ASSIGNMENT OF BARE RIGHTS TO LITIGATE:

ASSESSING THE MODERN DOCTRINAL POSITION

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**ABSTRACT**

It is well settled that an assignment of a bare right to litigate (or bare right of action) is prima facie invalid unless the assignee could establish a ‘genuine commercial interest’ in taking the transfer. Although the ‘genuine commercial interest’ test has frequently been applied in Australian cases, little ink has been spilled on elucidating its precise meaning. This paper begins with a critical examination of the mischief behind judicial opposition to assignments of bare rights of action, then proceeds to investigate the meaning of ‘genuine commercial interest’ with particular attention to two contentious aspects, viz.: the need for the assignee to possess a pre-existing interest arising separately from the assignment, and the relevance of profit making by the assignee. This paper argues that judicial inquiry should not focus on the *nature* of the assignee’s interest but rather on the *effect* of the assignment with reference to the mischief that maintenance and champerty were intended to redress; accordingly, an assignment should not be struck down merely because the assignee lacks a pre-existing interest or makes a profit from the assignment.
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I INTRODUCTION

It is a fundamental rule of assignment that bare rights of action cannot be assigned, on grounds that such assignments offend the law on maintenance and champerty. It is noteworthy that the mere support or ‘maintenance’ of litigation, for example, through providing finance, is not wrongful. To render an assignment of a cause of action objectionable for unlawful maintenance, there must be ‘wanton and officious intermeddling with disputes of others in which [the assignee] has no interest whatever, and where the assistance he renders…is without justification or excuse’. ¹ In other words, there must be some ‘stirring up’ of litigation without legal justification. ² Champerty is traditionally viewed as an ‘aggravated form of maintenance’³ and occurs when the supporter wrongfully maintains a suit for a share in the proceeds.⁴

The House of Lords in Trendtex Trading Corporation v Credit Suisse⁵ formulated the modern test for assessing the validity of such assignments: where the assignee could establish a ‘genuine commercial interest’ in the assigned cause of action, the assignment will not savour of wrongful maintenance or champerty because the assignee is seen to have ‘good reasons’ for maintaining the assignor’s action.⁶ Although the ‘genuine commercial interest’ formulation has been cited with approval in Australia,⁷ the cases do not exhibit a coherent and principled approach in its application. Thus, a great degree of uncertainty remains regarding the precise meaning of the formulation; surprisingly, little ink has been spilled on resolving this uncertainty.

Although this paper is not concerned with the policy and efficacy of litigation funding, it is recognised that such arrangements may in substance amount to assignments of bare rights of action by virtue of the plaintiff ceding significant control over the litigation to the funder. The High Court has recently held that litigation funding is not of itself at odds with public

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¹ British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006, 1014.
³ Giles v Thompson [1993] 3 All ER 321, 328 (Steyn LJ).
⁶ It is noteworthy that specific exceptions exist in relation to assignments of causes of action to receivers, liquidators and trustees in bankruptcy, which essentially derive from statutory powers (see for example Bankruptcy Act 1966 (Cth) s 134; Corporations Act 2001 (Cth) ss 420, 477). These statutory exceptions will not be examined in this paper.
⁷ Notably by the High Court in Equuscop Pty Ltd v Haxton (2012) 246 CLR 498.
policy and any issues arising may be dealt with through procedures controlling abuse of process. Two problematic areas are worthy of investigation here. First, it has always been said that the required interest to support an assignment must be pre-existing and cannot come from the assignment itself. However, there is an incongruity here in that a litigation funding arrangement may be upheld with the funder having no interest in the suit other than an interest in its outcome; yet that same transaction, if it took the form of an assignment, could be held invalid even though the assignee, being a party to the action, would presumably be more amenable to court procedures. Second, there have been issues around when and to what extent profit making by the assignee could render assignments of causes of action invalid on grounds of champerty; yet it is axiomatic that litigation funders derive profit from maintaining litigation. This paper scrutinises the modern judicial position and argues that there is no sound doctrinal basis for the view that an assignment should be struck down merely because the assignee lacks a ‘pre-existing’ interest arising separately from the assignment or makes a profit from it. It is suggested that judicial inquiry should not focus on the nature of the assignee’s interest per se but rather on the effect of the assignment with reference to the policy behind maintenance and champerty.

This analysis cannot take place in a vacuum, and thus it is first necessary to set the scene by examining the mischief behind the law’s denunciation of assignments of bare rights of action. Two aspects call for attention: what constitutes ‘bare rights of action’ (Part II), and what maintenance and champerty have to say about assignments of such rights (Part III). Against this backdrop, Part IV introduces the ‘genuine commercial interest’ test as formulated in Trendtex and examines its scope of application. The paper then proceeds to investigate two contentious aspects of the test: Part V elucidates and critiques the judicial position on the need for the assignee to possess a ‘pre-existing’ interest in the assigned claim, and Part VI analyses the relevance of profit making by the assignee. Finally, Part VII discusses how the policy-orientated approach suggested by Lord Mustill in Giles v Thompson could provide the gateway for further liberalisation in this area of the law. Part VIII is the conclusion.

8 Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386.
9 [1994] 1 AC 142.
II  BARE RIGHTS OF ACTION

The judicial orthodoxy has been that ‘bare rights of action’ are prima facie unassignable on grounds that such assignments savour of maintenance and champerty.\(^\text{10}\) To understand what constitutes a ‘bare right of action’, two distinctions need to be drawn: first, between bare rights of action and rights of action annexed to rights of property, and second, between bare rights of action and the ‘fruits’ of an action. These distinctions are critical to the question of whether an assignment is potentially champertous and warrants application of the ‘genuine commercial interest’ test, yet deeper analysis reveals that they are not always logically explicable.

A  Bare Rights of Action vs. Rights of Action Annexed to Rights of Property

The cases have provided guidance on which types of claims are categorised as unassignable ‘bare rights of action’. Rights to sue for tort\(^\text{11}\) and unliquidated damages for breach of contract\(^\text{12}\) are in this category, as are rights to sue in equity such as a right to set aside a deed for fraud.\(^\text{13}\) The assignability of a statutory cause of action will depend on the terms of the statute.\(^\text{14}\) In any case, an insurer may take an assignment of the insured’s rights to support that which the insurer acquired by subrogation.\(^\text{15}\) It is also clear that although the right to sue for unliquidated damages for breach of contract is unassignable, the benefit of a contract, whether the claim to which it gives rise is liquidated or unliquidated, may be assigned prior to breach occurring.\(^\text{16}\)

On the other hand, assignments of rights of action annexed to, or ‘incidental and subsidiary’ to a right of property (which also is assigned) fall outside the category of ‘bare rights of action’. Such assignments are valid by reason of the assignee’s interest in the

\(^{10}\) Ibid, 153.

\(^{11}\) *Poulton v The Commonwealth* (1953) 89 CLR 540, 602.

\(^{12}\) *May v Lane* (1894) 64 LJ (QB) 236; *County Hotel and Wine Co v London & North-Western Railway Co* [1918] 2 KB 251, 258.

\(^{13}\) *Prosser v Edmonds* [1835] 160 ER 196, 202.


\(^{16}\) *Torkington v Magee* [1902] 2 KB 427.
underlying property, which is readily assignable.\textsuperscript{17} For example, an assignment of chattels together with a right to sue a bailee in negligence in respect of damage caused to the chattels is valid.\textsuperscript{18}

However, the distinction between assigning an item of property and assigning a bare right to litigate is arguably one ‘whose policy roots were not readily discernible, the undesirability of maintenance and champerty being treated as self-evident’.\textsuperscript{19} An apparent anomaly to note in this respect is that debts and rights to sue for liquidated claims under a contract have always been regarded as rights of property and are capable of assignment,\textsuperscript{20} notwithstanding that the debt is overdue for payment,\textsuperscript{21} is disputed by the debtor,\textsuperscript{22} or has not been finally quantified.\textsuperscript{23} Scrutton LJ opined that ‘the necessity of an action at law to reduce [debts and liquidated claims] into possession [is] merely an incident which followed on the assignment of the property’.\textsuperscript{24} This reasoning is not entirely satisfactory. As Meagher et al asked, ‘for what is a debt but a right to sue to recover a sum certain? In what other sense is a debt to be regarded as property?’\textsuperscript{25} Perhaps it is explicable on the basis that actions in debt and liquidated claims under contract are based on the debtor’s possession of the creditor’s property and not on the debtor’s personal obligation to repay. However, such a distinction appears purely semantic; at a practical level, the ‘property’ cannot be obtained without proceeding with the suit, and thus has no practical existence or value for the assignee unless the suit succeeds.\textsuperscript{26}

The more convincing basis for treating debts and liquidated claims (as opposed to unliquidated contractual claims\textsuperscript{27}) as assignable is that the amount recoverable from these

\textsuperscript{17} Dawson v Great Northern and City Railway Co [1905] 1 KB 260, 271; Ellis v Torrington [1920] 1 KB 399, 407-408; Trendtex Trading Corporation v Credit Suisse [1982] AC 679, 703.
\textsuperscript{18} W J Vine Pty Ltd v Hall [1973] VR 161, 161-165.
\textsuperscript{19} Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386, 428.
\textsuperscript{20} Commonwealth v Ling (1993) 118 ALR 309, 432.
\textsuperscript{21} County Hotel and Wine Co v London & North-Western Railway Co [1918] 2 KB 251.
\textsuperscript{22} Camdex International Ltd v Bank of Zambia [1998] QB 22, 33.
\textsuperscript{23} Zabihi v Janzemini [2009] EWHC 3471, [23].
\textsuperscript{24} Ellis v Torrington [1920] 1 KB 399, 411.
\textsuperscript{25} Meagher, Heydon and Leeming, above n 14, 281.
\textsuperscript{26} Trendtex Trading Corporation v Credit Suisse [1980] QB 629, 665 (Oliver LJ).
\textsuperscript{27} May v Lane (1894) 64 LJ (QB) 236; County Hotel and Wine Co v London & North-Western Railway Co [1918] 2 KB 251, 258.
claims is certain. It follows that, from the perspective of maintenance and champerty (discussed in Part III), the assignee would not be able to advance inflated and unsustainable claims in an attempt to make a profit from the suit. However, this reasoning has no apparent connection with the doctrinal distinction between a ‘bare right of action’ and ‘property’. Whether the claim is liquidated or unliquidated, the practical position of the assignee is identical – the assignee must proceed with the suit to recover the ultimate ‘property’.

Despite the theoretical uncertainties associated with the meaning of ‘property’ in the context of assignments, the distinction between bare rights of action, which are unassignable, and rights of action annexed to rights of property, which are assignable, is one well entrenched in the case law.

B Bare Rights of Action vs. ‘Fruits’ of an Action

Historically, a distinction was also drawn between assigning a bare cause of action and assigning the ‘fruits’ of an action. The leading case was Glegg v Bromley.\(^28\) In that case, Mrs Glegg was the claimant in an action for slander. Before obtaining judgment, she assigned for value all potential proceeds from the action to her husband. The Court of Appeal was faced with the question whether this constituted an assignment of a bare right of action (which was impermissible by virtue of maintenance and champerty) or an assignment of the ‘fruits’ of the action (which was valid). The Court held that it was the latter. Vaughan Williams LJ said: \(^29\)

> I know 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…nothing resembling maintenance or champerty in the deed of assignment.

Allowing the assignment of potential proceeds of a suit is a seemingly logical result, given that a sum awarded by a court is analogous in nature to a debt which, as noted above, has always

\(^{28}\) [1912] 3 KB 474.

\(^{29}\) Ibid, 484.
been regarded as an item of property in its own right and thus freely assignable; maintenance and champerty were irrelevant.\textsuperscript{30}

However, the distinction drawn in \textit{Glegg v Bromley} has been the subject of criticism in subsequent decisions. Lord Denning MR in the Court of Appeal in \textit{Trendtex} contended that ‘[t]here is no reason in public policy why the law should permit assignment of the \textit{proceeds} of a right of action and refuse to allow the assignment of the right of action itself’.\textsuperscript{31} Moreover, in a number of insolvency cases, sales of proceeds of pending litigation have been declared void on the basis that the assignee lacked a legitimate interest in purchasing them.\textsuperscript{32} It is thus argued that what was central to the finding in \textit{Glegg v Bromley} that the assignment was valid was not the subject matter of the assignment itself, but the fact that the deed of assignment did not give the assignee a right to interfere with the suit. The assignee merely held a charge over any proceeds which may eventuate from the cause of action,\textsuperscript{33} while the assignor (Mrs Glegg) retained full control over the conduct of the proceedings – hence no issue of maintenance or champerty arose.\textsuperscript{34} On this basis, the better view is that the ‘fruits’ of an action are not always freely assignable; it is crucial to also examine whether the assignment undermines the integrity of the administration of justice.\textsuperscript{35} For example, if the arrangement mandates that the assignor follow the assignee’s instructions in taking steps to collect the proceeds, the assignment may still be declared void by virtue of champerty.\textsuperscript{36} This analysis highlights the importance of judicial inquiry into the \textit{effect} of an assignment which, as already noted, is a central argument of this thesis further developed in subsequent sections.

In any case, the fruits of an action are future property and thus, in principle, assignment is only possible in equity and for consideration.\textsuperscript{37}

\textsuperscript{30} \textit{Fitzroy v Cave} [1905] 2 KB 364, 372.
\textsuperscript{31} \textit{Trendtex Trading Corporation v Credit Suisse} [1980] QB 629, 656.
\textsuperscript{33} \textit{Glegg v Bromley} [1912] 3 KB 474, 488 (Fletcher Moulton LJ).
\textsuperscript{34} Ibid, 490 (Parker J).
\textsuperscript{36} \textit{Re Oasis Merchandising Ltd} [1988] Ch 170, 177.
\textsuperscript{37} \textit{Holroyd v Marshall} (1862) 11 ER 999; Meagher, Heydon and Leeming, above n 14, 283.
III MAINTENANCE AND CHAMPERTY

Maintenance and champerty are archaic doctrines, but they remain alive in the modern era as rationales underlying the prohibition on assignments of bare rights of action. This Part traces the historical roots of the doctrines and examines whether and to what extent they remain sound doctrinal bases for restricting assignments.

A Origins of Maintenance and Champerty

The doctrines of maintenance and champerty were developed in medieval England, during a time when ‘intermeddling’ in litigation was widespread. Under feudalism, litigation was one of the few means to augment one’s landholding. A practice was developed whereby feudal lords would underwrite the cost of suits for the recovery of land, and in exchange they would gain a share of the result and become joint owners of estates. This practice was also associated with large-scale judicial corruption under political patronage; suborning justices and witnesses was a common practice. In response, the English legislature enacted a series of statutes between 1275 and 1541 which prohibited maintenance and champerty in light of addressing the problems of oppressive litigation and corruption.

In modern times, oppressive use of litigation by feudal lords and judicial corruption are no longer concerns, and thus the original public policy concerns of the doctrines of maintenance and champerty, viz. enhancement of administration of justice and preservation of public order, have substantially diminished in significance. It has thus been suggested that champerty at common law is now ‘virtually dead’ and only maintains a ‘living presence’ in two respects, viz. as grounds for denying enforceability of ‘conditional fee arrangements’ with solicitors and

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38 See Part I (Introduction) for definitions of maintenance and champerty.
denying recognition of assignments of bare rights of action.\textsuperscript{44} This paper is only concerned with the latter.

B \textbf{Relevance of Champerty to Assignments: Incoherence in Jurisprudence}

Although the crimes and torts of maintenance and champerty have been abolished, this has not affected any rule which treats an assignment as illegal or contrary to public policy.\textsuperscript{45} This section critically examines judicial reasoning in favour of retaining maintenance and champerty as rules of public policy prohibiting assignments of bare rights to litigate, which will lay the groundwork for subsequent analysis of the ‘genuine commercial interest’ test.

The relationship between the law on maintenance and champerty and assignments of rights of action is historically explicable. Historically, legal assignments of rights of action were prohibited; instead, transfer of such rights was effected by subjecting the ‘assignor’ to an equitable obligation to bring a claim against the debtor for the benefit of the ‘assignee’, and in consideration the ‘assignee’ would indemnify the ‘assignor’ for costs.\textsuperscript{46} Under such an arrangement, the relevance of maintenance and champerty is apparent – the ‘assignee’ was in essence bankrolling the creditor’s suit in exchange for the spoils, rendering the arrangement champertous. Later, the \textit{Judicature Act}\textsuperscript{47} introduced a form of statutory assignment whereby the assignor could validly ‘pass and transfer the legal right to such debt or thing in action’ to the assignee. Here, a valid assignment would vest in the assignee a \textit{legal} right of action, permitting the assignee to enforce his own right directly and not the assignor’s indirectly;\textsuperscript{48} in this respect, it is difficult to see how champerty is relevant at all.

Unfortunately, the public policy concerns underlying maintenance and champerty in the modern era have not been well articulated by the courts. Hayne JA in \textit{Ultra Tune Australia Pty

\textsuperscript{44} \textit{Giles v Thompson} [1994] 1 AC 142, 153.

\textsuperscript{45} \textit{Maintenance, Champerty and Barratry Abolition Act} 1993 (NSW); \textit{Crimes Act} 1900 (NSW) sch 3 cl 5; \textit{Civil Liability Act} 2002 (NSW) sch 2 cl 2.


\textsuperscript{47} \textit{Supreme Court of Judicature Act} 1873 (UK) s 25(6).

\textsuperscript{48} Tettenborn, above n 46, 402.
Lindale Investments Ltd v UTSA Pty Ltd\(^9\) opined, without elaboration, that ‘public policy frowns upon “trafficking in litigation”’. This formulation is rather unhelpful. ‘Trafficking’ is a pejorative term which simply means trading in something in which it is impermissible to trade,\(^{50}\) but the reasons behind the impermissibility, in the context of assigning bare rights to litigate, are not at all self-evident. Perhaps the clearest judicial statement on the undesirable consequences of champertous maintenance was that by Lord Denning MR in Re Trepica Mines Limited:\(^{51}\)

The reason why the common law condemns champertous maintenance is because the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated: but, be that so or not, the law has declared champerty unlawful.

It is questionable whether the risks of inflaming damages, suppressing evidence and suborning witnesses rationally explain the reluctance of modern courts to recognise assignments of bare rights to litigate. First, the statement suggests that the law of champerty condemns procedural sins by the maintainer, \textit{viz.} potential abuse of the litigation process; it is strange that champerty should serve as a limit on assignability of choses in action, a substantive matter concerning the transfer and vesting of intangible rights.\(^{52}\) Further, modern courts are well-equipped with an armoury of sanctions to address these procedural risks, including stays of proceedings based on abuse of process,\(^{53}\) adverse cost orders\(^{54}\) and summary dismissal of frivolous actions\(^{55}\) – rendering an additional restriction on assignability of rights of action arguably redundant. Second, implicit in the quote is the assumption that an assignee will behave in a more corrupt fashion ‘for his own personal gain’ if he does not have a ‘genuine commercial interest’ over and above a mere personal interest in the assigned claim. While the precise content of the ‘genuine commercial interest’ test will be examined in a later part, it is noted here that such an assumption appears illogical. It is even arguable that an assignee who possesses an interest in

\(^{49}\) (1996) 14 ACLC 1610, 1615.

\(^{50}\) Massai Aviation Services Ltd v Attorney-General for the Bahamas [2007] UKPC 12, [19].


\(^{52}\) Tettenborn, above n 46, 402-403.


\(^{54}\) White Industries (Qld) Pty Ltd v Flower & Hart [1999] FCA 773.

the assignment additional to that of recouping the amount paid for it will in fact be more inclined to engage in mischievous behaviour in view of succeeding in the claim.  

Another well-known explanation for the common law’s reluctance to countenance assignments of choses in action was that proffered by Coke in *Lampet’s case*:

…[it is] the great wisdom and policy of the sages and founders of our law, who have provided that no…thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits… (emphasis added) 

However, this reasoning is largely unconvincing. Courts of Equity have ‘from the earliest times thought the doctrine too absurd for them to adopt; and therefore they have always acted in direct contradiction to it’. In modern times, the view that allowing unimpeded assignments of causes of action will increase the number of cases before the courts is hardly defensible in light of the overriding policy concern of access to justice. Valid claims deserve to come before the courts; those who wish to enforce or defend their legal rights should be given a reasonable opportunity to do so. Perhaps one could interpret the above quote as a concern that assignments of choses in action would lead to an increased number of *frivolous* claims. However, this interpretation is equally indefensible – there is no logical reason to assume that frivolous claims in particular will be assigned considering the multitude of reasons why a plaintiff might wish to assign his or her claim (for example, unwillingness to take on the risks associated with litigation, insufficient funds, inexperience in conducting proceedings etc.).

Despite flawed judicial reasoning in drawing the link between champerty and assignments, an important theme can be discerned from the above discussion for the purpose of subsequent analysis. The fears expressed by Lord Denning MR in *Re Trepica Mines* and Coke in *Lampet’s case* exhibit a unifying theme – viz. that the courts are in essence concerned with the *undesirable consequences on court processes* which may eventuate from such conduct as

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57 (1612) 77 ER 994, 997.
58 *Master v Miller* (1791) 100 ER 1042, 1053.
60 Campbell, above n 56, 157-158.
trafficking in litigation or speculating in causes of action for improper gain. It necessarily follows that any judicial test for assessing the validity of assignments must align with the courts’ central concern with the effect of an assignment on court processes and public policy more generally. This observation underpins subsequent analysis in this paper.

C The Continuing Relevance of Maintenance and Champerty

The High Court in the seminal case of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* examined the relationship between maintenance and champerty and abuse of process in the context of third-party litigation funding. Although this paper is not concerned with areas of civil procedure, an examination of *Fostif* provides important insights into the continuing relevance of maintenance and champerty as public policy concerns underlying the prohibition on assignments of bare rights to litigate.

In *Fostif*, plaintiff tobacco retailers sued defendant wholesalers in restitution to recover money had and received following the High Court decision in *Roxborough v Rothmans of Pall Mall Ltd*. Firmstone Pty Ltd, a firm specialising in provision of taxation advice, actively solicited tobacco retailers as clients to instigate the proceedings. Prospective clients who agreed to participate would sign an ‘opt in’ agreement whereby Firmstone would fund the proceedings and receive a ‘success fee’ equal to one-third of the amount recovered. Firmstone would also be responsible for appointment of legal representatives and all dealings with the defendant wholesalers. The defendants argued that the arrangements amounted to trafficking in litigation and that the proceedings should be stayed on the basis of abuse of process.

The High Court held that the proceedings had not been properly commenced as a representative action. For the purposes of this paper, of greater importance is the majority’s reasoning, in obiter, that maintenance of the proceedings by Firmstone did not amount to an abuse of process. Gummow, Hayne and Crennan JJ reasoned that the fears about adverse effects on the processes of litigation do not warrant the formulation of an overarching rule of public policy prohibiting funding arrangements which involve sharing of the proceeds of litigation –

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63 (2001) 208 CLR 516.
such a rule would take ‘too broad an axe to the problems that may be seen to lie behind the fears’. 64 The observation of Mason P in the Court of Appeal is also notable:65

[A] profit motive is no longer the touchstone of illegality, even at common law. …A desire to earn a ‘success fee’ may have a tendency to corrupt processes and that tendency may be greater if the fee is higher and the activity is unregulated. But such a finding should focus clearly on the dangerous tendency, not the profit as such.

The decision in Fostif suggests that the mere fact that a litigation funder could take control of and profit from the litigation is not of itself against public policy. The court emphatically denied maintenance and champerty as relevant considerations for granting a stay of proceedings based on abuse of process. The question that arises is whether, if at all, the Fostif decision affects the traditional judicial reluctance to recognise assignments of bare rights to litigate. Although the High Court did not directly deal with the issue of assignment, Firmstone’s acts in initiating interest in the litigation, exercising control over the proceedings and taking a share of the proceeds were arguably little different to taking an assignment of a right of action. However, Mason P in the Court of Appeal was careful to distinguish between non-recourse litigation funding on the one hand, where ‘a measure of control is essential if the funder is to manage group litigation and also protect its own legitimate interests’, and assignment of a bare right to litigate on the other, where excessive control is exercised by the assignee. 66 It therefore appears that the extent of control exercised by the funder is central to the validity of third-party litigation funding arrangements – the court may consider a host of factors such as whether the funder is subject to independent ‘checks and balances’ throughout the litigation or has the capacity to improperly ‘monopolise’ the litigation. 67

It is however apparent that neither the High Court nor the Court of Appeal in Fostif overruled the rule in Trendtex that the validity of an assignment of a cause of action will depend on the assignee having a ‘genuine commercial interest’ in the proceedings. 68 Thus, a litigation

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64 Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386, 434.
65 Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd (2005) 218 ALR 166, 190.
66 Ibid, 195.
67 Rachael Mulheron and Peter Cashman, ‘Third Party Funding: A Changing Landscape’ (2008) 27(3) Civil Justice Quarterly 312, 341. The general efficacy of third-party litigation funding is beyond the scope of this paper and thus this aspect will not be further examined.
funding arrangement may still be objectionable if the client cedes complete control of its claim to a funder with no pre-existing interest in the litigation, in substance amounting to a *de facto* assignment of a bare right of action.69 Nevertheless, by permitting maintenance of litigation by funders with no interest in the action other than the desire to profit and, in this respect, rejecting maintenance and champerty as relevant considerations, *Fostif* significantly erodes the caveat against assignments of bare rights to litigate and opens the door for further liberalisation in judicial attitudes towards recognising such assignments. But as of now, the deconstruction of maintenance and champerty as doctrines prohibiting alienation of claims is limited to assisting claim owners to initiate litigation they would not otherwise have been able to afford; as discussed further below, Australian jurisprudence still stops well short of allowing unimpeded assignments of bare rights of action.70

### IV OVERVIEW OF THE ‘GENUINE COMMERCIAL INTEREST’ TEST

#### A Genesis of the Test: Trendtex v Credit Suisse

*Trendtex Trading Corporation v Credit Suisse*71 remains the leading case on the proposition that an assignment of a bare right of action will be valid if the assignee has a ‘genuine commercial interest’ in taking the assignment. In that case, the Central Bank of Nigeria (‘CBN’) failed to honour a letter of credit in favour of Trendtex, a Swiss corporation. As a result, Trendtex was left heavily indebted to Credit Suisse, the latter having financed the original transaction between Trendtex and CBN. Credit Suisse guaranteed to pay Trendtex’s costs in its proceedings against CBN, and in consideration Trendtex agreed to assign to Credit Suisse all residual rights of action against CBN, in contemplation of a further assignment by Credit Suisse to a third party. Soon after, the matter settled for US$8,000,000. Trendtex claimed that the assignment should be set aside as savouring of maintenance and champerty.

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Lord Wilberforce held that, but for the involvement of the third party, the assignment from Trendtex to Credit Suisse would have been valid given that the latter had a ‘genuine and substantial interest’ in Trendtex’s claim against CBN. Credit Suisse had guaranteed the costs of the litigation, and without the assignment it would not have been able to recoup these costs. However, the assignment by Credit Suisse to the third party was held to savour of champerty as it ‘manifestly involved the possibility, and indeed the likelihood, of a profit being made, either by the third party or possibly also by Credit Suisse, out of the cause of action’. In particular, Lord Wilberforce expressed his concern that trafficking in litigation would be inimical to the interests of justice. However, one probably should not read too much into Lord Wilberforce’s point about the ‘possibility’ of a subsequent assignment. Most choses of action are capable of being assigned multiple times and thus the mere possibility of a further assignment should not of itself undermine the efficacy of the original assignment. Nonetheless, Lord Wilberforce probably came to the right conclusion given that the underlying purpose of the initial assignment to Credit Suisse was indeed to give effect to the possibility of ‘on-selling’ the claim to the third party.

Lord Roskill arrived at the same conclusion, but expressed the requisite interest as a ‘genuine commercial interest’.

A literal reading of the above quote suggests that, in Lord Roskill’s view, establishing a genuine commercial interest is a requirement additional to that of showing that the assignment does not fall foul of the law of champerty. Although intuitively one would think that there are significant overlaps in the rationales underlying the two requirements, there is in fact merit in maintaining a

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72 Ibid, 694.
73 Ibid. The relevance of profit making is further examined in Part VI.
74 Ibid.
75 Tolhurst, above n 2, 198.
distinction. For example, in *Deloitte Touche Tohmatsu v Cridlands Pty Ltd*, the relevant deed of assignment required the assignors to ‘give evidence and provide such further assistance as [the assignee] may require…and to use their best endeavours to ensure the provision of evidence by witnesses…in order for [the assignee] to prosecute [the claims against the defendant]’. It was held that this provision offended a key policy rationale underlying the law of champerty, viz. that it provided a strong temptation to suborn witnesses. Selway J emphasised that agreements which have an obvious tendency to undermine the integrity of the judicial process, not only in actuality but also in perception, are contrary to public policy. The assignment was thus held to be void notwithstanding the assignee’s contentions that it had a legitimate interest in the litigation and that it was unlikely to profit from the assigned action.

The modern approach can be summarised as follows: in determining the validity of an assignment, the court will first consider whether the transaction bears the marks of unlawful champerty, then inquire whether it is validated by the existence of a genuine commercial interest on the assignee’s part. However, even if the assignee has a legitimate interest in the outcome of the litigation, the assignment may still be regarded as champertous and objectionable if the arrangements, viewed in totality, pose a significant threat to the administration of justice.

B *Application of Trendtex in Australia*

There have been differing judicial opinions as to whether the *Trendtex* test applies in Australia at all, and in this respect it is pertinent to note an interesting jurisprudential divergence between Federal Court and State Supreme Court decisions. Generally, the Federal Court has demonstrated a marked reluctance to follow *Trendtex* on the basis that it feels bound by the

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80 *Giles v Thompson* [1994] 1 AC 142, 163; *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] QB 640, 650.
82 See cases collected in *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267, [46] and [48].
High Court’s *dictum* in *Poulton v The Commonwealth* to the effect that causes of action in tort are unassignable at law or in equity; in contrast, State Supreme Courts have tended to embrace *Trendtex* as good law and exhibit a more liberal attitude towards recognising assignments of bare rights to litigate.

Finkelstein J in a Federal Court decision boldly suggested that the High Court in *Fostif* had affirmed the *Trendtex* test. The correctness of this suggestion is doubtful, given that the High Court in *Fostif* was not concerned at all with any issues of assignment; their Honours simply held that litigation funding did not amount to an abuse of process, without apparent approval or disapproval of the ‘genuine commercial interest’ formulation. Nevertheless, this debate may now be over given the recent endorsement of the *Trendtex* test by the High Court in *Equuscorp Pty Ltd v Haxton*. In this case, a group of investors in a blueberry farm project borrowed money from a lender. The lender ran into financial difficulties, and in turn borrowed money from Equuscorp – this involved granting a charge over its assets to Equuscorp, and assigning to Equuscorp its rights under the allegedly invalid loan agreements with the investors and its restitutionary rights against the investors. The High Court held that the restitutionary rights were capable of being assigned. French CJ, Crennan and Kiefel JJ reasoned that the restitutionary rights were not assigned as bare causes of action, but were inextricably linked with the assigned contractual rights. As presumably an additional reason, they held that the assignee had a genuine commercial interest ‘in acquiring the restitutionary rights should the contract be found to be unenforceable’. Gummow and Bell JJ found the relevant interest in the assignee’s charge over the lender’s assets; the recovery on the restitutionary claim would ‘fill

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83 (1953) 89 CLR 540, 602.


86 *TS & B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3)* (2007) 229 CLR 386.

87 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 246 CLR 498.

88 Ibid, 525.

89 Ibid.
the gap created by the debts imploding under illegality’. Similar reasoning was adopted by Heydon J.

As a sidenote, although Trendtex was concerned with an assignment of a right of action in contract, the modern position seems to be that the ‘genuine commercial interest’ exception could also apply to validate assignments of causes of action in tort, which were customarily regarded as categorically unassignable owing to the dictum in Poulton v The Commonwealth. It has been said that the dictum in Poulton represents ‘at base a reflection of the policy of the common law against maintenance’ which changes from time to time. Moreover, as the court in First City Corporation Ltd v Downview Nominees Ltd had put it:

The original justification for the blanket rule preventing assignment of rights to sue in tort was that the law does not give effect to arrangements savouring of champerty. The same considerations apply to the assignment of causes of action in contract. Therefore it seems logical that the test should be the same whether in contract or tort; ie does the assignee have a legitimate commercial interest in taking the assignment of the cause of action?

This is especially so given the prevalence of cases involving concurrent liability in tort and contract. In summary, the old idea that there is something inherent in tort claims that makes them categorically unassignable is unlikely to be the prevailing view.

C  Qualities of the ‘Genuine Commercial Interest’

Cases applying Trendtex have sought to clarify the precise meaning of the phrase ‘genuine commercial interest’. Three aspects of the formulation appear relatively settled from the cases and are relevant to the analysis that follows.

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91 Ibid, 533.
92 Ibid, 558.
93 See the often-quoted statement by Williams, Webb and Kitto JJ in Poulton v The Commonwealth (1953) 89 CLR 540, 602: ‘according to well established principle, a [right of action in tort] was incapable of assignment either at law or in equity’.
96 See also Seven Utility Services Ltd v Rosekey Ltd [2003] EWHC 3415.
First, the requisite interest an assignee must possess to render an assignment valid probably need not be connected to a commercial transaction. Where the Commonwealth is the assignee, it has been held that a ‘genuine and substantial governmental interest’ in consumer protection may justify the government’s taking of an assignment of foreign students’ rights to refund against shady operators.\(^7\) Indeed, it would be most illogical if a non-commercial cause of action could never be assigned simply because the assignee’s interest could never be regarded as ‘commercial’ in nature.\(^8\)

Second, the ‘genuine commercial interest’ is not mere nebulous notion referring to the assignee’s general commercial advantage.\(^9\) Rather, it must specifically be an interest ‘in the assignor or its business affairs or activities which the assignment may in some way protect’.\(^10\) Circumstances which have been held to give rise to a sufficient interest include: where the assignee was a substantial creditor of the assignor;\(^11\) where the assignee was a sole shareholder who guaranteed the overdraft of the assignor;\(^12\) and where the assignee was a defendant who has taken an assignment of the plaintiff’s claim against a co-defendant in view of recouping an amount paid to the plaintiff in settlement.\(^13\)

Although the interest must relate to the assignor, it is not necessary that the assignee be in a position of suffering some loss attributable to the assignor. The spirit of the ‘genuine commercial interest’ criterion encapsulates situations where it makes commercial sense for the assignee to take an assignment in view of protecting its commercial relationship with the assignor. For example, in *The Kelo*,\(^14\) a consignee had a right of action against the carriers for goods damaged in transit. The consignee assigned the right of action to their agent, who habitually handled their dealings for them. It was held that the assignment was supported by a genuine commercial interest on the agent’s part, having regard to the agent’s functions in relation to the consignee as a legitimate part of its business activities. It is interesting to note

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\(^7\) *Commonwealth v Ling* (1993) 118 ALR 309, 342.

\(^8\) Tettenborn, above n 46, 147.


\(^12\) *Re Daley; Ex parte National Australia Bank Ltd* (1992) 37 FCR 390.

\(^13\) *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499.

that although Lord Roskill in *Trendtex* stated that the assignee must have a ‘genuine commercial interest…in enforcing [the claim] for his own benefit’, it was immaterial in *The Kelo* that the assignee sought to enforce the claim for the benefit of the assignor. As Tolhurst observed, Lord Roskill probably chose the words ‘for his own benefit’ due to the circumstances of *Trendtex*; in particular, his Lordship was referring to Credit Suisse’s ‘resale’ of the claim to a third party for the latter to enforce it for their own benefit, which was clearly objectionable.

Third, in determining whether the assignee’s interest is sufficient to validate the assignment, the transaction must be considered in its totality. To adopt the phrasing of White J:  

[T]he existence of the requisite interest is to be considered in a broad and practical way having regard to the totality of the circumstances, including the relationship between the assignor and assignee, the purpose of the assignment, the subject matter of the litigation, and the vice which the rule against assignment of causes of actions seeks to avoid.

It follows that the interest need not be related to every facet of the assigned claim. Thus, in *Brownton*, it was not fatal that the assignee’s genuine commercial interest did not relate to one head of damages out of several. Nor is it fatal that the assignee’s commercial interest is subject to contingencies – indeed, this is frequently a characteristic of interests that are characterised as ‘commercial’. For example, in *Dover v Lewkovitz*, the potential proceeds of the assigned claim were to be paid into a trust, of which the trustee had absolute discretion to distribute the money to beneficiaries other than the assignee. It was held that the assignee’s expectation to receive a larger sum from the trust (if the assigned claim succeeds) was distinctly greater than a mere hope of a nebulous nature; indeed, it was the likely outcome. Such an interest could be contrasted with mere hopes or personal interests, which are insufficient to support an assignment. For example, a mere commercial wish to participate in an investment,

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105 Tolhurst, above n 2, 202.
107 *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, 509.
109 Ibid, [26].
without the support of a legal right to do so, was held to be ‘too insubstantial and tenuous’ to qualify as an interest in the *Trendtex* sense; the interest must at least be rights-based.¹¹⁰

Having examined the general qualities of a ‘genuine commercial interest’, this paper is set to explore two contentious aspects of the formulation: the need for the assignee to possess a ‘pre-existing’ interest (Part V), and the relevance of profit making (Part VI).

**V THE NEED FOR A PRE-EXISTING INTEREST**

It has been said that the interest required to avoid a claim of improper maintenance does not encompass interests ‘arising from an arrangement voluntarily entered into by the assignee of which the impugned assignment is an essential part’.¹¹¹ As discussed above, the interest must be one ‘in the assignor or its business affairs or activities which the assignment may in some way protect’.¹¹² It necessarily follows that the interest cannot derive from the assignment itself. Rather, the genuine commercial interest must ‘[exist] already or by reason of other matters, and which receives ancillary support from the assignment’.¹¹³ As already noted, the approach of the law here seems inconsistent with that taken to litigation funding, whereby the lack of a pre-existing interest on the part of the funder does not appear to be fatal to the validity of a litigation funding arrangement where no outright assignment is involved. This Part examines what it means for the interest to be ‘pre-existing’, and whether such a requirement makes doctrinal sense in the context of assignments.

Indeed, in many cases an assignment has been held to be valid because the assignee had a pre-existing enforceable right against the assignor. For example, in *Trendtex*, Credit Suisse (the assignee) was a substantial creditor with a pre-existing right to enforce a debt against Trendtex (the assignor). In *Equuscorp*, the assignee had a pre-existing charge over the assets of the assignor (which included rights to sue for money had and received) to secure the latter’s indebtedness, the assignment being a means of recovering part of the assets to which the assignee was entitled under the charge. In *Hazard Systems Pty Ltd v Car-Tech Services Pty* ¹¹⁰

¹¹⁰ *Project 28 Pty Ltd v Barr* [2005] NSWCA 240, [42].
Assignment of Bare Rights to Litigate

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Lt. the insurer had a pre-existing right acquired by way of subrogation, which receives ancillary support by the assignment of causes of action in tort.

Stemming from this discussion is the question whether the pre-existing interest must be constituted by a right enforceable at law or in equity. The Queensland Court of Appeal in *WorkCover Queensland v Amaca Pty Ltd* answered this question in the negative. In that case, the personal representative of the deceased executed a deed under which the estate assigned to WorkCover the deceased’s cause of action against Amaca Pty Ltd (the deceased’s employer) relating to work-related injuries. Prior to his death, the deceased had successfully claimed statutory compensation from WorkCover of $550,351.50. The Court held that the assignment was valid as WorkCover had a genuine commercial interest in the assigned action, viz. its interest in recouping the amount paid out to the deceased by way of statutory compensation. This interest arose well before execution of the assignment and, although not legally enforceable, was nonetheless sufficiently ‘genuine’ and ‘commercial in nature’ to support the assignment. This conclusion is doctrinally defensible – whether or not the interest is constituted by a legally enforceable right is immaterial, as in neither case is the assignee acting as an ‘officious intermeddler’.

A related question is whether the pre-existing interest must arise from the same transaction which gave rise to the assigned cause of action. This question was left open by the court in *Brownton Ltd v Edward Moore Inbucon Ltd*. In this case, Man, on advice from EMR, bought a dysfunctional computer system from Cossor. Man brought an action against EMR in negligence, with Cossor being joined as a second defendant. Before the trial, EMR paid a sum in settlement to Man, on the basis that EMR would indemnify Man against any costs liability to Cossor, and Man’s cause of action against Cossor would be assigned to EMR. The Court held that EMR had a legitimate interest in taking the assignment, viz. in recouping what it had paid to Man in settlement. It is pertinent to note that although the contracts between Man and EMR and

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114 [2013] NSWCA 314.
116 *Workers’ Compensation and Rehabilitation Act 2003* (Qld).
117 *WorkCover Queensland v Amaca Pty Ltd* [2012] QCA 240, [67].
118 *Dover v Lewkovitz* [2013] NSWCA 452, [23].
119 [1985] 3 All ER 499.
Man and Cossor were separate, they were in essence part of the same transaction – if Cossor had properly performed its contractual obligations, it followed that EMR’s damages to Man would be less. These facts could be contrasted with those in WorkCover, where the amount paid to the deceased under his statutory compensation claim (from which the assignee’s interest arose) had no bearing on the amount recoverable from the assigned negligence claim – they were, in essence, legally distinct claims. Although WorkCover had a statutory right of indemnity by Amaca in specified circumstances, these circumstances were not satisfied on the facts and as such WorkCover had no pre-existing legal interest in the claim against Amaca. However, it is noteworthy that both the statutory compensation claim and negligence claim arose in respect of the same work-related injuries suffered by the deceased. In this respect, it would appear difficult for an assignee to argue that its pre-existing interest arising out of a distinct transaction, which has no legal or factual relevance to the assigned claim, could validly support an assignment. First, this argument is inconsistent with the position that the interest must be ‘in the assignor or its business affairs or activities’. Secondly, the law on maintenance and champerty could always be easily circumvented if the assignee was permitted to invoke an interest arising from a distinct transaction in support of a completely unrelated assignment. It therefore appears implicit in the Brownton and WorkCover decisions that the assignee must establish some nexus between the assigned cause of action and the transaction which gave rise to the pre-existing interest. At a basic level, both the assigned claim and the transaction giving rise to the pre-existing interest should essentially derive from the same matrix of facts; for example, it would suffice that both relate to the same loss suffered by the assignor. However, not too much can be said here as the quality or extent of the nexus required has yet to receive any judicial attention.

Perhaps the more fundamental question is whether it makes sense at all to require the assignee to have a ‘pre-existing’ interest arising separately from the assignment. The prevailing position is that lack of a pre-existing interest is a presumptive bar to assignment of a bare right of action. This position is premised on two assumptions which, it is suggested, are misguided.

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120 Tolhurst, above n 2, 201.
121 Workers’ Compensation and Rehabilitation Act 2003 (Qld) s 207B(7).
122 WorkCover Queensland v Amaca Pty Ltd (No 2) [2011] QSC 358, [30].
First, the law assumes that all assignments of bare rights of action prima facie offend the law on maintenance and champerty and thus necessitate an inquiry into the existence of a pre-existing interest on the assignee’s part. It is argued that this assumption is not grounded on sound legal principles or public policy concerns, and in this respect it is instructive to consider the recent case of Simpson v Norfolk and Norwich University Hospital NHS Trust. In Simpson, the claimant’s husband contracted an infection due to the hospital’s negligence. The assignor, who suffered the same infection due to the hospital’s negligence, assigned to the claimant his personal injury claim against the hospital for £1. The court held that, on the facts, the assignment was champertous and void because the claimant lacked a legitimate interest in taking the assignment. Moore-Bick LJ noted that:

[The claimant’s] only interest in the litigation is to pursue a campaign against the hospital. In my view it would be damaging to the administration of justice and unfair to defendants for the law to recognise an interest of that kind as sufficient to support the assignment of a cause of action for personal injury, because the conduct of the proceedings...is entirely in the hands of the assignee and is liable to be distorted by considerations that have little if anything to do with the merits of the claim itself.

It was strange that the court was critical of the claimant’s control over the proceedings and the fact that considerations separate from the merits of the claim could affect the proceedings. In Trendtex, it was immaterial (i) that Credit Suisse had full control over the assigned litigation and (ii) that Credit Suisse’s motive in pursuing the claim differed from that of Trendtex (the assignor) and was not necessarily related to the merits of the assigned claim. Equally perplexing is why Moore-Bick LJ considered the assignment in Simpson champertous at all. As Lim noted, the circumstances of this case do not appear to fall within the policy justifications underlying the law of maintenance and champerty. There was no indication that the claimant would inflame damages, suppress evidence, suborn witnesses or ‘on-sell’ the claim for a profit as Credit Suisse did in Trendtex. She was not trafficking in litigation or speculating for a gain, but merely wanted the hospital to rectify its deficient infection control procedures. Perhaps fatal to

125 Ibid, 652.
127 Re Trepica Mines Limited (No. 2) [1963] Ch 199, 219-220.
the assignment was that the assignee’s ‘principal object is not to obtain a remedy for a legal wrong, but to pursue an object of a different kind together’. However, this reasoning is misconceived as a pre-existing interest in the Trendtex sense by definition exists independently from the assignment and relates to a different object, whether it be an interest in recovering a debt from an insolvent assignor or recouping an amount paid to the assignor in settlement. This case shows that the link between champerty, the assignment and the need for a pre-existing interest remains unarticulated. The court’s criticism of the assignee’s motives was arguably baseless and cannot in principle support the conclusion that the assignment ‘savours of champerty’. This conclusion was seemingly reached solely because the subject matter of the assignment involved a bare right to litigate, which the law assumes to be prima facie unassignable. Such an assumption, which seeks to draw a hard-and-fast distinction between the assignability of different choses in action based on the nature of the chose alone without reference to policy justifications, lacks principled rationale and is doctrinally indefensible.

Second, the law assumes that the lack of a pre-existing interest means that the assignment is in some way contrary to public policy. This assumption is not without merits. For example, in Trendtex, the third party to which Credit Suisse executed an assignment had no pre-existing interest in the cause of action, which ultimately led to the finding that it was engaging in litigation trafficking. There are certainly good reasons to nullify such assignments which involve a ‘resale’ of the claim. To uphold such assignments would reorient the courts’ role to a forum which generates commercial gain for persons with no pre-existing interest in the litigation, analogous to the stock exchange – this is clearly inimical to the purity of justice. Indeed, secondary trading of claims yields no benefit to the plaintiff and is unnecessary to facilitate access to justice.

However, the case law seems to go further in holding that the lack of a pre-existing interest is itself sufficient to impugn the assignment, the corollary being that the presence of a pre-existing interest, over and above a mere personal interest, is the only means by which an assignment of a bare right of action can take place without offending the policy behind

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128 Simpson v Norfolk and Norwich University Hospital NHS Trust [2012] QB 640, 652.
129 Ibid, 653.
130 Idoport v National Australia Bank [2004] NSWSC 695, [87].
131 Waye, above n 70, 212.
maintenance and champerty. It is argued that such an approach is misguided. For example, in *Simpson*, the court equated the lack of a pre-existing interest with ‘wanton and officious intermeddling with the disputes of others’, without any apparent inquiry into the actual effect of the assignment such as whether it involved trafficking in litigation or speculating in legal claims for improper gain. Given that the circumstances of the case do not offend the policies behind maintenance and champerty (as discussed), there is no logical reason to require the assignee to possess a pre-existing interest over and above her interest in forcing the hospital to rectify its infection control procedures, the latter being a very real interest albeit a personal one.

To borrow Lord Scott’s statement made in an unrelated context, ‘[t]he wielding of a rule of public policy in circumstances where public policy is not engaged constitutes…bad jurisprudence’. It is not difficult to see the artificiality in focusing undivided attention on the nature of the assignee’s pre-existing interest, which could nullify assignments that have never been objectionable on public policy grounds. A more principled approach, it is suggested, is to consider the effect of the assignment with reference to the mischief that maintenance and champerty were designed to redress. Such an approach would validate assignments such as that in *Simpson*, where the assignee’s personal interest, viewed in light of the factual circumstances, is sufficient to take her outside the category of an officious meddler or speculator in the outcome of proceedings even though it would not have otherwise qualified as a pre-existing interest in the *Trendtex* sense.

It is further argued that in cases involving funding of litigation, the question whether the funder had a pre-existing interest is simply not the right one to ask, notwithstanding that such arrangements may in substance amount to an outright assignment of a bare right to litigate. First, any attempt to ask this question would invariably return a negative answer. The typical litigation funder’s sole interest is to profit from maintaining another’s action and thus would not normally possess any interest in the claim prior to executing the funding agreement. Second, following *Fostif*, maintenance and champerty were no longer relevant to the validity of litigation funding arrangements; instead, the essential inquiry is whether the arrangement would

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132 *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] QB 640, 651-652.
133 *Elfic v Mack* [2003] 2 Qd R 125, 137.
135 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.
or would have a tendency to lead to an abuse of process.136 In this respect, there is no reason in logic to regard that a funder with no pre-existing interest in the litigation will more likely engage in mischievous behaviour to corrupt the processes of the court. Third, it is suggested that the ‘pre-existing interest’ requirement, when considered in light of contemporary conditions, reflects unwarranted judicial paternalism. It has already been recognised that the funder is entitled to some control over the proceedings, as it has to keep abreast of the course which the litigation is taking in order to protect its own interests.137 The social utility of assisted litigation is now recognised and the provision of financial assistance is viewed favourably as a means of facilitating access to justice.138 In this respect, the policy rationale behind the ‘pre-existing interest’ requirement, viz. prevention of the ‘stirring up’ of litigation without justification, is probably redolent of ‘the ethos of an earlier age’.139 The courts today should adopt a liberal view of what might be acceptable, particularly if procedural safeguards are present or able to be applied.140 On this view, the requirement that the funder or assignee have a ‘pre-existing interest’ introduces unnecessary complexity in the law and could potentially invalidate entirely justifiable arrangements which serve to facilitate access to justice.

More generally, while courts must be vigilant to protect the integrity of court processes, it must at the same time recognise innovative but responsible ways of increasing access to justice for the impecunious.141 In this respect, instead of examining the nature of the assignee’s interest, it makes more sense to consider the effect of the assignment on the integrity of court processes so as to assist the courts to strike an appropriate balance. Such an approach is desirable as it avoids the artificiality of examining the assignee’s pre-existing interest and aligns judicial inquiry with the policy rationales underlying maintenance and champerty.

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136 Project 28 Pty Ltd v Barr [2005] NSWCA 240, [23].
VI RELEVANCE OF PROFIT MAKING BY THE ASSIGNEE

In *Re Movitor Pty Ltd (In Liq)*, Drummond J contended that the ‘genuine commercial interest’ required to support an assignment must be ‘separate from the benefit the outsider seeks to derive from his support for the litigation’, otherwise ‘the rule against maintenance and champerty could always be easily circumvented’. This statement is not without its difficulties – to require the assignee to have a motive outside of its interest in the assignment seems illogical and, if enforced, would severely limit the rights that may be assigned. It appears more logical to say that an assignee cannot have a motive that overrides the protection against claims of unlawful maintenance provided by the genuine commercial interest, such that its intention is not to protect that interest but to pursue that other motive. Nevertheless, the statement appears to suggest that the ‘genuine commercial interest’ must not only be pre-existing, but must also be distinct or independent from any motive to derive profit from supporting the litigation. This raises the question whether the assignee’s motive to make a profit or the amount of profit made from the assignment has any bearing on the sufficiency of an interest in the *Trendtex* sense to validate an assignment.

To understand the relevance of profit, it is instructive to examine the judgments of Megaw and Lloyd LJ in *Brownton*. While the Court did not hesitate to find that the assignee had a genuine commercial interest in taking the assignment, more interesting was the defendant’s contention that the assignment savoured of champerty because the assignee contemplated the making of profit from it. On this point, Megaw LJ concluded:

> An agreement to assign is not champertous merely because the assignee, or the assignor, or both has as a part of his genuine commercial interest the contemplation that he will be better off as a result. If, however, ‘contemplation of making a profit’ is confined to such situations as existed in *Trendtex* where the assignee’s intention was, not himself to pursue the action, but to sell the cause of action to a stranger for a higher price than he had paid for the assignment to him, there is obviously good reason why such a transaction may be regarded as champertous.

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142 (1996) 64 FCR 380, 388.
143 *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499.
144 Ibid, 506.
Megaw LJ appears to suggest that an assignment is not objectionable merely because the assignee, by taking the assignment, recovers an amount over and above the extent of his pre-existing commercial interest. However, in his view, excessive profit making from a further ‘resale’ of the assigned rights could undermine the ‘genuineness’ of the commercial interest, rendering the assignment champertous.\footnote{Ibid.}

In contrast, Lloyd LJ did not view the decision in Trendtex through the lens of profit making, but instead reasoned that the assignment in Trendtex was objectionable because the third party lacked a pre-existing genuine commercial interest in taking the assignment. On the issue of profit, Lloyd LJ noted ‘[i]f an assignee has a genuine commercial interest in enforcing the cause of action it is not fatal that the assignee may make a profit out of the assignment’.\footnote{Ibid, 509.} It appears that Lloyd LJ would consider the issue of profit irrelevant to the validity of an assignment. This is related to his insistence that the validity of any assignment be assessed at the time of the assignment, which raises two difficulties should the issue of profit be factored in. First, ‘it would be difficult to tell at [the time of the assignment] whether the assignment would be likely to result in a profit, and if so how great’.\footnote{Ibid.} Secondly, ‘even [if] the size of the profit could be foretold with certainty, there would arise the question, necessarily uncertain, whether the profit was out of all proportion to the interest’.\footnote{Ibid.}

Tan has thus suggested that the element of profit ‘is not as distinctive of champerty as it might seem to be’.\footnote{Y L Tan, ‘Champertous Contracts and Assignments’ (1990) 106 Law Quarterly Review 656, 674.} The prospect of profit making might simply mean that the assignee is more inclined to accept the assignment in satisfaction of existing obligations owed to him. It may also simply represent compensation to the assignee for putting the assignor in funds earlier and bearing the risk of litigation.\footnote{Ibid, 675.}

Perhaps one could deduce from Brownton that an assignment will only be invalid if the sole purpose of the assignment is to allow the assignee to profit from another’s suit. However, this interpretation is not free from problems. A key issue arises as to whether the courts should
look into the subjective motive of the assignee or the objective joint purpose of the assignment. The House of Lords in *Trendtex* seemed to favour the former approach. In the agreement between Trendtex and Credit Suisse, there was no mention that the latter would on-sell the assigned claim to a third party for profit. Article 1 of the agreement merely provided that Trendtex would not oppose a sale of its claim by Credit Suisse to a purchaser of its choice – this could at most be construed as giving rise to a possibility for resale of the claim, not a certainty. Thus, Lord Roskill’s conclusion that the ‘principal object’ of the agreement was to ‘enable Credit Suisse to resell the benefit of the assignment’\(^{151}\) could only be reached by having regard to extrinsic evidence, *viz.* the fact that the claim was indeed sold to the third party for a profit. This approach is clearly inconsistent with Lloyd LJ’s contention in *Brownton* that the validity of an assignment must be assessed at the time of the assignment. However, an objective approach is equally problematic. As the court acknowledged in *Stocznia Gdanska SA v Latvian Shipping Co*, it is highly artificial to talk of an agreement having an objective purpose which could be differentiated from the subjective motive of the parties.\(^{152}\) An objective bystander interpreting a commonplace litigation funding agreement would no doubt identify a significant profit element for the funder, contingent on the success of the claim – however, such a conclusion goes no further than to describe a common characteristic of such arrangements and provides little if any assistance to determining whether the profit element should justify the court’s denial of the validity of an assignment.

The better view is that a large mathematical disproportion between the value of the pre-existing commercial interest and the potential profit realisable by the assignee may allow an inference of champerty to be more readily drawn.\(^{153}\) but is not of itself conclusive. In *Stocznia Gdanska SA v Latreefers Inc*, there was considerable disproportion between the broker’s commission earnings (US$7.5 million) and the broker’s potential proceeds from the litigation (55% of recoveries with an estimated value of US$40 million) – however, it was held that the disproportion was insufficient to support a finding of champerty, given the unlikelihood that the full claim value would be realised and the substantial liability already incurred by the funder in

\(^{151}\) *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 701.

\(^{152}\) [1999] CLC 1451, 1458.

respect of the litigation.\textsuperscript{154} In contrast, in \textit{Clairs Keeley (a firm) v Treacy},\textsuperscript{155} the litigation funding arrangements were found to be champertous because the share of proceeds to be taken by the funder was excessive. It was held that the purpose of the proceedings was distorted as the litigation funder was permitted to take 35\% to 45\% of the proceeds, effectively leaving the plaintiffs with nothing after deducting costs and expenses.\textsuperscript{156} It was however clear from the judgment that the primary concern of the court was not the excessive profit per se, but that the arrangement did not truly facilitate access to justice which is the key policy underpinning forms of litigation funding. In particular, the court was critical of the fact that the clients have not received proper advice before entering into the funding arrangements and thus they would likely be conducting the proceedings at the funder’s sole direction. It is thus suggested that in assessing whether an assignment is objectionable, the court’s fundamental concern is with the mischief which the assignment is likely to cause in light of the policy underlying maintenance and champerty, \textit{viz.} protection of vulnerable litigants against opportunistic exploitation and of the purity of justice.\textsuperscript{157} The extent of profit realised or realisable by the funder is relevant but not determinative. This echoes a key theme reinforced throughout this paper, \textit{viz.} that the courts’ real concern is with the \textit{effect} of an assignment.

In \textit{Brownton}, Lloyd LJ deliberately left open the question whether, if the assignee does make a profit, he is accountable to the assignor for the profit made.\textsuperscript{158} The case law provides very little guidance on this question. However, it may be that if an agreement is drafted in a way such that there is no scope for the assignee to profit from the assignment, the assignment will more likely be upheld. For example, in \textit{WorkCover},\textsuperscript{159} the deed of assignment contained a clause to the effect that if the damages recovered by the assignee from the assigned claim exceeds the amount it previously paid to the deceased assignor by way of statutory compensation (constituting the value of its pre-existing interest in the litigation), it is to hold this excess amount in trust for the deceased assignor’s estate. The assignment was held to be valid. In contrast, the court in \textit{Simpson}, in holding that the assignment was invalid, was critical

\begin{itemize}
\item \textsuperscript{154} \textit{Stocznia Gadanska SA v Latreefers Inc} [2001] CLC 1267, 1284.
\item \textsuperscript{155} (2003) 28 WAR 139.
\item \textsuperscript{156} Ibid, [202].
\item \textsuperscript{157} \textit{Giles v Thompson} [1994] 1 AC 142, 164.
\item \textsuperscript{158} \textit{Brownton Ltd v Edward Moore Inbucon Ltd} [1985] 3 All ER 499, 509.
\item \textsuperscript{159} \textit{WorkCover Queensland v Amaca Pty Ltd} [2012] QCA 240.
\end{itemize}
of the fact that the assignee ‘would not be required to hold any damages recovered…on trust for the assignor’ which would ‘lead to her recovering damages in respect of an injury that she has not suffered’. However, this reasoning is indefensible given that there is nothing in the law on champerty or the ‘genuine commercial interest’ exception requiring the assignee to have suffered the same damage as the assignor. Given that profit making is not distinctive of champerty or fatal to an assignment (as discussed), there appears to be no doctrinal basis to compel the assignee to hold damages recovered on trust for the assignor.

VII FUTURE DIRECTIONS: A LIBERAL POLICY-ORIENTATED APPROACH

Based on the above analysis, it is suggested that the chief inquiry should not be on the nature of the interest but rather on the effect of the assignment. This suggestion is consistent with the centrality of public policy underpinning this area of the law. In this respect, maintenance and champerty cannot become ‘frozen into immutable respectability’ but must evolve to reflect modern thought. In Giles v Thompson, Lord Mustill in seeking to re-evaluate champerty in light of contemporary conditions said the following:

…the law on maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose…It is possible…that new areas of law will crystallise, with their own fixed rules which are invariably to be applied to any case falling within them. Meanwhile, I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.

In Giles v Thompson, the plaintiff motorists sustained injuries and damage to their motor vehicles due to the fault of the defendants. A hire company made cars available to the motorists while their damaged cars were repaired; in return the motorists allowed the hire company to finance and conducting proceedings against the defendants in their names. If the proceedings were successful, the hire charge was to be paid out of the damages recovered. The

160 Simpson v Norfolk and Norwich University Hospital NHS Trust [2012] QB 640, 653.
162 [1994] 1 AC 142, 164.
defendants argued that the arrangements between the plaintiffs and the hire company were champertous.

The House of Lords held that the arrangements were lawful. Lord Mustill, who delivered the leading opinion, declined to engage in conventional common law analysis and said this of the Trendtex formulation: ‘the tests there laid down were addressed to transactions of the kind then before the House; they are not to be interpreted as if they had statutory force’ (emphasis added). 163 Lord Mustill instead examined the validity of the arrangements by reference to the ‘origins [of maintenance and champerty] as principles of public policy designed to protect the purity of justice and the interests of vulnerable litigants’. 164 His Lordship rejected the defendants’ contentions that the hire company’s support of the litigation might encourage witnesses to exaggerate their evidence and encourage hiring of cars at inflated rates which the defendants would have to pay. The hire company did not engage in ‘wanton and officious intermeddling’ with another’s dispute as there was no realistic possibility that administration of justice would be undermined by the hiring arrangements. In short, the focus was on the effect of the arrangements.

Lord Mustill’s judgment reflects a liberal policy-orientated approach. 165 The key issue is how such an approach could inform future judicial interpretation of the ‘genuine commercial interest’ formulation.

The suggestion here is that it makes sense to play down the role of the ‘genuine commercial interest’ formula, and the approach of Lord Mustill points the way. The formula approach, which prompts inquiry into the existence and nature of the assignee’s interest, has proven to be confusing; the amount of litigation around the phrase reflects the difficulty in formulating principled criteria for its application and no one formula is capable of dealing with the myriad of circumstances that may come before a court in this area. It is therefore suggested that a more workable solution is to go back to the mischief that maintenance and champerty were intended to redress, define that purpose within the modern system and then determine whether any particular assignment would have the effect of engaging in the prohibited conduct.

163 Ibid, 163-164.
164 Ibid, 164.
As has been noted throughout this paper, whenever a court is asked to describe maintenance and champerty, the court will do so by reference to its purpose. Traditionally, that purpose was to counter oppressive use of litigation by feudal lords and widespread judicial corruption;\(^\text{166}\) today, it is to protect the integrity of court processes by precluding such conduct as trafficking in litigation or speculating in causes of action for improper gain.\(^\text{167}\) By focusing on that purpose and asking of each set of facts whether it may have the effect of undermining that purpose, the courts are equipped with a more workable approach and one that appears to underpin the cases as noted.\(^\text{168}\) The *Trendtex* formula tends to be misaligned with the rationales underpinning maintenance and champerty and allows the court to get too caught up in applying the formula while ignoring the true effect of an assignment.

However, that is not to suggest that the ‘genuine commercial interest’ formulation is always irrelevant or should be abandoned in its entirety. Rather, the formula approach should be one subset of the ‘effect’ approach suggested above. The existence of a ‘genuine commercial interest’, it is suggested, may be a relevant consideration in certain circumstances but should not be of itself decisive or divert attention away from considering the fundamental effect of an assignment. For example, it makes good sense to nullify assignments where the assignee is likely to resell the claim to a third party with no interest in the claim – there is no viable case in favour of such transactions facilitating secondary trading of rights of action, which in essence analogises legal claims with instruments of commerce and significantly undermines the integrity of the court system.\(^\text{169}\) In contrast, the formula approach is inapt in circumstances such as

\(^{166}\) Waye, above n 70, 13.


\(^{168}\) See for example *Massai Aviation Services Ltd v Attorney-General for the Bahamas* [2007] UKPC 12, [19] per Baroness Hale: ‘In order to decide whether the particular transaction is permissible, it is essential to look at the transaction as a whole and to ask whether there is anything in it which is contrary to public policy’. See also *R (Factortame Ltd) v Secretary of State for Transport* [2003] QB 381, [36] per Lord Phillips MR: ‘One must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice’. See also Tettenborn’s remark that there is ‘a distinct impression that when judges repeat the *Trendtex* formulation their heart is not really in it’ in Tettenborn, above n 46, 392-393.

\(^{169}\) See also Stauthton J’s remark in *Kaukomarkkinat O/Y v “Elbe” Transport-Union GmbH (The Kelo)* [1985] 2 Lloyd's Rep 85, 89 that there is a distinction between ‘selling lawsuits as activities of commerce’ and ‘taking an assignment in a case where one has a genuine commercial interest’.
as those in *Simpson*\(^{170}\) (discussed in Part V) where it is inconceivable that the assignment could in any way impede the administration of justice or lead to commodification of legal claims.

The significance of *Giles v Thompson* lies in its reflection of the need to constantly recalibrate the judicial approach to determining the validity of assignments of bare rights of action with reference to contemporary conditions, in particular, the mechanisms available to modern courts to detect and forestall abuses of process.\(^{171}\) Lord Mustill’s approach in focusing on the original policy concerns underlying maintenance and champerty, *viz.* protection of the purity of justice and interests of vulnerable litigants,\(^{172}\) opens the gateway for doctrinal development. The door is opened for further liberalisation of judicial attitudes to assignments of bare rights to litigate – hopefully it will lead to courts discarding the requirement that the assignee have a pre-existing interest in the assigned claim and giving no weight to the extent of profit made by the assignee in circumstances where the assignment presents no realistic impediment to the due administration of justice.

### VIII Conclusion

The analysis developed in this paper demonstrates that the modern approach to assessing the validity of assignments of bare rights to litigate, which focuses on strict application of the ‘genuine commercial interest’ formulation, is misguided and does not align well with the policies underpinning maintenance and champerty. The undue emphasis placed on the nature and existence of a pre-existing interest, over and above the assignee’s personal interest in the outcome of proceedings, diverts the courts’ attention away from the true effect of the assignment and fails to recognise situations where due administration of justice is still preserved notwithstanding lack of such an interest. Moreover, since *Fostif*,\(^{173}\) there has been a progressive liberalisation of judicial attitudes regarding lawful maintenance in light of the policy imperative of access to justice. Given that procedural safeguards can be applied by courts to deal with abuse of process, imposing an additional requirement that the assignee possess a pre-existing

\(^{170}\) *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] QB 640.

\(^{171}\) *Giles v Thompson* [1994] 1 AC 142, 153.

\(^{172}\) Ibid, 164.

\(^{173}\) *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.
interest is artificial and could condemn entirely justifiable transactions aimed at facilitating access to justice.

This paper has also sought to explain the difficulties associated with the position that an assignment will be invalid if its sole purpose is to allow the assignee to profit. Notably, there lacks a satisfactory approach for ascertaining the purpose of the assignment. The better view, it is suggested, is that a significant disproportion between the value of the pre-existing commercial interest and the profit realisable by the assignee may allow an inference of champerty to be more readily drawn, but this should not overshadow the broader and more fundamental question of the effect of the assignment on the integrity of court processes.

For the reasons given above, it is suggested that the ‘genuine commercial interest’ formulation should not be the decisive test but should instead form one subset of the ‘effect’ approach. In determining the validity of an assignment, rather than focus on the narrow issue of the existence of a qualifying interest which, as discussed, could be counterproductive in nullifying legitimate transfers, it is hoped that future courts would view the assignment holistically to determine its effect with reference to the policy behind maintenance and champerty, bearing in mind the mechanisms already available to modern courts to detect and forestall abuses of process. Such an approach, it is submitted, is not a radical departure from the existing doctrinal position – it has been reasoned through the cases but never expressly adopted, and it is time that the courts do so.
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