

Litigation funding and the impact of the decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*

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Introduction

“Litigation funding” has become an increasingly significant issue in the administration of justice over the last ten or twenty years. The catalyst for this was probably the combined effect of the abolition, in England and some Australian States, of the torts and crimes of champerty and maintenance and the reduction in the availability of publicly funded legal aid.

The torts and crimes of champerty and maintenance imposed limitations upon the feasibility of a third party providing financial assistance to a litigant. However, the abolition of those torts and crimes did not provide an unambiguous endorsement of litigation funding. A question remained whether there was a public policy against litigation funding. The statutes which abolished the torts and crimes expressly reserved “any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal”¹. In England, it was held that notwithstanding the abolition of the torts and crimes, there remained a public policy against litigation funding in certain respects².

Notwithstanding the ambiguity of the position, litigation funding has become increasingly prevalent since the abolition of the torts and crimes. Litigation funders have entered into arrangements whereby they have obtained both significant control over funded litigation and a significant percentage of the ultimate proceeds. This, in turn, has led to an increasing number of cases in which defendants have attempted, with limited success, to resist the prosecution of funded proceedings. A principal question which has arisen in these cases was whether there was any principle of public policy which defined

¹ See eg s 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW).

² See eg *Giles v Thompson* [1994] 1 AC 142 at 153-154, *Stoczni Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 151f.

the boundary of legitimate litigation funding and if there was such a principle, how a defendant (or anyone else) could utilise it in a defence to the funded proceedings.

The effect of the decision in *Fostif*

This question has now been considered by the High Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (hereinafter “Fostif”). The decision provides little comfort to those who believed that the common law could provide a guiding principle, defining the boundary of “legitimate” litigation funding. Rather, it casts doubt upon whether there is any substance in any public policy objections to litigation funding and substantially limits the ability of defendants to challenge proceedings on the basis that they are funded, no matter how extreme the nature of the funding arrangements.

Whilst a number of differing views were expressed in the judgments delivered in *Fostif*, it can certainly be said that the majority of the High Court took the view that the common law had a very limited role in preventing the prosecution of proceedings funded by third parties.

The decision concerned proceedings which had purportedly been commenced as representative proceedings under Part 8 r 13 of the Supreme Court Rules, on behalf of numerous tobacco retailers, seeking recovery from the defendants (tobacco wholesalers) of certain payments alleged to be made in respect of tobacco licence fees (which fees had been declared invalid by the High Court in *Ha v New South Wales* (1997) 189 CLR 465).

The Defendants (wholesalers) raised two main objections to the proceedings: first, that the proceedings were not properly constituted as representative proceedings under the Supreme Court Rules and secondly, that the proceedings ought be struck out or stayed because the proceedings were an abuse of process or were in breach of public policy, largely due to the involvement of a third party funder in the proceedings. The Defendants succeeded on both grounds at first instance, failed on both grounds before the Court of

Appeal and succeeded on the first ground (the representative issue) in its successful appeal to the High Court.

The substance of the majority view on the litigation funding point was that there is no overarching principle which defines the limits of legitimate litigation funding or which would bar prosecution of funded actions on the basis that the funding agreement provides for control by and/or rewards to a funder beyond certain identified limits.

The status of the decision

As just stated, the actual decision of the Court was, by a majority, to allow the Defendants' appeal by upholding the first ground of objection to the proceedings, ie that the proceedings were not properly constituted representative proceedings under the Supreme Court Rules.

In the circumstances, it is probably the case that the views of the majority, rejecting the litigation funding point were strictly *obiter*. It is only the *ratio decidendi* in a judgment of the High Court which is binding. Here, the *ratio decidendi* of the decision allowing the appeal was that the proceedings were not properly constituted as representative proceedings. This decision arose from the combination of the joint judgment of Gummow, Hayne and Crennan JJ and the joint judgment of Callinan and Heydon JJ. The views of the majority on the litigation funding point (see the judgments of Gummow, Hayne and Crennan JJ - with whom Gleeson CJ agreed – and Kirby J) did not form a basis for the decision of the Court.

Having said that, this majority view on the litigation funding issue (and in particular, the views in the judgment of Gummow, Hayne and Crennan JJ, with which Gleeson CJ agreed) clearly represents the most authoritative statement on the law in Australia in this area. As a practical matter, the judgment of Gummow, Hayne and Crennan JJ has

determined the nature and effect of any public policy relating to champerty and maintenance in Australia³.

The specific issue concerning litigation funding considered in *Fostif*

The question of the limits of legitimate litigation funding was an important but subsidiary issue in *Fostif*. The principal issue was whether the proceeding constituted an abuse of process. The alleged abuse was based upon a number of factors, principal amongst which was the role of the third party (funder) (“Firmstones”) in instigating and controlling the proceedings. It was contended by the Defendants that there continued to be a public policy against champerty and maintenance and this supported the conclusion that the identified factors caused the proceedings to be an abuse of process.

The existence of a continued public policy against champerty and maintenance had been recognised by the House of Lords in *Giles v Thompson* [1994] 1 AC 142 at 164, where Lord Mustill said:

“[I] believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question whether, in the terms expressed by Fletcher Moulton LJ in the passage already quoted from in British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006, 1014, there is wanton and officious intermeddling with the disputes of others in where [sic] the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse”.

The proposition that these public policy considerations were relevant to an abuse of process found support in the decision of the English Court of Appeal in *Stoczni Gdanska*

³ Although the decision does not deal determine the matter as regards those States which have not abolished the tort or crime.

SA v Latreefers Inc (No 2) [2001] 2 BCLC 116, in which the Court gave the following summary of the position (at paragraph [61]):

“Abuse of the court's process can take many forms and may include a combination of two or more strands of abuse which might not individually result in a stay. Trafficking in litigation is, by the very use of the word "trafficking", something which is objectionable and may amount to or contribute to an abuse of the process. We think that it is undesirable to try to define in different words what would constitute trafficking in litigation. It seems to us to connote unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation. "Wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse" may be a form of trafficking in litigation. Lord Mustill's words, quoted by Simon Brown L.J. in the context of an application to stay, are powerfully descriptive of the kind of plain and obvious champerty of which Chadwick LJ considered Faryab v. Smyth itself not to be an example. A large mathematical disproportion between any pre-existing financial interest and the potential profit of funders may in particular cases contribute to a finding of abuse but is not bound to do so.”

Thus:

- the primary issue in the appeal in *Fostif* was whether the proceedings constituted an abuse of process.
- Allied to that question was whether there continued to be a rule of public policy against champerty and maintenance, which was relevant to the issue of abuse of process.

The judgment of Gummow, Hayne and Crennan JJ dealt with these questions together but concentrated on the latter question. Gleeson CJ agreed with the judgment of Gummow, Hayne and Crennan JJ on this issue. Kirby J gave individual reasons concurring in the result.

The joint judgment of Callinan and Heydon JJ also dealt with both issues. Their Honours differed from the majority. They accepted the existence of the policy against champerty and maintenance and accepted that the facts which make an agreement champertous were also relevant to the question whether there was an abuse of process (see paragraph [265]).

Their Honours held that the proceedings constituted an abuse of process and should be stayed.

The facts

The essential facts in *Fostif* were as follows:

- The High Court in *Ha v New South Wales* (1997) 189 CLR 465 had declared State tobacco licence fees invalid. These licence fees were paid to the government on a regular basis by wholesalers. The amount of the licence fees was included in the price paid by retailers, and, in turn, by consumers.
- At the time the decision in *Ha* was handed down, there were amounts of moneys which wholesalers had obtained from retailers to cover the licence fees which had not yet been paid over to the government. These amounts represented a windfall gain to the wholesalers, because the amounts related to the old invalid licence fees and were not recoverable by the State government. New federal legislation was introduced to replace the fees, but this did not catch the amounts paid under the State regime and not yet remitted to State governments.
- In *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, the High Court upheld a claim by certain tobacco retailers in New South Wales to recover their windfall gain. The decision depended on the fact that there had been a failure of a severable part of the consideration paid by retailers, the amount of invalid tax having been separately set out in the wholesaler's invoices.
- Firmstones, an accounting/tax advice firm became aware that other tobacco retailers had potential claims for refunds by analogy with the claim in *Roxborough* and instigated a project to recover the refunds for retailers.
- Firmstones engaged in a marketing campaign to seek agreement from retailers to recover licence fees on their behalf. Firmstones sent mail-outs proposing an arrangement with retailers whereby Firmstone would pursue claims for refunds on the basis that it would take control of the claims, including any litigation, (which it would fund) and would receive a third of the total amount recovered including interest.

- Firmstone's estimate of the number of potential claimants against all of the various wholesalers it had identified was 10,000 with a likely average claim of \$4,000 excluding interest.
- Some retailers signed and returned authority forms, but by July 2003, (the date of the expiry of the limitation period), only a small proportion of the retailers with potential claims had done so.
- On the eve of the expiry of the limitation period, Firmstones instigated representative proceedings on behalf of all retailers who had paid to certain wholesalers in the relevant period an amount referable to licence fees as a severable part of the consideration paid in relation to the sale of tobacco and who opted in to those proceedings on the terms proposed by Firmstones.
- Firmstone's agreements with the retailers (and the opt-in arrangements for representative persons) gave Firmstone control over the litigation and the power to settle. Because of the expiry of the limitation period, Firmstones was in a unique position of control over the represented persons' claims.
- Firmstones had retained a solicitor to act as the project solicitor but the solicitor's role and his contact with the retailers was limited under the retainer agreement.
- A short time after commencing proceedings, Firmstones gave instructions for an application to be made for discovery by the defendants (wholesalers) of documents identifying any represented persons.
- The defendants (wholesalers) filed motions seeking orders that the proceedings no longer continue as representative proceedings or be stayed on a number of bases, including that the proceedings were not properly constituted as represented persons and that the proceedings involved an abuse or tendency to abuse.

The majority view – no overarching principle of public policy which bars funded proceedings

As stated above, the judgment of Gummow, Hayne and Crennan JJ was the majority judgment on the issue of litigation funding and abuse. Their Honours rejected the

defendants' (wholesalers') argument. Their Honours' reasons were, ultimately, fairly straightforward, and to the following effect:

- the outcome of the abuse of process argument depended upon whether there continued to be a public policy against champerty and maintenance (see paragraph [66] and [84]).
- This, in turn, depended upon the nature of the law of champerty and maintenance and the terms of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) (see paragraphs [66] and [67]).
- (Their Honours found it unnecessary and inappropriate to decide what the position was in those jurisdictions where the crimes and torts continued to exist).
- Their Honours held that considerations of public policy and illegality can still arise in connection with *contracts* which involve champerty or maintenance (paragraph [67]).
- However, in New South Wales (and other jurisdictions where the torts and crimes have been abolished), the public policy concerning champerty and maintenance did not go beyond matters relevant to the enforceability of the agreement for maintenance of the proceedings as between the parties to the agreement (paragraph [84]). There were a number of reasons for this:
 - First, section 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) preserved any rule of law as to the cases in which a *contract* is to be treated as contrary to public policy or as otherwise illegal. It preserved no wider rule of law.
 - Secondly, there was no identifiable content or basis for any wider rule of public policy against champerty and maintenance (paragraph [86]).
- There was no overarching rule of public policy which would have the effect of barring funded proceedings when the funding agreement provided for control by and/or rewards to a funder beyond certain limits (paragraph [91]).

In coming to this conclusion, their Honours undertook a brief review of the history of champerty and maintenance (see paragraphs [68] to [82]). In their view, the cases

disclosed little clear exposition of the basis for or content of the asserted policy against the champerty and maintenance.

Their Honours went on to consider the Appellants' key complaints, which their Honours paraphrased (at paragraph [88]) as:

“Firmstones' seeking out those who may have claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones”

Their Honours' conclusion regarding this was:

*“none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process”.*⁴

Their Honours characterised the Appellants' argument as putting forward two bases as founding the asserted rule of public policy: fears about the adverse effects on the processes of litigation and fears about the “fairness” of the bargain struck between the funder and intended litigant. Their Honours stated (at paragraph [91]):

“Neither of these considerations, whatever may be their specific application in a particular case, warrants formulation of an overarching rule of public policy that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the

⁴ In this regard, their Honours expressed the view that many people sought to profit from litigation and the fact that “a person who hazards funds in litigation wishes to control the litigation is hardly surprising” (paragraph [89]). This is, with respect, a fairly benign view which fails to draw a distinction between, on the one hand, persons such as barristers and solicitors, who play a critical role in facilitating the proper conduct of litigation, and, on the other, a third party funder, whose only interest is the commercial return. The fact that a person who “hazards funds” in litigation may wish to control it begs the question whether it is proper for such a person to obtain control.

agreement. To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears”

Their Honours’ reasons for this conclusion included the following:

- Fears about the adverse effects on the processes of litigation could be addressed by existing doctrines of abuse of process (paragraph [93]).
- Their Honours were dubious about whether the fairness of the bargain struck between funder and litigant was a justiciable issue, and, in any event, considered that this was a matter to be dealt with in proceedings as between the litigant and funder (paragraph [92]).

Conclusion

In the result, the majority view in *Fostif* can be encapsulated as establishing the following propositions in those States where the torts and crimes of champerty and maintenance have been abolished:

- Public policy issues connected with champerty and maintenance are now only relevant to cases involving enforcement of contracts involving champerty or maintenance (ie in proceedings between the litigant and funder);
- there is no overarching rule of public policy that either would, in effect, bar the prosecution of an action where an agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement;
- questions as to whether the funded proceedings involve an abuse of process are to be addressed by “existing doctrines of abuse of process”.

As a result, the major questions which arise concerning litigation funding are now probably philosophical or political rather than legal.

A defendant to funded proceedings has little scope to raise the issue of funding as a basis for staying or otherwise defending the proceedings. It would appear that no matter how extreme the arrangement between the litigant and funder, this issue *per se* cannot be used as a basis for staying the proceedings. A defendant may seek to stay any specific act which constitutes an abuse of process according to “existing doctrines”, but, as a matter of reality, the scope for a defendant to find out about and agitate such matters is likely to be very limited.

The wider philosophical or political questions involve some fairly fundamental questions, including

- do litigation funders provide worthwhile benefits for the administration of justice? Does their involvement give rise to detriments? Is there a net utility in the availability of litigation funding?
- is litigation funding, in effect, an industry which utilises the courts as an adjunct to profit-making and if so, is this a proper role for the courts?

It is true, on the face of things, that litigation funders provide some benefit: they enable some litigants who are unable to afford the cost of litigation to prosecute the litigation. However, it appears that the target market for litigation funders is fairly limited. The funded cases seem often to involve class actions involving small claims which, but for the involvement of the funder, would not have been prosecuted and which involve an insignificant return to individuals.

Prosecution of such claims is said, nonetheless, to be beneficial in that it is undesirable that a defendant should be entitled to exploit this situation to get away with its conduct. But a defendant only gets away with its conduct if the case is clear. Where the claim is a dubious one, the involvement of the litigation funder may involve the equally undesirable consequence that the funder can use the massive potential consequences of the claim to extract a settlement where the claim has little merit. On the other hand, there are mechanisms available to defendants, such as orders for security for costs, which may go some way to lessen the opportunities for such tactics.

It is questionable whether litigation funders will provide “access to justice” in any broad sense. It is doubtful whether litigation funders have any interest in providing funding for the vast majority of individual litigants with relatively small “one-off” claims. If they do, it would probably only be on terms which emasculates the litigant’s control of and financial interest in the litigation.

If litigation funders are not really providers of “access to justice”, can they be seen as nothing more than an industry, whose stock in trade is a specific type of action which the funders control and prosecute in a way which suits their own interests, ultimately, their profit-making requirements? If so, are their dangers for the administration of justice in this type of activity? The decision in *Fostif* indicates that there is no overarching principle which places a limit on the extent to which a funder can obtain control of litigation or which places a limit on the extent of its reward. The dangers of funder control may be intangible, ie not amounting to identifiable abuses of process but rather pressure on the standards under which litigation is required to be conducted. Any assumption by funders of the roles which ought properly to be performed by solicitors in the conduct of the litigation would be a matter for concern. Indeed, it can probably be said that the central involvement of an external solicitor in the conduct of funded proceedings should be seen as a very important element in maintaining what Lord Mustill referred to as “the purity of justice”.

Is it the proper role of the courts to facilitate the commercial activities of litigation funders? The function of the courts is, *prima facie*, the determination of disputes which litigants themselves are seeking to prosecute. They carry out this function within a framework which imposes rights and obligations on the litigants themselves (as opposed to the funder). Litigation usually involves consequences and considerations for the parties which go beyond the ultimate financial outcome. It is questionable whether the courts’ role should include the determination of disputes where the *raison d’être* for the prosecution of the claim is not the desire of the litigant itself to obtain judgment, but the

purely commercial interests of a third party which has acquired the control of a litigant's claim.

In this connection, it is apt to conclude by quoting from the judgment of Callinan and Heydon JJ in *Fostif*. Their Honours differed from the majority on the issue of litigation funding and abuse. Their judgment encapsulates a particular view which is relevant to some of the wider issues involved. At paragraph [266] their Honours said:

“Court process is expensive for the State to supply and for litigants to participate in. It is coercive and otherwise injurious both to litigants and to third parties and should not be employed beyond legitimate necessity. To the extent that people with urgent claims are held out from having them heard by actions in abuse of process, the latter actions should be stayed so that the former may be heard. Normal litigation is fought between parties represented by solicitors and counsel. Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the courts. They can readily be controlled, not only by professional associations but by the court. The court is in a position to deploy, speedily and decisively, condign and heavy sanctions against practitioners in breach of ethical rules. The appearance of solicitors is recorded on the court file. Institutions like Firmstone & Feil, which are not solicitors and employ no lawyers with a practising certificate, do not owe the same ethical duties. No solicitor could ethically have conducted the advertising campaign which Firmstone & Feil got Horwath to conduct. The basis on which Firmstone & Feil are proposing to charge is not lawfully available to solicitors. Further, organisations like Firmstone & Feil play more shadowy roles than lawyers. Their role is not revealed on the court file. Their appearance is not announced in open court. No doubt sanctions for contempt of court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners. In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control. Finally, the function of court proceedings is to provide a means of quelling real and active controversies that have arisen between persons who are unfortunate enough to have fallen into disputes with each other and that exist independently of and anterior to the commencement of the proceedings. The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits. Courts are designed to resolve a controversy between two parties who are before the court, dealing directly

with each other and with the court: the resolution of a controversy between a party and a non-party is alien to this role. Further, public confidence in, and public perceptions of, the integrity of the legal system are damaged by litigation in which causes of action are treated merely as items to be dealt with commercially.”