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Judicial Views on Third Party Litigation Funding - A Comparative Overview

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By Jason D Karas*[1]
Principal of law firm Lipman Karas
Hong Kong

A. Introduction

1. Third party litigation funding has become a popular topic of discussion, with the development of the so - called litigation funding industry being the subject of significant public attention in recent years.

2. This is largely a consequence of the growing judicial acceptance of third party litigation funding in a number of 'Commonwealth' jurisdictions, where the judiciary has increasingly given priority to access to justice over the risk of abuse of process, when balancing those competing policy considerations.

3. Historically, the prohibition of maintenance (assisting another to sue) and champerty (taking part of the proceeds) prevented the funding of litigation by third parties, at least outside of the insolvency context. Maintenance and champerty were both torts and crimes which originated in medieval times, when the civil justice system lacked the internal mechanisms to resist the corruption of the judicial process and oppression of the vulnerable by the powerful and unscrupulous.

4. However, a statutory exception in the insolvency context, namely a form of third party litigation funding through the assignment of causes of action, has been well established for over 100 years. The origin of the modern statutory provisions which contain the 'power of sale' exception in insolvency was Section 90 of the Joint Stock Companies Act 1856 (UK) (19 and 20 Vic c47).[2]

5. The subsequent abolition by legislation of the torts and crimes of maintenance and champerty in some jurisdictions did not displace any common law rule in which a contract was treated as contrary to public policy or illegal due to maintenance and champerty.

6. Despite this, the modern judicial trend even outside of the insolvency context, is to permit the funding of litigation by a third party for a share of the proceeds, even if it would strictly involve maintenance or champerty, provided that the Court is satisfied that there is little or no risk of corruption of the processes of the Court as a consequence of the involvement of the third party funder.

7. The judicial focus has therefore shifted from a blanket prohibition on maintenance and champerty to facilitating access to justice while remaining vigilant to the risk of abuse of process.[3] In doing so, the judiciary is placing increasing reliance on the strength and sophistication of the modern justice system to withstand any real or perceived risks of abuse of process.

8. The effective use of the insolvency exception appears to have promoted a wider acceptance of third party litigation funding outside of the insolvency context, in particular over the last decade. In turn, the increased availability of external funding for litigation means that giving active consideration to available alternatives for funding investigations and litigation has become an important component of the duty to maximise the assets of the insolvent estate.

9. This paper will address these topics in more detail, by reference to the most recent judicial pronouncements in each of England, South Africa, Australia, New Zealand, Hong Kong,

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* The views expressed in this article are the views of the authors and not of INSOL International, London.

1 This article has been adapted from a paper prepared by the author for delegates at the INSOL International annual conference held in Singapore in March 2011. The author was a speaker on a plenary panel discussing Judicial Views on Litigation Funding.

2 Section 90 empowered the liquidator, with the consent of the Court, "To sell the real and personal and heritable and moveable property, effects and things in action of the company by public auction or private contract, with power, if they think fit, to transfer the whole thereof to any person or company, or to sell the same in parcels".

3 See *Giles v Thompson* [1994] 1 AC 142, where the House of Lords stated at 164 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."

Singapore and Canada.[4] Although the modern judicial trend is clear, it remains essential for insolvency practitioners, litigation funders and those advising them to exercise caution to ensure that arrangements for the funding of investigations and / or litigation fall within the boundaries that have been established by the courts for such arrangements and that careful attention is given to different judicial practices and approaches between certain jurisdictions.

B. "Litigation Funding" Defined

10. Without further explanation, the term "litigation funding" is a somewhat abstract concept. There are of course many different ways in which both plaintiffs and defendants finance the cost of litigation. In the present context, it refers primarily to the funding of an action by a third party that does not have a pre - existing interest in the litigation, usually in exchange for a share of the net proceeds of any recovery from the litigation.[5]

11. Third party litigation funding can take various forms, including the payment of the costs of investigation, litigation or arbitration, including those of insolvency practitioners, lawyers and independent experts. It can also include the payment of security for costs and indemnification to meet adverse costs orders, either directly or through after the event costs insurance.

12. Generally third party litigation funding is utilised by claimants who do not have the necessary resources to investigate and / or pursue a legal claim. However, there are instances where third party funding may be capable of being utilised by an uninsured defendant, either as a means of managing risk or facilitating the pursuit of a cross - claim.

C. The Prohibition of Maintenance and Champerty

13. A brief history of the development of the prohibition of maintenance and champerty is provided in the majority judgment in the leading decision of the High Court of *Australia Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 ("Fostif") at [68]-[82].

14. The law of maintenance and champerty has been traced to the Statute of Westminster the First, in 1275. Maintenance was an offence at common law, and champerty was a particular species of maintenance.[6]

15. Maintenance is the encouragement of litigation. It was described by Lord Abinger CB in *Findon v Parker* (1843) 11 M & W 675 (at 682-683) as *"where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make."*

16. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action. Champerty included every kind of maintenance for reward, whether by sharing of the "*thing in plea*" or otherwise. Champerty was originally seen as precluding the assignment of choses in action.[7]

17. The prohibition against maintenance and champerty developed in medieval times, before the Courts had the capacity to deal with unruly nobles. In *Giles v Thompson* at 153, referring to those times, the House of Lords stated that *"The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand."*

18. In the nineteenth century, the English courts were prepared to accept that an assignment of a chose in action could be lawful if the assignee had "*some legal interest (independent of that*

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[4] An examination of the position in the United States is outside of the scope of this paper. The issue of access to justice has been addressed differently in the United States, principally through the acceptance of largely unrestricted contingency fee arrangements as between lawyer and client and the general rule that an unsuccessful litigant is not exposed to adverse cost liability. Moreover, the law as to maintenance and champerty differs from state to state within the United States.

[5] The focus of this paper is comparative judicial views on the funding of claims in the commercial and insolvency context. It does not address issues arising from the external funding of personal injury, matrimonial and other claims, which can give rise to different considerations.

[6] Fostif at [68].

[7] Fostif at [70].

acquired by the assignment itself) in the property in dispute". However, *"where his interest is generated only by the assignment itself, such a stipulation would be improper"*.[8]

19. By the early twentieth century, the English courts accepted that *"…the old common law of maintenance is to a large extent obsolete."* The general character of the mischief against which it was directed was *"wanton and officious intermeddling with the disputes of others in which the [funder] has no interest whatever, and where the assistance he renders…is without justification or excuse."*[9]

20. The English courts, however, continued to give priority to the prevention of such mischief over access to justice. For example, in *Re Trepca Mines Ltd [No 2]* [1963] Ch 199 at 220, Lord Denning MR stated that *"…the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses"*.

21. In 1967, criminal and tortious liability for maintenance and champerty were abolished in England. However, the common law rules specifying when a contract involving maintenance or champerty was contrary to public policy or otherwise illegal were preserved, particularly when there was no pre - existing common interest between the maintainer and the maintained.[10]

D. Litigation Funding in the Insolvency Context

Introduction

22. It is long established that liquidators and trustees in bankruptcy are entitled to seek funding from third parties for the conduct of litigation by selling or assigning a cause of action, or all or part of the proceeds of successful pursuit of a cause of action, without risk of contravening the prohibition against maintenance and champerty. However, in the latter case of an assignment of all or part of the proceeds of an action, at least the English courts have insisted that the office holder does not assign his or her discretionary power to prosecute and conduct the proceedings.

23. The insolvency exception to maintenance and champerty originates from the statutory power of sale conferred in the discharge of duties of the liquidator or trustee in bankruptcy, first conferred by Section 90 of the Joint Stock Companies Act 1856 (UK) (19 and 20 Vic c47). Without the ability to sell the cause of action or the proceeds thereof, in the insolvency context there was often little or no prospect of the office holder bringing proceedings for the benefit of creditors and shareholders. As the lawsuit was in the hands of the liquidator or trustee in bankruptcy, from whom high standards are expected as officers of the Court, the risk of abuse may have also been seen as reduced.

24. Pursuant to these well - established principles, a liquidator is entitled to assign the proceeds of a cause of action as consideration for funding in circumstances where he or she considers it to be in the best interests of the estate as a whole. There is no requirement that the assignment take place in circumstances of financial necessity.[11]

25. Where it is the fruits of an action which are being assigned, at least in England, the liquidator must maintain control of the action. On the other hand, where the whole cause of action is assigned, the assignee becomes the plaintiff and so obtains control of the action.

26. In light of the long - standing insolvency exception to maintenance and champerty, a number of the more prominent litigation funding providers in England and Australia initially focussed on providing funding to insolvency practitioners. As the courts have increasingly accepted third party litigation funding in the non - insolvency context, so too have litigation funding providers broadened the class of plaintiff to whom they provide funds.

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[8] Fostif at [73].
[9] Fostif at [78].
[10] Fostif at [79]-[80] citing the decision of the House of Lords in *Trendtex Trading v Credit Suisse* [1982] AC 679 at 694-5.
[11] *Seear v Lawson* (1880) 15 Ch.D 426 at 433 per Sir George Jessel MR cited by Lord Hoffmann in *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1 at 11; see also *Stein v Blake* [1996] AC 243 at 260 per Lord Hoffmann.

27. The discussion that follows focuses on decisions from England, Australia and Hong Kong, being the jurisdictions from which the majority of the Commonwealth jurisprudence on the statutory power of sale has developed. There are similar statutory provisions in most other Commonwealth jurisdictions and the jurisprudence that does exist elsewhere generally follows the approach taken in the jurisdictions where there is a more developed body of case law.[12]

England

28. A liquidator's statutory power to sell the assets of the company is contained in s 167(1)(b) of the Insolvency Act 1986 (UK), which states that where a company is being wound up by the Court, the liquidators may, with or without the sanction of the Court, exercise certain general powers contained in Part III of Schedule 4 to the Act. Among the powers so conferred is the power to sell the company's property. Section 436 of the Act provides that the term "*property*" includes "*things in action" and "every description of interest, whether present or future …, arising out of, or incidental to, property*". The power of sale is necessary to enable liquidators to perform the role of realising the assets of insolvent companies.

29. *Seear v Lawson* (1880) 15 Ch D 426, Re Park Gate Wagon Works Co (1881) 17 Ch D 234 and *Guy v Churchill* (1888) 40 Ch D 481 are early examples of the English courts expressly permitting office holders to assign causes of action to third parties pursuant to their statutory power to assign property and as an extension of the duty to realise assets of the insolvent estate. This was confirmed in *Ramsey v Hartley* [1977] 1 WLR 686, and was extended in *Stein v Blake* [1996] 1 AC 243 to include the power to assign the net balance of proceedings. In the latter case, Lord Hoffmann (with whom Lord Keith of Kinkel, Lord Ackner, Lord Lloyd of Berwick, and Lord Nicholls of Birkenhead agreed) stated (at 257-258):

> *"… [in Ramsey v Hartley [1977] 1 W.L.R. 686] [h]is [the trustee in bankruptcy's] statutory duty to realise the estate excluded the doctrines of maintenance and champerty which would otherwise have struck down such an assignment. Likewise, there is no rule to prevent him from assigning such a right of action to the bankrupt himself. So why should a trustee not assign the right to the net balance?"*

30. In *Re Oasis Merchandising Services Ltd* [1998] Ch 170, the English Court of Appeal examined the appropriateness of an equitable assignment of all of the fruits of an action for wrongful trading under section 214 of the Insolvency Act to a litigation funder in return for funding to pursue the claim. The funding agreement provided that the liquidator would conduct the proceedings and any settlement negotiations in accordance with the directions of the litigation funder. The Court of Appeal upheld the stay of proceedings granted at first instance by Robert Walker J, holding that (1) as a matter of policy, there was no impediment to a liquidator selling the fruits of an action, provided that the funder is not given the right to interfere with or dictate the liquidator's conduct of the proceedings; and (2) the fruits of a statutory cause of action could not be assigned by the liquidator pursuant to the insolvency exception, as these were not property of the company at the commencement of the liquidation and thus fell outside of the definition of "*the company's property*" in the Insolvency Act and therefore outside of the Liquidator's statutory power of sale.[13]

31. The House of Lords in *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1 at 11 confirmed that it is appropriate for a liquidator to assign a cause of action to a party who has sufficient funds to pursue that action. Lord Hoffmann, with whom the other Law Lords agreed, stated at 11:

> *"The law is traditionally hostile to the assignment of causes of action in return for a share of the proceeds. Such transactions were described as champerty (division of*

[12] See for example section 386(4)(h) of the Companies Act 1973 (South Africa) Chapter 14 of the 1973 Companies Act, regarding winding-up of insolvent companies, continues to operate pursuant to Schedule 5, cl 9 of the Companies Act 2008 (South Africa); Schedule 6(g) of the Companies Act 1993 (New Zealand), considered by Anderson J in *Re Nautilus Developments* Ltd [2000] 2 NZLR 505 at [22]-[25], following English and Australian jurisprudence; section 272(2)(c) of the Companies Act 2006 Rev. Ed (Singapore); sections 2 and 30(1)(a) of the Bankruptcy and Insolvency Act 1985 (Canada), considered by the Ontario Court of Appeal in *Rizzo & Rizzo Shoes Ltd (Bankrupt), Re* (1998) 107 OAC 288 at [19]; section 236(2)(c) of the Companies Act 1965 (Malaysia), considered by James Foong J in *Quill Construction Sdn Bhd v Tan Hor Teng* [2006] 2 CLJ 358 at [28]-[37].

[13] This somewhat narrow definition of *"the company's property"* in *Re Oasis* has been questioned in subsequent decisions such as *Re Exchange Travel (Holdings) Ltd (No 3)* [1997] 2 BCLC 579 per Phillips LJ at 587 and Morritt LJ at 595-596 and in the recent decision of Finkelstein J in *Cook v Italiano Family Fruit Company Pty Ltd (in liq)* (2010) 190 FCR 474, which contains a comprehensive review of the English and Australian case law. It light of the decisions of the English Court of Appeal over the last decade in the non-insolvency context (discussed below), it is unlikely that questions as what falls within or outside the definition of "the company's property" will any longer be of any practical consequence.

> *the field) and regarded as illegal and unenforceable. It is unnecessary to examine the reasons: judges said that it would encourage malicious suits, but treating such arrangements as criminal was also, before the introduction of legal aid, an effective way of preventing poor people from obtaining legal redress. The position of liquidators and trustees in bankruptcy is however quite different. The courts have recognised that they often have no assets with which to fund litigation and that in such case the only practical way in which they can turn a cause of action into money is to sell it, either for a fixed sum or a share of the proceeds, to someone who is willing to take proceedings in his own name. In this respect they are of course no different from many other people. But because trustees and liquidators act on behalf of creditors, the courts have for the past century constructed their statutory powers as placing them in a privileged position."*

32. The authorities were again reviewed by Ramsey J in *Ruttle Plant Limited v Secretary of State for Environment Food and Rural Affairs No 2* [2008] EWHC 238. Ramsey J concluded that it was beyond doubt that the fruits of an action were assignable by a liquidator, provided the liquidator maintained control of the cause of action.

Australia

33. In Australia, s 477(2)(c) of the Corporations Act 2001 (Cth) provides that a liquidator *"may…sell or otherwise dispose of, in any manner, all or any part of the property of the company*". Section 477(2B) imposes a requirement that the approval of the Court or creditors must be obtained if a liquidator is proposing to enter an agreement of more than three months duration. As litigation funding agreements will invariably have a life of longer than three months, the requirement of court approval has led to an expanded body of Australian jurisprudence on this subject.

34. In *Re Movitor Pty Ltd (in liq)* (1996) 64 FCR 380, Drummond J held that a liquidator could assign a right to proceeds of a successful cause of action (rather than the cause of action itself). The assignee was to receive reimbursement of expenses covering legal costs, plus 12% of the proceeds recovered (at 386). Drummond J noted (at 391F):

> *"In my opinion, there is no reason why this statutory authority [of a trustee in bankruptcy to sell a bare right of action] should not make lawful any other sale of the insolvent company's property by a liquidator, including the sale of a share in the proceeds of an action belonging to the company to a person with no interest in the litigation on terms that that person is to have control of the litigation, although that would involve champerty but for the transaction being made under that authority. This will be the position, provided only that the subject matter of the sale is "property of the company" within the statutory power."*

35. Nor is it the case that a liquidator can only assign a cause of action where he or she is satisfied that it has a realistic chance of success. In *Bankruptcy Estate of Cirillo; ex parte Official Trustee in Bankruptcy* (1996) 65 FCR 576, Branson J said (at 585):

> *"it is not the law that a trustee can only assign a cause of action if he or she is satisfied that it has a realistic chance of success. In circumstances in which insufficient funds are available to the trustee to allow a proper consideration of the likelihood of success of a cause of action asserted by the bankrupt to form part of his or her property, the appropriate course for the trustee to follow may well be to assign such causes of action to the bankrupt for a consideration which the trustee regards as appropriate in the light of such information as is available…*
>
> *It is not to be forgotten, however, that a trustee in bankruptcy, as an officer of the court, is one from whom high standards of conduct are to be expected: Ex parte James; Re Condon (1874) 9 LR Ch App 609. In my view, it would not be proper for a trustee in bankruptcy to assign to any person a cause of action which demonstrably had no prospects of success. This would be even more strongly the case should he or she be alert to the possibility that such cause of action might be utilised to cause embarrassment to a third party."*

The decision and reasoning of Branson J was upheld on appeal, the Full Federal Court concluding that where a clear case arises of a claim with no reasonable prospect of success, the

trustee and the Court itself *"in the public interest, should not allow the assignment to occur, even where an immediate sum of money is offered as consideration that would benefit the estate of the bankrupt."*[14]

36. In *Jarbin Pty Ltd v Clutha Ltd* (2004) 180 FLR 393 at [107], Campbell J stated that *"It is now well established that a liquidator's power of sale of the property of the company, under section 477(2)(c) of the Corporations Law, enables him or her to assign all, or part, of a cause of action of the company in return for a consideration, which might be a fixed payment, a share of any net proceeds of the action, or a consideration arrived at in some other way, and such assignment may be made without infringement of the law concerning maintenance and champerty."*

37. Consistent with the position in England, s 477(2)(c) does not permit a statutory cause of action not otherwise assignable to be assigned.[15] Similarly, the liquidator's power to sell the company's property under s 477(2)(c) does not extend to the sale or assignment of contractual rights that are subject to an express non - assignment clause binding on the company that renders property inherently incapable of being assigned.[16]

38. In *Hall v Poolman* (2009) 254 ALR 333, the NSW Court of Appeal was required to consider whether it is ever permissible for liquidators to commence or continue with proceedings where there is no prospect that a successful outcome will permit a substantial distribution to creditors but will only benefit the professionals and litigation funders involved (through the repayment of their costs). Subject to a number of provisos as to costs having been justifiably incurred and the funding agreement not being manifestly unreasonable, the Court of Appeal concluded that the liquidators may legitimately and in accordance with their duties pursue litigation with the aid of a litigation funder, and they may do so even if there is little or no likelihood of recovery going beyond recovery of their own costs and expenses and the funder's fees. The Court of Appeal reached this conclusion at [149-153]:

> *"…because in our opinion there is a public interest in liquidators making preliminary investigations into matters that appear to them to warrant investigation, even when there are no assets available to fund their doing so. Liquidators may be discouraged if it were held to be improper per se for liquidators to try to recover the costs of their investigations by legal proceedings that would not directly benefit creditors."*

39. Finally, the decision of Barrett J in *Re HIH Insurance Ltd* (2010) 266 ALR 642 is of significant utility to insolvency practitioners, as it confirmed that where one company in liquidation has a legal claim but insufficient funds to prosecute it, a related company (also in liquidation) may be permitted to use its surplus assets to fund the litigation of the first company's claim. However, Barrett J identified the need to answer the following questions affirmatively before granting approval to such an arrangement: (1) whether (and, if so, how) the process of winding up and distribution of the property of the funding company would be enhanced by the funding company giving the proposed financial assistance; and (2) whether (and, if so, how) the separate interests of the funding company would be promoted by the application of funds in accordance with the financial assistance proposal. In Re HIH, approval for the intra - group funding arrangements was given, but only after the Court received the written advice of senior counsel and comprehensive independent expert evidence that enabled Barrett J to conclude that an *"informed and independent assessment of the separate and selfish interests of the funding company alone"* demonstrated that entry into the proposed arrangement was appropriate.[17]

Hong Kong

40. Although litigation funding arrangements pursuant to the statutory power of sale under s199(2)(a) of the Hong Kong Companies Ordinance have been approved by the Hong Kong Companies Court on a number of occasions over the last decade, the recent decision of Harris J in *Re Cyberworks Audio Video Technology Ltd* [2010] 2 HKLRD 1137 is the first occasion on which the Hong Kong Court has published reasons for judgment on such an application. *In Re Cyberworks,* Harris J heard an application for approval by a liquidator seeking leave to enter into an agreement for the funding of investigations and an option for the funder to take an assignment of any claims identified through those investigations, which the liquidators

[14] See *Citicorp v Official Trustee* (1996) 141 ALR 667 at 681 per Foster, von Doussa and Sundberg JJ.
[15] See *Mijac Investments Pty Ltd v Graham (No 2)* (2009) 72 ACSR 684 at [185] and the authorities referred to therein.
[16] See *Owners of Strata Plan 5290 v CGS & Co Pty Ltd* (2011) 281 ALR 575 at [59] per Sackville AJA with whom Giles and Campbell JJA agreed.
[17] See at [25] (first judgment) and at [18] (second judgment).

themselves did not have funds to pursue. His Lordship approved the funding agreement on the basis that the assignment constituted a proper exercise of the liquidator's statutory power of sale under s 199(2)(a) of the Companies Ordinance.[18]

41. Harris J adopted the reasoning of the English Court of Appeal in *Re Oasis* to the effect that a liquidator can also assign the proceeds of a cause of action, provided the liquidator does not also assign the discretionary power to prosecute and conduct the proceedings. Harris J also drew support from the decision of the *Hong Kong Court of Final Appeal in Unruh v Seeberger* (2007) 2 HKLRD 414 at [76] (discussed below), where the CFA recognised various instances in which conduct that would otherwise constitute maintenance and champerty is permissible, including in the insolvency context and in circumstances of impecuniosity.

42. In *Berman v SPF CDO I Ltd* [2011] HKEC 380, Harris J was required to consider an application by a US trustee for leave to enter a deed of assignment in respect of debts owed by two companies in Hong Kong, with a third party litigation funder, outside of the s 199(2)(a) statutory exception to maintenance and champerty and in circumstances where maintenance and champerty remain crimes and torts in Hong Kong. Pursuant to the deed of assignment, the funder would have the opportunity to investigate the bona fides of the debts, conduct a comprehensive review of books and records as they relate to the debts and commence proceedings against the debtors.

43. Harris J stated that the law in Hong Kong permits the assignment of debts under certain conditions, but that assignments of choses in action are still subject to the prohibition against champerty (at [18-19]), citing the decision of the Court of Appeal *in Bank of China (Hong Kong) Ltd v Chan Yeuk Wai* [2007] 1 HKLRD 172.

44. Harris J held that the effect of *Camdex International Ltd v Bank of Zambia [1998] QB 22 and Bank of China* was that assignments of choses in action were permissible, unless they revealed some further element that would make the assignment invalid and illegal, stating that:

> *"In my view the central question to be answered by the court when assessing the assignment of a chose in action is whether or not there is a proper commercial purpose to the transaction, which gives rise to no risk of the corruption of the judicial and litigation process."* (at [26-27])

45. Harris J concluded that the Deed of Assignment was not caught by the prohibition against champerty and that it was appropriate for the trustee to have leave to enter the deed of assignment, because *"it clearly has a legitimate commercial purpose, namely, the funding of a claim that might otherwise not be capable of prosecution and it is the type of transaction that ought not to be stifled by the prohibition against champerty"*. Harris J reaffirmed that there would need to be *"an independent indication that the agreement would give rise to trafficking or gambling in litigation before a funding agreement became objectionable"* (at [28]).

E. Litigation Funding in the Non - Insolvency Context

Introduction

46. In the non - insolvency context, the prevailing judicial approach throughout the majority of the 'Commonwealth' jurisdictions surveyed in this paper is now consistent with the long established position in the insolvency context, namely that third party funding of litigation is permitted, subject to varying controls.

47. Courts increasingly have accepted that the risk of abuse of process resulting from third - party litigation funding is outweighed by the need to facilitate greater access to justice. As a result, England, South Africa, Australia, New Zealand and Hong Kong have, to differing degrees, adopted a more liberal approach to litigation funding in the non - insolvency context.[19]

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[18] Section 199(2) of the Companies Ordinance states that *"… the liquidator in a winding up by the court shall have power … to sell the real and personal property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels"*.

[19] Questions of champerty and maintenance in the context of 21st century public policy have not yet been the subject of any comprehensive re-examination in either Singapore or Canada and the courts in these jurisdictions have arguably taken a more conservative approach to date.

48. In these jurisdictions, third party funding is not prohibited merely because it may involve maintenance or champerty, even outside the insolvency exception. Instead, the facts and circumstances are examined to determine whether the involvement of a third party funder may involve an abuse of the Court's processes. If there is insufficient risk of an abuse of process, then the Court will generally not interfere.

49. Further, the decisions show that the Courts place great weight upon their own supervisory role as well as on the safeguards inherent in the modern civil justice system. The Courts have recognised that as a result of the increased sophistication of the modern justice system and because litigation funding arrangements are subject to the scrutiny of the Court and in some cases by opposing parties in litigation, the risk of abuse of process in modern times is significantly diminished. However, a certain judicial reticence towards the funding of litigation by third parties remains. It is therefore important for litigants, funders and their advisers to ensure that the applicable local jurisprudence and practices are complied with, in both the formation and implementation of funding arrangements.

England

50. As early as 1886, the Privy Council (on appeal from India) in *Ram Coomar Coondoo v Chunder Canto Mookerjee* [1876] 2 AC 186 at 210 recognised that champertous agreements which were fair and promoted access to justice ought not be regarded as being *per se* opposed to public policy, subject to the important proviso *"that agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefore, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy - effect ought not to be given to them."*

51. In more recent times, courts in England have recognised that the modern judicial system is strong enough to withstand the risk of abuse of process that could arise from maintenance and champerty. In the decision of the House of Lords in *Giles v Thompson* [1994] 1 AC 142 at 153, Lord Mustill (with whom the other Law Lords agreed) stated:

> *"As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self - reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation."*

52. Lord Mustill further stated (at 164):

> *"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…there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse. "*

53. The English Court of Appeal in *R (Factortame) Ltd v Secretary of State for Transport (No. 8)* [2003] QB 381 held that an agreement pursuant to which a third party agreed to fund litigation would not be automatically struck down as offending public policy and that whether such an agreement was champertous would depend upon the particular circumstances. The Court of Appeal confirmed that the question of whether maintenance and champerty can be justified must be kept under review as public policy changes. Phillips LJ, delivering the judgment for the Court (Robert Walker and Clarke LJJ) said (at [36]):

> *"Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his*

personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice."

54. The Court of Appeal in *Factortame* confirmed that, in each case, it is necessary to look at the agreement under attack to see whether it conflicts with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant (at [44]).

55. The following year, Lord Phillips MR in *Gulf Azov Shipping Co Ltd v Idisi [2004] EWCA 292* at [54] stated that *"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."*

56. In *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055, the English Court of Appeal (Lord Phillips MR. Brooke and Dyson LJJ) confirmed that maintenance and champerty would no longer prevent litigants in the non - insolvency context from obtaining funding to pursue litigation. The claimant, Mr Arkin, was a man without means. He was however able to pursue his claim to judgment because of the financial support provided by a professional funder. The funding agreement provided that the funder would receive 25% of the first £5m awarded, and 23% thereafter. Mr. Arkin's claim ultimately failed. The defendants had incurred substantial costs in their successful defence of the claim and the issue was whether the professional funder was liable to pay those costs.

57. The Court of Appeal accepted that third party funding of litigation was permissible in the interests of ensuring access to justice. However, the Court held that *"a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided."* (at [41] to [44]).

58. Coulson J in *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 TCC at [103], following Underhill J in *Mansell v Robinson* [2007] EWHC 101 (QB), provided the following succinct summary of the current state of the law in England:

> *"a) the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable: see R (Factortame) Ltd v Secretary of State for Transport (No. 8) [2003] QB 381;*
>
> *b) in considering whether an agreement is unlawful on grounds of maintenance and champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement: see Giles v Thompson;*
>
> *c) the modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable; see, for example, Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd (No 2) [2002] 2 Lloyd's Rep 692;*
>
> *d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction: see* Papera."

59. As will be seen below, the Australian courts have also taken a liberal approach to litigation funding over the last decade. However, two significant practical differences in the approach of the courts in England are that (1) the English courts appear to place greater importance upon the need for the plaintiff to retain control of the externally funded litigation, whereas in Australia it appears to have been accepted that the funder will demand at least a degree of control; and (2) the adverse costs exposure of the litigation funder in England appears to be limited to the extent of the funding provided (in effect, dollar for dollar), whereas in Australia the exposure is unlimited.

South Africa

60. The South African courts have also taken a liberal approach to litigation funding by third parties. Third party funding agreements are not void as being contrary to public policy, unless the funder is engaged in an abuse of process. It is notable that in South Africa the courts have recognised for over 100 years that a champertous agreement would not be unlawful or void if financial assistance was provided in good faith to a poor suitor to enable them to prosecute an action in return for a reasonable recompense or interest in the suit. This was an early recognition of the special exception to the rules against champerty in circumstances of financial necessity in order to facilitate access to justice.

61. In *PriceWaterhouseCoopers Inc & Ors v National Potato Co - operative Ltd* [2004] 3 All SA 20, the Supreme Court of Appeal of South Africa was asked to determine whether an arrangement whereby a plaintiff who lacked funds to bring proceedings would receive financial assistance from a litigation funder in exchange for 45% of the proceeds was against public policy and invalid.

62. Southwood AJA delivered the decision on behalf of the unanimous five member Court. The Court considered the historical position in England, citing *Trendtex Trading*, before turning to the position in South Africa, stating that:

> *"[26] A number of cases decided in South Africa in the last years of the 19th and the early part of the 20th Century show that the courts took an uncompromising view of agreements which I shall call champertous … and refused to entertain litigation following on such agreements or to enforce them.*
>
> *[27] However, it is clear that the courts acknowledged one exception. It was accepted that if any one, in good faith, gave financial assistance to a poor suitor and thereby helped him to prosecute an action in return for a reasonable recompense or interest in the suit, the agreement would not be unlawful or void…This was early recognition that in a case where an injustice would be done if a litigant was not given financial assistance to conduct his case a champertous arrangement would not be contrary to public policy.*
>
> *[28] Although the number of reported cases concerned with champertous agreements diminished, courts have still adhered to the view that generally they are unlawful and that litigation pursuant to such agreements should not be entertained.*
>
> *[29] The reasons for champertous agreements being considered to be contrary to public policy have not, so far, been reconsidered or tested by the courts in the light of changed circumstances and, in particular, in the light of the Constitution."*

63. Having regard to the House of Lords decision in *Giles v Thompson*, the Court stated that:

> *"[32] The law of maintenance and champerty developed out of a need to protect the system of civil justice; and as the civil justice system has developed its own inner strength the need for the rules for maintenance and champerty has diminished - if not entirely disappeared.*
>
> *[33] Lord Mustill observes that in mediaeval times the mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious because the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. Two important factors contributed to the growth of these abuses; first, there was no independent judiciary ('detachment and disinterestedness was not the hallmark of the mediaeval judiciary') and second, the civil justice system was not developed and was not capable of exposing abuses of legal procedure and giving effective redress. To deal with these abuses a number of statutes created the offences of maintenance and champerty. Gradually these conditions disappeared and by the beginning of the 19th Century England had an independent judiciary ('the cold neutrality of the*

impartial judge became the established convention') and after the procedural reforms of the 19th Century there was an effective civil justice system. Despite these changes the offences and torts of maintenance and champerty lingered on in atrophied form for more than a century after any public interest in preserving them had disappeared." (emphasis added)

64. The Court considered the development of permitting limited contingency fee arrangements in England and observed that developments in England were mirrored in South African law. This indicated a change in public policy through legislative recognition of the strength of the civil justice system to withstand abuses which could arise as a result of contingency fee arrangements. The Court also observed that:

> *"[39] The judiciary is independent. Its independence is guaranteed by the Constitution. The civil justice system is regulated by the state and has the necessary mechanisms to withstand the abuses perceived to flow from champertous agreements. There are trained and disciplined legal professionals who are subject to strong ethical codes. And there are pre-trial procedures such as discovery to ensure that evidence is not fabricated or suppressed. There is also the trial itself where the veracity of the evidence can properly be tested. There is also the cost of losing. This is a great disincentive to the dishonest litigant."*

65. The Court found that upholding agreements between a litigant and a third party who finances the litigation for reward is also consistent with the constitutional values underlining freedom of contract, in light of s34 of the South African Constitution, which provides that every citizen has the right to have any dispute decided in a fair public hearing before a court (at [43]-[44]).

66. The Court concluded that:

> *"[46] In my view it must also be recognised that the civil justice system is strong enough to withstand the perceived abuses which could arise if civil litigation is made possible by financial support given by persons who provide such support in return for a share of the proceeds. Accordingly it must be held that an agreement in terms of which a stranger to a lawsuit advances funds to a litigant on condition that his remuneration, in case the litigant wins the action, is to be part of the proceeds of the suit, is not contrary to public policy. Price Waterhouse are therefore not entitled to base a defence on the assistance agreement".*

67. The Court went on to briefly consider whether such an agreement could constitute an abuse of process and hence be struck down as invalid:

> *"[50] In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end… a plaintiff who has no bona fide claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process (citation omitted). Nevertheless it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court will close its doors to anyone who wishes to prosecute an action (citation omitted). The importance of the right of access to courts enshrined by section 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with bona fide disputes (citation omitted)."*

68. The decision of the Supreme Court of Appeal of South Africa preceded the decision of the High Court of Australia in *Fostif* by just over two years. These decisions together provide the most comprehensive and authoritative analysis of the modern approach to maintenance and champerty. They demonstrate the evolving nature of the rules against maintenance and champerty in the modern context of a sophisticated and reliable civil justice system where priority is given to access to justice as a matter of public policy, provided that there is no abuse of the court's process involved.

Australia

69. The leading case in Australia is the decision of the High Court of Australia *in Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 ("Fostif"). The Court upheld the litigation funding arrangement, by a five to two majority, in a decision which has gained international attention. This decision illustrates the strong divergence of views on the subject expressed in the three separate judgments delivered by the Court.

70. Fostif involved a class action to recover moneys paid by retailers of tobacco products to wholesalers, representing licence fees which the wholesalers did not pass on to the relevant taxing authority because the High Court held the licence fees to be unconstitutional. After the High Court held these licence fees to be unconstitutional and in a separate judgment held that retailers were entitled to recover from wholesalers the money representing the licence fees which had not been passed on to the taxing authorities, a third party, Firmstones, wrote to retailers who may be eligible to recover the fees seeking permission to start proceedings on their behalf against the wholesalers. Firmstones would take principal control of the litigation and would receive 33.3% of the proceeds (at [26]).

71. The joint majority judgment of Gummow, Hayne and Crennan JJ (Gleeson CJ agreeing) confirmed that there was no broad public policy against litigation funding agreements:

> *"[89] As Mason P rightly pointed out in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?"*
>
> *[90] Two kinds of consideration are proffered as founding a rule of public policy - fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant. In Giles v Thompson, Lord Mustill said that the law of maintenance and champerty could best "be kept in forward motion" by looking to its origins: these his Lordship saw as reflecting "a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants."*
>
> *[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 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."*

72. The majority also affirmed that the doctrine of abuse of process, coupled with the rules regulating the duties of lawyers to the court, provided sufficient protections against the fears which had historically concerned the common law:

> *"[93] As for the fears that "the funder's intervention will be inimical to the due administration of justice", whether because "the greater the share of the spoils…the greater the temptation to stray from the path of rectitude" or for some other reason, it is necessary first to identify what exactly is feared. In particular what exactly is the corruption of the process of the Court that is feared? It was said, in In re Trepca Mines Ltd [No 2], that "the common law fears that the*

champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress the evidence, or even to suborn witnesses". Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise."

73. In a separate concurring judgment, Kirby J emphasised the importance of ensuring access to justice as a fundamental human right, stating:

"[145] The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking about representative or "grouped" proceedings. It is this consideration that has informed the decisions of other Australian appellate courts on such questions and also a decision of the Supreme Court of Appeal of South Africa."

74. Callinan and Heydon JJ, in a joint dissenting judgment, were of the view that the following factors, in combination, pointed to the proceedings being an abuse of process:

74.1 that Firmstones' motivation was purely to make a profit ([269]);

74.2 that Firmstones sought out and encouraged people to sue who would not otherwise have done so ([270]-[271]);

74.3 that the plaintiff's losses were small ([272]-[274]), but Firmstones' potential gain was enormous ([275]-[276]);

74.4 that Firmstones had too much control of the litigation ([277]-[280]);

74.5 that the litigation was being pursued in such a way that the plaintiffs' interests were subservient to Firmstones' ([281]);

74.6 that the plaintiffs' solicitors had only a limited role ([282]); and

74.7 that Firmstones had a monopoly position, in that any plaintiff who wished to make a claim had to do so on Firmstones' terms ([283]).

75. The minority considered that the facilitation of access to justice needed to be viewed in light of established principle and ought not to be unduly elevated:

"[256] …The importance of not preventing "humble men" from receiving "contributions to meet a powerful adversary" has been long recognised, and underlies the exceptions to the common law doctrines of maintenance and champerty. The facilitation of access to justice, however, is not to be treated as having absolute priority over traditional principle."

76. The Fostif decision has confirmed that in Australia, even outside the insolvency context, the funding of litigation by third parties is permissible and appropriate, provided that the involvement of the funder does not give rise to any material risk of abuse of the court's process. It is also notable that Fostif probably goes further than any other decision to date in recognising, if not giving its implicit imprimatur to, a significant degree of control over the legal proceedings by the funder, at least in the context of representative proceedings.

77. The Australian courts have also recognised the benefits of external litigation funding in the context of costs and efficiency, even in circumstances where the claimant is not impecunious such that the policy considerations in favour of access to justice are not invoked. Although decided before Fostif, such that there was a greater emphasis on the question of control than there may have been post Fostif, in *QPSX Limited v Ericsson Australia Pty Ltd* (No 3) [2005] FCA 933, French J (then of the Federal Court, now Chief Justice of the High Court of Australia) upheld a funding agreement entered into by a plaintiff who was alleging breaches of a licensing agreement and misleading conduct relating to the licensing and use of patent rights in

technology used in telecommunications. French J described the plaintiffs as *"substantial commercial enterprises experienced in entering into co - funding arrangements around the world"*, such that they were unlikely to tolerate any compromise of their interests by the funder in pursuit of its own.

78. In the following passages, French J identified additional policy considerations in favour of external litigation funding and recognised that the involvement of external funders *"may inject a welcome element of commercial objectivity into the way in which budgets are framed and the efficiency with which the litigation is conducted"*, provided there is no risk of abuse of process:

> *"[54] The considerations relevant to the range of acceptable litigation funding arrangements today go beyond questions of access to justice for the ordinary litigant. The present proceedings do not involve ordinary litigants. The parties are sophisticated, well resourced commercial actors operating in domestic and international markets for the sale of complex and potentially very lucrative technologies. Their capacities to exploit those technologies and to enjoy intellectual property rights associated with them, whether as the creators of those rights or as their collectors under assignment or license, are important elements of their participation in the relevant markets. There is no doubt that the cost of litigation in relation to such rights can be very high. Even when conducted as efficiently as it can be with the aid of skilled advisers and technical experts, it is time consuming and expensive. The development of arrangements under which the cost risk of complex commercial litigation can be spread is at least arguably an economic benefit if it supports the enforcement of legitimate claims. Where such arrangements involve the creation of budgets by funders knowledgeable in the costs of litigation it may inject a welcome element of commercial objectivity into the way in which such budgets are framed and the efficiency with which the litigation is conducted. The formulation of a budget limiting the amount of funding provided is, of course, different from the assumption by the funder of control of the conduct of the litigation. The Court is in no position to pass definitive judgments on questions of the overall economic benefits to be derived from legitimate litigation funding arrangements. But the development of modern funding services in commercial litigation may be seen as indicative of a need in the market place to which those developments are legitimate responses. It is not for the Court to judge them as contrary to the public interest unless it be shown that a particular arrangement threatens to compromise the integrity of the Court's processes in some way.*
>
> *[55] The public policy concerns associated with handing over the conduct of litigation to a non - party, whether by assignment or other means, remain. For the assumption of control by a non-party raises the possibility that decisions may be made affecting the conduct of the litigation which serve the interests of the funder in a way that is incompatible with the interests of the funded party and the legitimate purposes for which the litigation is to be prosecuted or defended."*

79. Australian courts have recognised that the funding of litigation by third parties gives rise to important and at times difficult questions in the areas of (1) security for costs; and (2) the payment by litigation funders of adverse costs orders against funded plaintiffs.

80. On the question of security for costs, the New South Wales Court of Appeal *in Green (as liquidator of Arimco Mining Pty Ltd (in liq)) v CGU Insurance Ltd* (2008) 67 ACSR 105 per Hodgson JA at [53] (see also Campbell JA at [86]) expressed the view that the involvement of a non - party who stands to benefit from the litigation *"is a matter that favours an order for security"*. However, the Court of Appeal accepted that the exercise of the court's discretion to order security in such circumstances would depend very much on the facts of the case. Basten JA at [76 and post] expressed the view that the fact the litigation funder expects to profit from the litigation may be of limited relevance.

81. In *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174, Barrett J of the Supreme Court of New South Wales stated that:

> *"[13] The main purpose of the power to order security for costs is to ensure that lack of success by a plaintiff does not visit injustice upon a defendant who would, in that*

event, expect to have an order that the plaintiff pay the defendant's costs. The power is discretionary. Security, if granted, serves the purpose of providing to the defendant a measure of assurance that, having been brought to court by the plaintiff and having successfully resisted the plaintiff's claim, the defendant will have some means of recovering costs awarded to the defendant.

[14] Central to any decision to award security for costs, therefore, is a conclusion reached by the court that the prospects that the defendant, if successful, will enjoy the fruits of a costs order against the plaintiff are somehow in jeopardy.

[15] If, in the present case, those prospects centred on the personal financial capacity of the liquidator, the court would reach such a conclusion…But an added dimension comes from the litigation funding agreement."

82. In *Doubell,* the litigation funding agreement provided the liquidator with a full indemnity against any adverse costs order. On the strength of the indemnity contained in the funding agreement, Barrett J of the Supreme Court of New South Wales was satisfied that subject to the liquidator providing appropriate undertakings to (a) inform the defendants if the funding agreement was terminated (so that they may renew their application for security for costs); and (b) to pursue the recovery from the funder in the event that the funder did not willingly pay any adverse costs order, security for costs would not be ordered at that point in the proceedings.

83. The question whether the absence of an indemnity from a litigation funder to pay adverse costs constituted an abuse of process was recently considered by the High Court of Australia in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75.

84. In a joint majority judgment, French CJ, Gummow, Hayne and Crennan JJ concluded that there was no such abuse of process of the court and held that there is no general proposition that those who fund another's litigation must place the party funded in a position to meet any adverse order for costs:

"[43] The proposition that those who fund another's litigation must put the party funded in a position to meet any adverse costs order is too broad a proposition to be accepted. As stated, the proposition would apply to shareholders who support a company's claim, relatives who support an individual plaintiff's claim and banks who extend overdraft accommodation to a corporate plaintiff. But not only is the proposition too broad, it has a more fundamental difficulty. It has no doctrinal root. It seeks to take general principles about abuse of process (and in particular the notion of "unfairness"), fasten upon a particular characteristic of the funding arrangement now in question, and describe the consequence of that arrangement as "unfair" to the defendant because provisions and principles about security for costs have been engaged in the case in a particular way and the rules will not permit the ordering of costs against the funder unless the principles of abuse of process are engaged. For the reasons stated earlier, that proposition is circular. And to point to the particular feature of a funding arrangement that the funder is to receive a benefit in the form of a success fee or otherwise, adds nothing to the proposition that would break that circularity of reasoning or otherwise support the conclusion that there is an abuse of process."

85. Heydon J (who was also in dissent in Fostif) delivered another strongly worded dissenting judgment which concluded that a funder who does not provide an indemnity to the plaintiff for adverse costs commits an abuse of process. Although the judgment of Heydon J does not represent the law of Australia, it is cited below to demonstrate the spectrum of senior judicial opinions on the subject of third party litigation funding and its practical implementation:

"[111] The court's procedure exists primarily to serve the function of enabling rights to be vindicated rather than profits to be made. Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd recognised that it was legitimate for third parties having no prior concern with the subject of the litigation to fund that litigation in return for profit, but it dealt only with circumstances where the funder had indemnified the plaintiffs against their liability for costs to defendants in a manner that would be practically effective. Those circumstances do not exist here. The authorities, scattered and directed to other questions though they generally are, evince a

repugnance for third party litigation funding of the type which leaves defendants at risk of not being able to enforce costs orders in their favour. As a matter of fairness and justice, the successful party to litigation is ordinarily entitled to an order for costs in its favour. To the extent that that order is not complied with, the successful party will have been treated unfairly and unjustly.

[112] It is true that not every unfair and unjust outcome signifies an abuse of process. But the unfair and unjust outcome of these proceedings for the defendant was generated by an abuse of process: the maintaining of litigation a primary purpose of which was the gaining of a very large "success fee" for the funder without any effective indemnity from the funder for the plaintiff's liability to the defendant.

[113] The funder's "success fee" was on one view more than double the sum advanced and on another more that treble that sum. If viewed as interest on a loan to support proceedings conducted with proper expedition, it would be extortionate to a degree, beyond the dreams of the greediest usurer. If charged by a lawyer, it would cause that lawyer to be barred from practice. It is an abuse of process, in several senses, for a non - party funder to fund the plaintiff's prosecution of proceedings in which the funder has that kind of financial interest without giving a practically effective indemnity to the plaintiff against its liability to the defendant for costs in the event that the plaintiff loses. It is manifestly and grossly unfair and unjust to the defendant. It is seriously burdensome, prejudicial and damaging to the defendant. It is productive of serious and unjustified trouble and harassment: for it caused the defendant to be vexed by baseless proceedings without being indemnified against the costs of demonstrating their baselessness. It is "unjustifiably oppressive" to the defendant. If the funder's conduct in this case became an institutionalised practice in the administration of justice, it would be an institutionalised practice by which injustice is constantly and inevitably caused. An institutionalised practice of that kind would bring the administration of justice into disrepute. Bringing the administration of justice into disrepute is a touchstone of abuse of process. The funder was telling the defendant:

> *"[Y]ou ... have no choice about whether to play this game; we are going to provide the means to start and continue it; if our side wins, you pay us; but if you win we will not pay you."*

The funder wished to take the chance of financial gain by backing a horse to win without being responsible for paying a component of the sum wagered if the horse lost. The funder wanted to obtain insurance monies without paying a key part of the premium. The funder wanted the palm without much of the dust. A funder who funds litigation instituted by an impecunious plaintiff for the purpose of large personal profit without giving an indemnity to that plaintiff against its liability for the defendant's costs in a manner which will protect the defendant is, in the light of our forensic mores and standards, a funder who commits an abuse of process."

New Zealand

86. The New Zealand courts have followed and applied the decision of the High Court of Australia in Fostif.

87. In *Houghton v Saunders* [2008] NZHC 1569, the plaintiffs sought to bring representative proceedings on behalf of a large number of shareholders of Feltex Carpets Limited over a share prospectus which they alleged contained untrue and misleading statements. A litigation funder offered to fund the proceedings in exchange for 33% of any damages or settlement plus costs, increasing to 38% if there was an appeal, plus a “project management fee” of 25% of the total costs of the project recovered if the claim was successful. The funder stood to make a potential profit of up to $82.5 million, or $95 million if there was an appeal. The defendants contended the funding arrangement was champertous and constituted an abuse of process and sought a permanent stay of the action. The terms of the funding agreement were precisely the same as those in Fostif.

88. French J at first instance concluded that the funding agreement was champertous but did not amount to an abuse of process such as would warrant a stay, whilst reserving the right to keep the funding agreement under review as the proceedings progressed. French J recognised that *"in more recent years there has been a dramatic change in attitude, with some jurisdictions abolishing the tort of champerty altogether and courts generally adopting a much more liberal and relaxed approach, to the point where many authorities appear actively to support litigation funding as a matter of public policy"* (at [176]).

89. French J noted that "*Any wrongdoing by the funder can be controlled by the laws relating to misleading and deceptive conduct, unconscionable contracts, abuse of process and contempt of Court*" (at [195]) and held that *"the principles and policy considerations articulated in the High Court [of Australia in Fostif] are of sufficient general application to be able to be relied upon in this case"*, despite the fact that in New Zealand the tort of champerty had not been abolished by statute (at [197]-[198]).

90. On the question of the potential profit to the litigation funder, the Court was referred to decisions where percentages of the new proceeds charged by funders as high as 75% (*Buiscex Ltd v Panfida Foods Ltd* (in liq) [1998] NSWSC 516; 66.6% (*Bell Group v Westpac* (1993) 18 WAR 21); and 55% (*Bandwill v Spencer - Laitt* [2000] WASC 210) have all been upheld.

91. The decision of French J was upheld by the New Zealand Court of Appeal *in Saunders v Houghton* [2009] NZCA 610 per Glazebrook, O'Regan and Baragwanath JJ. The Court of Appeal referred to the decision of the High Court of Australia in *Jeffrey & Katauskas*, noting that the involvement of a litigation funder *"can give rise to deep - seated differences of approach among judges"* and of the need for *"at least careful control of the funder by suitable conditions"* (at [21]).

92. The Court of Appeal recognised that until recently, in the absence of legislation to the contrary, funding litigation for profit was treated as an abuse of process, but that in recent years a more nuanced approach had emerged, particularly in England and Australia, based on access to justice considerations:

> *"[28] Nevertheless, the interests of justice can require the court to unshackle itself from the constraints of the former simple rule against champerty and maintenance. Access to justice is a fundamental principle of the rule of law. It can require flexibility to meet the harsh reality of the current cost to the injured party of litigation, which is often more than a would - be plaintiff can sensibly be expected to bear. The result can be a failure of justice: a plaintiff with merits can be excluded from relief against the defendant who has committed a legal wrong.*
>
> *[29] It follows that a more discriminating test is required……*
>
> *[34] The Australian experience is that a professional funder can add value to the administration of justice. Where the funder engages able counsel and performs the research needed to establish that the case has merit the public interest in giving access to the courts for proceedings against a wrong - doer in favour of those who have been wronged can be promoted. But as was shown in Clairs Keeley (a firm) v Treacy [2004] WASCA 277; [2005] WASCA 86, the court will pay close attention to the protection of the funded parties and may stay the litigation until their interests are properly protected."*

93. The Court of Appeal concluded that, despite the absence of New Zealand legislation abolishing the torts of champerty and maintenance, those torts were created *"in an era before the courts had the capacity to deal with unruly nobles"* [77] and that *"… the common law in other jurisdictions had moved on and access to justice and comity with other states mean we should follow"* (at [78]).

94. In so concluding, the Court of Appeal emphasised the need for proper controls appropriate to the nature of the case and the particular funder and funding terms, but that the New Zealand courts *"should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where (a) the court is satisfied there is an arguable case for rights that warrant vindicating; (b) there is no abuse of process; and (c) the proposal is approved by the court"* (at [79]).

95. On the often "vexed question" of security for costs, the Court of Appeal stated:

> *"[36] The making of orders for both representation and admission of a funder substantially alters the balance between plaintiffs and defendants. We consider that the change is so radical as to justify the High Court, in exercise of its inherent jurisdiction… to consider ordering security as a term of such orders, even where numerous natural persons are among the plaintiffs, as the price of the privilege to employ such a procedure. That is in order to protect defendants against the effect of a procedure which could otherwise be oppressive. The fact that the funder has no personal right at stake, that it takes part of the proceeds of any claim, and that it is motivated by the financial considerations that gave rise to the common law prohibition of champerty point to the need for the funder to provide security for costs in most cases."*

96. Although not cited in the reasons of the Court of Appeal, this conclusion on the question of security for costs is consistent with that of the New South Wales Court of Appeal in *Green v CGU,* referred to above.

Hong Kong

97. The leading authority in Hong Kong is the decision of the Court of Final Appeal *in Unruh v Seeberger* [2007] 2 HKLRD 414. Ribeiro PJ (with whom Li CJ, Bokhary PJ, Chan PJ and McHugh NPJ agreed) upheld a funding agreement pursuant to which the plaintiff would receive 10% of any monetary compensation in respect of foreign arbitration proceedings exceeding US$10 million, despite the prima facie champertous nature of the funding agreement, on the basis that the plaintiff had a genuine commercial interest in the outcome of the arbitration.

98. The CFA recognised that the origins of maintenance and champerty were *"ancient and obscure"* (at [77]) but that the common law rules making them criminal offences, torts and a ground of public policy for invalidating tainted contracts were part of the law of Hong Kong prior to 1997 and remained applicable after 1997 by virtue of Article 8 of the *Basic Law* (at [78]). However, the CFA recognised that the early policy imperatives for prohibiting maintenance and champerty *"have long gone"* (at [89]) and identified three categories of cases "*where conduct which would otherwise constitute maintenance or champerty has been excluded from the sphere of such liability*" in modern times, namely:

98.1 the "*common interest*" category, where certain relationships have been judicially recognised as involving persons with a legitimate common interest in the outcome of litigation sufficient to justify them supporting the litigation (at [92]-[94]);

98.2 cases involving "*access to justice considerations*", noting that, in Hong Kong, Article 35 of the Basic Law recognizes access to the courts as a fundamental right and that this category is not static (at [95]-[97]; and

98.3 a miscellaneous category of practices accepted as lawful even though they do not differ in substance from practices which have been traditionally roundly condemned, such as the statutory insolvency exception and the doctrine of subrogation as applied to insurance contracts (at [98]).

99. The CFA then identified four modern public policy considerations which ought to be taken into account when examining questions of maintenance or champerty:

99.1 the traditional legal policies underlying maintenance and champerty (such as prevention of officious intermeddling, perversion of justice and trafficking in litigation) continue to apply although they must be substantially qualified by other considerations (at [100]-[101];

99.2 the fact that an arrangement may be caught by the broad definitions of maintenance and champerty is not itself sufficient to found liability and the totality of the facts must be examined asking whether they pose a genuine risk to the integrity of the court's processes (at [102]);

99.3 countervailing public policies must be taken into account, especially policies in favour of ensuring access to justice or recognizing, where appropriate, legitimate common interests of a social or commercial character in a piece of litigation (at [103]); and

99.4 it is important not to confuse related but separate policies with those which properly underlie the operation of maintenance and champerty. For example, it "*may be to use too blunt an instrument*" to strike down an arrangement as unlawful maintenance or champerty and to leave a litigant with no means to pursue a good claim. In such cases resort might more appropriately be had to other doctrines and remedies more suited to granting relief to a vulnerable party who has been unconscionably exploited or against a solicitor acting in conflict of interest or engaged in other professional misconduct (at [104]).

100. The CFA held that for a genuine commercial interest to provide a justification for an otherwise champertous agreement, the potential gain under the relevant agreement did not have to be proportionate to the value of the maintainer's commercial interest (at [114]). Nor did the CFA consider it appropriate to strike down an agreement on grounds of maintenance or champerty where it was to be performed in relation to judicial or arbitral proceedings in a jurisdiction where no such public policy objections exist (at [122]), but left open the question whether maintenance and champerty apply to agreements concerning arbitrations taking place in Hong Kong (at [123]).

101. The CFA also invited the Hong Kong legislature to abolish criminal and tortious liability for maintenance and champerty, concluding that *"the continued retention by Hong Kong of criminal and tortious liability for maintenance and champerty may not be justified and this question merits serious legislative attention"* (at [119]).

Singapore

102. Issues of champerty and maintenance have come before the Singapore Court of Appeal on two occasions, in 1997 and 2006. However, the Court of Appeal has not examined the policy considerations which have featured heavily in the decisions of the senior courts over the last decade in the other jurisdictions surveyed. So it remains to be seen how questions of maintenance and champerty will be determined by the Singapore courts.

103. *Lim Lie Hoa & Anor v Ong Jane Rebecca* [1997] 2 SLR 320 was a matrimonial and estate case in which Court of Appeal found that the funder of the plaintiff's case had a genuine pre - existing interest in the litigation such that no issue of champerty arose. The Court of Appeal placed reliance on *Giles v Thompson*, which was at the time the most recent decision on the subject in England.

104. In *Otech Pakistand Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989, the Court of Appeal opined by way of obiter that the law of champerty applied to all types of legal disputes and claims including arbitration proceedings. On the facts of the case, it was not necessary for the Court to undertake any examination of whether or not the agreement would have been struck down, nor did the Court of Appeal refer to any of the 'Commonwealth' decisions of the last decade.

105. However, the concluding observations of the Court of Appeal suggest that it cannot be assumed that the Singapore courts will necessarily adopt the more liberal approach which now predominates in the 'Commonwealth' jurisdictions surveyed in this paper:

> *"[38]…The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation. This case, in fact, is a good example of why the doctrine must apply to arbitration. The evidence showed that Mr Latif had repeatedly urged Clough to increase the amount that it was demanding from OGDCL to settle its claim. This must be because Otech had everything to gain from a higher settlement figure. The need to deter such behaviour was one of the reasons for the development of the doctrine. It would be absurd, in our judgment, to condone behaviour of this kind by saying that it was permitted because the parties were looking to resolve their dispute by way of arbitration instead of in the*

courts. We must reiterate that the principles behind the doctrine of champerty are general principles and must apply to whatever mode of proceedings is chosen for resolution of a claim."

106. It remains to be seen as to which side of the public policy divide the Singapore courts will favour.

Canada

107. The leading decision in Canada is that of the British Columbia Court of Appeal *in Fredrickson v. Insurance Corp. of British Columbia* (1986) 28 DLR (4th) 414 per Seaton, Anderson and McLachlin JJA, which was affirmed without comment by the Supreme Court of Canada on 13 June 1988.

108. The case concerned whether an insured could assign to the party claiming against him a cause of action against the insurer for failing to defend and negotiate a settlement on his behalf. The assignment was upheld on the basis that the assignee had a legitimate pre - existing financial interest in the cause of action in tort assigned to her.

109. McLachlin JA (now the Chief Justice of the Supreme Court of Canada) delivered the decision of the Court of Appeal, stating:

"[23] On the assumption that, as a general rule, causes of action in tort are not assignable, it is clear that that rule is subject to a number of exceptions. In dealing with those exceptions it must be borne in mind that the categories of exceptions are not closed. In each case the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason: Fleming, The Law of Torts, 6th ed. (1983), p593.

[24] First, it is clear that the fruits of an action, as opposed to the action itself, are assignable. In Glegg v Bromley, supra, the issue was the validity of an assignment by a wife to her husband of the damages of a slander action. The court accepted that an assignment of a tort action based on a "personal wrong" would be invalid. It held, however, that if there were words in the assignment which purported to convey the cause of action as opposed to the fruits of the action, those words would be inoperative, leaving intact the portion of the assignment conveying the right to fruits of the action.

[25] The assignment in the case at bar purports to convey both the cause of action and the fruits of the action. If Miss Nielsen's only interest were in obtaining any damages which Mr Fredrickson might obtain as a result of the suit, then the matter could be disposed of on the basis of this exception. However, it appears that she is desirous of prosecuting the action as well, through her agent, the Public Trustee. Her right to do so cannot be resolved on the basis of this exception.

[26] A second exception concerns cases where the assignee has either a pre - existing property interest or a legitimate commercial interest in the enforcement of the claim. An assignment where the assignee possesses such an interest will be valid, provided the action in tort is not based on a personal wrong, such as assault, libel or personal injury. The reason for the latter stricture appears to be that in cases of personal torts, the assignee can have no legitimate property or commercial interest in recovery: Trendtex Trading Corp v Credit Suisse (citations omitted) ……

[37] I would summarize the effect of these cases as follows. An assignment of a cause of action for non - personal tort is generally valid if the assignee has a sufficient pre - existing interest in the litigation to negate any taint of champerty or maintenance. In determining if this test is met, the court should look at the totality of the transaction: Trendtex, per Lord Roskill at p531. A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre - existing commercial interest will suffice. The term "commercial interest" is used in the sense of financial interest; it need not arise

> *from commercial dealings in the narrow sense. Assignment of a cause of action to a stranger will not be permitted, nor will the court uphold an assignment made for the purpose of obtaining more than what the assignee is legally entitled to. The conditions necessary to support the assignment of a cause of action in tort will be met where one party to litigation assigns to the other a cause of action arising out of the conduct of that litigation, with a view to enabling the assignee to recover the judgment which the court has previously produced in his favour."*

110. In the context of an application for approval of an indemnification agreement for a class action being conducted pursuant to a contingency fee arrangement, Leitch RSJ of the Ontario Superior Court of Justice in *Metzler Investment GmbH v Gildan Activewear Inc & Ors* [2009] OJ No 3315 held that third party funding agreements, like contingency agreements, were not *per se* champertous, but required an examination of the conduct of the parties involved and the propriety of the motive of the funder (at [63]).

111. In Metzler, a professional third party funder indemnified the plaintiff against any adverse costs aware in exchange for a commission equal to 7% of any net judgment or settlement sum payable to the class members. The plaintiff was "a sophisticated entity" who brought the claim before the indemnification agreement was entered into, such that the indemnity was not necessary to ensure access to justice (at [56]).

112. The Court found that the indemnification agreement did not contravene public policy, but only after undertaking a 'blue pencil' exercise, deleting clauses which permitted the indemnifier to attend settlement discussions and to terminate the agreement without cause (at [58]-[62]).

11.3 However, the Court concluded that it could not at the time of the hearing declare that the indemnification agreement did not engage in maintenance and champerty because it was not possible to undertake any assessment of the fairness and reasonableness of the compensation payable to the indemnifier, as the compensation to be paid was entirely related to the sum ultimately recovered and bore no relationship to the degree of risk taken by the funder (at [70]-[73]).

114. It appears that the Court was influenced in reaching this conclusion by the fact that the class members would assume the liability for the commission payable to the indemnifier, as the Court accepted that examination of the fairness of the transaction could be left to the plaintiff's business judgment if the liability for the commission was assumed by the plaintiff or class counsel (at [70]).

115. It is notable that it was accepted that third - party indemnification agreements were novel in Canada and the Court made brief reference to *Fostif* and *Arkin*. However, the defendant contended that these decisions were irrelevant because contingency fee agreements are not permitted in England or Australia and because in *Arkin* the plaintiff was impecunious and the Court did not discuss the policy considerations addressed in these decisions (at [30]-[35]).

116. Although it was not the subject of discussion in *Metzler,* it is possible that the Canadian courts might adopt a more cautious approach to third party litigation funding, particularly if undertaken in conjunction with contingency fee arrangements. In such a case, one of the significant protections to the proper administration of justice and therefore a safeguard against abuse of process is absent, namely the involvement of a lawyer without a direct financial interest in the outcome of the litigation.

117. In *Dugal v Manuli* [2011] ONSC 1785, G.R. Strathy J approved a litigation funding agreement that indemnified the plaintiffs in a class action against an adverse costs order, in exchange for a 7% share of the proceeds, holding that it was beneficial to the proper administration of justice. G.R. Strathy J held (at [33]) that (1) the funding agreement helped to provide access to justice, in that the representative plaintiff would not have to bear the burden of a potentially crushing costs award; (2) there was no evidence that the funder encouraged the litigation; (3) the plaintiffs remained in control of the litigation; (4) the commission of 7% was reasonable; (5) the plaintiffs were represented by experienced lawyers; and (6) the court would have supervision of the parties to the agreement. The Court was referred to the English and Australian cases *Arkin, Fostif* and *Ericksson,* but did not examine these, noting that the situation in Australia is different than in Ontario because in Australia lawyers' contingency fees are not permitted.

118. It remains to be seen whether Canada will continue to adopt what appears to be a more conservative attitude to third party litigation funding, by reason of the ready availability of lawyers' contingency fees such that the same access to justice considerations are not enlivened as in the other jurisdictions examined, or whether the appellate courts in Canada will adopt the more open but careful approach to third party funding that has been accepted by senior courts in each of England, Australia, South Africa, New Zealand and Hong Kong.

F. Conclusion and Looking Ahead

119. The principal theme that emerges from this review of the English and Commonwealth case law is that the Courts in the 21st century are in a position to give greater weight to considerations of access to justice than their predecessors. This is a matter of both necessity due to the high costs of litigation and the greater sophistication of and safeguards built into the modern civil justice system. This has enabled the Courts to effectively police and prevent abuse of process.

120. The statutory insolvency scheme, insolvency practitioners and insolvency judges have been at the forefront of the development of litigation funding as an effective, court sanctioned, mechanism to facilitate access to justice. The effective use of litigation funding in the insolvency context has at the very least demonstrated to the wider judiciary that with appropriate safeguards, third party litigation funding has an effective role to play in the facilitation of access to justice beyond insolvency cases. In addition to improved access to justice, the utilisation of third party funding in insolvency has also served the wider public interest, by facilitating the investigation and identification of corporate misconduct and the pursuit of those responsible for losses suffered by creditors and investors.

121. In turn, the pursuit of actions that would otherwise be lost without investigation due to lack of financial resources has aided the development of company and insolvency law jurisprudence and increased the expectation in the commercial community that misconduct will be investigated and pursued, even in jurisdictions where regulatory authorities might lack the necessary resources or expertise to pursue such matters. At least in theory, this ought to lead to improved standards of corporate behaviour and reduce the burden on the public purse.

122. Nevertheless, the Courts remain vigilant to prevent the risk of abuse of process by closely examining and controlling the types of funding arrangements that will be countenanced. The strong objections to external litigation funding voiced in some of the dissenting opinions discussed above demonstrates the importance of practitioners, litigants and funders taking care to ensure that their funding arrangements comply with the specified legal framework in the relevant jurisdiction. A careful approach referable to the safeguards that have been articulated by the Courts will maximise the prospect that judicial confidence that the benefits of third party litigation funding outweigh the risks continues to increase, rather than diminish, in turn enabling the litigation funding jurisprudence to continue to develop in a positive direction.

123. There are a number of areas within the subject of third party litigation funding where we are likely to see further judicial development in coming years. Some of the decisions discussed in this paper have touched on practical issues such as the extent to which a third party funder may be permitted to exercise actual control over litigation, confidentiality and legal professional privilege, dispute resolution and termination mechanisms, court sanction and judicial supervision, adverse costs liability and security for costs. As with other subjects, it is unlikely that the judiciary will develop an entirely consistent approach to these issues across the common law world.

124. A particularly important issue that is emerging in the context of third party funding arrangements implemented to facilitate access to justice is the extent to which the costs of litigation funding may be recoverable by a successful litigant from their unsuccessful opponent.[20] Extra cost of litigation finance caused by a litigant's foreseen impecuniosity is arguably recoverable from an unsuccessful litigant as part of a costs award.[21] It remains to be seen whether this reasoning will

[20] See for example the recent decision of Sales J in *F&C Alternative Investments (Holdings) Ltd v Barthelemy and Culligan* [2011] EWHC 2807 (Ch). Although this was not a third party funding case, the successful defendants were required to borrow money from bridging finance providers at effective rates of between 24% and 47% p.a. to fund their on-going legal bills. On the particular facts of the case, Sales J at [71-81] exercised his discretion to award interest on costs by reference to the actual costs incurred by the defendants, so as to do broad justice between the parties in a reasonably simple and straightforward to apply manner.

[21] See *Landoro (Qld) Pty Ltd (Administrator Appointed) v Jensen International Pty Ltd* [1999] QCA at [11-12] per Davies JA with whom McMurdo P agreed. See also *IMF Australia Limited v Meadow Springs Fairway Resort Limited (in Liquidation)* (2009) 253 ALR 240 at [63-73] per North, Emmett and Rares JJ, where the Full Federal Court held that amounts payable to a litigation funder (including fees of $115,000 and a 35% net

be extended in appropriate cases to impose on an unsuccessful litigant the costs paid by a successful litigant to a third party funder, including the funders' share of the net proceeds from the litigation.

125. It also remains to be seen whether judicial acceptance of third party funding, in particular in those jurisdictions where maintenance and champerty are no longer crimes or torts, will extend to the utilisation of third party funding as a legitimate risk and cost management tool, even where external funding is not required to facilitate access to justice[22]. Competing policy considerations include the increased prospect of overt "trafficking in litigation" that has traditionally been frowned upon by the judiciary, counterbalanced by efficiency and economic benefits. Analogies can be drawn with the use of professional indemnity insurance and the role of insurers in litigation on behalf of defendants.

premium on recoveries) as consideration for funding legal proceedings in which compensation or other property was recovered, were properly characterised as an expense necessary to obtain that compensation, such that they were recoverable in priority to the entitlements of a secured creditor. See also *Motto v Trafigura Limited* [2011] EWCA Civ 1150 at [104] – [145].

[22] See *QPSX Limited v Ericsson Australia Pty Ltd (No 3)* [2005] FCA 933 at [54-55] per French J, discussed above.