comfort v Betts* [1891] 1 QB 737; *Fitzroy v Cave* [1905] 2 KB 364; *County Hotel and Wine Co Ltd v London and North Western Railway Co* [1918] 2 KB 251; *Re Daley*; *Ex parte National Australia Bank Ltd* (1992) 37 FCR 390.”

⁶³ (2006) 229 CLR 386, 431 (Gummow, Hayne and Crennan JJ), 484 (Callinan and Heydon JJ).

⁶⁴ (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).

⁶⁵ (2006) 229 CLR 386, 431 (Gummow, Hayne and Crennan JJ), 484 (Callinan and Heydon JJ).

⁶⁶ (1997) 189 CLR 465.

⁶⁷ This is especially the case with regard to the comments of Gummow, Hayne and Crennan JJ at 431 which only mentioned the *Trendtex* principle in passing. It is arguable that the comments of Callinan and Heydon JJ at 484 were more directed, and perhaps can be accurately framed as *obiter* in favour of the *Trendtex* principle. Callinan and Heydon JJ at 484 remarked: “[b]ut the cases do point to some clear criteria. As between the funder and the party funded, there is “trafficking” in causes of action where they are assigned by the latter to the former in circumstances where there is neither any transfer of any property interest to which the causes of action are ancillary nor any genuine commercial interest which the funder has in taking the assignment of the causes of action and enforcing them for the funder’s own benefit. Although the term “genuine commercial interest” calls for further definition, in this sense to traffic in litigation is to attempt an invalid assignment of a bare cause of action, or to enter a champertous agreement [See *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 703 per Lord Roskill; *Kaukomarkkinat OY v Elbe Transport-Union GmbH (The Kelo)* [1985] 2 Lloyd’s Rep 85 at 89 per Staughton J.]”

⁶⁸ (2007) 158 FCR 444; [2007] FCA 151 [81] (Finkelstein J).

⁶⁹ [2008] FCA 377 [33] (Gyles J).

suggesting *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*⁷⁰ approved the *Trendtex* principle, whilst other cases, such as *Salfinger v Niugini Mining (Australia) Pty Ltd (No 3)*,⁷¹ indicated to the contrary.

The confusion was resolved with the High Court's decision in *Equuscorp Pty Ltd v Haxton*.⁷² In that case Rural Finance Pty Ltd (RFPL), a lender to investors in a blueberry farm, assigned to Equuscorp Pty Ltd (EPL) the rights that it had against the investors. These rights included those under allegedly invalid loan agreements and restitutionary claims. French CJ, Crennan and Kiefel JJ held that the assignments of the restitutionary claims to EPL were valid as they were assigned "along with contractual rights, albeit their existence is contestable" and that EPL had a "legitimate commercial interest in acquiring the restitutionary rights should the contract be found to be unenforceable."⁷³ Gummow and Bell JJ similarly held that EPL held a genuine commercial interest evidenced by the charge which it held over the assets of RFPL to secure RFPL's indebtedness.⁷⁴ Heydon J made analogous remarks.⁷⁵

D *The Genuine Commercial Interest Criterion*

The *Trendtex* principle revolves around the genuine commercial interest criterion. This prompts the inevitable question: what is a genuine commercial interest? To begin with, a mere personal interest will not suffice.⁷⁶ This was aptly demonstrated in *Monk v ANZ Banking Group Ltd*⁷⁷ where the assignee, Monk, had attempted to take the assignment of a cause of action against the ANZ Bank so that he would have something to set off against a judgment debt recovered by the ANZ Bank against him. It was held by Cohen J that Monk did not have a genuine commercial interest in the assignment: "[t]he using of the debt as a set-off against the judgment debt is merely an example of obtaining some personal benefit ... [W]here the *Trendtex* test has been applied, the commercial interest has gone beyond a mere personal interest in profiting from the outcome in the proceedings...."⁷⁸ The assignment was thus found to

⁷⁰ (2006) 229 CLR 386, 431 (Gummow, Hayne and Crennan JJ), 484 (Callinan and Heydon JJ).

⁷¹ [2007] FCA 1532 [117] (Heerey J).

⁷² (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).

⁷³ (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ).

⁷⁴ *Ibid.*, 533 (Gummow and Bell JJ).

⁷⁵ *Ibid.*, 558 (Heydon J).

⁷⁶ *ICM Agriculture Pty Ltd v Young* [2009] FCA 109 [123] (Lindgren J).

⁷⁷ (1994) 34 NSWLR 148; BC9405181.

⁷⁸ *Ibid.*, BC9405181, 8.

be ineffective. Instructively, Cohen J rendered the following empirical categorisation of situations where the genuine commercial interest criterion *had* been satisfied:

[T]he assignee was already a substantial creditor of the assignor with a right to enforce the debt (*Trendtex, Re Timothy's*) or where the assignee was the sole shareholder who was guarantor of the overdraft of the assignor (*Re Daley*) or where the assignee was a debenture holder with an interest in protecting the value of his security (*First City Corporation*).⁷⁹

Cohen J also attempted to make a more abstract distillation of principle suggesting that the genuine commercial interest criterion required “an interest by the assignee in the assignor or its business affairs or activities which the assignment may in some way protect.”⁸⁰ This alludes to the need for the interest to be commercial in nature, or in other words, related to a business activity which will supersede any personal interest attaching to the assignee.

In *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Limited*⁸¹ Lindgren J was confronted with the assignment of causes of action by investors to the National Mutual Group of companies against Citibank Saving Ltd and individual agents arising from a negative gearing investment scheme. His Honour defined a genuine commercial interest as, “an interest which exists already or by reason of other matters and which receives ancillary support from the assignment.”⁸² In a negative sense, his Honour held that a genuine commercial interest “is not a nebulous notion of the general commercial advantage of the assignee but something more specific and limited.”⁸³

In *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr*⁸⁴ the New South Wales Court of Appeal was required to decide whether a property developer, Austcorp Group Ltd (AGL), held a genuine commercial interest in an assignment from a lessee, Tim Barr Pty Ltd (TBPL), which had an option to purchase the demised land. The land’s owner, Narui Gold Coast Pty Ltd (NGCPL), had purported to terminate the lease and TBPL sought a declaration that the termination was invalid so that it could exercise the option to purchase

⁷⁹ Ibid., BC9405181, 8.

⁸⁰ Ibid., BC9405181, 8.

⁸¹ (1995) 132 ALR 514.

⁸² Ibid., 540.

⁸³ Ibid., 540.

⁸⁴ [2005] NSWCA 240.

The same issue fell for consideration in *Dover v Lewkovitz*.⁹⁰ In that case Dover was the lessee of premises in Coogee and vacated. The lessor, Tolicar Pty Ltd (TPL), took possession of the premises and assigned its rights under the lease with Dover to Lewkovitz by way of deed for \$1. Lewkovitz subsequently commenced proceedings against Dover in the Retail Leases Division of the Administrative Decisions Tribunal claiming outstanding rent, outgoings and liquidated damages under the lease. Importantly, the ordinary shares in TPL were owned by Solrose Investments Pty Ltd (SIPL), which in turn were owned by Barak Pty Ltd (BPL) and held under a discretionary trust by Lewkovitz Nominees Pty Ltd (LNPL). Lewkovitz, his wife and sister were the directors of TPL, SIPL and BPL. The principal beneficiaries of LNPL were Lewkovitz and his sister. Macfarlan JA upheld the assignment from TPL to Lewkovitz with reference to the *Trendtex* principle. On the issue of whether an assignee required a pre-existing enforceable right against the assignor to take the advantage of the *Trendtex* principle, his Honour stated:

The prima facie prohibition against the assignment of bare rights of action is founded upon a public policy of precluding trafficking in litigation. *Trendtex* recognised that that policy would not be infringed if the assignee had a pre-existing genuine commercial interest in the right of action sought to be assigned. In my view this is so whether or not that interest is constituted, or accompanied, by a pre-existing enforceable right of the assignee against the assignor. In neither type of case is the assignee acting as “an officious intermeddler”.⁹¹

This import of these comments was reaffirmed in *WorkCover Queensland v AMACA Pty Ltd*⁹² and *EWC Payments Pty Ltd v Commonwealth Bank of Australia*.⁹³

F *Whether the Trendtex Principle Extends to Causes of Action in Tort*

It will be recalled that the *Trendtex* principle was formulated in response to a factual matrix involving the assignment of a cause of action in contract – not tort. This is significant, as earlier authorities such as *Prosser v*

⁹⁰ [2013] NSWCA 452.

⁹¹ *Ibid.*, [23].

⁹² [2012] QCA 240 [66]-[67] (Gotterson JA (with whom Martin J agreed)).

⁹³ [2014] VSC 207 [55], [74] (Elliot J). See also *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 4 [71] (Derham AsJ).

Edmonds,⁹⁴ *Dawson v Great Northern & City Railway Co*,⁹⁵ *Defries v Milne*⁹⁶ and *Poulton v The Commonwealth*⁹⁷ indicate that a cause of action in tort is incapable of assignment. Decisions subsequent to *Trendtex Trading Corporation v Credit Suisse*⁹⁸ have investigated whether this principle should be qualified where the assignment of the cause of action in tort involves a genuine commercial interest.

In *Monk v ANZ Banking Group Ltd*⁹⁹ Cohen J indicated in the affirmative, noting that there was nothing to be gained by drawing a distinction between a cause of action in tort or in contract which involved a genuine commercial interest.¹⁰⁰ His Honour also noted that the *Trendtex* principle was shaped primarily with reference to the “genuine commercial interest” criterion, rather than the assignment of a cause of action in contract. Accordingly, so long as a cause of action in tort satisfied the genuine commercial interest criterion, it would be assignable.¹⁰¹

In *South Australian Management Corporation v Sheahan*¹⁰² Debelle J similarly decided that the *Trendtex* principle extended to causes of action in tort, so long as these were not imbued with a personal nature. The case was brought by the former State Bank of South Australia which was attempting to assume control of causes of action in contract and tort which were instituted by receivers appointed by it over the third defendant, Health and Life Care (HLC), with respect to advice HLC obtained from Price Waterhouse concerning the acquisition of a group of companies. Debelle J noted:

The decision in *Trendtex* has the effect of qualifying substantially the principle that it is not possible to assign a bare right to sue for unliquidated damages for breach of contract. There seems to be no reason in logic or as a matter of public policy, why it should not also be possible to assign the bare right to sue for unliquidated damages in tort where the cause of action is not for a personal tort such as damages for personal injury, defamation, or false imprisonment: cf Lord Denning MR in *Trendtex* [1980] 1 QB at 656.¹⁰³

⁹⁴ (1835) 1 Y & C Ex 481.

⁹⁵ (1905) 1 KB 260, 270-271 (Stirling LJ (with whom Collins MR and Mathew LJ agreed)).

⁹⁶ (1913) 1 Ch 98, 109 (Farwell LJ), 112 (Hamilton LJ (Cozens-Hardy MR agreeing)).

⁹⁷ (1953) 89 CLR 540, 602 (Williams, Webb and Kitto JJ).

⁹⁸ [1982] AC 679; [1981] 3 All ER 520.

⁹⁹ (1994) 34 NSWLR 148; BC9405181.

¹⁰⁰ BC9405181 at 7.

¹⁰¹ These views were endorsed by Olsson J in *Singleton v Freehill Hollingdale & Page* [2000] SASC 278 [30]-[32].

¹⁰² (1995) 16 ACSR 45.

¹⁰³ *Ibid.*, 57-58.

Debelle J soon thereafter noted that *Poulton v Commonwealth*¹⁰⁴ did not prevent the assignment of causes of action in tort, as the decision did not involve consideration of a genuine commercial interest.

In *Beatty v Brashs Pty Ltd*¹⁰⁵ Smith J also endorsed the extension of the *Trendtex* principle to a cause of action in tort provided it was not of a personal nature. The case was initiated by deed administrators under a deed of company arrangement seeking orders that the deed “operated in equity to assign absolutely to the Deed Administrators... the whole of the right title and interest of Brashs in any chose in action or cause of action being the claims for debts, damages or other relief arising out of “the Proceedings”...” Smith J noted that *Poulton v Commonwealth*¹⁰⁶ was “decided before modern developments in the law of negligence which is now commonly relied upon in commercial disputes.”¹⁰⁷ In light of these observations, his Honour concluded that there was “no justification for any distinction between rights of action in tort and contract.”¹⁰⁸

In *Vangale Pty Ltd (in liq) v Kumagai Gumi Co Ltd*¹⁰⁹ Mullin J was confronted with the question of whether upon crystallisation of a floating charge, the chargee was entitled to pursue in the chargor’s name rights of action in contract, tort and a *quantum meruit* claim. Her Honour, under the heading “assignability of claim for damages in negligence”, stated that older authorities indicating that a right to sue for damages in tort were incapable of assignment were outdated in light of the *Trendtex* principle.¹¹⁰ Mullin J continued by endorsing Smith J’s comments in *Beatty v Brashs Pty Ltd*¹¹¹ and explicitly noting that the modern law of negligence is now routinely applied in commercial disputes and is thus no longer mostly personal in nature.¹¹² Mullin J consequently approved the assignment of a cause of action in tort when there was a genuine commercial interest, subject to the *proviso* that the tort not be of a personal nature.¹¹³

¹⁰⁴ (1953) 89 CLR 540.

¹⁰⁵ [1998] 2 VR 201; BC9507670.

¹⁰⁶ (1953) 89 CLR 540.

¹⁰⁷ [1998] 2 VR 201; BC9507670.

¹⁰⁸ *Ibid.*

¹⁰⁹ [2002] QSC 137.

¹¹⁰ *Ibid.*, [68]-[69].

¹¹¹ [1998] 2 VR 210, 215.

¹¹² [2002] QSC 137 [70].

¹¹³ This reasoning was received favourably by Selway J in *Deolitte Touche Tohmatsu v Cridlands Pty Ltd* (2003) 204 ALR 281 [101].

Two further supreme court cases support the extension of the *Trendtex* principle to causes of action in tort: *Rickard Constructions v Rickard Hails Moretti*¹¹⁴ and *Whyked Pty Limited v Yahoo!7 Pty Limited*.¹¹⁵ In both cases McDougal J was the presiding judge and both opinions on this point are, *mutatis mutandis*, identical. In *Whyked Pty Limited v Yahoo!7 Pty Limited*,¹¹⁶ a case which involved the assignment of an online freighting business, his Honour acknowledged the importance of *Poulton v Commonwealth*,¹¹⁷ but notwithstanding admonitions by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*¹¹⁸ that an intermediate court of appeal should not depart from the serious *dicta* of a majority of the High Court, felt that it was permissible to extend the *Trendtex* principle to the assignment of causes of action in tort.¹¹⁹

The interaction of the *Trendtex* principle and the assignment of causes of action in tort was touched upon by the High Court in *Equuscorp Pty Ltd v Haxton*.¹²⁰ There three judges arguably indicated it was correct to distinguish the result in *Poulton v Commonwealth*,¹²¹ which affirmed the then general rule that causes of action in tort could not be assigned, in light of *Trendtex*. Gummow and Bell JJ noted that:

[T]he Assignment was not open to the objection that it dealt with no more than “bare” rights of action and so attracted the statements of principle in *Poulton v Commonwealth* [(1953) 89 CLR 540 at 571, 602]. It has long been held that an exception exists where the assignee has an interest in the suit [*Ellis v Torrington* [1920] 1 KB 399 at 406], and a genuine and substantial commercial interest is now regarded as sufficient [*Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 703; *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 188 FLR 278 at 280-285 [42]-[61]].¹²²

Heydon J similarly found:

There is a different point which favours the appellant. *Poulton’s case* predates *Trendtex Trading Corporation v Credit Suisse*.... In *Poulton’s case* no argument

¹¹⁴ [2004] NSWSC 1041

¹¹⁵ [2008] NSWSC 477.

¹¹⁶ [2008] NSWSC 477.

¹¹⁷ (1953) 89 CLR 540.

¹¹⁸ (2007) 81 ALJR 1107 [135].

¹¹⁹ *Whyked Pty Limited v Yahoo!7 Pty Limited* [2008] NSWSC 477 [136]. His Honour stated, “I acknowledge that the point made by their Honours applies a fortiori to judges of first instance. Nonetheless, I think, the developments that I traced in *Rickard Constructions* at [42] and following justify what, otherwise, must be an unacceptable course.”

¹²⁰ (2012) 246 CLR 498.

¹²¹ (1953) 89 CLR 540.

¹²² (2012) 246 CLR 498 at 533.

was presented that there was any “genuine commercial interest” associated with the supposed assignment. There is a “genuine commercial interest” here.... Hence what was said in *Poulton’s case* is distinguishable.¹²³

On a strict reading of *Equuscorp Pty Ltd v Haxton*,¹²⁴ it could be said that since only three of the six judges indicated support for the extension of the *Trendtex* principle to the assignment of a cause of action in tort, a majority on this point was lacking, and the previous authority of *Poulton v Commonwealth*¹²⁵ endured.

Interestingly, this more restrictive view was taken by McCallum J in *Kovarfi v BMT & Associates Pty Ltd*.¹²⁶ In that case a building quantity surveyor, BMT & Associates Pty Ltd (BMTAPL), was employed by the Commonwealth Bank to oversee the work of a mortgagor building development company, Kata-Lyn Pty Ltd (KLPL), on a commercial development in Queenscliff. As a result of BMTAPL over-stating the value of work undertaken by builders, KLPL had its loan facility with the Commonwealth Bank unexpectedly cut short. KLPL subsequently entered into a new building contract with Atilla Kovarfi to complete the development for a fixed price of \$2,120,349 which exceeded the loan facility’s undrawn balance. Soon thereafter the Commonwealth Bank sold the development as mortgagee in possession. KLPL meanwhile had assigned its professional negligence claim against BMTAPL to Curl Curl Creative Co Pty Ltd (CCCCPL), which in turn assigned its rights to Kovarfi’s wife. Although the professional negligence claim was statute barred under section 14 of the *Limitation Act 1969* (NSW), McCallum J nonetheless discussed the effect of *Equuscorp Pty Ltd v Haxton*,¹²⁷ drawing a distinction between the assignment of a cause of action in tort (*Poulton v Commonwealth*)¹²⁸ and contract (*Trendtex Trading Corporation v Credit Suisse*).¹²⁹ Her Honour explicitly observed that:

Equuscorp was not specifically concerned with the question that arises in the present case and does not resolve it. The joint judgment of French CJ, Crennan and Kiefel JJ did not analyse the relevant principles in terms that shed

¹²³ Ibid., CLR 588.

¹²⁴ (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).

¹²⁵ (1953) 89 CLR 540.

¹²⁶ [2012] NSWSC 1101.

¹²⁷ (2012) 246 CLR 498.

¹²⁸ (1953) 89 CLR 540.

¹²⁹ [1982] AC 679; [1981] 3 All ER 520.

any light on the present question [concerning the assignment of a cause of action in tort].¹³⁰

In the final analysis, however, it is submitted that the view in *Kovarfi v BMT & Associates Pty Ltd*¹³¹ is an excessively cautious one, as *Equuscorp Pty Ltd v Haxton*¹³² clearly indicated support for the *Trendtex* principle, thereby suggesting that *Poulton v Commonwealth*,¹³³ which antedated the *Trendtex* principle, must in contemporary times be subject to qualification, namely, that where the genuine commercial interest criterion is satisfied the assignment of a cause of action in tort can be upheld.

This view is supported by the recent New South Wales Court of Appeal decision in *Hazard Systems Pty Ltd v Car-Tech Services Pty Ltd (in liq)*¹³⁴ where the assignment of a cause of action in tort (and also in contract and under statute) from an insured to an insurer regarding allegedly defective equipment was held to satisfy the genuine commercial interest criterion on the grounds “that it supported and enlarged the existing right acquired by way of subrogation.”¹³⁵

G *Assignment of Causes of Action in Tort in Canada, New Zealand and the UK*

Jurisprudence from other common law jurisdictions supports the extension of the *Trendtex* principle to the assignment of causes of action in tort. In *Fredrickson v Insurance Corporation of British Columbia*¹³⁶ McLaughlin JA in the British Columbia Court of Appeal upheld the assignment of Frederickson’s cause of action in tort against his insurer, Insurance Corporation of British Columbia (ICBC), for failing to properly defend him in an action brought against him by Neilsen arising from a motor vehicle collision. ICBC settled the claim for \$1,200,000, but Fredrickson was only covered for \$500,000. Fredrickson, who had no assets of any significance, assigned the cause of action against ICBC to Neilsen. After discussion of the *Trendtex*

¹³⁰ [2012] NSWSC 1101 [53].

¹³¹ [2012] NSWSC 1101.

¹³² (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).

¹³³ (1953) 89 CLR 540.

¹³⁴ [2013] NSWSC 314.

¹³⁵ *Ibid.*, [15] (Basten JA (with whom Meagher and Barrett JJA agreed)); See also *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 4 [68] (Derham AsJ).

¹³⁶ (1986), 28 DLR (4th) 414 (BC CA).

principle, McLaughlin JA stated that “the assignee [Nielsen] had a legitimate pre-existing financial interest in the cause of action in tort assigned to her, and that consequently the assignment is valid.” The result was upheld by the Canadian Supreme Court in *Insurance Corporation of British Columbia v Fredrickson*.¹³⁷

In *Continental Bank of Canada v Arthur Andersen & Co*¹³⁸ Montgomery J in the Ontario High Court of Justice also upheld the assignability of a cause of action in tort. The facts were that the Continental Bank of Canada (CBC) had commenced proceedings against various companies for breach of contract and negligence. CBC was subsequently purchased by Lloyds Bank under a sale agreement which included all of CBC’s “business, undertaking, property and assets, real and personal, moveable and immoveable, tangible or intangible, of whatsoever nature and kind.” The companies subject to proceedings contended that CBC intended to convey to Lloyds Bank bare causes of action which savoured of maintenance. In the course of delivering his opinion, Montgomery J indicated that causes of action in contract and tort were assignable:

- (a) if the assignee has a legitimate property or commercial interest in enforcement of the claim: ... (b) if, looking at the totality of the transaction, the assignment is of a property right or interest and the cause of action was ancillary to that right or interest: ... [and] (c) even where the assignee has no ancillary property interest, where the assignment is a bona fide business arrangement for legitimate business reasons...¹³⁹

His Honour thus stressed the need for a business arrangement or interest to be involved before the assignment of a cause of action in tort could occur.

An analogous conclusion was reached by Gault J in the New Zealand High Court in *First City Corporation Ltd v Downsvie Nominees Ltd*.¹⁴⁰ In that case the assignment from a parent company, First City Corporation Ltd, to its subsidiary, First City Finance Ltd, of causes of action in tort were upheld because they were ancillary to the assignment of property, namely, a debenture. However Gault J expressly linked the assignment with the *Trendtex* principle, stating that the assignee possessed a genuine commercial interest:

¹³⁷ [1988] 1 SCR 1089 [1] (Dickson CJC (with whom Beetz, McIntyre, Lamer and Wilson JJ agreed)); See also *Gentra Canada Investments Inc v Lipson* (2011) 33 DLR (4th) 666, 678.

¹³⁸ (1987) 39 DLR (4th) 261.

¹³⁹ *Ibid.*, 266.

¹⁴⁰ [1989] 3 NZLR 710.

In light of the modern approach to maintenance in general, and paying particular regard to the approach of the House of Lords in *Trendtex*, I conclude that the assignment from First City to First City Finance of the right of action in tort falls within the category of valid transactions. [...] First City Finance had a genuine commercial interest in the actions, for the reason that as the new debenture holder, it clearly had an interest in protecting the value of the security. Added to this fact is the relationship between First City and First City Finance (parent and subsidiary), and the nature of the restructuring exercise which, to my mind, strengthens the commercial interest involved.¹⁴¹

Support for the assignment of a cause of action in tort was also provided by Lloyd LJ in the Court of Appeal in *Brownston Ltd v Edward Moore Inbucon Ltd*.¹⁴² In that case ED & F Man Ltd (EDFML) were commodity brokers, and hired EMR Management Services Ltd (EMRMSL) to consult on the installation of a suitable computer system. As a result of the consultancy, EDFML entered into a contract with Cossor Electronics Ltd (CEL) for the supply, installation and maintenance of a computer system which ultimately failed to work as intended. As part of a settlement with EDFML, it was held that EMRMSL held a genuine commercial interest in taking the assignment of EDFML's rights against CEL. Lloyd LJ stated that, "[a] bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest."¹⁴³ These comments were interpreted by Smith J in *Beatty v Brashes Pty Ltd*¹⁴⁴ to mean that his Lordship had "expressly treated [the *Trendtex*] principle as applying to assignments of rights of action in both tort and contract."¹⁴⁵

A further case to approve the assignment of a cause of action in tort is *24 Seven Utility Services Ltd v Rosekey Ltd (t/a Atwasl Builders)*.¹⁴⁶ The facts were that London Power Networks (LPN) supplied electricity in Kent, and 24 Seven Utility Services Ltd (24SUSL) entered into an agreement with the London Electricity Group (LEG) to maintain and repair LPN's underground cables. An electrical cable at Dartmouth, Kent, was subsequently damaged by a pile driving accident on a building site which 24SUSL repaired at its own cost. LPN

¹⁴¹ *Ibid.*, 754.

¹⁴² [1985] 3 All ER 499.

¹⁴³ *Ibid.*, 509 (with whom Sir John Donaldson MR agreed).

¹⁴⁴ [1998] 2 VR 210.

¹⁴⁵ *Ibid.*,

¹⁴⁶ [2003] EWHC 3415 (QB).

subsequently assigned to 24SUSL the right to claim damages for negligence from the building site third party. Leighton Williams QC upheld the assignment:

[24SUSL] has established to my satisfaction that, in the words of Lord Roskill, it has “a genuine commercial interest in taking the assignment and in enforcing it for his own benefit”. I can see no reason in the present case why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.¹⁴⁷

Leighton Williams QC qualified these comments, however, by indicating that the *Trendtex* principle would not extend to the assignment of personal torts.¹⁴⁸

Canadian, New Zealand and UK case law therefore supports the extension of the *Trendtex* principle to causes of action in tort. This adds further credence to the numerous Australian cases which have expressed the same position post-*Trendtex*.

H *Assignment of Causes of Action in Tort in Canada, New Zealand and the UK*

It has traditionally been held that personal torts are not assignable.¹⁴⁹ In *WorkCover Queensland v AMACA Pty Ltd*,¹⁵⁰ however, the Queensland Court of Appeal upheld the assignment of a personal injury claim from a worker affected by asbestos induced mesothelioma to WorkCover Queensland (WCQ). McMurdo P stated that WCQ, which had previously paid out statutory compensation to the worker, held a “legitimate or genuine commercial interest, akin to an insurer’s right of subrogation” in taking the assignment.¹⁵¹ Gotterson JA (with whom Martin J agreed) similarly analogised with an insurer’s right of subrogation¹⁵² and further observed that:

¹⁴⁷ Ibid., [31].

¹⁴⁸ Ibid., [25].

¹⁴⁹ *Glegg v Bromley* [1912] 3 KB 474, 488 (Fletcher Moulton LJ); *Trendtex Trading Corporation v Credit Suisse* [1980] 1 QB 629, 656 (Lord Denning MR); *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 702 (Lord Roskill (with whom Lord Edmund-Davies, Lord Fraser of Tullybelton and Lord Keith of Kinkel agreed)); *Union Gas Co. of Canada v Brown* (1968) 67 DLR (2d) 44 (Ont. HC) 51 (Moorehouse J); *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710, 754 (Gault J); *South Australian Management Corporation v Sheahan* (1995) 16 ACSR 45, 57-58 (Debelle J); *Beatty v Brashes Pty Ltd* [1998] 2 VR 201; BC9507670 (Smith J); *Deolitte Touche Tohmatsu v Cridlands Pty Ltd* (2003) 204 ALR 281 [101] (Selway J); *24 Seven Utility Services Ltd v Rosekey Ltd (t/a Atwasl Builders)* [2003] EWHC 3415 (QB) [25] (Leighton Williams QC).

¹⁵⁰ [2012] QCA 240.

¹⁵¹ Ibid., [16].

¹⁵² Ibid., [66].

Whilst it is true that *Equuscorp* did not involve the assignment of causes of action for damages for personal injury [...] [t]here is no reason to think that the observations made were not intended to refer to them as well. There is no inherent characteristic of an action for damages for personal injury which would make the observations inapplicable to them.¹⁵³

There is Canadian authority indicating that a blanket prohibition on the assignment of personal torts is incorrect. In *Margetts v Timmer*¹⁵⁴ two motor vehicles laden with passengers collided near Gibbons, Alberta. This was followed by the conclusion of “Mary Carter agreements”¹⁵⁵ between two sets of plaintiffs and the Province of Alberta. The conclusion of the agreements was challenged by the non-settling defendant on the grounds that they violated common law rules prohibiting maintenance and champerty. Berger JA (with whom Nash J (ad hoc) agreed) stated that, “[t]here is no policy or other principled reason to automatically conclude that the assignment of every action in tort based on a personal wrong is champertous and therefore non-assignable.”¹⁵⁶ This *dicta*, whilst not bearing upon the *Trendtex* principle, does suggest that a blanket prohibition upon the assignment of personal torts is too inflexible and ought not to be followed.

A similar position on the assignment of personal torts – with direct reference to the *Trendtex* principle – was recently taken by the UK Court of Appeal in *Simpson v Norfolk & Norwich University Hospital NHS Trust*.¹⁵⁷ In that case Catchpole had contracted Methicillin Resistant Staphylococcus Aureus (MRSA) at the Norwich University Hospital (NUH). At the same time, Simpson had contracted MRSA at the NUH before soon thereafter dying of cancer. Catchpole had commenced proceedings against the NUH seeking £5000 for the personal injury he suffered as a result of contracting MRSA. However he subsequently assigned the claim by deed to Simpson’s widow, Jennifer Simpson, for £1. Although increasing the value of the claim to £15,000 Simpson claimed to take up the action not for financial reasons, but to ensure that the NUH

¹⁵³ *Ibid.*, [62]. See also by way of *obiter* *Press Metal Aluminium (Australia) P/L v Total Concept Group P/L (Externally Administered) & Anor* [2014] QDC 280 [148] (Dorney QC, DCJ).

¹⁵⁴ (1999) 178 DLR (4th) 577.

¹⁵⁵ A “Mary Carter” agreement has been defined as: “[An agreement] where a Plaintiff has sued at least two parties as joint and several tortfeasors and where one of the Defendants wants to settle with the Plaintiff but the other does not. The Defendant favouring settlement may not be able to remove himself from the action simply by settling with the Plaintiff because this Defendant is usually also subject to a claim for contribution from the remaining Defendant pursuant to statutory authority.” See Barbara Billingsley “*Margetts v Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements*” (1998) 36 *Alberta Law Review*, 1018.

¹⁵⁶ (1999) 178 DLR (4th) 577 [12].

¹⁵⁷ [2011] EWCA Civ 1149; [2012] 2 WLR 873.

would undertake more effective infection control procedures. Moore-Brick LJ (with whom Dame Janet Smith DBE and Maurice Kay LJ agreed) stated that a cause of action in tort could be assigned if there was a genuine commercial interest, and this might also potentially include “a cause of action in tort for personal injury”.¹⁵⁸ Importantly, with respect to the facts at hand, a genuine commercial interest could not be ascertained, and consequently the purported assignment was invalid.¹⁵⁹

V CONCLUSION

The *Trendtex* principle is one of many well recognised exceptions to the prohibition on the assignment of rights to litigate. The principle’s precursors are arguably traceable to other recognised exceptions to the prohibition on the assignment of rights to litigate in favour of trustees in bankruptcy, company liquidators and vendors of property with an incidental right to litigate. It can also be argued that the principle’s development was given secondary impetus by the recognition of the assignment of debts in judicature legislation, as well demonstrated by the facts and *ratio* of *Re Daley; Ex Parte National Australia Bank Ltd*.¹⁶⁰

Although the *Trendtex* principle was originally crafted with respect to the assignment of contractual claims, the recent High Court decision in *Equuscorp Pty Ltd v Haxton*¹⁶¹ has established the principle’s application to the assignment of restitutionary claims, and arguably non-personal torts. Cases such as *WorkCover Queensland v AMACA Pty Ltd*¹⁶² and *Simpson v Norfolk & Norwich University Hospital NHS Trust*¹⁶³ also seem to extend the principle’s application to personal torts under appropriate conditions.

The fulcrum around which the *Trendtex* principle turns is the “genuine commercial interest” criterion, which as highlighted in *Monk v ANZ Banking Group*,¹⁶⁴ requires something more than a mere personal interest. Put slightly differently, the genuine commercial interest must be one which extends beyond

¹⁵⁸ *Ibid.*, [24].

¹⁵⁹ *Ibid.*, [28].

¹⁶⁰ (1992) 8 ACSR 395; 37 FCR 390.

¹⁶¹ (2012) 246 CLR 498, 525 (French CJ, Crennan and Kiefel JJ), 533 (Gummow and Bell JJ), 558 (Heydon J).

¹⁶² [2012] QCA 240.

¹⁶³ *Ibid.*

¹⁶⁴ (1994) 34 NSWLR 148; BC9405181, 8 (Cohen J).

the mere benefit of the assignment itself.¹⁶⁵ Furthermore, as emphasized by the New South Wales Court of Appeal in *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr*,¹⁶⁶ the interest must be grounded in rights, as opposed to mere hope. Having said this, cases such as *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd*¹⁶⁷ and *Dower v Lewkovitz*¹⁶⁸ have held that the assignee does not require a pre-existing enforceable right against the assignor. Ultimately, determination of what constitutes a “genuine commercial interest” will turn upon individual case circumstances.¹⁶⁹

The *Trendtex* principle’s current flexibility suitably parallels the relaxation of judicial attitudes towards maintenance and champerty throughout the latter half of the twentieth century. It also compliments the upsurge in usage of the corporate form and commercial litigation in the late twentieth and early twenty first centuries. Without the flexibility afforded by the *Trendtex* principle, a plausible argument can be made that the arteries of capitalism might be unduly restricted. Why, for example, should the *Trendtex* principle not exist if creditors, trustees in bankruptcy, company liquidators and vendors of property with an incidental right to litigate are able to assign causes of action? This argument is heightened when it is considered that the threat posed by maintenance and champerty has diminished since medieval times.¹⁷⁰ Future case law will no doubt further develop the *Trendtex* principle ensuring its continued adaptation to modern commercial exigencies.

¹⁶⁵ *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Limited* (1995) 132 ALR 514, 540 (Lindgren J).

¹⁶⁶ [2005] NSWCA 240 [42] (Ipp JA (with whom Hodgson JA and Campbell AJA agreed)).

¹⁶⁷ [2007] FCAFC; 158 FCR 417 (Tamberlin and Jacobson JJ);

¹⁶⁸ [2013] NSWCA 452 [23] (Macfarlan JA).

¹⁶⁹ *Whyked Pty Ltd v Yahoo Australia and New Zealand Pty Ltd* [2006] NSWSC 650 [24] (Bergin J); *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 207 [76] (Elliot J).

¹⁷⁰ *Jeb Recoveries LLP v Judah Eleazar Binstock* [2015] EWHC 1063 (Ch) [9]-[17] (Simon Barker QC).