

FUNDING THE FIGHT : A LOOK AT RECENT DEVELOPMENTS IN THE LAW IN RELATION TO LITIGATION FUNDING

Introduction

1. Litigation funding is a topical area. The emergence of litigation funders in the last ten to fifteen years has seen an increase in the financing of cases by third parties. It is an area that affects insurers as claims against service providers and professionals in particular are capable of being funded.
2. There have been a number of cases looking at litigation funding in the last ten years and, in particular, there have been a series of decisions in New South Wales in the last twelve months on the issue. Invariably, these cases have been in the nature of applications to courts brought by a non funded party in litigation seeking to obtain a stay of the funded action on the basis that there is an abuse of process.
3. It is fair to say that the current state of law is such that it is difficult for lawyers to advise clients with any certainty as to whether particular funding arrangements may constitute an abuse of process. It appears that the prospect of a stay of proceedings being granted depends upon examination of all the circumstances of the relevant funding arrangements

so that a decision can be reached as to whether there is a risk of corruption of the administration of justice.

4. In April of this year the High Court heard argument in the matter of *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited*. The Court has not yet delivered its judgment. The judgment is eagerly anticipated by many in the litigation environment as it is an opportunity for the High Court for the first time to rule upon the legality of litigation funding.

Historical Background

5. The original legal bar to litigation funding stemmed from the existence of the torts of maintenance and champerty.
6. Any person who, without lawful justification, assists a plaintiff or defendant in civil proceedings to which that person is not a party commits the tort of maintenance. At common law, a person committing the tort of maintenance is liable to be sued by anyone who can show damage as a consequence. The tort of champerty is committed where the person engaging in the maintenance does so on the basis that he or she receives a share of the proceeds of litigation in consideration for the assistance given.¹

¹ See Balkin & Davis, *The Law Of Torts*, 3rd ed, at 25.33

7. The torts have been abolished in many jurisdictions by statute, including New South Wales.²

8. The rationale behind the law was as follows:

"... the essence of the action [is]... the officious intermeddling in and supporting litigation in which the maintainer has no legitimate interest, the invasion of a person's right not to be harried in courts of justice by litigation of this sort".³

9. Originally, the torts had been aimed at repressing the interests of powerful medieval figures who were prone to exercising overbearing influence over the courts. Obviously, this has long ceased to be a relevant consideration and in most instances it is a (non funded) defendant that makes application to the court for remedies.

Exceptions

10. There have been longstanding exceptions to the prohibitions against maintenance and champerty in an insolvency and bankruptcy context. For example, a trustee in bankruptcy is entitled to assign to a third party a claim which the bankrupt enjoyed, in return for a share of the proceeds. A

² Maintenance and Champerty Abolition Act 1993 (NSW)

³ Neville v London Express Newspaper Ltd [1919] AC 368 at 395 per Lord Atkinson

liquidator of a company is also permitted to dispose of a claim which the company is entitled to prosecute. In doing so both the trustee and the liquidator augment the funds which are available for distribution to the unsecured creditors.

11. Despite the absence of any policy considerations being expressed in the Bankruptcy Act 1966 or the Corporations Act 2001, it appears that the courts act on the basis that there is no danger of overreaching by the assignee of the cause of action available to the trustee or liquidator, as the case may be. It has been suggested that this is because each is a skilled professional exercising a statutory power in the interests of unsecured creditors and therefore acts from a disinterested motive and, secondly, as an officer of the court, each is subject to a disciplinary regime in the event of misconduct.⁴

Recent Cases On Litigation Funding

12. Prior to looking at the recent decisions in New South Wales, it is worthwhile to examine a Western Australian decision from 2003.

Clairs Keeley v Treacy⁵

⁴ See Lee Aitken, "Before The High Court", 28 Sydney Law Review 171.

⁵ (2003) 28 WAR 139

13. This case concerned an action brought against a firm of solicitors by over 2,000 plaintiffs. The actions were funded by Insolvency Management Fund Ltd (“IMF”). Each of the plaintiffs entered into an agreement with IMF. The terms of the agreement included such matters as an agreement to use a particular firm of solicitors. Additionally IMF was to bear the costs of the actions and meet any order for security for costs. IMF was to receive 35% of any net recovery. There was a side agreement that the Real Estate Consumer Association, who assisted in organising a number of the plaintiffs, would receive 5% of the recovery out of IMF’s 35%. Individual plaintiffs were free to settle their cases, however if they did so for a sum IMF regarded as inadequate, its share was increased to 45%.

14. The principal judgment was delivered by Templeman J. It was considered that the arrangements in place resulted in the funder, who had no involvement in the relevant circumstances other than as funder, effectively running the litigation on the basis that it would pay some 65% of the proceeds to the plaintiffs. Further, in the circumstances of the case it was considered that the investors had no legal or financial expertise in circumstances where the executive chairman of IMF at the time had substantial experience in commercial litigation and litigation funding. As a consequence it was considered that there was a high likelihood that the case would be run by IMF and not the plaintiffs.

15. His Honour determined, after weighing all relevant factors, that the risk of intermeddling by the funder and the risk of improper conduct of the solicitors led to the result that the proceedings should be stayed. It was considered that IMF's activities amounted to "*trafficking in litigation*" and the proceedings should be stayed so as to prevent the "*court's resources being subverted to a commercial enterprise...at least until some safeguard was put in place to ensure IMF's role was confined to funding*".⁶

Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd⁷ ("*Fostif*")

16. This case concerns claims brought by licensed tobacco retailers against wholesalers to recover licence fees paid by the retailers. The proceedings were brought as representative proceedings and were funded by an organisation known as Firmstone.

17. Notices of motion seeking various orders were listed for hearing before Einstein J. In particular, the defendants to the proceedings sought orders dismissing or staying the proceedings as an abuse of process.

18. Firmstone maintained a very active role in the running of the litigation. It was responsible for overall management, as well as "*strategic and technical issues*". It appointed the lawyers, funded the actions and dealt with tobacco suppliers and government bodies. Firmstone also provided a

⁶ At 164

⁷ (2005) 63 NSWLR 203

contractual indemnity to the retailers in respect of any adverse costs order and preferred security for costs. It entered into an arrangement with accountants who were to assist in respect of certain administrative and other matters associated with the litigation, on the basis of a 50/50 split with the accountants of its 33% of recovery fee.

19. The control over the litigation given to Firmstone by clients extended to the right to give instructions as to how the claims were to be moulded, the evidence to be relied on and such matters.

20. Einstein J ordered that the proceedings be stayed on account of there being an abuse of process. The fact that the arrangements were financed by Firmstone did not in itself make them champertous or an abuse of process. However, his Honour was concerned that matters such as the size of the funder's anticipated profit led to the conclusion that the proceedings were an abuse. Additionally, his Honour considered that the proposed distribution of "*opt in*" notices in connection with the representative proceedings would amount to trafficking in litigation that ought not be allowed to go forward.

21. The plaintiffs appealed the decision of Einstein J to the Court of Appeal

22. The Court of Appeal overturned the decision of Einstein J. The principal judgment is delivered by Mason P.⁸ The President stated the following as a matter of broad principle at [114],

“In my opinion, a conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents). The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them.”

23. The President goes on to say at [132] – [133]:

“132 In my opinion, the court’s basal inquiry should be whether the role of the particular funder has corrupted or is likely to corrupt the processes of the court to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process. The standard of proof is high where (as here) the plaintiff has a genuine and viable cause of action. The court will lean in favour of moulding its remedy so as to eliminate the abuse, resorting to dismissal only as a last resort where this is impossible (see

⁸ Sheller JA not only agreed with Mason P but stated, “I have had the privilege of reading in draft the President’s judgment with which I entirely agree”.

generally **Jago v District Court (NSW)** (1989) [168 CLR 23](#) and **Clairs Keeley (No 2)**).

133 I do not understand it to be suggested that any abuse of process has occurred to date. The proceedings are in proper form and they have been placed under judicial scrutiny at the earliest opportunity. The question whether the Rule has been engaged and the conditions under which the litigation will be permitted to go forward as representative proceedings have been submitted to the court. There is no suggestion that the retailers have been misled about the arrangements under which the litigation is proposed, nor has any evidence been led as to an existing conflict of interest between the funder and the retailers (contrast Clairs Keeley). The respondents have not suggested that any misrepresentation of fact or law appears in Firmstone’s advertising material or the opt-in notices.”

24. It was considered that there was no trafficking of litigation in this instance.

It was observed that trafficking cases appear to involve “*the funder taking some role akin to that of an assignee in relation to claims that are incapable of assignment because they are bare causes of action for damages*”. To the contrary, in this case the causes of action were essentially in the nature of a claim in debt, being a cause of action that is readily able to be assigned.

25. A significant matter emerging from this judgment is the importance of examining the effect of the funding arrangement on the litigation, rather than looking at the relationship between funder and plaintiff and such matters. Another significant matter is that a permanent stay of proceedings should be regarded as a last resort and that where appropriate a Court will look at moulding less drastic relief if it is required to intervene.

***Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr*⁹ (“Project 28”)**

26. In this case, which was argued shortly after the decision in *Fostif*, a differently constituted New South Wales Court of Appeal was required to consider whether particular funding arrangements amounted to an abuse of process.

27. The proceedings concerned a dispute relating to a lease in respect of a parcel of land. Mr Barr, the lessee, had entered into a deed with Austcorp granting that company an option in respect of certain rights arising under the lease. Subsequently Mr Barr and Austcorp entered into a further deed whereby conduct of the proceedings in connection with the lease was transferred to Austcorp.

⁹ [2005] NSWCA 240

28. The lessor and defendant to the proceedings, Narui, applied to the Court for orders dismissing and, alternatively, staying the proceedings. At first instance, Palmer J dismissed the Narui application, stating that Narui had a genuine commercial interest in funding the arrangements such that its control of them did not “*savour of maintenance*” and did not amount to an abuse of process.

29. The principal judgment in the Court of Appeal is delivered by Ipp J. His Honour acknowledged the authority of *Fostif*, without appearing to warmly embrace it. Nevertheless, Ipp J confirms that post *Fostif* the task of the Courts is to focus on the tendency of the funding arrangements to produce an abuse of process rather than indulge in arguments as to champerty or maintenance when deciding whether to dismiss or stay the proceedings.

30. Ipp J makes the following comments on the issue of abuse of process in the litigation funding context:

“58 Abuse of process is not restricted to defined and closed categories. In the context of arrangements that fund litigation, an abuse of process may occur on a number of bases. For example, the funder may be attempting to use the litigation as a business and not for the purpose of achieving justice in a genuine dispute between the parties. In these circumstances, it is possible that the

funder would be seeking to use the proceedings otherwise than for the purpose for which they were intended. Other ways in which a particular instance of litigation funding might lead to abuse of process are where the funding results in the defendant being oppressed or prejudiced, or the procedures of the court subverted or improperly manipulated.

59 In the present case, Austcorp is not trafficking in litigation. Its business is not acquiring claims and then prosecuting them.

Rather, the contention is that the arrangements by which it funds and controls the Lease Proceedings corrupt or tend to corrupt the process.”

31. His Honour confirmed the position as expressed in *Fostif* that complete transfer of control of litigation to a third party does not of itself amount to a corruption of the Court's processes. By way of analogy, reference is made to the insurance situation where an insurer often has complete control over litigation involving the insured.

32. Other matters not considered to be persuasive were the fact that Austcorp might gain a commercial advantage by being involved in the litigation, and an asserted lack of proportionality in respect of the subject of the litigation and rights independent of the action. In relation to the latter issue, his Honour appeared to be comforted by the fact that solicitors and counsel

acting for the Barr interests were of a character such that they could be relied upon “*to act with complete propriety*”.

33. Ipp J was, however, concerned at the apparent absence of an indemnity by Austcorp for the costs payable by the Barr interests, should Narui succeed in its defence of the action. Whilst noting that it is ultimately open to Narui to seek a costs order against Austcorp at the appropriate time, if it is successful, the prospects of obtaining such an order depended on establishing an abuse of process at this time. Similarly, the prospects of obtaining orders as to security for costs were also uncertain.

34. In the final analysis Ipp J ordered a conditional stay of proceedings, being a stay until such time as Austcorp provides the Barr interests with an indemnity against any costs they might be ordered to pay Narui.

Volpes v Permanent Custodians Limited¹⁰

35. This is a decision of Smat AJ of the New South Wales Supreme Court, in which his Honour usefully sets out relevant principles in relation to a stay application in connection with litigation funding, post *Fostif* and *Project 28*. A total of eleven principles are set out. The relevant portion of the judgment is annexed to this paper.

¹⁰ [2005] NSWSC 827

36. In this case a borrower brought an action against a lender in respect of liability to pay certain administration fees. The proceedings were funded by another lender and major competitor of the defendant. The amount in dispute was relatively small (\$16,480) but it was agreed that important questions of principle were involved and the cost of the litigation would be high. Despite the fact that the funder of the action, Liberty, stood to gain a commercial advantage from the proceedings, the fact was that the plaintiffs had a viable cause of action which, without the funding, would otherwise be unlikely to be pursued.

37. The other interesting aspect of this case is that the defendant made an open offer of settlement to the plaintiff, such offer being on the basis that it was confidential. Acceptance of such an offer meant that the Volpes would breach the funding deed they entered into with Liberty. On the facts of this case his Honour did not accept the position that the offer of settlement was so attractive that it could not fairly be declined by the Volpes unless illicit factors came into play or were taken into account.¹¹

38. In all the circumstances his Honour did not consider the role of the funder corrupted and was not likely to corrupt the process of the Court “*to a degree that attracts the extraordinary jurisdiction to stay permanently for abuse of process*”. His Honour held that the plaintiffs were entitled to

¹¹ At [81]

bring the proceedings and were permitted to discuss with their funder any offer of settlement achieved.

Commentary

39. The Western Australian Court of Appeal's approach to litigation funding is clearly more restrictive to that of the New South Wales Court of Appeal.

This is expressly stated in *Fostif*:

*"113 In **Clairs Keeley (No 2)** the Full Court of the Supreme Court of Western Australia (Steytler, Templeman and McKechnie JJ) referred to the funding agreement in that case as being champertous, containing features that were contrary to public policy, and "a de facto assignment of the plaintiffs' causes of action to [the funder], which was in effect, trafficking in litigation" (at [1]).*

The Court said (at [71]) that:

It is acceptable for the litigation to be pursued by plaintiffs who, although funded by a third party, are acting in their own interests in the pursuit of justice in their respective causes, and are so acting on the advice of independent solicitors. It is not acceptable for the litigation to be pursued in such a way that the interests of the plaintiffs are subservient to those of the funder. That would be an abuse of process.

114 I respectfully disagree with the categorical thrust of the last two sentences, although I observe that this was a decision in a State where the tort has not been abolished. In my opinion, a conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents). The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them.”

40. The thrust of the recent New South Wales cases is that funding is permissible provided appropriate safeguards are to place to ensure the risk of an abuse of process is minimised. Such safeguards include the provision by the funder of an indemnity in respect of costs orders, as per *Project 28*, or, alternatively, safeguards may be in place as to the decision making processes in the action and the basis on which solicitors are instructed.

41. A clear difference in the approach of the two courts is the greater examination by the Western Australian Court of Appeal of the objectives of the funder. The New South Wales cases emphasise a focus on how the

funding arrangements impact on the proceedings. As long as the proceedings are not “*corrupted*” then the courts will not be inclined to intervene, despite the benefit that may be derived by the funder.

42. The examination as to whether proceedings are “*corrupted*” is to some degree a value judgment and, naturally, subjective beliefs of the particular judge or judges hearing the matter may influence the outcome of a case. For example, despite the Court of Appeal in *Project 28* acknowledging the authority of *Fostif* and being guided by it, one is tempted to think that the *Fostif* Court of Appeal may have reached a different conclusion on the facts if it had determined *Project 28*. Similarly, one can imagine different judges placing different emphasis on the various matters to be taken into account when looking at the impact of funding arrangements on proceedings – the nature of any costs safeguards, the funder’s prospective benefit, the degree of control exercised by the funder and the like.

43. There is of course an inevitable tension between the desire that individuals have access to justice and the position that trafficking in litigation ought not be encouraged.

44. The approach the High Court will take in *Fostif* remains to be seen. Recent experience teaches that long awaited decisions from the High

Court in respect of a controversial area of law rarely answer all questions in a black and white fashion. Nevertheless, the High Court's decision will be an important one and it is no doubt keenly awaited by those in the litigation funding environment.

19 July 2006

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Volpes v Permanent Custodians Limited [2005] NSWSC 827 (17 August 2005)

Summary of relevant principles by Smart AJ at [44]

1. *Access to justice is now regarded as a fundamental human right which ought to be readily available to all (per Millett LJ in **Thai Trading Co v Taylor** [1998] QB 781 at 786).*

2. *The policy underlying the law of maintenance is directed against wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatever and where the assistance he renders to the one or the other party is without justification or excuse (per Fletcher Moulton LJ in 1908 adopted by Lord Mustill in **Giles v Thompson** [1994] 1 AC 142, 161). The language and the policy it described are redolent of the ethos of an earlier age – per Millett LJ, *supra*.*

3. *The considerations of public policy which once found maintenance and champerty so repugnant have changed over the course of time. The social utility of assisted litigation is now recognised and the provision of legal and financial assistance viewed favourably as a means of increasing access to justice. (**Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd** [2005] NSWCA 83 at [91] and following.*

4. *Maintenance is permissible when the maintainer has a legitimate interest in the outcome of the suit. This is not confined to cases where the maintainer has a financial or commercial interest in the result. It extends to other cases where social, family or other ties justified the maintainer in supporting the litigation, for example, an employer and employee, an heir, a near relative or where a poor man is helped out of charity to maintain a right which he might otherwise lose. (**Thai Trading** at 786-787). Similarly, a trade union will help its members.*

5. *Support of legal proceedings based upon a bona fide common interest, financial or philosophical must be permitted if the law itself is not to operate oppressively. The Courts today are likely to take an even wider view of what might be acceptable, particularly if procedural safeguards are present or able to be applied. See **Magic Menu Systems v AFA Facilitation Pty Ltd** (1997) 72 FCR 261 and **Fostif** at pars [95] and [96].*

6. *"It is not correct in this State to conflate the principles of maintenance/champerty with those touching abuse of process, or view them as arming a defendant with a right to stay proceedings because they are maintained (even champertously)" (**Fostif** at [93].*

7 A conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought. The court is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the Court in the particular litigation. (**Fostif** at par [114] per Mason P).

8. Trafficking in or speculating in causes of action is impermissible. (**Elphic Ltd v Mack** [2003] 2 QdR 125 per Byrne J). In **Fostif** at par [123] Mason P tentatively expressed the view that "the cases involving the elusive notion of 'trafficking' all appear to involve the funder taking some role akin to that of an assignee in relation to claims that are incapable of assignment because they are bare causes of action for damages."

9. The "court's basal inquiry should be whether the role of the particular funder has corrupted or is likely to corrupt the processes of the court to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process. The standard of proof is high where ... the plaintiff has a genuine and viable cause of action. The court will lean in favour of moulding its remedy so as to eliminate the abuse resorting to dismissal only as a last resort where this is impossible." (**Fostif** per Mason P at par [132])

10. Some degree of control over the proceedings residing in the funder is permissible. The funder has to keep abreast of the course which the litigation is taking and protect its own legitimate interests. Excessive control, when established is probably impermissible, although the Court must be wary of unwarranted paternalism. (See **Fostif** at par [137])

11. The possibility, even likelihood, that circumstances may arise in which situations of conflict may present themselves calls for vigilance but is not itself a basis for finding abuse of process meriting an unconditional stay. (**Fostif** at par [138])