

# *Before the High Court*

## ‘Litigation Lending’ after *Fostif*: An Advance in Consumer Protection, or a Licence to ‘Bottomfeeders’?

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The grant of special leave in *Campbell v Cash & Carry Pty Ltd v Fostif Pty Ltd Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd*<sup>1</sup> has, at last, provided a vehicle for the High Court to rule upon the legality and merits of ‘litigation lending’.<sup>2</sup> In particular, the Court will need to balance two competing aims. On one hand, there is an undoubted consumer benefit to be derived from providing funding via a litigation funder to potential litigants who might otherwise be unable to sue a large corporation because of the cost, or whose claim is otherwise too small to justify commencing action.<sup>3</sup> On the other hand, there is an attendant danger of ‘bottom feeding’; where a funding party with no other interest in the litigation but a potentially large share of the verdict stirs up litigation and strife, thus contradicting a basic rule of all legal systems: *interest rei publicae ut sit finis litium*. Collaterally, it has been suggested that in a litigation funding arrangement ‘consumers are poorly protected’<sup>4</sup> and that some regulation of the lender is needed.<sup>5</sup> That proposition is examined below.

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1 [2005] HCATrans 777 (30 September 2005). An earlier attempt to raise the question of litigation lending before the High Court in *Elfic Ltd v Macks* [2003] 2 Qd R 125 foundered when it was discovered that there was in fact no special leave point on the facts: see the High Court transcript of 19 March 2002.

2 There is an important temporal difference between the two cases in that *Fostif* (2005) 63 NSWLR 203 is a considered judgment of a strong New South Wales Court of Appeal, whereas *Trendlen v Mobil Oil* [2005] NSWSC 741 is an interim decision of an experienced New South Wales Commercial Division judge. The latter case represents what one might call the ‘usual’ tactical application by a large, well-funded corporate defendant which faces a potential class action by a disaffected group of plaintiffs. In *Trendlen*, petrol retailers sought to recover an improperly charged impost. It is contended in *Trendlen* that it is in some way oppressive under the judicial power of the Commonwealth to foment litigation: para 58 per McDougall J. An important factual matter may well be that in *Trendlen*, the main instigator of the litigation had no personal interest in that it did not belong to the potential class of claimants. McDougall J held that the proceedings could only be characterised as ‘oppressive’ ‘in the sense that any proceedings brought against any wrongdoer, for civil rectification of or recompense for the wrong, are oppressive. I do not think that the law goes so far as to recognise that it is oppressive to call upon a wrongdoer to rectify a wrong’: at para 76.

3 The Law Council of Australia, ‘Submission on Litigation funding’ to the Officers, Standing Committee of Attorneys-General, 6 October 2005 (hereafter ‘Law Council submission’) considered that ‘litigation funding is a service which improves access to justice and should therefore be encouraged in the public interest’.

At base, the issue is, and always has been, one of public policy. For a period, those seeking to resist litigation-lending attempted to pre-empt the question by invoking it as a type of fixed rule of the common law against intermeddling in law suits by a third party. But, as Lord Esher noted in *Alabaster v Harness*<sup>6</sup> in a passage cited by Dixon J in *Stevens v Keogh*<sup>7</sup> but surprisingly, not referred to in the most recent appellate cases:

The law of maintenance is founded not so much on general principles of right and wrong or on natural justice, as on considerations of public policy.

It is always exciting to observe the common law moving to accommodate market realities; what a glorious thing it must have been to watch as the floating charge slowly evolved from its equitable antecedents in the 1860s and 1870s to provide a simple and effective method of providing security over a company's future assets.<sup>8</sup> Similarly, the notion of entering into a non-champertous arrangement, in which a 'litigation lender' bargains to receive 30 or 40 per cent of the net proceeds of a court case in return for lending money unsecured to the plaintiffs to enable them to ventilate their claims, is slowly gaining acceptance in the courts, and on the Rialto.<sup>9</sup>

## 1. *Historical Antecedents*

It has long been clear that 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.<sup>10</sup> There is no difficulty with this, because the vesting of the bankrupt's property in the trustee means that the trustee is simply disposing of his or her own property.<sup>11</sup> Similarly, a liquidator of a company, by analogy with the trustee, has been held

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4 Michael Pelly, 'State Seeks Greater Control of Firms Funding Litigation: Judges Concerned at Conduct' *Sydney Morning Herald* (25 July 2005) apparently quoting the NSW Attorney-General, Mr Debus, who was mooted further regulation. Quite how the sub-editor could have thought that judges were 'concerned' when the article expressly refers to the vindication of such activity in *Fostif* is unclear! A cynical view is that it is yet another attempt by an unsympathetic government to stymie litigation.

5 The Law Council submission suggested that any regulation 'should be directed toward achieving certainty, transparency and uniformity across jurisdictions and ... that formal regulation could make way for court based practice directions': above n3.

6 [1895] 1 QB 339 at 342.

7 (1946) 72 CLR 1 at 28.

8 See generally, Robert Pennington, 'The Genesis of the Floating Charge' (1960) 23 *Mod LR* 630 and Gerard McCormack, 'The Floating Charge in England and Canada' in John de Lacy (ed), *The Reform of United Kingdom Company Law* (2002).

9 The spate of recent cases suggests that both litigants are now more aware of the possibility of funding arrangements and that there are more 'funders' in the market.

10 'There is ... a long established exception [to champerty and maintenance] which allows trustees in bankruptcy, liquidators, administrators, and deed administrators, to exercise their statutory powers of sale by selling a cause of action, or the proceeds of a suit' in *Domson Pty Ltd v Zhu* [2005] NSWSC 1070 at para 57 (White J) citing *Cotterill v Bank of Singapore Australia Ltd* (1995) 37 NSWLR 238; *Movitor Pty Ltd (in liq) v Sims* (1996) 64 FCR 380; *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219; *Re William Felton & Co Pty Ltd* (1998) 145 FLR 211.

11 See generally, Lee Aitken, 'Champerty, Statutory Assignment and the Liquidator or Trustee in Bankruptcy' (1995) 8 *Corporate & Business Law Journal* 225.

entitled to dispose of a claim which the company is entitled to prosecute.<sup>12</sup> In doing so, both the trustee and the liquidator augment the funds which are available for distribution to the unsecured creditors by disposing of an asset in the insolvent regime. Furthermore, although the policy consideration is articulated in neither the *Bankruptcy Act* 1966 (Cth) nor the *Corporations Act* 2001 (Cth), the courts act on the basis that there is no danger of overreaching by the assignee of the statutory cause of action available to the trustee or liquidator, as the case may be. This must be because, first, each is a highly skilled professional exercising a statutory power in the interests of the unsecured creditors and thus acts always from a disinterested motive,<sup>13</sup> and secondly, as an officer of the court, each is subject to a disciplinary regime in the event of any misconduct.

It is no doubt for these reasons that there is very little discussion in these cases of the appropriate payment in return for which the trustee or liquidator may make the assignment. Thus, if the 'claim' which is assigned is likely to be unsuccessful, or is otherwise flawed, an insolvency practitioner will frequently assign it for \$1, or a share of the proceeds of the recovery.<sup>14</sup> This makes it very difficult to argue by analogy when the question of a purely commercial funding arrangement is involved. If the unsecured creditors will receive more because of the assignment and subsequent prosecution of a claim which the trustee, or creditors, are unwilling to undertake, it should make no difference how much is demanded for the transfer of the chose in action. Such considerations, however, loom large with a disparate group of individuals who may wish to obtain funding to maintain a claim. How much then is too much, or too little?

The statutes aimed to deal with common and ageless problems in insolvencies in relation to recovery for the unsecured creditors. As Sir George Jessel said long ago with respect to the prospects of recovery for the unsecured creditors:

Sometimes the property is wholly unsaleable, unfinished works, drowned-out mines, and things of that sort, and great delay takes place in realising them. Then there are bad and doubtful debts which cannot be got in. Very often they result in suits. Debtors run away and you have to find them and compromise with them. That is one source of delay; and the other is the immense mass of litigation with shareholders and creditors. Everybody who under any pretence whatsoever can dispute his liability does so.<sup>15</sup>

Central to the question of litigation funding is the extent to which a chose in action may be assigned at common law or in equity. In *Re Oasis Merchandising*

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12 He or she has power to do so pursuant to the *Corporations Act* s477(2)(c).

13 This is not the appropriate forum to discuss the potential for abuse which does exist between the professional requirement to recover as much as possible for unsecured creditors, and the business imperative to charge by way of profit costs as much as the market will bear.

14 For example, in *Cotterill v Bank of Singapore (Australia) Ltd* (1995) 37 NSWLR 238 the trustee assigned a claim said to be worth \$17 million in return for payment of \$10 000 and 10 per cent of the total amount recovered. The precise amount to be paid depends upon the operation of section 134 of the *Bankruptcy Act* 1966 (Cth). Under section 134(1)(a), a trustee may dispose of the property of the bankrupt by sale. Under section 134(1)(aa), the trustee may dispose of property of the bankrupt in return for a sum of money payable at a future time – and there appears to be no limit on how much or little should be demanded.

15 As quoted in Edward Manson, 'Tinkering Company Law' (1890) 6 *QLR* 428 at 432.

*Services*,<sup>16</sup> Robert Walker J noted that there are three methods of disposing of a cause of action against a third party to another.

First, there may be a transfer of property with inherent rights, as for example, the absolute assignment of a debt. There is no question of champerty because the assignee obtains a legitimate interest in the subject matter of the litigation.<sup>17</sup> This has been variously described as ‘genuine commercial interest’, or ‘something beyond a mere personal interest in profiting from the outcome of proceedings’. The interest must be ‘rights-based’ not a mere ‘hope’. Secondly, there may be an assignment of a bare chose in action, divorced from any property right.<sup>18</sup> Thirdly, there may be an assignment of the damages to be awarded in a case which has not yet been decided. In this last case, the assignee has no right to interfere in the proceedings, so no objection can be taken to the assignment.<sup>19</sup>

## 2. *The Recent Course of Authority*

Although the matter has not been previously examined in the High Court,<sup>20</sup> a number of intermediate appellate courts, have recently examined the validity of ‘litigation lending’.<sup>21</sup> Furthermore, in 1994 the New South Wales Law Reform Commission had recognised the ‘social utility of assisted litigation’.<sup>22</sup> Shortly thereafter, the New South Wales Parliament abolished the torts of champerty and maintenance.

Prior to *Fostif*, the application to stay the proceedings on the ground of champerty was invariably brought by the *defendant* in the proceedings being prosecuted, not the party who had entered into the funding arrangement.<sup>23</sup> This dynamic effectively reversed the underlying historical reason for the emergence of the torts of champerty and maintenance.

Historically, the torts had aimed at repressing those powerful medieval figures who, by influence or money, may have been able to overbear the King’s courts.

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16 [1995] 2 BCLC 493.

17 See generally, *First City Corporation Ltd v Downsvieview Nominees Ltd* [1989] 3 NZLR 710 which was affirmed by the Privy Council on other grounds: [1993] AC 295. See also *Re Daley; Ex parte National Australia Bank Ltd* (1992) 37 FCR 390.

18 *Poulton v The Commonwealth* (1953) 89 CLR 540 at 602 (Williams, Webb & Kitto JJ).

19 *Glegg v Bromley* [1912] 3 KB 474.

20 The decision in *Elfic* potentially involved the High Court but special leave was refused. The High Court case which most directly bears on the issue is *Poulton v The Commonwealth* (1953) 89 CLR 540 at 593–607 (Williams, Webb & Kitto JJ). However, the statement on mere causes of action was not part of the *ratio*: see the general analysis by Olsson J in *Singleton v Freehill Hollingdale and Page* [2000] SASC 278 at para 31 and following. On the question of public policy generally, see *Stevens v Keogh* (1946) 72 CLR 1 at 28 (Dixon J) cited by Williams J at first instance in *Elfic Ltd v Macks* [2000] QSC 18. Note also the important judgment of Byrne J in *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 605.

21 See, in particular, the course of decision in Western Australia in the *Clairs Keeley* litigation: *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139; (2004) 29 WAR 479; [2005] WASCA 86.

22 See New South Wales Law Reform Commission, *Barratry, Maintenance and Champerty* Discussion Paper 36 (1994) at para 2.55 quoted by Mason P in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at para 91.

23 But see now *Domson Pty Ltd v Zhu* [2005] NSWSC 1070.

Such a danger had become chimerical from at least the beginning of the eighteenth century.<sup>24</sup> It was, accordingly, something of a paradox that the presumptively stronger and better funded defendant should be in a position to invoke the ‘remedy’ of a stay application to thwart the efforts of a poorly funded plaintiff from having his or her day in court. It was this irreconcilable tension which was the focus of the judgments in *Fostif* and which Mason P’s judgment, in particular has now exploded.

In *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*<sup>25</sup> the New South Wales Court of Appeal overturned the decision of the Commercial Division Judge to permanently stay the proceedings, which were being litigation funded. In *Fostif*, Mason P made it clear that the only reason now to prevent a party funding an action was to prevent corruption of the court’s process.<sup>26</sup> On the one hand, it is not permissible simply to ‘traffick’ in litigation, but all such 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’.<sup>27</sup> On the other hand, if there is a genuine and viable cause of action, then the defendant faces a high hurdle in attempting to stay the action on the ground of abuse.<sup>28</sup> In any event, the court has the power to mould its remedy to prevent the dangers of any abuse. For example, in relation to costs orders, the court may order that the funder provide security so that the defendant is not faced with the prospect of not recovering any costs at all in the event that it is successful. Mason P held that, henceforth, the ability to stigmatise the funding agreement as involving an abuse of process would be the touchstone of its validity:

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.<sup>29</sup>

Subsequently, in *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr*<sup>30</sup> a differently constituted New South Wales Court of Appeal concentrated on the Court’s inherent control over the profession as the most efficacious way of ensuring that funding agreements do not lead to an abuse of process. Ipp JA stated:

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24 William Holdsworth, *History of English Law*, 18 vols (5<sup>th</sup> ed, 1942) at 3:395 examines the history of a number of ways in which a party might seek to interfere, inter alia, with the proper working of the judicial system and which fell within the jurisdiction of the Star Chamber. These included forgery, perjury, conspiracy, deceit, champerty, maintenance, and embracery. Edward Jenks lists the various statutes commencing with 3 Edw I, c25 of 1275, which was replicated over the next 30 years and which first made champerty a criminal offence: *A Short History of English Law* (6<sup>th</sup> ed, 1949) at 144, note 7.

25 (2005) 63 NSWLR 203 (Mason P, Sheller & Hodgson JJA) (hereafter *Fostif*).

26 *Id* at para 114.

27 *Id* at para 123.

28 *Id* at para 132.

29 *Ibid*.

30 [2005] NSWCA 240 (Hodgson, Ipp JJA & Campbell AJA) (hereafter *Narui*).

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.<sup>31</sup>

It is perhaps not entirely clear, with respect, what contrast the judgment is drawing between a funder who uses litigation ‘as a business’ and not ‘for the purpose of achieving justice in a genuine dispute’. By definition, the funder is only engaged in the litigation because of the prospect of obtaining payment by way of a verdict in favour of the funded plaintiff(s). Yet, the plaintiff(s) will, from their perspective, be engaged in vindicating their rights.

### 3. *Some Tests of ‘Abuse’*

It seems clear on decided authority that if the funder purports to assert complete practical control over the proceedings, such an action may amount to an abuse of process. If the litigant cannot make informed decisions ‘there will be a substantial risk that the funder’s intervention will be inimical to the due administration of justice’.<sup>32</sup>

Equally, there may be a lack of ‘proportionality’ in the sense that the greater the ‘share of the spoils, the greater the temptation to stray from the path of rectitude’.<sup>33</sup> On the other hand, that danger is said to disappear if the ‘solicitors and counsel representing [the plaintiffs] ... may be relied upon to act with complete propriety’.<sup>34</sup> It may be said as a respectful aside that this *dictum* suggests that different categories of solicitors exist viz those that act with ‘complete propriety’ and those others who on some *ex ante* basis may, perhaps, be stigmatised and thus justify an application for a stay because of some apprehended abuse! It is not clear how such invidious distinctions would be drawn in practice, what would characterise a ‘danger’, and who would be prepared to go on oath about it.

Left undiscussed is the appropriate level of return which the funder may properly charge. As we have seen above, the insolvency practitioner appears to be very much at large as to the quantum of recovery which must be demanded. This is no doubt because it is perceived that the trustee or liquidator may be relied upon to drive a hard bargain, and to be skilled at properly evaluating the claim to be assigned. As a conventional matter, a recovery of 30 per cent to 35 per cent appears

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31 *Id* at para 58 (Ipp JA).

32 *Clairs Keeley (a firm) v Treacy* (2004) 29 WAR 479 at 502.

33 *R (Factortame Ltd) v Secretary of State for the Environment, Transport and the Regions (No 2)* [2002] 4 All ER 97 at para 85; *Fostif*, above n25 at para 118 (Mason P).

34 *Narui*, above n30 at para 93.

to have been ‘accepted’ without any real scrutiny; but if the desire is simply to increase the recovery of litigants who might otherwise recover nothing, it is not clear why a much higher return for the funder would not be appropriate. Why is it, for example, that a return of 30 per cent of the net amount to the assignor(s) is not appropriate, when the alternative is that they recover nothing?

At base, perhaps drawing on well-established principles of equity involving unconscionable transactions and catching bargains, the High Court should indicate the permissible limits of usual recovery. If the question is regarded simply as one of ‘market efficiency’ then the deeper and better organised the market for such claims, the lower will be the percentage of recovery for which the funders will competitively bargain.

#### 4. *The Position After Fostif*

A useful summary of the present position after *Fostif* may be found in the judgment of Smart AJ in *Volpes v Permanent Custodians Limited*,<sup>35</sup> where his Honour noted the following principles.

First, access to justice is now regarded as a fundamental human right which ought to be readily available to all.<sup>36</sup> The policy which prohibits maintenance is directed against ‘wanton and officious’ intermeddling with the disputes of others and is redolent of ‘the ethos of an earlier age’.<sup>37</sup> Secondly, public policy has changed so that 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.’<sup>38</sup> Maintenance is permissible when the person maintaining the action has a ‘legitimate interest’ in the outcome of the suit. Furthermore, ‘support of legal proceedings based upon a bona fide common interest, financial or philosophical must be permitted if the law is not to operate oppressively’.<sup>39</sup> There is no reason after *Fostif* to ‘conflate’ the doctrines of maintenance and champerty with abuse of process. Any finding of abuse must ‘stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought’.<sup>40</sup>

The main prohibition against ‘trafficking’ in litigation, still prohibited, involves the acquisition of a ‘bare’ cause of action for damages which is otherwise incapable of assignment, as for example, an action for personal injury at common law.<sup>41</sup> The key issue is whether the role of the funder is likely to corrupt the court’s processes. The court is able to ‘mould’ a remedy to eliminate most species of potential abuse. The funder is entitled to some control over the proceedings. The

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35 [2005] NSWSC 827.

36 Citing Lord Millett in *Thai Trading Co v Taylor* [1998] QB 781 at 786.

37 *Ibid* (Lord Millett).

38 *Volpes*, above n35 at para 44 (Smart AJ) citing *Fostif*, above n25 at para 91 and following.

39 *Ibid* (Smart AJ) citing *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 and *Fostif*, above n25 at paras 95 and 96.

40 *Ibid* (Smart AJ).

41 *Ibid* (Smart AJ).

potential for abuse simply means that the court must be vigilant; it does not justify an unconditional stay.

The impact of *Fostif* was immediately felt in other Australian jurisdictions. In *Clairs Keeley (a firm) v Treacy*<sup>42</sup> the Western Australia Court of Appeal was pressed to reconsider the stay which had been granted earlier in the proceedings on the basis that they were champertous. In its earlier emanations, the Court had declined to permit a funded plaintiff from continuing its action against a professional adviser for alleged negligence.<sup>43</sup> Subsequently, it concluded that the protections now required by the court had removed the dangers to the funded parties which had previously existed.<sup>44</sup> This was largely because the parties who had entered into the funding agreement were fully apprised of all aspects of the arrangement by subsequent communications on counsel's advice from the firm of solicitors which represented them. Thus, the danger of any overreaching by the funder as against the individual litigants was removed.

In *Domson Pty Ltd v Zhu*<sup>45</sup> White J was asked to consider for the first time whether it made any difference, after *Fostif*, if, rather than the defendant to the action, it was the litigant who had entered the agreement with the funder who complained of its champertous nature.

After protracted litigation, the individual funded plaintiff had been ultimately successful in the High Court,<sup>46</sup> but then wished to resile from any obligation to pay the funder under the agreement! It was said that too much 'control' had passed to the funder so that the agreement was proscribed within the *Fostif* guidelines. White J gave the argument short shrift, noting that 'no public policy was infringed' and that 'it sits ill in the mouth of [the plaintiff] to submit that the agreement could give rise to an abuse of process' since 'the funding arrangement ... assisted [the plaintiff] in ultimately establishing a meritorious claim.'<sup>47</sup>

## 5. *A Recent South African Decision*

It is interesting and informative to note recent overseas developments. In particular, in *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd*<sup>48</sup> the Supreme Court of Appeal of South Africa examined in detail the legality of litigation-lending under South African law. In brief, an agricultural co-operative had received an amount from a third party with a view to prosecuting an action against the well-known accountants in return for receiving 50 per cent of the 'gross proceeds of a successful claim or settlement of the claim'.<sup>49</sup> The agreement recorded that the sale was occurring because the co-operative was 'not able to

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42 [2005] WASCA 86 (Steytler P, Roberts-Smith & McLure JJA).

43 *Clairs Keeley*, above n32.

44 *Clairs Keeley*, above n42.

45 [2005] NSWSC 1070 (hereafter *Domson*).

46 See *Zhu v The Treasurer of the State of New South Wales* (2004) 218 CLR 530.

47 *Domson*, above n45 at para 78.

48 [2004] (6) SA 66.

49 *Id* at 69 (Southwood AJA).

finance the litigation against Price Waterhouse Coopers and regarded the sale as an alternative method of financing the action.<sup>50</sup> The earlier course of South African authority was firmly against the validity, or enforcement, of such an agreement.<sup>51</sup> The Court did allow one exception however. 'If anyone, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void'. The court concluded that the old regime which prohibited such an arrangement (a *quota de litis* under Roman-Dutch law) was no longer effective to impugn a funding agreement in a modern context.

## **6. *The View of the Law Council of Australia***

The Law Council of Australia has supported the availability of litigation funding with appropriate safeguards.<sup>52</sup> In particular, the Council has noted that funding should be encouraged on the basis that it improves access to justice. Furthermore, the 'price' of funding should be left to the market, so long as it is transparent; however, a problem at present is that the relevant market of fund providers is not very deep. The Council argued that if the area is to be regulated, that regulation should not 'seek to define or limit the courts' discretion to consider factors relevant to whether an agreement constitutes an abuse of process'.

As a matter of mechanics and procedure, the Council has supported a proposal that a copy of the funding agreement be filed with the originating process. This is with respect a most sensible suggestion, since much of the earlier litigation has turned on 'collateral disputes' in which the defendant has sought to gain access to an agreement in order to then support an argument of abuse of process. In addition, the Council supported a proposal that there would need to be a direct retainer between the solicitor and the client in the funded action. Once again, this is a sensible suggestion and should go far to removing the sting of any complaint that the action is solely in the hands of the funder. As well, it would strengthen the approach which may be perceived in Justice Ipp's approach, discussed above, that the matter may be best controlled by using the court's own broad, inherent powers over the conduct of its officers. Finally, the Council supported a proposal that uniform practice directions be promulgated to deal with funding issues.

On the broader front, the Council has recommended three things. First, that the rules in relation to champerty and maintenance be made uniform across the Commonwealth by the removal of any civil prohibition on them. In some states, legislation still prohibits such agreements. Secondly, that the States seek to improve their own schemes to provide access to justice in situations not covered by funders. The final recommendation was that the Attorneys-General consider making litigation insurance more generally available to provide an alternative to litigation funding.

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50 Id at 70 (Southwood AJA).

51 See, for example, *Green v De Villiers, Dr Leyd's, NO and the Rand Exploring Syndicate* [1895] 2 OR 289 at 293–294 and the other decisions cited by Southwood AJA, above n48 at 74–75.

52 'Submission on Litigation Funding', above n3.

## 7. *Conclusion*

Does it matter if a funder receives some payment for the risk inherent in the litigation, if the alternative is that an injured plaintiff might not be able to commence action at all? One commentator has inveighed against the ‘frankly entrepreneurial industry of litigation funding’; ‘[n]o-one who has advised or appeared on either side of these models of modern litigation could be unaware of the fertile soil they present for conflicts of the most venal kind’.<sup>53</sup> But that may simply provide all the more reason to articulate carefully the professional constraints to which Justice Ipp has already alluded in *Narui*,<sup>54</sup> difficult though that task may be. It is, with respect, unsurprising that Justice Ipp expressed the views which he did, given his long-standing interest in professional control and conduct.<sup>55</sup>

The decision of the High Court this year will be a most important one for the profession and for litigants generally. If funding is generally prohibited, on the basis of champerty or some other ground, then a large number of claimants will not have their day in court. On the other hand, if funding is overly encouraged, then no doubt, the government may well be quick to intervene legislatively to prevent the profession once again from profiting too much from another’s claim. The Law Council’s measured recommendations should provide some balance against an overly-zealous response from government.

Furthermore, as a matter of basic principle, once it is perceived that the party who is being sued can have no legitimate basis for complaint in relation to the funding which permits the suit to be brought, the question resolves itself simply into asking whether ‘the deal is too sweet’ for the funder from the individual litigants point of view. This is not a question, issues of general unconscionability aside, in which the courts have traditionally interfered. If the parties are at arm’s length, or otherwise properly advised as to their respective positions so that the litigant’s consent is fully informed, why should that be any concern whatever for the court?

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53 Bret Walker in his address ‘Lawyers and Money’, presented at the St James Ethics Centre 2005 Lawyers’ Lecture, 18 Oct 2005: <[http://www.ethics.org.au/things\\_to\\_read/articles\\_to\\_read/law\\_and\\_justice/article\\_0465.shtml](http://www.ethics.org.au/things_to_read/articles_to_read/law_and_justice/article_0465.shtml)>.

54 Above n34.

55 David Ipp, ‘Lawyer’s Duties to the Court’ (1998) 114 *LQR* 63.