



Supreme Court of New Zealand

20 September 2013

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

**GODFREY WATERHOUSE AND ROBERT JOHN WATERHOUSE v
CONTRACTORS BONDING LIMITED
(SC 66/2012) [2013] NZSC 89**

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Messrs Godfrey and Robert Waterhouse, have brought proceedings in the High Court against Contractors Bonding Ltd, in relation to a failed business in Georgia, United States of America. The Waterhouses allege negligence, deceit and breach of fiduciary duty. Their litigation is to be funded by a litigation funder. Contractors Bonding applied for a stay of proceeding until the litigation funding agreement, as well as information about the funder and its relationship with the Waterhouses, are disclosed. The issue in this appeal is whether the Waterhouses should be ordered to disclose the litigation funding arrangements to Contractors Bonding, and if so, on what terms.

The High Court ordered the Waterhouses to produce the litigation funding agreement to the Court for inspection so that the Court could ensure that the funder was not legally able to take control of the proceedings. The High Court granted a

stay pending disclosure of the agreement. After inspecting the agreement, the High Court concluded that nothing in the agreement warranted its disclosure to Contractors Bonding or its counsel.

The Court of Appeal held that a funded party should give formal notice that a litigation funder is involved to the trial court and to the non-funded party when the proceeding is commenced. It held that the following four details of the funding arrangement should then be disclosed to the non-funded party:

- (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- (d) the terms on which funding can be withdrawn and the consequences of withdrawal.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 of Appeal considered these factors to be relevant in determining whether the funding arrangement raised any issues that could lead to an abuse of process.

The Supreme Court has unanimously held that, where litigation is to be funded by a third party that has no prior interest in the proceedings, the following two details should be disclosed when the proceeding is commenced: the identity and location of any such litigation funder, and its amenability to the jurisdiction of the New Zealand courts. It is not necessary to disclose litigation-sensitive material, such as the terms on which funding may be withdrawn. Nor is it necessary to disclose details about the financial standing of the litigation funder.

The Supreme Court emphasises that it is not the courts' role to act as general regulators of litigation funding arrangements. Nor is it the courts' role to assess the fairness of any bargain between a funder and plaintiff. It is the role of the courts to adjudicate on applications brought before them in a proceeding. The Supreme Court made no comment, however, on whether the courts should take a wider supervisory role in a representative action.

The Supreme Court held that, where an application for a stay on abuse of process grounds is made, the courts may order disclosure of the litigation funding agreement, subject to redactions relating to confidential, litigation-sensitive and privileged matters. The existence and terms of a litigation funding agreement may also be relevant to an application for security for costs and to an application for costs.

A stay on the basis that a litigation funding arrangement amounts to an 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 an impermissible assignment of a cause of action to a third party. In assessing whether there has been an assignment, the courts 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.

The Supreme Court does not comment on the situations where assignments of causes of action are permissible and, in particular, does not comment on whether an assignment of the causes of action in this case would be permissible.

This means that the appeal against the decision of the Court of Appeal was allowed in part.

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