IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2012
[2013] NZSC 89

BETWEEN	GODFREY WATERHOUSE AND ROBERT JOHN WATERHOUSE Appellants
AND	CONTRACTORS BONDING LIMITED Respondent

Hearing:	19 March 2013
Court:	Elias CJ, McGrath, William Young, Chambers* and Glazebrook JJ
Counsel:	S J Mills QC and S A Grant for Appellants R E Harrison QC and J E Riddle for Respondent
Judgment:	20 September 2013

JUDGMENT OF THE COURT

A The appeal is allowed in part and the orders set out at [78] and [79] are made in substitution for the orders made by the Court of Appeal.

B As each party has had a measure of success, there is no costs award.

REASONS

(Given by Glazebrook J)

* Chambers J died before this judgment was delivered. The remaining Judges have decided under s 30(1) of the Supreme Court Act 2003 to continue the proceeding to judgment.

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Introduction

[1] Messrs Godfrey and Robert Waterhouse have brought proceedings against Contractors Bonding Ltd in relation to a failed insurance business in Georgia, the

United States of America.[1] The Waterhouses allege negligence, deceit and breach of fiduciary duty. The litigation is to be funded by a third party litigation funder.

[2] The issue in this appeal is whether the Waterhouses should be ordered to disclose the litigation funding agreement to Contractors Bonding and, if so, on what terms.[2] Before discussing our approach to that issue, we summarise the judgments of the Courts below.

The High Court judgment

[3] When Contractors Bonding was informed by the Waterhouses of the existence of the litigation funding, it applied for a stay of the proceeding either permanently or until:

(a) the litigation funding agreement was disclosed. This was to include disclosure of the identity of the litigation funder and the nature of all relationships which may subsist as between the litigation funder and the solicitors and counsel acting for the Waterhouses;

(b) the Waterhouses applied for and obtained leave to prosecute the proceeding; and

(c) all conditions of any leave were complied with, including the lodging of adequate security for Contractors Bonding's costs.

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1 The full details of the claim are set out in the judgments of the Courts below: *Waterhouse v Contractors Bonding Ltd* HC Auckland CIV-2010-404-3074, 13 December 2010 at [2]–[10] [*Waterhouse* (HC)]; and *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399, [2012] 3 NZLR 826 at [3]–[7] [*Waterhouse* (CA)]. We note that the High Court entered summary judgment against Mr Robert Waterhouse with regard to the claims on 3 August 2012. Summary judgment was also sought but not entered against Mr Godfrey Waterhouse: *Waterhouse v Contractors Bonding Ltd* [2012] NZHC 566 at [133]. Mr Robert Waterhouse filed a notice of appeal against the High Court's 3 August 2012 decision in the Court of Appeal. Contractors Bonding applied for an order striking out Mr Robert Waterhouse's appeal. The Court of Appeal refused Contractors Bonding's application to strike out Mr Robert Waterhouse's notice of appeal on 14 May 2013: *Waterhouse v Contractors Bonding Ltd* [2013] NZCA 151 at [40]. Contractors Bonding also applied for leave to appeal against the decision refusing summary judgment against Mr Godfrey Waterhouse, leave being required because the proceeding is on the commercial list and is therefore subject to s 24G of the Judicature Act 1908. Winkelmann J granted leave on 26 July 2013, and gave reasons for that decision on 19 August 2013: *Waterhouse v Contractors Bonding Ltd* [2013] NZHC 2100 at [5] and [28].

2 *Waterhouse v Contractors Bonding Ltd* [2012] NZSC 98.

[4] The stay was sought on the grounds that the Waterhouses had not sought and obtained leave to bring proceedings funded by a litigation funder; that the stay was necessary to prevent or control an abuse of the Court's processes as well as to protect Contractors Bonding's financial position as a litigant facing a substantial damages claim; that the Waterhouses were impecunious; and that Mr Robert Waterhouse was resident in the United States of America.

[5] In the High Court, Allan J decided to follow the implied direction of the Court of Appeal in *Saunders v Houghton*.[3] He ordered the Waterhouses to produce the litigation funding agreement to the Court for inspection, so that the Court would be able to ensure that the funder was not legally able to usurp control over the proceeding.[4] The proceedings were stayed pending production of that agreement.[5]

[6] After inspecting the agreement, Allan J issued a minute saying that there was nothing in the agreement warranting its disclosure to Contractors Bonding or to its counsel.[6] In particular, he was satisfied that the agreement did not confer on the litigation funder an unacceptable level of control over the conduct of the proceeding.

The Court of Appeal judgment

[7] The Court of Appeal saw the two issues in the case as being whether the courts should exercise any form of oversight over proceedings between individual litigants where a litigation funder is involved, and if so, the nature and extent of that oversight.[7]

[8] The Court held that both the trial court and the non-funded party should be given formal notice that a litigation funder is involved when a proceeding is

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3 *Waterhouse* (HC), above n 1, at [36], citing *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [79].

4 At [44] and [59].

5 At [59].

6 Issued on 16 February 2011.

7 *Waterhouse* (CA), above n 1, at [17]–[18]. The Court said that, when it referred to a litigation funder, it meant a third party in the business of funding civil litigation. Litigation funder did not, for example, include litigation funding by an associated body, by a relative, through legal aid or by an insurance company through subrogation: at [17]. The Court noted that the situation relating to litigation funding in the context of a representative action had been dealt with in *Saunders v Houghton*: at [1], citing *Saunders*, above n 3.

commenced.[8] The following details of the funding arrangements should then be disclosed to the non-funded party:[9]

(a) the identity and location of the 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.

The Court said that these details were relevant to determining whether the agreement raised any issues that could lead to an abuse of process.[10]

[9] In addition, the Court directed that a redacted copy of the agreement be provided to Contractors Bonding within 10 working days.[11] The Court considered that input from Contractors Bonding would be necessary to assist the High Court's assessment of the funding arrangements.[12]

[10] The Court accepted, however, that 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.[13] It considered that any issues concerning the breach of a confidentiality clause in the agreement could "be managed" but did not elaborate on how this might be done.[14]

[11] The Court rejected the suggestion made by Contractors Bonding that any litigation funding agreement should be submitted to the trial court for approval at the time the litigation is commenced. Once the key features of the litigation funding

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8 At [67].
9 At [67].
10 At [68].
11 At [77].
12 At [77].
13 At [68].
14 At [70].

agreement were disclosed, the matter could be left to the defendant to raise any concerns in a particular case.[15]

[12] The Court of Appeal also rejected the suggestion of Contractors Bonding[16] that 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 disbursements in favour of the defendant and any order for security for costs made against it (or the plaintiff). The Court commented that the ability to seek security for costs and the ability to award costs against a non-party was relevant to that suggestion.[17]

[13] The Court set a timetable for applications to the High Court by the Waterhouses in relation to privilege issues and for any applications by Contractors Bonding in relation to the agreement.[18] The proceeding was stayed pending disclosure of the redacted version of the agreement or further order of the High Court.[19]

Parties' submissions

The Waterhouses' submissions

[14] Mr Mills QC, for the Waterhouses, submits that the torts of maintenance and champerty should be abolished. In his submission, in cases not involving representative actions, litigation funding arrangements should only concern the courts if they are an abuse of process.[20] He submits further that the High Court Rules that prohibit abuse of process should be interpreted consistently with the tort that they were designed to embody.

[15] Mr Mills submits that there must be some indication of an abuse of process, which is independent of the mere existence of a litigation funding agreement, before

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15 At [76].
16 Set out at [63(f)] of the Court's decision.
17 At [74].
18 At [77] and [78].
19 At [79].
20 Relying on the approach of the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, [2006] 229 CLR 386.

any application for a stay can be made. Even where arguable abuse of process manifests itself, Mr Mills submits that disclosure of the litigation funding arrangement (including the identity of the funder) should be limited in the first instance to the court only.

[16] As to the specific matters that the Court of Appeal ordered be disclosed,[21] Mr Mills submits that no such disclosure is warranted. In particular, Mr Mills submits that the funder's financial position is irrelevant. Any failure to pay costs by an unsuccessful funded plaintiff can be dealt with by means of an order for third party costs. Mr Mills submits that the terms on which a litigation funder might withdraw funding constitute commercially sensitive information and disclosure would have the potential to provide a tactical advantage to the other party.

[17] Mr Mills submits that the case by case development of a judge-made regime to supervise litigation funding arrangements, which he posits would result from the Court of Appeal's approach, will spawn satellite litigation. He stresses the importance of access to justice for plaintiffs bringing legitimate claims.

[18] Mr Mills does not, however, challenge the decision in *Saunders*,[22] arguing that representative actions come into a different category because of High Court Rule 4.24(b), which he submits invites and expects the Court to have some early engagement with and management of a representative action. He points out that a comparable rule does not apply to individual claims.

Contractors Bonding's submissions

[19] Mr Harrison QC, for Contractors Bonding, submits that it is not necessary for a defendant to demonstrate that it is the victim of tortious conduct before the courts can exercise supervisory control over litigation funding arrangements. Nor is the abuse of process ground for a stay limited to the narrowly confined tort of abuse of process. He argues that the existence and terms of a litigation funding arrangement should be disclosed to the opposing party (invariably a defendant) when the

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21 As set out above at [8].

22 *Saunders*, above n 3.

proceedings are instituted. On application by the defendant, the role (and duty) of the courts is to scrutinise the agreement.

[20] Mr Harrison submits that there are at least four aspects of a litigation funding arrangement that may raise abuse of process or public policy concerns:

(a) the level of control over the litigation, including the terms on which claims may be settled, held by the funder;

(b) the litigation funder's percentage share of the proceeds of the litigation;[23]

(c) whether the litigation funding extends to indemnifying the funded litigant against an adverse costs award;[24] and

(d) the contractual basis on which the litigation funder may withdraw funding part way through the litigation. The submission is that the defendant should not be left "high and dry" to face a plaintiff who is insolvent and unfunded if litigation funding is terminated.

[21] Mr Harrison accepts that the courts' scrutiny of these and other relevant factors will not necessarily mean that objections to the particular litigation funding agreement on public policy grounds will succeed. The countervailing interest in access to justice for the funded litigant may prevail but he submits that the balancing exercise between these competing considerations and interests should be addressed by the Court when put in issue by the unfunded party.

[22] Mr Harrison submits that these considerations cannot be adequately dealt with if the court does not hear from the defendant. Thus disclosure to the court only will never suffice. Mr Harrison meets the concerns about satellite litigation by submitting that, once the ground rules are progressively established (assuming the

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[23] Relying on *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381 at [85].

[24] Mr Harrison submits in this regard that the dissenting judgment of Heydon J in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, [2009] 239 CLR 75 is to be preferred. See our summary of Heydon J's judgment below at [51].

area remains unregulated by procedural rules), disputes over the content of litigation funding arrangements are likely to become a rarity.

Issues arising from the submissions

[23] The following issues arise from the submissions:

(a) Should the torts of maintenance and champerty be abolished?

(b) Should the courts exercise a general supervisory role over litigation funding arrangements?

(c) Is the ability for the courts to intervene confined to cases where conduct amounting to the tort of abuse of process manifests itself?

(d) Are there other matters that can give rise to an abuse of process in litigation funding cases?

(e) In what circumstances should disclosure of litigation funding arrangements be made?

(f) Should there be limits on disclosure?

[24] We stress that we are dealing in this appeal with the situation of third party funders who, as in this case, have no prior interest in the proceedings and whose remuneration is tied to the success of the proceeding and/or who have the ability to exercise some form of control over the conduct of the proceeding. We are not addressing the position of relatives or associated bodies who might fund litigation. Nor are we addressing conditional fee arrangements by solicitors[25] or the position of those who fund litigation for no more than a commercial rate of return on the money

[25] See s 334 of the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008, rr 9.8–9.10. For further discussion on conditional fee agreements, see *Kain v Wynn Williams* [2012] NZCA 563, [2013] 1 NZLR 498; leave to appeal to this Court declined [2013] NZSC 26. We leave open issues relating to conditional fee agreements involving non-lawyers as these have not been argued before us.

lent, either because it is their business to do so or through altruistic motives. Finally, the appeal does not concern litigation funded by insurance.

Should the torts of maintenance and champerty be abolished?

[25] Counsel for the Waterhouses submits that the torts of maintenance and champerty should be abolished. Counsel for Contractors Bonding was inclined to agree that the tort of maintenance may be obsolete but submitted that this was not the case for those arrangements involving champerty.[26] In any event, he submitted that any abolition of the torts should be left to Parliament.

[26] This appeal concerns an application for a stay and the underlying proceeding is not an action in maintenance or champerty.[27] The extent of the torts of maintenance and champerty and what is needed to sustain an action under those torts is not before us and we have in any event no factual foundation on which to base any discussion. We have not even seen copies of the litigation funding agreement in this case. It would therefore be inappropriate for us to make any comments on the torts and, to the extent it is relevant to this judgment, we assume their continued existence.

Should the courts exercise a general supervisory role over litigation funding arrangements?

[27] Mr Harrison's submission is that, on the application of the non-funded party, the role of the courts is to scrutinise the agreement for the factors he identifies[28] and then balance those and any other relevant factors against the countervailing interest in access to justice for the funded party. He argues that it is the role of the courts to exercise supervisory control over litigation funding arrangements.

[28] We do not accept that submission. It is not the role of the courts to act as general regulators of litigation funding arrangements. If that is considered desirable, it is a matter for legislation or regulation. It is certainly not the courts' role to give prior approval to such arrangements, at least in cases not involving a representative

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26 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC Trans 7 at 73.

27 Nor does it concern an application for an injunction on the basis of maintenance and champerty.

28 See factors outlined above at [20].

action. Whether or not the courts have a wider supervisory role in a representative action is not before us and we make no comment on it.[29]

[29] The role of the courts is to adjudicate on any applications brought before them in a proceeding.[30] This leads onto a consideration of the type of applications where the existence and terms of a litigation funding arrangement may have some relevance. The other party may, as happened in this case, apply for a stay of the proceeding on the basis that the funding arrangement is an abuse of process.[31] The existence of a litigation funder may also be relevant in any application for security for costs. Finally, the successful party could apply for third party costs orders against the funder.

Is the ability for the courts to intervene confined to cases where conduct amounting to the tort of abuse of process manifests itself?

[30] We accept the submission of Mr Harrison that the power, under the High Court Rules or the inherent powers of a court, to stay a proceeding for abuse of process is not limited to the narrow tort of abuse of process.[32] In any event, Mr Mills accepts the abuse of process ground would also be available in the circumstances set out by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*:[33]

> … the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The

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29 We are thus not to be taken as commenting on the supervisory role of the courts under High Court Rule 4.24. Nor are we to be taken as commenting on the approach taken in the *Saunders* litigation. A summary of the *Saunders* litigation is provided in *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652 at [3]–[4].

30 There may be exceptional cases where a court has to act on its own motion to prevent an abuse of its processes.

31 The stay may be sought under a court's inherent jurisdiction or powers or under High Court Rule 15.1(3).

32 The bringing of proceedings for an ulterior purpose (such as extortion or oppression) or some collateral advantage for which the legal process is not designed. See discussion on the tort of abuse of process in Stephen Todd "Abuse of Legal Procedure" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers Ltd, Wellington, 2013) ch 18 at [18.4.01].

33 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536, as cited in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [61] per Elias CJ, Gault and Keith JJ and [165] per Tipping J. This passage has also been adopted by the High Court of Australia in *Walton v Gardiner* [1993] HCA 77, (1993) 177 CLR 378 at 393 per Mason CJ, Deane and Dawson JJ.

> circumstances in which abuse of process can arise are very varied; … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[31] In Australia, a majority of the High Court in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* identified the following categories of conduct that would attract the intervention of the court on abuse of process grounds:[34]

(a) proceedings which involve a deception on the court, or those which are fictitious or constitute a mere sham;

(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose; and

(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[32] The majority also said that, although the categories of abuse of process are not closed, this does not mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party.[35] It does, however, extend to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment".[36]

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34 *Jeffery*, above n 24, at [27] per French CJ, Gummow, Hayne and Crennan JJ, citing IH Jacob "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at 43.

35 *Jeffery*, above n 24, at [28].

36 At [28], citing *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27, (2006) 226 CLR 256 at [14] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

Are there other matters that can give rise to an abuse of process in litigation funding cases?

[33] Mr Mills submits that the courts can only intervene in litigation funding cases where an abuse of process on traditional grounds manifests itself. In this regard, he submits that we should follow the decision of the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*.[37] By contrast, Mr Harrison submits that at least four aspects of a litigation funding arrangement may give rise to an abuse of process.

[34] We first set out the approach taken in *Fostif* and the differing approaches in other jurisdictions. We then make some general comments on litigation funding arrangements, after which we discuss the factors Mr Harrison submits may give rise to an abuse of process. Finally we outline what the appropriate approach to litigation funding and abuse of process should be in New Zealand.

The approach in Fostif

[35] *Fostif* considered the effect of the legislation that abolished maintenance and champerty in New South Wales and, in particular, the effect of s 6 of that legislation, which provides that the Act "does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal … ".[38]

[36] The High Court held that litigation funding was not an abuse of process, even if it involved, as it did in that case, the "seeking out of claimants", a degree of control exercised by the funder which rendered the litigants' interests "subservient" to that of the funder, and the fact that the funders bought rights to litigation with a view to profit.[39]

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37 *Fostif*, above n 20.

38 Maintenance, Champerty and Barratry Abolition Act 1993 (NSW) [the NSW Act], s 6. The torts of maintenance and champerty have also been abolished in Victoria (since 1969), South Australia (since 1992) and the Australian Capital Territory (since 2002). All have "saving" provisions like in the NSW Act but these provisions are framed in slightly different ways. See the Wrongs Act 1958 (Vic), s 32; the Criminal Law Consolidation Act 1935 (SA), sch 11, cl 1(3) and cl 3; and the Civil Law (Wrongs) Act 2002 (ACT), s 221.

39 *Fostif*, above n 20, at [87] and [88] per Gummow, Hayne and Crennan JJ. Gleeson CJ wrote a separate judgment, but agreed with Gummow, Hayne and Crennan JJ's reasons concerning the issues of public policy and abuse of process: at [1]. Kirby J also wrote a separate judgment,

[37] There are two points to make about *Fostif*. The first is that the High Court in *Fostif* expressly left open the question as to what the position would be in those jurisdictions where maintenance and champerty remain as torts.[40] In Australia, the torts of maintenance and champerty have not been abolished in Queensland, Western Australia and Tasmania.

[38] In those jurisdictions in Australia where the torts have not been abolished, stays have been granted, on the basis of abuse of process arising through public policy concerns underlying maintenance and champerty, to enable the funded party to modify the terms of its funding arrangements to the court's satisfaction. The most significant cases have been in Western Australia, in particular the *Clairs Keeley* litigation,[41] and Queensland.[42]

[39] The second point is that the approach in England and Wales is not the same as in Australia, even though both the crimes and torts of maintenance and champerty have been abolished by the Criminal Law Act 1967 (UK) and there is a saving provision in much the same terms as s 6 of the New South Wales legislation.[43]

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expressly agreeing with the conclusion reached by Gummow, Hayne and Crennan JJ on the abuse of process issue: at [146] and fn 272. Kirby J expressly agreed with [83]–[93] of the plurality judgment. Kirby J stressed the importance of access to justice as a fundamental human right, especially in the context of representative actions: at [145].

40 At [85]. We note that *Fostif* has been referred to in subsequent Queensland and Western Australia decisions, but these decisions have not considered *Fostif* in detail.

41 *Clairs Keeley (a firm) v Treacy* [2003] WASCA 299, (2003) 28 WAR 139 [*Clairs Keeley no 1*]; [2004] WASCA 277, (2004) 29 WAR 479 [*Clairs Keeley no 2*]; and [2005] WASCA 86 [*Clairs Keeley no 3*]. The principles relating to litigation funding were set out in *Clairs Keeley no 1*. The following cases concerned the Court's subsequent consideration of the revised funding arrangements and its ultimate satisfaction that the arrangements were adequate. This litigation pre-dated *Fostif*, however.

42 See, for example, *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 (FCA); and *Elfic Ltd v Macks* [2001] QCA 219, [2003] 2 QR 125. In Canada, where the torts also remain, the most significant decisions in relation to third party litigation funding have come from the Ontario courts, see *Metzler Investment GmbH v Gildan Activewear Inc* (2009) 81 CPC (6th) 384 (ONSC); *Dugal v Manulife Financial Corp* 2011 ONSC 1785, (2011) 105 OR (3d) 364; and *Fehr v Sun Life Assurance Co of Canada* 2012 ONSC 2715, (2012) 10 CCLI (5th) 1296; and Eriks S Knutsen and Janet Walker "Canada" in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, Oregon, 2010) 239 at 249.

43 Criminal Law Act 1967 (UK), s 14. The saving provision in s 14(2) states that the "abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".

[40] The English courts have interpreted the saving provision in the United Kingdom Act as requiring them to scrutinise agreements for maintenance and champerty (in their more modern manifestations) although, it seems, that most of the cases have allowed the funded party to proceed.[44] This has even been the case in what might be called pure third party funding arrangements where the funded party has no pre-existing interest in the litigation (a common example of such funders being professional third party litigation funders).[45]

General comments

[41] Much was made by Mr Mills of the importance of access to justice for plaintiffs who could not otherwise afford to bring a meritorious suit. We agree that access to justice is an important value in our society. However, this justification for litigation funding can be exaggerated. Commercial litigation funders will only fund claims where the projected return is sufficient to offset the costs of litigation and the risks of failure. Litigation funding is thus not a general panacea to offset rising costs of litigation and resulting access to justice concerns.

[42] Further, litigation funding, apart from through insurance, will not be available to defendants. This raises the prospect of a disparity in resources in the litigation and therefore defendants being forced into premature settlements. Litigation is a burden to all parties and this burden is not merely financial. Litigation can be time-consuming and emotionally burdensome. It can even be oppressive. The availability of litigation funding could exacerbate the risk of defendants being faced with unmeritorious claims and forced into unjustifiable settlements.

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44 See, for example, *Giles v Thompson* [1994] 1 AC 142 (HL); *Re Latreefers Inc* [2001] BCC 174 (EWCA); *Factortame*, above n 23; *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (the "Eurasian Dream") (No 2)* [2002] EWHC 2130 (Comm), [2002] 2 Lloyd's Rep 692; *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 (TCC); *In the Matter of the Valetta Trust* [2012] (1) JLR 1; and *Golden Eye International (Ltd) v Telefónica UK Ltd* [2012] EWHC 723 (Ch).

45 See for example, *Valetta Trust*, above n 44, which was a decision of the Royal Court of Jersey applying English law, and which involved a professional third party litigation funder. *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 1 WLR 3055 is also a helpful authority, although the issue in that case was the extent of a professional funders' liability to pay the successful defendant's costs.

[43] In some instances, the existence of a litigation funder might mean that litigation is conducted in a professional manner with more of an eye to the potential risks and benefits of the litigation[46] but that depends on the commercial ability, integrity and motives of the funder, as well as on the motives and integrity of the lawyers involved.[47]

Control of litigation and remuneration

[44] The first two factors identified by Mr Harrison as being relevant to abuse of process are control of the litigation by the litigation funder and the remuneration to be received by that funder.

[45] Control of litigation by a third party has long been a concern of the courts. One of the reasons traditionally given is that such control might tempt the allegedly champertous maintainer, for his or her personal gain, to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.[48]

[46] While such issues could arise, it seems to us that they are no more or less likely to do so than in the case of individual litigants. We agree with the comments in *Fostif* that such concerns can be dealt with through conventional court procedures.[49] We also accept that some measure of control is inevitable to enable a litigation funder to protect its investment. Not to allow sufficient control for this purpose may reduce unmeritorious claims but this would be at the expense of denying access to the courts for many with legitimate claims.[50]

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46 See French J's comments in *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* [2005] FCA 933, (2005) 219 ALR 1.

47 See PA Keane "Access to Justice and Other Shibboleths" (paper presented to the Judicial Conference of Australia Colloquium in Melbourne, 10 October 2009) as an example of concerns that have been raised in relation to litigation funding. Other instructive sources on the challenges arising out of litigation funding include the reports that arose out of the review of civil litigation costs in the United Kingdom (Rupert Jackson *Review of Civil Litigation Costs: Preliminary Report* (vol 1, Ministry of Justice, United Kingdom, 2009) ch 15, and the subsequent Rupert Jackson *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, United Kingdom, 2010) ch 11 [*Jackson Final Report*]), as well as discussions on this topic by the Australian Attorneys-General (Standing Committee of Attorneys-General *Litigation Funding in Australia: Discussion Paper* (2006)).

48 *Factortame*, above n 23, at [36].

49 *Fostif*, above n 20, at [93].

50 See discussion in *Clairs Keeley no 2*, above n 41, at [124].

[47] We discuss below whether control by itself, or in combination with other factors such as remuneration, can ever amount to an abuse of process. We do comment at this stage that any consideration of control should be linked to potential legal control and not potential *de facto* control of the litigation. The use of the *de facto* control test in the *Clairs Keeley* litigation arose largely out of the Supreme Court of Western Australia's concern to protect the position of the plaintiffs in that case and to ensure that they were fully informed of the bargain they had made.[51]

[48] We do not consider that it is the role of the courts to assess the fairness of any bargain between a funder and a plaintiff.[52] The reasoning of the plurality in *Fostif* seems to us to be compelling in that regard.[53] The plurality in *Fostif* said that to ask whether a bargain is fair assumes the existence of an ascertainable objective standard against which fairness is to be measured and a power of the courts to relieve persons of full age and capacity from bargains otherwise untainted by infirmity.[54]

Is it an abuse of process for a litigation funder not to provide an indemnity for costs?

[49] Mr Harrison submits that it would be an abuse of process for a funder not to provide an indemnity for costs to a funded party. In this regard, Mr Harrison urged us to follow the approach of Heydon J in his dissent in *Jeffery*.[55]

[50] In *Jeffery* the High Court, by majority,[56] held that, just as it is not an abuse of process for a non-party, for reward, to contribute to the costs of a party in a proceeding,[57] it is not an abuse of process if a funder does not provide an indemnity for the costs awarded against a funded party. Under the applicable New South Wales

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51 The position may be different in representative actions but we offer no comment on this. We note that the draft Class Actions Bill 2008, cl 9(3)(f) and the draft High Court Amendment (Class Actions) Rules, r 34.23(4)(a) envisage the possibility that the court may review a litigation funding agreement for any oppressive or unjust characteristics. These provisions have not been introduced in Parliament nor have any rules been promulgated.

52 As we have already stated above at [28], we are not dealing with the role of the courts in a representative action.

53 In *Fostif*, above n 20.

54 At [92] per Gummow, Hayne and Crennan JJ.

55 *Jeffery*, above n 24.

56 The majority comprised French CJ, Gummow, Hayne and Crennan JJ, with Heydon J dissenting.

57 At [30].

rules of the court, costs orders could only be made against third parties on the ground of abuse of process.[58]

[51] Heydon J considered it was "manifestly and grossly unfair and unjust" to the defendant to allow a non-party funder to fund a plaintiff's prosecution of proceedings without providing an indemnity for costs awarded against the funded party.[59] Not requiring a funder to provide indemnity would have the perverse effect of allowing funders to fund an impecunious plaintiff in the hope of making a profit, without having to shoulder the costs if the proceeding fails.[60]

[52] We reject Mr Harrison's submission that we should adopt Heydon J's reasoning in *Jeffery*. We do not consider that it is an abuse of process in New Zealand for a funder not to provide an indemnity for costs to the funded party. The third party costs regime in New Zealand is quite different from that in New South Wales. Costs orders can be made against funders, without needing to make out an abuse of process. Funders in New Zealand are thus subject to the discipline of the costs regime without the need to show an abuse of process.

[53] We do not wish to be definitive but there is nothing in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* to suggest that third party costs orders against funders are limited to the funding provided.[61] There is also, as in New South Wales, the ability to apply for security for costs. Any defects in that regime should in our view be addressed in that context and not by stretching the concept of abuse of process.[62]

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58 At [43]. See also at [37], citing the Uniform Civil Procedure Rules 2005 (NSW), r 42.3 (repealed) and s 98(1) of the Civil Procedure Act 2005 (NSW).

59 At [113] per Heydon J.

60 At [113] per Heydon J.

61 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145. This Court recognised *Dymocks* as the leading case on costs against non-parties in *Mana Property Trustee Ltd v James Developments Ltd (No 2)* [2010] NZSC 124, [2011] 2 NZLR 25 at [11]. We also note that the English Court of Appeal held in *Arkin*, above n 45, that a professional funder should be potentially liable for the costs of the opposing party to the extent of the funding provided: at [41]. However, this decision has been subject to much criticism, helpfully discussed in the *Jackson Final Report*, above n 47, at [11.4].

62 See the comment of the majority in *Jeffery*, above n 24, at [38]–[40] per French CJ, Gummow, Hayne and Crennan JJ.

Terms on which funding can be withdrawn

[54] Mr Harrison submits that the terms on which funding can be withdrawn is a relevant factor in deciding if there is an abuse of process. He expressed concern that a defendant could be left "high and dry" to face an impecunious plaintiff.[63]

[55] We do not accept this submission. The possibility that a plaintiff may run out of funds and have to carry on proceedings without representation is one that all defendants face, whether the plaintiff is funded by a third party funder or not.

What is the appropriate position for New Zealand with regard to litigation funding and abuse of process?

[56] We do not consider that it is appropriate in the New Zealand context to accept the *Fostif* position that litigation funding arrangements can only be challenged on traditional abuse of process grounds.

[57] Assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand. The rule had its origins in the torts of maintenance and champerty but now seems to have an independent existence of its own.[64] This leads to the conclusion that, if a funding arrangement amounts to an assignment of a cause of action to a third party funder in circumstances where this is not permissible, then this would be an abuse of process.[65] In assessing whether litigation funding arrangements effectively amount to an assignment, the court should have regard to the funding arrangements as a whole, including the level of control able to be exercised by the funder and the profit share of the funder. The role of the lawyers acting may also be relevant.[66]

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63 See above at [20](d).

64 See discussion in Stephen Todd "Parties" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers Ltd, Wellington, 2013) ch 23 at [23.12]. See also Marcus Smith and Nico Leslie *The Law of Assignment* (2nd ed, Oxford University Press, Oxford 2013) at ch 23, especially [23.54]–[23.56]; and RP Balkin and JLR Davis *Law of Torts* (4th ed, LexisNexis Butterworths, Australia, 2009) at [25.40]–[25.41] and [29.22].

65 The plurality in *Fostif* discussed assignments of causes of action, above n 20, at [73]–[75] as part of their discussion of maintenance and champerty. We note, however, that the litigation funding arrangements in *Fostif* do not appear to have amounted to an assignment of the causes of action in that case.

66 See the issues that arose with the lawyers in the *Clairs Keeley* litigation discussed, for example, in *Clairs Keeley no 1*, above n 41, at [129], [167]–[171] and [181].

[58] We prefer to put the test for abuse of process relating to litigation funding arrangements in the way we have, rather than the way it was put by the House of Lords in *Giles v Thompson*.[67] In *Giles*, Lord Mustill said that the law on maintenance and champerty had not stood still and could be best "kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants".[68] He went on to say that all aspects of the transaction had to be taken into account to answer the single question of whether or not there is "wanton and officious intermeddling with the disputes of others in which the meddler has no interest whatever, and where the assistance he [or she] renders to one or the other party is without justification or excuse".[69]

[59] We agree with the plurality in *Fostif* that the *Giles* formulation of the test based on general public policy concerns is highly uncertain.[70] The plurality in *Fostif* said that any alleged rule of public policy based on the old torts "would readily yield no rule more certain than the patchwork of exceptions" than existed in the law of maintenance and champerty at the beginning of the 20th century.[71] The plurality continued:[72]

> No certain rule would emerge because neither the content nor the basis of the asserted public policy is identified more closely than by the application of condemnatory expressions like "trafficking" or "intermeddling", with or without the addition of epithets like "wanton and officious".

In what circumstances should disclosure of litigation funding arrangements be made?

[60] We have identified three applications where the existence of a litigation funding arrangement may have relevance. These are applications for a stay on abuse of process grounds, applications for security for costs and applications for costs. We discuss each in turn. We then examine whether there should be disclosure of the four

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67 See Lord Mustill's test in *Giles*, above n 44, at 164.

68 At 164.

69 At 164, citing *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 (CA) at 1014 per Fletcher Moulton LJ.

70 *Fostif*, above n 20, at [85]–[86] per Gummow, Hayne and Crennan JJ.

71 At [86].

72 At [86], citing *Giles*, above n 44, at 164.

items identified by the Court of Appeal[73] and finally discuss if and when there should be disclosure of the funding agreement itself.

Applications for a stay on abuse of process grounds

[61] We have held that a funding agreement may be an abuse of process where it effectively amounts to an assignment of a cause of action where such an assignment is not permissible. Whether there has been an assignment is assessed through consideration of the terms of the agreement as a whole, including the level of legal control by the funder and its remuneration. The litigation funding agreement and its terms would clearly have to be before the court to enable it to decide on any such application. The terms of a litigation funding arrangement may also be relevant where an application for a stay on traditional abuse of process grounds is made.

[62] We comment that, if an application for a stay on abuse of process grounds is made but the application fails, then the losing party would normally face an adverse costs order. We also note that we have not heard argument on and therefore do not comment on the situations where assignments of personal causes of action may be permissible in New Zealand. In particular, we are not to be taken as commenting on whether an assignment of the causes of action in this case would be permissible.

Applications for security for costs

[63] In this case, security for costs has been voluntarily provided and Mr Mills' submission is that this can be increased as necessary. If an application for security for costs had been required, whether or not there was litigation funding would have had obvious relevance. It seems strongly arguable, therefore, that the courts would have had the power to order disclosure, at least of the existence of a litigation funder and the relevant terms of the funding agreement.[74] We make no definitive comment on this matter as it was not argued before us.

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[73] See above at [8].

[74] *McGechan on Procedure* takes as its starting point the position that the courts do have jurisdiction to order disclosure: *McGechan on Procedure* (Looseleaf ed, Brookers) at [HRPt 14.09(6)]. In support of this position is *Hamilton v Papakura District Council* (1997) 11 PRNZ 333 (HC) at 338–339; *Arklow Investments Ltd v MacLean* HC Auckland CP 49/97, 19 May 2000 at [18]; and *Chisholm v Auckland City Council* (2000) 14 PRNZ 302 (HC) at [33]. However,

Applications for costs

[64] In New Zealand, costs awards may be made against non-parties. The leading case is the 2004 decision of the Privy Council in *Dymocks*.[75] Under the principles outlined in that case, third party litigation funders would only be liable for a costs order to be made against them if the litigation would not have been undertaken without their involvement,[76] and where they not only fund the proceedings but substantially control or benefit from them.[77] This is because, in such circumstances, the funder is gaining access to justice for its own purposes and is in effect the "real party" to the litigation (even if not the sole party).[78] The terms of a litigation funding arrangement are likely to be relevant to assessing if the *Dymocks* test is met.

[65] Mr Mills accepts that disclosure of funding arrangements would be required if there is failure to pay any costs order by an unsuccessful party. Mr Harrison submits, and we accept, that any such disclosure at a time when there has already been a failure to pay costs is too late. Under the current costs regime, standard costs orders are usually made automatically and any submissions on costs are made at the time of the hearing, rather than separately after the result of the case is known.[79] If the existence of the litigation funder is not known at the time of the hearing, then the non-funded party would not be able to make submissions as to any third party costs orders at the hearing. Further, costs order for interlocutory matters are now usually made as the matter is progressing, rather than at the end of the proceedings.[80]

Jupiter Air Ltd (in liq) v Australian Aviation Underwriting Pool Pty Ltd (2002) 16 PRNZ 702 (HC) at [25] questioned this line of authority. *Jupiter Air* was applied in *Hampton Securities Ltd (in liq) v Accent Management Ltd* HC Auckland CIV-2005-404-3127, 28 March 2007 at [23]; and *Pickard v Ambrose* HC Wellington CIV-2003-091-143, 13 August 2009 at [14]. In *New Zealand Vee Eight Entrants Group Association Ltd v Petch* [2012] NZHC 2350, the High Court acknowledged *Jupiter Air* but held that it did have jurisdiction to order disclosure: at [38] and [42].

75 *Dymocks*, above n 61.

76 At [20].

77 At [25(3)].

78 At [25(3)]. There are exceptions to this general rule, however. The principles relating to costs against non-parties and the exceptions were summarised by the Court of Appeal in *S H Lock (NZ) Ltd v New Zealand Bloodstock Leasing Ltd* [2011] NZCA 675 at [14]–[16].

79 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [4] (submissions on costs are made at the time of the hearing as required by s 41(1)(c) of the Court of Appeal (Civil) Rules 2005) and [16] (reasons for costs orders are not required where the fundamental principle that costs follow the event applies and a standard costs order is given).

80 High Court Rule 14.8(1) provides that costs on an opposed interlocutory application must, unless there are special reasons to the contrary, be fixed when the application is determined and become payable when they are fixed.

Initial disclosure

[66] Should there be disclosure of the four specific matters ordered by the Court of Appeal at the time a proceeding is commenced?[81]

[67] We consider that the fact that there is a litigation funder and the funder's identity should be disclosed to the other party or parties when the litigation is commenced. As we have indicated, the assistance of a litigation funder is relevant to applications for security for costs and costs. The non-funded party would also have to know of the existence of a litigation funder before it can decide whether to make an application for a stay on abuse of process grounds.

[68] In addition, as a matter of principle, we consider that the courts (and the other party or parties) are entitled to know the identity of the "real parties" to the litigation.[82]

[69] Further, as it would be relevant for applications for security for costs, we consider that whether or not the funder is subject to the jurisdiction of the New Zealand courts is also a matter that should be disclosed.

[70] We do not consider that the financial means of the funder should be disclosed. The legitimate interest of the other party in this issue can be met by way of an application for security for costs. In any event, it is not the function or within the competence of the courts to provide any general regulation of litigation funders, including of their financial standing.[83]

[71] We also accept Mr Mills' submission that there should be no obligation to disclose the terms on which funding can be withdrawn. Such information, like that of a "war chest", could give a tactical advantage to the non-funded party as it could put the non-funded party in a position to precipitate the withdrawal of funding. We

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81 See above at [8].

82 *Dymocks*, above n 61, at [25(3)]. See also our discussion above at [64].

83 See discussion above at [28].

do not consider Mr Harrison's concern about a defendant being left "high and dry"[84] justifies disclosure.

[72] We leave open the possibility that disclosure of the terms of withdrawal may be appropriate if the terms in some way give legal control over the proceedings to the funder (for example, the ability to withdraw funding if the funded party refuses to obey instructions given). We also leave open the question of whether the terms of possible withdrawal may be relevant to an application for security for costs.[85]

When should there be disclosure of litigation funding agreements?

[73] We now move onto whether the litigation funding agreement itself should be disclosed and on what terms. We consider that such arrangements should be disclosed where an application is made to which the terms of the agreement could be relevant. This may include applications for a stay on the basis of abuse of process (albeit limited to the narrow grounds discussed above[86]) and applications for third party costs orders. It may include applications for security for costs. Disclosure should not include privileged matters or those which might give a tactical advantage to the non-funded party.[87]

[74] Mr Mills submits that litigation funding agreements are confidential. It cannot be sensibly argued that all litigation funding agreements as a whole are confidential in all circumstances. We accept that there may be confidential aspects to a funding agreement. However, in this case, we have not seen the terms of the funding agreement, including the alleged confidentiality clause contained within it, and we can sensibly say no more. Any arguments as to confidentiality will have to be put before the High Court.

Should there be limits on disclosure?

[75] We do not accept Mr Mills' submission that disclosure of the funding agreement in the first instance should be to the court only (except insofar as it is a

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84 See above at [20](d).
85 See above at [63].
86 See above at [56]–[57].
87 Subject to our comments at [72] above.

question of privilege, confidentiality or matters arguably raising a tactical advantage). Ours is an adversarial system and we accept Mr Harrison's submission that the non-funded party has the right under the principles of natural justice to provide submissions to the court, which in turn would be assisted by hearing submissions from all parties.[88] We note that most of the cases involving litigation funding agreements in the United Kingdom, Australia and Canada were determined with both the court and the non-funded party having full knowledge of the particular funding agreements at issue in those cases.

Conclusion

[76] We summarise our conclusions as follows:

(a) On the issuing of proceedings that are to be funded by a third party unrelated litigation funder who has no prior interest in the proceedings and whose remuneration is tied to the success of the proceedings and/or who has the ability to exercise some form of control over the conduct of the proceeding,[89] the following details should be disclosed:

(i) the identity and location of any such litigation funder; and

(ii) its amenability to the jurisdiction of the New Zealand courts.

(b) No litigation-sensitive material need be disclosed, including the terms on which funding may be withdrawn.[90] There is no need to disclose details of the financial standing of the litigation funder**.**

(c) Where an application for a stay on abuse of process grounds is made (or any other application where the terms of a funding agreement may be relevant), then the courts may order disclosure of the litigation funding agreement, subject to redactions relating to confidentiality, and litigation sensitive and privileged matters.

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88 See comments in *Fehr*, above n 42, at [104] and [108]–[109].
89 Subject to our comments at [24].
90 Subject to our comments at [72] above.

(d) The existence and terms of a litigation funding agreement may be relevant to an application for security for costs and to an application for costs.

(e) A stay on the grounds of abuse of process should only be granted where there has been a manifestation of an abuse of process on traditional grounds or where the funding arrangement effectively constitutes the assignment of a cause of action to a third party in circumstances where such an assignment is not permissible.[91] In assessing whether there has been an assignment, the court will have regard to the funding arrangements as a whole, including the level of legal control able to be exercised by the funder, the profit share and the role of the lawyers acting.

(f) It is not the role of the courts to act as general regulators of funding arrangements. Nor is it the courts' role to assess the fairness of any bargain between a funder and a plaintiff.[92]

Result

[77] The appeal is allowed in part. The four details about the funding agreement,[93] which the Court of Appeal required to be disclosed, are reduced to the details set out above at [76](a)(i) and (ii). We make the orders set out below in substitution for the orders made by the Court of Appeal.

[78] If the application for a stay on the grounds of abuse of process is not withdrawn by the respondent, a redacted version of the litigation funding agreement must be disclosed to the respondent within 10 working days. The two matters set out above at [76](a)(i) and (ii) must also be disclosed. If the appellants consider this disclosure raises an issue of privilege and/or confidentiality (including relating to litigation sensitive material), they must make an application to the High Court within the 10 day period. The effect of filing such an application will be to stay the requirement to make disclosure, pending further order of the High Court. The proceeding in the High Court remains stayed pending disclosure of the matters set

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91 As noted above at [62], we make no comment on when assignments of personal causes of action may be permissible.

92 As noted above at [28], we do not comment on the role of a court in a representative claim.

93 As set out above at [8].

out at [76](a)(i) and (ii) and of the redacted version of the agreement or further order of that Court.

[79] If the application for abuse of process is withdrawn, then no order for disclosure of the redacted funding agreement is required. The disclosure of the details at [76](a)(i) and (ii) would still be required.

[80] As each party has had a measure of success, there is no costs award.

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