IN THE SUPREME COURT OF NEW ZEALAND SC 66/2012

[2013] NZSC Trans 7

BETWEEN **GODFREY WATERHOUSE**

First Appellant

ROBERT JOHN WATERHOUSE

Second Appellant

AND **CONTRACTORS BONDING LIMITED**

First Respondent

Hearing: 19 March 2013

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: S J Mills QC and S A Grant for the Appellants
R E Harrison QC for the Respondent

CIVIL APPEAL

MR MILLS QC:

At the heart of this appeal, your Honours, is the issue of access to justice by individual plaintiffs who have required litigation funding in order to pursue a meritorious claim. In my submission, that is the central issue that is at the heart of this.

The submission I will be developing is that the effect of the Court of Appeal judgment [*Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399, [2012] 3 NZLR 826] is that although the plaintiffs have been able to obtain initial access to the courts with the

support of this funding, their right to pursue that claim is now conditional and the conditions that have been imposed on them proceeding, because of the litigation funding, have put them on a different footing to any plaintiff who is proceeding without the need for litigation funding, and, in fact, on a different footing to those who get funding from the state through legal aid or through insurance or through a trade association or through family or any of the other exceptions that have been made over the centuries really to the initial concepts of maintenance and champerty.

My submission, the conditions that have been imposed on these plaintiffs by the Court of Appeal threaten the plaintiffs' access to justice because of delays and costs that have already resulted from the interlocutory matters that are in fact bringing us before this Court, that are focused on the issue of litigation funding and, in my submission, the further delays and costs that will inevitably follow from the Court of Appeal judgment if this Court upholds that, and I will develop that point as I go along, but I think it's clear from the Court of Appeal judgment, and I'll take your Honours through this of course, that there are further issues that are immediately both obvious but also foreshadowed really in the Court of Appeal judgment that will be the next round, potentially, of satellite litigation over the litigation funding issue.

ELIAS CJ:
Sounds as if we should not have granted leave, Mr Mills.

MR MILLS QC:
Well, I'm hoping that it will be worthwhile in the end, but of course that's a matter for this Court.

Now, I did just note when I was reading through the many cases that are in the various bundles of authorities that your Honours have got, a comment by Justice Finkelstein in the *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 3)* [2009] FCA 450, (2009) 256 ALR 427 case that I won't be going through in any great detail, but it arose out of the Wembley Stadium issues, and he commented at first instance that the maintenance and champerty challenge was motivated by the "desire to stop the action in its tracks." Now, whether that's the desire or not, that is potentially the effect when litigation funding is there, because on the basis that it's the only way in which the plaintiffs have been able to proceed with

their claim, if that litigation funding is somehow withdrawn or is dissipated by being used up on satellite litigation, then that's the practical effect of it.

In the High Court of Australia in *Campbells Cash and Carry Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386, which I will of course be taking the Court to at some length and in some detail, I just noted, and because I'll take you to the cases in much more detail later I won't take it, take you to this at the moment, but just for reference this is in the appellants' authorities at page 172, page 450 of the judgment in *Fostif*, Justice Kirby, supporting the majority view there, noted that the mere fact that litigation funding – sorry. Supported the majority view that the mere fact that litigation funding is there should no longer be regarded as an abuse of the Court's processes just because there is litigation, made reference to the International Convention on Civil and Political Rights, article 14.1, and regarded it as a matter that needed to be considered in thinking about these issues, that article recognised "the fundamental human right to have equal access to independent courts and tribunals." And of course the New Zealand Bill of Rights Act 1990 affirms New Zealand's commitment to that Convention.

And in my submission, while it's only one of many factors that warrant consideration here, it is my – one of the points I make to the Court that I think the result of what the Court of Appeal has decided here is that the plaintiffs do not have equal access to justice because they are running with conditions that apply only to them because of their commercial litigation funding, and those conditions have real effects.

Now, I will take you at this point to *Fostif*, the first of many dips into it I suspect, and it's in –

ELIAS CJ:

Sorry, can I just ask you, because of course you will develop the difference between maintenance and champerty, champerty being perhaps slightly more objectionable than maintenance, because so many litigants are maintained in litigation one way or another, but suppose a litigation funding agreement meant that the plaintiff had no benefit. There was no possibility of benefit to the plaintiff. Is that something that the Court should be concerned about?

MR MILLS QC:

Well, of course, it's a step along the way to my ultimate argument, so I should say no. The presence of maintenance is not something the Court should be concerned about. But then of course –

CHAMBERS J:

Well, that would be though, Mr Mills, effectively an assignment of the cause of action, wouldn't it?

MR MILLS QC:

Yes, in some cases.

CHAMBERS J:

The facts postulated by the Chief Justice, you would need to suggest that assignments of causes of action should be permissible.

MR MILLS QC:

Well, because the assignment of many causes of action has routinely been permitted. The ones that I'm aware of where the courts continue to say it's inappropriate are the personal claims such as defamation, and one of the cases which I think is in the authorities, and I must admit off-hand I don't recall the name of it, where a disgruntled husband, I think, of a wife who had died as a result of her hospital treatment purchased from the wife or the widow of a man who had died in similar circumstances from hospital treatment, purchased that right of action for a pound and sought to pursue it because he wanted to reinforce this complaint that he had about the way his wife had been treated in hospital, and that was treated as not assignable, despite the general approval of assignments, those causes of action which are assignable. Routinely.

So I think, Chief Justice, the answer I would give to that is that, yes, it is of course correct that the cases have from time to time referred to champerty as a particularly offensive form of maintenance. It is of course implicit and, I think, unavoidable with commercial litigation funding because it is a commercial arrangement, but my submission ultimately will be that certainly the way in which it's been approached in the Court of Appeal, neither maintenance nor maintenance plus champerty ought to be treated as being – litigation funding ought not to be treated as either maintenance

even with champerty clipped onto it. But I accept that on the traditional view of it that maintenance is seen as less troubling than maintenance plus champerty.

Now if I could just take you for the first time to *Fostif*, which is in the appellants' authorities at page 164, at least the passage I want to take you to is at 164, and at paragraph 95 of that judgment which is at page 435 of the actual judgment, and it's the judgment of –

ELIAS CJ:
Sorry, what page?

MR MILLS QC:
It's at page 164 of the authorities themselves and then at 435 of the judgment and at paragraph 95 on page 435. And this, of course, is the judgment of their Honours Justices Gummow, Hayne and Crennan. And the – you'll see that what the Court says there, and I just make this as a preliminary point, they talk first about the difficulties that are thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages but which to defend would take a very long time and very large resources, and of course I pause to make a point which I'm sure your Honours are aware of, that *Fostif* is a group action claim. It's not an individual action, and one of the points I will be making in my submissions is that there's a very real difference between group actions, with which *Saunders v Houghton* [2010] 3 NZLR 331 (CA) and with which *Fostif* was concerned, and what we have here, which is individual litigants, and there are some real issues that arise, in my submission, that warrant very different treatment.

But nonetheless, the Court then goes on to say, "The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be observed principally in actions where a plaintiff represents others," in other words the group actions, "that is a problem to be solved, in the first instance, through the procedures that are employed in that kind of action. It is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against that defendant."

So I make that point simply as part of my initial submission about the fact that equality of access is an issue in this proceeding and in this appeal and that the

conditions that have been imposed by the Court of Appeal mean that even though the plaintiffs have been able to gain access to the Court through litigation funding, their ultimate access to justice is running on the basis of different conditions to those which an unfunded litigation would face or, as I said before, someone on legal aid or someone who's supported by a union fund or any of those things, and those conditions, have very real effects on the way in which this is running.

ELIAS CJ:

You don't have a substantive judgment on the conditions the Court might apply, so you are going to have to develop the reasons why the disclosure has the effect that you are contending for of interfering with the quality of access.

MR MILLS QC:

Yes I am, and I will come back to that in –

ELIAS CJ:

And the question on which leave has been given is a fairly narrow one. The submissions open the thing wide open. But I should signal a degree of discomfort as to whether the Court is being asked to make a sweeping statement about the implications of maintenance and champerty where we don't have a substantive judgment to attach that.

MR MILLS QC:

Well that, again, is a matter that, of course, your Honours will decide after I have finished my submissions and you've heard from my learned friend. As I understand it, the two questions on which leave was given was whether there should be disclosure and if so on what terms. And so ultimately my submission will be: no, there should be no disclosure in the case of individual litigants, and I will be developing the point, which is that the individual litigant claims, the individual plaintiff claims are, are different from the representative group action, group action claims with which *Saunders v Houghton* was concerned. They raise very different issues and the consequences of imposing conditions on the individual plaintiff claims analogous to those which were applied in *Saunders v Houghton* on the group claims are much more significant. And furthermore, do not have the authority, really, which the group actions have from the High Court Rules themselves, rule 4.24 I think it is, which invites the Court, expects the Court on the group action claims to have some

early engagement and some management of the group. There's no comparable provision in relation to individual claims.

And I'm coming back then to this issue, to the conditions which have been imposed which I've been addressing. The sole –

CHAMBERS J:
I am correct though, aren't I, that it was in issue in the Court of Appeal as to whether maintenance and champerty should remain as part of the law in New Zealand? That certainly seems to have been, from the account at page 88 on the case on appeal, paragraphs 20 to 23, 24, issue does seem to have been joined on that.

MR MILLS QC:
Yes it was. Yes it was. Yes.

Coming back then to the reason that the Court of Appeal has given for the different treatment of these appellants, it is that the legal funding agreement is on its face champertous, and your Honours will find that in the case on appeal at page 100 of the, of the case. And at paragraph 62 you'll see the Court of Appeal saying, having, and I'll come back to the paragraph that leads into this, but they've considered initially at paragraph 61 the concerns underlying the group actions that *Saunders v Houghton* dealt with and then are considering whether these apply as well to the individual claim of the Waterhouses. And they say, "none of these factors alter the fact that the arrangement is on its face champertous and so warrants some assessment at least of whether it is in fact wrongful."

So it's the fact that it was on its face champertous that is the justification for then requiring an examination of the litigation funding agreement, in which of course they also held that the defendant should have a role in looking at it and potentially making submissions on it. It's because it's on its face champertous. And the respondents in their written submissions refer to it as a presumption that it's champertous because there is a litigation funding agreement. But ultimately the Court of Appeal then is looking to see whether there's an abuse of process. Just as the High Court of Australia does in *Fostif*. It's the question of, in a case where there is no independent evidence of an abuse of process but the Court's power to intervene and order a stay depends upon there being an abuse of process. It is the presence of the litigation funding agreement and the argument either that it's therefore presumptively

champertous or on its face champertous, that is the avenue through to looking at whether there is an abuse of process in circumstances where, in my submission, there would normally be no basis for looking at an abuse of process at this stage because there's no independent evidence of that. It depends solely upon examining the litigation funding agreement, and the basis for doing that is that it is on its face champertous.

Now, that's of course the point on which the High Court of Australia in *Fostif* reaches a completely different view. And it says that the effect of putting it that way, and again I'll develop this, is to conflate two quite separate concepts: the concept of maintenance and champerty and the concept of abuse. And the correct approach, which is now what the High Court of Australia has referred to twice. It was also in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75, similar point made or same point made, you go to the question of abuse. Is there independent evidence of abuse? The presence of the litigation funding agreement is neither one thing or another in relation to that. You don't go through it on the basis that it's champertous presumptively, therefore we have to look to see whether there might be abuse. You ask yourself the question directly, is there an abuse of process here? And there must be independent evidence of that, quite apart from the existence of a litigation funding agreement.

ELIAS CJ:
But if you had – if the defendant had applied for an injunction on the basis of the tort, would that have been different?

MR MILLS QC:
Well, the – of course the – to a very substantial extent –

ELIAS CJ:
I mean it would have raised the question of whether the tort is still part of the law of New Zealand –

MR MILLS QC:
Yes it would.

ELIAS CJ:

- but I'm just really wondering whether you can evade by saying that the Court has to come to a conclusion if there's an abuse of process, whether you can avoid the grounding of the abuse on the existence in New Zealand law of the tort.

MR MILLS QC:

I agree –

ELIAS CJ:

Because if it's wrongful it must be an abuse.

MR MILLS QC:

I accept that, your Honour, that if it were the case, and if this Court concludes it is still the case, that a litigation funding agreement is champertous, then it is, on its face, unlawful. As I understand the respondent's position, at least in its written submissions, they don't go so far as to say that all litigation fundings are champertous. It's a really – it all depends, and that's why they have to be looked at. So it's not the existence of the litigation funding agreement as such, it's what might be in it in relation to certain aspects which might then be treated as an abuse of process. And the obvious one there which the Court of Appeal notes is the extent of the control that the funder has got over the running of the litigation. It's those things that ultimately determine the question of whether there's an abuse of process, I think, on the respondent's argument, but of course they'll make their own.

CHAMBERS J:

Should a defendant, however, be able to, under the cloak of abuse of process, effectively allege that the tort of champerty has been committed without the litigation funder being before the Court?

MR MILLS QC:

Well I think the answer to that must be no, and of course as your Honour will be aware, it's one of the reasons why the courts in both Australia and, and the United Kingdom have, have said that you can't get a stay because of the presence of a, of a litigation funding agreement, that there's maintenance and champerty. It's an issue that arises ultimately between the parties to the agreement where, on trying to enforce the litigation funding agreement against the funded party, the funded party might suddenly say, "Well wait a minute. This is a champertous agreement. You

can't enforce this." But in terms of the, the defendant here having a stake in that, the answer, I think, is clearly no. They don't. There is no basis on which they could allege a tort of maintenance or champerty on the basis that they simply are the other party to the litigation. And I think the cases are clear on that.

So then just to reiterate this point from the Court of Appeal, which I mentioned before, that –

ELIAS CJ:
I'm sorry, I'm just thinking about that point, which I think is an important one. Would it – I'm not very familiar with this tort, but would it not be possible to bring a claim against one party to the – I'm just wondering why it's said that a claim could not be brought against one party?

MR MILLS QC:
Well because the –

ELIAS CJ:
I mean it may be that it can't. But I'm just questioning the assumption that's been put to you that the litigation funder would have to be before the Court. It may be there is authority to that effect, but do we have a champertous tort in this material that would give some indication of that?

MR MILLS QC:
Well it's possible that my learned junior will find that.

CHAMBERS J:
Well the point is though, it's the litigation funder that's committed the tort, isn't it?

MR MILLS QC:
Yes it is. That's the point I was just going to make.

ELIAS CJ:
Is it?

CHAMBERS J:
If there is a tort. Yes.

ELIAS CJ:

Is – that's the –

MR MILLS QC:

Yes. Yes.

ELIAS CJ:

Well that's the answer to my question.

CHAMBERS J:

It operates in two ways. The defendant could sue and seek an injunction from the litigation funder. Then there's the further point that as between the litigation funder and the person he or she is funding there may be a defence to a claim in contract based on, "I'm entitled to money from you from litigation."

MR MILLS QC:

Yes. And if the defendant were to sue the, the maintainer, they'd have to prove some damage because damage is an essential part of the tort. And so that has led the courts to say that you – it's not a defence, and even if there was a conclusion reached by the court that we have here a funding agreement which is champertous, not just on its face champertous but is champertous, that would still not entitle the defendant to a stay of the proceeding to which the funding is simply collateral. In other words, the merits of the case and the right of the plaintiff to pursue those merits does not get brought to a halt on a whole line of authorities which are in the materials, and I'll take you to some of them, which say it's not a defence and to give a stay in those circumstances would be the equivalent of treating it as a defence. And if it were open to a plaintiff who was funded to do that, then sometimes we have funded defendants, it would have to be equally open to a defendant, and then how would that all work? And so the answer is no, it doesn't lead to a stay and it's, as his Honour Justice Chambers said, it has the consequences that his Honour referred to.

Now, just coming back to that passage in the Court of Appeal that I took your Honours to in paragraph 62, so on the face of it you get to the question of abuse of process because there is a litigation funding agreement that on its face is champertous but not necessarily so, and so we have to look at the funding agreement to see whether there's something in there that might make it an actual

abuse of process. That's the analysis as I understand what the Court of Appeal has done.

ELIAS CJ:

Well what's your definition of "champertous"? Because on one view of the authorities any benefit obtained by the funder makes the agreement champertous except in some recognised categories of case.

MR MILLS QC:

Well my answer to that, I think, is that I'm submitting to the Court that as with those many recognised exceptions which have developed over the centuries and continue to develop, this too, in just the same way as the High Court of Australia in *Fostif* has treated it, that we could either, either in the case of individual litigants it is an exception to the circumstances in which that third party funding could be considered champertous or my preferred or my primary submission is that what the High Court of Australia has done, which is to focus directly on the question of abuse, unencumbered by what Lord Mustill referred to as these ancient doctrines of maintenance and champerty which are now being shoehorned into a very different environment.

CHAMBERS J:

There was a reason though for that approach in *Fostif*, which was that it was an appeal from New South Wales where maintenance and champerty had been abolished by legislation.

MR MILLS QC:

I accept that there is that issue and, again, I'll answer it now but then give you a slightly more extensive comment on it later perhaps, if you don't mind, but the, the, the thing that I think is – well two things about *Fostif*. First of all, on that question of the effect of the abolition act, and as your Honour will be aware there's a parallel in the UK and I think the wording is essentially identical, the High Court of Australia in *Fostif* simply leaves open the question of whether it would have made a difference if it had come from one of the Australian states where it hadn't been abolished by statute, and one can read into that what one can, but I think the more significant point is that when the abolition acts were passed in Australia and in the UK they both contained a provision, and I think it's section 6 of the Act that the High Court of Australia had in front of it in *Fostif*, which preserved the policies that

may have applied under the rubric of maintenance and champerty. And so in my submission, certainly the effect of abolition is not pivotal to the approach the Australian, the High Court of Australia has taken. The policies are preserved in the abolition, so if the Court had felt that the policies that underpinned it still mandated the retention of a similar approach it was certainly open on the abolition act, but instead what they have done is effectively to set aside entirely the policies that underpinned maintenance and champerty and instead said the proper question is, is there an abuse of process? And that must be established independently.

CHAMBERS J:

I, with respect, would question that submission, Mr Mills. I think the commentaries show that the effect of section 6 is somewhat uncertain, but all it affects is the relationship between the maintainer and the maintained. There is no suggestion that as regards litigation between the maintained and the defendant, say, or the other party to the litigation, that there is any continuing effect of the policies behind maintenance and champerty.

MR MILLS QC:

Well, I'm aware that that view has been taken of it in some quarters. I wouldn't have thought, with respect, that it's the, that the language of section 6 says that's the case. I – and I'm not clear how the High Court of Australia was reading it. But certainly the way I've read it, although I'm aware of the point your Honour raises –

ELIAS CJ:

Can you go to the text of the legislative provision?

MR MILLS QC:

Yes. I –

CHAMBERS J:

It's – if you turn to page 163 of the, your case of authorities, the top of page 433, paragraph 86, you get there the majority set out, "Section 6 –

GLAZEBROOK J:

Sorry. Can we just have the page number again?

CHAMBERS J:

I'm sorry. Page 163 of the casebook, top of 433, para 86.

MR MILLS QC:

You will find the actual text at page 159.

CHAMBERS J:

Oh, thank you.

MR MILLS QC:

Paragraph 66 sets out the actual wording of section 6 and then you'll see at 67 the Court's commentary on how they have interpreted that.

CHAMBERS J:

I would've thought on the facts of *Campbells Cash and Carry* that if in that case there was nothing to be investigated so far as abuse of process was concerned, then if that is right there is really nothing left so far as abuse of process is concerned in this area. Because that was a far more extreme example of litigation funding than the one we have in the present case. We had a funder who went around stirring up plaintiffs and proposing the terms on which they would do it and the one-third that they would get and encouraging people to sign up. It was a far more blatant attempt, if you like, of currying or fostering litigation. And yet the majority did not consider that was something that was even worth investigating, effectively, for abuse of process.

MR MILLS QC:

So the point I take it your Honour's putting to me is if that's the case, then if on this argument that I'm putting to the Court that section 6 has preserved the policies, it really hasn't preserved anything?

CHAMBERS J:

Well, it's preserved the policies insofar as there may be a rule of law about contracts being illegal or contrary to public policy, i.e. between the maintained and the maintainer. There might still be an argument that for some public policy reason the maintained should not have to hand over all the money to the maintainer.

MR MILLS QC:

Yes. Yes. Well, I think that the – well my, my response to that, Justice Chambers, is that there are issues with litigation funding that might emerge as part of a, an independent inquiry into abuse. There may be issues about the way in which a case is being conducted which indicate that the processes of the Court are not being used for their proper purposes and so on. It's possible that in the context of that manifestation of an issue of abuse, that the question of the funding arrangements might come into focus as a factor in why that's occurring. And of course with the representative actions, because of the effect of the High Court Rules, that issue does come up just as it does in *Houghton v Saunders* (2009) 19 PRNZ 476 (HC) at an early stage, and I'll develop this point, but it does seem to me that there are, there are typical characteristics of the group actions which quite rightly lead the courts, just as they will if we ever get a class actions regime, into an early inquiry into a range of issues which are I suppose characteristic or systemic about those group actions that are not present with the individual actions. And in that context, even though the presence of litigation funding is not the cause of those characteristics which lead the courts to engage early on and the rules to ask the court to engage early on, they can exacerbate it. So to give a tangible example of that, one of the differences between the kind of litigation we've got here and the group actions, *Houghton v Saunders*, is that because of the numbers of parties to that group action the relationship between lawyer and client can become quite tenuous, and it's one of the issues the courts have expressed concern about.

Now, in that context, the presence of a litigation funder can become relevant. Because as the solicitor – as the lawyer-client relationship weakens, so the presence of the litigation funder and the issue of who's running this case, the accuracy of communications that are going to the various members who are either invited into or given the chance to opt out of the class, the funding issue has a bearing on all of that. So not surprisingly that all gets attention in those group actions.

ELIAS CJ:

But if that's so, that could equally be the case according to the nature of the litigation funding agreement, and is that not a reason to look at – if you say that in the case of the group action the Court is rightly concerned to ensure that proper ethical standards will be maintained and the client remains in control, then what is the objection in the case of an individual in ensuring that the agreement itself doesn't provide that sort of impediment?

MR MILLS QC:

Well, probably three points I'd make to that. Well the first one is one I've already made, which is that unlike the group actions, the representative actions where the High Court Rules specifically invite and expect the Court to involve itself, there is no comparable provision in relation to an individual plaintiff. So it's a much more radical step for, in my submission, for the Courts to engage on the same basis with an individual claimant.

Secondly, the consequences for individual litigants are much more significant because the, the effect really – let me put that differently. Group actions typically have very large total sums of money involved. There is a capacity for them to sustain long and hard litigation with a lot of satellite litigation around the funding agreement or whatever else. In the context of individual litigants, and this is a classic example here, and I will just take the Court to the facts a bit soon because I think it makes this clear, with sums that are typically much smaller, the consequences of a comparable approach threaten, I think, the ability of the smaller litigants to get litigation funding on, available at all or on a basis that is economical for that claim.

And then my third point really is back to this issue about the much more direct connection between client and lawyer with the individual claims than you get typically in the group actions.

ELIAS CJ:

Well again that depends on the terms of the litigation agreement, the litigation funding agreement.

MR MILLS QC:

Well, my –

ELIAS CJ:

Suppose it's an assignment outside the usual exceptions that are recognised.

MR MILLS QC:

Well, lawyers have obligations to their clients which override those sorts of arrangements.

ELIAS CJ:

Well, there's a different client in the case of assignment, effectively.

MR MILLS QC:

Once again, if the lawyer is acting then the lawyer has independent ethical obligations to whoever that client might be. And, I mean, I know that theoretically they apply equally in the group actions, it's just as the courts have recognised the practical consequence of thousands of potential members of a class means that there are real concerns, practical concerns, about the way that that already tenuous relationship is affected by the presence of a funder. In my submission it does not arise in the individual litigant cases.

CHAMBERS J:

I must say I have some difficulty with this bright line you are drawing between so-called individual claims as opposed to so-called general or representative claims because I think, as the Chief Justice's questions have really indicated, there's not necessarily a bright line. Is there any provision in the High Court Rules which permits a different approach to the question of abuse of process in representative claims from that which would be applicable to individual claims?

MR MILLS QC:

Well, the principles of abuse of process would be the same, and of course the content that the courts put into what is abuse of process is a matter for the courts in their inherent jurisdiction. But the – so I come back to this point really that I'm not, I'm not submitting to the Court that individual claims should not be subject to scrutiny for abuse of process. Of course they should be, just as should group actions. My submission is that in the same way that the High Court of Australia has approached it, that it should be looked at independently for evidence of abuse.

CHAMBERS J:

Well if you accept that they can be looked at, to use your terminology, then it is obvious, isn't it, that disclosure must take place?

MR MILLS QC:

Sorry, I spoke too loosely. When I said, "looked at", I didn't mean look at the litigation funding agreement. I mean the conduct of the litigation being looked at to see whether it is evidencing some abuse. At that point it's possible that because of the

way in which this concern about abuse of process is arising that the funding agreement may come into play.

CHAMBERS J:
All right. Well, what is the abuse that we're looking out for?

MR MILLS QC:
Well, I suppose really the same kind of – no different really, would be my submission, to the abuse that might be seen in any individual litigation. The indications that a party is seeking to run out the capacity of the other side to continue. The way in which it's actually being conducted is the normal focus of any issue of abuse of process, and that's what, in my submission, the Courts ought to be looking for here.

ELIAS CJ:
So that would only, though, be abuse in the face of the Court, as it were?

MR MILLS QC:
Effectively, yes. And as I say, my, my –

CHAMBERS J:
Well I come back to my question, and let's assume that's right for a moment and you're using abuse in that term. Why then is there any distinction between the "individual case", to use your words, and the general or the representative case? Why shouldn't it too just be judged by that standard?

MR MILLS QC:
Well first of all, because of the High Court Rules.

CHAMBERS J:
Well that's what I – what – which are the provisions of the High Court Rules that play on this?

MR MILLS QC:
It's 4.24(b) I think is the relevant High Court Rule.

ELIAS CJ:
What does it say? Have you got it for me?

MR MILLS QC:

I'd better not – I'd better make sure – I can tell you effectively what it says.

ELIAS CJ:

No, one'd better, Mr Mills.

MR MILLS QC:

It, it effectively says that there are two ways for representative actions to get underway, but the usual way, which is sub (b), is on application to the Court. And at that point the Court engages in approving the content of the representative group and all those other matters that have arisen in *Houghton* and my very technically literate junior has said, "One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—

> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding."

And it's –

CHAMBERS J:

What was that rule number sorry?

MR MILLS QC:

4.24. And it's usually (b) which is the way these things are done and it was (b) that was used ultimately in *Saunders v Houghton* and the, and the Court then engages right at the outset, and as I said before, because the, of the concerns, and I was going to take your Honours to this more specifically, but again I'll just touch on it now, because of the characteristics that are seen in group actions that are seen in group actions that can cause concerns and they include these issues about large numbers of plaintiffs but with relatively small individual claims, weak connections with solicitor-client relationships, pressure on the defendant because of the very large potential claims that get put together when they're added up and the pressure on the defendant potentially to just settle to get, to get out from under, as it were, that the funding agreement has come into that mix. But of course the High Court rule itself says nothing about funding. It talks about characteristics of the group, but as we've seen in *Saunders v Houghton*, Justice French and also the Court of Appeal there

endorsed looking at the funding issue as part of that mix because of its interrelationship with the characteristics of group actions that have led to that rule.

CHAMBERS J:
So you accept that *Saunders v Houghton* was correctly decided?

MR MILLS QC:
I have absolutely no need to challenge that, is the first point, because I do say that it's different here, and so this is not a case of challenging *Saunders v Houghton* at all. And all I would say about that is that on – I have no issue with it. Ultimately it may end up in this Court but not on this case.

McGRATH J:
Mr Mills, are you coming back to this second point in your answer to the Chief Justice's question, which is really the access to justice issue? Are you coming back to that?

MR MILLS QC:
Yes I am. Yes. And it's –

McGRATH J:
I certainly would want some guidance on where the most full judicial discussions of that issue are, which may be in dissenting judgments.

MR MILLS QC:
Yes, I certainly intend to do that. Certainly in *Fostif*, extensively in *Fostif*. But what indeed – the question of access to justice is, is emerging as the dominant driver, really, in all of the courts that we tend to look at, in relation to litigation funding, and I think it's, it's – no one – I don't think, I don't think my friend's going to dispute that there has been very significant change going on across, really, our common law world in the way in which litigation funding is being viewed. And as I said before, in many respects this is just the latest round of huge change that has occurred, I got back as far as Roman times in my reading of a monograph that I did in preparation for this. You know, maintenance and champerty originally had such an enormously strict approach to everything so that even a witness giving evidence without subpoena was regarded as maintenance. So what we're seeing now with the driver of a recognition that access to justice is in difficulty and that litigation funding is not

only to be tolerated as a way of dealing with that but is to be encouraged, which is, I think, the theme of quite a lot of these cases. There's a sort of common acceptance of that across a wide range of courts at quite high levels in various jurisdictions.

The difference that I discern, at any rate, between where Australia has got to and where the United Kingdom has got to is that Australia has gone further in saying it is no longer to be regarded as maintenance and champerty for there to be litigation funding. The question is directly, is there an abuse of process in this particular case on these particular facts? And that must be evidenced independently of the existence of litigation funding. Now the United Kingdom, on the other hand, despite the fact it too has this similar abolition legislation, is going a long way down that route but in the end is continuing to say, rather like the Court of Appeal here, that we have to examine the funding agreement on an individual basis to see whether there's abuse. And as I've indicated in, I hope if I have time to develop more fully, the principal concern that I'm raising about that is the extent to which that leads to a funded plaintiff having to face hurdles which other unfunded plaintiffs don't have to face and the very real consequences of that which we can see here, three years after these proceedings were issued. And I think it's quite clear that the satellite litigation around the litigation funding issue is not over yet.

ELIAS CJ:
Can I just, because you are moving on, take you back to one thing that you said? You – I asked you about if this was treated as an exception. You've developed a much more ambitious argument but indicated that it could be regarded as an exception. How would you describe the exception if we're not with you on the bigger thing? What –

MR MILLS QC:
I would –

ELIAS CJ:
What exception would apply here?

MR MILLS QC:
I would really develop it by analogy to, I think, one of the cases that's probably quite useful, it's an older case but quite useful analogy in answering that, is the English decision in *Martell v Consett Iron Co Ltd* [1955] Ch 363 (CA), which some of you may

remember, about the fishing association funding Ms Martell over the pollution of the river, and that is – find that for you. I won't do other than note its existence at the moment because I think I can answer your question more directly, Chief Justice, but *Martell* is in volume 2 of our authorities at page 381, and it is a case that gets, has been referred to a lot in the more recent cases as well, so probably worth review. But I will come back to it. But the, that deals with the expansion of the exemptions through the common interest issue. And because some of the exceptions that are referred to in *Martell* have a distinct antique oddity to them. One of them is it's an exception if somebody is being supported because they're poor. So there's –

ELIAS CJ:
Well that's the charitable –

MR MILLS QC:
The charitable one, yes.

ELIAS CJ:
- exception. Because there's nothing charitable about –

MR MILLS QC:
No there isn't.

ELIAS CJ:
- what's being proposed here.

MR MILLS QC:
No, no. I'm simply commenting though that the – these exceptions have developed over time and the, and then we get to the common interest exception that *Martell* is concerned with, and in *Martell* you see the Court there expanding what a common interest is, to accommodate the association giving support. So the exception that I would say here is quite simply that it is an exception to the rule of maintenance and champerty that a commercial litigation funding agreement is in respect of individual claimants. I could stop there.

ELIAS CJ:

Well that takes you into the area that Justice Chambers was exploring about whether there really is any sensible distinction and it really means that there – that the exception swallows the rule.

MR MILLS QC:

Well, with respect, Chief Justice, I don't think it does because I, I do say, as I've said before, that I think that there are, there are real, real differences between the group actions and the individual claims. Now, I accept the point I suppose that was perhaps implicit in what Justice Chambers said about, well what's an individual action versus a group action? And a similar issue faced the Rules Committee on, you know, what's the definition of a class? And I think they said, well, seven members are a class. Yes, there are going to be some, as always in these areas, some difficulties with lines, but the courts have themselves referred to claims as individual claims. That's not a term that I've come up with. So there is a view that –

ELIAS CJ:

But is that in the context of dealing with class actions and the rules about control of class actions rather than in dealing with maintenance or champerty?

MR MILLS QC:

Well, it's – no. It's been in the context of saying, "We're not dealing here with an individual claim. We're dealing with a group claim." And, I mean, similarly in the Court of Appeal here the Court of Appeal did recognise, "We're dealing with an individual claim, not a group claim." It then went on to say, "Nonetheless, the principles laid down in *Houghton v Saunders* are of general application," and so on. So despite the fact that there may be some lines where one might say, "well, which is it?", in general, my submission would be that there is a distinction that can generally be easily drawn between the individual claims and the group claims. The High Court Rules themselves, 4.24 that we were looking at, relates to the representative claims and that issue's had to be drawn there, and there are the differences that I've been endeavouring to describe between the two types of claims which, on the one hand call for a difference because they raise different issues at the outset. I mention relationship, solicitor-client, the fact that they don't create this huge volume of claim, quantum claim which can put undue pressure on a defendant and so on. But on the other side of it, for an individual plaintiff facing the consequences

of the conditions which the Court of Appeal have imposed here, they are – they have consequences for individual plaintiffs which are very severe.

CHAMBERS J:

Well, has any jurisdiction adopted the distinction that you're suggesting to us?

MR MILLS QC:

No it has not, because the – because the High Court of Australia has just gone all the way really and dealt with it as a, as an issue for group claims, and having gone at least as far and, and arguably further than I'm submitting that this Court should do, in effect it's gobbled up the need to deal separately with individual claims. But I'm coming at it from the other end, and in my submission there are sound reasons for drawing distinctions and in the typical manner of the common law, and of course this is a common law tort, in the typical manner of the common law it develops and changes incrementally.

CHAMBERS J:

Yes, but what I'm suggesting to you is, is the distinction sound if no other jurisdiction has seen fit to make it?

MR MILLS QC:

Well, I'm not aware of any of the cases that I've looked what where it's been put as directly as I'm putting it to this Court. And that is because the issue has generally been arising in the context of group claims. Or analogous to that. But here the position is that the Court has individual plaintiffs. And the reason that the Court of Appeal has applied the conditions to it that they have is, as I said before, because of the view that it's on its face maintenance and champerty, and therefore there's the potential for it to be abusive, because it's potential we must look to see whether it is, and my response to that is that in the case of individual litigants, those conditions are not appropriate and have consequences that put funded individual litigants on an unequal footing with any other individual plaintiff who comes before the courts.

CHAMBERS J:

If we are not with you on this division between personal and general, what do we do?

MR MILLS QC:

Well you, I mean there's a range of answers, aren't there? You could uphold the Court of Appeal decision, with consequences that I think are very concerning and I intend to develop those further. You could find some other line to draw and as I said, typical of the common law, common law change moves incrementally and there might be some other line that would meet the issues that I am putting to the Court but which would not be quite the line that I am suggesting. But my principal submission is that the High Court of Australia is correct, but in this case what the High Court of Australia has done, because we're not dealing with a group claim, should be applied simply to individual claims which is the matter before the Court.

GLAZEBROOK J:

Can I just check perhaps to see if I can understand your argument? You say that there is an ability to intervene early in group claims because of the High Court Rules and that actually doesn't have anything really to do with litigation funding as such. It has to do with the characteristics of group claims, which is what the rule is directed at, but that because litigation funding may have some exacerbating effect on the group issues, then you can enquire into it under that, so that's –

MR MILLS QC:

That's exactly my point.

GLAZEBROOK J:

- so that's where the distinction comes. There is no distinction in terms of what is abuse of process with individual and group claims; there is no other distinction other than the – well, arguably there is no other distinction and ability other than the High Court Rules. And then your second argument is that other than under the High Court Rules giving an explicit ability to do that, which it does for group claims but not for individual claims, you take the approach of the High Court of Australia and wait to see if there is evidence of abuse before you can enquire. At that stage it is possible, you might enquire at that stage into the litigation funding agreement if in fact there seems to be some link between what has been happening with the claim and the litigation funding agreement. Is that –

MR MILLS QC:

That is precisely my submission. I wish I could have put it that clearly, but thank you. Yes, that is precisely my submission.

ELIAS CJ:

This area – speaking generally, this area of class actions and how they are maintained, is under consideration for legislative reform, isn't it?

MR MILLS QC:

Mhm.

ELIAS CJ:

And indeed litigation funding has also been the subject of distinct consideration by the Law Commission, not acted on or their recommendation followed by –

MR MILLS QC:

This is the 2001?

ELIAS CJ:

- Parliament, yes. Isn't this an area where some legislative attention is best because, as you say, the reasons you are inviting the Court to move away from the common law is because of policy reasons?

MR MILLS QC:

Well again, a couple of responses to that. First one is the class actions legislation, as, Chief Justice, you will be aware, the Rules Committee advanced that quite some distance and then it disappeared off into the Ministry and, as I understand it, there is a bill but it's well down the priority list, from the enquiries that the Bar Association made of the Attorney relatively recently about that issue.

ELIAS CJ:

But the Rules Committee took that view because of concerns about whether it was beyond its jurisdiction to advance matters in a way that some members of the Committee thought appropriate.

MR MILLS QC:

Yes, well, I think, of course it is – the Rules Committee and the Bill are solely and specifically concerned with class actions.

ELIAS CJ:

Yes, I understand that.

MR MILLS QC:

And I think that it is correct that in the case of class actions that there are good reasons for doing what's now happening although the Rules Committee came up with, because I have seen what the Rules Committee did, a very comprehensive and coherent view about how to manage class actions, as I understand it. Again, I wasn't on the Rules Committee but as I understand it, the reason for legislation was because it was thought that the nature of the change was such that it really needed the imprimatur of the legislature.

ELIAS CJ:

Well, it needed primary legislation.

MR MILLS QC:

Now there is nothing in there that deals with individual claims, it's all class actions, and the consideration of litigation funding, as far as I am aware, was also all in the context of class actions. So –

CHAMBERS J:

Just remind me, does the draft bill say anything about litigation funding?

MR MILLS QC:

You've got the draft bill actually in the authorities, that you have been given. It's in volume 1 of the appellants' authorities at page 1 and I think – I don't think there is anything in the Bill about litigation funding. Oh, litigation funder is defined in the Bill. Yes, so it is. "A person whose business consists wholly or mainly of financing civil proceedings for profit, but does not include", etc.

CHAMBERS J:

Sorry, where are you reading from?

MR MILLS QC:

I'm reading from page 5 of the authorities number.

GLAZEBROOK J:

I wonder if they can search for when it is actually used in the Bill itself.

MR MILLS QC:
I don't think there is any reference –

CHAMBERS J:
It must be used somewhere.

GLAZEBROOK J:
It seems odd if it is defined – we can get the bills up on here and search, can't we? I think we can.

MR MILLS QC:
You would think it would be in there somewhere, given it is defined. I see that it is at page 8 and you will see that it is under 9(3)(f)(iii) so the regulation, so this is making provision for rules.

ELIAS CJ:
The Rules Committee to make rules relating to.

MR MILLS QC:
Yes. Between a class member or class members and a litigation funder. Between the lead plaintiff or lead plaintiffs and litigation funder. So rules in relation to that and then, of course, the Rules Committee did make rules which you have also, I think we have also given you those. The background for that starts at page 14, second consultation paper prepared by the Rules Committee in 2008, and I do note 2008, because waiting for Parliament, and then the Rules Committee after that, to deal with rules in relation to individual litigants, decidedly a long time coming.

ELIAS CJ:
Well, no, the reason it was thought to be, to exceed the powers of the Rules Committee were the compulsory opt in and opt out procedure, that's why it went on for legislation.

MR MILLS QC:
Yes, the rules themselves begin at page 26 and, as you would expect, it is of course all on this issue that, Chief Justice, you just raised about the position of the plaintiff's opt in, opt out and so on.

ELIAS CJ:

Because it took away rights to sue. It takes away rights to sue, people haven't taken steps to opt out, or something to that effect.

MR MILLS QC:

Yes, that is the effect of it.

GLAZEBROOK J:

You've probably authored this.

MR MILLS QC:

No I did not, no.

CHAMBERS J:

There was also, there were also problems with limitation periods.

ELIAS CJ:

Yes.

MR MILLS QC:

Yes I see that, Sir, and there are obviously –

CHAMBERS J:

Which could only be dealt with by legislation.

MR MILLS QC:

Yes, which ultimately, I think, in the end, terminated the *Fostif* because they ultimately didn't comply with one thing they were required to comply with and they couldn't re-issue because they were out of time. I think that ultimately is what happened in that cash and carry case but that's just by the by. So did that respond to what I was asked?

ELIAS CJ:

Yes it does, it provides that context.

GLAZEBROOK J:

I suppose, too, you would say because if you are looking at individual claimants, what you have is somebody who presumably or is assumed to know what they are doing, because we don't have unconscionable, except in the extreme cases, we have freedom of contract effectively so the individual plaintiff is thought to be able to look after themselves particularly with the obligations to the lawyer involved. There is a much more direct relationship as you said. And while there is not a bright line, the rules draw a line.

MR MILLS QC:

They do.

GLAZEBROOK J:

And so that's the sensible line to draw in these circumstances as well, even though there might be difficulties at the margins.

MR MILLS QC:

Yes, and I think that the idea that, or the focus on whether there is an actual abuse of process, may be affected, the Court's concerns about it, the extent of that focus might differ when the Court thinks that are on the margins, on the facts of a particular case.

GLAZEBROOK J:

My issue probably, I mean, I might say that I think the torts are stupid and outdated. So that's my personal view on them.

MR MILLS QC:

Yes.

GLAZEBROOK J:

And I don't think they have any place and I can quite understand why they've been got rid of in other jurisdictions now. The question of whether the Court can get rid of them although it does seem to be able to get rid of other rules like barristers' immunity, etc. that it thinks, and possibly expert witness immunity.

MR MILLS QC:

Well, I was going to refer to barristers' immunity because in fact the significance of that compared to this seems to be much greater. Because there you've got reliance on the current arrangements and this Court concluded quite rightly, that times have changed. There was no adequate justification any more for that immunity rule.

GLAZEBROOK J:

I mean one of the troubles is that this is probably not before us in terms of the leave and there is not –

ELIAS CJ:

Well, that's my –

GLAZEBROOK J:

- and there's not, hasn't been fully teased out in the Courts below. So in some ways I think we are probably going to have to operate on the presumption that something still remains of those torts even if we think that for a later day and in a different case, we might be able to deal with them. Now given that it seems to me that it is relatively difficult to get away from the argument that some element of abuse of process might be at least the champerty aspect of this, aside from – unless you say there is some of exception for commercial litigation funders, but then who are commercial litigation funders? There is no register of them, it's not as if it is a profession where you have to have particular rules of engagement in respect of it and a total control of the litigation handed over, even if there's a split in proceeds, is going to be seen as beyond the pale. You are not going to be able to find that by independent evidence because it might be that the litigation is being conducted in the courts in a perfectly okay manner. It is just that the actual client has no control over it. Now I would say probably, well, the actual client has decided that's the case and in any case it might be better that the litigation funder deals with it, you know, in more sort of, method that says you shouldn't be your own doctor, etc. You mightn't be able to see things as clearly as somebody looking at it in a totally commercial way. But if we do have those torts still here, and that wouldn't come out in a litigation funding, or in an abuse of process enquiry, because it might be that it is actually being conducted much more sensibly than if the litigant him or herself was instructing the lawyer.

MR MILLS QC:

Which, of course, immediately raises the question as to why the courts should be concerned with that which brings us back to, well because we have this presumption because of maintenance and champerty, these same two torts, which I agree with your Honour.

GLAZEBROOK J:

I think what I am really putting to you is if we are not looking at that, if we are not, and I don't we can because, one, leave wasn't granted on it, and, two, it wasn't squarely raised below. If we are not looking at abolishing those, then it's difficult for us, I would have thought, to say, well, we are actually not concerned if that's going on.

MR MILLS QC:

Well, I thought it was frankly squared raised. I wasn't in the Court of Appeal but I thought it was squarely raised and I thought that the, that that was apparent from the judgment itself which perhaps I could just take you to.

GLAZEBROOK J:

Well, possibly not. Possibly the difficulty is that we haven't actually had any, well the leave granted didn't squarely raise that issue even if it was squarely raised in the Court below and the Court below didn't sensibly discuss whether there should be those torts still which is probably slightly understandable given that it was –

MR MILLS QC:

Well, can I just go back over this a little bit, because I hadn't anticipated that there would be this difficulty with it, given that this is not as the respondent had suggested, a challenge to the decision in *Saunders v Houghton*. If you go to the case on appeal at page 87, and paragraph 17 of the judgment in the Court of Appeal.

ELIAS CJ:

Sorry, just tell me again.

MR MILLS QC:

Page 87 of the case on appeal, paragraph 17 of the judgment. You will see there that the Court says, "The first issue arising on the appeal is whether the courts should exercise any form of oversight over proceedings between individual litigants where a litigation funder is involved." So that's exactly the issue, which in my

submission is being raised here. They then, I will come back to this because they then go on to say at some length, why they ultimately think it should be but then I think somewhere else they say the position between the two parties is –

CHAMBERS J:
It is the next page at para 20.

MR MILLS QC:
Yes it is. So then, at the competing contentions, this is paragraph 20. "The difference between the parties' respective positions is quite stark. The appellants' approach is hands on in terms of the extent of the Court's control and oversight of litigation where a third party litigation funder is involved. The respondents advocate a hands off approach unless there is evidence of an actual abuse of process", which is the point that I've been putting to this Court. So then they expand that, so I had thought the issue was clearly before the Court of Appeal, the Court of Appeal came down on one particular side of that and laid down various conditions which are the conditions that I have been saying have caused consequences which I think are of a real concern, with individual litigants and then the leave, as I understood it, was granted on two questions. The first one was whether the Court should require the –

YOUNG J:
Well, for my way of thinking I have to say that if one has to make the decision about champerty and maintenance to decide those questions, then we have to do that.

GLAZEBROOK J:
I mean I suppose the other issue is that if you are not challenging *Saunders v Houghton*, then effectively that did suggest that you could have conditions in respect of the litigation funding to make sure that the interest of the person being funded were looked after. Now you try and say that's only in respect of group plaintiffs.

MR MILLS QC:
I am, Ma'am.

GLAZEBROOK J:
Well I suppose I understand your argument there. It is the argument that I put before.

MR MILLS QC:

Yes. Yes, it is.

GLAZEBROOK J:

It's not necessarily a bright line but it's one that's in the High Court Rules and that's where that ability comes from.

CHAMBERS J:

Well it's –

MR MILLS QC:

Which is why I – sorry.

CHAMBERS J:

It's only obliquely in the High Court Rules though because - this is where I continue to have difficulty with where you draw the line. There is nothing to stop 30 plaintiffs being first to 30th plaintiff and suing X. They could also, if they chose, choose one of them as a representative plaintiff and that one could sue for all of them utilising rule 4.24. But there is no difference in substance between those two. It's just that one is using the advantage of a procedural rule. Now it seems to me you would call the first one a personal claim because they all happen to be plaintiffs, the other one you would call a general or a representative claim. That's a mere procedural distinction. Nothing hangs on that.

MR MILLS QC:

Well I don't think I would take that position, your Honour. I think that the – it is conceivable that in the case management process that the Court itself might say that this needs to be dealt with in – either as a representative claim –

CHAMBERS J:

Why?

MR MILLS QC:

- or a manner analogous. Because depending upon how it's being run it has those characteristics of representative claims which are really, as I –

CHAMBERS J:

So what you're saying is we have a rule of law as to the extent to which one can investigate the funding of litigation depending exclusively on just how many plaintiffs there are? If there are too many, then you fall into one camp. If there aren't many you fall into another camp. What's the logic in that?

MR MILLS QC:

Well, the logic really goes back to the points that I've been making previously, that there are issues about – they really, in part, turn upon the presence of a single, a single firm or single legal advisor with a significant number of plaintiffs being grouped together, which I think is pretty much the characteristic of these representative actions. It's certainly true in *Saunders*, which I guess is the most significant one we've seen so far in New Zealand. And those sorts of concerns, as I've said before, lead to issues where the litigation funding potentially exacerbates those issues, the tenuous and weak connections see potential for greater dominance by the litigation funder if there's a litigation funder there. But – and they're not present in the case of individually represented plaintiffs. Now, I suppose if you've got 30 plaintiffs and a single proceeding, proceedings consolidated or however it gets to that stage, and you've got each of those plaintiffs separately represented, then it's not going to raise some of those concerns that seem to me to be characteristic of these group and class actions because that's not generally the way they're run.

CHAMBERS J:

Well let's suppose the 30 individual plaintiffs are all represented by the same lawyer. You call that, for the purposes of your dividing line, a personal action or a representative action?

MR MILLS QC:

I would call that a personal action.

CHAMBERS J:

But if by chance they elect to utilise rule 4.24, they find themselves in a different regime so far as potential disclosure of funding arrangements and the like is concerned?

MR MILLS QC:

If that happened I think the, the history so far is that, that I'm aware of, is that you would not have individual representation in those group action claims, but if you did then I would say it's then in the discretion of the Judge under rule 4.24 to manage that process in whatever way seems right. There's no template under rule 4.24. There is a power to manage and approve the representative group. And of course as we've seen in, in *Saunders v Houghton*, it's typically throwing up these issues about opt in, opt out, quality of the representation and, when funding is involved, issues relating to the funding. But 4.24, as I understand its operation, is not a template for what must happen in every case but rather a power for the Court to sensibly and efficiently manage that kind of claim.

CHAMBERS J:

Well it would make sense then, wouldn't it, under your postulation for litigation funders to say, "Don't use rule 4.24. Have all the people listed as individual plaintiffs."

MR MILLS QC:

Yes, but of course the – by and large the reason the litigation funding is being sought is because of the fact that – well, very often any rate, it almost typically in the, in the ones that I've seen, the amounts at stake for individual plaintiffs are small. Consumer claims are of course typically in that group. *Fostif* was in that category. So the reason that they come together in the way that they do with individual representation is because it's only economical to bring those cases before the Courts even though they may involve quite significant issues of law and issues of consumer rights and so on. They come that way because they become economical to pursue only because of aggregating them and then having a limited number of counsel or law firms representing them, and typically, as we've seen, single law firm with however many counsel then get engaged to actually argue it. So that's the – that's the way it works.

Can I then come back to some other points I wanted to make? The, the next point that I wanted to make, and it's probably come through pretty clear already, but it is, just to reiterate, that the history of maintenance and champerty is the history of major shifts in what the courts have considered to be unlawful. And your Honours are no doubt aware of the early language talking about this not only being unlawful but maintenance and champerty being an evil. And many of those things castigated as

evils are now regarded as routine and along the way that includes subrogated insurance claims. And I want to come back to that.

Now, the respondent acknowledges in its written submissions that over these areas such as insurer, trade association, family members and assignment, all of which are now common but which were once castigated as unlawful and an evil in the, to the eye of the law, they are now things that no one raises an eyebrow at. Why is that? That is because there have been social and economic policy changes which have driven that, with assignment being one of the very early ones and his Honour Justice Chambers probably knows more about this area than I do, but certainly my reading of the history of this is that, that assignments came early because of economic drivers for that, the desire to create more property that could be dealt with in a, in a growing market economy, so that came early but was once absolutely outside the pale for maintenance and champerty. And so the point that really, that I make about this, and is simply that the –

ELIAS CJ:

But you have – I mean the cases in which assignments – perhaps you need to remind us or remind me of the cases in which assignments are permitted. They're all cases where there is some genuine stake in the litigation by the person who takes over the conduct of it, isn't it? It's because the property has passed to the person to whom the cause of action has been assigned.

MR MILLS QC:

Yes. I accept that, Chief Justice. That is right. But the interest arises only because it's been assigned.

ELIAS CJ:

Yes, I understand.

MR MILLS QC:

So the creditor claims of course are the classic ones here. And so in effect the, the, the reason that it's now accepted is because there's a prior acceptance which is that passing along to somebody who didn't originally have a stake in the litigation and who in many cases might not have pursued it, because a number of these assignment cases involve situations where the original party would not have pursued it but they assign it to somebody else who does, which is why originally it was

condemned as, as maintenance and potentially champertous depending upon the arrangements. So I simply emphasise that, and I see that it is 11.30, but I emphasise that point simply because it underscores the point that the changes under this label of maintenance and champerty have been massive over the centuries, and they have always been driven by changes in economic, social and institutional changes, stronger courts being initially one of the first movements that we saw in maintenance and champerty, and that the driver now of access to justice which is repeatedly being emphasised in the courts in taking either a complete abolition approach such as *Fostif* in the High Court of Australia or something less than that, but nonetheless expansive, is all because the next wave of change is being driven by the recognition that at the – the failure to have access to justice for so many people actually fundamentally threatens the rule of law.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.50 AM

MR MILLS QC:
Now, Chief Justice, before I move on, in response to your question about assignments, I just, I thought I'd give you a couple of cases that might be of interest. The first one – they're both in the authorities. The first one is the decision of Justice Heath in *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) which is in the first bundle of the authorities at page 76, and that's, as some of your Honours may be aware, it's one of these leaky building cases where –

ELIAS CJ:
Was that one that came through on appeal? Was that one of – because one of Justice Heath's decisions came through on appeal.

MR MILLS QC:
I'm not aware that this one did.

ELIAS CJ:
No. Okay.

MR MILLS QC:

I won't spend a lot of time on it but really just to help with an illustration. So here we had leaky building claim –

GLAZEBROOK J:

Sorry, I was typing something and I didn't get the page number. Was there a page number?

MR MILLS QC:

I'm sorry. It's at page 73 of the authorities, which is the first bundle.

GLAZEBROOK J:

Thank you. Sorry. Very sorry.

MR MILLS QC:

And it's, it's in the bundle for various reasons. Because he does talk about policy issues around maintenance and champerty and, and fairly dismissive of the, of the maintenance and champerty principles. But on the assignment issue here we have the Auckland City Council settling with the other plaintiffs and getting an assignment of their causes of action against the defendants. So there's, there's an agreement between the Council and the other leaky building plaintiffs, under which I think the way it worked was the Council would take whatever it could get from the defendants up to the amount at which it had settled, which I think was three million. Beyond that, whatever it recovered it would give to the other plaintiffs. And there was an objection to this on the grounds of it being champertous.

And so that's one where the actual causes of action are assigned. But there are some, and I'll give you an example, where it's the fruits of the judgment that are assigned, and the example I have of that, which is in the (inaudible 11:52:48) two of the authorities –

CHAMBERS J:

Just before you leave that, in that case did the Council have to disclose the terms of its agreement with the –

MR MILLS QC:

Yes.

CHAMBERS J:

- defendants?

MR MILLS QC:

Yes.

CHAMBERS J:

Why did it have to?

MR MILLS QC:

I'll have to have another look at it.

ELIAS CJ:

Well, I may not have – it may have been happy to, I suppose. It may not have been decided.

MR MILLS QC:

It certainly wasn't put in issue. I certainly endorse that.

CHAMBERS J:

It's just that we're concentrating on whether you should have to disclose something.

MR MILLS QC:

Yes, indeed.

CHAMBERS J:

So I'm interested to know – you tell me that the counsel did disclose, and so it might be of interest to find out why it disclosed. It may be, as the Chief Justice said, it just voluntarily did it, but...

MR MILLS QC:

Well certainly as far as I can recall it I do not recall anything in the case which focuses on that issue.

CHAMBERS J:

I'll tell you why it might have had to disclose is presumably it had to plead that it was the assignee and provide the agreement which assigned the rights to it.

MR MILLS QC:

Well, that might be so. It would certainly have to have pleaded that it was the assignee of the rights. And –

CHAMBERS J:

Yes. And that would be a discoverable document, in other words, to find out whether it truly had been assigned.

MR MILLS QC:

Well it might well have been. And it's certainly true, just to sidestep into that briefly, these issues about the litigation funding agreements can certainly come up in the context of a discovery question. That, of course, is then raising issues about privilege. Now that's not the issue before the Court here. But the, certainly the issue in some of the Australian decisions around litigation funding agreements has focused directly on whether they're privileged as containing, as being in effect, containing legal advice and on that basis privileged. And you may have noted that in the Court of Appeal in this case, in *Waterhouse*, that the Court of Appeal has on the list of future things that may arise the question of whether there might be a privilege claim in relation to the funding agreement. But that's not the issue here. But I just do note because it's come up that that can arise.

CHAMBERS J:

All right. Well, don't waste more time on Justice Heath. I just thought you might know the answer. We'll look at that point for ourselves.

MR MILLS QC:

No. I think the, the issue is – there's no, there's no specific discussion about that as far as I recall it, and – but while we're on his judgment, I just do draw your Honours' attention at paragraph 17 in that judgment, which is at page 75 of the authorities, which is where his Honour deals with this wider issue about maintenance and champerty. Discussion begins on page 841 of the judgment under the heading, "Analysis: Maintenance and champerty", but then at the top of page 842 on page 75 of the authorities he says, "Access to justice is one reason for reconsideration of the public policy based rules. I regard the desirability of promoting settlement of litigation as another. If the old rules continue to have any place in modern society, it is to protect the vulnerable from exploitation by those with means to their legitimate

claims." So, as I said, I raise that, Chief Justice, because you asked about assignments. So there's an example of assignment of the cause of action.

The other one I wanted to take your Honours to is *Glegg v Bromley* [1912] 3 KB 474 (CA), which is at page 280, and that's volume 2 of the authorities. It's an old case and again I don't think –

ELIAS CJ:
Is that undue – or unconscionable bargain or something?

MR MILLS QC:
Excuse me?

ELIAS CJ:
No, I'm just vaguely familiar with this case.

MR MILLS QC:
Well, the, the reason I draw your Honours' attention to this is because this too is an assignment case but it's an assignment of the fruits of the judgment, which arguably gets very close to the champerty issues. What we have here, in broad terms, was a husband providing funding to his wife to pursue a claim. I think it was a claim for malicious prosecution, but in any event to pursue a claim. And the arrangement was that the wife would then give to the husband the fruits of the judgment if there were any. The claim was indeed successful and there then turned out to be two claimants, in effect two creditors, against the judgment sum: the husband and someone else. And hence the issue of maintenance and champerty arises. The party, the other party who's saying, "Now I want this," saying, "But the agreement between husband and wife that he will get the fruits of the judgment, that's champertous, and so agreement should be set aside and I should get the money here," and the Court held that it was not maintenance or champerty. All it was was recovering the amount of the loan that enabled the claim. And I think I identified the parts in that where – yes, I think, page 285 of the authorities number, page 484, you'll see discussion of that at that point.

ELIAS CJ:
Sorry, what page?

MR MILLS QC:

285 of the authorities, 484 of the judgment itself. Where the Court says, this is Vaughan Williams LJ, "There are some further matters which I have to consider. First, it is said the consideration assigned", et cetera, et cetera, and then goes on to talk about the fruits of the action and the fact that there was nothing involving maintenance or champerty in the deed of assignment.

McGRATH J:

Sounds like it was a pretty simple form of assignment, wasn't it?

MR MILLS QC:

Well yes. But at one stage undoubtedly would have been regarded as, as champertous that, that this was being done.

Now...

ELIAS CJ:

Well, I'm not sure that it would be.

MR MILLS QC:

I think in the very strict early approach to maintenance and champerty all of these things, they would have been out. But as I said before, I think assignments emerged early, earlier than some of the other exceptions to things that would be said no longer to be within the rule.

What I wanted to do next, unless your Honours have got any further questions around that.

ELIAS CJ:

This was a conveyance to the fee creditors, wasn't it? It was 13 Elizabeth, chapter 5?

MR MILLS QC:

That the issue it was raised under?

ELIAS CJ:

Yes.

MR MILLS QC:

Yes. Unless there are any other issues around that I wanted to just anchor this back briefly into the facts of this case, and as an illustration of the point that I've been making that the consequences of what I've described as the conditional access to justice which results from the Court of Appeal judgment have real consequences, as your Honours are no doubt aware, but let me briefly go over it.

We have here plaintiffs who were unable to proceed with this claim without funding. They finally obtain funding very shortly before the limitation period ran. The claim was issued. Going back to events that I think, initially, 2005 or thereabouts, so in 2010 the claim gets issued and that's followed very soon after that by the application for stay on the grounds that the litigation funding agreement should have been disclosed both to it and the Court and leave sought to bring the proceedings. So that was the original position. Analogous, really, to the representative action position. And that that initial stage should also have included an examination of the merits.

The –

CHAMBERS J:

How, as a matter of interest, did the defendant find out about the litigation funding agreement?

MR MILLS QC:

I'm being told there was a letter before action that deliberately or otherwise referred to litigation funding.

CHAMBERS J:

I see.

MR MILLS QC:

The next step in that, of course, was that his Honour Justice Allan looked at it, declined the orders, but issued a stay pending disclosure to the Court only of the litigation funding agreement. His Honour looked at the litigation funding agreement. There's a minute on the case on appeal dated 16th of February in which he said that he'd looked at the litigation funding agreement and he found nothing in it that warranted disclosure to either the defendant or its counsel. He was satisfied in

particular that it didn't confer an unacceptable level of control. So that was the principal thing that he noted.

CHAMBERS J:
Have you got any problem with Justice Allan's decision?

MR MILLS QC:
It's not the position that I'm putting forward as a principal submission, but I would say that a significant number of the adverse consequences that I have alluded to already and intend to identify a bit more fully that flow from the Court of Appeal judgment flow as a result of the disclosure to the defendant, and I'm not just talking about in this case, the general proposition that whenever a defendant learns there is litigation funding that they are entitled to have the funding agreement disclosed subject to any issues about redactions over which there will inevitably be a scrap, and so my principal submission is the one that I've been putting and which Justice Glazebrook so kindly articulated, but certainly the position that's taken here as an alternative seems to me have much to recommend it.

ELIAS CJ:
Well, you're really saying though that Allan J was wrong.

MR MILLS QC:
Yes I am. Yes.

ELIAS CJ:
And so why do you say it has much to recommend it?

MR MILLS QC:
If this, if this Court were to say that the primary submission I'm putting is not accepted, then I would then say the position taken there is, might be the one that would appeal to the Court, certainly would avoid the – a number of the problems that I'm pointing to with the Court of Appeal judgment.

McGRATH J:
Scrutiny, actual scrutiny by the Court is preferential to release to the other party?

MR MILLS QC:

Yes. And I say that also, quite apart from the fact that it does not then open up this very real spectre of satellite litigation which we've seen here, is that it is for the Court to determine its own processes. And I will develop this more carefully, but of the issues that have been either identified or alluded to, and in some cases it's little more than that, as matters that might be relevant in looking at a litigation funding agreement, the one that is, that is the one that I think if, if I was on the other side of this, the one that comes closest to something I think which could result in abuse of process is the control question. And that is not an issue on which the defendant, I'm not talking specifically about this defendant but defendants generally, it's not a matter on which they can contribute anything to whether or not the level of control is one that should cause concern to the Court. That is, it seems to me, quintessentially an issue of the Court judging its own processes.

ELIAS CJ:

What about natural justice?

MR MILLS QC:

Well, the analogy, and I think it is an analogy, not perfect but worth putting in, is the question of a Judge looking at privileged documents where Courts, of course, if there's an objection to the claimed privilege the Judge will look at the document and make a decision. Now I know immediate response to that may be well of course it has to be done that way because otherwise the privilege, if it's being upheld, would be, would effectively be foreclosed, but of course as I said before, this issue about the litigation funding agreement can come up on a privilege claim because it can come up as a discovery issue, and in that context if the funded party were to claim privilege because it discloses legal advice, then if that was challenged then we'd be in the same position. The Judge would look at the document. And if the Judge concluded that it did indeed include legal advice, the privilege was properly made, that would be the end of the matter.

GLAZEBROOK J:

Can I –

ELIAS CJ:

Yes, it's a legal assessment, however. Whereas what you're talking about here when you're talking about degree of control is a factual assessment on which

perhaps the parties might have some perspective the Court might want to hear. Anyway...

MR MILLS QC:

Well that's certainly what I'm sure you'll hear from my friend. But the – my submission, the issue of the extent to which a funding agreement might give the funder whatever it is that we characterise as control, and there's a whole range of things that might be said to come to that, but it's really the Court deciding whether, having read the document, the Court is concerned that this is not a proper use of its processes because, to take the extreme case, this is really a case run by the litigation funder, for example, because the direct lawyer relationship is not solicitor-client but is solicitor-funder, for example. Those are issues which, in my submission at any rate, are quintessentially issues for the Court alone. I don't, with respect, see a natural justice issue in that.

ELIAS CJ:

Well, just the natural justice point that, you know, the *Jones*, the *Jones v Rhys* thing. The world is full of open and shut cases that weren't.

MR MILLS QC:

Yes. Yes. Well, I can certainly see why the unfunded party wants access, because, as that reference I made to Justice Finkelstein, it's a very good way to stop a substantive claim in its tracks if you can cut off at its root what makes that claim one that can be pursued.

ELIAS CJ:

Oh, that's only though if the result is no funding.

MR MILLS QC:

That's right.

ELIAS CJ:

But that doesn't necessarily go to the disclosure point.

MR MILLS QC:

Well the – I agree that it may not result in no funding ultimately, but satellite litigation, I made this point before, which it does open up and which it's opened up here,

particularly with relatively modest individual claims, can fairly quickly have that effect. And for the future, of course, if it becomes common that litigation funding agreements go through the kind of route that this one is going through, then funders are bound to take regard to that in deciding what level of claim is one that can be commercially funded. And so it's going to push up the size of the claim that can appropriately be funded, and that seems to me to be highly undesirable from an access to justice perspective. And so that's why I say that Justice Allan's approach to this is not my principal position that I'm taking here but it does, first of all, put the judgment in my submission where it belongs on whether there's been an abuse of process and avoids these satellite litigation issues which are I think of real concern. So that's –

GLAZEBROOK J:

Can I just check with you? Do you say the defendant has no interest in whether there's control over the litigation, that the interest and the control over the litigation is a concern that the Court might have for the usually plaintiff being the funded person and nothing to do with the defendant and, if so, why doesn't the defendant have interest in the litigation if in fact the tort of maintenance and maintenance and champerty still exist?

MR MILLS QC:

We'll assume it still exists and in answer to the first point, yes that is what I say, and as to the second point –

GLAZEBROOK J:

So therefore in relation to the first point you say, well the defendant has no interest because it's only to protect the plaintiff, the funded person?

MR MILLS QC:

Yes, I do, and to protect the processes of the Court.

GLAZEBROOK J:

But why are the processes of the Court disturbed in any way by who has control over the litigation, unless that control over the litigation manifests itself in something inappropriate in the Court?

MR MILLS QC:

Well I think that is right, yes, I do come back to this point that we need an actual evidence of abuse which is why, one of the reasons why I don't support even what Justice Allan did, I simply say it's a secondary submission that would be a preferable position.

GLAZEBROOK J:

So the control may, if there is actual evidence of abuse, it may be that the control shows that to be the case –

MR MILLS QC:

Yes.

GLAZEBROOK J:

– because maybe the funder actually has an interest that's not a financial interest in the litigation –

MR MILLS QC:

Possible.

GLAZEBROOK J:

– but some other interests in the litigation such as vindictiveness –

MR MILLS QC:

Yes.

GLAZEBROOK J:

– or a collateral purpose, the classic abuse of process.

MR MILLS QC:

All of those sorts of things are possible. Now following that minute then we have, there was an application by the defendant to strike out the claim or alternatively the summary judgment. That was heard by Justice Potter and judgment delivered in August 2012, that's the next step that happens. And the summary judgment was entered against the second plaintiff but not against the first and there are now appeals against the entry of summary judgment and also an application, as I understand it, for leave to appeal in respect of the strikeout.

Along the way –

McGRATH J:
Is this all related to the contract nature of the claims is it? What should it –

MR MILLS QC:
Yes, well, related to the substantive nature of the claim not the litigation funding issue.

McGRATH J:
The tortious nature of the claim I should have said rather than being a contractual claim.

MR MILLS QC:
I will just make sure I'm not misleading you at all. The summary judgment application related to the substance of the claim itself, nothing to do with the litigation funding issue.

McGRATH J:
Yes.

MR MILLS QC:
And so we've had the merits of it tested really is the point, at least in the normal way, which is why I said at the outset, we're dealing here with a meritorious claim because by the normal measures of whether it is meritorious a strikeout has been refused and summary judgment failed against the first plaintiff.

McGRATH J:
Yes.

MR MILLS QC:
And so then we have, so we've gone through all of that, potentially further appeals, and so in relation to –

ELIAS CJ:
But as you say, it's irrelevant to the case we're considering.

MR MILLS QC:

It's relevant only in the sense that the issue of its merits have been tested at least by the normal standards which I think enable me to properly say that we're dealing here with a meritorious claim which has made very little progress because of the stay that has been in place to the merits of that case coming to trial.

ELIAS CJ:

But surely the merits of a claim are not behind the policy against maintenance and champerty because, as you rightly indicate, they can be summarily dealt with through the Court processes anyway. So in a way, don't we have to assume a meritorious case and –

MR MILLS QC:

Yes.

ELIAS CJ:

– and whether nevertheless there is something abusive in a professional litigation funder, a commercial litigation funder staking the plaintiffs?

MR MILLS QC:

Yes, yes, I agree with that, Chief Justice. The only point I make is, I suppose I should have put it a little differently, is that apart from just reminding you of the history of this, is that demonstrates to the extent that there is any concerns about the presence of the funding driving unmeritorious claims, there are the normal ways of testing that and they're being tested here, because that does sometimes come up, the other funder will drive the claim even though there is no merit –

ELIAS CJ:

I'm not, I should say, concerned about unmeritorious claims. It seems to me that the policy issues though are about removing, I suppose, the discipline of real stake –

MR MILLS QC:

Yes.

ELIAS CJ:

– and a commercial funder with deep pockets may work the margins and be released from the discipline because it may be able to force a settlement or something of that sort, but that's the area of concern it seems to me, behind the policies.

MR MILLS QC:

Yes, well, I think that is right, but I think a number of policy concerns are behind it.

ELIAS CJ:

And also there is the issue of unfairness to the plaintiff who may be in impecunious circumstances, are being –

MR MILLS QC:

Yes.

ELIAS CJ:

– yes.

MR MILLS QC:

Well that's the reality of it, isn't it, in these cases, access to funding means access to justice for these –

ELIAS CJ:

Well, I query whether it's quite as absolute as that because, as I indicated, some sort of discipline has always been expected of plaintiffs who seek vindication through the courts.

MR MILLS QC:

Yes, I was just making a narrower point, or intending to that, for the kinds of people we're talking about here it's only through commercial funding being available to them that they are able to proceed at all, without that they have no means of pursuing the claim, and I mean that's really the access to justice issue that's coming through again and again in the cases that are in the, the more contemporary cases that are in the authorities.

ELIAS CJ:

Well quite a lot of pro bono litigation has been conducted for impecunious plaintiffs.

MR MILLS QC:
Well, I accept that there is that –

ELIAS CJ:
Yes.

MR MILLS QC:
– but it's a hit and miss process.

ELIAS CJ:
Yes, I accept that, and so too may be commercial funding, of course, because of the rule, the ruler that they will apply to claims.

MR MILLS QC:
Yes, look, I'm not for a moment suggesting that litigation funding is a panacea for all of the access to justice issues and the costs of litigation that have arisen, but what I do submit is that it opens up a body of cases and gives them access which they wouldn't otherwise have, but the concern that I'm expressing, and the care that I think needs to be taken in terms of the rules that are put around this, is that, depending upon how the conditions are imposed on access, because of the potential for satellite litigation, which all comes at a cost, they do have the potential to reduce the number of claims that can commercially be funded.

Now, I just observe before leaving that point that in an era where the new High Court case management rules are so firmly now focusing on getting matters to trial efficiently and quickly and with a minimum of satellite issues arising, what's happening here is as a result, and will happen in my submission, is a result of the way the Court of Appeal has approached this is to have the opposite effect, and in my submission underscored by that new and greater emphasis on issues and getting to trial, improving access to justice, that for an individual litigant case there needs to be a strong justification for the conditions that have been placed at least by the Court of Appeal on a funded party and how they then have to proceed and, in my submission, the representative action cases do not provide that justification, and I want to come back to that point now.

Now just to, just on this question of the consequences of the Court of Appeal judgment I want to take you to –

McGRATH J:

Have you finished with the circumstances of those?

MR MILLS QC:

I have, yes.

GLAZEBROOK J:

Are you going to at some stage take us to why the particular disclosure – because I can understand the point about satellite litigation, but if there has already been litigation that says that these things must be disclosed, then it seems difficult to see what satellite litigation arises in other cases, because in fact you just disclose the same things, but what is there about the particular – if you are coming to it later that's absolutely fine.

MR MILLS QC:

No, I'm going to come to it now because I think the best way that I can do that is to take you to the Court of Appeal judgment and show you what I think are the significant uncertainties about that very issue about what has to be disclosed and the invitation to further rounds of argument, which I think are implicit in it.

GLAZEBROOK J:

And you're also going to take us to why the things that have been said to be disclosed would actually be a real difficulty in terms of the litigation or –

MR MILLS QC:

I'm hoping it will come out of this.

GLAZEBROOK J:

All right.

MR MILLS QC:

If it doesn't, please tell me. Now, the judgment of the Court of Appeal –

ELIAS CJ:

Sorry Mr Mills, because we've interrupted you a lot but I'm hoping that you are going to be able to conclude by lunchtime, is that –

MR MILLS QC:

I know, so am I.

ELIAS CJ:

Yes, thank you.

MR MILLS QC:

If I just take you to the judgment, it's at page 82 of the case and the pages I want to take you to, initially page 102.

McGRATH J:

And paragraphs?

MR MILLS QC:

And the paragraph is paragraph – well, let me start with, you will see at page 101 just to put this in context, under that heading, "What is required." So the Court has got to the point about it has to be disclosed, what is required. So it begins at paragraph 63 and you'll see the two options that my learned friend, Dr Harrison, put up to the Court, and then the Court considers those and then over on paragraph 65 you'll see, and it's a relevant point, that the defendant has to take the initiative and then they, at 66, discuss these two options below, however, regardless of which of these options is adopted, we see disclosure of key features as critical and the language is "key features". This is the best means of ensuring that there is in fact no issue that might give rise to an abuse of process, which made me wonder whether my earlier proposition that the Court is going from presumptively maintenance and champerty or on the face maintenance and champerty to whether there is abuse. In fact, I might have put it too strongly because it looks from this as though it would be enough to find something that might give rise to an abuse of process and that would be sufficient to intervene which, in my view, is not supported by the authorities.

Now then, you'll see the things at paragraph 67 that the Court of Appeal considered should be provided.

ELIAS CJ:

There is nothing in there directed at control?

MR MILLS QC:

No, not – and I'll take you to that in a moment in what the Court says. So we've got the four things set out there and the one I particularly draw your attention to is the last of those, sub (d): the terms on which funding can be withdrawn and the consequences of withdrawal. Now, in my submission, that is highly sensitive material in the hands of a contending party and yet that's on the list to be disclosed and there's a tension in this between that statement and the next paragraph because the Court then goes on to say, "We see these factors as relevant to determining whether the agreement raises any issues potentially giving rise to an abuse of process. We accept that disclosure should not generally," and again we've got the broad word, "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'", and then, paragraph 69, "Disclosure should be made as early as possible," et cetera, "to avoid any delays caused by any challenges by the non-funded party," so the anticipation of further interlocutory skirmishes.

Now, I just pause there to say that as a guide to exactly what it is that has to be disclosed, with all respect to the Court of Appeal, this is murky. There is, I think, first of all the fact that, I'm hoping I don't have to push this point too hard for it to be understood but the terms on which funding can be withdrawn and the consequences of withdrawal would be matters that, if known to the opposite party in litigation, would be extremely valuable.

ELIAS CJ:

Well, except that they do qualify that in paragraph 68.

MR MILLS QC:

Well, yes, but my point about that is that in terms of the point Justice Glazebrook made to me about once we've got this decided that the funding agreement has to be provided that it will be all, I don't want to put words in your mouth, your Honour, but all relatively clear cut from thereon, that is not the result of this approach, with respect, and so we've got to reconcile 67(d), in particular, with, as the Chief Justice said, 68, and then we've got down at paragraph 75, you'll see the Court acknowledging this concern about satellite litigation, saying we also share the concerns advanced by Ms Grant as to the practical consequences of the first of Dr Harrison's options, "It does very much raise the spectre of satellite litigation that delays the substantive proceeding. Both *Saunders v Houghton* itself and this case

are illustrations of this possibility. Further, the fact that individual actions raise lesser concerns in terms of the potential for oppression may support a less intrusive option, especially given the importance of access to justice" and –

CHAMBERS J:

What strikes me about the Court of Appeal's list which is perhaps slightly odd is that in those jurisdictions where champerty and maintenance has been abolished, the one remaining concern exemplified by section 6 has been protection of the litigation funded party, vis-à-vis the funder, none of these conditions or points of disclosure here have anything to do with that aspect, they're all about potentially trying to protect or give some comfort to the other party to the litigation.

MR MILLS QC:

That's right, yes, and I think the reason for that is because it's carried across the principles from *Saunders v Houghton* into the individual litigation category and just to underscore that point, Justice Chambers, if you go to paragraph 77 you will see, accepting a submission from Dr Harrison, "that the extent of control by the funder is not the only criterion of potential interest to the court" but the, and then goes on to say further, "we accept the submission he makes that input from the appellant is necessary to enable or assist the Court," but there's no, there's nothing said here about what are the other things beyond control. So we end up, I think, again with great respect to the Court of Appeal, with a guide as to what has to be disclosed which is less than clear and where inevitably there is likely to be a further scrap over that and, on the other hand, a lack of clarity about what it is the Court is looking for when it looks at the litigation funding agreement and it's not just about control. As Justice Chambers said, the list that's there on paragraph 67 is not directed at the things which generally maintenance and champerty historically has been.

And so what it seems to me is that it is, as I said in response to Justice Chambers, very heavily influenced by the approach in *Houghton v Saunders* despite saying that we recognise that lesser concerns arise with individual actions than with group actions and simply a generalised desire to be able to have the litigation funding agreement out on the table in every case where the defendant says it wants it and that, in my submission, is not warranted. It is, it has or will have the consequences that we are seeing here and will have the consequences in the future for other commercially funded claims, which are the opposite of opening up access to justice, and they are built upon, as I said earlier, the proposition that maintenance and

champerty presumptively arises here and because of that on grounds that would not otherwise give a proper basis for an inquiry based on abuse of process is used to get to where the Court of Appeal has got to, and in my submission, that is not the approach that this Court should take. So that's, I think, moved me along a way and, Justice Glazebrook, did that pick up?

Now, just before leaving that, just perhaps to round that off, I do say that when we – if the courts get to the point, as at least a number of senior courts have, that litigation funding is not only to be tolerated but is to be encouraged as a way of achieving greater access to justice, then the conditions that are then put in place for dealing with claims where litigation funding is involved need to be done with great care so that what is not given with the one hand in terms of improving access is in effect taken away or severely restricted on the other by the conditions that are imposed on it.

Now the issue about, which I had next in my notes here, about the difference between individual claims and group claims, I think that's been pretty thoroughly worked through, unless there are some other issues about that? I drew your attention to what the Court of Appeal had said about acknowledging there were differences, and perhaps in fairness to the Court of Appeal and to you I ought to just take you to one other paragraph in there where they, where the Court touches on this issue, and it's paragraph 61 where they specifically refer to the relevance of *Houghton*.

Paragraph 61, you'll see that the issue there is directly addressed. "The concerns underlying the approach in *Saunders v Houghton* are applicable also to cases involving individual litigants. The principles embody views about how litigation should be conducted, not just representative claims. That said, as French J in the next stage of the litigation", et cetera, "stated, a 'commercially funded representative action involving very large numbers of claimants substantially alters the balance between plaintiffs and defendants and is potentially oppressive'. The position is much less acute in a case like the present. Further, courts", et cetera.

ELIAS CJ:

Well, it depends who your target is. Because it – the litigation – the defendant isn't able to access litigation funding.

MR MILLS QC:

Well they, they might be able to.

ELIAS CJ:

In what way?

MR MILLS QC:

Well, I suppose it would normally be in the context where they might have a counterclaim. Yes, you're right. There'd, there'd have to be some funding in there somewhere. Yes. Unless there was some arrangement that was being made to provide assets which a bank wouldn't accept for funding purposes but a commercial litigator –

CHAMBERS J:

Well the problem is different though isn't it?

MR MILLS QC:

It is.

CHAMBERS J:

Because they have their protection in that impecunious defendants are not going to find themselves sued –

MR MILLS QC:

Mmm. Well that's –

CHAMBERS J:

- because they, the plaintiff won't get litigation funding.

MR MILLS QC:

Yes. Well, that of course would be right.

CHAMBERS J:

It will be self-policing.

MR MILLS QC:

Yes. I think of course that is right.

ELIAS CJ:

But it's hardly dressed up as access to justice. It is commercially driven, which is the point that Justice Heydon made. It's not quite the same thing to be striving for a commercially sound response as an access to justice response. Anyway, sorry, that's just bandying these things. I think we understand each other.

MR MILLS QC:

Yes. All right. Let me then move over that issue then. I've covered off all the things, I think, about the differences. Perhaps just to reiterate again, it was pointed up there, I see numerous – in the representative action cases, the points that I noted as I was thinking this through are numerous parties, typically small individual claims, weak monitoring by the group members, burdensome on defendants. Those are the sorts of characteristics that typify the group claims which justify the early involvement of the Court and bringing the litigation funding in as part of that consideration. So I, I say it's pretty obvious, I think, whether or not I've said already, that *Houghton* should be treated as a case solely concerned with representative actions, and while there may be points in there of wider interest to what the Court is dealing with here, the individual litigants issue is a distinct one and needs to be thought about distinctively.

Now, I need to get, before I run out of time, to the High Court of Australia. So if I could come then to, first of all, the judgment of President Mason in the New South Wales Court of Appeal, because that gets a very strong endorsement in the High Court, and, with respect, I think is a very fine judgment, and that is in volume 1 of the authorities at page 228. At least the passage that I want to take you to is at 228.

And you'll see at paragraph 99 of that judgment there's a passage quoted with approval from President McMurdo in *Elfic Ltd v Mack* [2003] 2 Qd R 125 (CA), and I just want to draw your attention to that. "The mere fact that proceedings are financed by third parties with no interest in the outcome other than repayment and profit from the litigation is not itself sufficient to invoke the jurisdiction of the court. Courts should be careful not to use that power to deny access to justice to a party who has sought to fund bona fide proceedings in a way which may be contrary to public policy unless that which has been done amounts to an abuse of the court's own process..." And that really captures, I think, quite nicely the point I would put to you. If you read the *Elfic* case you'll see it's rather more complex on its facts, but that's endorsed very firmly.

ELIAS CJ:

Do we have that? *Elfic*?

MR MILLS QC:

No you don't. No you don't.

CHAMBERS J:

No, we don't. Why it might be interesting is it comes from Queensland, obviously, and that's a state which hasn't by statute abolished champerty and maintenance.

MR MILLS QC:

Yes, now my very potted version of the facts, because I have taken a quick look at *Elfic*, and I acknowledge it's little more than that, is it involved an injunction to restrain a liquidator from implementing a funding agreement. And it's principally, it principally turns on the interpretation of the Corporations Act.

CHAMBERS J:

I see.

MR MILLS QC:

But in the course of that this statement is made which is then picked up and endorsed both in the Court of Appeal, New South Wales Court of Appeal and in the High Court, and I simply draw it to your attention because it puts what I would like to put to the Court as a central element of the argument I am putting.

Then, staying with that, at page 229 you will see paragraph 106. While they, he refers, first of all, to the English decision in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA 92, [1999] All ER 1330 (QB), which you don't have in the bundle because there's more recent ones which make very similar points, including *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2000] EWCA 17, [2001] 2 BCLC 116 (CA), which is in the authorities. "Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."

And then, going on at paragraph 106, "A defendant has no claim in 'justice' to burke", this wonderful Australian language, "to burke otherwise viable proceedings simply

because a plaintiff receives assistance and encouragement from a third party. As indicated, any complaint emanating from the defendant must be based upon abuse of process, not concern based on the claimed inequality of proceedings in which the other party has funding assistance."

And then – I shouldn't have shut my own volume. Then, 231, there's another statement there at paragraph 114 that I just draw your Honours' attention to. I – where the Court says, "I respectfully disagree with the categorical thrust of the last two sentences," which is, "It is not acceptable for the litigation to be pursued in such a way that the interests of the plaintiffs are subservient to those of the funder. That would be an abuse of process." The Court says, "I respectfully disagree with the categorical thrust of the last two sentences, although I observe that this was a decision in a State where the tort has not been abolished," which is the point Justice Chambers raised with me. "In my opinion, a conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents). The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them. Even at common law, the aspects of public policy hostile to champerty were concerned with the interests of the opposing party, not the party who had entered into the champertous arrangement," and they refer to *Giles v Thompson* [1994] AC 142 (HL), which you do have in the authorities bundle.

ELIAS CJ:

Well that's actually a little contrary to the impression that I had from some of the earlier discussion that the public policy behind champerty was concerned with the interests of the opposing party.

CHAMBERS J:

No, you may have taken – what I was saying earlier on that topic was the only thing left in the jurisdictions where they have abolished champerty and maintenance is a continuing concern about public policy between maintained and funder but of course traditionally the tort was concerned with the opposing party.

ELIAS CJ:

Was concerned with that, thank you. Sorry, yes, I did mistake what you said.

CHAMBERS J:

Yes.

MR MILLS QC:

Then I wanted to take you briefly to *Katauskas* which is at, it's in the second volume of the authorities. *Katauskas* of course comes after *Fostif* and essentially endorses *Fostif* on that key issue about maintenance and champerty no longer being unlawful. You will find that at page 316 of the authorities. This is principally a case about costs and not as relevant, I don't think, for your Honours as *Fostif* but important because under a new Chief Justice the Court confirms very firmly the position in *Fostif* and you'll see that at page 326 at paragraphs 29 and 30 affirming *Fostif.* And at paragraph 30 saying, "It follows that an agreement by a non-party for a reward to pay or contribute to the costs of a party in instituting and conducting proceedings is not of itself an abuse of the Court's processes." And because of the statutory provisions under which *Katauskas* was being considered, with a liquidator, it was essential to find there had been an abuse of process, so they then turned to look at that issue independently of the question of litigation funding and it related to the question of whether it was an abuse to not agree to indemnify the plaintiff – I need to slow down a bit. It arose from the question of whether it was an abuse for the funder not to agree to indemnify the plaintiff, and the answer was no.

Now, let me say a few quick words then about the issue of stay of proceedings as an independent issue which I touched on before and to reiterate that the effect of the Court of Appeal judgment is to stay proceedings in circumstances where the courts have consistently held that a stay is not to be given simply because there may be even what's still regarded as an unlawful agreement because it's maintenance and it's champertous, but the courts have consistently said that doesn't give rise to a stay and, similarly, and the two have been related in the way the courts have dealt with this, it's not a defence, and we touched on this point before, and it follows from that, the mere possibility of an abuse of process isn't sufficient for a stay either and that point again was just touched on in the passages I was reading you. And because I'm so short of time I just draw the Court's attention to *Abraham v Thompson* [1997] 4 All ER 362 (CA), I just note that it's in the authorities, volume 1 at page 70, it's English Court of Appeal and you'll see there at, I think it's page 374 the – no wrong volume. I

think it is page 374 of the judgment, so it is page 70 of the authorities and it's 374 of the judgment. You'll see there at line, well beginning at line, between lines B and C. Referring to the logic of the reasoning of Lord Justice Jenkins and going on to make this point that, and it goes on for a couple of pages that you do not get a stay because there may be an unlawful maintenance and champerty involved and then relating that to the question of it's not a defence and Lord Justice Millett saying that he agrees with all of that and saying it's not an abuse of process for an impecunious plaintiff to bring proceedings for a proper purpose and in good faith by being unable to pay the defendant's costs and so, no more so here.

So because of time I won't go –

McGRATH J:
That was Lord Justice Potter did you, was there –

MR MILLS QC:
There's a very good judgment by Lord Justice Potter.

McGRATH J:
Yes, you don't want us to look at Lord Justice Millett?

MR MILLS QC:
No, it's really Lord Justice Potter's judgment.

McGRATH J:
Right, thank you.

MR MILLS QC:
It really is pointing out that Lord Justice Millett agrees with what's said but it's really Lord Justice Potter's judgment that I draw your Honours' attention to and, so that's the very clear rule. No stay because it may be champertous. No defence that it may be champertous and effectively, in my submission, what the Court of Appeal has done here is to not find it is champertous but rather it might be, and not to find that there's an abuse, there might be, but on that basis to issue a stay and while it, I suppose at one level steps around the issue by the way it comes at it, at another the result is –

ELIAS CJ:

It's not a permanent stay though.

MR MILLS QC:

It's a stay until such time as the order is complied with.

ELIAS CJ:

Yes.

MR MILLS QC:

I mean the alternative would have been –

ELIAS CJ:

But it's not a stay on the basis that this is champertous and therefore the proceedings can't go ahead which is really what's being discussed.

MR MILLS QC:

Well, that's the difference I suppose.

ELIAS CJ:

Yes.

MR MILLS QC:

That they said well it might be champertous. It's on the face champertous. If the Court had said that it is champertous because this is, we just can't do this and we're going to issue a stay then it would fall squarely within what's being talked about here in this case. It's stepped around by saying, well, it might be on its face, it might, you know –

CHAMBERS J:

Remind me – did the Court of Appeal look at the agreement?

MR MILLS QC:

No, not that I'm aware of. And so the, I just do emphasise this point that –

CHAMBERS J:

Well that was odd, wasn't it, given that Justice Allan had looked at the agreement.

MR MILLS QC:

My learned junior will have to tell you what happened in the Court of Appeal. Do you wish to hear from her? But I do think there's an issue here about the stay, it's not necessary always to issue a stay when an order is made, in fact many orders are made without a stay. You either comply with the order or it's contempt but the effect here is to give a stay in relation to these issues of it might be unlawful and it might be abuse and to give it on that basis.

Now I'm going to have to now move very quickly to an important point that I want to bring the Court's attention to in *Fostif* and it's to summarise where I'm going on this. My submission, what the Court of Appeal has done here is to conflate what are really two distinct issues. On the one hand the question of maintenance and champerty and on the other hand the question of abuse and this is the question of how they get into the question of abuse through the on its face champertous, and if I could just take you quickly to the High Court of Australia judgment which is at page 227 of the authorities, so it's the first volume. Sorry I've put you wrong. It's at –

CHAMBERS J:

It's at page 140.

MR MILLS QC:

Thank you very much. Yes, so the first passage I wanted to take your Honours to is at paragraph 84, and that is, that is at page 163 of the authorities. And what the Court says is this, and this is the point about conflation that I want to bring to your Honours' attention because I think it's what's happening here.

"Abuse of process?" Beginning at 83, "the appellants did not contend that" it "provided any defence" and so on. Then at 84, "The appellants sought to encapsulate their submissions on this aspect of the appeals by describing Firmstones' conduct as 'trafficking' in the litigation. Expressed in that way, the appellants' submission may be understood as conflating two separate propositions: first, that the funding arrangements constituted maintenance or champerty and, second, that for the maintainer to institute and continue proceedings, in the name of or on behalf of plaintiffs who were thus maintained, was an abuse of process" et cetera. "The second of these propositions, about abuse of process, assumed that maintenance and champerty give rise to public policy questions beyond those that

would be relevant when considering the enforceability of the agreement for maintenance of the proceedings as between the parties to the agreement.

"In jurisdictions where legislation has been enacted", this is paragraph 85, "the same effect as the Abolition Act, the premise for the second proposition identified is not valid; there are several reasons to reject it," et cetera, et cetera.

And then, the next point, and I'm sorry, I'm having to deal with this pretty quickly now. I mean, obviously *Fostif*, *Fostif* deserves some careful review on a number of these points, but the other case I wanted to draw to your attention on this submission I'm putting to you of the conflation of, of maintenance and champerty and abuse, and of course if the Court says, as the High Court of Australia did, that maintenance and champerty is no longer to be regarded as unlawful in relation to the kind of funding of individual litigants that we're dealing with here, then that conflation falls away and it has to then focus, as the High Court of Australia has done, on the question of whether there is evidence of actual abuse.

Now the other judgment, quite a lot older, that I just draw the Court's attention to is the *Martell* case, which is at page 393 of the second bundle, where a very similar point is made a very long time ago, or relatively a very long time ago. I suppose I was alive so it can't be that – have to be careful here. At 393, you'll see at page 387 of the judgment, so it's that right-hand column, the Court says, you'll see it begins, "It was said on behalf of the defendant company that the maintenance in the present case was oppressive," and then Justice Danckwerts goes on to say, "But what was meant no doubt was that if maintenance is a civil wrong and a crime, the unlawful support of an action against the party is oppressive. If, however, the support given is legitimate and is not a wrong, the maintenance of the action is not oppressive and this ground of complaint disappears." So in my submission –

ELIAS CJ:

Sorry, where are you? Page 375?

MR MILLS QC:

I'm at page 393 of the authorities, 387 of the judgment and about the middle of that right-hand column where it begins, "It was said on behalf of the defendant company".

ELIAS CJ:
Thank you.

MR MILLS QC:
And in my submission, it's the same point and they're saying it in a different way, that it – if we – it is no longer unlawful for a litigation funding agreement in these circumstances on the grounds that it is not maintenance and champerty then it is no longer an abuse simply because of the presence of the agreement. There must be actual abuse evident in the way the case is run.

Now in the few minutes left to me I wanted to just very briefly refer to what in my submission is relevant here on the question of comity with Australia. I said before that, while the Australian and English authorities share much in common on where they've gone over the issue that is before the Court, they have diverged to the extent that Australia's gone further and said it's no longer unlawful for there to be litigation funding and not an abuse simply because there is litigation funding. In my submission it is relevant that there be, where appropriate, and it's for this Court to decide, of course, what's appropriate here, there is an alignment between New Zealand and Australia in this area because we are particularly developing a trans-Tasman litigation funding agreement market. It's quite clear that that's what's happening. And so the more competitive that market, the better it will be for the funded parties. Competition is what will deal with a significant number of the issues here. So the alignment of rules with Australia where appropriate, rather than with the UK, does seem to me, with respect, to have much to recommend itself. And that's touched on by Justice Baragwanath in *Houghton* in giving the judgment of the Court there. You will find that reference to page 502 of the authorities at paragraph 72, and you'll find that developed in our written submissions at paras 93 and 94.

My only principal area after that that I had intended to develop with your Honours was that, the issue that these are common law wrongs and although there has of course historically been the occasional statutory intervention, but they are common law torts. And as principally the creations of the common law, the courts have repeatedly reshaped them over the centuries, and what was once condemned as an unmitigated evil is now simply treated in many cases as routine and unquestioned. And there is a list of exceptions which, that have developed over time, which I was going to take you through but probably the best thing I can do now is just refer you to *Fostif* at page 187 of the authorities, I think it's 481 of the judgment, and it's at

paragraph 253. I don't even, I'm not even convinced this is a totally exhaustive list, but you'll see there the Court saying, "There are numerous areas in which the proscriptions effected by the principles of maintenance and champerty do not apply." And they set out the exceptions that have been accepted over the many, many years. And so those have all been common law changes. And the changes that I'm inviting the Court to make here again are, in my submission, well within the authority of this Court as the final court for our jurisdiction on appropriate common law developments, and it doesn't raise the issues of reliance that might have been said to be there in *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7, and, indeed, the question which was asked by this Court in positioning the question in *Lai v Chamberlains* which was, in effect, does the public interest require retention of the barrister immunity rule? In my submission, it's the same question, really, that should be asked here.

ELIAS CJ:
There were also unsatisfactory features of the reasoning in the earlier case law.

MR MILLS QC:
Yes. Yes.

ELIAS CJ:
Which was of comparatively recent origin.

MR MILLS QC:
Yes. Yes. Of course I would say the same thing here. Any rate.

Now, perhaps just before I sit down I'll give you some other references that I think are relevant to this. The Court of Appeal judgment at paragraph 17, you'll see there that the Court of Appeal very quickly said that litigation funding by an associated body, by litigation funding agreement, by an insurance company, by subrogation, state funding via legal aid, funding by a relative, the Court of Appeal said they do not engage any particular concerns. Now all I say about that is my respectful submission that was to dismiss those issues far too quickly because their significance is that some of those get very close to what we're talking about here and they have all at one time been regarded as repugnant. They are all now treated as routine.

The other case that I had noted here that touched on insurance issues, trade unions, lawyers, is the *Stocznia Gdanska* case, which is in the authorities at page 529 at paragraph 59, and there's just the discussion there about many commonplace and unobjectionable circumstances in which modern litigation is funded by others. I just draw that to your Honours' attention.

Giles v Thompson in the House of Lords, it's in the authorities at 276 at page 162 of the judgment, talks about issues that might arise with partially subrogated claims where the insurer is pursuing not only the recovery of its own insured amount but also on behalf of the insured for money that will go to them and how that gets pretty close to what we're dealing with here.

On the 2001 New Zealand Law Commission report, if you could just indulge me for a moment more, which, Chief Justice, you raised with me, I just mention that in its 2001 report and in *Houghton* Justice Baragwanath specifically acknowledged that the law had already moved on since then and, of course, that report precedes big developments in Australia in *Fostif* and *Katauskas*.

And then on this issue of dealing with the present case by exceptions I just draw Your Honours' attention again to the *Martell* case which we looked at before, both in the first instance court and on appeal. You'll see there's a discussion there about the development of the common interest exception, what justifies it, the rationale for the various exceptions which I think your Honours might find of some assistance and some help.

And then a passage in *Fostif* in the High Court of Australia at page 162 which talks about, "The truth of the matter is that the common law doctrine of maintenance took its origin several centuries" et cetera, et cetera. It has long passed away and it gets in the way, in effect.

So I'm sorry to run over, but unless there's any other issues I can assist with that's really the nub of my submissions.

COURT ADJOURNS: 1.02 PM
COURT RESUMES: 2.16 PM

ELIAS CJ:
Thank you, Mr Harrison.

MR HARRISON QC:
My learned friend has presented an entirely new and different set of submissions from his written submissions and that really necessitates my departing from my script a fair amount as well. So I wonder if I can just begin by making a preliminary point which is that in my submission dealing with the judgment under appeal and whether it was right or wrong, a two step analysis is needed in my submission.

The first question is, is there a supervisory power over litigation funded claims and in particular litigation funding agreements, and the second part of the first question, and if so on what terms? And that I submit is essentially a jurisdictional question. Does the Court have power to intervene?

ELIAS CJ:
Yes, carry on.

MR HARRISON QC:
The second question is, if so, were the orders made by the Court of Appeal open to it and properly made in the circumstances? And the only objections put forward by the appellants and really not even touched on by my learned friend, but in the written submissions were confidentiality of the funding agreement and perhaps legal privilege.

Now, my submission is the appellants' submissions tend to run together those two issues but they do need to be kept separate. Keeping them separate makes the answers a lot easier.

Now I will argue that the answer to the first part of question one, is there a supervisory power, is clearly yes and that power can be upheld on all or any of three heads.

First of all, and I'm just summarising them, first of all the power to police litigation funding agreements on the basis that they are presumptively maintenance and champerty.

Second, the power, indeed the duty of the High Court and other courts to prevent an abuse of process, including one which has not happened yet.

Thirdly, and by no means least, the court's inherent jurisdiction to regulate its own procedures where the rules of procedure do not expressly do so, and each of those is a separate and viable ground for saying there is the supervisory power or jurisdiction which the Court of Appeal asserted.

The answer to the second part of question one flows largely from the answer to the first part but with the addition that once it's accepted that there is the supervisory power available we need to identify the policy concerns and grounds for the exercise of the supervision.

Now if the analysis reaches that point in my favour and the answers to one are in the affirmative, then turning to question two, whether the order is open to the Court and properly made, there is very little left of the appellants' arguments by that point.

In summary, I argue in the written submissions that confidentiality, in particular the self-imposed confidentiality obligation that these appellants undertook, cannot be absolute and cannot be an answer to the exercise of a supervisory jurisdiction for the purposes that would have been identified by this point.

Secondly, as to legal privilege, not even raised by my learned friend, unlikely to arise in relation to the entire litigation funding agreement, I submit, conceptually not possible in terms of the Evidence Act provisions that govern privilege, litigation privilege and what used to be called legal professional privilege but, in any event, the Court of Appeal reserve that very issue for further consideration. So that in a nutshell is the roadmap that I submit ought to be adopted.

I want to say next, if I may, something just very broad about maintenance and champerty. I was interested to her your Honour Justice Glazebrook effectively saying if you were Queen you'd abolish it. I want to make this point about maintenance and champerty. In terms of what it originally was at common law it was of course three things. First a common law crime which is irrelevant in this country. Secondly a tort at common law and, thirdly, a source of illegality based on public policy.

The first two propositions are obvious and I think common ground. The third I put in the way I did because I don't accept that it is purely a contractual doctrine. It's a source of illegality that remains part of our law and thus it is, while its natural application is to potentially, to invalidate contracts on the public policy ground, it's nonetheless a source of illegality.

Now, if I were King, I would see a good argument for the complete abolition of maintenance as distinct from champerty because under modern conditions the line could properly and logically be drawn between helping someone else with their litigation and nearly all of the exceptions my learned friend took you through that he said were cursorily recognised in the Court of Appeal judgment relate to what is commonly called maintenance, the support of someone. The line could well in modern day terms be drawn at champerty, which is accepting a share of the proceeds of litigation, and that is where the concerns that I have highlighted in the written submissions arise.

But we face the issues that arise in this case because, ironically for us, because the judgment in *Saunders v Houghton* liberalised the law of maintenance and champerty in favour of access to justice. Until that liberalisation, the position would have been that these appellants would not have been able to undertake litigation funding at all. The arrangement would have been plainly champertous. That is why we don't have rules in the High Court Rules that govern what is to happen in a case such as the present. The substantive law has moved in favour of the litigation funded litigant. Well and good. We do not challenge that as a general development, but that then gives rise to the question, what supervisory powers should the Court exercise over that partial legalisation? And in the context of representative proceedings, the *Saunders v Houghton* litigation has been working through the implications quite tortuously. I have in the written submissions taken you through the various steps and decisions in that litigation which has been to the Court of Appeal twice.

Now we had, until this case, we had a similar lacuna in the law assuming, as one had to, that the *Saunders v Houghton* liberalisation of maintenance and champerty logically applied where it was a non-represented plaintiff, which I felt obliged to concede and still think was right, there is a lacuna in how the Court deals with it. That's why we come back to the debate between total hands off and hands on and the options that were outlined in the Court of Appeal judgment. It's not dealt with in the High Court Rules. There’s no parallel rule to the representative claim procedure

but that is of course a classic territory for the Court to step in using its inherent jurisdiction to deal with its processes, to control its processes, where the rules do not make provision to the contrary.

Now I doubt that anyone in this Court, your Honours, or counsel, would dispute that *Saunders v Houghton* and this case demonstrate that there is a need for regulation of the area, for the legislature to step in.

In the meantime, the courts have to grapple with these problems as best they can and my, I suppose my plea to your Honours is that it is really far too early in the history of this country's experience of litigation funding to be completely jettisoning all control over litigation funding in a case such as the present. It would leave, for one thing, it would leave litigation by plaintiffs, litigation funded plaintiffs who are not representative plaintiffs, unregulated in a way that is completely anomalous by contrast with representative plaintiffs and company liquidations, both of which fields, and assignments, straight out of assignments. All of those are regulated by reference to at least the concerns if not the principles of maintenance and champerty. In all of those areas, the litigation funding agreement is provided for the Court's perusal and approval and not on an ex parte basis.

So that is the situation that the Court faces, and your Honours can scarcely have failed to notice the announcement last week of a supposed billon dollar representative claim against the major trading banks, and again these issues are going to come up and now is not the time to have abolished maintenance and champerty even if your Honours could.

Now, there is a very good reason not mentioned by my learned friend why that is impossible, if not impossible at least very difficult, and that is section 334 of the Lawyers and Conveyancers Act, but I want to give that separate treatment a little further down the track.

My learned friend said he would set out to demonstrate that there were, I'm just trying to find where, precisely what language he used. He argued that there were serious adverse effects of the orders that have been made and I waited with interest to see whether he would identify these serious adverse effects flowing from the orders under appeal but what he listed was a series of delays and no doubt expenses

incurred by the parties to the substantive litigation and the expression “satellite litigation” was repeatedly used.

Now, I simply submit in response that this needs to be put in perspective, not only the appellants but also my client would have preferred not to be the test case litigants that are fighting out a brand new issue of law consequent upon an earlier liberalisation of the substantive law. But it's a dirty job, someone has to do it. It is really because the Court is having to, the courts at all levels are having to grapple with what safeguards, if any, should be applied to a litigation funder in a case such as the present that the so-called adverse consequences are arising, and viewed in that way they are not adverse consequences of the orders at all. They are simply the adverse consequences of being stuck in an interlocutory battle which can happen to the best of us.

Now the other point I would make is that, about that is that if the Court of Appeal is right then these appellants ought to have disclosed certain matters at the outset. The name of the – the fact they were litigation funded, which they fortuitously did, the name and various other things and a redacted version of the agreement. The fact that they didn't has meant that this issue has had to be raised and dealt with obliquely. That’s the reason for the stay order. It's not that you'll get a stay order every time. If you comply with the Court of Appeal’s formula, if it's upheld, you won't be in that stay situation. You'll be in a situation where the agreement is disclosed with redactions and there could be an argument over those, and there could also be an argument about privilege if the plaintiff applies for that but otherwise we're not in a stay scenario.

Another criticism of my learned friend of the Court of Appeal judgment is, well, they really didn't say what was wrong with the litigation funding agreement. Well, that is to put the cart right, well and truly before the horse. Until we know what the litigation funding agreement says and those principles are further developed, regrettably it may have to be in another hearing, we won't have reached that point so the Court of Appeal was only and correctly interested in the disclosure issue which was the main thrust.

GLAZEBROOK J:

What is the particular interest – well, let's just take the matters at 67 that are said to be disclosed. Now, I know that you had argued for a much wider disclosure so it's

perhaps unfair to ask you this in the sense that this wasn't what you were asking for effectively, and also, what's the interest in those matters there particularly and also what is going to be the result after having had them disclosed? I'm really – what I'm really trying to get at is, what is it with those things that could be wrong that would cause either, I'm not sure the defendant to be able to say that that litigation funding arrangement couldn't continue or whatever it might be.

ELIAS CJ:
Is this paragraph 67?

GLAZEBROOK J:
Paragraph 67, and I think Mr Mills particularly was concerned about (d) rather than (a), (b) and (c) is what I understood.

MR HARRISON QC:
Well unless, if I can just say, your Honour, unless my memory is playing me tricks, what I argued ought to be disclosed in the first instance is not too far from what the Court of Appeal has suggested. What I argued for was that on one option was that there ought to be a leave to commence requirement as same as –

GLAZEBROOK J:
Which I thought it applied for wider disclosure but no, you weren't really arguing that, this was a bit, I might have misunderstood.

MR HARRISON QC:
Well my alternative is at 64 of the judgment. "Formal notice identifying litigation funder and place of business, that's (a), separately certifying about funding available and personally undertake to pay awards of costs, disbursements." I must confess I think that would have been a simple solution and disclosure of the funding agreement with redactions in particular, a redaction of the fighting fund, level of fighting fund.

But coming back to your Honour's question about 67. If we have reached the point where it is held that the Court does have the jurisdiction or power to supervise litigation where a litigation funder is involved and that it is in the public interests that it do so, then if we look at that list I'd turn it around and say, "What possible harm could there be from doing," and then go through each one. So what's wrong with disclosing –

GLAZEBROOK J:

Yes, although perhaps you probably need to say well why – I can understand they might have the power and jurisdiction to do so and I think because they can regulate the procedures I don't even think your friend would argue they didn't have the power to do that in certain cases but why is it in the public interest to do so?

MR HARRISON QC:

Well, a different view of the public interest could be taken for each of these aspects of disclosure, I concede that. So it may be necessary to address each one but I would submit that under the, at least under the written argument for the appellants it would be possible for defendants, such as my clients, to go right through an entire piece of litigation until the bitter end simply not knowing that a litigation funder was involved if –

GLAZEBROOK J:

Well, he probably wouldn't know necessarily that a union was involved or that Aunty Mabel was involved or a family trust was involved, would you, or a, an environmental defence association with a, not a straw plaintiff but a plaintiff.

MR HARRISON QC:

That is true and –

GLAZEBROOK J:

But that’s possibly your distinction between maintenance and champerty that you were indicating earlier.

MR HARRISON QC:

Exactly.

GLAZEBROOK J:

I agree.

MR HARRISON QC:

I would submit that a line is crossed when you've got litigation funding for profit by an entity that is, that may have taken, contractually taken control over the subject matter of the litigation, may have powers to withdraw, I will come to (d) in a moment because I want to address it, may have a whole series of powers which are identified

in the written submissions by reference to a couple of papers, research papers which are in our bundle. That material reveals that there are, there's a whole range of litigation funding arrangements that, for example, in Australia some (inaudible 14:40:56), they stipulate that out of any proceeds the legal costs are reimbursed first, then there is an administration fee for their running of the litigation, the litigation funders' running of it and then there is a percentage off that.

Now this is not just crocodile tears for the plaintiff. In my submission, the dynamics and especially the settlement dynamics of a disadvantageous litigation funding agreement when one takes into account the phenomenon of sunk costs which, as we all know, can impact hugely on whether matters can settle and at what level, all of these are matters in which defendants legitimately have an interest, and if it is said that, and it was in the written submissions for the appellants, that all is all right, all is well because at the end of the day there's always the prospect of a third party costs order and yet in the next breath it's argued that the identity of the litigation funder need not even be disclosed. My submission is that the Court should undoubtedly order that. We should also know (b) and (c), they seem to flow in the wake of the premise behind the first two.

Now as to (d) –

GLAZEBROOK J:
Can I just check in?

MR HARRISON QC:
Yes.

GLAZEBROOK J:
You're really suggesting that's only in cases where they have a financial interest and of course they don't say anything about control here, but the financial interest is there because there is in those cases presumably more of a prospect of a third party costs order than there is with the other types of funders who might be meddling but they are not meddling with a financial motive.

MR HARRISON QC:
There certainly ought to be. Just if we look at the disclosure, the existence of the litigation funder. That has to be relevant to the issue of security for costs.

CHAMBERS J:

Why?

MR HARRISON QC:

Well, one, it will flag that the plaintiff is impecunious, cannot even pay its own costs, and it's often quite difficult in practice to even raise the question of insolvency of the plaintiff.

CHAMBERS J:

Well, why should you get further protection then from – with, in contradistinction to an impecunious plaintiff who may be being supported by a family member or something?

MR HARRISON QC:

Well, it comes back to where the line is crossed. When a powerful commercial entity is supporting the litigation for profit then it is appropriate that the court exercise control. But can I just go back to security for costs? The second point must be, I submit, that even under the rule, security for costs rule as currently drafted, it must be relevant to the level of and the court's preparedness to order security for costs that there is a litigation funder in the background. You couldn't possibly proceed on a totally false premise that you've got an impecunious plaintiff that, whose progress of the litigation might be prejudiced if it can't post security for costs when in fact there in the background there is this deep pocketed litigation funder. So the disclosure of the litigation funder, seems to me, is necessary, to be blunt, to avoid the administration of justice being brought into disrepute.

CHAMBERS J:

Why then don't, or don't we require every plaintiff to advise their wealth so that defendants can make an informed decision as to whether or not security for costs is required?

MR HARRISON QC:

Well there might, the rules don't require it or authorise it. The rules are clear in stating that the, that leaving aside the question of an overseas plaintiff, it's for the defendant to show the impecuniosity. Again, I submit that we need to focus on the situation of the commercial litigation funder for profit and also the fact that in the background we have the only partial relaxation of maintenance and champerty under

the law as it stands at this very moment and that is the difference. It's always been considered that champerty is an aggravated form of the tort, the one most likely to spark concerns about the administration of justice. Litigation funding for profit is fairly and squarely champerty but in the relaxed form of the principle it all depends on the particular funding arrangements.

So to address that issue, in the interests of justice and the defendant, you disclose the fact that you are litigation funded and I'm quite comfortable with drawing the line there and leaving Aunty May out of the disclosure regime. That is until, as no doubt eventually will happen, the legislature or the Rules Committee comes along and devises a better solution.

Now if I may just go back to paragraph 67 and (d). The terms on which funding can be withdrawn and the consequences of withdrawal. That is there, I would submit, because without it, there would be the possibility that the litigation funder, as some funding agreements permit, could simply decide that it was going to fund no further and withdraw from the arrangement and there would be no obligation on the appellant's argument for the plaintiff to reveal that it was no longer litigation funded. That (d) does not include disclosure of the level of the fighting fund because –

GLAZEBROOK J:
What interest does the defendant have in that, is it merely the costs issue because otherwise all you've got is somebody who is either relying on the pro bono work of the lawyer acting to date or has become a litigant in person which they could have been all along, absent the litigation funding and as difficult or not difficult as litigants in person always are, but that's –

MR HARRISON QC:
Well the – if, I mean, obviously if there's no obligation to disclose the presence in the litigation of the litigation funder then (d) doesn't arise but if there is an obligation to disclose the funder's presence and some scrutiny of the arrangements, an important part of that scrutiny in my submission is to know whether the funder could simply withdraw leaving the plaintiff as a non-litigation-funded shell with no recourse at least past that point by way of third party costs order against the litigation funder.

GLAZEBROOK J:

But without the litigation funder you wouldn't have had that in the first – I'm just – because if nothing can be done about this by the Court or the defendant then I'm not suggesting necessarily that you don't get this information, it's just you really need to know what you can do about it. So if you have an arrangement where the funder can withdraw at any time, well as far as the defendant is concerned, as I put to you before, you then have a litigant in person, presumably, or a pro bono aided litigant and that person may be easier to settle with in those cases because the pro bono might be for only a short time or the litigant in person mightn't be capable, or may be more difficult, but I can't quite see what else – and I can understand the costs issue.

MR HARRISON QC:

It might well trigger a further application for security of the costs and quite rightly.

GLAZEBROOK J:

So it's a costs issue.

CHAMBERS J:

Well, it could also, however you devise the redacting, it could also give huge tactical advantages to the defendant, for instance, suppose a term of the agreement was that we will only fund this if all interlocutory applications are complete by a specified date. Now that would be enormously helpful for a defendant to know that that was a term of the funding.

MR HARRISON QC:

I accept that and so far as I am concerned there is still, there are still details to be worked through in a next round. Let's assume the Court of Appeal order stands and there's a redacted litigation funding agreement provided that no doubt the redactions will be of this and that point which is seen as critical information which would give the defendant an advantage and the Court is just going to have to address that, but it's not a reason –

CHAMBERS J:

It might be said the cure is worse than the disease.

MR HARRISON QC:

Well, in my submission that is not the case, the disease has not, the disease itself, as per *Saunders v Houghton*, still exists. There are overarching interests in the administration of justice and in the protection of defendants, and in my submission, we've really just got to work this through, rather than throw the proverbial baby out with the bathwater, and do so only for this category of case not for representative claims where it gets worked through, not for winding ups and not for assignments.

So the war chest or any, or other commercially sensitive details, I'm reading from the top of page 103 of the case and the judgment, you could say or other legislation sensitive details might be a better way of putting that because commercial sensitivity is probably not quite what we're on about here.

ELIAS CJ:

Sorry what's legislation sensitive?

MR HARRISON QC:

Sorry, no did I say – litigation sensitive.

ELIAS CJ:

Litigation sensitive.

MR HARRISON QC:

If I said –

ELIAS CJ:

Yes, I thought the problem was that we didn't have legislation and perhaps –

MR HARRISON QC:

No I meant to say, whatever I did say I meant to say litigation sensitive.

ELIAS CJ:

And perhaps the cure is to disassociate ourselves from *Saunders v Houghton* –

MR HARRISON QC:

Well.

ELIAS CJ:

– leaving it all to legislative solution because it does, it is the case that once you embark on this, as you're quite fairly indicating, there's quite a long process of working out the correct response.

MR HARRISON QC:

Yes, and perhaps that's as good a time as any. I want to talk about the Australian cases my learned friend relies on but maybe if we just go to my discussion of section 334 of the Lawyers and Conveyancers Act. That's at page 19 of my written submissions and you'll need to go to the bundle of authorities, tab 1, where extracts –

ELIAS CJ:

Your bundle is it?

MR HARRISON QC:

Our bundle, yes, our bundle, where I've got part 11, "Miscellaneous provisions." Now maybe if I just take a moment if your Honours are not fully familiar with this part of the Act. Section 333, you've got a definition of a conditional agreement which basically is a lawyer's fee agreement for services payable only if the outcome of that matter is successful. That's at the end of that first definition.

Then there's a definition of normal fee, I quite like that.

ELIAS CJ:

It's nice if you can get it.

MR HARRISON QC:

Yes. Then there's a definition of premium in relation to a conditional fee agreement, means remuneration that a lawyer may become entitled to under the agreement in addition to a normal fee, being remuneration by way of premium that (a), (b), (c). (c) compensates the lawyer for the risk of not being paid at all and, two, for the disadvantage of not getting payments on account and (d), importantly, is not calculated as a proportion of the amount recovered.

Then 334(1), conditional fee agreement is not an illegal contract or an unenforceable contract by reason only of the fact remuneration is dependant on the outcome. If (a), it's a normal fee or a normal fee plus a premium, and then under subsection (2), if a

conditional fee agreement is by virtue of subsection (1) not an illegal or an unenforceable contract, lawyer does not by entering into that agreement make himself or herself liable to proceedings founded on the tort of maintenance or the tort of champerty. So as at 2006, the legislature was referring to and recognising these torts.

Now going back to my written submissions, which is probably the quickest way of dealing with it, paragraph 34. So the features are that the legislature went no further than to provide that these conditional fee agreements are neither illegal nor unenforceable in the respects stated.

ELIAS CJ:
What page?

MR HARRISON QC:
Page 19 of my written submissions, paragraph 64. So the normal fee or the normal fee plus the premium is okay if the protections are in place but that is as against, as I say, a fee calculated as a proportion, which in other words is the champerty scenario.

GLAZEBROOK J:
Yes, although you'll be aware of course that the discussions in relation to lawyers are related to the particular position of lawyers and the dangers that there are in those sort of conditional fee arrangements in terms of the independence of lawyers, which don't apply, those policy reasons don't apply to the same extent to the funders, in that they are not the people who have the duty to the Court and the duty to argue, because the difficulty there is that you actually have a conflict of interest in the situation where the lawyer is a fiduciary. I'm not suggesting that that's the total answer to it but that is the thinking behind the, these conditional fees. I must have been something to do with the Law Society at the time these were done because a lot is coming back to me in respect of this which is why – but those were the particular issues there were with lawyers.

MR HARRISON QC:
There's, well, but prior to these provisions it was certainly arguable that the common practice of charging only in the event of success was itself –

GLAZEBROOK J:

Yes.

MR HARRISON QC:

– maintenance and conceivably champerty but here this is – again, like *Saunders v Houghton* itself, it's a partial legalisation. It's a partial legalisation which, and this is my paragraph 65, leaves in other respects the law of maintenance and champerty intact.

CHAMBERS J:

Another way of looking at it, of course, is just as the torts were created by the courts they could be abolished by the courts, but Parliament has said that so far as lawyers are concerned this is all that lawyers can do.

MR HARRISON QC:

Yes, as I say over the page at 66, no one is arguing that the enactment of section 334 has set the law of maintenance and champerty in stone, it's still based on public policy, but it's inherent in these provisions, I would submit, that the lawyer that entered into a fee agreement which is not compliant, for example, one that stipulates for a percentage share of the proceeds, that agreement is void and unenforceable on the grounds that it's maintenance and champerty. So they've said if you enter into a compliant agreement, this is section 334(2), in effect, they put it the opposite way but in effect they're saying if you enter into a compliant conditional fee agreement then you're okay but then a non-compliant conditional fee agreement is still liable to be considered maintenance and champerty, and I'm just submitting that that is a policy marker here in terms of public policy. The legislature has contemplated that some form of maintenance and champerty will be continuing in force here, and even if the Court can, as happened in *Saunders v Houghton* and it did, the Court of Appeal in that case explicitly faced up to these provisions and acknowledged their existence and said, “Yes, well, we can still liberalise maintenance and champerty but we cannot abolish,” in effect they said, and that must, I submit, be sound reasoning.

McGRATH J:

I just have some difficulty with that, Mr Harrison. That the way the matter has been expressed seems to leave completely open the possibility of future development or destruction of maintenance and champerty.

MR HARRISON QC:

Well, I would have to respectfully quarrel with destruction –

McGRATH J:

What is it about the statutory provision of section 334(2), what words do you say freeze the position of the law in that respect?

MR HARRISON QC:

Well, it's not expressly stated that the law is frozen and I don't contend that the law is frozen, but it is obviously within the contemplation and I'm repeating myself, it's within the contemplation of the legislature that non-compliant fee agreements by lawyers will not be enforced. Why will they not be enforced? Because they don't come within the liberalisation of maintenance and champerty, the limited liberalisation which these provisions –

McGRATH J:

I think the way – perhaps to be a bit more specific, the way the section is expressed, it seems to me is endeavouring to say that if you conduct yourself in this way whatever the content of that law is, you won't be caught by it.

MR HARRISON QC:

Yes.

McGRATH J:

Now that doesn't seem to me to be making any assumptions at all about what the content of the law is or will be.

MR HARRISON QC:

Well –

GLAZEBROOK J:

Can I also put to you that it seems to me that subsection (2) is saying that it is a legal an enforceable conditional fee agreement unless it comes within subsection (1), but if it does come within subsection (1) then as Justice McGrath says whatever the content of maintenance and champerty, it doesn't fall foul of that, but it seems to me that it does seem to be – and one can understand why a conditional fee agreement by a lawyer who was supposed to be independent and the explicit rejection of

conditional fee agreements as in the US is a major public policy issue that isn't, just what I put to you before, that isn't present when you're just looking at litigation funders or Aunty Mabel.

MR HARRISON QC:

Well, if we can just simplify by calling the US style percentage agreement a contingency fee rather than conditional fee agreement.

GLAZEBROOK J:

Yes, because it doesn't come within –

MR HARRISON QC:

So my rhetorical question in response is that if a New Zealand lawyer enters into a contingency agreement which plainly is impermissible in terms of this section, what principle of law invalidates it?

GLAZEBROOK J:

Well it's because –

MR HARRISON QC:

By necessary implication from these provisions I submit the law of maintenance and champerty.

GLAZEBROOK J:

Well no, doesn't it say if a conditional fee arrangement is by virtue of subsection (1) not an illegal contract or an unenforceable contract, so you say we have to imply that it can only be illegal or unenforceable because of maintenance and champerty but it doesn't actually say that, does it? Because there are other public policy grounds for having an illegal or unenforceable contract and if you're only allowed under this to charge this type of conditional fee then I would have thought you could imply that any other type of conditional fee, like a contingency arrangement, is unlawful or unenforceable?

MR HARRISON QC:

Well, if we ask ourselves what ground of illegality of unenforceability section 334(1) is contemplating when it says that a conditional fee agreement is not illegal or

unenforceable, the answer must surely be the ground of maintenance and champerty. Maybe others but certainly that ground.

GLAZEBROOK J:
Or just general public policy.

MR HARRISON QC:
Well the public policy, the public policy ground that underlies maintenance and champerty.

GLAZEBROOK J:
Well no, that underlies the duties of a lawyer to be independent and to represent their client in a proper manner and not to charge conditional fees that are a percentage of the proceeds.

MR HARRISON QC:
Well surely subsection (2) is a very strong clue that the legislature had in mind maintenance and champerty when it was talking about illegality and unenforceability.

GLAZEBROOK J:
All right.

ELIAS CJ:
I suppose it's too much to expect that members might have discussed in the House maintenance and champerty but is there anything in the legislative history?

MR HARRISON QC:
I'm not aware of that I'm afraid, your Honour.

ELIAS CJ:
No.

MR HARRISON QC:
In any event, I mean the fact that lawyers who are highly regulated have been told that they must draw the line short of a contingency fee, a percentage fee is surely a warning pointer in respect of litigation funders who are not regulated at all.

ELIAS CJ:

Well, it has to be though under, in terms of what the Act is directed at, which is proper conduct of lawyers, isn't it?

MR HARRISON QC:

Well the Act has to deal with lawyers –

ELIAS CJ:

Yes.

MR HARRISON QC:

– but what I'm submitting is that whether we have this debate about whether an abolition of maintenance and champerty would be consistent with the legislative regime or we put it on my alternative ground, and it's in the submissions, that it's an important public policy marker that the legislature has seen fit to only go this far and in particular to stop short of contingency fees. These are relevant, I submit, to the general inquiry at hand.

CHAMBERS J:

Wouldn't it be more accurate, as Justice McGrath has said, to categorise this part of the Act as saying, we are wanting to liberalise how lawyers charge and we tell you that whatever the law might be on champerty and maintenance, this sort of fee at least will be lawful. Isn't that a more accurate summation of these sections?

MR HARRISON QC:

No, I don't accept that, with respect. I submit that the message does come through clearly enough by implication that if your fee agreement as a lawyer is not compliant, it is not enforceable and that interpretation, I submit, would be consistent with the policy of the Act, otherwise you could get a lawyer who's entered into a contingency fee agreement arguing that it's lawful and valid which, if we just focus on lawyers at the moment, would not, I submit, be consistent with the purpose of the legislation.

All right, now I, stepping back from my learned friend's submissions, he relies heavily on the Australian authorities, in particular the High Court of Australia, and in effect says, well, the English approach, which remains a focus on the individual case and the individual, looking at the individual litigation funding agreement does not go far

enough, and I need to address that issue in a little bit of detail and maybe I should start with looking at the Australian authorities.

Now, I know we've been through those a little bit. But I just want to – [*aside*] – with *Fostif*, which is at, in volume 1 at page 204 –

CHAMBERS J:
That's the Court of Appeal.

MR HARRISON QC:
Oh, I'm sorry. Is that the Court of Appeal?

CHAMBERS J:
I think it's 140, this –

MR HARRISON QC:
Yes, thank you. I did, I did want to refer to that, the Court of Appeal decision.

CHAMBERS J:
Then you did have the right page.

MR HARRISON QC:
No, that's all right. The, the – aside from just dealing with *Fostif* generally, and I'll come to the passage, aside from the obvious point that *Fostif* is dealt with, is dealing with a situation where in New South Wales the legislature has abolished the torts of maintenance and champerty, the focus in *Fostif* is, puts the matter too high, in my submission, by focusing the court's power to intervene solely on abuse of process and arguing that an abuse of process has to be made out. In my submission, the approach in this country should be that the Court is prepared to prevent a, a potential abuse of process, not to operate as some, some kind of ambulance at the bottom of a cliff intervening only if, at the end of the day, an abuse of process has, has been committed.

This comes through clearly, I submit, in this Court's, the majority judgment in *Lai v Chamberlains*, reference to which I have in footnote 34 of my submissions where the majority judgment of your Honour the Chief Justice and Justices Gault and Keith at paragraph 63 identified the abuse of process doctrine as, "an independent duty of the

Court to prevent abuse, not limited to fixed categories". So it's not really a power but a duty.

CHAMBERS J:

What I couldn't see from the Court of Appeal decision's in our present case is quite how, the basis upon which they distinguished the thinking in *Fostif*.

MR HARRISON QC:

Well it's, it's, it's addressed at –

CHAMBERS J:

They mention the case.

MR HARRISON QC:

- at, at some reasonable length in the judgment. They, they do identify the, as a key difference, the Australian cases are based on the, the statutory abolition. Just looking. The, the section is the – of the judgment starts at page 89 of the case and there's a discussion of *Campbells Cash and Carry v Fostif* from 28 on.

CHAMBERS J:

Well, they set it out there but they don't say there which – why effectively they're going with the dissenters.

MR HARRISON QC:

Well...

ELIAS CJ:

Are they really going with the dissenters?

GLAZEBROOK J:

Can I just check what the, what your – sorry, I just want to check what your argument. You accept that *Fostif* says you just look at abuse of process. Is that right?

MR HARRISON QC:

Yes.

GLAZEBROOK J:

So that's fine. I just wanted to check that. Now, the second thing you seem to say is that – you seem to be saying that the Court should prevent an abuse of process and equating that with champerty in some way. Is that – I'm just trying to get what they – so I'm probably just asking whether champerty is separate from abuse of process or whether it's somehow subsumed in the abuse of process issue.

MR HARRISON QC:

Well, it's –

GLAZEBROOK J:

Because for myself, I personally would prefer to deal with it in the abuse of process and then identify exactly what it is about, perhaps, a champertous arrangement that was dealt with in abuse of process. When I said I would abolish it, it was more to say that I would see it dealt with if there are concerns in an abuse of process situation, and I can understand, although that's subject to it actually being before us in a proper way when we might be really deciding whether the tort still has, or the tort still has some kind of ongoing necessity. So a conditional, "I would abolish it." But what's – what exactly is the argument?

MR HARRISON QC:

Well, my submission is that –

GLAZEBROOK J:

Or do you say that from a defendant's point of view, champerty too, in a particular form, can become an abuse of process?

MR HARRISON QC:

Well, in, in, in short, yes.

GLAZEBROOK J:

All right.

MR HARRISON QC:

But conceptually they are different. Conceptually –

GLAZEBROOK J:
Yes.

MR HARRISON QC:
- we still have –

GLAZEBROOK J:
Yes, I –

MR HARRISON QC:
- maintenance and champerty in its watered down form as in *Saunders v Houghton*. We also have abuse of process until we actually get to examine the particular litigation funding arrangements. It's not possible to say whether any adverse features, and there may be none for all we know, are better treated as constituting champerty or having the potential to bring about an abuse of process.

Just going back to, to your Honour Justice Chambers, I mean I, all I can point to is the reasoning at page 95 of the case where there's a summary of the, the discussion of the authorities. Then there's a discussion of *Saunders v Houghton* which in, in, in its turn had declined to follow the Australian approach. So the Court of Appeal in our case is saying, "Well, we agree with *Saunders v Houghton* and that's about as far as it goes. And of course your Honour is, is every bit entitled to go beyond that. But in my submission a case like *Fostif* is quite plainly decided under the influence of the abolition of maintenance and champerty and evinces a more tolerant approach to litigation funding than in the context of abuse of process than I, I, I submit is appropriate in this country.

CHAMBERS J:
Do you think that really is the case though? Because if they really had thought there was an evil in this, in the case before them, they could have done it via abuse of process, couldn't they? But they found there wasn't an abuse of process.

MR HARRISON QC:
Well, but there wasn't an evil because they were dealing with a transaction which was no, no longer tortuous, and that seemed to weigh heavily with them. And, and, and the, the issue there was whether or not the proceedings should be stayed. We haven't reached, this case has not reached that point. The issue is simply whether

the evil is sufficiently in prospect for the Court to order the plaintiffs to make certain forms of disclosure. Ultimately, I won't argue this if it goes back of course, but ultimately we could end up in an Australian position once we've had a look at a range of litigation funding agreements. But there could be – the one that really gets me, I suppose, is in the next Australian case, *Katauskas* or whatever it is, where the litigation funding agreement was of an insolvent company and it expressly declined to indemnify that plaintiff company against any adverse costs order. And the, the, the procedural rules of Court involved in that case expressly provided that there – you could have, could not have a third party costs order, i.e. against the litigation funder, unless the, there had resulted an abuse of process as such. That was what, the term the rule used. So the, the High Court in that case, with a strong dissent from Justice Heydon, said that even, even litigation funding where you decline to indemnify the funded plaintiff against an adverse costs order is not an abuse of process. To which I would say, well, I would hope a New Zealand court would reach a different conclusion even as to abuse of process, but equally, as we've still got at least the remnants of maintenance and champerty, we're also allowed to argue that such a litigation funding agreement is champertous because it is, it is so abusive of the defendant's position to litigate with a view to getting the proceeds but expressly decline to indemnify the poor defendant if you lose.

Now, all of that is ahead of us, I keep submitting, but on a worst-case scenario these appellants could be litigating under precisely that kind of agreement. We will not know until too late when we've run up hundreds of thousands of dollars of costs, ex hypothesi successfully defending the substantive proceedings, we turn around and say, "Well we happen to know there's a litigation funder. We don't know who it is. Will you pay?" "No. We won't."

Those are the kinds of, at the very least at the, at the really abusive end, that the Court needs to be policing at this early stage of the development of litigation funding.

CHAMBERS J:
And why can't –

MR HARRISON QC:
And it cannot happen without the information being provided in the first instance.

CHAMBERS J:

And why can't you protect yourself with a security for costs order given that you do have evidence that these plaintiffs, if not impecunious, are short of funds?

MR HARRISON QC:

Well, I don't want to give evidence from the bar, but security for costs orders are never an adequate protection, in my submission. They are always far too, far too small. They never approximate the actual ultimate costs award, in my experience, and, and it's – you've got to constantly go back and renew the application. It's, it's completely unsatisfactory. A simple solution would have been the one I put to the Court of Appeal, the litigation funder discloses its presence via the plaintiff and an undertaking to pay costs if the plaintiff is unsuccessful is provided. Bingo. You wouldn't even necessarily need anything more than that, certainly from the defendant's point of view.

But coming back to these Australian cases, they are not cases which are, in my submission, the Court ought to be following with the quite different background of the non-abolition and continued viability of maintenance and champerty.

Now we've had – on that issue of course we seem to have had different views. Your Honour the Chief Justice suggested, if I understood you right, that we could go back on *Saunders v Houghton* and in fact –

ELIAS CJ:

Well, I was responding to your persuasive submissions that really it's going to be a huge, effectively legislative exercise to put in place protections to cover any area of legitimate concern based on the remnants of champerty and maintenance.

MR HARRISON QC:

Well, the policy choices are actually across a wider range. On the one hand you could say, well, litigation funding has always been regarded as champerty. Leave it to the legislature to change that. The other, the other end is abolish maintenance and champerty. And I'm arguing for a very low-level solution well in the middle, which is, let's disclose on a case by case basis as the English go, and I'm coming to the English next, let's disclose on a case by case basis and then, with safeguards in terms of redaction, and then see what, what that disclosure reveals in terms of the kind of litigation funding agreement that is being used in the particular case.

Now, I just wanted to go to a couple of –

ELIAS CJ:

By the way, I should indicate that we'll take an adjournment at 3.30.

MR HARRISON QC:

And, and sit then –

ELIAS CJ:

And carry on. Yes.

MR HARRISON QC:

- sit then till 4.30, thereabouts? Okay.

ELIAS CJ:

No, sit then until five.

MR HARRISON QC:

Very good.

ELIAS CJ:

Thank you.

ELIAS CJ:

Right. Well, I was just going to deal with a couple of cases, and they're addressed at page 16 and following of my written submissions. Two cases which, I submit, are instructive. I'd better explain why. The, the English cases have taken a very strict view about solicitors' fee agreements. There's a regime which, like our section 334, permits a certain type of fee uplift agreement and they have concluded that nothing that, nothing that does not fall within that is permitted and what's, and any agreement going beyond it is, is maintenance and champerty no matter what its terms are. So there's a blanket prohibition which addresses the lawyers.

CHAMBERS J:

It can't be called maintenance and champerty though can it? Because the English Parliament abolished that.

MR HARRISON QC:

It can be still, in public policy terms it can. They abolished the torts and the crimes.

CHAMBERS J:

Oh, I see.

MR HARRISON QC:

And the, the, the recent Court of Appeal decision in this country in *Kain v Wynn Williams & Co* [2012] NZCA 563, which is in volume 2 – sorry, I'm jumping around, but just to – *Kain v Wynn Williams & Co* in volume 2 of the appellants' bundle, in *Kain* our Court of Appeal declined to follow the English authorities in relation to a New Zealand lawyers' fee agreement concluded before our section 334 came into being. So *Kain* is interesting as to the New Zealand law for solicitors' fee agreements, the common law, just predating section 334. And what *Kain v Wynn Williams* said is that the English approach to the lawyers' fee agreements in terms of maintenance and champerty is too strict. We think a similar relaxation of the public policy along the lines of *Saunders v Houghton* is right for lawyers at common law pre section 334. So both *Kain*, briefly, *Saunders v Houghton*, and the Court of Appeal in our case have looked at section 334.

But to return, and accept I'll adjourn now, I'm going to now, having set the stage, that's why I'm going to refer to, to particular English Court of Appeal decisions after the break.

COURT ADJOURNS: 3.29 PM
COURT RESUMES: 3.43 PM

MR HARRISON QC:

If I may just enter up myself again. When dealing with the Australian cases I did want to hand in a paper which I came across, this so often happens, researching something else entirely, by Justice Keane who is a Judge of the Court of Appeal of Queensland.

ELIAS CJ:

No more.

WILLIAM YOUNG J:
High Court of Australia.

MR HARRISON QC:
Is he now High Court of Australia?

ELIAS CJ:
Yes.

MR HARRISON QC:
Right.

ELIAS CJ:
And in between Chief Justice of the Federal Court.

MR HARRISON QC:
Right, well, in any event, the paper is headed, "Access to justice and other shibboleths," and gives an alternative –

CHAMBERS J:
He was lucky.

MR HARRISON QC:
– an alternative view of the development of litigation funding in Australia and, in particular, he was quite trenchant about the effects in practice of the case of *Fostif.* It provides a case study of several major pieces of litigation funded litigation which went terribly, terribly wrong and generally provides quite a helpful antidote to the proposition which comes through in the written submissions for the appellants that litigation funding is benign and beneficial and litigation funders can be relied on to do the right thing always. And so I have marked in little brackets some of the key passages. I won't take your Honours through it but I commend it, if I may, as something of an antidote based on experience of a leading Australian Judge who was also, it appears, counselling one of those pieces of litigation.

So to return to the English cases I wanted to look at. The first of those is one of *R (Factortame Limited) v Secretary of State (No 8)* [2003] QB 381 (CA) decisions and that's at tab 12 of our bundle, the respondent's bundle. And one can also be at page

16 of my written submissions. Now against the background that there are special rules –

ELIAS CJ:
Sorry, say that again, the reference to the case.

MR HARRISON QC:
The case is at tab 12.

ELIAS CJ:
Tab 12, okay.

MR HARRISON QC:
Of the respondent's bundle.

ELIAS CJ:
Yes.

MR HARRISON QC:
So in *Factortame* I'd like to just spend a minute based on the headnote. The *Factortame* litigation of course went backwards and forwards and ultimately ended at a point where the fishing companies who had been done out of their fishing were able to pursue a claim for compensatory damages, but the litigation had exhausted their finances by that stage and, as the headnote recites, they entered, this is at (e) of the headnote on page 381, the entered into agreements with a firm of chartered accountants who were already, were owed substantial fees and for eight per cent of the final settlement those accountants agreed to run the forensic accounting side of the case, including hiring independent experts because it was seen that they couldn't provide the expert advice themselves. That's what they did and then the Government turned around and said the accountants were not entitled to claim reimbursement for the accountant's eight per cent because the agreement was maintenance and champerty and the issue about public policy was therefore, it was looking at a contingency agreement, a percentage share agreement but not for a lawyer and on a one-off basis by a party that already, the accountants who already had some interest in the matter and it was held that the agreement was enforceable, over the page, page 382. The Court had to look at the facts of the particular case and the particular agreement, in particular to see whether the terms of agreement

might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, suppress evidence, suborn witnesses or otherwise undermine the ends of justice, and it was concluded after a careful examination that eight per cent was not extravagant, that the accountants were reputable members of a profession that was professionally accountable and the arrangement was okay.

Now the major judgment was delivered by Lord Phillips.

CHAMBERS J:
It's a slightly different issue, though, that arose in that case from here, isn't it, because Factortame was claiming costs from the Secretary of State and on the indemnity basis in the UK was seeking, wasn't it, the amount of money it had had to pay to GT?

MR HARRISON QC:
That's correct.

CHAMBERS J:
So it's a different issue. GT was in fact paid and nothing was said to be wrong with that.

MR HARRISON QC:
It's a different issue but in fact the GT in that case and the plaintiffs were entitled to be treated, to be regarded more benignly than the litigation funder in this case who is doing it purely for profit. In other words –

CHAMBERS J:
But did Factortame at the start of the arrangement or at a subsequent time, did it, was it required by the courts to disclose the terms of its arrangement with GT?

MR HARRISON QC:
Yes, yes, it was.

CHAMBERS J:
Was it?

MR HARRISON QC:

It was, well, when it was acquired or –

CHAMBERS J:

Well that's the key point. I mean obviously it had to disclose it at the time it was seeking costs because it was saying to the Secretary of State we want the eight per cent we've had to pay to GT, but had it been required to disclose it prior to then?

MR HARRISON QC:

I can't answer that question from memory. The use I'm trying to put this authority to is on the general question of the courts' approach to litigation funding for a contingency percentage and the issue being whether the English approach of saying, well, we will look at the individual case and the individual agreement to decide whether it is on the wrong side of the line as against the Australian approach of saying litigation funding is fine and cannot be an abuse of process.

CHAMBERS J:

It seems to me, though, it's been raised in a totally different context in *Factortame*, it's a question of whether Factortame should have been able to recover this amount of money by way of costs which is not the issue before us and wasn't the issue before the High Court of Australia.

MR HARRISON QC:

Agreed, it is being raised in a different context, but the question of how you approach litigation funding issues when they come before the Court however they come before the Court, your Honour would say it matters how they come before the Court but my submission is that once they get before the Court then the issue is, well do we say litigation funding, okay, no longer champerty, cannot be an abuse of process or do we say, there are still issues here around the original concerns, we've only partially liberalised the law and we must look to see, look at this particular agreement to see what its content is, the extent to which it allows the funder to usurp control and according to *Factortame*, the extent to which the percentage fee might make the funder greedy I suppose and open to taking an inappropriate approach.

So Lord Phillips, now I think a visitor to this country or soon to be, delivered the leading judgment and he – and I want to just go on a small digression here, I suppose to the point I hope not only do we need to consider the contemporary

content of the public policy issues at stake here we need to consider the definitions of maintenance and champerty a little bit, I submit, and at 32 on page 399 of the judgment his Lordship defines maintenance as *Chitty on Contracts* does, support of litigation in which the maintainer has no legitimate concern without just cause or excuse, and then there is a definition of champerty also from *Chitty.*

Now the judgment goes on to discuss some of the leading authorities and then at paragraph 40 deals with the leading case of *Giles v Thompson* and the judgment of Lord Mustill in which Lord Mustill approved, and this is summarised at paragraph 42 of the judgment, approved the formulation of Lord Justice Fletcher Moulton in *British Cash and Parcel Conveyers Limited v Lamson Store Service Co Limited* [1908] 1 KB 1006, of a definition of maintenance as, this is just below line C, page 402, "Directed against wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatever and no justification or excuse. For champerty there must be added the notion of a division of the spoils." And at paragraph 44, Lord Phillips says, "This decision abundantly supports the proposition that in any individual case it is necessary to look at the agreement under attack to see whether it tends to conflict with existing public policy," I note the expression "tends to" which was criticised in the Court of Appeal judgment, "that is directed to protecting the due administration of justice with particular regard to the interests of the defendant," and I stress the reference to the defendant. This is a question we have to address.

Now then there is a further discussion of the law relating to conditional fee. There's a note – at paragraph 60 there's a reference to the English position and at 62 referring to the English section dealing with the profession. "More generally, however, section 58 evidences a radical shift in the attitude of public policy to the practice of conducting litigation on terms that the obligation to pay fees will be contingent on success." That's an argument analogous to the one I raised in respect of our section.

Then at paragraph 76, his Lordship returns to Lord Mustill in *Giles v Thompson* and the test of wanton and officious intermeddling and he says just below (e), "That test is appropriate when considering those who, in one way or another, support litigation in which they are not concerned. It is not, however, really in point when considering agreements under which those who are playing a legitimate part in the process of litigation provide their services on a contingency fee basis." And I omit some words. "The public policy in play in the present case is that which weighs against a person who is in a position to influence the outcome of litigation having an interest in that

outcome." So the point is, I submit, that one needs to be careful about simply parroting the definition, the British *Cash and Carry* definition of wanton and officious intermeddling and a better restatement of the tort or principle is the passage from *Chitty* which I referred to earlier, and there is another case which I am coming to which bears that out.

At 83 and 84, his Lordship looks at the, what he calls the agreement to share the spoils. And first he rejects an argument that the terms on which Grant Thornton agreed to provide their service was justified because they were the only way the claimants could obtain access, so he rejects the idea that the end justifies the means in this context. He goes on to say at 84, "A contingency fee agreement which entitles those providing litigation services to a percentage of anything recovered may give rise to particular objection on the ground that it poses a temptation to act in an unethical manner in order to achieve the maximum recovery," and then at 85 the same message, "The greater the share of the spoils that the provider of legal services will receive, the greater the temptation to stray from the path of rectitude. The eight per cent "was not extravagant." And, and so on.

So I'm citing this both because of the discussion about what was a true percentage contingency in a context that didn't involve lawyers and because of the reference to supervising the percentage level of the recovery by the litigation funder.

There's another case that is of interest because, again, it's a recent British case outside the area of lawyers' fees, and that is at tab 14 of my bundle, *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2011] EWCA 1149, [2012] QB 640 (CA). It's mentioned in footnote 27, page 17 of the written submissions. And it's a, it's a case my learned friend touched on briefly involving someone who had a campaign against the defendant hospital who procured an assignment of a cause of action which was capable of alleging that treatment had been negligent. So this person, Simpson, as assignee was assigned the cause of action, wanted to pursue his campaign, as my learned friend said, for the princely sum of one pound he received the cause of action. Headnote page 1424 is sufficient for the moment. There was an argument first about whether the cause of action, being for personal injury, was capable of assignment. It was. But at headnote – at line C, headnote 2, there was a refusal to accept that the, the assignment of a right to litigate when there was no interest, no legitimate interest, shall we say, in the outcome was appropriate.

That was rejected on the grounds of public policy and on the basis of the law of maintenance and champerty.

So this case illustrates that maintenance and champerty may still have some legitimate functions to perform, in my submission. So it, for better or for worse, it continues to be part of our law. *Saunders v Houghton* is correct. Its authority needs to be applied in the context of litigation funding in a non-representative context.

There's another interesting little point about this question of definition of the elements of the tort or wrong at paragraph 22 of that judgment. Incidentally, the judgment recognises *Factortame* as a leading case in the development of the law at paragraph 20, saying the law relating to champerty took another step forward in *Factortame*, but then at 22 it said at G in para 22, "In this context I think that the expression 'wanton and officious intermeddling' is liable to be a little misleading. It can easily be taken to suggest that the person concerned is acting in an arbitrary and capricious manner, but I doubt whether in this context it should be understood to mean anything more than that he or she does not have a sufficient interest in the subject matter of the claim to justify", in that instance, "taking an assignment."

So my submission is that, properly so defined, the litigation funding in this case is both maintenance and champerty and – or presumptively so, has the potential to be so, depending on the terms of the litigation funding agreement. And the courts would, with respect, be abrogating their duty to ensure the due and lawful administration of justice if they simply stood by and allowed cases such as this to proceed without scrutiny of the detail of the arrangements and certainly, at the very least, without revealing to the other side and the Court the fact that a litigation funder is involved.

Now, how are we doing? Not too badly.

And on that topic, I, I confess that I find it difficult to understand how my learned friend can say on the one hand that he's happy with and doesn't challenge *Saunders v Houghton* and its liberalisation of maintenance and champerty, while at the same time contending that maintenance and champerty per se is not up for consideration in the present case. The two arguments seem to me ultimately to be irreconcilable.

ELIAS CJ:

I must say I didn't understand him not to be challenging maintenance and champerty.

MR HARRISON QC:

Well, if so, he must be challenging *Saunders v Houghton*. And I take no point about the scope of the grant of leave to appeal, but I mean let's, let's be plain and – let's be, let's be clear about what, what is being done here or what the Court is being asked to do and let's face that head on, with respect.

There was one proposition that my learned friend put that – I'm really just dealing with – perhaps I'm almost down to miscellaneous rejoinders now, you'll be pleased to hear. My learned friend did submit that an adverse effect of the, or tendency, I think he was prepared to concede a tendency in this instance, of the orders under appeal was that their outcome, the, the, the outcome of allowing the defendant to raise these kinds of challenge, I have him saying, "We'll push up the level of the monetary claim for damages that can be commercially funded," because going through the hoops, in effect, my expression, will, will, will be a disincentive for litigation funders.

Well, I – there's no evidence to support that submission and it's quite simply conjectural and not accepted. It's, it's as conjectural as the submission that the appellants will lose their funding because they've entered into a contract which keeps the agreement confidential and, and if they're compelled to reveal it they'll be in breach of the agreement. If we want to look at commercial forces, I submit that there's only one answer to that. This, this is an attempt, this is an attempt by whoever the litigation funder is to gain a foothold, a procedural foothold and advantage for the future in this country, and if it fails to do so, if not that, this litigation funder, some other litigation funder will modify its approach and fund on terms that it sees commercially, as commercially advantageous. So I simply don't accept the submission that, that there are in fact any adverse consequences.

Now, the part of the heavy reliance of my learned friend on the Australian authorities was a closing point that, given the degree of commercial and financial comity that exists and is to be encouraged between Australia and New Zealand, it is appropriate for there to be an alignment of the law and procedure in, in this area also.

And my response to that is that there are too many underlying legal differences, both substantive and procedural, for this to occur without legislation. The, the substantive

differences of course are failure to abolish maintenance and champerty as torts and the extent to which it's been left declared in the law.

CHAMBERS J:

Just on that topic, does that in fact make any difference? Because it is clear that in England and in those Australian states where the torts have been abolished that the public policy element continues, at least with respect to the agreement between the litigation funder and the fundee, and potentially, as you've shown from cases like *Factortame*, potentially having a further effect towards other parties as well. So that regardless of whether the torts exist, and we're not actually dealing with the torts here at the moment, why can't, why does it make a difference whether or not the torts have been abolished?

MR HARRISON QC:

Well, the difference it makes, I suppose, relates to the use to which the High Court of Australia has put the abolition, with which one can respectfully quarrel. In *Fostif* there are – the, the, the dissenting judgments are, are highly persuasive and, and are to be preferred. But if you, if you don't, if you follow the majority, then the majority is saying, in effect, we – for all purposes in litigation conducted between the litigation funded plaintiff and the defendant we ignore maintenance and champerty. And we only ask –

CHAMBERS J:

Well, they haven't really said that though. That's my point. You haven't brought a claim in tort. Nor had they in the Australian case. In both situations it is public policy that's having an effect through the ambit of potential abuse of process. The Australian High Court did look at abuse of process and they concluded that on the facts of that case, really nothing to do with whether or not a tort existed, the majority concluded there was no abuse, the minority thought it was. But that sort of argument surely could also take place in a jurisdiction where the torts at least nominally continued to exist.

MR HARRISON QC:

I accept that there is force in that analysis, which perhaps demonstrates that there are many points at which the *Fostif* majority approach is contestable. They – on my reading they have read far too much into the statutory abolition. They have also, perhaps because of the, the cases before them they have also taken a very stringent

approach to the making out of a claim of abuse of process. They have not looked at, they have not looked at the prospective situation.

CHAMBERS J:

Yes. I think the point I'm trying to make is you don't like the majority's public policy analysis. You prefer the public policy analysis of the dissenters, and remember those dissenters nonetheless developed their argument in a context where the tort had been abolished. That didn't prevent their take on the public policy analysis. So isn't it just a question of which of the public policy analyses is the more persuasive, irrespective of the status of the torts?

MR HARRISON QC:

It certainly is a key question, which public policy analysis is more persuasive? And I suppose what I'm submitting is that the flaw in the Australian approach is to fail to engage in a public policy analysis based on the particular funding transaction and agreement in question. Rather they've chosen to, to lay down a general approach, viewed through the spectacles of the abuse of process doctrine as they conceive it to be. By contrast with the English approach, which remains focused on the principles and public policy of maintenance and champerty as a doctrine in its own right, and looking at the individual transactions and their tendency.

And, and the English approach is entirely consistent with the approach traditionally adopted in this country. The issue of extent to which the funder takes over control of the litigation has been emphasised in previous decisions, including a case I've provided, *Re Gellert Developments Ltd (in liq)* (2001) 9 NZCLC 262 (HC), which is a decision of your Honour Justice Glazebrook in which you followed an earlier decision of Justice Anderson and emphasised that when considering whether to approve a particular litigation funding arrangement in the context of a liquidation there, the extent to which the funder is permitted to take over control of the litigation is a critical consideration. That's been the approach we've adopted in this country. We're in the chicken or egg –

GLAZEBROOK J:

Although not in the Court of Appeal, because there's nothing about control in their paragraph 67. Which on the basis of the previous authorities seemed to be a lack. Of course it may be that that's thought to be not of interest to the defendant and more of interest to the plaintiff, especially in a representative case, because of the sort of

matters that can occur in a representative case with that disconnect between the actual plaintiffs and the lawyer.

MR HARRISON QC:

I just repeat the point I made earlier about paragraph 67 of the Court of Appeal judgment in this case, which is that it is only dealing with disclosure, not the test to be applied to the, the agreement when disclosed. There is a concern.

GLAZEBROOK J:

Well I understand that, except that why, why would they leave out one of the main elements that may on the previous authorities create some difficulties in the disclosure?

MR HARRISON QC:

There is a –

GLAZEBROOK J:

Unless it's that – it had already been looked at, of course, by Justice Allan and he decided there wasn't, as I understand it, there wasn't an undue element of control.

MR HARRISON QC:

Yes. He said – his – there wasn't an unacceptable level of control, which of course begs the question –

GLAZEBROOK J:

Well, there'll obviously always be some control in the litigation funding agreement because you're not going to throw your money in and have absolutely no say, one assumes.

MR HARRISON QC:

Quite. But to decide, we're on a side point here, but to decide whether the level of control is acceptable ex parte is itself unacceptable because there may be any number of points which counsel for a defendant can raise.

GLAZEBROOK J:

But that was my point I was meaning, that I don't think – why wouldn't they say that they had to disclose control?

MR HARRISON QC:

Well, no, they have in effective, effectively required the matter of control to be disclosed by saying that the, the, the agreement must be disclosed other than redaction of certain details. And there is a reference somewhere in the judgment of course.

GLAZEBROOK J:

So you say they say the whole thing must be disclosed under 67 subject to redacting anything that's unacceptable.

MR HARRISON QC:

So –

GLAZEBROOK J:

Why did they – I mean the first three are fairly, the first, well the first one, I've lost 67 of course which is why I'm being rather vague but the first one was the name of the litigation funder which would be in the litigation funding agreement. The next was whether they're subject to the jurisdiction which I which I accept would not be –

MR HARRISON QC:

– sensitive.

GLAZEBROOK J:

Or not be sensitive but wouldn't be in the litigation agreement but all the other things would be in the litigation agreement. So you say the order was disclose everything except litigation sensitive?

MR HARRISON QC:

Well the order addressed, the order is at –

CHAMBERS J:

Eighty two.

GLAZEBROOK J:

Eighty two.

MR HARRISON QC:

The –

CHAMBERS J:

Page 82.

MR HARRISON QC:

Well, 77 and 78 as well. The direction was to disclose a redacted version, this is 77 in the middle, "Within 10 working days." If the present appellants consider this raises an issue of privilege they make an application claiming privilege. So privilege.

GLAZEBROOK J:

Well, don't they say you give a redacted claim only with that information in 67?

MR HARRISON QC:

Yes, they – the order is to disclose a redacted version.

GLAZEBROOK J:

But only with the information there, so it doesn't say anything about control which on the previous authorities and *Saunders* was actually one of the main points wasn't it?

MR HARRISON QC:

Well I think, I'm trying as we debate this, to find the passage in the Court of Appeal judgment but there is a reference to the issue of control of the litigation by the funder as being a matter –

ELIAS CJ:

Is it a consideration not however carried through into the formal orders?

GLAZEBROOK J:

Because I thought they had said well we're only going to have the minimum disclosed rather than the – that's why I put it to you before, that you would ask for a wider disclosure.

MR HARRISON QC:

Well can I just go back to the control. The first point is at 77, third sentence, they identified the extent of control by the funder as a matter of interest. The way they

dealt with the disclosure was to say as to the agreement the entire agreement is to be disclosed to the Court and the defendant subject to redaction. They identified –

GLAZEBROOK J:
Where do they say that?

MR HARRISON QC:
Well –

CHAMBERS J:
Well the formal order of the Court is at page 82. Unfortunately, it is somewhat ambiguous as to, I think as to what the formal order – it could be read as Mr Harrison suggests, it could be read as though it is only the information in 67 I'm not very sure.

GLAZEBROOK J:
Well that's how I read it, that's all, but…

MR HARRISON QC:
Well, yes, so that the redacted version provides the information but if, and this is the way I interpret it, if even with redaction or with or without redaction, there is an issue of privilege, they get a chance to raise that. Equally –

CHAMBERS J:
I'll tell you why it must mean what you've just told us now that I look at it. (b) is what indicates, it must be what you mean. You have to give a redacted copy of the agreement, now the things that you can redact are stated at paragraph 68 but you must in addition, if need be, reveal the information set out at 67 because for one thing the litigation funder's financial standing and viability will not be in the agreement. So it's clear that 67 is setting out things that must be disclosed whether or not they are in the agreement.

ELIAS CJ:
Yes.

CHAMBERS J:
Yes.

MR HARRISON QC:

And then the two mechanisms to deal with the possibility that this order could in practice require disclosure of something that gives an unfair litigation advantage or involves privilege, a mechanism that the plaintiffs apply to protect their privilege or the redacted version may be the subject of an application by the defendants. So it's an attempt at balancing between the competing interests which, in my submission, should stand because there are sufficient safeguards to be worked out in due course in an area which is quite novel in this country, both the practice of litigation funding and the effects of the liberalisation of the law by *Saunders v Houghton.*

ELIAS CJ:

Mr Harrison, there's reference in the submissions to the fact that in Australia litigation funders often publish their agreements. Is there any requirement, any court requirement through rules or any other form of regulation requiring such publication?

MR HARRISON QC:

Well there's a reference to that in the Court of Appeal decision at paragraph 72, page 103 of the case.

ELIAS CJ:

Yes, that's what I was thinking of.

MR HARRISON QC:

And I've provided a paper by a senior personnel member of IMF, the largest funder, which is among the materials and I have given the footnote, the reference to the fact that their disclosure occurs.

That long research paper which I also refer to reviews some of the disclosure issues but I'd have to say that the practice in Australia seems to be by no means consistent and perhaps a little opportunistic. For example, if I may just perhaps deal with a point –

ELIAS CJ:

Well, there is this reference to the Federal Court's practice note.

MR HARRISON QC:

Yes, yes.

CHAMBERS J:

Although didn't I think Mr Mills, in his submissions, says that there's a statutory reason for that, isn't there? Didn't I read somewhere that it's because of something under some corporation's law or some –

MR MILLS QC:

In one of the cases we looked at that was true.

ELIAS CJ:

One of the cases but this seems to be a more general practice note doesn't it?

CHAMBERS J:

It's because they're otherwise regarded as lenders and in breach of some statutory provision there or something –

MR HARRISON QC:

Yes, that's right, there was a –

CHAMBERS J:

– I can't remember the details.

MR HARRISON QC:

– decision that effectively ruled that, put loosely, a litigation funding agreement was, and a class action was, some kind of prospectus, like a prospectus.

ELIAS CJ:

Yes.

MR HARRISON QC:

There had to be some disclosure and that set the cat among the pigeons for a while.

ELIAS CJ:

But this practice note can't be directed, one wouldn't have thought, at such substantive law provision, it must be a –

MR HARRISON QC:

Yes, it relates to representative proceedings generally, that's my understanding.

ELIAS CJ:

I see, for, yes, I see.

MR HARRISON QC:

And at the end of the day, as I submit with footnoted references, the practice in this country in other contexts has been to put the litigation funding agreement before the Court for approval, or the assignment where the assignment is in issue, and at the end of the day – on one hand you can say, well, this arises in a different context, yes, all right, but is the sky going to fall in if a redacted version of the litigation funding agreement is provided to the Court and the defendants? My submission is no. It's happening in Australia, it's happened here in the past, but it does enable the Court to supervise what is, could be quite a critical issue and a growing issue. Does the Court really want to relinquish control entirely right at the start of the development of the litigation funding industry in this country? Are your Honours so confident that that is a wise step and if you do it in this case where it's a non-representative claim what are the implications for representative claims where a different regime is being set up and we're about to have a million dollar claim against the trading banks. It's, it's, it needs to be dealt with incrementally and cautiously, and that's effectively what the Court of Appeal has done.

Next round, if we don't like what's in the litigation funding agreement as disclosed to us, we might get a definitive ruling on the permissible limits and terms of such agreements.

GLAZEBROOK J:

Well, what do you say would happen in that case? Do you say that the person would be told that they couldn't be funded? Would you – would the matter be stayed until they found acceptable funding? What – and what basis would there be for that?

MR HARRISON QC:

Well, if need be, the answer is yes, there might have to be a permanent stay, and I give the example of the *Fostif* case where a litigation funder is funding and is, but has declined, expressly declined to fund an adverse costs award against the plaintiff. In my respectful submission, that is not something – it's only tolerated in Australia because there's an explicit rule that funnels it through abuse of process and would not, ought not to be tolerated in this country. Such an agreement should be stayed.

GLAZEBROOK J:

But what's that got to do with maintenance and champerty? Because the issues with the maintenance and the evils are not that you don't pay a costs award. The evils are actually related to suborning witnesses. At the matters that were indicated before, that you might act improperly in the litigation. But they're nothing to do with not paying costs awards.

MR HARRISON QC:

Well, the –

GLAZEBROOK J:

I mean, it might be a bad thing. I'm not suggesting in any way that it's not a bad thing. But I don't know that it has anything to do with maintenance and champerty.

MR HARRISON QC:

Well, with respect, it does in my submission, your Honour. The –

GLAZEBROOK J:

Well, not in terms of the traditional justifications for the rules and the tort of maintenance and champerty –

MR HARRISON QC:

Well –

GLAZEBROOK J:

And the public policy reasons, which are focused on the conduct of the litigation and the, the temptation that that might put someone to behave wrongfully.

MR HARRISON QC:

Well again, might I respectfully disagree. That the, the – generally speaking, and without being exhaustive, the, the public policy considerations look to be protective of the interests of the plaintiff where appropriate, of the defendant where appropriate, and the interests of the purity of the administration of justice. That, that phrase has been used, I think, by Lord Mustill. What it means is we are looking at what sort of a civil justice system should we have? Should we permit what would otherwise be champerty to be used in a context where, purely for profit and possibly a disproportionate percentage of profit, the litigation funder is there but not prepared to

stand behind the plaintiff in, in the case of an adverse costs award? My – I'd, I'd be arguing, faced with such an agreement, that the Court should simply not tolerate it. We don't know whether such an agreement exists in this case until it's disclosed.

So probably on, on that note, everything else being covered in my submissions, unless your Honours have anything more for me, I'll close.

ELIAS CJ:
Thank you, Mr Harrison.

Yes, Mr Mills.

MR MILLS QC:
Yes, thank you, your Honour. I'm aware it's been a long day so I'll try to just deal with a few points. I sense that the issues are pretty well understood and I think I'm happy to leave it in the hands of the Court, really, to reach a decision. But there are just one or two things I want to touch on.

First of all, the issue as to what am I really saying about maintenance and champerty? I didn't realise I was that obscure but perhaps I am. So, my friend said let's face it head on. Well, let me then again make it clear what my position is on maintenance and champerty. The submission is that where the litigation funding in respect of any individual claim is any longer to be regarded as maintenance and champerty, I am putting that directly in issue and saying that in my submission it ought not to be within this jurisdiction. So, and as I said before, I separate off the representative actions, but that is most firmly my position here that it ought not to be.

Now, just on another point, came up late, Chief Justice had a question that I think you put for – were talking to my friend about and that is that practice note. You'll note if you look at the footnote there it is about representative actions only.

Next thing I wanted to touch on briefly is this question of the significance of the abolition legislation which my friend placed considerable weight –

ELIAS CJ:
I'm sorry, does that mean there's no comparable practice direction in relation to litigation funding more generally?

MR MILLS QC:

That is my understanding. I ought to be hesitant about that –

ELIAS CJ:

Yes.

MR MILLS QC:

- because I haven't done personal research but my understanding is, like so many of these cases, that they've been focused on –

ELIAS CJ:

They generally arise –

MR MILLS QC:

- representative actions.

ELIAS CJ:

- in representative – yes.

MR MILLS QC:

Yes. Yes. And for the same reasons that here we've gone, focusing on class actions rather than the more general question.

Now, on the abolition Acts, the one matter I wanted to draw your Honours' attention to is the way that was dealt with in *Houghton*, and you'll find that at page 502 of our authorities, so that's volume 2 at paragraph 73, and I think what's –

ELIAS CJ:

Sorry, what page of the volume?

MR MILLS QC:

502, according to the note I made, and paragraph 73. Yes, it is. Yes, I'll just take you through this but I think it's a fair reading that what you see here is the Court looking, being conscious of the fact that there's been statutory abolition in Australia, looking at it, but really attaching little significance to it in terms of what the New Zealand Court of Appeal could do and should do in *Houghton*. And you'll see it starts out, "In Australia there has been legislative removal of the torts of maintenance

and champerty. But Australian legislatures have taken care to ensure that their removal does not lead to abuse by members of the legal profession," a point that's been canvassed pretty fully.

And then 74, "Notwithstanding such constraints on legal practitioners, the High Court of Australia has declined to reason that litigation funders, not officers of the Court nor subject to Law Society discipline, should be subjected to analogous controls," and then the references. And then the, as the Court says, "We must consider: (1) whether the absence of New Zealand legislation abolishing the torts of champerty and maintenance coupled with the reference to those torts in s 334(2)", which the Court's been taken to by my learned friend, "bars this Court from reviewing the common law and; (2) if not, whether and to what extent we should follow the Australian lead."

And then you'll see over on the next page, I won't take you through this in detail, but canvassing a few cases, and then at paragraph 77 saying, "The common law torts of maintenance and champerty were created in an era before the courts had the capacity to deal with unruly nobles" and so on. And then, "The modern Australian approach," this is at about line 32, "seen also in Canada, is to face these realities directly and make a judgment according to the merits of each case," which, in my submission, is this abuse of process focus that I'm supporting.

And then they move on and say at paragraph 78, "We have concluded that the common law in other jurisdictions has moved on and access to justice and comity with other States means we should follow." And then they touch on the Lawyers and Conveyancers Act 2006 and reach a conclusion, at 79, "that, like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where," then they set out the three points that we've looked at before, and of course the issue that's been, that I've been raising in part about the Court of Appeal judgment that's under appeal here is that those three points that are set out in paragraph 79 have then been treated as equally applicable in individual litigation.

So really, the point I make about that to the Court is that, despite the weight that my learned friend has placed on the significance of the abolition Acts there, my reading of the judgment is that really it was a matter of interest, but it wasn't seen in any way as a barrier to the Court of Appeal making changes in the common law if it thought it

was right to do so. And I think that's consistent with a point, I think it was coming from Justice Chambers, about the fact that the policies underpinning maintenance and champerty remain when the abolition Acts are passed at any rate and that so it does not prevent them coming into play when you focus directly on abuse. It just means that instead of getting caught up in what, in my submission, are distracting issues when you have to come at this obliquely through maintenance and champerty, you can focus directly and ask the right questions.

ELIAS CJ:

Mr Mills, I meant to ask about the position in Canada. I don't know that it's – is it separately canvassed in the submissions?

MR MILLS QC:

No it's not.

ELIAS CJ:

Was that a – were there statutory reforms of the common law there?

MR MILLS QC:

Well I'm not able to give you a confident answer on that.

ELIAS CJ:

No. That's all right. That's all right.

MR MILLS QC:

My understanding from a brief discussion I had about it with Ms Grant is that, like so many other things in Canada, you've got a lot of provincial variation and it, and it won't be a federal issue, it will be a provincial issue. And I know from my time there that the provinces can vary quite, quite sharply. But I – beyond that I –

ELIAS CJ:

I just wondered, in this case, *Saunders v Houghton*, the Court of Appeal doesn't go into – there's just this reference to it, or is there some actual discussion of the Canadian cases?

MR MILLS QC:

I don't think there's any discussion at all.

ELIAS CJ:

No.

MR MILLS QC:

Just a passing reference. So I would help you if I could –

ELIAS CJ:

Thank you.

MR MILLS QC:

- but I'd probably just be misleading you. So I should say nothing.

Now, next issue I wanted to touch on was the question of where my friend started from when he was structuring his argument, and first question was the supervisory powers of the Court. And remember that's where he started and asked that question, does the Court have supervisory powers in respect of this?

Now, at risk of reopening a big issue at nearly 5 o'clock, let me say this. I accept of course that in a general sense the Courts have got jurisdiction to look at issues that might constitute an abuse of its own processes. But, of course as with all other powers, they need to be exercised for a proper purpose. And, for example, it would not be considered proper for the Courts to ask and require information as to whether somebody's insured. Plenty of authority on that. But it seems to me, although I've not seen any case to confront this, that there might be circumstances in which abuse of process issues begin to concern the Court where there might be something about an insurance policy, some element of legality about what the policy is covering, which might emerge as a potential aspect of an abuse of process issue. Then, I would've thought, the Court would have the power to require even an insurance policy to be disclosed. But – so that's where I get to on this really, that, yes, the Court certainly does have inherent and both, or both inherent and under the Rules powers, but it must be exercised for a proper purpose, and my submission, which I made before, is that here the power is being built upon the reliance that maintenance and champerty still applies for litigation funding, and absent that, any exercise of the power in respect of abuse of process would need some evidence on that.

ELIAS CJ:

Well, that doesn't seem to be what is being said in *Saunders v Houghton* at 79.

MR MILLS QC:
No, I think that's fair.

ELIAS CJ:
So you are distancing yourself from that?

MR MILLS QC:
I'm distancing myself from it only in respect of a distinction I draw between representative and individual actions. I'm not challenging what the Court of Appeal has done.

ELIAS CJ:
You say that the proposal does not have to be approved by the Court as an additional consideration? The Court in individual litigation is concerned only with abuse of process?

MR MILLS QC:
Yes. Yes, that is what I say.

On –

ELIAS CJ:
Similarly, would you say that the Court doesn't have to be satisfied there's an arguable case for rights that warranted vindicating?

MR MILLS QC:
I say that as well.

ELIAS CJ:
Yes.

MR MILLS QC:
I say that will get tested in the normal way as it's done here, if somebody wants to apply for summary judgment as a defendant or to strike out, in other words I come back to the point I started with really which is that absent very, very compelling reasons to the contrary, an individual litigant ought to be entitled to proceed on the

same basis whether they are self-funded or funded from somewhere else, be it trade association, union or litigation funding.

Now it may be that there are compelling reasons why that should not be the case here. In my submission there are not, but because it does not have the imprimatur of, and the authority of, the High Court rule that applies to representative actions and because, in my submission, I'm not going to go back over ground I've already covered, but, in my submission, because there are significant implications of the conditions the Court of Appeal has laid down in creating an unequal position for litigation funded plaintiffs from those who are not, that there needs to be a convincing reason why one would do that. In my submission, that convincing reason has not been shown and to the extent that there are issues, they are properly and better addressed by evidence of abuse of process.

On section 334, I think that's been very adequately covered. I agree of course, with respect, completely with what Justice McGrath and Justice Chambers were saying. It is nothing more than Parliament saying, well, because the existing law in maintenance and champerty in this country might apply to this we need to have this provision that says, if you do this it's okay and that's all you are entitled to do.

ELIAS CJ:
Well except that it could equally be said that the legislature, having turned its mind to it, has come up with a carve-out in section 334 or whatever it is.

MR MILLS QC:
Yes, yes, I agree they have done that but what I respectfully agree with what their Honours have said on this, that it is not a –

ELIAS CJ:
It doesn't present –

MR MILLS QC:
– not a legislative endorsement of maintenance and champerty.

ELIAS CJ:
– no, okay.

CHAMBERS J:

I don't think I necessary think that, Mr Mills, because I am quite attracted to what the Chief Justice has put to you on that one.

MR MILLS QC:

All right, well then, I will disassociate you from my proposition, your Honour, let it stand on its own feet, or fall on its own feet.

ELIAS CJ:

And again, a different view would be contrary, not that we can't be contrary to *Saunders v Houghton*.

MR MILLS QC:

The advice on the termination of funding which came up as an issue. In my submission that's a very significant issue for a defendant to be told and I can comment on that from direct experience in a very significant arbitration I had some years ago where before the arbitration started it became clear that my instructing solicitors had done a very poor job of managing a pool of money and there was no more money and, of course, had that been known to the defendants, any settlement would not have been worth anything. So in those circumstances, I ran it through for them and fortunately was ultimately successful so I got paid but it became absolutely critical that the defendants had no idea that there was a funding problem.

WILLIAM YOUNG J:

Why?

MR MILLS QC:

Because as soon as you know that you know you've got a very weak bargaining party in terms of striking a settlement.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Except that you were prepared to run it.

MR MILLS QC:
Well, I was, but the notion that somehow as a routine matter it's neutral, which as I understand it is the position that's been taken, that there should be a disclosure if in some stage during the course of funded litigation the funding ceases, in my view is highly sensitive information that offers an enormous tactical advantage to the other side.

Now this proposition again about still issues to be worked through, that it can all take time, and so on. Of course, that is exactly the concern that I've expressed.

ELIAS CJ:
What did you do, did you settle it?

MR MILLS QC:
No, I won it.

ELIAS CJ:
Well done.

MR MILLS QC:
It was an arbitration in front of Sir Ian Barker. I felt very strongly about the position of the clients and so, in fact, the reason that the question of not enough funding came to a head was that Sir Ian was insisting on a substantial fee being paid before the arbitration started. The money wasn't there. I said, "You can have my last bill back and you can pay him."

ELIAS CJ:
Too much information, Mr Mills.

MR MILLS QC:
But, so, I think that's a real issue about any requirement that that be done.

Now, on this issue that's come up several times and is a significant one about whether the issues that have now become apparently so significant are sufficiently before the Court, I do just note in passing that *Fostif* came up on an interlocutory issue. That's how it arose there, it was an interlocutory issue that ended up in the High Court of Australia.

ELIAS CJ:
They make mistakes too.

MR MILLS QC:
Yes, well, of course I don't think it was a mistake.

Costs issue, I just briefly in passing that if what my friend wants is indemnity costs, in my general position on that, although I think it's at the side of what's before the Court, is, why should a, why should a defendant be in any better position with a litigation funded plaintiff than they would be with any other plaintiff, and they don't get an early order for indemnity costs against plaintiffs generally. I – and so the notion that somehow there should be entirely different approach just because of litigation funders, well, I think it is off to the side. I just note that the case for that seems to me not to be made out.

Again, another issue that's off at the side but I just mention it in case it's of interest to the Court, the question of disclosure, I'll just give you a reference in the authorities of an Australian case which is at page 439 which is on privilege and I think, from the reading I've done, is fairly typical, and that is that the Australian courts at any rate are quite frequently treating the litigation funding agreements as privileged because they contain legal advice, and you'll see that at page 439. The case is, it's a very short case, the decision of Justice Santow, *Re Global Medical Imaging Management Ltd (in liq)* [2001] NSWSC 476, and it's at paragraph 7. And that's there if it's of any value at all.

And other than that, I think, unless there's something my... I've been told that we've arranged copies of *Elfic*, so if you'd like those to be handed in to the registrar we can do that.

ELIAS CJ:
Yes I would. Thank you.

MR MILLS QC:
And other than that, unless there's any questions, that's my submissions.

ELIAS CJ:
No. Thank you.

Thank you counsel for your helpful submissions. We'll reserve our decisions in this matter.