

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA200/2011
[2012] NZCA 399**

BETWEEN	CONTRACTORS BONDING LIMITED Appellant
AND	GODFREY WATERHOUSE First Respondent
AND	ROBERT JOHN WATERHOUSE Second Respondent

Hearing: 10 July 2012

Court: Ellen France, Harrison and White JJ

Counsel: R E Harrison QC for Appellant
S A Grant for Respondents

Judgment: 31 August 2012 at 10 am

JUDGMENT OF THE COURT

- A The appeal is allowed. The respondents must provide the appellant with a redacted copy of their agreement with the litigation funder revealing the information set out at [67] in the reasons within 10 working days. Any issues of privilege arising must be the subject of an application to the High Court within the 10 working day period. Filing of such an application will stay the disclosure requirement pending further order of the High Court. Any application by the appellant arising out of disclosure of the funding agreement must be made to the High Court within 10 working days of receipt of the redacted funding agreement.**
- B The proceeding in the High Court is stayed pending disclosure of the redacted version of the agreement or further order of that Court.**

- C The respondents must pay the appellant costs for a standard appeal on a band A basis plus usual disbursements.**
- D The costs award in the High Court is quashed. Costs in that Court are to be re-visited in light of the outcome in this Court.**
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REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] This is an appeal from a decision of Allan J declining to stay proceedings pending disclosure by the respondents, Godfrey Waterhouse and Robert Waterhouse, to the appellant, Contractors Bonding Ltd, of their agreement with an independent

litigation funder.¹ The appeal raises issues about the courts' role in non-representative actions when a party's legal costs are being met by a litigation funder. The role of the court in relation to litigation funding has been considered previously by this Court in *Saunders v Houghton* but only in the context of a representative action.²

Background

[2] The factual narrative and details of the respondents' claim are set out in full in Allan J's judgment.³ For present purposes we need only summarise that description.

[3] The respondents formerly engaged in insurance business in Georgia, the United States of America. They each directed a company that specialised in shuttle limousine and taxi insurance. In particular, Godfrey Waterhouse was a director and sole shareholder of Phoenix Brokers Inc (Phoenix). In December 2000, Phoenix entered into an insurance underwriting agreement with the appellant, which is a company registered in New Zealand. The respondents also held their own insurance licences to enable them to carry on business in Georgia. The ability to do so was dependent on compliance with Georgia's laws about insurance underwriting.

[4] In early 2002, Georgia changed its laws relating to the eligibility of insurers. The appellant became ineligible to underwrite further business unless and until it qualified under the new regime. The appellant advised the respondents that it was able to continue to underwrite business placed by the respondents because it had recently acquired a qualifying insurer in American Samoa. The appellant and the respondents carried on business for several years.

[5] However, in March 2005 the authorities in Georgia took steps against Phoenix, the respondents and the appellant. The claim was that the appellant was not qualified to operate as an underwriter in Georgia and that the parties were carrying on business unlawfully. Criminal charges were laid against the respondents but it

¹ *Waterhouse v Contractors Bonding Ltd* HC Auckland CIV-2010-404-3074, 13 December 2010.

² *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331.

³ At [2]–[10].

appears that they did not proceed to trial. A class action was launched against the appellant and Phoenix but was ultimately compromised, although the precise details of the arrangement are not before the court. Phoenix was struck off the register in Georgia and the respondents say they suffered significant losses.

[6] The respondents filed the present proceeding in the High Court in May 2010. Their claim centres on the allegation that the appellant misled the respondents as to its acquisition of a qualifying insurance entity in American Samoa. The respondents allege that this acquisition did not occur, so that the parties were not qualified to conduct insurance business in Georgia. The appellant denies these allegations. The respondents allege deceit, breach of fiduciary duty and negligence. As Allan J said, they are unable to rely directly on the contractual arrangements with the appellant because Phoenix, the contracting party, no longer exists. The respondents jointly claim special damages of \$4.3 million, together with general damages of \$50,000 each and exemplary damages of \$50,000 each. There is also a claim for interest.

[7] The respondents say they could not pursue their claim earlier because of their impecuniosity. However, in 2010 they reached an agreement with an independent litigation funder. The respondents informed the appellant of the existence of their agreement with the litigation funder but have not disclosed the agreement itself to the appellant, nor the identity of the funder. The appellant then sought a stay of the proceeding pending disclosure by the respondents of the agreement.

[8] Allan J heard the stay application. The Judge made an order that the respondents produce the litigation funding agreement to the High Court for inspection. A stay was imposed pending production of the agreement. After consideration of the agreement, the Judge considered disclosure to the appellant was not necessary and lifted the stay.

[9] We turn now to summarise the Judge's reasoning.

The High Court judgment

[10] Allan J approached the application for a stay on the basis that this Court in *Saunders v Houghton* was intending to set out an approach which was applicable to litigation funding generally. Accordingly, the Judge said he should follow the implicit direction in the case. Allan J's assessment of what that direction meant is set out in this excerpt:

[38] In my view, the proper course is to follow the implied direction of the Court of Appeal in *Houghton* at [79] and to direct production of the litigation funding agreement in question. But production is to be made to the Court alone, and not to the defendant, at least in the first instance. The purpose of a production order limited in that way is to enable the Court to ensure that the litigation funder concerned is not legally able to usurp control over the proceeding.

[11] The Judge gave two reasons for not ordering production of the agreement to the appellant. The first reason was that maintenance (assisting another to sue) and champerty (taking part of the proceeds of the action) would not, even if present, amount to a defence to the substantive proceeding. The Court had the task of supervising the operation of any litigation funding agreement, not the appellant. Second, Allan J considered issues arose about confidentiality and privilege, in that disclosure of sensitive information may grant a tactical advantage to the appellant.

[12] Accordingly, Allan J made an order directing production of the litigation funding agreement to the Court for inspection within 15 working days of the date of judgment. The proceeding was stayed pending production of the agreement.

[13] The agreement was duly disclosed to the Court. Allan J subsequently issued a minute in which he recorded:⁴

[3] In my view there is nothing in the deed which would warrant disclosure to the defendant or its counsel. In particular, I am satisfied that the deed does not confer upon the litigation funder an unacceptable level of control over the conduct of the proceeding.

⁴ *Waterhouse v Contractors Bonding Ltd* HC Auckland CIV-2010-404-3074, 16 February 2011 (Minute of Allan J).

[14] On 15 March 2011, Allan J made an order granting the appellant leave to appeal those aspects of his earlier judgment concerning the funding of the respondents' case by a third party funder.⁵

[15] There are two other aspects of the subsequent procedural steps we should record. First, the appellant made an application for strike out and summary judgment. That application has been successful in part in that Potter J has granted the appellant summary judgment against Robert Waterhouse, the second respondent.⁶ We have nonetheless proceeded to deal with the matters raised before us. The issues before us affect both respondents and remain live against Godfrey Waterhouse.

[16] The second development is that the respondents have paid \$50,000 to the High Court by way of a bond as security for costs.

The issues on appeal

[17] The first issue arising on the appeal is whether the courts should exercise any form of oversight over proceedings between individual litigants where a litigation funder is involved. We interpolate here that when we refer to a litigation funder, we mean a third party in the business of funding civil litigation. There is a spectrum of possible funding arrangements. At the hearing, counsel referred to litigation funding in a representative action, litigation funding in an individual claim, litigation funding by an associated body, litigation funding by an insurance company by subrogation, state funding via legal aid, and funding by a relative. The last four scenarios do not engage any particular concerns.⁷

⁵ *Waterhouse v Contractors Bonding Ltd (No 2)* HC Auckland CIV-2010-404-3074, 15 March 2011. Leave to appeal from this interlocutory decision was required because the case is on the Commercial List: Judicature Act 1908, s 24G.

⁶ *Waterhouse v Contractors Bonding Ltd* [2012] NZHC 566.

⁷ The Rules Committee, in the context of considering rules for class actions, would exclude from the definition of litigation funder the following: insurance companies financing litigation by virtue of subrogation or otherwise; bodies like unions which finance members' civil proceedings; the Legal Services Agency; and friends helping on an ad hoc basis: New Zealand Rules Committee *Class Actions for New Zealand: A Second Consultation Paper prepared by the Rules Committee* (October 2008) at [20]. See also the definition of "litigation funder" in cl 34.2 of the associated draft High Court Amendment (Class Actions) Rules 2008, which excludes "an organisation which finances, or assists in financing, a member of that organisation in relation to a civil proceeding" or "a lawyer who provides services under a conditional fee agreement". See also Stephen Todd "The Law of Torts in New Zealand" (5th ed, Thomson Reuters, Wellington, 2009) at [18.5.02].

[18] If there is court oversight, that leads to the second issue, namely, the nature and extent of that oversight.

[19] These two issues emerge clearly from the helpful submissions of the parties.

The competing contentions

[20] The difference between the parties' respective positions is quite stark. The appellant's approach is "hands on" in terms of the extent of the courts' control and oversight of litigation where a third party litigation funder is involved. The respondents advocate a "hands off" approach unless there is evidence of an actual abuse of process.

[21] For the appellant, Dr Harrison QC's starting point is that maintenance and champerty remain part of the New Zealand law, albeit partially modified by *Saunders v Houghton*. The high point of the appellant's argument is that the litigation funding agreement is on its face champertous unless the court approves it. Dr Harrison puts forward an alternative option involving less court control at the outset. We discuss these two options later.

[22] From that starting point, the appellant submits the courts should maintain some control over the initiation of proceedings involving third party funding, whether a representative action or not. The submission is that the respondents, in proceeding without appropriate disclosure and court approval, have not acted properly. In order for the courts to exercise appropriate control over such a proceeding, Dr Harrison submits it is necessary for the other party to have information about the litigation funding arrangements so that relevant matters can be drawn to the courts' attention.

[23] Ms Grant for the respondents submits that champerty is now a redundant tort. Its role in public policy terms has been overtaken by the emphasis on access to justice and the powers of the courts to prevent an abuse of process.

[24] Ms Grant submits that a litigation funding agreement is not an abuse of process. Unless something is being done pursuant to that agreement which amounts to an actual abuse of process, the courts have no interest in the litigation funding agreement.

[25] The submission is that any potential concerns can be met by the responsibilities imposed on counsel in terms of counsel's obligations as an officer of the court.⁸ If concerns materialise, then there are suitable means of addressing them short of an approval process and stay as sought by the appellant, for example, by way of an order for security for costs.

[26] Before we address the parties' arguments, it is helpful to discuss the key Australian and English authorities relied on by Ms Grant and then to set out in some detail this Court's earlier decision in *Saunders v Houghton*.

The Australian and English authorities

[27] The respondents rely in particular on two decisions of the High Court of Australia, *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*⁹ and *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*.¹⁰ Both of these cases reject the notion that litigation funding is of itself an abuse of process. We discuss each in turn.

Campbells Cash and Carry v Fostif

[28] This case involved a representative action brought on behalf of a number of tobacco retailers. The proceedings were initiated and funded by Firmstones Pty Ltd (Firmstones) in return for a share of the proceeds. The defendants contended that the nature of the funding arrangements along with Firmstones' role in seeking out potential claimants warranted the conclusion reached at first instance that the arrangements were an abuse of process. This finding had been overturned on appeal.

⁸ Lawyers and Conveyancers Act 2006, s 54(a) and (d), and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 2.1, 2.2, 2.3, 13 and 13.2.

⁹ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386.

¹⁰ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75.

[29] In concluding that there was no abuse of process, Gummow, Hayne and Crennan JJ¹¹ noted in the High Court of Australia that two types of considerations were advanced as supporting a rule of public policy against the maintenance of actions, namely:¹²

... fears about adverse effects on the processes of litigation and fears about the “fairness” of the bargain struck between funder and intended litigant.

[30] Gummow, Hayne and Crennan JJ did not consider these matters justified an “overarching rule of public policy” that would prevent litigation funding or one that would bar the prosecution of claims according to whether the funding agreement met standards about the nature or degree of funder control or benefit.¹³

[31] In dissent, Callinan and Heydon JJ concluded there was an abuse of process. Various factors were identified as, in combination, pointing to an abuse of process including the fact Firmstones sought out potential claimants, Firmstones’ degree of control over the proceedings and the limited role of the plaintiffs’ solicitor. One of the concerns of the minority was that the court has less ability to supervise litigation when the real controller of one side of the case (here, Firmstones) was beyond the court’s direct control.

Jeffery & Katauskas v SST Consulting

[32] In *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*, the High Court of Australia dealt with litigation funding after a proceeding had ended. The unsuccessful funded plaintiff became liable for costs. The plaintiff had sued a company that had provided geotechnical services for some building works. The owner of the work advanced monies to the plaintiff for the purpose of prosecuting the proceedings. At all material times the plaintiff was unable to meet any costs order and the funder did not indemnify the plaintiff against liability for costs. The plaintiff’s action failed, and although the defendant received the amount paid as security for costs it was left with a shortfall under the order against the plaintiff. The

¹¹ Gleeson CJ and Kirby J agreed that the proceedings were not an abuse of process.

¹² At [90].

¹³ At [91].

defendant pursued the litigation funder and its directors for the shortfall on the basis they had committed an abuse of process.

[33] The Court said that an agreement by a non-party, for a fee, to assist with the funding of litigation was not, “of itself”, an abuse of process.¹⁴ Nor was the failure by a funder to provide indemnity for costs. The abuse of process identified by the defendant was based on the plaintiff’s inability to meet an adverse costs order, together with the provision of funds by a funder who was not liable to meet an adverse costs order.

[34] The Court rejected these arguments noting, first, that the mere inability to pay costs does not mean further prosecution is an abuse. On the second point, the Court noted that the defendants’ ability to recover the costs shortfall from the plaintiff was neither greater nor less than it would have been absent the funding arrangement. The defendants could recover from the plaintiff through security for costs. Further, recovery from a non-party could be obtained in terms of the civil rules.

[35] The majority held that the proposition that those who fund litigation must put the party funded in a position to meet any costs order was too broad and without a doctrinal basis. The problem with that approach is that it:¹⁵

... seeks to take general principles about abuse of process (and in particular the notion of “unfairness”), fasten upon a particular characteristic of the funding arrangement now in question, and describe the consequence of that arrangement as “unfair” to the defendant because provisions and principles about security for costs have been engaged in the case in a particular way and the rules will not permit the ordering of costs against the funder unless the principles of abuse of process are engaged ... that proposition is circular.

[36] Heydon J, dissenting, saw *Campbells Cash and Carry* as distinguishable because it did not deal with the situation where there was no indemnity for costs should the defendant succeed and where the plaintiff was at all times incapable of paying the defendant’s costs.

[37] Heydon J explained the concerns underlying his approach in this way:

¹⁴ *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*, above n 10, at [30].
¹⁵ At [43].

[110] ... litigation is something capable of causing immense harm unless its use is properly controlled and unless those who institute it and prosecute it are subject to legitimate pressures generating a measure of discrimination. The liability of a plaintiff to pay the defendant's costs if the plaintiff's allegations against the defendant are rejected by the courts is one of the mechanisms for alleviating (though only partially) the harm which the plaintiff has caused the defendant by bringing litigation based on unfounded allegations. That liability is also one of the legitimate pressures generating a measure of discrimination in conducting that litigation.

[111] The court's procedure exists primarily to serve the function of enabling rights to be vindicated rather than profits to be made. ...

[112] It is true that not every unfair and unjust outcome signifies an abuse of process. But the unfair and unjust outcome of these proceedings for the defendant was generated by an abuse of process: the maintaining of litigation a primary purpose of which was the gaining of a very large "success fee" for the funder without any effective indemnity from the funder for the plaintiff's liability to the defendant.

[38] The approach taken in these cases is consistent with the approach taken in the context of consideration of the application of aspects of the Corporations Act 2001 (Cth) to litigation funders. The Federal Court had determined that funded class actions were managed investment schemes and so subject to regulation as such under the Corporations Act.¹⁶ In the explanatory note to the legislation reversing this decision the Australian Government stated that it supported class actions and litigation funders "as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes".¹⁷

Martell v Consett Iron

[39] *Martell v Consett Iron Co Ltd* is the first of the English authorities on which the respondents place particular emphasis.¹⁸ The funder in that case was an association established to protect fishing rights and the conservation of rivers. The association supported the plaintiffs, who were members of the association, in their claim that their fishery was being polluted by effluent from the defendant's ironworks. The funding support was in the form of indemnities for costs. Before the

¹⁶ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, (2009) 260 ALR 643 and *International Litigation Funding Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50, (2011) 276 ALR 138.

¹⁷ Corporations Amendment Regulation (No 6) 2012 (explanatory statement).

¹⁸ *Martell v Consett Iron Co Ltd* [1955] 1 Ch 363 (CA).

action was heard the defendant sought a stay on the ground the action was illegal and an abuse of process because it was being maintained by a third party.

[40] The Court of Appeal concluded that the association had a sufficient common interest in the subject matter of the litigation to justify maintenance even though some of its members had no direct interest in the outcome apart from their objection in principle to the pollution of rivers. In reaching this view, Jenkins LJ said that criminal maintenance:¹⁹

... is committed whenever a third party aids the prosecution or defence of an action in the absence of circumstances sufficing in law to justify the giving of such aid, whatever the motive or purpose of the person giving such aid may have been, the element of impropriety or officious intermeddling being supplied by the fact of interference in the suit by giving aid to one party or the other, coupled with the absence of legal justification for so doing; while, on the other hand, the giving of such aid will not be criminal if it is justifiable in law by reference to one of the specific exceptions ... or if the person giving such aid has such an interest in the action as can be held in law sufficient to justify him in giving it.

Abraham v Thompson

[41] The plaintiffs, who were funded by a third party, and the relevant defendants in *Abraham v Thompson* were resident in Portugal.²⁰ The defendants were concerned that if the plaintiffs' funder was not resident in the European Union (EU) they would not be able to recover costs. They sought disclosure from the plaintiffs of the identity of the funder and said they would seek security for costs if the funder was outside the EU.

[42] The information requested was not disclosed. The defendants applied for disclosure so they could apply for a stay unless the third party funder provided security or agreed to accept liability for costs. At first instance, Lloyd J accepted there was an inherent jurisdiction to stay when it appeared the plaintiff was being funded by a third party who would not or could not accept liability to pay costs. This decision was overturned on appeal. The Court of Appeal's decision illustrates that access to justice is seen as the critical value in any balancing of interests.

¹⁹ At 399–400.

²⁰ *Abraham v Thompson* [1997] 4 All ER 362 (CA).

[43] Potter LJ said that where a stay was sought in circumstances not provided for by statute or in the rules of court, the starting point was the “fundamental principle” that an individual generally was entitled to “untrammelled access” to a court of first instance in relation to a bona fide claim based on a properly pleaded cause of action.²¹ Potter LJ continued:²²

[This principle is] subject only to the sanction or consideration that he is in peril of an adverse costs order if he is unsuccessful, in respect of which the opposing party may resort to the usual remedies of execution and/or bankruptcy if such order is not complied with. This principle is of course subject to the further proviso that, if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious, oppressive or otherwise an abuse of process then the court may dismiss the action or impose a stay whether under the specific provisions of the rules of court or the inherent jurisdiction of the court.

[44] Millett LJ, in what reflects the high point for the respondents’ argument, stated:²³

It is not an abuse of process of the court for an impecunious plaintiff to bring proceedings for a proper purpose and in good faith while being unable to pay the defendant’s costs if the proceedings fail. If the plaintiff is an individual the court has no jurisdiction to order him to provide security for the defendant’s costs and to stay the proceedings if he does not do so. It may be unjust to a successful defendant to be left with unrecovered costs, but the plaintiff’s freedom of access to the courts has priority. The risk of an adverse order for costs and consequent bankruptcy has always been regarded as a sufficient deterrent to the bringing of proceedings which are likely to fail. Where there is no risk of personal bankruptcy, as in the case of a plaintiff which is a limited company, the court has a statutory jurisdiction to award security for costs; but even in this case it will frequently not do so if this will have the effect of stifling bona fide proceedings. It is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a plaintiff with a genuine claim should be prevented from pursuing it.

²¹ At 374.

²² At 374.

²³ At 377. The position on that point in terms of RSC Ord 23 is to be contrasted with that under r 5.45(1)(b) and (2) of the High Court Rules. RSC Ord 23 provided for security to be ordered if the specified conditions were met, if, “having regard to all the circumstances ...”, the Court thinks it just to do so” and see: *Halsbury’s Laws of England* (4th ed, 1975) vol 10 County Courts at [597] and [602]. The combination of r 5.45(1)(b) and (c) provides that security for costs may be awarded where there is reason to believe an unsuccessful plaintiff will be unable to pay the successful defendant’s costs.

Stocznia Gdanska

[45] Finally, there is a useful discussion of the principles implicit in the tort of champerty by Toulson J in *Stocznia Gdanska SA v Latvian Shipping Co (No 2)*.²⁴ Toulson J referred to the often cited description of Lord Mustill in *Giles v Thompson* in which two aims were identified, namely, protection of the purity of justice and protection of the interests of vulnerable litigants.²⁵ As to the latter, Toulson J observed that the public interest in access to justice is accompanied by a public interest in protecting vulnerable litigants from opportunistic exploitation. Toulson J suggested that there remains a public interest in averting the development of an “unlicensed and unregulated market in litigation for fear of the abuses to which that might lead”. The Judge considered that is the sort of thing contemplated when references to “trafficking in litigation” have been made.²⁶

Conclusion

[46] The key principles we draw from these cases are as follows:

- (a) Following the abolition of maintenance and champerty, the courts in Australia and England have focused on whether there is an abuse of process when approaching litigation funding.
- (b) Litigation funding is not of itself treated as an abuse of process. Nor is it an abuse of process to bring proceedings without being able to meet an adverse costs order, or for a funder to maintain an impecunious plaintiff without providing indemnity for costs.
- (c) Something more is needed to found an abuse of process, such as the funding agreement giving improper control over the proceedings to

²⁴ *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 All ER 822 (QBD).

²⁵ *Giles v Thompson* [1994] 1 AC 142 (HL), at 161, citing *British Cash and Parcel Conveyers Ltd v Lamson Store Service Co Lt* [1908] KB 1006 at 1014.

²⁶ At 831. The Law Commission reached a similar view in concluding that the torts of maintenance and champerty should be maintained in New Zealand: Law Commission *Subsidising Litigation* (NZLC R72, 2011 at [11].

the litigation funder, or something that would tend to corrupt the processes of the court.

- (d) This, more benevolent, approach to litigation funding reflects the value ascribed to access to justice. The plaintiff's interest in bringing a bona fide action prevails over the defendant's interest in recovering costs.

This Court's decision in *Saunders v Houghton*

[47] Baragwanath J, delivering the judgment of this Court, discussed the development of the common law on maintenance and champerty from the Anglo-Saxon sanctions for abuse of process followed by the "mediaeval prohibition of maintenance (assisting another to sue) and champerty (taking part of the proceeds) to deal with unruly nobles".²⁷ From that position, Baragwanath J noted there was a move to the common law's acceptance of the tests expressed respectively by Lord Mustill in *Giles v Thompson* and Mason P in the New South Wales Court of Appeal in *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd*.²⁸

[48] In *Giles v Thompson* Lord Mustill said that:²⁹

... all the aspects of the transaction should be taken together for the purpose of considering the single question whether ... there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse; ...

[49] Mason P in *Fostif* stated:³⁰

... 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

²⁷ At [24(a)], citations omitted.

²⁸ *Giles v Thompson*, above n 25, and *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83, (2005) 63 NSWLR 203.

²⁹ At [164], cited in *Saunders v Houghton* at [24(c)].

³⁰ At [132], cited in *Saunders v Houghton* at [24(d)], citations omitted.

[50] This Court also noted that the justice requirement of r 1.2 of the High Court Rules includes what was described as the “fundamental principle” that there must be no abuse of process.³¹

[51] Baragwanath J said that while the “pendulum has swung a good distance from Lord Denning’s utter rejection of maintenance and champerty”,³² the Court was satisfied that there was still force in the concerns there expressed.³³ Baragwanath J continued:

[27] ... Subjection to litigation can be a heavy burden for any defendant. Lives can be put on hold for the duration of the case which, if complex, may last a long time and be punctuated by appeals. The resulting cost and anxiety can exact a heavy toll.

[28] Nevertheless, the interests of justice can require the court to unshackle itself from the constraints of the former simple rule against champerty and maintenance. Access to justice is a fundamental principle of the rule of law. It can require flexibility to meet the harsh reality of the current cost *to the injured party* of litigation, which is often more than a would-be plaintiff can sensibly be expected to bear. The result can be a failure of justice: a plaintiff with merits can be excluded from relief against the defendant who has committed a legal wrong.

[52] Accordingly, this Court said that a “more discriminating” test was required.³⁴ The Court then discussed the position in England and Australia. This led the Court to conclude that there was now an appreciation of the fact here and elsewhere that access to justice may not be available without the aid of funders prepared to fund the litigation in exchange for a cut of the proceeds. Baragwanath J continued:

[77] ... The modern Australian approach, seen also in Canada, is to face these realities directly and make a judgment according to the merits of each case. In New Zealand also, funding arrangements have been approved by Anderson, Glazebrook and Heath JJ in *Re Nautilus Developments Ltd* [2000] 2 NZLR 505 (HC), *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262,714 (HC), and *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) respectively, albeit with control of the proceedings remaining with the litigants. There remains cause for anxious care in assessing them. ...

[53] The Court in *Saunders v Houghton* expressed its conclusions as follows:

³¹ At [26].

³² See *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 (CA) at 654.

³³ At [27].

³⁴ At [29].

[78] ... the common law in other jurisdictions has moved on and access to justice and comity with other states mean we should follow. We already have decisions at High Court level ... approving funding arrangements and Parliament must be assumed to have passed the Lawyers and Conveyancers Act in knowledge of that trend.³⁵ Moreover, the context of that legislation was very different from non-lawyer cases: lawyers are officers of the court and when arguing a case they owe what may be conflicting duties to clients as well as to the court. Parliament could well have thought that the sort of objectivity needed to fulfil their role could be compromised by a financial stake in the outcome.

[79] ... like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where:

- (a) the court is satisfied there is an arguable case for rights that warrant vindicating;
- (b) there is no abuse of process; and
- (c) the proposal is approved by the court.

We have discussed the need for proper controls, appropriate to the nature of the case and the particular funder and funding terms proposed.

[54] The Court did not set out any detail as to the procedures to be followed. These have been the subject of further consideration in the High Court.³⁶

[55] The issue before us is whether any different approach should be adopted in a case involving individual claims, that is, a non-representative action.

Our evaluation

[56] The fact that there has been only a partial modification of maintenance and champerty is a feature distinguishing the position in New Zealand from that in England and the states in Australia on which Ms Grant relies. In those jurisdictions, the torts (and crimes) have been removed by statute.³⁷ Further, it appears that

³⁵ The Lawyers and Conveyancers Act 2006, s 334(2) states that if a conditional fee agreement is, by virtue of s 334(1), not an illegal contract, a lawyer by entering into such an agreement does not become potentially liable to proceedings founded on the torts of maintenance or champerty.

³⁶ *Houghton v Saunders* (2011) 20 PRNZ 509 (HC) (lifting stay) at [37]. That decision, in turn, is the subject of an appeal to this Court.

³⁷ Criminal Law Act 1967 (UK), ss 13–14; Civil Law (Wrongs) Act 2002 (ACT), s 221; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), ss 3–4, and 6; Criminal Law Consolidation Act 1935 (SA), Sch 11, ss 1(3) and 3 (inserted by 35/1992, s 10 (Sch) in 1993); Abolition of Obsolete Offences Act 1969 (Vic), s 4, which amended the Wrongs Act 1958 (Vic), s 32; Crimes Act 1958 (Vic), s 322A. The position in other states and territories has to be considered in light of the High Court of Australia's decision in *Campbells Cash and Carry v Fostif*.

New Zealand lags behind other jurisdictions in terms of the prevalence of litigation funding. Vince Morabito and Vicki Waye note, for example, that since about 2004, commercial litigation funders “have become leading protagonists in Australia’s class action landscape”.³⁸ Finally, there are particular factual differences between those cases and the present.

[57] Notably, in *Campbells Cash and Carry* the funder was contractually obliged to indemnify the plaintiffs against adverse costs orders and there was no reason to doubt the funder’s capacity to honour the indemnity. While the former was not a feature of the arrangements in *Jeffery*, there was at least disclosure of the funding arrangements in that case.

[58] We consider that *Abraham v Thompson* is distinguishable on three bases. First, it was dealing with maintenance and not champerty. The same point can be made about *Martell* which was also dealing with public interest litigation. Second, the appellants were seeking disclosure in order to get an order which they were not entitled to get (that is, an order for security for costs against a third party) where there was a procedure available post-trial that would have remedied the position for them. Finally, the application was made in a situation where the applicants were not at risk themselves as they were indemnified for their costs.

[59] Accordingly, while the overseas experience is obviously relevant, we consider that the nature and extent of judicial oversight of litigation funding in cases involving individual litigants should be determined having particular regard to the New Zealand experience.

[60] The approach taken in *Saunders v Houghton* reflects a careful balancing between the various interests, including that of access to justice. Reflecting the modification rather than rejection of maintenance and champerty, the court has seen a need to continue to exercise controls on a case specific basis to ensure that the

³⁸ V Morabito and V Waye “Reining in Litigation Entrepreneurs: A New Zealand Proposal” [2011] NZ Law Review 323 at 325. In a report produced by the Lincoln University and the Centre for Socio-Legal Studies, at Oxford University, Christopher Hodges, John Peysner and Angus Nurse *Litigation Funding: Status and Issues* (Research Report, January 2012) at 38 note that: “Although litigation funding has existed in restricted form for some years in USA, it has grown quickly in the past decade in Australia and Canada. ... [Forms of] litigation funding [have] also developed in Germany, Austria and Belgium within the past decade.”

arrangement does not offend against the principles implicit in those torts, particularly, champerty. In *Saunders* this Court sanctioned the imposition of conditions designed to safeguard the interests of defendants which may be disadvantaged by the particular arrangements. In that case they relevantly included vesting responsibilities in counsel and solicitors for communicating with the represented class, adequate arrangements for communication of information, and a prohibition on provision of misleading information.

[61] The concerns underlying the approach in *Saunders v Houghton* are applicable also to cases involving individual litigants. The principles embody views about how litigation should be conducted, not just representative claims. That said, as French J in the next stage of the litigation in *Saunders v Houghton* stated, a “commercially-funded representative action involving very large numbers of claimants substantially alters the balance between plaintiffs and defendants and is potentially oppressive”.³⁹ The position is much less acute in a case like the present. Further, courts have a responsibility in relation to representative actions which they do not have for individual claims. Finally, the funding arrangements are a part of the mix in approving such representative actions.

[62] However, none of these factors alter the fact that the arrangement is on its face champertous and so warrants some assessment at least of whether it is in fact wrongful. That assessment requires, at least, disclosure of some elements of the litigation funding agreement. The hard question is the nature and extent of any judicial oversight. As the Rules Committee put it in their consultation paper on class actions for New Zealand:⁴⁰

Litigation funding agreements between litigation funders and those they fund must unquestionably be subject to judicial scrutiny and possible disapproval. The really difficult issues relate to the degree, the timing and the intensity of such judicial scrutiny.

³⁹ *Houghton v Saunders*, above n 36, at [37] (this was the judgment lifting the interim stay).

⁴⁰ Rules Committee, above n 7, at [18].

What is required?

[63] Dr Harrison suggests two options. The first option involves initial court approval and supervision. The process he recommends is as follows:⁴¹

- (a) The litigation funding agreement should be submitted to the Court for approval at the time when the litigation is commenced.
- (b) In approving the litigation funding agreement the Court may have regard to the identity of the litigation funder, including its qualifications and its prior conduct in litigation funding matters.
- (c) There should be a direct client-solicitor relationship between the plaintiff(s) and the lawyer acting in the litigation.
- (d) The lawyer acting in the litigation should be responsible for advising the plaintiff(s) about the merits of the case and all material developments in the case. That advice should be prepared and provided without interference by the litigation funder.
- (e) The litigation funder, including the directors and employees of the litigation funder, should not provide expert evidence in the litigation. Expert witnesses should be instructed directly by the lawyers acting in the litigation and the litigation funder should have no direct involvement in that process.
- (f) The litigation funder must both certify to the Court that it has funding available to meet the costs of the litigation and undertake to pay any order for costs and disbursements made against either it or the funded party and/or any order for security for costs made by the Court.

[64] The alternative option advanced by Dr Harrison would involve initial disclosure and other requirements on the litigation funded plaintiff but dispensing with an on notice approval process. Steps would have to be taken at the time when the proceedings are commenced or continued with the involvement of the litigation funder. These would be:

- (a) Both the Court and the defendant(s) should be given formal notice that a litigation funder is involved. The notice should identify the litigation funder and its place of business;
- (b) In a separate document, the litigation funder should certify to the Court that it has funding available to meet the costs of the litigation and personally undertake to pay all awards of costs and

⁴¹ This is a version of the steps put before this Court in *Saunders v Houghton* although they were not the subject of any determination by the Court.

disbursements in favour of the defendant(s) and any order for security for costs made against it (or the plaintiff).

[65] On this approach, it would be for the defendant to take the initiative to challenge the involvement in the proceedings of a litigation funder and/or to apply for security for costs. It would be for the defendant to pursue its own challenge, if any, to the strength of the plaintiff's claim, whether by summary judgment or strike out application.

[66] We discuss these two options below. However, regardless of which of these options is adopted, we see disclosure of key features of the litigation funding arrangements as critical. That is the best means of ensuring there is, in fact, no issue that might give rise to an abuse of process.

Disclosure of some details of the funding arrangements

[67] We agree with Dr Harrison that both the court and the non-funded party should be given formal notice that a litigation funder is involved. We consider the details of the funding arrangements that should be disclosed to the non-funded party are as follows:

- (a) the identity and location of litigation funder;
- (b) its financial standing/viability;
- (c) its amenability to the jurisdiction of the New Zealand courts if that is relevant; and
- (d) the terms on which funding can be withdrawn and the consequences of withdrawal.

[68] We see these facts as relevant to determining whether the agreement raises any issues potentially giving rise to an abuse of process. We accept the disclosure should not generally include details that might give rise to a tactical advantage to the

non-funded party such as information about any “war chest” or other commercially sensitive details.

[69] Disclosure should be made as early as possible in the litigation to avoid any delays caused by any challenges by the non-funded party.

[70] Ms Grant raises issues about breach of confidentiality arrangements with the funder and the potential to confer a tactical advantage on the non-funded party. We consider the first of these concerns can be managed. As to the second, the issue can be addressed by limiting the disclosure required to the key details, as we have discussed.

[71] Our approach is consistent with the general practice to date in the New Zealand cases. As Dr Harrison submits, the terms of the funding agreement were before this Court in *Saunders v Houghton*. In the High Court cases referred to in *Saunders v Houghton*, there was also disclosure.⁴² The same was true of the contractual assignment which was not upheld in *Citic New Zealand Ltd v Fletcher Challenge Forest Industries Ltd*.⁴³

[72] The approach of IMF (Australia) Ltd, the significant player in this market in Australia, is instructive. IMF is a publicly listed company. The information on its website provides details about its funding arrangements.⁴⁴ The Victorian Law Commission in its report on Civil Justice noted that some commercial litigation funders such as IMF make disclosure of funding agreements.⁴⁵ In the context of representative actions, the Federal Court of Australia’s Practice Note CM17 provides for early disclosure of any litigation funding agreement.⁴⁶ Clause 3.6 of the Practice Note provides that any funding agreement disclosed may be redacted to prevent

⁴² See the passage set out at [52] above.

⁴³ *Citic New Zealand Ltd v Fletcher Challenge Forest Industries Ltd* HC Auckland CP583-SW/99, 1 March 2002.

⁴⁴ IMF (Australia) Ltd “Combined Financial Services Guide and Product Disclosure Statement” (18 January 2010) <www.imf.com.au>.

⁴⁵ Victorian Law Reform Commission *Civil Justice Review: Report* (Melbourne, 2008) at 471.

⁴⁶ Federal Court of Australia *Practice Note CM17: Representative Proceedings Commenced Under Part IVA of the Federal Court of Australia Act 1976 (Cth)* (1 August 2011).

disclosure of information “which might reasonably be expected to confer a tactical advantage” to the other party.⁴⁷

Beyond disclosure?

[73] There is merit in taking a cautious approach while, at least in the New Zealand context, the involvement of litigation funders is in its relative infancy. There is also force in Dr Harrison’s related submission that what is necessary will change over time.

[74] On the other hand, there is an issue about whether further restrictions are necessary, given the availability of other remedies such as a stay for abuse of process, the ability to seek summary judgment and security for costs, and the ability to award costs against a non-party.⁴⁸ (These avenues are relevant in particular to the proposition in Dr Harrison’s second option that the litigation funder provide an undertaking to meet any costs award.) Further, we query how far it is appropriate to impose restrictions on individual litigants absent any rules in the area. We interpolate here that it would be helpful for consideration to be given to this possibility.⁴⁹

[75] We also share the concerns advanced by Ms Grant as to the practical consequences of the first of Dr Harrison’s options. It does very much raise the spectre of satellite litigation that delays the substantive proceeding. Both *Saunders v Houghton* itself and this case are illustrations of this possibility. Further, the fact that individual actions raise lesser concerns in terms of the potential for oppression may support a less intrusive option, especially given the importance of access to justice.

[76] On balance, we consider the approach taken in individual cases can be modified to reflect the less acute nature of the concerns in those cases. We consider that if there is disclosure of the key features of the litigation funding agreement, the

⁴⁷ In *Lion Energy Ltd v Tulloch Lodge Ltd (in liq), in the matter of Tulloch Lodge Ltd (In liq)* [2011] FCA 1139 the Federal Court refused to make orders protecting the confidentiality of the terms of the litigation funding agreement which by then had run its course.

⁴⁸ As to the latter see *McGechan on Procedure* (looseleaf ed, Brookers) at [14.09(1)] and [J51G .02].

⁴⁹ As we have noted, the Rules Committee has proposed rules dealing with class actions.

matter can be left to the defendant to raise any concerns in a particular case. Issues such as the sufficiency of the case can be dealt with in the normal way, as has occurred here with the application for summary judgment.

Results in this case

[77] Dr Harrison accepts that any directions will need to be tailored to the present case. The question of a prima facie case has already been dealt with. The agreement also has the High Court's approval. However, we agree with Dr Harrison that the extent of control by the funder is not the only criterion of potential interest to the court. Further, we accept the submission he makes that input from the appellant is necessary to enable or assist the court. We accordingly direct the disclosure of a redacted version of the litigation funding agreement to the appellant within 10 working days. If the respondents consider that this raises an issue of privilege, the respondents will need to make an application to the High Court claiming privilege within the 10 day period. That matter will then be dealt with in the High Court. We add that the effect of filing an application for privilege will be to stay the requirement to disclose the agreement pending further order of the High Court.

[78] The appellant must make any application it wishes to make in relation to the litigation funding agreement to the High Court within 10 working days of the date of receipt of the agreement.

[79] The proceeding in the High Court is stayed pending disclosure of the redacted version of the agreement or further order of that Court.

Costs

[80] The appellant, having succeeded, is entitled to costs. The respondents must pay the appellant costs for a standard appeal on a band A basis plus usual disbursements.

[81] The appellant also seeks an order vacating the costs order in favour of the respondents in the High Court.⁵⁰ That course seems appropriate given the outcome in this Court and we order accordingly. Costs in the High Court are to be reconsidered in light of this judgment.

Solicitors:

Fortune Manning, Auckland for Appellant

Harmos Horton Lusk Ltd, Auckland for Respondents

⁵⁰ *Waterhouse v Contractors Bonding Ltd* HC Auckland CIV-2010-404-3074, 7 June 2011.