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ARTICLE

How Far Can Litigation Funders Go? The New Zealand Case of *PwC v Walker*

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Introduction

New Zealand has been a late bloomer in developing laws on litigation funding and representative actions. Without waiting for the law to catch up, the use of litigation funding arrangements has increased in recent years. The New Zealand Supreme Court decision in *PwC v Walker* exposes the potential limits of litigation funding arrangements – and uncertainties over their legality.[1]

After a hearing in New Zealand's highest court on whether certain litigation funding arrangements were an abuse of process, but before judgment, the parties settled their dispute.[2] Nevertheless, the majority (Glazebrook, Arnold, O'Regan and Ellen France JJ) believed that the case involved matters of importance and so decided to hand down the decision they would have made and the reasoning they would have given, had the case not settled.[3] Although the Chief Justice believed issuing a judgment was unwarranted, Elias CJ put her dissent on record in response to the majority.[4]

The liquidators of Property Ventures Limited ('PVL'), a failed property development firm, brought a claim against the auditors of PVL alleging that they had been negligent and in breach of contract when auditing PVL.[5] It was alleged that but for the auditor's negligence, PVL's operations would have been wound up sooner, avoiding PVL's ongoing losses and deepening insolvency.[6]

SPF No. 10 Limited, a litigation funder, funded the liquidators' claim under an agreement whereby the funders would cover the 'project costs' of the proceedings. In the event of a settlement or a successful outcome, the funders would be entitled to the repayment of the project costs advanced as well as the greater of a percentage of the proceeds, or a further payment of 200 per cent of the project costs (the 'Funding Agreement').[7]

The Funding Agreement was conditional on an existing general security agreement ('GSA') over PVL's property being assigned to the funders (the 'Allied Assignment').[8] The Funding Agreement and the Allied Assignment also gave the funders substantial control over the liquidators' claim, as they would have full consultation rights and power over whether the claim was discontinued or settled.[9] The Court held that the two instruments were interlinked, and were to be considered together.[10]

The appeal concerned the auditor's challenge to the validity of the funding arrangements; with an application for a stay of proceedings, on the basis that the Funding Agreement and Allied Assignment were effectively a bare assignment of PVL's cause of action, which is an abuse of process.[11] Both the High Court and Court of Appeal held that the assignment was not an abuse of process.[12] The Supreme Court would have reversed that decision but for two 'new developments' which altered the character of the arrangements. Following the Court of Appeal judgment, the funders made undertakings which, in the eyes of the majority of the Supreme Court, meant that the arrangements fell short of a bare assignment, and were therefore permissible.

Notes

1 *PricewaterhouseCoopers v Walker and Ors* [2017] NZSC 151 [6 October 2017].
2 At [4].
3 At [4].
4 At [99] and [102].
5 At [1].
6 At [14].
7 At [18]-[31].
8 At [2] and [31].
9 At [26]-[28].
10 At [80].
11 At [3].
12 At [58]-[61].

Was the arrangement an effective assignment of the cause of action, amounting to an abuse of process?

Although litigation funding is permitted in New Zealand, a court can stay proceedings for abuse of process, which extends to arrangements amounting to an effective assignment of the cause of action.[13] This contrasts with the much narrower Australian position, which only permits challenges to litigation funding agreements on traditional abuse of process grounds, such as proceedings that deceive the court, are fictitious, shams, manifestly groundless, or vexatious or oppressive.[14]

Substantial control over the litigation and proceeds

The first issue considered by the majority was whether the funders secured substantial control over the litigation and over the proceeds of litigation. In determining whether there was an *effective* assignment, the majority looked at the level of control and profit share of the funders, as well as the role of the lawyers acting.[15] Essentially, the Court had to determine whether the funders had near-total control coupled with near-total benefit in relation to the litigation.

Counsel for the auditors argued that the arrangements constituted an assignment of PVL's cause of action, at least in substance, because of:[16]

(a) the likelihood that the proceeds of the claim would accrue to the funders, with only a theoretical possibility that unsecured creditors would benefit also; and

(b) the level of control that the funders had over the conduct of the litigation, mainly due to clause 6.3 of the GSA (which provided that in the event of default, the funders could 'bring, defend, submit to arbitration, negotiation, compromise, abandon or settle any claim or proceeding, or make any arrangement or compromise, in relation to the Secured Property').[17]

When the assignment of the GSA took place, the proceedings were already on foot – funded by the funders.[18] By this point, PVL had no realisable assets other than the potential value of the litigation itself.[19] Given these circumstances, the majority considered it arguable that the liquidators *had* taken a bare assignment of the cause of action against the auditors, because the funders had legal control over the proceedings; and an entitlement to all, or substantially all, of the proceeds of a successful claim.[20]

The effect of the undertakings

Following the Court of Appeal decision, the funders and their associates gave undertakings that proved decisive to the Supreme Court majority's decision.

First, counsel for the funders made an undertaking that the funders would not seek to rely on clause 6.3 of the GSA and would modify it accordingly.[21] Second, the chairman of the funder's parent company swore an affidavit to the effect that the funders had undertaken to pay part of the proceeds to the liquidator for the benefit of the unsecured creditors of PVL.[22]

Neither undertaking had been formalised in a written contract or deed at the time of the hearing.[23] Even so, the majority considered that, in substance, the two undertakings would have been enough to dispel any concerns that the arrangements amounted to the assignment of a bare cause of action.[24] The combined effect of the undertakings meant that the funders had something less than substantial control over the proceedings and would not be the only party gaining substantial benefit from them.[25]

However, the majority voiced its dissatisfaction at receiving the undertakings so late in the proceedings and in an informal manner.[26] Had the dispute not settled, it would have directed that the liquidators and the funders enter into a contractually enforceable document recording the two undertakings, which would then be filed in the High Court and served on the auditors.[27]

Notes

13 At [57] and [119].
14 At [57].
15 At [57] and [76].
16 At [68].
17 At [34], [67] and [68].
18 At [81].
19 At [81].
20 At [82]-[90].
21 At [87].
22 At [90].
23 At [41] and [50].
24 At [91].
25 At [91].
26 At [93].
27 At [94] and [95].

The dissenting Chief Justice

Elias CJ considered that it was unnecessary to issue judgment.[28] The proceedings involved a unique dispute concerning particular agreements between the parties that had been settled and was unlikely to arise again in similar circumstances.[29] The Chief Justice was apparently concerned that the majority judgment would be treated as having a broader significance and cementing a 'liberal' approach to litigation funding found in the earlier case of *Waterhouse v Contractors Bonding Ltd* – without full argument.[30]

In the Chief Justice's view, the very legality of litigation funding was contestable (even though this had been assumed by both parties in the Court of Appeal, and not raised before the Supreme Court).[31] In short, Elias CJ proposed a 'root and branch' review of litigation funding, in light of the policy rationale behind the torts of champerty and maintenance. These seek to prevent litigation conducted by those 'otherwise unconnected with the claim' and 'for their own interests'.[32]

Nonetheless, the Chief Justice observed that litigation funders needed to have some control over the litigation, and receive some benefit from it.[33] If they were not allowed any self-interest in the proceedings, funding arrangements would not be viable.[34] Where to draw the line is 'in part a matter of degree'.[35] Since there is no legislative regulation of litigation funding, it is up to the judiciary to ensure that the courts are not misused, with causes of action treated as things 'bought and sold' for profit.[36] Close scrutiny by the courts is, therefore, desirable.[37] Elias CJ considered that a funder's self-interest in the arrangement would likely be objectionable if their control over the litigation went beyond that which was reasonable to protect their investment.[38] The Chief Justice thought it was arguable that the funding arrangement in this case was a 'transfer of a bare cause of action for profit' and therefore a 'champertous… trafficking in litigation'.[39] Elias CJ emphasised, however, that this was only a 'provisional' conclusion, as the point had not been subject to full argument before the Court.[40]

Contrary to the majority, the Chief Justice did not think that the two undertakings were relevant to the question of whether there had been an assignment of PVL's cause of action to the litigation funder.[41]

Conclusion and controversy

On the view of the majority, for there to be an effective assignment of a cause of action, something close to total benefit and total control of the litigation needs to be transferred to the funder. However, this decision shows that litigation funding arrangements can be modified so that they fall short of an effective assignment – for instance, by the addition of undertakings removing some of that control and benefit from the funder.

There is always the chance that the Chief Justice's dissent may prompt further consideration of litigation funding in New Zealand. Elias CJ put forward strong indications that the approach of the courts could, and should change. In an unusual step, the funder's parent company, the LPF Group, has laid an official complaint against the Chief Justice over what it says are 'unfair and unjustified opinions' which have created 'uncertainty over the validity of legal funding in New Zealand'.[42]

Notes

28 At [99].
29 At [102], [109], [110] and [135].
30 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89; *PwC v Walker* at [113] and [135].
31 At [99], [100] and [111].
32 At [121] citing *Wild v Simpson* [1919] 2 KB 544 at 563 per Atkin LJ.
33 At [119].
34 At [122].
35 At [122].
36 At [121] and [131].
37 At [121].
38 At [122].
39 At [134].
40 At [134].
41 At [105] and [106].
42 Sophie Boot, 'Litigation funder LPF lays judicial complaint against chief justice' <www.nbr.co.nz/article/litigation-funder-lpf-lays-judicial-complaint-against-chief-justice-b-209920> 14 November 2017.

International Corporate Rescue

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