IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-4890
[2014] NZHC 1514

BETWEEN	BODY CORPORATE 160361 (FLEETWOOD APARTMENTS) First Plaintiff
	BODY CORPORATE 160362 Second Plaintiff
	F H YEUNG & ORS Third Plaintiffs
AND	BC 2004 LIMITED AND BC 2009 LIMITED First Defendants
	ANDREW PROPERTY SERVICES LIMITED Second Defendant
	AUCKLAND COUNCIL Third Defendant
	PBS DISTRIBUTORS LIMITED First Third Party
	FAÇADE DESIGN SERVICES LIMITED Second Third Party
	RONALD CHARLES HANLEY Third Third Party
	JOHN LUKASZEWICZ Fourth Third Party

Hearing:	12 June 2014
Counsel:	MC Josephson and M Gibson for Plaintiffs MJW Lenihan for First Defendants JD McBride, DA Cowan and JPM Wood for Second Defendant SA Thodey and KM Parker for Third Defendant J Keating for Second and Third Third Parties
Judgment:	4 July 2014

JUDGMENT OF FOGARTY J

This judgment was delivered by me on 3 July 2014 at 4.30 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors:	*Grimshaw & Co, Auckland*
	Blackwells (Nigel Seebold)
	Rainey Law, Auckland
	Heaney & Partners, Auckland
	Kennedys, Auckland

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Introduction

[1] The plaintiffs in these proceedings are the owners of 40 apartments located within a development known as "Fleetwood Apartments" in the Auckland CBD. The first defendants, commonly known as "the Babbage Companies", are a multi-disciplinary building consultancy that has operated throughout New Zealand for over 75 years.

[2] In 2003, the plaintiffs engaged Babbage to investigate suspected leaky building syndrome in the apartments. Then between 2004 and 2006 they engaged Babbage to design and supervise remedial works that form the subject matter of these proceedings.

[3] The second defendant, Andrews Property Services Limited (APS), is a construction company that has operated in New Zealand for nearly 25 years and continues in business.

[4] The third defendant, the Council, was responsible for regulation of the building works.

[5] These proceedings were set down for trial, but shortly before the trial date settlement agreement was reached between the plaintiffs and the Auckland Council but not with APS, who refused to settle.[1]

[6] Under the settlement agreement, the Council pays the plaintiffs the sum of $1.5m. It admits that it is liable to pay the claimants this sum. The claimants agree that they are not entitled to any further payment or recovery from the Council except as provided in this agreement. The settlement contains an assignment of the plaintiffs' causes of action:

> **Assignment**
>
> 5 In exchange for the payment of the settlement sum the claimants hereby unconditionally and irrevocably assign to the Council the

[1] This is the operative settlement agreement. The first settlement agreement was by consent set aside and a new agreement written.

claimants' entitlement to recover damages against BC 2004 Limited and BC 2009 Limited and Andrew Property Services Limited.

6 It is agreed the Council will not profit from this assignment and:

(i) The claimants will receive the first $200,000 (GST inclusive if any) of any recovery (in cash) that the Council secures from any of the other defendants to the claim; and

(ii) The Council will receive the next $1.5m (GST inclusive if any) of any recovery (in cash) and a further sum reflecting the costs incurred by it in pursuing the assignment as from 21 May 2014. The Council further agrees to take reasonable steps to provide such documents as the plaintiffs require to evidence those costs; and

(iii) The claimants will receive any amount in excess of the referred to in (i) and (ii) above recovered (in cash).

[7] The sum of $1.5m is less than half the amount being sued for in the current statement of claim.

[8] Ms Thodey, for the Council, agreed that the effect of the assignments is to reduce significantly the likely contribution otherwise payable by the Council following a judgment were the judgment to proceed, and to be around $3m. The flow of funds would be:

(a) The first $200,000 to the plaintiffs;

(b) $1.5m to the Council to reimburse its payment to the plaintiffs;

(c) All the Auckland Council's costs on a solicitor/client basis, leaving the balance over to the assignor;

(d) The net cost of the litigation to the Council would be just $200,000.

[9] The Council as the local authority, as a tortfeasor, would usually expect to contribute approximately 20 per cent of the $3m,[2] subject to upward adjustment should the other concurrent tortfeasors not be solvent for their assessed contribution. So the assignment delivers a much lower net cost of the litigation. On the example

[2] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) at 241.

above it is a net cost of $200,000 to be compared with otherwise a likely liability of at least $600,000 and probably considerably more. This is without taking into account the application of s 17 of the Law Reform Act 1936.

[10] The current statement of claim pursues claims against Babbage in contract, and in breach of the Consumer Guarantees Act 1993, and in breach of Building Act warranties under the Building Act 2004. The fourth cause of action against Babbage is in negligence. The fifth cause of action is in breach of the Fair Trading Act 1986.

[11] The claim against APS is for a breach of contract. The second cause is for breach of the Consumer Guarantees Act. The third cause is for the breach of Building Act warranties. The fourth cause is in negligence and the fifth cause is for breach of the Fair Trading Act.

[12] The claim by the plaintiffs against the Council is in negligence. The relief sought against all these causes of action is the same:

(a)	The cost of rectification work	$1,964,500.25
(b)	Losses on sale of three units	$475,000.00
(c)	General damages for the consequences of depression, anxiety, distress, inconvenience and loss of enjoyment of the properties caused to the unit holders, currently assessed at $20,000 per person in round terms -$400,000 - $5,000	$400,000.00 to $500,000.00

[13] Following the settlement, the Auckland Council – still described as the third defendant – sought leave to file an amended cross-claim in order to take advantage of the assignment in the settlement. The grounds on which the order is sought are:

(a) that leave is required as the date for pleadings have closed;

(b) the amendments are required to bring the real issues in dispute between the parties before this Court; and

(c) that no prejudice will be suffered by any parties as a result of the proposed amendments.

[14] The intituling of the proposed "Amendment statement of cross-claim by third defendant against first and second defendants" still records the plaintiffs as before but inserts the phrase "(as assignors)". The Auckland Council is still identified as the third defendant but after its name is added "(as assignee)".

[15] This cross-claim amends the losses but not significantly. The cost of remediation is reduced to $1,652,574.67. Interest of $59,172.99 is sought with leave to update the sum. Consequential losses of loss of rental and cleaning costs of $255,748.98 are sought, with provision for some adjustment. Losses in respect of the three units are pursued still at the sum of $475,000 and the general damages, a cause to the third plaintiffs for depression, anxiety etc, are the sum of $745,000. Also in general damages there is a further claim of $386,564.71 being various named plaintiffs who have lost the opportunity to sue the Council for losses. And there is a third general damages claim in respect of some units for reclad costs of $77,777.28. The total damages claimed, special and general, exceed $3m.

[16] The amended statement of cross-claim pleads the assignment, particularly:

> In that [settlement] agreement the plaintiffs have agreed that they unconditionally and irrevocably assign to the Council the plaintiffs' entitlement to recover damages in this proceeding.

[17] The claim then proceeds as a statement of claim, the particulars being largely the same as the statement of claim as it was when the pleadings closed and prior to the settlement. There are, however, new particulars against APS. It is not necessary at this stage to detail those particulars.

[18] In respect to the pleading of each cause of action against the defendants, there is a sequence of two clauses. For example, [48] and [49]

> [48] The Council has admitted liability to the plaintiffs in respect of the losses referred to in para [44] and [45] up to a value of $1.5m:

> [49] As a consequence, the Council is entitled to an indemnity for contribution from Babbage. Such rights exist at common law and/or further to s 17(1)(c) of the Law Reform Act 1936.

[19] It is the intention of the Council to rely on the assignment and to pursue the original statement of claim against Babbage and APS, seeking judgment overall exceeding $3m on all the causes of action on the sums pleaded and, as just noted above, seeking indemnity in the sum of $1.5m.

[20] The response of APS was to oppose the application to file this new cross-claim, on four grounds:

(a) Council has followed the wrong procedure. It should be seeking leave to be named as a plaintiff and to file a statement of claim.

(b) The draft claim is hopelessly unparticularised and time barred in any case.

(c) The assignment the Council relies on is void.

(d) If the Court were nevertheless minded to grant leave, APS will suffer undue prejudice if required to respond to such a significant change in the case against it close to trial.

The issue resolved in this judgment – whether the assignment is void as against public policy

[21] The argument in this hearing centred on ground (c), the assignability of the causes of action. For if the assignment is found to be void as against public policy, the rest of the procedural issues fall away. The procedural issues were touched on in the hearing only in the context of exploring the character of the assignment.

Champerty

[22] Champerty is a concept with which modern litigation lawyers are not familiar. It is, as Lord Denning called it, "Champerty is a species of maintenance: but it is a particularly obnoxious form of it".[3]

[23] Maintenance and champerty are defined as follows:[4]

> The tort of maintenance is committed where a person, without lawful justification, assists a party to a civil action to bring or defend the action, thereby causing damage to the other party. Champerty is that form of maintenance in which a person giving the assistance does so in consideration of his or her receiving a share of anything that may be gained as a result of the proceedings.

[24] The mischief that the rules against maintenance and champerty were designed to prevent is set out in the same passage:

> The law of maintenance and champerty seeks to prevent wanton and officious interfering with the disputes of others in which the intervenor has no interest and, where the assistance is without justification or excuse.[5]

[25] It was common ground of counsel, and accepted by this Court, that there has been a shift in policy by the common law courts to tolerate funding of litigation which might, in other times, have been considered to be champerous. Class actions, and some representative actions can now be funded by litigation funders whose fees are set in accordance with the success of the action.[6]

The Trendtex test for void against public policy

[26] The leading case on whether assignments are void by reason of maintenance and champerty is *Trendtex Trading Corporation v Credit Suisse.*[7] This decision is regarded as the leading case in the United Kingdom, in New Zealand and in Australia. It is common ground that the *Trendtex* decision sets the current standard for judging maintenance and champerty by examining whether the assignee had *"a*

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3 *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 (CA) at 654.
4 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [18.5.01].
5 At [18.5.01].
6 *Saunders v Houghton* [2010] 3 NZLR 331 (CA) at [77].
7 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL).

genuine commercial interest in taking the assignment and in enforcing it for his own benefit".[8]

[27] Where counsel differed in argument was the point of time at which the assignee Council had a genuine commercial interest and, related to that, the nature of the genuine commercial interest.

[28] The Auckland Council's argument was that it had a genuine commercial interest in the litigation as a defendant and, for that reason alone, had an interest in taking the assignment and enforcing the pleadings for the Council's ultimate benefit.

[29] For APS, Mr McBride argued that the genuine commercial interest must exist prior to the litigation. It is not sufficient for it to be a commercial interest arising by reason of being a party to the litigation.

[30] Counsel agreed that the standard of "genuine commercial interest in taking the assignment and in enforcing it for his own benefit" is a general standard. Since then, there has been a slew of cases.

[31] It needs to be kept in mind at all times that the torts of maintenance and champerty are still part of the common law. In that context, the *Trendtex* decision and other decisions that followed are essentially identifying legitimate assignments or agreements taking an interest in litigation which fall short of maintenance and/or champerty. The standard of genuine commercial interest functions as a justification for conduct amounting to a defence to an action in tort of maintenance and/or champerty.

[32] One keeps in mind champerty is a pernicious form of maintenance. In some contexts, it would not be necessary to refer to champerty. But, in this context, it is because APS's argument goes further than alleging unjustifiable maintenance but includes, at least implicitly, that it is champerous. At least that is how I heard Mr McBride, who used strong, morally critical language to describe the conduct of the Council, and that is how Ms Thodey understood Mr McBride's argument.

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[8] At 703 per Lord Roskill.

[33] As is the method of common law, the commonwealth courts' understanding of "the standard of genuine commercial interest" is being tested on a case by case basis. To understand the standard, its scope and its limits, it is necessary therefore to first have a good understanding of the *Trendtex* decision and, second, to appreciate where how the common law courts in the United Kingdom, Australia and New Zealand have applied the standard.[9]

The issues and their resolution in Trendtex

[34] The setting of Trendtex was the buying and selling of cement by Trendtex. Trendtex was buying a very large quantity of 240,000 tonnes to be delivered in a series of shipments.

[35] To finance the purchase Trendtex entered into an arrangement with Credit Suisse. Credit Suisse secured its advance by taking an assignment of Trendtex's purchase of the cement. Trendtex had sold the cement, the purchaser of which had in turn provided a letter of credit from another bank, the Central Bank of Nigeria, whose correspondent was the Midland Bank in London. All went well for the first four shipments but then congestion in Lagos delayed shipments and the letter of credit was not honoured. In the meantime, Credit Suisse had honoured their letter of credit. When the ships were delayed and demurrage occurred, Credit Suisse paid these costs and debited Trendtex. When Trendtex brought proceedings in the English courts against the Central Bank of Nigeria for defaulting on its letter of credit, Credit Suisse assumed the costs of that litigation.

[36] In due course Credit Suisse, concerned to realise its advances, took an assignment of the claim Trendtex had against the letter of credit issued by the Central Bank of Nigeria.

[37] So far so good. The problem came when Credit Suisse assigned those rights to a third party whose identity was unknown. The sale was for $800,000. The third party then brokered a settlement with the Central Bank of Nigeria at some $8m.

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[9] The standard also applies in Canada. Counsel were not able, in the time, to advise the Court as to what standard is used in the United States. Two Canadian cases were cited to me but are not of assistance on the facts.

Trendtex, being of course ultimately liable for all Credit Suisse costs, determined to challenge the assignment with a goal of procuring the $8m settlement for itself. The House of Lords agreed the second assignment was void but the original assignment from Trendtex could not be criticised.

[38] In respect of the original assignment of Trendtex's rights to its banker, Credit Suisse, Lord Roskill said: [10]

> The Court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, *or if the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit,* I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.

[39] The assignment onto the third party was another matter. Lord Roskill went on: [11]

> Though your Lordships do not have the agreement between Credit Suisse and the anonymous third party, it seems to me obvious, as already stated, that the purpose of Article 1 of the agreement of 4 January 1978 was to enable a claim against CBN to be sold onto the anonymous third party for that anonymous third party to obtain what profit he could from it, apart from paying to Credit Suisse the purchase price of $1,100,000. In other words, *the "spoils" whatever they might be, to be got from CBN were in effect being divided, the first $1,100,000 going to Credit Suisse and the balance, whatever it might ultimately prove to be, to the anonymous third party. Such an agreement, in my opinion, offends, for it was a step towards the sale of a bare cause of action to a third party who had no genuine interest in the claim in return for a division of the spoils, Credit Suisse taking the fixed amount for which I have already mentioned.* (Emphasis added.)

[40] Lord Wilberforce in the same judgment framed the test slightly differently: [12]

> If no party had been involved in the agreement of 4 January 1978 but Trendtex and Credit Suisse, I think it would have been difficult to contend that the agreement, even if it involved (as I think it did) an assignment of Trendtex's residual interest in the CBN case, offended against the law of maintenance or champerty. As I have already shown, Credit Suisse had "a genuine and substantial interest in the success of the CBN litigation" … The vice, if any, of the agreement lies in the introduction of the third party. … This 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 my opinion this manifestly "savours of champerty",

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10 *Trendtex Trading Corporation v Credit Suisse*, above n 5, at 703.
11 At 703 – 704.
12 At 694.

> since it involves trafficking in litigation, a type of transaction which, under English law, is contrary to public policy.

Leading cases following Trendtex

Brownton Limited v Edward Moore Inbucom[13]

[41] Brownton sought advice from Edward Moore Imbucom (EMR) concerning a new computer system. EMR recommended the services of Cossor. Brownton entered into a contract with Cossor for the supply, installation and maintenance of a computer system. The system failed. Brownton sued EMR for damages for breach of contract and negligence. EMR denied liability and said the true cause of the loss was Cossor's breach of contract. Brownton joined Cossor as a second defendant, claiming breach of contract (but not negligence). EMR cross-claimed against Cossor, who responded with a claim for contribution. EMR subsequently settled. As part of the settlement, it took an assignment of Brownton's claim in contract against Cossor. The question for the Court of Appeal was whether EMR had a sufficient interest in Brownton's cause of action against Cossor. The English Court of Appeal adopted the reasoning of Lord Roskill in *Trendtex* set out above.

[42] It is important at this point to pause and note that the assignment was of a claim in contract, not a claim in tort. The validity of assignments of claims of contract has a different common law history from the validity of assignment of claims in tort.

[43] Sir John Megaw said: [14]

> Looking, in accordance with Lord Roskill's injunction, at the totality of the transaction, one finds that, although the contracts between EMR and Man and Man and Cossor are separate contracts, they arise out of the same commercial transaction. EMR are liable to Man for the damages caused by EMR's breach of contract which resulted in Man making their contract with Cossor. If Cossor were in breach of that contract with Man, whereby Man suffered all or part of the damage claimed by them in the action, it must follow that the loss suffered by Man had been less if Cossor had duly performed their contract. Hence the damages payable by EMR would have been less. It is, of course, true that if Man had pursued their action themselves against both defendants and if both were held liable and damages were awarded, in some amount, against each, it would (subject to one

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13 *Brownton Ltd v Edward Moore Inbucom Ltd* [1985] 3 All ER 499 (CA).

14 At 505.

> possible, recondite, argument put forward on behalf of EMR based on RSC Ord 74, r 1) be in the discretion of Man whether they executed the whole of their overlapping judgments against EMR or Cossor, or partly against one and partly against the other. But that does not, in logically commonsense, provide an argument against EMR having had, immediately before the assignment, a genuine commercial interest in taking the assignment, because so to do would, in certain events and to an unpredictable extent, reduce the amount of EMR's loss arising out of their contract with Man and the breach of that contract.

[44] In his judgment Lloyd LJ observed:[15]

> Thus the difference between the House of Lords and the Court of Appeal in *Trendtex* comes to this: the Court of Appeal held that, subject to very limited exceptions, any cause of action for breach of contract is assignable, as being in itself a "property right", whether or not there is also a genuine commercial interest in enforcing the cause of action. The rule against assigning a bare right to litigate should, they held, be confined to personal claims, mainly in tort. The House of Lords, on the other hand, that not every cause of action for breach of contract is assignable. Such a cause of action can only be assigned if the assignee has a genuine commercial interest in enforcing the claim. The prohibition against assigning a bare right to litigate shall be confined to cases where there is no such genuine commercial interest.

[45] Having gone on to summarise *Trendtex*, Lloyd LJ then applied it to these facts in this way:[16]

> In the first place, EMR and Cossor are both sued in respect of the same damages. Of that there can be no doubt. Assuming therefore there had been no payment into Court and no assignment, any sum recovered by Man from Cossor would have gone in reduction of the sum recoverable from EMR. It makes no difference that they could each have been sued to judgment. Even if they had been sued to judgment, Man could not have recovered the same damages twice over. Anything recovered from Cossor would to that extent have relieved EMR. It follows that EMR had a pre-existing interest in the success of Man's cause of action against Cossor. It cannot, in my view, be doubted such an interest was a "genuine commercial interest" within the principles established by *Trendtex*.
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> Secondly, (and here I again respectfully differ from the Judge) I consider that EMR had a genuine commercial interest in the avoidance of a pre-existing potential liability for Cossor's costs. But it is unnecessary to elaborate that head of interest, since the first head of interest is so palpable.

[46] Mr McBride submitted that the decision of *Brownton* to permit the assignment resides on the fact it was a contractual right that was being assigned, which concerned a pre-existing commercial relationship between the three parties.

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15 At 507.
16 At 509.

However, there is significant argument that Lloyd LJ saw the genuine commercial interest arising because the co-defendants were being sued in respect of the same damages.

[47] Ms Thodey argued that the commercial interest in EMR taking the assignment was, to quote from Sir John Megaw:[17]

> So to do would, in certain events and to an unpredictable extent, reduce the amount of EMR's loss arising from their contract with Man and the breach of that contract. (As cited above.)

Brownton followed in New Zealand in Beresford Street

[48] Mr McBride argued that *Brownton* has not been followed in England and Wales in the sense of encouraging well-resourced defendants to multi-party litigations to strike a deal with the plaintiff by which they isolate a party refusing to settle. *Brownton* was followed in New Zealand by Heath J in the *Auckland City Council v Auckland City Council* [18] case (*Beresford Street*).

[49] In *Beresford Street* the Court was examining a very similar settlement here. The Body Corporate and individual unit owners of a residential complex had sued a number of defendants in respect of a leaky home claim seeking damages in the sum of approximately $6.5m. The Council settled with the original plaintiffs for an agreed sum of $3m, taking an assignment of their cause of action against the remaining defendants. The settlement agreement was structured in such a way that the Council's liability was limited to $3m plus associated costs and any recovery over that sum would be payable to the original plaintiffs. The detail of the claim are as similar as here. The Council was going to receive the $3m of any recovery, together with its costs, providing the claimants with any excess. The Council was then intending to sue for the original claim of $6.5m, even though the plaintiffs, as the persons who had suffered damage giving rise to the cause of action in tort, had recovered the sum of $3m.

[50] Heath J reasoned:

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17 At 506.

18 *Auckland City Council v Auckland City Council* [2008] 1 NZLR 838 (HC) [*Beresford Street*].

Application of law to facts

[47] For the reasons given by Lloyd LJ and Sir John Megaw in *Brownton*, I consider that the Council did have a "genuine commercial interest" in completing settlement and in taking an assignment of the claims. It was faced with a claim for approximately $6.5 million. Ratepayers were at risk in respect of such a claim. Sensibly, the Council elected to settle. That settlement was advantageous both to it and to the original plaintiffs.

[48] From the Council's perspective, it limited its liability at $3 million plus costs. The original plaintiffs received funds in settlement of their claims and removed the inevitable costs and risks of proceeding to trial.

[49] If the assignment were set aside, the litigation would not cease; rather, the original plaintiffs would be denied their settlement funds and would be forced to litigate. That cannot be in the interests of justice. No rule of public policy ought to prevent a genuine settlement of that type.

[50] Second, under New Zealand contribution legislation there is no prejudice to the designers and project manager. The inherent flexibility of the contribution rules was emphasised by Cooke P in both *Day v Mead* [1987] 2 NZLR 443 (CA) at 541-542 and *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) 563-564. The lack of prejudice can be tested by considering what would have happened if the settlement agreement had been structured differently. If the original plaintiffs had settled with the Council for $3 million, the designers and the project manager would have remained at risk of a claim for approximately $6.5 million. The original plaintiffs could have continued to sue for $3.5 million and the Council could have sought contribution for $3 million.

[51] Because any assignee takes property "subject to equities" (see Laws NZ, Choses in Action, at para 49 and the authorities cited in fn 1 and 2) the designers and project manager can plead contributory negligence against the Council (in relation to any such negligence by the original plaintiffs) as well as seeking contribution against the Council, qua defendant.

[52] Mr Rzepecky was able to point only to the possibility of prejudice arising from the need for the designers and project manager to initiate evidence in support of a claim against the Council, as opposed to relying on the original plaintiffs' evidence. He also placed reliance on the problems inherent in contribution issues because of the apparent insolvency of some parties.

[53] Those contribution considerations cannot make something that is not contrary to public policy into something that is. That view accords with the authorities cited by Mr Goddard, particularly *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 (HL) and *Fisher v CHT Ltd* [1966] 2 QC 475 (CA). In *Dubai*, at 384, para 52, Lord Nicholls of Birkenhead (giving the principal speech) said:

> I cannot accept this submission. It is based on a misconception of the essential nature of contribution proceedings. The object of contribution proceedings under the Contribution Act is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the plaintiff, regardless of

> where that cost has fallen in the first instance. The burden of liability is being redistributed. But, of necessity, the extent to which it is just and equitable to redistribute this financial burden cannot be decided without seeing where the burden already lies. *The court needs to have regard to the known or likely financial consequences of orders already made and to the likely financial consequences of any contribution order the court may make. For example, if one of three defendants equally responsible is insolvent, the court will have regard to this fact when directing contribution between the two solvent defendants.* The court will do so, even though insolvency has nothing to do with responsibility. An instance of this everyday situation can be found in Fisher v C H T Ltd (No 2) [1966] 2 QB 475, 481, per Lord Denning MR. (My emphasis).

Citibank, the Australian case inconsistent with Brownton and Beresford Street

[51] Mr McBride for APS, opposing the assignment, distinguished *Brownton* as confined to assignments of contract causes of action. He relied principally on a line of recent Australian authorities.

[52] He led off with a decision of Lindgren J in *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Bank Ltd.*[19] Heath J had noted that in that case an assignment similar to that taken by the Auckland City Council in the *Beresford Street* case had been held void for champerty but preferred *Brownton* as I have discussed.[20]

[53] Mr McBride submitted that in Australia, a party without a pre-existing commercial interest cannot acquire a cause of action from a third party. He described *Citibank* as the leading judgment.

[54] In *Citibank* the claimants were aggrieved investors in an investment described as negative gearing packages. They sued both National Mutual and Citibank. The claims were in negligence and under the Trade Practices Act 1974, the equivalent of our Fair Trading Act, and under the Security Industry Code. The claimants had settled with one defendant, the party through whom they had made the investments (National Mutual). They received their claimed damages in full. In return they assigned their rights to National Mutual. The other defendant sought to

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[19] *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* (1995) 132 AR 514 (FCA), [*Citibank*].

[20] *Beresford Street*, above n 17 at [24].

strike out the claims against him on a number of grounds, including that the assignment was invalid.

[55] Justice Lindgren held that the claim should be struck out as the assignment infringed the rule against double satisfaction as the plaintiffs had received the entire amount of their claim and, for that reason, there was no remaining loss.[21]

[56] The Judge then went on to assess whether the claims were, in any event, capable of assignment. He stated that unless the assignment satisfied the *Trendtex* test, the claims were not capable of assignment.[22] He suggested that Gault J in *First City Corporation Limited v Downsview Nominees Limited*[23] restricted the right to assign to where the assignment was ancillary to an interest in property, there a debenture. In that case, where a party has purchased a debenture, it was accompanied by an assignment of causes of action in tort.

[57] Gault J had cited *Defries v Milne*[24] where Fawell LJ stated: [25]

> A right of action in tort was never assignable at law, and no case has been cited to us, nor do I think it is possible to find any case, where it has ever been assignable in equity.

[58] Gault J distinguished *Defries*: [26]

> I am of the view that *Defries v Milne* is distinguishable from the present case in that the commercial interest element was lacking and there was thus not the same nexus between the tortuous damage and the plaintiff's acquisition of a right of occupancy in *Defries* as with *First City Finance* acquisition of the business, including the indebtedness and the security, in the present case. To the extent that it is not distinguishable I do not consider it should be followed in the light of developments in the law since it was cited (going on to cite *Trendtex*).

[59] Gault J then went on to cite the Court of Appeal *Trendtex* decision, where Lord Denning MR said that assignments for tort were just as assignable as any other assignment. He then concluded: [27]

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21 *Citibank*, above n 19, at 536.
22 At 539.
23 *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710 (HC).
24 *Defries v Milne* [1913] 1 Ch 98 (CA).
25 *First City Corporation Ltd*, above n 23, at 756, citing *Defries v Milne* at 109.
26 At 756.

> Therefore it seems logical that the test should be the same whether in contract or tort; i.e. does the assignee have a legitimate commercial interest in taking the assignment of the cause of action?
>
> I see no risk of encouraging speculation for profit and bare rights to litigate if assignments of action in tort are subjects to the test I have referred to: at least, whatever risk there is, it is the same as for the assignment of any other chosen action. Such a test still excludes the assignment of personal tort such as defamation or false imprisonment, but it would permit assignments of tort relating to property, as in this case. This would mean conformity of the principles applicable to tort with those applicable to contract, where the benefit of a covenant entered into for the personal advantage of an individual, not for the protection of property, is not assignable: see *Davies v Davies* [1836] 36 ChD 359,388,394 (CA). (Emphasis added)

[60] That led on to the Judge's conclusions:[28]

> In the 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. The actions in tort were ancillary to the assignment of the debenture itself – in the words of Scrutton LJ, First City Finance "was not buying an order merely to get a cause of action; [it] was buying property and a cause of action as incidental thereto". The actions in tort are subsidiary matters, assigned with a debenture so the assignee can protect the property it has received. First City Finance had a genuine commercial interest in the actions, for the reasons that as the new debentureholder, it clearly had an interest in protecting the value of the security. (Emphasis added.)

[61] I have set out the reasoning of Gault J in *Downsview Nominees* in some detail, interspersed in an analysis of *Citibank*, partly because I think the passages I have indicated make it clear that the material facts in *Downsview Nominees* do not resolve the problem faced before me, nor which faced Heath J. It also explains why Lindgren J can find in Gault J's reasoning in *Downsview Nominees* a qualified right of assignment of a tort action: where the assignment was ancillary to an interest in property.[29]

[62] More pertinently to the material facts of this case, Lindgren J went on to conclude that the subject assignment might abrogate the contribution rules as

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27 At 757.
28 At 757.
29 *Citibank*, above n 19, at 539.

between tortfeasors so that National Mutual might recover sums that would otherwise had been required to pay: [30]

> Secondly, it is clear that the assignments have been taken because the National Mutual companies believe that they offer them an advantage not available under s 5(1)(c) of the LR(MP) Act or its Victorian equivalent. The former provision is as follows:
>
> 5.1 Where damage is suffered by any person as a result of a tort (whether a crime or not):
>
> …
>
> (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[63] It will be immediately apparent that this legislation is essentially enacting the same reform of the common law as we have in s 17 of the Law Reform Act 1936.

[64] Justice Lindgren went on, after citing the provision:[31]

> Under the assignments, the National Mutual companies would not need to prove their own liability, but more importantly, subject to any claim by Citibank under the LR(MP) Act they would be entitled as of right to indemnity. While it is readily understandable that the National Mutual companies might have wished to be assured of this if they were to pay the claimant's claim in full, one need only consider a hypothetical "amongst other tort-feasor" which, pursuant to section 5(1)(c) might be held liable to contribute to the extent of say only 10%, to appreciate the kind of commercial interest relied upon by the National Mutual companies may not be the kind of "genuine commercial interest" contemplated by Their Lordships in *Trendtex*. Although not seeking by the assignment to make a profit by recovering by Citibank more than the amounts that they had paid to the claimants, they are seeking to ensure that they recover the whole of these amounts irrespective of whether City Bank should be held liable to contribute at all, or if so, in what proportions.

[65] Justice Heath in *Beresford Street* recorded this reasoning in his decision at [33]. He records at [35] that counsel relied on this reason. Heath J's answer would

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30 At 540.
31 At 540.

appear to be in [50] – [53] of his judgment cited above.[32] The main proposition in his argument is the concept of the inherent flexibility of contribution rules, quoted in [50] of his judgment.

Is section 17 of the Law Reform Act sufficiently flexible to handle the presence of a common law assignment of the causes of action to one of the tortfeasors, without defeating the purpose of the legislation?

[66] Just how flexible is the statutory jurisdiction in s 17 of the Law Reform Act?

[67] Section 17, subs (1) – (2) of the Law Reform Act 1936 provides:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> (a) Judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage:
>
> (b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, [civil union partner, de facto partner,] parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action:
>
> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued [in time] have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.
>
> (1A) Repealed.

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[32] At [50].

> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

The relevant provisions are s 17(1)(c) and subs (2).

[68] Counsel, at my request prior to the hearing, concentrated on examining just how the objectives of s 17 of the Act could be achieved, in the context of the assignment agreement. I had in mind particularly giving effect to the purpose of that provision summed up by Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam*[33] quoted by Heath J at [53] of his judgment:

> The object of contribution proceedings under the Contribution Act is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the plaintiff, regardless of where the cost has fallen in the first instance. (Emphasis added.)

[69] As I have previously noted, this issue did not arise in *Brownton.*

Examples developed by counsel

[70] Counsel responded to the Court's invitation with hypothetical analyses as to how the assignment would play out in the context of plaintiff contribution under the Law Reform Act.

[71] For the Council, Ms Thodey submitted there is no prejudice to the other defending parties in the settlement. This was because:

(a) Absent the assignment the claimants could pursue the claim of $2.3m as against the other defending parties; and

(b) In any event, the Council could pursue its cross-claim for indemnity or contribution in respect of the funds it has already paid over of $1.5m.

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[33] *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 (HL).

Ms Thodey went on:

> A simple example of this can be expressed in the following way:
>
> (a) The Council as an assignee of the plaintiffs' rights pursues the claim as against the other defendants and secures a judgment of $3.8m. As the plaintiffs have already received payment of $1.5m, the Council as an assignee of its rights may only enforce the judgment against Babbage and APS up to the level of $2.3m.
>
> (b) In the expectation that those parties have also secured a cross-claim judgment against the Council of say 10 per cent, this means they can recover $230,000 from the Council. In other words, the net position for the Council as assignee will be $2,070,000.
>
> (c) Similarly, on the cross-claim the Council would be permitted to recover 90 per cent from the other parties, a total sum of $1,350,000.
>
> (d) At this point there has been a recovery of $3,420,000. Of that amount the Council is required to pay to the claimants the first $200,000. Thereafter, it is reimbursed for its $1.5m and costs and the balance is then returned to the plaintiffs.

[72] Ms Thodey went on to acknowledge:

> The above illustrates that the Council may in certain circumstances achieve a better position than it otherwise would have done if it had not taken the assignment. However, that benefit can only ever be limited to a maximum figure (in the above example) of $150,000 and the difference between actual costs and scale costs. Such benefit (which may be a maximum benefit) is modest compared to the risk it takes in the event the assigned claim is not successful.
>
> Again, this may be seen in contrast to the *Citibank* decision where it is unclear why *Citibank* would not have in turn recovered a contribution back from National Mutual with the result that National Mutual would suffer some form of loss.

[73] The above example helpfully explores the issues against the numbers and parties involved in this case. It would have been invidious to suggest that Babbage or APS were not good up to a level of $2.3m. But a judgment as to whether this assignment is void against public policy has to take into account the common phenomena that some, if not most, of the tortfeasors in these claims are insolvent or of limited means. This fact leads to the consequence that the Council, as the party with the deepest pockets, very often shoulders a level of contribution in excess of the standard 20 per cent contribution based on causation, without regard to means.

[74] Mr Josephson, for the plaintiff, assignors, supported the argument presented by the assignee, and particularly the judgment of Heath J. He submitted:

> The sensible approach to sorting out payments in a partial settlement situation is for the Court to decide who has succeeded on their claims and to what extent. Adjustments can be made to any payments that have already been made after that.

[75] He then took this hypothetical example. Assume the Council, as the plaintiffs' assignee, obtained judgment against APS and Babbage for say $3m on the assigned claim. But the Council, as defendant, would face claims for contribution pursuant to s 17 of the Law Reform Act. Therefore, if each of the three defendants were held liable as to 33 per cent each, the Council's recovery under the assigned claim would be $2m. Under the settlement agreement the Council would pay the plaintiffs' $200,000, cover its costs, reimburse itself the $1.5m paid out under the settlement, and pay anything left over to the plaintiffs. In other words, the Council makes no financial gain from the transaction.

[76] On that example, the Court when applying s 17 of the Law Reform Act, and in particular the just and equitable test, would take no account of the final flow of funds in favour of the Council.

[77] I also note that the example presumes that the case can continue with the assignee seeking a judgment as pleaded in the order of $3m. The assignee can be in no better position than the assignors. The assignors by the settlement have received $1.5m. They cannot pursue damages for $3m which would mean a double recovery. So the maximum judgment that can be pursued against APS and Babbage by the Council as assignee (if the settlement is not set aside) is for the balance of the sum pleaded after deducting $1.5m.

[78] The example also does not take into account adjustment under the just and equitable test to the capacity of the other defendants to meet a large judgment.

[79] Mr McBride, for the builder APS, started by presenting the local authority's "deep pockets" problem. He presented the scenario absent an assignment. It is a generic example not based on the facts of this case. It starts with the assumption that

the plaintiffs have obtained a judgment of $1m against: the Council, a solvent builder, an insured architect and a developer who is insolvent. The defendants cross-claimed against each other and liability is apportioned 15 per cent to the Council, 20 per cent to the builder, 10 per cent to the architect and 55 per cent to the developer. The plaintiffs then enforced the judgment against the Council, knowing it can meet the judgment. The developer declares himself bankrupt. The Council then obtains the builder's contribution of 20 per cent ($200,000) and the architect's contribution of 10 per cent ($100,000) but nothing from the insolvent developer. So in spite of being only 15 per cent liable, the Council in fact has to meet 70 per cent of the judgment.

[80] That example was criticised, and rightly, by Ms Thodey, for not meeting the power to rebalance the first set of contribution percentages to take into account the insolvency of the developer.[34]

[81] Mr McBride then had a second scenario entitled "the Council as assignee – shifting the risk in profit":

> The Council settles with the plaintiffs and pays them $500,000 and takes an assignment of the $1m claim. The Council proceeds to trial where it succeeds against the other three defendants for the remaining $500,000.[35]
>
> The Court apportions liability as before. The Council (as an acknowledged tortfeasor in the settlement) 15 per cent, builder (solvent) 20 percent, architect (insured) 10 per cent, developer (insolvent) 55 per cent. The Council, as plaintiff, demands that the solvent builder pay the full $500,000. The builder has no option but to pay, and does so.
>
> The builder then recovers $50,000 from the architect who is 10 per cent liable for the $1m loss to the Council and the builder, who have met the total claim 50/50. The builder has now paid $450,000 but has only 20 per cent of the liability (as against $200,000 in scenario one.) The Council pays $450,000 ($500,000 to the original plaintiffs pursuant to the assignment) less $50,000 from the architect (too, but this is a better outcome than the $100,000 payment in scenario one.) The Council also has the benefit of the $450,000 payment from the builder, its total payments net out at zero. Even if it only obtains a judgment of $100,000 against the others, provided some are solvent, to be able to have the benefit of both the assignment and its cross-claim.

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[34] See the dictum of Lord Nicholls above at [50] and set out in *Beresford Street*, above n 17, at [53].

[35] (This step correctly adopts the presumption that the assignee is in no better position than the plaintiffs and thus has to acknowledge that the plaintiffs have received the $500,000 and their loss is reduced to $500,000.)

> This explains why – absence of settlement from all defendants – the Council will seek an assignment and take control of the claim. In this way it is able to require solvent parties to assume the risk of insolvent defendants who cannot meet their share, and assume a potential windfall if it successfully proves the case. It is not fettered by the Law Reform Act construct of allocating fault for loss.
>
> This is exactly the sort of "*officious intermeddling*" that the Australian and English courts do not tolerate. There is no pre-existing commercial relationship between the Council and the other tortfeasors. It is acting purely for its own reasons, and manipulating the litigation to suit its own purposes. This is contrary to public policy and void.

[82] While this example is helpful, again, it presumes that there will not be one hearing before a judge where the Council's status is an acknowledged tortfeasor, not as an assignee. For the question is, when applying the "*just and equitable*" standard, can the Court take into account the status of the Council as assignee? Should the assignment affect the balancing of the final contribution ordered as between the parties?

[83] Mr Lenihan, for the architects, Babbage, made a number of submissions. Firstly, that the consequence of the assignment is that the Auckland Council obtains an indemnity, as it will be able to seek a contribution for the $1.5m it has acknowledged liability for, yet, as assignee, apart from paying the first $200,000 of any money obtained from APS or Babbage to the plaintiffs, the next $1.5m plus whatever covers actual solicitor and client costs goes to the Auckland Council.

[84] He then made a submission which may be an alternative, I am not sure:

> Council does not really avoid making a contribution. This is because the continued existence of the cross-claim by APS against Council (and that of Baggage were it to cross-claim) means that there will be an apportionment of liability in relation to the claim *over and above the $1.5m settlement*.
>
> Council will not be able to pursue PBS and Babbage for an amount of liability beyond the overall assessment to their liability. To give an example, assume overall liability the three defendants is assessed at a third each. The Council [as plaintiff] will discharge the liability of the Council [as defendant] for its one-third of liability. This would operate as an extinguishment, not a default. Therefore the principle of liability between joint/concurrent tortfeasors being *in solidum* will not apply.

[85] Mr Lenihan then challenges the merit argument of Council that the assignment is in the public interest is limiting the cost of litigation. He submits:

> It is stated that the Council has a clear interest in limiting the exposure of ratepayers' funds to the claim. It is debatable as to whether this is what is happening in substance when the Council takes an assignment and continues the plaintiff's claim.
>
> Council could have achieved a limitation of exposure simply by settling and pursuing APS and Babbage for a contribution. In taking the assignment, the Council weakens its limitations of costs argument as the main trial will still proceed and take a significant amount of hearing time in comparison to pre-assignment hearing estimates.

[86] On the Council's commercial interest, Mr Lenihan takes the same position of Mr McBride that it should be assessed pre-assignment. On that basis, if it is, he said there are real difficulties:

> (a) If the Council's litigation risk in a particular matter was high, then it should be looking to settle anyway. If it did this, then why should it be considering taking an assignment of a claim and pursuing it against defendants with (presumably) a low litigation risk.
>
> (b) Conversely, if the Council has a low litigation risk, then what commercial interest would Council ratepayers have in entering into a settlement, taking an assignment (and therefore obviating the plaintiff's litigation and credit risk) and taking on this risk?

[87] In addition to the submission that the Council has or is seeking an indemnity, a submission of Mr Lenihan that I found particularly pertinent is as follows:

> If the Court accepts that by taking an assignment, Council cannot avoid an apportionment of liability between itself and APS and Babbage (assuming each defendant has cross-claimed against the other), then the substance of what is being proposed is to be closely examined.

[88] That to me is one of the central issues in the question of whether this agreement is void against public policy, namely whether or not it handicaps in any way achievement of Parliament's purpose in enacting the Law Reform Act 1936 or, to put it the other way, whether it is seeking to thwart or avoid that statutory process.

[89] Mr Lenihan submits that by the assignment the Council is seeking a cost advantage. His example assumes an apportionment of one-third liability between each of the three defendants. His analysis follows:

> (a) Had Council not taken an assignment, its liabilities to the defendant would have been for one-third of the claim and costs. Pre-hearing, an estimate of cost liability was in the order of $300,000. The Council would therefore be liable to the plaintiffs for roughly $1.3m.

(b) However, under the assignment, a quite different situation plays out:

(i) The Council will already have paid out $1.5m to the plaintiffs.

(ii) However, if the Council, as plaintiff, obtains a judgment against APS and Babbage, then the picture changes.

(iii) The Council will have to pay the first $200,000 and any money it gets to the plaintiffs. So, the Council could be $1.7m down at this stage.

(iv) The Council, as a plaintiff, will forgive any costs liability of Council, as defendant. The Council might then get a balance of the claim and costs from APS and Babbage. So, Council could receive approximately $2.6m back. Under the assignment, $200,000 of this has to go back to the plaintiffs. The next $1.5m in the Council's cost (on a solicitor/client basis) go to the Council.

[90] Mr Lenihan's conclusion from the foregoing analysis is that the Council is, in substance, getting indemnity costs without being awarded these by the Court. He submits:

> That encouragement of this type of behaviour could see something akin to a scramble by co-defendants to take assignment of a claim in order to secure themselves a costs indemnity.

[91] Mr Lenihan submits that this analysis lays the situation bare: "Council is purely engaging in a cost-saving exercise." He said the talk of settlement was fallacious as the hearing is still proceeding with the same parties and for roughly the same amount of time. What is happening is that the Council is seeking to secure for itself a cost advantage. The real commercial interest here for the Council is costs recovery.

Rebalancing for solvency – applying the just and equitable test

[92] As I have had occasion to observe, most of the examples by counsel are proceeding on the basis that the exercise, when applying s 17(2), is to ascertain contribution in terms of a measure of actual contribution to damage similar to contributory negligence analysis. There is no doubt that this is part of the exercise. But equally the outcome of the whole of the exercise is that there be a "just and equitable" contribution from all the tortfeasors.

[93] A number of the examples of counsel assume that there can be some kind of first mover advantage where one party sues the other. That is possible in the short term. However, in terms of the ultimate outcome, the ability of any one tortfeasor to counter-claim against one or more of the other tortfeasors means that in the end Parliament assumes that the Court will reach a just and equitable contribution among all liable tortfeasors to the successful plaintiff. At the time, in 1936, when the section was enacted, the assignment taken in this case would clearly be void. The relaxation of the standard of maintenance and champerty is relatively recent. There is no doubt that the legislators never intended s 17 to apply where one of the tortfeasors had purchased the plaintiff's claims.

[94] The New Zealand statute followed upon the United Kingdom introducing the Law Reform (Married Women and Tortfeasors) Act 1935. That Act has now been replaced with the Civil Liability (Contribution) Act 1978. The applicable provisions in the New Zealand Act just noted, ss 17(1)(c) and (2), are identical to s 6 of the United Kingdom statute.

Rebalancing in the UK

[95] The dictum of Lord Nicholls cited by Heath J in the *Beresford* case is directly apposite.[36] Lord Nicholls was responding to a submission. *Dubai Aluminium* was a case dealing with the aftermath of a complex fraud. The plaintiff, Dubai, was induced to pay out US$50m under a bogus consultancy agreement with a company called Mark Rick & Co AG. The proceeds of this fraud were shared out among a number of principals. At various stages during the court of the trial, all the defendants settled with Dubai Aluminium, agreeing to make substantial payments. The law firm settled for US$10m. These settlements left outstanding and unresolved contribution claims brought by some of the defendants against others and against third parties. The law firm sought contributions from two of the co-defendants, Mr Salaam and Mr Tajir.

[96] In the House of Lords the question of contribution was considered afresh. A major factor in this consideration was that, at the time of assessing contributions,

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[36] See [50] above.

Mr Salaam and Mr Tajir had still not disgorged their full receipts from the fraud. Mr Salaam still held some US$13m and Mr Tajir held approximately US$7.5m as proceeds from the fraud. The trial judge had considered it would not be just and equitable to require one party to contribute in a way which would leave another party in possession of his spoils. The two defendants submitted that the fact that they still held proceeds of the fraud was irrelevant, as the Court was only required to assess the amount of contribution with regard to the extent of individual responsibility for the damage. Lord Nicholls rejected the defendants' submission, finding that the court needs to have regard to the known or likely financial consequences of any contribution order the court may make when applying the just and equitable test, particularly so in cases where potential or actual insolvency is a factor. Lord Hobhouse also rejected the defendants' submission, noting that the purpose of contribution is the application of the principle that there should be restitutionary remedies for unjust enrichment at the expense of another, and to allow the defendants to retain the proceeds of the fraud would allow them to be unjustly enriched at the expense of the law firm.

[97] On the facts, Lord Nicholls upheld the contribution order given by the trial judge, finding that Mr Salaam, Mr Tajir, and the solicitor should bear the burden of liability equally. With equality as the goal, the contribution payments were split so Mr Salaam would be left with US$5.5m and Mr Tajir with US$5m. The law firm was thus indemnified of its settlement payment of US$10m.

[98] In his judgment, Lord Nicholls cited with approval Lord Denning MR's decision in *Fisher v CHT Ltd (No 2).*[37] *Fisher* involved electrical work being done in a restaurant. There were three defendants. The first defendants ran a club containing the restaurant. The restaurant was managed and run under licence by the second defendants. The third defendants were plasterers employed to redecorate the restaurant, doing the electrical work with their own electrician. The plaintiff was employed by the third defendants, the plasterers. He was putting up plasterwork when he came in contact with a live electrical wire. He received a shock which made him fall and injure himself. The wire had become live when the electrician had, without warning, switched on all the electric switches leading to the restaurant.

[37] *Fisher v CHT Limited (No 2)* [1966] 2 QB 475.

The plaintiff sued the defendants based on negligence and breach of duty under the Occupier's Liability Act and breach of the Electricity Regulations. The plaintiff got judgment and the trial judge held that the occupiers were 20 per cent, the restaurant managers 60 per cent and the plasterers 20 per cent responsible for the accident. The managers had no money. Therefore the trial judge held that the first and third defendants should be left to bear the damages equally between themselves. This judgment was appealed.

[99] On appeal, the Court of Appeal continued to put aside the managers of the restaurant who were unable to meet a judgment. The Court of Appeal then focused on the solvent parties and apportioned the contribution between them. Lord Denning said: [38]

> We have eventually to apportion the responsibility as between Crockfords (the owners) and the plasterers.
>
> ...
>
> I think that as between Crockfords and the plasterers, Crockfords' responsibility (as occupier) should only be reckoned as one-quarter and the plasterers three-quarters. So instead of 20 per cent and 20 per cent, I would put 10 per cent to Crockfords and 30 per cent to the plasterers; and they should bear the whole of the damages which they have to pay in those proportions. So in respect of the whole damages of $4,000, one quarter should be paid by Crockfords and three-quarters by the plasterers.

[100] Relying on *Fisher* and *Dubai*, applying s 17 is a two-stage process. The first stage is to assess contribution, in a process akin to assessing contributory negligence. The second stage is to examine the extent to which the tortfeasors have the capacity to meet the contribution so apportioned. To the extent they do not, they drop out. The task then is to reallocate contribution with the goal being a just and equitable apportionment to the total sum to which the plaintiffs are entitled, factoring in the ability to meet the judgment. The end result, however, will be that the plaintiff is paid in full by the solvent tortfeasors, in proportions which are just and equitable.

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[38] At 483.

Can this statutory process apply alongside an assignment of the plaintiff's entitlements to a tortfeasor?

Dual role of assignee

[101] By the terms of this assignment, the Auckland Council wants to "wear two sets of shoes". It does not want to be, but cannot avoid being in the shoes of a liable tortfeasor, for it has admitted liability. But it also wants to be in the shoes of the plaintiffs, after paying the first $200,000 recovered from the judgment to the assignors, then retaining the next $1.5m plus its solicitor and client costs from the contributing tortfeasors, which, by s 17, must include itself.

[102] ACC submits that it did not enter into the assignment to make a profit on the Plaintiffs' causes of action. That is a direct reference to the entrenched common law hostility to trading in causes of action, particularly torts. However, in my assessment, the ACC did enter into these agreements to obtain financial advantage. That inference can be drawn confidently as otherwise it would have settled, and pursued relief in due course under section 17. I follow Lingren J in *Citibank*.[39]

[103] In the s 17 statutory process, the Auckland Council must want the Court to ignore the fact of the assignment when doing a just and equitable apportionment under s 17 of the Law Reform Act. For if the assignment is recognised and the original intent of s 17 is pursued, the Court must apportion actual contribution to the judgment in favour of the plaintiffs in proportion to the causal contribution and ability to pay of the common tortfeasors. Given that policy, if the Court recognises the assignment, and the actual flow of the judgment sums, it may find that the actual contribution to the original plaintiffs, the victims of the torts, will not be the "just and equitable" apportionment the court would have achieved absent the assignment. Should the Court be bothered by that? Can that happen, and the purpose of s 17 be achieved? If the purpose is not achieved, does it matter? Is the assignment "meddling" with the common law causes of action, as reformed by statute? "Meddling" being a term used in the Australia.

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[39] At [62] above.

[104] I refer to the citation from Lindgren J's judgment.[40] He said although Citibank were not seeking to make a profit by recovering more than they had to pay to the original plaintiffs:

> They are seeking to ensure that they recover the whole of these amounts irrespective of whether Citibank should be held liable to contribute at all, or if so, in what proportions.

This is exactly my concern here. Mr Josephson, for the plaintiff assignors, relies in turn upon a dictum of Sir John Megaw in *Brownton*:[41]

> When an agreement to assign a cause of action is made, the ordinary contemplation of the assignor and of the assignee is that it will be to the advantage of each of them: they will be better off, in some way, as a result of the assignment than they would be if the assignment were not made. Usually the 'better off' can be expressed as financial benefit, even though the amount in money may be incapable of assessment. If this were to be treated as 'contemplation of making a profit' and if the consequence in law were to be that the agreement to assign would be champertous and illegal, few assignments would stand. That cannot be the law.

[105] However, as I read *Brownton*, the reasoning deliberately eschewed an analysis of the implications of contribution between tortfeasors which directly arises here. Sir John Megaw also said earlier in his judgment:[42]

> There is no question in this appeal of this court deciding any issue on these contribution proceedings. It is, however, desirable to mention at this point that certain potential difficulties, which might or might not be overcome, faced EMR in both contract and tort, Man's claim against Cossor was limited to a claim in contract. The provisions as to contribution in s 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 are confined to proceedings between tortfeasors. If the Civil Liability (Contribution) Act 1978 had been in force at the relevant time for the purpose of this action (it was not) EMR would not have been faced with that particular difficulty. By ss 1(1) and (2(1) of the 1978 Act they would have been entitled to "just and equitable" contribution from Cossor if they were able to show that Cossor as well as themselves were liable to Man 'in respect of the same damage', without regard to the technicality that the claim against Cossor was in contract and not in tort. <u>It may be that if the 1978 Act had applied the court would not have been troubled with the issue which now arises</u>. (Emphasis added.)

[106] Lloyd LJ made a similar observation:[43]

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40 At [64] above.
41 *Brownton*, above n 12, at 506.
42 *Brownton*, above n 12, at 502.
43 *Brownton*, above n 12, at 510.

> Counsel for EMR had an alternative argument that EMR are entitled to a contribution from Cossor in their third party proceedings, and that the assignment is therefore valid in support of those proceedings. But he only needs that alternative argument if he is wrong on his main argument, and if counsel for Cossor is right in arguing that a bare right to litigate means a right to claim damages in respect of a sum not otherwise recoverable by the assignee. Since I have rejected that argument of counsel for Cossor, it is unnecessary to consider the alternative argument of counsel for EMR; all the more so since EMR will be pursuing their claim for contribution at the resumed trial, as well as their claim as assignee, and since the point is never likely to arise again in view of the subsequent enactment of the Civil Liability (Contribution) Act 1978. It may be some satisfaction to those engaged in law reform that, if the 1978 Act had been in force at the date of the contract between Man and Cossor, none of the questions which have been so thoroughly argued before us would have arisen. (Emphasis added.)

[107] It is my understanding of these dicta that both judges in the Court of Appeal were observing that one of the justifications for the assignment in *Brownton* is that there was no ability to for EMR obtain contribution from Cossor, as the claim that Man had against Cossor was in contract only.

Assignee tortfeasor controls quantum being sought

[108] Whether or not the plaintiffs are entitled to more than $1.7m now depends on conduct of the Auckland Council, one of the tortfeasors; because, by reason of the assignment, they now have control of the proceedings. It is up to them to decide whether or not to pursue the case for trial. The plaintiffs, whether as assignors or assignees, can only sue for compensation. The $1.5m has to be taken into account. Everybody agrees on that. The only issue between counsel was when. But, however it is done, the trial issue will be the liability of Babbage (the accountants), the liability of APS (the builders), both for sums to the extent that they exceed $1.5m. Had that $1.5m been paid into Court and accepted by the plaintiff, that would have set a ceiling on the plaintiff's entitlement and the contribution proceedings under the Law Reform Act would have been done within that figure. This assignment is premised on the basis that it is not equivalent to the plaintiffs accepting a payment into Court.

[109] The trial judge would hear the case knowing all about the assignment. The trial judge would know the case is being run by a party (the assignee) with the principal goal of recouping its settlement payment.

Section 17 decision may not in fact allocate the judgment between solvent tortfeasors upon a just and equitable footing

[110] Depending on what the ultimate judgment sum is, it is likely that, for one reason or other, the Court will hear arguments from any other tortfeasor, that it is not just and equitable that it or they should have to contribute to a judgment sum which stays in the pockets of another joint tortfeasor. Say the total sum recovered is $2.5M, the Court may well be met with an argument to the effect that the Court should ignore the assignment, assume as the statute does that the judgment is for the benefit of those damaged by the tort and allocate contribution so as to ensure that the Council's co-tortfeasors do not pay any more than they would have had there been no assignment.

The trial will proceed with the assignee necessarily contending for a sum in damages, exceeding the settlement sum, as that has reduced the loss

[111] The trial judge, knowing of the settlement and yet asked to form an independent judgment as to the true scale of the loss, cannot help but have some reflection on the acceptance by the plaintiffs assignors, of the lesser sum. The trial judge's function of applying the law of tort is capable of being disturbed by the contract of assignment.

The assignee has an incentive to pursue argument at trial, designed to increase contribution of other defendants.

[112] In the absence of the assignment, counsel for the plaintiffs will be indifferent as to the relative contributions of the tortfeasors. For, at the end of the day, their clients will be paid so long as one of the tortfeasors has sufficient solvency.

[113] But if the case is tried on behalf of the assignee, by an acknowledged tortfeasor in the name of the plaintiffs, the Court may be wary as whether the assignee will be trying to pursue some particulars over others with the view of adjusting contribution among solvent tortfeasors.

[114] This is precisely what Mr McBride is complaining about with the amended particulars. This judgment does not deal with the amended particulars but

Mr McBride has submitted that since the settlement, the Council (as assignee) is seeking to amend the particulars of the claim of the plaintiffs so as to plead additional particulars of negligence by the builders to those so far pleaded.

Conclusion

[115] There is a general common law hostility to enable causes of actions to be a tradable commodity. There is a longstanding reluctance of common law judges to allow assignment of claims, particularly tort claims. This is particularly so when the damage is to individuals. Part of these claims include damage to individuals, stress etc, for which there is a claim totalling approximately $20,000 per head, or nearly half a million.

[116] The goal of the assignment on the part of the Council is to reduce the amount that it would otherwise have to pay after a combination of a trial leading to a judgment and then a second hearing leading to apportionment of the judgment sum under the Law Reform Act 1936. For otherwise the assignment would not have been entered into.

[117] In the context of the pressure of the costs of trial and proceedings being brought by litigants for whom this kind of action is probably the first of their lives, i.e. they are not hardened litigants, the Council is endeavouring to achieve an outcome inconsistent with the common law and statute by reason of interposing a private contract over the outcomes intended to be achieved by the common law of tort, and the statutory reform of contribution.

[118] Counsel cannot agree, and the Court is not sure, just how all these factors will be in play during the common law trial and when it comes to statutory apportionment of contribution. I am not sure if a "just and equitable" final outcome is still possible, notwithstanding the assignment, assuming the assignment is a fair contract. In that respect, I do not share Heath J's confidence in *Beresford.*

[119] Normally the Court is not asked to consider whether contracts are fair or not. The only issue is whether they are voluntary. But the statutory goal is a just and equitable contribution by joint tortfeasors to plaintiffs. The Court is obliged and

cannot dismiss from view at any time the statutory goal. It may be that the statutory goal can still be achieved. But in my judgment, at the very least, this assignment meddles in that process.

[120] Mr Lenihan also submits that the statutory causes of action under the Fair Trading Act, Consumer Guarantees Act and possibly the Building Act are personal and cannot be assigned. Inasmuch as these are strictly personal causes of action, they are probably not assignable.

Alignment of New Zealand and Australian common law policy on assignments of causes of action

[121] Independently of the question of whether or not the assignment frustrates or avoids the application of s 17 of the Law Reform Act, Mr McBride submitted that all the Australian authorities confine the commercial interest justification to pre-existing commercial interests prior to the litigation interest. He submitted that the New Zealand common law should align itself with the Australian common law. The Court of Appeal in *Saunders v Houghton* said:[44]

> Among the considerations relevant to whether and how the judicial lawmaking power should be employed is the practical administration of justice. Bearing on that is the important reality of our relationship with Australia. There are powerful reasons to minimise any unnecessary differences in the ways we deliver justice from those of our close friend and partner in most kinds of activity in which litigation can arise.

The lead case, and essentially the first in time, is Lingren J in *Citibank.* Mr McBride then cited a number of other decisions which I will summarise. I have selected those which I find assist the resolution of this case.

[122] In the case of *Monk v ANZ Banking Group Limited*[45] National Mutual drew seven cheques on the Westpac Bank in favour of Coutts Morgan. The director of Coutts Morgan was the plaintiff, Mr Monk, and Mr O'Neill. It was alleged the cheques were stolen and deposited into the credit of an account in the name of Premium Financial Services at an ANZ Bank. Coutts Morgan assigned to its director, Mr Monk, choses in action it might have against the ANZ Bank. This

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44 *Saunders v Houghton*, above n 6, at [72]

45 *Monk v ANZ Banking Group Limited* (1994) 34 NSWLR 148.

assignment was given in October 1993. Earlier, in February 1993, the ANZ Bank had obtained judgment against Mr Monk for an amount of $111,000 odd, not far away from the total value of these cheques, of $145,000.

[123] A bankruptcy notice was issued and an application to extend time for compliance was dismissed. The matter had gone on appeal and, at the time of the hearing of this case, was to be heard later in April 1994. The assignment was held to be void. Cohen J said:[46]

> The plaintiff's only apparent interest is in the possibility of his becoming a creditor of the Bank. That is, his interest is in using the debt which might arise from the cause of action for his personal benefit. That no doubt is the interest of any assignee. The using of the debt is a set-off against the judgment debt is merely an example of obtaining some personal benefit. In that regard the plaintiff is in no stronger position than he would be if he had obtained an assignment of a cause of action for negligence by a customer of the Bank who claimed to have suffered injuries arising from unsafe premises. In the authorities where the *Trendtex* test has been applied, the commercial interest has gone beyond a mere personal interest in profiting from the outcome of the proceedings and has required an interest by the assignee in the assignor or its business affairs or activities which the assignor or its business affairs or activities which the assignment may in some way protect. In my opinion it has not been shown that the plaintiff has a relationship to Coutts Morgan to the extent that he has an interest to protect by taking an assignment in the cause of action.
>
> The claim that there is a distinction to be drawn between property torts and personal torts does not take the plaintiff any further. When Gault J in the *First City Corporation* case, referred to the difference, it was for the purpose of pointing out that in a personal tort there can be no genuine commercial interest, but that where the tort was based on property rights, the *Trendtex* test could be applied. It was not suggested that there should be any lesser test that would apply in an assignment of a cause of action in contract, which is not recognised at law or in equity in the absence of a genuine commercial interest. In effect a cause of action based on a so-called property tort could only be assigned if that interest could be established.

[124] *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Limited*[47] is a judgment of the full court of the Federal Court of Australia. In 1998 – 1999 the respondent, JP Morgan PSL, purchased two share registry businesses from the appellants, Deloittes. When JP Morgan PSL purchased this business, it was a member of the Bankers Trust (BT) group of customers and its shares were held by

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46 At 153.

47 *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Limited* [2007] FCA 52.

BT Australia Limited. At the time of the purchase, JP Morgan PLS was called BT Portfolio Services Limited, befitting the fact it was member of the BT Group.

[125] Westpac is now the holding company and ultimate owner of the BT Group. When the BT Group sold its shareholding in BT Portfolio Services Limited/JP Morgan PSL, it sought to exclude from the terms of sale the BT Group's interest in the two share registry businesses that had been purchased by JP Morgan PSL and, associated with that, the causes of action against Deloittes arising from the purchase. The causes of action were retained for the benefit of the BT Group and the two companies, now known as BT Registries, were on-sold in 2001.

[126] Thus, the causes of action came into existence as an asset of JP Morgan PSL, when it was a member of the BT Group and it was always been intended that the cause of action would remain as an asset of the BT Group. The majority of the Full Court held that Westpac, as owner of the BT Group, has always had a genuine commercial interest in the causes of action. That interest could be traced back through the dealings in the shares of JP Morgan PSL, back to the inception of the causes of action. Commercial imperatives at the time explained the retention of the causes of action.

[127] *Dover v Lewkovitaz*[48] is a recent decision of the Court of Appeal of New South Wales. Mr Dover had been the lessee of certain premises in Coogee. He vacated the premises. The landlord, Tolicar, took possession of the premises, relet them and assigned the landlord's rights to Dr Lewkovitaz.

[128] Dr Lewkovitaz, however, had always had an interest, albeit indirect, in the landlord, Tolicar. For the ordinary shares of Tolicar were owned by a company called Solrose which were, in turn, owned by a company called Barak and Lewkovitaz Nominees Pty Limited. Dr Lewkovitaz was a director of Tolicar, Solrise and Barak.

[129] The New South Wales Court of Appeal noted:

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[48] *Dover v Lewkovitaz* [2013] NSWCA 452.

> [18] In each of *Trendtex*, *Equuscorp* and *Hazard Systems*, the assignee had a pre-existing enforceable right against the assignor …

[130] It went on to summarise *Deloitte* as follows:

> [19] … By a majority, the Court held that the Bank had a genuine commercial interest in the subject right of action on the basis that it was the holding company of the owner of the shares of the company that held the right of action when the right of action arose.

[131] It then went on to cite and follow a 2012 decision of the Queensland Court of Appeal.[49] The Court cited a dictum of Gotterson JA (with whom Martin J agreed) in *WorkCover* where the Judge said:

> [66] Secondly, the pre-existing commercial interest need not be an interest which, itself, is enforceable at law and equity. In *Brownton* … for example, the commercial interest that a defendant who had settled with the plaintiff had in recouping, if only partially, against another defendant who had refused to settle, was held sufficient to sustain an assignment of the plaintiff's rights against that defendant to the other defendant who had settled. The assignee's interest in recoupment was not a legally enforceable interest; yet, clearly, it was a genuine commercial interest which was in existence at the time of the assignment.

[132] The emphasis is mine. It appears to undercut Mr McBride's submission that the pre-existing commercial interest must be prior in time to the litigation which is being assigned.

[133] The New South Wales Court of Appeal then went on to address Lingren J's decision in *Citibank*. The judgment said:

> [24] … His Honour reached that conclusion because such interest as the assignee had arose from the same arrangement in which the impugned assignment was an essential part. The interest was thus not pre-existing.

[134] Mr Dover's appeal was dismissed. Effectively, therefore, the Court was approving Dr Lewkovitaz's obtaining by assignment the right to sue the tenant.

[135] On its facts, the case of *Dover v Lewkovitaz* does not assist. The facts also explain why the Court cited with apparent approval both *Citibank* and *Brownton.*

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[49] *WorkCover Queensland v AMACA Pty Ltd* [2012] QCA 240.

[136] The most recent Australian decision is a decision this year, *EWC Payments Pty Limited v Commonwealth Bank of Australia*[50] being a decision of the Victoria Supreme Court, Commercial and Equity Division, Derham AJ.

[137] In March 2003, a party called "eWorld" was declared bankrupt under the laws of the Canton of Geneva. EWC took an assignment of the causes of action of eWorld against the Commercial Bank of Australia (CBA). eWorld was the holding company of EWC.

[138] Derham AJ pointed out that in each of *Trendtex* and *Equuscorp Pty Limited v Haxton*[51] the assignee had a pre-existing enforceable right against the assignor. He then noted a number of cases extending the circumstances to a genuine commercial interest beyond a pre-existing right and cited *Deloitte, WorkCover* and *Dover.* He cited *Citibank Savings* as a case where there was a finding of no pre-existing genuine commercial interest. Discussing *Monk,* the Associate Judge interpreted Cohen J as saying:[52]

> The commercial interest must go beyond a mere personal interest in profiting from the outcome of the proceedings. It requires an interest by the assignee in the assignor or its business affairs or activities which the assignment may in some way protect. (Emphasis added.)

[139] Mr McBride submitted generally that there was no practice in Australia, nor in the UK, nor in any other common law jurisdiction that he was aware of, where a defendant in a multiple-defendant litigation, let alone tort litigation, settles by taking an assignment of the plaintiff's cause of action against the other defendants, and uses the commercial interest of being a defendant in such litigation as the justification for taking an assignment whereby the defendant acquires a personal interest of a financial nature in pursuing the plaintiff's claims against the other defendants.

[140] None of these Australian authorities have criticised the reasoning of Lingren J in *Citibank.* Many of the Australian authorities are dealing with assignments of causes of action to parties who already had an indirect property interest by way of holding companies or subsidiary companies or trusts in the litigant who assigned the

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50 *EWC Payments Pty Ltd v Commonwealth Bank of Australia* [2014] VSC 4.
51 *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.
52 *EWC Payments Pty Ltd v Commonwealth Bank of Australia*, above n 42, at 70(c)(c).

cause of action. *Brownton* has not been directly criticised. The Australian courts do look for a genuine commercial interest in the assignment. Other than *Citibank*, none of the Australian authorities has had to consider the ramifications of an assignment disturbing the law reform statutory power given to the courts to adjust contribution to the judgment sum between tortfeasors.

[141] Given the trans-Tasman nature of the Australian and New Zealand economies and the trans-Tasman investment in the construction sector of the economy, it is of particular importance, I think, that so far as possible New Zealand common law should align itself with Australia. It may be noted that the Australian courts are citing with approval Gault J's analysis in *Downsview* which analysis ties assignments of causes of action to transfers of property rights.

[142] Although the Australian cases, other than *Citibank*, have not had to precisely describe the point, they do use the phrase "pre-existing" commercial interests and in all the cases, on the facts that pre-existing right was there independently of the litigation. At the very least, a prior pre-existing commercial interest in the matters that give rise to the cause of action is, at the very least, a powerful consideration in support of the assignment being legitimate and not contrary to public policy as being champerous. The Auckland Council does not meet that criterion.

Conclusion

[143] The common law has long been hostile to assignments of causes of action. It has identified the tort of maintenance and its most pernicious form, champerty, as wrongs contrary to public policy, by reason of being a trade in causes of action. Judges have an instinctive hostility to surrogates bringing claims, taking advantage of the misfortune of others.

[144] The torts of maintenance and champerty have not been abolished. Rather, funding arrangements which are fair are tolerated, consistent with facilitating access to justice. Secondly, when property is sold and causes of actions run with the property, the common law courts, which have always facilitated a free market in property, tolerate assignments of causes of action, including those in tort.

[145] Neither of these two qualifications, however, reflects any lessening of the basic common law hostility to there being trade in causes of action. Causes of action, unless there are special reasons, should always be brought by the persons in respect of whom the law provides rights and damages or other relief. Assignments have to be justified.

[146] The judgment that I essentially am faced with is that I cannot be sure that a trial judge during a trial and when fixing contribution after judgment, would not be distracted, deflected, or even frustrated by considerations as to the role of the assignee and the weight to be attached to the assignment. The trial judge would know, at all times, that the plaintiffs claims are being pursued in the interests of the tortfeasor, not in fact in the interests of the original plaintiffs, unless the judgment reaches up and beyond $1.7m.

[147] Ms Thodey agreed in the course of argument that if this assignment stands, there is nothing to stop any defendant, in any proceedings, entering into a bargain to purchase the plaintiff's causes of action as part of a settlement in order to sue the other defendants. There will then be a market for the plaintiffs' causes of action when there is more than one defendant. Such a state of affairs does not happen anywhere else in the common law world. The case of *Brownton* stands on its own. The Australian jurisprudence does not allow it. Lingren J's judgment in *Citibank* has been cited many times by other Australian judges, without criticism.

[148] The torts of maintenance and champerty are still law. The law tolerates some relief against their strictures when there are good reasons in the public interest to do so. The reduction of those reasons to the principle of pre-existing commercial considerations existing prior to the litigation itself is the standard followed in Australia, ultimately applying the standard in *Trendtex*. *Brownton* should be confined to its facts. In that case the UK equivalent to s 17 of the Law Reform Act was not available to adjust contribution between the defendants.

[149] I do not think there is sufficient merit in this stratagem of the Auckland Council to warrant extending the toleration of such assignments. It is meddling with the common law of torts, and the purpose of the Law Reform Act 1936. It will

encourage traffic in assignments of actions and will make a trial judge's duty to do justice between the parties even more difficult, and potentially prevent the judge from applying both the common law and the statute.

[150] For these reasons, APS' challenge to the assignment succeeds on the ground that the assignment is void as contrary to public policy by undermining the law of maintenance and champerty, as well as meddling with the trial process and with the statutory remedy of s 17 of the Law Reform Act 1936. It follows that the Auckland Council's application for leave to file an amended cross-claim is dismissed. The plaintiffs' causes of action remain, but cannot be pursued pursuant to the purported assignment. The pleadings remain closed, and the case awaits a fixture.

Costs

[151] The first and second defendants are entitled to costs on a 2B basis against the Auckland Council. I will receive submissions if the parties cannot agree, limited to five pages, exchanged in advance.