Litigation Funding: Some Modest Proposals

B C BAILEY

A dissertation submitted in partial fulfilment of the degree Bachelor of Laws (with Honours)
at the University of Otago, Dunedin, New Zealand.
October 2018

ACKNOWLEDGMENTS

I would like to thank Associate Professor Barry Allan for being a limitless source of inspiration and encouragement. Thank you for hours of discussion on litigation funding, travel, disputing parking fines in Tasmania, and everything in between.

I would also like to thank Jordan Sangster, who somehow struck the perfect balance between ruthlessly critiquing my writing and inflating my already enlarged ego.

As well as Timothy Wilkinson for his insatiable desire to talk about law at any time of day.

TABLE OF CONTENTS

INTRODUCTION

Litigation is costly.[1] Plaintiffs[2] may therefore prefer or require outside funding to bring proceedings. New Zealand has recently addressed the legality of the practice of third-party investment in legal claims.[3] This practice is widely known as litigation funding. There are currently at least seven professional litigation funders operating in New Zealand.[4]

The practice operates whereby capital is provided to a plaintiff in return for a portion of any financial recovery from the lawsuit.[5] Funding is provided on a non-recourse basis, meaning that if the case is lost, funders receive nothing. A funder's proportion is calculated based upon the risk of a particular case.

Litigation funding is steadily growing internationally.[6] Countries differ widely in their regulation of litigation funding. The litigation funding market is unregulated in New Zealand. Courts have been reluctant to elucidate clear principles relating to the practice and the New Zealand Law Commission has recently announced it will be reviewing the law relating to class actions and litigation funding.[7] The practice excites controversy.

Advocates trumpet its many virtues, including increased access to justice and market efficiency. The civil justice system is critiqued as too slow, too expensive and too adversarial.[8] It favours repeat players and well-resourced entities over citizens with legitimate claims but without resources to pursue those claims. Risk averse or liquidity constrained plaintiffs may be prevented from bringing a case.[9] Litigation funding purportedly alleviates

---

[1] Saskia Righarts and Mark Henaghan "Public perceptions of the New Zealand court system: an empirical approach to law reform" (2010) 12(2) Otago L Rev 329; Justice Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (Ethel Benjamin address, 7 November 2014) (2014) 13 Otago L Rev 229.

[2] Litigation funders most commonly fund plaintiffs, however, defendants may use their services as well. Discussion in this dissertation will be confined to funded plaintiffs.

[3] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR; *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735.

[4] James Greenland "Seven litigation funding services in NZ" (5 May 2016) New Zealand Law Society <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/seven-litigation-funding-services-in-nz>.

[5] Either damages awarded or settlement.

[6] See generally Leslie Perrin (ed) *The Third-Party Litigation Funding Law Review* (Gideon Roberton, London, 2017).

[7] Sir Douglas White, President of the Law Commission "Setting the Scene: The law reform project and the current review of class actions and litigation funding" (The Future of Class Actions Symposium, University of Auckland Business School, Auckland, 15 March 2018).

[8] Justice Stephen Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (An address to the Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016).

[9] Roland Kirstein and Neil Rickman "Third Party Contingency Contracts in Settlement and Litigation" (2004) 160 Journal of Institutional and Theoretical Economics 160 555 at 556.

these problems. Advocates argue that everyone benefits: plaintiffs may bring claims they could never otherwise bring, lawyers enjoy a greater demand for their services, and investors can profit from investing in litigation risk, which has the benefit of being uncorrelated with the market.[10] The overarching mantra is access to justice, with litigation funders supporting the underdog.

Opponents are apprehensive at the prospect of so much private investment flowing into the justice system.[11] They suggest the practice will transform our courtrooms into a stock exchange and inappropriately commodify justice. Litigation funders may exploit impecunious plaintiffs by imposing burdensome terms in funding agreements or exerting inappropriate control over the litigation. Primarily opponents challenge the David versus Goliath access to justice narrative. When funders broadcast access to justice and helping the underdog, "they generally mean helping millionaires pursue claims against billionaires."[12] There is strong self-interest involved. The areas where the demand for legal services is greatest – employment, family, and housing – are largely un-serviced.[13] As the market currently operates, litigation funders are almost exclusively interested in high yielding commercial claims.

Regardless of their opinion, most commentators agree that litigation funding requires caution because it is novel. Areas of concern do exist. This dissertation unpacks this premise. To date, litigation funding has been largely unproblematic in New Zealand. This good fortune cannot be guaranteed to continue if litigation funding is perceived as a lucrative market. What controls are needed for unscrupulous funders entering the market and how do funding arrangements fit within existing legal structures?

Litigation funding fills an important role in New Zealand society. The emergence of litigation funding in New Zealand must be understood in the context of the country's ban on percentage contingency fees[14] and the financial threshold for legal aid eligibility being set

---

[10] Michael Velchik and Jeffery Zhang "Islands of Litigation Finance" (25 April 2017) Harvard Law School < http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Zhang_71.pdf>

[11] W. Bradley Wendel "Alternative Litigation Finance and anti-Commodification Norms" (2014) 63 DePaul L. Rev. 655; Thurbert Baker "Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding" (2013) 23 Widener L.J. 229.

[12] Matthias Schwartz "Should you be allowed to invest in a lawsuit?" (22 October 2015) New York Times Magazine <https://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html>

[13] Peta Spender "After Fostif: Lingering Uncertainties and Controversies About Litigation Funding" (2008) 18 JJA 101 at 110.

[14] Lawyers and Conveyancers Act 2006, ss 333–335; Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.8. Contingency fees are permitted if the fee is calculated in the normal billing manner plus a premium to compensate for the risk assumed. Lawyers payment or the premium cannot be a percentage of the proceeds of a successful claim.

very low.[15] The practice enhances access to justice; not for all, but certainly for those with genuine claims who are currently excluded from the legal system. The demand for such services is a symptom of a broader access to justice problem. It also assumes the function of shouldering financial burdens and litigation risks that individuals and businesses are unwilling to bear, even if financially able. The practice enhances vindication of rights.

Litigation funding has encountered the historical antipathy to maintenance and champerty. Chapter I demonstrates that litigation funding does not per se involve maintenance and champerty. The litigation market is expanding in New Zealand and is here to stay. This dissertation takes a pragmatic approach to addressing three main areas of concern arising from the current unregulated practice: concerns of parties to the funding agreement, concerns of non-parties to the funding agreement, and wider court concerns. Chapter II explores concerns from a plaintiff-centric stance. Chapter III highlights defendant-centric concerns. Chapter IV deals with court concerns and wider ethical issues. The conclusion advocates for a disclosure-based approach to funding agreements, with some form of principled oversight. This dissertation does not determine what particular form oversight should take, but rather addresses principles that should underpin oversight.

Discussion will be confined to an individual plaintiff and a litigation funder. Highly significant issues are raised by the use of litigation funding in representative proceedings[16] but these are beyond the scope of this dissertation.[17]

---

[15] Justice Winkelmann "Access to Justice – Who Needs Lawyers?" (Ethel Benjamin address, 7 November 2014) (2014) 13 Otago L Rev 229 at 234. See Ministry of Justice *Eligibility Guidelines* (1 July 2018).

[16] Otherwise known as class actions.

[17] See *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [63]. Courts assume a supervisory role of representative actions to ensure that sufficient communication with the class members is occruing; that those who are represented are informed and consulted on all steps; and that no misleading information is given to encourage new participants.

CHAPTER I: INTERFACE WITH MAINTENANCE AND CHAMPERTY

1.1 History

Historically, common law courts were of the view that litigation funding for profit was an abuse of process, offending against the ancient doctrines of maintenance and champerty, and was unlawful per se.[18] The law of maintenance and champerty developed as both crimes and torts in medieval England in response to wealthy nobles procuring litigation against enemies to inflict harm and engage in a form of private war.[19] Maintenance occurs when an unconnected third party assists to maintain litigation (for example, via financial assistance).[20] Champerty is a subspecies of maintenance, where a third party pays a proportion of the litigation costs in return for a share of the proceeds.[21]

Maintenance and champerty are unlawful on the grounds of policy reasons. Policy aims to protect the integrity of courts and the party facing the maintained litigation.[22] As a matter of policy, it is undesirable to have excess litigation as this encumbers an efficient judicial system. The law also seeks to prevent officious meddling where a disinterested party interferes with the disputes of others, without justification or excuse.[23] Historically, concerns arising from entrusting the control of litigation to a third party included inflating damages, suppressing evidence, buying witnesses, or furthering the interests of the third party at the expense of undermining justice.[24] These concerns are largely anachronistic, with the exception of the final concern which will be discussed in Chapter IV. The torts were created in an era where the wealthy could commandeer the judiciary to accrue wealth, harass enemies, or accumulate dependents. Modern courts are able to combat these abuses. Courts have jurisdiction to prevent abuse of its processes and address perceived exploitation of the vulnerable.[25]

1.2 Developments in other jurisdictions

In England and most Australian states the doctrines of maintenance and champerty have been abolished as both crimes and torts.[26] The eradication of civil and criminal liability of the

---

[18] *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [24].
[19] *Campells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA, (2006) 229 CLR 386 at [68]-[82].
[20] *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331at [24].
[21] *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 (CA) at 654.
[22] *Wild v Simpson* [1919] 2 KB 544 (CA) at 562–563 per Atkin LJ.
[23] *Giles v Thompson* [1994] 1 AC 142 (HL) at 161.
[24] *R (Factortame) v Secretary of State for Transport, Environment and the Regions (No 8)* [2003] QB 381 at [36].
[25] High Court Rules 2016, r 15.1; District Court Rules 2014, r 15.1; inherent powers of the Supreme Court to stay proceedings for abuse of process – see *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR at [30].
[26] Criminal Law Act 1967 (UK), ss 13–14; Civil Law (Wrongs) Act 2002 (ACT), s 221; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), ss 3–4 and 6; Criminal Law Consolidation Act 1935 (SA), sch 11, ss 1(3) and 3 (inserted by 35/1992, s 10 (sch) in 1993); Abolition of Obsolete Offences Act 1969 (Vic), s 4, which amended the Wrongs Act 1958 (Vic), s 32; Crimes Act 1958 (Vic), s 322 A. The position in other

doctrines does not, however, impact any rule of law in cases where a contract is to be treated as contrary to public policy.[27] This preserves the rule that maintenance may render a contract unenforceable and ensures policy considerations remain important in assessing the legality of a contract.

There are no statutory provisions in New Zealand concerning maintenance and champerty. The doctrines were abolished as crimes in New Zealand, however the torts remain. The Law Commission recommended retaining the torts as no simplification of the law was perceived in aligning with other common law jurisdictions by abolishing the torts while preserving the underlying public policy issue in their application to contract legality.[28] Although New Zealand lacks the unruly barons of medieval England whose behaviour led to the creation of the torts, New Zealand does not lack unruly corporations prepared to employ ruthless litigious processes against business rivals.[29] The Law Commission concluded situations still exist for which the torts may provide redress, and if the torts were abolished another method for providing redress would need to be invented.[30] The consequence of an objectionable maintained or champertous agreement subjects the maintainer to liability in tort and the agreement itself will be of no effect by virtue of the Contract and Commercial Law Act 2017.[31]

1.3 Public policy

The formerly strict policy against maintained and champertous actions has been greatly relaxed in recent decades. As noted by Elias CJ, "such evolution was inevitable because the law in this area is based not upon fixed rules or principles but on notions of public policy which necessarily adapt to meet changing social circumstances."[32] Provision of financial support by trade unions[33] and relatives or friends[34] is permissible. Subrogation under insurance policies does not offend the principles against assignment of causes of action.[35]

---

states and territories must be considered in light of the High Court of Australia's decision in *Campbells Cash and Carry v Fostif* [2006] HCA, (2006) 229 CLR 386.

[27] Criminal Law Act 1967 (UK), ss 13(1), 14(1), 14(2); Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), s 6.

[28] Law Commission *Subsidising Litigation* (NZLC R72, 2001), at 11.

[29] At 10.

[30] At 11. In *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331, Baragwanath J at [27] remarked that experience elsewhere, especially in the United States, showed that there was still force in the concerns underlying maintenance and champerty as torts.

[31] Contract and Commercial Law Act 2017, s 73. Illegal agreements can nonetheless be validated.

[32] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [15], citing *Stevens v Keogh* (1946) 72 CLR 1, (1946) 20 ALJR 161 (HCA) at 28 per Dixon J.

[33] *Stevens v Keogh* (1946) 72 CLR 1, (1946) 20 ALJR 161 (HCA).

[34] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [253] per Callinan and Heydon JJ.

[35] *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216 (QB).

Assignments of causes of action which are ancillary to property interests do not offend against the policies behind maintenance and champerty. Litigation funding arrangements are being permitted to give effect to other facets of public policy: access to justice and vindication of rights. The harsh reality of the current cost of litigation has required the court to unshackle itself from the former simple rule against maintenance and champerty.[36]

Most modern applications of maintenance and champerty have been concerned with the distinction between assignment of property and the rights ancillary to it and the assignment of a "bare cause of action", a line not always easily maintained.[37] No clear distinction has emerged between support or assignment arising out of an existing proper interest and support or assignment which in substance amounts to "trafficking in litigation."[38]

1.4 Bare cause of action

It has long been established at common law and equity that a bare cause of action may not be assigned to a third party.[39] Jurisprudence lacks clear elucidation of what a bare cause of action is.[40] Unassignable claims that amount to a bare cause of action include rights to sue for tort[41], unliquidated damages for breach of contract[42] and rights to sue in equity such as a right to set aside a deed for fraud.[43] Such agreements have been said to "savour of maintenance or champerty", and amount to trafficking in litigation.[44] The prohibition on bare causes of action is rooted in the torts of maintenance and champerty,[45] but has been recognised in the Supreme Court as having independent existence of its own as the boundaries of unlawful maintenance have been pushed back.[46]

---

[36] *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [28]. As noted in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [120] per Kirby J, to lawyers raised in an earlier era, litigation funding and its associated fees may seem unconventional or horrible, "[but] the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights."

[37] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [115].

[38] At [115].

[39] *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629; [1980] 3 All ER 721 at 741.

[40] As hyperbolized by Lloyd LJ in *Brownton Ltd v Edward Moore Inbucom Ltd* [1985] 2 All ER 499 (CA), "no single phrase has given rise to greater confusion than the rule, described by Lord Roskill in the House of Lords as still being a fundamental principle of our law, that you cannot assign a 'bare right to litigate.'"

[41] *Poulton v The Commonwealth* (1953) 89 CLR 540 at 602.

[42] *May v Lane* (1894) 64 LJ (QB) 236; *County Hotel and Wine Co v London & North-Western Railway Co* [1918] 2 KB 251 at 258.

[43] *Prosser v Edmonds* [1835] 160 ER 196 at 202.

[44] *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) at 683.

[45] Law Commission *Subsidising Litigation* (NZLC R72, 2001) at 25-30.

[46] *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57]. Elias CJ in *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [116] noted that "despite some conceptual obscurity, it is however striking that judges continue to acknowledge the legitimacy of concern about litigation funding which amounts to the assignment of a bare cause of action."

1.4.1 Exceptions

There are several exceptions to the rule against the assignment of a bare cause of action. First, if a cause of action is ancillary to the transfer of a property right, the assignment will be upheld.[47] The court regards the cause of action as part of the property transferred and necessary for its enjoyment. Debt is regarded as property, and thus assignable.[48] Secondly, insurers have a right of subrogation to any claim that an insured party may have against third parties in respect of the loss indemnified.[49]

1.4.2 Assignable actions

The leading case on whether an assignment is void for maintenance and champerty is *Trendtex Trading Corporation v Credit Suisse*.[50] The decision identifies legitimate assignments that fall short of maintenance or champerty. A genuine commercial interest in an assignment amounts to a defence to an action in tort of maintenance or champerty.[51]

1.5 Litigation funding agreements

To be a valid litigation funding arrangement, there must be an assignment of the fruits of the cause of action, rather than the assignment of the cause of action itself.[52] A funding arrangement is objectionable if in substance it constitutes an assignment of a bare cause of action.[53] Such assignment of a bare cause of action is impermissible unless it falls within one of the recognised exceptions.

In determining whether a funding agreement amounts to an assignment of a bare cause of action, courts shall consider the funder's level of control over the proceedings, the funder's share of profit and the role of the lawyers acting.[54] The giving of financial assistance to a party to pursue litigation is not of itself unlawful maintenance. The receipt of a portion of the fruits of litigation does not automatically render an arrangement void for champerty. More than meeting the literal definition of maintenance and champerty is needed for an arrangement to be found unlawful.[55] There must be a tendency to corrupt public justice for a

---

[47] *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629 at 684.

[48] The majority in *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at [78] recognised the exception of the commercial assignment of debt, even if it is foreseeable that litigation will be necessary to recover the debt.

[49] *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629; [1980] 3 All ER 721 at 721.

[50] *Trendtex Trading Corporation v Credit Suisse* [1980] QB 629; [1980] 3 All ER 721.

[51] At 740.

[52] Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [23.12]. See also *Glegg v Bromley* [1912] 3 KB 474 (CA); *Camdex International Ltd v Bank of Zambia* [1998] QB 22 (CA).

[53] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [57].

[54] At [63].

[55] See *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399, [2012] 3 NZLR 826 at [62]. The Court observed the funding agreement was on its face champertous and therefore warranted some assessment of whether it was in fact wrongful.

funding arrangement to become unlawful.[56] If the funder is improperly motivated, endorses unmeritorious claims or takes control of the litigation, the funding agreement may be objectionable.[57] These concerns can be managed through modern court procedures and will be discussed in Chapter IV.[58]

The labels maintenance and champerty do not greatly help understand the judicially developed limits on litigation funding. The torts were created in an era before courts had the capacity to deal with unruly nobles.[59] Modern courts are equipped to address the underlying mischief the torts were seeking to target. New Zealand's retention of the torts has caused them to shadow litigation funding jurisprudence, but modern mechanisms are better suited to address concerns arising from litigation funding.

1.5 Litigation funding agreements

A series of decisions in New Zealand have given the judicial green light to litigation funding arrangements.[60] Funding arrangements first became known in the context of liquidation[61] but have slowly expanded into other areas of law.

There remains some trepidation in courts' assessment of funding agreements. Most recently, in *PricewaterhouseCoopers v Walker*, Elias CJ (dissenting) expressed concern that a litigation funding agreement was arguably objectionable. Her Honour took issue with the degree of control afforded to the funder, particularly with regard to settlement matters.[62] Settlement offers could not be approved without the funder's consent, and the funder was to partake in any settlement negotiations. In addition, the lawyers acting were to be approved by the funder, and the funder had the ability to remove or add lawyers. The lawyers were required to supply a copy of all correspondence and advice to the funder and were required to

---

[56] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [61]-[63], noting public policy and abuse of the court process are two closely connected ideas. Whether proceedings funded by a litigation funder are an abuse of process depends on whether the role of that funder has corrupted or is likely to corrupt the process of the court.

[57] The control of litigation funders to be addressed in Chapter II; unmeritorious claims and court concerns addressed in Chapter IV.

[58] Modern mechanisms include abuse of process (found in High Court Rules 2016, r 15.1, District Court Rules 2014, r 15.1 and as part of the Supreme Court's inherent jurisdiction – see *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [31]), public policy and the prohibition against a bare cause of action.

[59] *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [77].

[60] See generally: *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331; *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91; *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596; *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735.

[61] *Re Nautilius Developments Ltd (in liquidation)* [2000] 2 NZLR 505 (HC); *Re Gellert Developments Ltd (in liquidation)* (2001) 9 NZCLC 262,714 (HC); *AMP Capital Investments No 4 Ltd v IBS Group Ltd (in liquidation)* [2009] NZCCLR 19.

[62] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [126].

undertake that they owed a duty of care to the funder. The effect of this, according to Her Honour, was that the litigation funder was treated as a client with full access to all the material information regarding the conduct of the litigation, thus granting it control of the proceedings.[63] Her Honour also expressed concerns about the funder's ability to withdraw from the agreement and its control over the provision of funds. She concluded by stating, "such control arguably allows the claim to be treated as an investment to be maintained to the extent to which it provides a commercial return to the litigation funder. If so, it is difficult to see that it would not operate as an assignment of the cause of action." The majority did not consider the funding agreement in isolation, as the defendant did not argue the agreement itself was objectionable.[64]

As will be discussed, some of Her Honour's concerns are valid. The minimal oversight of the litigation funding market in New Zealand gives rise to numerous concerns. There is public interest in preventing the development of a completely unregulated market, for fear of abuses which may be caused by the attraction of unscrupulous funders.[65] Concerns can be managed by properly drafted funding agreements, wide disclosure and oversight of the agreements, and recourse to modern court procedures.

---

[63] At [128].

[64] The defendants argued that the combined effect of the funding agreement and the fact that the funder had taken an assignment of a general security agreement (GSA) (giving it a first charge over the debtor company's assets) amounted to an abuse of court process. By the time judgment was released, the litigation funder had given two important undertakings which made the agreement unobjectionable - first, the funder would not exercise its rights under the GSA to take control of the litigation. Secondly, the funder would pay back a portion of the proceeds of the claim to the liquidator, which would significantly increase the amount available to pay unsecured creditors of the debtor company.

[65] *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 ALL ER 822 at 831 per Toulson J.

CHAPTER II – PLAINTIFF CONCERNS

This chapter considers concerns arising from the funder-plaintiff relationship, with a particular focus on plaintiff interests – control of the litigation, settlements, termination of funding arrangements, conflict management mechanisms and the role of a lawyer.

2.1 Control and misaligned incentives

Litigation funding agreements vary with regard to the level of control a funder exercises over a claim. This may be problematic as a misalignment of motivations between a funder and a plaintiff could lead to differing views of how litigation ought to be conducted. This concern arises because funders do not own the claim yet often have some form of control over the litigation strategy.[66]

Litigation funding agreements are generally unobjectionable as long as a funder funds, but does not control the litigation.[67] A popular argument against litigation funding is that the legal system should not encourage parties to sell their control over litigation that would vindicate their rights.[68] This criticism is based on an assumption that private law theory requires party control to stay with the original right-holder, and that contracts that allow the sale of party control to a stranger should be struck down, either for being contrary to public policy or some other legal basis.[69] Public law theory also condemns the sale of bare right to litigate. Courts exist as a forum for civilised dispute ventilation and resolution; they do not exist as a marketplace. Litigation funding agreements are vulnerable to judges interpreting them to be de facto assignments of a bare right of action and thereby invalid if too much control is given to the funder.

If litigation funding is about vindication of a plaintiff's rights, the plaintiff ought to retain control of the proceedings to determine precisely how its rights should be vindicated. At the same time, funders are investing a significant amount and should be entitled to take steps to

---

[66] In *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 it was accepted that some measure of control is inevitable to enable a litigation funder to protect its investment, at [46].

[67] The Supreme Court in *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [76] noted in determining whether there was an impermissible assignment, the court will have regard to the level of legal control able to be exercised by the funder under the funding agreement; *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [122], Elias CJ (dissenting) noted that "to be objectionable such control must be beyond that which is reasonable to protect money actually advanced or committed to by the funder."

[68] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [77] affirms that a bare assignment of a cause of action remains unlawful after *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596 at [65] noted, "concern remains to ensure that funders do not have control over claimants' causes of action so as to pursue and determine them in their own interests, rather than facilitating pursuit by those who are entitled to assert the causes of action".

[69] Anthony J. Sebok "Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards" (2015) 56 Wm. & Mary L. Rev. 833 at 833.

protect their investment.[70] Their expertise may often be valuable to the plaintiff being funded. The line between legitimate protection of investment and the illegitimate takeover of litigation is a blurry one.[71]

2.2 Interface with insurance

Subrogation under insurance policies does not offend the principles against assignment of causes of action.[72] Alternatively, an insurer may take an assignment of a defendant's cause of action rather than rely on subrogation rights, by virtue of the genuine commercial interest exception.[73] This exception enables an insurer to take from an insured its rights against a third party in respect of an insured's loss.[74]

It is frequently argued that court attitudes towards the sale of party control have been significantly liberalised, as evidenced by the accepted alienation of control of litigation in insurance subrogation and liability insurance.[75] It can be argued that insurers are already litigation funders and if an insurer's *control* of a defendant's litigation is palatable, then mere funder *involvement* must be even more so.[76] Conclusively determining whether litigation funding is sufficiently similar to insurance to warrant similar treatment is beyond the scope of this dissertation. However, several key differences can be noted.

In the insured-insurer relationship, litigation funding is not the primary purpose of the contract. Litigation is merely an incident of the contract.[77] In insurance contracts, litigation is a risk that may never materialise. In most cases it does not. An insurer's involvement in the litigation is automatic, not an investment choice. The insured is bound by a contract pre-existing litigation to surrender ownership of the claim to the insurer. Insurers run the proceedings, often with very little involvement from the insured. Conversely, plaintiffs seeking litigation funding retain ownership and exert more control over the claim. Funded

---

[70] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [118], citing *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

[71] David Capper, "Third Party Litigation Funding in Ireland: Time for Change?" (2018) 26 CJQ 193 at 211; *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [122] Elias CJ noted, "where the line is drawn is inevitably one of degree."

[72] *Compania Columbiana de Seguros v Pacific Steam Navigation* Co [1965] 1 QB 101 (QB).

[73] Robert Merkin, Chris Nicoll (eds) *Collinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at 671.

[74] At 671.

[75] Anthony J. Sebok "Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards" (2015) 56 Wm. & Mary L. Rev. 833 at 834; *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [115]; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 at [82],[137] Mason P pointed out that the supposedly wrongful monopolisation by a funder, and the lawful control exercised by an insurer were difficult to reconcile.

[76] Michelle Boardman "Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation" (2012) 8 J.L. Econ. & Pol'y 673 at 674.

[77] At 682.

plaintiffs are heavily involved in the proceedings. Having a funder control a claim could amount to an assignment of a bare cause of action.

Overlaying the insurer-funder comparison is the fact that one side is initiating litigation and one side is responding.[78] It may be that third-party intervention in one raises concerns not raised by the other. If control is unobjectionable, an exception should be carved out for litigation funders (similar to the right of subrogation) to permit the assignment of the cause of action. However, as the law currently stands, public policy will find agreements ceding significant control to a funder to be objectionable and amounting to an impermissible assignment of a bare cause of action.

2.3 Specific control scenarios

As the market currently operates, litigation funders largely purport to not interfere with litigation decisions. Plaintiffs often retain the control of day-to-day running.[79] Nevertheless, less scrupulous funders who may try to control litigation should be contemplated. Mechanisms should be implemented to preserve plaintiff control of the claim. The control dynamic between the funder and plaintiff will be addressed in three contexts: settlement, termination of the funding agreement and litigation strategy.

2.3.1 Settlement

There may be reasonable disagreement between a funder and a plaintiff about settlements. Funders may view a settlement offer as a lucrative return on investment or be attracted to an early resolution to improve cash flow. Funders also bring commercial objectivity to claims and enable hard commercial decisions to be made where plaintiffs stop being objective. Because a plaintiff's funds are not at stake, moral hazard may mean the plaintiff wishes to continue proceedings and fight for the principle of the matter.[80]

Conversely, a funder may wish to persist with litigation until a satisfactory profit is reached while a plaintiff is content with a proposed settlement offer. Even where a funder covers legal costs, litigation is a significant burden on the plaintiff. Unlike insurance claims where proceedings are run by insurers, in funded claims plaintiffs must remain involved and could be prone to litigation fatigue.

---

[78] At 695.

[79] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [123].

[80] Moral hazard refers to the tendency of failing to guard against risk where one is protected from its consequences. See generally William J Baumol and Alan S. Binder *Economics Principles and Policy* (5th ed, Harcourt Brace Jovanovich, Inc., Orlando, 1979).

2.3.1.1 English approach

In England, the voluntary Association of Litigation Funders (ALF) Code of Conduct[81] attempts to make reconciliation of conflicting considerations a matter for agreement between the two parties by specifying that the funding agreement shall state how a funder may provide input into the funded party's decision about settlement.[82] In other words, the level of control a funder has in relation to settlement is a commercial term to be decided by the parties to the agreement. It is doubtful whether private agreements that amount to the assignment of a bare right to litigate, concerned with the corruption of public justice, can be made the subject of private agreement. If a plaintiff abdicates all control over settlements to the funder, this could amount to an impermissible assignment as the funder effectively decides whether litigation continues or concludes.

2.3.1.2 New Zealand

In *PricewaterhouseCoopers,* Elias CJ (dissenting) was not prepared to make a finding but took the view that the control able to be exercised by the funder over settlement was substantial.[83] Under the litigation funding agreement, the funder had the right to participate in settlement negotiations; the plaintiff was obliged to give the funder notice of any communications or meetings for settlement purposes; and the plaintiff was to acknowledge its consent to the funder being present at any such meetings or approving such communications.

Further, the funder was able to request the plaintiff make or accept any settlement offer (however the plaintiff was not obliged to do so), and the plaintiff was not able to make or accept an offer of settlement without the funder's written consent. Elias CJ considered this control to approve settlements, among other things, afforded the funder substantial control over the proceedings.[84] Her Honour found it arguable that such control over the proceedings operated as the assignment of a cause of action.[85] The funder's control was contrasted with that of the funder in *Re Nautilus*,[86] where an obligation of consultation with the funder existed, but the plaintiff retained the right to discontinue or settle. Notably, however, the funding agreement was not disclosed to the court in *Re Nautilus*.[87] The majority in

[81] A Code of Conduct for Litigation Funders published by the Civil Justice Council. The Association of Litigation Funders is charged with administering self-regulation of the industry in line with the Code.
[82] ALF Code of Conduct, cl 11.1 as at January 2018.
[83] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [100].
[84] At [131].
[85] At 131].
[86] *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC) at [15], [24].
[87] At [12].

PricewaterhouseCoopers did not address this issue as there was no objection to the funding agreement on its own.[88]

With respect, funders participating in the settlement process is sensible. Participating in negotiations and being privy to all communications regarding settlement enables a funder to protect its investment. This should not be objectionable. Her Honour correctly identifies plaintiffs requiring written consent from funders for settlement offers or acceptance affords a great deal of control to funders. Written consent in itself should not be objectionable, however limits should be imposed on a funder's discretion to withhold consent. Fettering a funder's ability to withhold consent will limit a funder's control of a claim.

Discussion

A balance must be struck between plaintiffs retaining control of their case, and funders protecting their considerable investment. If litigation funding is about access to justice and vindication of rights, there is greater justification for a plaintiff retaining tight control over settlement. Meanwhile it must be borne in mind that cases could not be brought without funder involvement and investment. This justifies input by a funder.

If a funder controls settlement, the funder controls the course of proceedings. Control of proceedings in the hands of anyone but the original right-holder is objectionable. This principle is expressed through a wide range of legal bases: maintenance and champerty, abuse of process, prohibition on assigning a bare right to litigate or public policy. The amount of control a funder can have over settlements is closely tied to the limits on what is permissible under these legal bases.

No clear acceptable level of control has emerged from any legal rule. A bare cause of action may not be assigned to a third party as such agreements have been said to "savour of maintenance or champerty", be contrary to public policy and amount to trafficking in litigation.[89] There is uncertainty in this area because neither the content nor the basis of the asserted public policy is defined more closely than by condemnatory expressions like "trafficking" or "intermeddling", with epithets like "wanton and officious."[90] Despite its origins in the torts of maintenance and champerty, the prohibition on assignment of a bare cause of action appears to have achieved an independent existence.[91] Impermissible assignments are assessed on a case-by-case basis, with regard to the arrangement as a whole

[88] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [60]. The majority considered whether the effect of an assignment of a GSA and the funding agreement amounted to an impermissible assignment at [62].

[89] *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) at 683.

[90] *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91at [59], citing *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386.

[91] *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91at [57].

including the level of control reserved to the original right-holder.[92] Due to the case-by-case nature, no clear principles have emerged to indicate what level of control is too much. Similarly, abuse of process (to be discussed in Chapter IV) offers no illuminating guidance on appropriate levels of control.[93] As a result, New Zealand has four legal bases that are awkwardly intertwined and equally unhelpful.

What is certain is that all four legal bases find control of proceedings in the hands of anyone but the original right-holder objectionable. How much control is acceptable is necessarily a matter of degree. This is problematic in the context of litigation funding because debate over where the line is to be drawn in a case will cause more litigation and expend court resources. This draws out proceedings and increases legal fees, which reduces a plaintiff's recovery. Control of settlement should therefore be prohibited as it sits too closely to controlling litigation, which in turn amounts to a bare cause of action.

Recommendation

Settlements should be consented to by both parties but the consent of neither is to be unreasonably withheld.[94] This approach ensures both parties interests are respected, but ad hoc objection to settlements and uncertainty is removed.

Certainty may be improved if unreasonable withholding of consent could be assessed against a list of factors. These factors should emphasise that settlement in funded cases is a financial determination. The assessment of any settlement must consider whether it represents a fair return to the funder and give a fair settlement to the aggrieved party. Mandatory disclosure of funding agreements will help uphold this standard and prevent agreements from being struck down for granting too much control to a funder.

2.3.2 Termination of the funding agreement

Funding agreements occasionally set out grounds upon which a funder may terminate the agreement and thereby withdraw funding from a plaintiff. The contractual bases upon which funding can lawfully be withdrawn are inevitably controversial, for to do so may bring a plaintiff's claim to an end and may even grant the funder de facto control by threatening to cut off funding if an impasse occurs between the funder and the plaintiff.

Recommendation

As discussed, a funder having control of a claim is objectionable. It therefore follows that limits ought to be placed on when a funder may withdraw funding to prevent a funder having

[92] At [57].

[93] *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91at at [61].

[94] Similar to Residential Tenancies Act 1986, s 44(3).

complete discretion and using withdrawal as a bargaining chip to direct proceedings as it wishes.

England's ALF Code provides an attractive framework regarding termination of funding. The Code provides for three grounds for termination: (a) where the funder "reasonably ceases to be satisfied about the merits of the dispute"; (b) "reasonably believes that the dispute is no longer commercially viable"; or (c) "reasonably believes that there has been a material breach of the LFA by the funded party."[95] There is no discretionary right on the part of the funder to deviate from these grounds of termination in the LFA.[96] The funder must remain liable for all funding obligations accrued to the termination date, unless the ground of material breach applies.[97]

A similar framework could be workable in New Zealand. It is logical for a funder be able to withdraw funding if circumstances change or evidence is revealed causing the funder to doubt the merits of the dispute after the contract has been entered into. Similarly, a breach of the funding agreement by the funded party should provide justification for withdrawal of funding. For example, a material breach may be a failure of the plaintiff to disclose important information about the claim, but information that does not directly affect the merits of the dispute or render the dispute commercially unviable. A material breach could also be a lack of cooperation by the plaintiff. Commercial viability is an equally important ground for withdrawal. Funding is an investment and costs should correlate with risk. For example, if a funder is investing in a claim valued at $1 million to the funder[98] that has a 60% chance of success, a funder would never want its costs to exceed $600,000. Realistically a funder would want to spend significantly less than $600,000 to allow for a profit margin. If costs increase, a claim may no longer be commercially viable.

Discretion will necessarily be required for termination based on commercial viability and the merits of the dispute, as funders will not know the strength of the opposing party's case until proceedings are well underway. Funders ought to have the right to withdraw funding if investment prospects look unsound. The potential for widely varying yet simultaneously reasonable positions on commercial viability was highlighted in *Harcus Sinclair v Buttonwood Legal Capital Ltd*.[99] The funding agreement specified the funder was permitted to terminate the agreement if, "in the reasonable opinion of the funder, the [plaintiff's]

[95] ALF Code of Conduct, cl 11.2 as at January 2018.
[96] ALF Code of Conduct, cl 12 as at January 2018.
[97] ALF Code of Conduct, cl 13.1 as at January 2018.
[98] Note the full value of the claim would be greater (e.g. a $5m claim where a funder is funding 20% would render a claim a $1m value to the funder).
[99] *Harcus Sinclair v Buttonwood Legal Capital Ltd* [2013] EWHC 1193, Ch – NB this case pre-dates the ALF Code of Conduct.

prospects of success in the proceedings are 60% or less."[100] The funder formed the view that chances of success of the claim were less than 60% and gave notice terminating the agreement. The plaintiff obtained a preliminary legal opinion from its legal representatives stating that the chances of success exceeded 75%. The plaintiff contended that the funder's opinion on the prospects of success was unreasonable, however the court disagreed and the agreement was terminated. The decision confirmed that where a funder has serious doubts about the merits of a funded action or wishes to terminate, its assessment of the prospects of success is "a purely substantive question, to be answered by an objective assessment of the available evidence" and that "it matters not by what route or process it was reached; the result is all."[101] Moreover, a reasonable assessment did not include any obligation on the funder's part to consult the plaintiff or to postpone a decision until the plaintiff's lawyers had furnished a further opinion.[102]

There is scope for reasonable disagreement about the merits of a case and its prospects of success. Subjectivity is inherent in this calculation. A funder's commercial assessment of its investment should be the basis upon which to invoke termination grounds. The scope of termination should be narrowed to clear grounds to prevent discretionary termination being a tool to control litigation. Termination grounds should be clear, limited, yet also discretionary to accommodate subjectivity in merit and commercial viability assessment.

Remedies for plaintiff?

If a funder does withdraw funding unreasonably, plaintiffs may have an oppression remedy available to them by virtue of the Credit Contracts and Consumer Finance Act 2003.[103] A litigation funding agreement falls within the scope of the Act by being a "credit contract."[104] A practical impairment to this remedy is that an impecunious plaintiff will need to source another funder to fund litigation against the original funder. This is evidently problematic.

2.3.3 Litigation strategy

Litigation strategy ought to be a matter for agreement between the funder and the funded party, on the proviso that the funder does not control the proceedings. Litigation funders are powerful repeat players in the legal services market and can provide valuable expertise to plaintiffs. In certain cases, individual non-repeat clients are disadvantaged by acute information asymmetry.[105] They are unlikely to be able to discriminate between various legal strategies open to pursue a claim, to understand the requisite amount of time required to carry

[100] At [23].
[101] At [43].
[102] At [83], note 6.
[103] Credit Contracts and Consumer Finance Act 2003, Part 5.
[104] Credit Contracts and Consumer Finance Act 2003, s 7.
[105] Vicki Waye "Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 BLR 225 at 232.

out particular strategies and cannot evaluate whether strategies have been performed well (although this may be mitigated by legal representation).[106] In other cases, proceedings may be commenced by sophisticated commercial plaintiffs who have the capacity and resources to evaluate litigation strategy, and have merely elected litigation funding as a means of financing.

The varying degrees of party sophistication requires different levels of funder involvement. Litigation strategy decisions should be made mutually to enable a funder to protect its investment, while also ensuring a plaintiff remains in control of its claim. If there is disagreement, conflict resolution schemes can be triggered.

2.4 Conflict management

Conflict management mechanisms are essential in funding agreements due to potential misaligned incentives manifesting in conflict. Litigation funders are subject to the Financial Service Providers (Registration and Dispute Resolution) Act 2008, as they provide a "financial service."[107] The effect of being subject to this Act is that the funder must have a dispute resolution scheme included in its funding contracts.[108]

2.5 The role of a lawyer

In funded litigation, a lawyer may be called on to act for both the plaintiff and the funder. Three levels of control exist for protecting a plaintiff's interests in the tripartite relationship between the funder, lawyer and plaintiff. Controls exist in Client Care Rules,[109] a lawyer's fiduciary duties and tort law. To navigate the current system, litigation funding arrangements must have regard to these three control mechanisms.

2.5.1 Client Care Rules

Rule 6.1[110] applies where lawyers act for more than one client on the same matter. The rule gives practical effect to a lawyer's fiduciary obligations and to the four fundamental obligations found in s 4 of the Lawyers and Conveyancers Act 2006. The rule is divided into three parts. Rule 6.1.1 forbids a lawyer from acting for more than one client on a matter where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to all clients. Informed consent will not cure conflicting duties.

---

[106] At 232.

[107] Credit Contracts and Consumer Finance Act 2003, s 5. Litigation funders are creditors under a credit contract.

[108] Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 47. Litigation funding agreements typically refer disputes to an independent third party or "expert" – see *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [26].

[109] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[110] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 6.1.

Rule 6.1.2 imposes obligations on lawyers who act for more than one party in circumstances where there is no conflict. The lawyer must obtain informed consent of all parties concerned.[111]

If having commenced acting for more than one client, it becomes apparent that the lawyer will no longer be able to discharge the obligations to all clients, rule 6.1.3 is activated. The lawyer must immediately inform each client of this fact and terminate the retainer with all clients.

In most instances, there will be a more than negligible risk that a lawyer will be unable to discharge the obligations owed to both clients. As best practice, lawyers should be retained solely by the plaintiff. Numerous conflicts of interest could arise if a lawyer is retained by both a funder and a plaintiff. The first hurdle in r 6.1.1 is unlikely to be cleared in most cases.

If a lawyer is retained by both the funder and the plaintiff, and it becomes apparent the lawyer cannot discharge obligations owed to both clients, rule 6.1.3 provides the lawyer must cease acting for both clients. New lawyers would have to be found and briefed on complex litigation. This would require a funder to expend more resources and potentially increase tension between the funder and plaintiff given the pre-existing conflict of interests.

The solution is for lawyers to be retained solely by the plaintiff. Funders should not retain the lawyer because the lawyer's overriding duties would then be owed to the funder. To prevent funding agreements from amounting to a bare cause of action, a clear line must be drawn between the funder and the plaintiff. Funders fund and plaintiffs litigate. Plaintiffs need to retain control of the proceedings and should therefore retain the acting lawyer.

Funders could perhaps enter into a limited retainer with the lawyer to enable the lawyer to perform administrative or ministerial functions. This would be consistent with the court's approach in *Royal Bank of Scotland Plc v Etridge (No 2)*,[112] which addressed independent advice in the context of bank customers. The court held that for banks to have a valid security despite it being procured by undue influence, they must ensure that their customers received independent legal advice. The lawyer giving independent advice could, however, also be acting for the bank. Lord Nicholls held lawyers must only act for banks "in a wholly ministerial capacity, such as carrying out conveyancing formalities or supervising the execution of documents and witnessing signatures."[113] This preserved the practicality of using one lawyer while not compromising the obligations owed to the client.

---

[111] "Informed consent" defined in r 1.2.

[112] *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773; [2001] 4 All ER 449; [2-001] 3 WLR 1021.

[113] At [69].

2.5.2 Fiduciary duties

As a fiduciary, a lawyer acting for a client gives rise to a relationship of trust and confidence. Lawyers owe clients a single-minded duty of loyalty.[114] While most litigation funders do not appoint the plaintiff's lawyers, funders are nevertheless influential in lawyer selection and may even make funding contingent on retaining a particular lawyer or law firm they have previously worked alongside. Although the lawyer is solely employed by the plaintiff, payment of legal fees is often provided by the funder and the lawyer has an incentive to please the funder to attract repeat work. As noted by Waye, the economic dependence of the lawyer upon the funder and the funder's desire to monitor and control its investment has the potential to detract from the lawyer's client centred focus.

Waye suggests the most favourable method of dealing with the duty of loyalty in a litigation funding context is for the lawyer to agree with the plaintiff to waive strict fiduciary obligations owed.[115] This enables a lawyer to comply with fiduciary obligations owed to a client while legal fees are being paid by a funder. For this reason, litigation funding agreements characteristically contain clauses providing the funder with the right to receive regular reports of progress, to be advised of any settlement proposal, and to be privy to communications between the plaintiff and the lawyer.[116] Funders attendance at client meetings would be a form of funders being privy to communications. This should not extend to funders having private meetings with the lawyer.

In *Etridge*, Lord Nicholls held that if banks ensured that customers obtained independent advice, they could not be responsible for that advice being defective.[117] This principle can be extended to litigation funding agreements. Reliance must be placed on a lawyer's legal and professional responsibilities. Funders should be entitled to rely on the assumption that the lawyer has done its job properly in advising the client, unless circumstances indicate otherwise.[118]

2.5.3 Duty of care

In *PricewaterhouseCoopers*, the funding agreement required the lawyers to assume a duty of care to the funder in relation to the proceedings and provided that all advice and

---

[114] *Bristol and West Building Society v Mothew* [1998] Ch 1 per LJ Millet.

[115] Vicki Waye "Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 BLR 225 at 239.

[116] Vicki Waye "Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 BLR 225 at 240.

[117] *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773; [2001] 4 All ER 449; [2001] 3 WLR 1021at [77].

[118] At [41], [147].

correspondence between the lawyer and plaintiff in connection with the proceedings was to be copied to the funder.[119]

A duty of care owed to a funder is problematic. Lawyers are obligated to protect the best interests of their clients, be independent in providing services to their clients and owe fiduciary duties as well as duties of care to their client.[120] If a duty of care is simultaneously owed to a funder, there is potential for a conflict of interests. Where a plaintiff and a funder have adverse interests, lawyers cannot be expected to act in the best interests of both parties. Owing conflicting duties of care will inevitably result in a breach of one.

In *Connell v Odlum*,[121] Thomas J found that the liability of lawyers who are professionally negligent may not be limited to liability in contract to their own clients.[122] Third parties may be owed a duty of care. The duty owed to the third party was upheld because it did not conflict with the duty to the client, but rather it enforced it.[123] This case can be distinguished from litigation funding arrangements. Owing a duty of care to funders could jeopardise a lawyer's duty to the client. If duties of care are owed to both the funder and client and their interests diverge, the lawyer's duty to the client could be jeopardised. There is potential for two completely contradictory duties.

In *Brownie Wills v Shrimpton,*[124] it was acknowledged that if a lawyer voluntarily assumes a position of conflict, courts will not have a problem finding a duty owed to both parties. Assumption of responsibility was found to be the touchstone of liability.[125] If the parties' interests conflict, there will inevitably be a breach. Where a duty of care is not voluntarily undertaken, the Court recognised that it is not usually sound as a matter of policy to impose a duty of care in tort which runs counter to the primary duty owed to the client.[126] The Court emphasised that lawyers typically owe single-minded duties to their clients.[127]

Public policy informs the realm of duties of care. Courts should be reluctant to enforce any duty of care owed to funders if it jeopardises a lawyer's duties to its client. A duty of care may perhaps be owed the funder if it is explicitly subsidiary to duties owed to the plaintiff.

---

[119] At [30].
[120] Lawyers and Conveyancers Act 2006, s 4.
[121] *Connell v Odlum* [1993] 2 NZLR 257.
[122] At 264.
[123] This was a relationship property case relating to the duty of a lawyer to advise his client of the effect and implications of an agreement made pursuant to s 21 of the Matrimonial Property Act. The lawyer had undertaken an obligation to certify that the s 21 agreement had been explained, and owed a duty to care to the other spouse in making this certification.
[124] *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA).
[125] At 329.
[126] At 328.
[127] At 328.

However, having a duty of care attenuated so much by the pre-existing duties to the plaintiff may render the duty of little practical effect.

The contracted duty of care owed to the funder in *Pricewaterhousecoopers* gives rise to concerns *Connell v Odlum* and *Brownie Wills v Shrimpton* were targeting. Such a clause has potential to cause problems in funding arrangements. Funders cannot be expected to be owed a duty of care. Lawyers should not be signing agreements that confer a duty of care to funders. Funding agreements should not be contingent on having a duty of care owed to funders. If conflicting duties are owed, funders and clients risk having their interests compromised and lawyers will be exposed to liability. The law will not protect lawyers who voluntarily assume a duty of care that runs contrary to their client's duty of care.

Rather than owe a duty of care to funders, wide duties of disclosure should be imposed upon lawyers and waivers of confidentiality obtained from plaintiffs. A funder would be fully informed and aware of any information that comes forward, while not compromising a lawyer's duty to act solely in the best interests of its client. Agreements would need specific drafting to make it clear that the client waives legal professional privilege over information generated for the purpose of the proceedings.[128] Making funding contingent on full disclosure of all matters relating to proceedings, including privileged information, protects a funder's position and prevents conflicting duties of care.

Public policy strongly favours disclosure of information to the funder that has a material impact on its position.[129] Proceedings should not be funded, and the funder exposed to potential liability for abuse of process or contempt, if information emerges that throws doubt on the validity or viability of the claim.[130] One of biggest benefits of litigation funding is the commercial objectivity funders bring to claim evaluation.[131] Objectivity should be supported by full and frank communication between the funder, plaintiff and lawyer.

---

[128] An exception may need to be carved out to the protection of privilege under the Evidence Act 2006: see ss 52-24.

[129] This touches on concerns such as trafficking in litigation and unmeritorious claims being brought.

[130] Vicki Waye "Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 BLR 225 at 248.

[131] Vicki Waye "Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 BLR 225 at 248; *QPSX Ltd v Ericsson Australia Pty Ltd* (2005) 219 ALR1 at [54].

CHAPTER III: DEFENDANT CONCERNS

The analysis in this chapter focuses on concerns of defendants faced against plaintiffs backed by litigation funders. Discussion will address disclosure of funding agreements, adverse costs, security for costs and capital adequacy of funders.

3.1 Disclosure of funding agreement

Defendants will wish to know of a funder's involvement in a case. Knowing a funder stands behind a plaintiff may impact many of a defendant's litigation decisions. Most notably, the presence of a funder may impact a defendant's decision to seek security for costs. If a defendant seeks security for costs against a plaintiff, the presence of a funder and the funding agreement may be voluntarily disclosed to ward off the need for the plaintiff to post security.[132] A defendant may either accept its chances of recovering costs are sufficient that no further action needs to be taken or be prompted to seek security for costs against the funder.[133]

Knowledge of a funder's presence may also impact litigation strategy. Knowing a plaintiff is backed by a reputable litigation funder who has decided to support the claim after extensive research, performing due diligence and undergoing risk assessments may render a defendant more likely to settle. There is potential for this to be abused, depending on the defendant. Plaintiffs funded by multi-million-dollar funders may pressure defendants with less liquidity into settling.

This is not a new problem. Our justice system has long conferred a benefit to those who have funds to argue their position. Some even argue litigation funders help combat abuses arising from a disparity in resources by levelling the playing field between plaintiffs and defendants backed by insurers.[134] Defendants who are aware of economic pressures burdening unaided plaintiffs may be incentivised to prolong litigation with extensive discovery and frivolous claims. A level playing field enables litigation and settlement to be about the merits of the claim, rather than a battle of resources.

3.1.1 New Zealand position

In *Waterhouse v Contractors Bonding,* the Supreme Court found that where proceedings were funded by a litigation funder that had no prior interest in the proceedings and whose remuneration was tied to the success of the proceedings and/or had the ability to exercise some form of control over the conduct of the proceeding, the identity and location of the litigation funder and its amenability to the New Zealand courts were to be disclosed when the

---

[132] David Capper "Third Party Litigation Funding in Ireland: Time for Change?" (2018) 26 CJQ 193, at 208.
[133] At 208.
[134] Douglas R. Richmond "Other People's Money: the Ethics of Litigation Funding" (2005) 56 Mercer L. Rev. 649 at 661.

litigation is commenced.[135] The assistance of a litigation funder was held to be relevant to applications for costs and security for costs.[136] Additionally, the non-funded party would have to know of the existence of a funder in order to decide whether to make an application for a stay on abuse of process grounds.[137] As a matter of principle, it was held that courts and opposing parties are entitled to know the identity of the "real parties" to the litigation.[138]

The Court held the financial means of the funder and the terms upon which funding could be withdrawn did not need to be disclosed.[139] The Court, however, left open the possibility that disclosure of the terms of withdrawal may be appropriate if the terms in some way give legal control over the proceedings to the funder (for example, the ability to withdraw funding if the funded party refuses to obey instructions given).[140] If an application of security for costs had been made, the Court considered it arguable that it had the power to order disclosure.[141] Disclosure would include the existence of the litigation funder and the relevant terms of the litigation funding agreement.

3.1.2 Two Critiques

3.1.2.1 Interface with discovery principles

First, *Waterhouse* is inconsistent with standard discovery principles. Relevance is the touchstone for disclosure.[142] Parties are required to disclose only those documents which are relevant to a matter in question in the proceedings, and relevant in the sense of being capable of advancing a party's case or of damaging the case of its adversary.[143] The definition of standard discovery in r 8.7 of the High Court Rules 2016 can be seen as an elaboration on the concept of relevance and provides a formula by which relevance can be assessed.[144]

The Court's comment in *Waterhouse* that disclosure of funding agreement terms could be arguable if an application for security for costs was made does not align well with the discovery relevance test. The benchmark against which to assess relevance is the pleadings.[145] Costs are not a matter in question in proceedings; costs come after the proceedings. In *Body Corporate 187242,* it was held that a party was not entitled to discovery

---

[135] *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [67]-[71], [76].
[136] At [63], [67].
[137] At [67].
[138] At [68], citing *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [25(3)]
[139] At [70]-[71].
[140] At [72].
[141] At [63]. The court left this point open, as security for costs had been voluntarily provided.
[142] *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614, (2016) 27 NZTC 22-084 at [21].
[143] *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA).
[144] *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2013] NZHC 1054 at [15].
[145] *Body Corporate 187242 v Auckland City Council* CIV-2005-404-001597, 20 July 2006 at [20].

of the other party's insurance arrangements as the insurance documents did not relate to the issues raised in the statement of claim or statement of defence.[146] The Court also noted that there is "no general right to obtain the name of an insurer from a defendant in proceedings."[147]

A solution to this inconsistency could be an amendment to the High Court Rules 2016, similar to the Draft Rules regarding representative actions. Draft r 4.71 deals with information required to be included in an affidavit in support of an application for a representative order, which includes whether the plaintiff's claim is funded by a person who is not a party to the proceeding (defined by the rule to be a "litigation funder").[148] A similar rule should be created to mandate disclosure of a funder, rather than extending the well-established principles of discovery.

3.1.2.2 Dual standard

Secondly, the approach in *Waterhouse* creates a dual standard of disclosure, based on whether security for costs are applied for or not. This could create false security for costs applications to trigger disclosure of funding agreements. To prevent such fishing expeditions, wide disclosure should be the norm. Wide disclosure would mean disclosure of the general terms of a funding agreement in every funded case. However as noted in *Waterhouse*, disclosure should not include privileged matters or matters which might give a tactical advantage for the non-funded party.[149] The Federal Court of Australia's Class Action Practice Note permits the redaction of information that may reasonably confer a tactical advantage on the other party.[150] This includes information about the case budget, estimates of litigation costs, funds available to the plaintiff and any indications regarding the assessment of the merits of the claim.[151]

New Zealand courts should support disclosure of a redacted form of funding agreements. Such disclosure will facilitate court processes and is unlikely to be detrimental to plaintiffs or litigation funders if the agreement is properly drafted.

---

[146] At [47].
[147] At [40].
[148] The Rules Committee "Minutes of meeting held on 26 February 2018" (26 February 2018) Courts of New Zealand < https://www.courtsofnz.govt.nz/about-the-judiciary/rules_committee/meetings/RC_260218.pdf>
[149] *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 [72].
[150] Class Actions Practice Note 2016 (GPN-CA) (FCA), cl 6.4(b).
[151] Class Actions Practice Note 2016 (GPN-CA) (FCA), cl 6.4(b)(i),(ii).

3.2 Meeting the defendant's costs

3.2.1 Background

Adverse costs may be awarded in New Zealand, whereby the losing party in litigation pays some or all of the winner's legal costs.[152] The winning party's costs recovery is generally two-thirds of costs considered reasonable for the proceeding, as opposed to the actual costs incurred.[153] Courts have discretion to alter costs awards depending on the complexity of the proceedings and the conduct of the parties.[154] The guiding principle of all costs awards is that there will be a substantial contribution by the losing party to the winning party's costs.

3.2.2 Concern

Defendants will be concerned about having no recourse against an impecunious plaintiff if the plaintiff's claim is unsuccessful. If a plaintiff requires a funders' financial assistance to cover their own legal costs, it is a logical corollary that the plaintiff will require assistance paying adverse costs in the event of defeat.

3.2.3 New Zealand position

Litigation funding agreements may specify that the funder will pay adverse costs in the event of an unsuccessful claim. If a funder fails to comply with the funding agreement, a contract privity claim may be available as a remedy for the defendant.[155] If the funding agreement does not provide that a funder will pay adverse costs, courts may order non-party costs orders against a funder.[156] New Zealand courts have exercised their discretion to award costs against non-parties where proceedings involve litigation funding arrangements.[157] The Privy Council in *Dymocks*[158] held that third party litigation funders would only be liable for a costs order if the litigation would not have been undertaken without their involvement, and where they not only fund the proceedings but substantially control or benefit from them.[159] The rationale behind the court's finding is that in such circumstances the funder is gaining access to justice for its own purposes and is in effect the "real party" to the litigation (even if not the sole

---

[152] High Court Rules 2016, r 14.2.
[153] High Court Rules 2016, r 14.2(1)(d),(e).
[154] High Court Rules 2016, rr 14.1,14.4, 14.5, 14.6, schs 2-3.
[155] Contract and Commercial Law Act 2017, s 12.
[156] High Court Rules 2016, r 14.1.
[157] *Waterhouse v Contractors Bonding Ltd.* [2013] NZSC 89, [2014] 1 NZLR 91 at [64]; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145.
[158] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145.
[159] At [25(3)]. Note that this approach to costs approaches the underlying concerns of assigning a bare cause of action.

party).[160] The terms of the litigation funding agreement are then likely to be relevant in assessing whether the *Dymocks* test is met.[161]

3.2.4 Quantum

In *Houghton v Saunders,* it was held that the nature of the funding arrangements and the influence that their involvement had on the course of the proceedings could not justify attributing liability to the funders for indemnity costs, if there was otherwise no basis for doing so.[162] In other words, a plaintiffs' funded status is not sufficient to entitle a defendant to indemnity costs. The court reasoned that imposing indemnity costs "would inevitably have some chilling effect on the potential availability of [funding] arrangements in cases where they may well be justified in the interests of facilitating access to justice."[163]

The court went on to note that funding arrangements are merely one factor in assessing the overall conduct of the litigation when considering the defendants' entitlement to an award of increased costs beyond scale, and this factor cannot of itself transform the defendants' entitlement to one for indemnity costs.[164] Importantly, *Houghton v Saunders* was a representative action funded by litigation funders. Courts have a supervisory jurisdiction over group litigation which extends to the supervision of funding.[165]

Funding arrangements should not, however, be a factor at all in determining costs outside the context of group litigation. Cost determinations hinge on the merits of a claim and the conduct of the unsuccessful party rather than the financial resources fueling the claim. The presence of a litigation funder in proceedings should not be a relevant factor in determining a costs award. The ordinary provisions for orders for increased costs are sufficient to protect a defendant's interests. There is no justification to impose indemnity costs, or increased costs, merely because a plaintiff is funded by a litigation funder.

In England, it has been established that a funder must "follow the fortunes" of the plaintiff it funds, meaning that if the court awards costs on an indemnity basis, it would be just and equitable that the funder should pay on that same scale.[166] In *Excalibur Ventures LLC v Texas*

---

[160] At [25(3)]. There are exceptions to this general rule, however. The principles relating to costs against non-parties and the exceptions were summarised by the Court of Appeal in *S H Lock (NZ) Ltd v New Zealand Bloodstock Leasing Ltd* [2011] NZCA 675 at [14]-[16].

[161] *Waterhouse v Contractors Bonding Ltd.* [2013] NZSC 89, [2014] 1 NZLR 91 at [64].

[162] *Houghton v Saunders* [2015] NZHC 548 at [15].

[163] At [14].

[164] At [15].

[165] In the context of representative actions, the Court noted that in the absence of specific class action rules, the Court ought to assume a supervisory role of representative actions to reduce disadvantages to class members. The jurisdictional basis for supervising funding arrangements in representative actions is under Rule 4.24 of the High Court Rules 2016 and the Court's inherent jurisdiction: see *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331; *Saunders v Houghton* [2013] NZHC 1824 at [104].

[166] *Excalibur Ventures LLC v Texas Keystone Inc* [2017] 1 WLR 2221 at [24].

Keystone Inc, it was held that while the funder may not have engaged in blameworthy conduct, the court saw no principled basis upon which the funder could dissociate itself from the conduct of those whom it had enabled to conduct the litigation and upon whom it relied to make a return on its investment.[167] This approach is logical where a funder has contributed substantially to the costs of bringing a claim.

3.2.5 *Arkin* Cap

In England, the "Arkin cap" is a term derived from the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd*[168] which limits the liability of a litigation funder for adverse costs to an amount equivalent to the funding provided. In *Arkin,* the funder had only covered the plaintiff's expert evidence and the cost of organising documents.[169] The cap was implemented because the court was concerned about the chilling effect imposing potential liability for the entirety of a defendant's costs would have on the litigation funding market where a funder had only funded a discrete part of the plaintiff's expenses.[170] The court noted, however, that it saw no reason why the cap should not also be applicable where the funder had contributed to the greater part, or all, of the litigation expenses.[171] The *Arkin* cap thus limits a funder's exposure for adverse costs to the amount of their investment but funders will be liable to pay full adverse costs if the funding agreement is found to be champertous.[172]

The cap was designed to balance access to justice, by encouraging litigation funding, against the need for fairness to successful defendants who ought to be able to recover their costs. The court considered having a cap on funders exposure to adverse costs should also have a salutary effect in keeping costs proportionate.[173] It has not been universally popular.[174]

---

[167] At [24].

[168] *Arkin v Borchard Lines Ltd* [2005] 1 WLR

[169] The litigation funder met the cost of expert evidence and compiling documents at around £1.3m. When the plaintiff's claim failed, Mr. Arkin had no funds to meet the £6m owed in adverse costs, so the defendants pursued the funder instead.

[170] *Arkin v Borchard Lines Ltd* [2005] 1 WLR at [39].

[171] At [43].

[172] At [40].

[173] At [42]. The Court found it possible that the costs the funder had agreed to fund grew to an extent where they ceased to be proportionate.

[174] See Rupert Jackson *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, United Kingdom, 2010) ch 11. Sir Rupert Jackson criticised the existence of the Arkin Cap. Jackson recommended that in order to protect the successful defendant against the prospect of unrecovered costs, and to protect the plaintiff against the prospect of being exposed to liability to the defendant for those costs, the Arkin cap should be overruled, whether by rule change or by legislation and that the amount of a Funder's liability should be a matter for the discretion of the judge in the individual case. See also Rachael Mulheron, "England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments" (2014) 73 CLJ 570, 573. Mulheron notes that Sir Rupert's recommendation was not expressed to be limited to the scenario (as in *Arkin*) where the funding agreement was silent as to the funder's liability for adverse costs, but appeared to encompass the scenario in which a funding agreement expressly provided that the funder would not bear any liability for

Why has England retained the *Arkin* cap now that litigation funding is a relatively well-established practice? Retention could be justifiable based on economic incentives[175] or courts' concern to keep costs low.[176] The cap helps limit over-investment in litigation which preserves access to justice. Or perhaps the *Arkin* cap is merely an approximation of a funders involvement in claim. Courts recognise that funders increase or cause a defendant's costs. Causation is therefore be the touchstone of a funder's adverse costs liability. Rather than assess costs on a case-by-case basis and evaluate to what extent the funder has caused the defendants costs increase, court have perhaps retained the *Arkin* cap as an approximation. The bright line figure may be an estimation of a funder's involvement and offers the benefit of a funder knowing its liability exposure. Australia has no similar cap on funder's adverse costs liability.

Recommendation

New Zealand should not embrace the *Arkin* cap as a universal approach to costs. The cap is logical in cases such as *Arkin*, where a funder pays a small proportion of expenses. The cap is illogical where a funder is funding all costs and disbursements of the plaintiff.

Fully funded claims

If a funder enables a claim to be brought through substantial funding, it is wrong that the funder should be able to escape part of the liability for costs in the event of defeat.[177] It is an important principle of reciprocity that funders cover defendants' costs if a plaintiff's claim is unsuccessful. As the market currently operates, funders seeking profit are not likely to fund litigation unless the prospects of winning and enforcing judgment are high. Funders are cherry picking defendants to pursue based on their affluence. If a defendant cannot afford to pay damages, then it will not be attractive to funders or even plaintiffs. A funder should therefore accept the consequences of cherry picking by paying adverse costs. Unlike plaintiffs, defendants do not choose whether or not to engage in litigation and should be entitled to recover this expense against the funder who made it necessary in the event of success.[178] As noted in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*,[179] where a funder controls or benefits from proceedings, justice will ordinarily require the funder to pay

---

adverse costs. In *Excalibur Ventures LLC v Texas Keystone Inc.* [2017] 1 WLR. At [28], there was judicial repetition of concerns that the existence of the Arkin Cap was "over-generous to commercial funders".

[175] See *Arkin v Borchard Lines Ltd* [2005] 1 WLR at [42]. Funders and plaintiffs both incentivised to keep costs low.

[176] In England, all reasonable and proportionate costs are recoverable (See Civil Procedure Rules 1998, r 44.4). There is no two-thirds recovery limit like New Zealand.

[177] Rupert Jackson *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, United Kingdom, 2010) ch 11.

[178] David Capper "Third Party Litigation Funding in Ireland: Time for Change?" (2018) 26 CJQ 193 at 209.

[179] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145.

adverse costs. The funder is gaining access to justice for its own purposes, and only incidentally facilitating access to justice for the funded party.[180]

In fully or substantially funded claims, funders should not have a cap on their liability to pay costs. Capping adverse costs liability where a funder has fully funded a claim inhibits access to justice for the defendant as it may face unrecovered costs. It also runs counter to the policy of cost recovery. Moreover, the *Arkin* cap is likely unnecessary in fully funded cases due to New Zealand's two-thirds costs recovery regime. The costs a defendant recovers will likely be less than the amount the funder has agreed to pay in the first place.

Partially funded claims

Discrete or partial funding may justify a cap on adverse costs. There is merit to the rationale of the *Arkin* cap that if the funder is only involved for limited exposure or has created a marginal effect on whether the litigation was commenced, it should not be fully liable for adverse costs. Full adverse costs liability in such situations may create a chilling effect in New Zealand's emerging litigation funding market. Funders may be discouraged from funding small proportions of claims if their liability can extend to full adverse costs.

Sir Rupert Jackson's *Review of Civil Litigation Costs* recommended the extent of the funder's liability should be a matter for the discretion of the court in any individual case.[181] It was recommended that a funder's potential liability should not be limited by the extent of its investment in the case.[182] There is merit in the suggestion that costs should be a matter for discretion based on particular facts, but limits should exist on a funder's liability.

Alternative: presumption of proportional cap

The extent of a funder's liability should be a matter for court discretion with a presumption of proportional liability to the extent of the amount funded. Rather than a funder's liability for adverse costs be limited to the actual amount of funding provided (as in *Arkin*), liability could be limited *proportionally* to the funding provided. For example, rather than having a funder cover $1 million of a plaintiff's costs, and then owe a corresponding $1 million to a defendant in the event of defeat, if the funder covers 40% of the plaintiff's costs, the funder should then cover the same percentage of adverse costs. This ensures funders are not exposed to liability which grossly exceeds their proportion of financial assistance in a claim, while also preventing a defendant from facing unrecovered costs where a funder fully funds a claim.

---

[180] At [25(3)]. This was contrasted against "pure funders" (those with no personal interest in the litigation, who do not stand to benefit from it and are not funding litigation as a matter of business). Costs will not ordinarily be ordered against pure funders.

[181] Rupert Jackson *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, United Kingdom, 2010) at 123.

[182] At 123.

How would a proportionality cap be effectuated?

Court discretion would determine the extent of a funder's liability, fettered by a presumption in favour of a cap proportional to the funder's investment. This would offer some guidelines for a funder's adverse costs liability. In cases where ascertaining the specific proportion paid by the funder is impractical or impossible, the presumption could be set aside. A funder's liability would become a matter for court discretion based on the particular facts.

Justifications

If the Arkin cap is being treated as a close approximation of the extent the funder has caused the defendant's costs increase, a proportional cap is an even closer approximation.

By the court's logic in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2),*[183] the less a funder controls or benefits from proceedings, the less adverse costs it should be exposed to. In Chapter II, the necessity of distinguishing the roles of funders and plaintiffs was highlighted. This distinction is key in relation to control of proceedings. For a funding arrangement to avoid being treated as an assignment of a bare cause of action, plaintiffs must retain control. If a line is being drawn between the plaintiff and the funder, there should be limits on what a funder can be expected to contribute to a case. If a funder is not enjoying the benefit of controlling proceedings, it should not be burdened with complete liability for adverse costs beyond its investment. It cannot be expected that funders be exposed to liability for full costs liability where they have not funded the entire claim.

Difficulties

A proportional cap has some difficulties. It would be difficult to monitor what percentage of a claim is covered by a funder given funding agreements typically do not specify funders will cover a percentage of a claim. Funders instead typically agree to cover specific costs, such as lawyer fees, security for costs and expert witness costs.[184] Disclosure of funding agreements will help indicate how involved a funder is in litigation but will rarely conclusively determine the proportion a funder has provided. This may lead to disputes over what the actual costs of litigation were and the proportion covered by a funder. If practical difficulties are insurmountable, the presumption can be set aside. The primary consideration of courts in their exercise of discretion must be for successful defendants to avoid costs prejudice.

---

[183] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 [25(3)].

[184] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [19]; *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596 at [80].

3.3 Security for costs

If a defendant can obtain an adverse costs order against a funder it is reasonable that the defendant should also be entitled to seek security for the funder's potential costs liability. The purpose of a security for costs order is to protect a defendant's entitlement to recover legal costs from an unsuccessful plaintiff.[185] Security for costs ensures that the orders of the court regarding costs are not frustrated and that a party's success is not pyrrhic.[186]

Under the High Court Rules, a defendant must have reason to believe a plaintiff will be unable to pay adverse costs to make an application for security for costs.[187] In *Walker v Forbes*,[188] the plaintiffs were insolvent and backed by a litigation funder. The insolvency was sufficient justification to believe that without assistance from the litigation funder, the plaintiffs would be unable to meet an adverse award of costs. The presence of a litigation funder alone, without an insolvent plaintiff, would likely be insufficient to justify a belief that a plaintiff cannot pay adverse costs in proceedings to trigger a security for costs application.

Without capital adequacy requirements for litigation funders in New Zealand, the presence of a funder will unlikely reassure a defendant that it will have its costs met. The implementation of capital adequacy requirements on funders may reduce a defendant's desire to have security for costs posted when facing funded plaintiffs (capital adequacy to be discussed later in this chapter).

3.3.1 Quantum

In England, the High Court recently considered the extent to which the *Arkin* cap should be applied to limit the sum a funder could be ordered to give by way of security for costs in *Bailey v Glaxosmithkline UK Ltd*.[189] The Court ordered security for costs against the litigation funder in a sum greater than the amount committed by the funder to fund the litigation, therefore in excess of the cap. The Court found that whether the *Arkin* cap should ultimately be applied is properly to be determined at the conclusion of the case.[190] At the security for costs stage, the *Arkin* cap is only one of the factors to be considered in the exercise of the court's broad discretion.[191] An important factor the Court considered in exercising its discretion was that the litigation funder was balance sheet insolvent and reliant

---

[185] G E Dal Pont *Law of Costs* (2nd ed,LexisNexis, Sydney, 2009) at 939-940.
[186] At 939-940.
[187] High Court Rules 2016, r 5.45.
[188] *Walker v Forbes* [2017] NZHC 1212.
[189] *Bailey v Glaxosmithkline UK Ltd* [2017] EWHC 3195 (QB). Note that the Civil Procedure Rules in England and Wales enable security for costs to be ordered directly against a party that "has contributed or agreed to contribute to the claimant's costs in return for a share of money or property which the claimant may recover in the proceedings." (Civil Procedure Rules, rr 25.14, 46.2)
[190] At [49].
[191] At [60].

upon its sole shareholder for its liquidity.[192] The Court's inclination to order security in excess of the *Arkin* cap was related to the Court of Appeal's proviso in *Arkin* that the cap would apply where funding had been provided "in a manner which… is otherwise not objectionable."[193] There was clearly more of a concern about the funder's position in *Bailey* and the Court was willing to accept that the *Arkin* cap may not ultimately be applied in respect of adverse costs. The Court also held there would be no injustice if the cap was ultimately applied as, if the security had been paid into the court, the additional money could be returned to the funder if the funds were not required.[194]

3.3.2 Recommendation

Funders should not greatly complicate the security for costs regime. If a defendant is concerned about not recovering its costs, an order for security for costs may be made against the plaintiff. It is then up to the plaintiff and the funder to negotiate the payment of security for costs as it arises. If a presumptive proportionality cap limits a funder's liability at the costs stage, it is logical that a funder's exposure to security for costs should be limited in the same manner. This would be appropriate where a funder is paying a proportion of the litigation costs and where a plaintiff is capable of paying some security. Ultimately, it is of no concern to the defendant *how* security for costs is financed provided that it is *somehow* financed.

If a presumptive proportionality cap is adopted in New Zealand, it should be subject to the same proviso as the *Arkin* cap: it will only apply if the funding agreement is unobjectionable.[195] For the cap to apply at the security for costs stage, there will need to be some sort of preliminary finding to determine whether an agreement is unobjectionable. Disclosure of litigation funding agreements at the commencement of proceedings will achieve this.

Courts may strike out a claim where the plaintiffs or the funder do not pay the ordered security for costs.[196] If agreement cannot be reached between the plaintiff and the funder regarding payment, the claim may not continue. This may limit access to justice for a plaintiff by precluding the continuance of its claim but avoids costs prejudice to the defendant. Funders may have to post full security for costs to enable litigation to proceed. This will be a new cost for funders to consider, as posting security for costs will reduce their cash flow and result in opportunity costs.

---

[192] At [8], [35].
[193] *Arkin v Borchard Lines Ltd* [2005] 1 WLR at [40].
[194] *Bailey v Glaxosmithkline UK Ltd* [2017] EWHC 3195 (QB)at [61].
[195] *Arkin v Borchard Lines Ltd* [2005] 1 WLR at [39].
[196] High Court Rules 2016, r 7.48.

As noted in *Reekie v Attorney-General*, there are competing considerations to consider when requiring security to be posted:

> The poorer the plaintiff, the more exposed the defendant is as to costs and the greater the apparent justification for security. But, as well, the poorer the plaintiff, the less likely it is that security will be able to be provided and thus the greater the risk of a worthy claim being stifled.[197]

The court noted applications for security for first instance proceedings call for careful consideration and judges are slow to make an order for security which will stifle a claim.[198]

However, in both *Saunders v Houghton* and *Walker v Forbes*, it was held that a court should be readier to order security for costs where a non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, but rather is a person whose interest is solely to make a commercial profit from funding the litigation.[199] The Court in *Walker* went further and noted the funder elected to fund the plaintiffs' claim knowing that security may be ordered, and the funding agreement provided that the funder would meet any order for security.[200]

The mere fact that a non-party stands to benefit from proceedings should not be the reason for courts to be readier to order security for costs. Rights are being vindicated in claims involving a funder. The fact that a funder is making a profit is irrelevant. Courts *should* be readier to order security for costs against funder-backed plaintiffs where the funder is funding a substantial part of a claim, but not because the funder is making a commercial profit and is not the person interested in having its rights vindicated. The justification ought to be that there is less risk of a claim being stifled where a funder is involved than in ordinary instances involving impecunious plaintiffs. If a funder is prepared to cover adverse costs or a proportion thereof, a funder ought to be prepared to cover the same proportion of security for costs. It is therefore appropriate for courts to be readier to order security for costs where funders are funding the bulk of a claim. Moreover, ensuring a defendant is not costs prejudiced should be the primary consideration in funded claims.

However, courts should not be readier to order security for costs against a funder-backed plaintiff where a funder is merely funding a slight proportion of the claim. The ordinary

---

[197] *Reekie v Attorney-General* [2014] NZSC 63 at [2].
[198] At [3].
[199] *Houghton v Saunders* [2013] NZHC 1824 at [106]; *Walker v Forbes* [2017] NZHC 1212 at [31], both following *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148; (2008) 67 ACSR 105.
[200] *Walker v Forbes* [2017] NZHC 1212 at [33], [34].

analysis of competing policy considerations (stifling worthy claims versus defendants facing unrecovered costs) should apply to claims where a funder plays a minor role.

Disclosure of funding agreements will be crucial to a court's determination of security for costs. Security for costs orders will be a matter for court discretion depending on how much a funder is funding a claim. A case-by-case approach will be required. This may create inconsistent results, but arguably orders for security for costs are already inconsistent and discretionary. The role a funder plays in proceedings will merely be another factor for courts to consider in determining a security for costs order.

3.4 Capital Adequacy

A healthy capital base is necessary to fund complex high value litigation that typically does not provide any return for a number of years.[201] Without capital adequacy requirements, entities with insufficient capital to see cases through court are capable of becoming litigation funders. Litigation funding is a nascent industry in New Zealand, therefore capital adequacy requirements ought to be grappled with and insisted upon now before financial problems emerge and become too big to manage.

The voluntary ALF Code of Conduct in England imposes capital adequacy requirements on funders.[202] An obvious gap is that the Code is voluntary. Mulheron noted in 2014 that only seven out of the 16 recognised funders in England had subscribed to the Code.[203] Plaintiffs ought not have the option of electing a financially dubious funder as this may prejudice a defendant's costs recovery. Removing such options will prevent the situation where funders provide the means to start and continue a claim in the pursuit of profit but are unable to cover a winning defendant's costs.

3.4.1 Recommendation

Insurers, banks, and non-bank deposit takers are all subject to reserve requirements.[204] Litigation funding is potentially riskier than ventures financed by these entities, therefore there is compelling reason to mandate capital adequacy requirements. Admittedly, reserve requirements for banks can be distinguished on the basis that they are fuelled by a macroeconomic rationale to maintain economic stability rather than protect individual

---

[201] Michael Legg and others "The Rise and Regulation of Litigation" (2011) 38 Northern Kentucky L. Rev. 625 at 672.

[202] ALF Code of Conduct, cl 9.4.1-9.4.3, 9.4.4.1, as at January 2018.

[203] Rachael Mulheron "England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments" (2014) 73 CLJ 570 at 578.

[204] Minimum capital ratios are imposed by the Reserve Bank of New Zealand, pursuant to its powers to register and supervise banks under Part 5 of the Reserve Bank of New Zealand Act 1989; and the Insurance (Prudential Supervision) Act 2010 and the Non-bank Deposit Takers Act 2013 are administered by the Reserve Bank.

consumers.[205] Why then, is capital adequacy so important in the context of litigation funders? Parties to litigation regularly run out of funds in non-funded cases, so why are capital adequacy requirements necessary when a funder is involved?

The reasoning is two-fold. First, litigation funders hold themselves out as specialists to fund litigation through until its end (except in rare instances of withdrawal). Plaintiffs seek out funders' services precisely because plaintiffs are unable to finance litigation until judgment is delivered. There thus ought to be a mechanism to ensure funders are capable of delivering on their service. Secondly, while it is true that parties run out of money in non-funded cases, given the typically complex nature of high value cases being funded in the current market, interrupting proceedings due to an insolvent funder will have a greater effect on the efficient resolution of disputes than smaller claims where parties run out of funds.[206] Disrupting proceedings due to an insolvent funder will prevent an efficient judicial system, elongate proceedings and waste court resources. If the litigation funding market expands into small consumer claims, many little pieces of litigation will be disrupted with many people affected. This is equally undesirable.

Imposing capital adequacy requirements will ensure funders of substance are entering the market. Concerns of such requirements deterring new entrants may be valid, and the percentage that litigation funders can charge may remain high because users of litigation funders may have less choice.[207] This is a worthwhile concession given the benefits assurance of adequate capital provides.

---

[205] Reserve Bank of New Zealand Act 1989, s 8.

[206] A key pillar of civil procedure is to provide an efficient system of dispute resolution: see Andrew Barker "Ideas on the Purpose of Civil Procedure" (2002) NZ L Rev 437 at 440.

[207] Michael Legg and others "The Rise and Regulation of Litigation" (2011) 38 Northern Kentucky L. Rev. 625 at 672.

Chapter IV

The analysis in this chapter will address court's concerns and wider ethical issues arising from litigation funding – trafficking in litigation, funders pursuing an improper purpose, funders fees, and commodification of justice.

4.1 Trafficking in litigation

If a funder is acting with an improper motive or facilitating meritless claims, this could amount to trafficking in litigation. Maintenance and champerty have long recognised that transactions amounting to trafficking in litigation are against public policy.

The issue of trafficking in litigation divided the majority and the minority in *Fostif*.[208] The majority found that funders assisting plaintiffs into a legal action for the vindication of their legal rights was not creating controversies that did not exist.[209] The controversies pre-existed the proceedings, even if those involved were unaware of them, or unwilling earlier to pursue their rights.[210] Conversely, the minority in *Fostif* argued that funders nevertheless foment disputes by encouraging people to litigate who would not otherwise have done so, either because they were unaware of their loss or right to sue or because they simply chose not to sue.[211] Notably, the High Court decided *Fostif* against the background of the torts of maintenance and champerty being abolished in New South Wales in 1993.[212] The majority explicitly acknowledged that its reasoning was confined to Australian jurisdictions which had legislated to abolish maintenance and champerty, and left open what the position in those jurisdictions ought to be.[213]

Recommendation

As affirmed in *Waterhouse*, the torts of maintenance and champerty continue to be part of New Zealand law.[214] While the torts of maintenance and champerty are designed to prevent trafficking in litigation, the torts are grounded in public policy. It is not desirable as a matter of policy to shut arguable claims out of court simply because they were organised and supported by a funder. There are many reasons why a right-holder may not pursue a claim: insufficient resources, the right to sue may not be recognised, or the wrong itself may not be recognised.[215] If there is an arguable wrong against the right-holder, it is hard to justify objections to funders spurring right-holders into litigation. Pinpointing the difference between

---

[208] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386.
[209] At [202].
[210] At [202].
[211] At [274].
[212] Maintenance, Champerty and Barratry Abolition Act 1993 (NSW).
[213] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [85].
[214] *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [25], [26] and [35]-[40].
[215] Peta Spender "After Fostif: Lingering uncertainties and controversies about litigation funding" (2008) 18 JJA 101 at 108.

optimal litigation for socially beneficial outcomes and suboptimal trafficking in litigation is difficult.[216]

The continued presence of the torts in New Zealand frequently induces courts to embark on an analysis of trafficking in litigation. This is unnecessary. Meritless or vexatious claims can be dealt with by dismissal or strike out through modern civil procedures such as court rules and court's inherent jurisdiction.[217] Such procedures are a preferable response to any concerns of trafficking in litigation, rather than delving through the common law abyss.

Additionally, the risk of funders supporting meritless litigation is relatively minimal given the selective nature cases funders undertake to fund.[218] Extensive risk assessments are undertaken prior to funding, with particular focus on the legal position being argued, a defendant's ability to pay, costs to be covered, and the timeframe of the particular case. Funders arguably assist the justice system by weeding out frivolous, vexatious and unmeritorious claims.[219] Moreover, funders stand to lose if funding unmeritorious claims. Funders retain the right to terminate funding if a claim begins to appear weak or commercially unviable once proceedings commence.[220]

The implementation of capital adequacy requirements will prevent funders with inadequate capital from gambling on litigation with no intention of paying a winning defendant. This will prevent trafficking in litigation concerns from materialising into a problem.

4.2 Abuse of process

Funders may improperly stir up litigation in furtherance of their own agenda. Court processes may be misused to generate profit, further the interests of those who provide capital to litigation funders (such as hedge funds, private equity firms or venture capitalists) or stir up litigation against competitors. Improperly motivated litigation funders have potential to abuse court procedures.

New Zealand courts have consistently refused to stay a proceeding against a defendant on the grounds of maintenance and champerty and have instead turned to abuse of process to

---

[216] At 107.

[217] High Court Rules 2016, r 15.1, District Court Rules 2014, r 15.1 and the Supreme Court's inherent jurisdiction – see *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [31].

[218] Wayne Attrill "Funding justice: the role of litigation funders in class actions" (1 July 2015) < http://classic.austlii.edu.au/au/journals/PrecedentAULA/2015/51.html>

[219] Wayne Attrill "Ethical issues in litigation funding" (16 February 2009) <https://www.imf.com.au/docs/default-source/site-documents/ethical-issues-paper-imf09---globalaw-conference>.

[220] For example, see *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [130].

prevent misuse of the court procedures and prevent manifest unfairness to a party to litigation.[221]

Different courts have different legal bases for preventing abuse of process. The High Court Rules provide for dismissal or a stay of proceedings on abuse of process grounds.[222] At a High Court level, the scope of abuse of process extends beyond other grounds for dismissal of proceedings (such as a claim being frivolous, vexatious or likely to cause prejudice or delay).[223] Abuse of process can be used to strike down proceedings that have been brought with an improper motive or that are an attempt to obtain a collateral advantage beyond that legitimately gained from a court proceeding.[224] The improper motive need not be the sole motive, so long as it is the predominant motive.[225]

At the Supreme Court level, in *Waterhouse* it was found the court possessed an inherent power to stay proceedings in the event of abuse of process. The Court considered whether the power to intervene on the "abuse of process" ground was limited to the four traditional grounds identified in *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, and found that it was not. The traditional categories of abusive proceedings are:[226]

1. Those that deceive the court are fictitious, or a mere sham;
2. Those that use the process of the court in an unfair or dishonest way or for some ulterior or improper purpose;
3. Those that are manifestly groundless, without foundation or serve no useful purpose; and
4. Those that are vexatious or oppressive.

The Court in *Waterhouse* added that it could also intervene on abuse of process grounds if the arrangement infringed against the rule that assignment of a bare cause of action is not permitted.[227]

The broad scope of abuse of process intervention can address many concerns arising from litigation funding agreements, but most notably any instances where a funder is acting for improper purpose. If a funder is stirring up litigation or pushing its own agenda, courts are

---

[221] Victoria Stace "When can litigation funding by liquidators be challenged as an "abuse of process"?" (2017) NZLJ 152.
[222] High Court Rules 2016, r 15.1.
[223] High Court Rules 2016, r 15.1(a)-(c).
[224] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [89].
[225] *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (CA); *Williams v Spautz* (1992) 174 CLR 509.
[226] *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43 at [14].
[227] *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [61]. Notably, what amounts to an abuse of process where there is a bare assignment of a right is not clearly defined. It involves consideration of the terms of agreement as a whole, including the degree of control the funder has over the proceedings and its remuneration (at [57]).

adequately equipped to protect the integrity of the judicial process. As noted by the minority in *Fostif*, the purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes.[228]

4.3 Funders fees

4.3.2 High proportion

Funders invest a significant amount into litigation. Basic investment theory provides the higher the risk of an investment, the higher the potential return. It therefore follows that the riskier the case, the higher the funder's fee. However, funders claiming a high percentage of the fruits of litigation may be problematic in two situations: if the fee does not align with the risk, or if the case is so risky it borders on trafficking in litigation.

4.3.2.1 Risk and reward misaligned

A funder's fee ought to be inversely correlated to a case's chance of success. If a case has a 95% chance of success, a funder should not be obtaining 95% of the damages awarded. Where the funder's fee does not accurately reflect the riskiness of a case, the funder is getting a windfall. This renders the facilitation of a claim, by providing funding, more valuable than the claim itself. This is not what justice is about. As a matter of policy, funders getting a windfall at the expense of plaintiffs is undesirable. Plaintiffs bring civil claims to receive monetary compensation as a form of vindication of their rights. Funders should not be receiving a lion's share of the settlement or damages award if they are proffering "access to justice" and "vindication of rights" as the underpinnings of their profession.

Conversely, it is arguable that a mere 20% of damages is better than nothing, which is what a plaintiff would receive without a funder's involvement as claims could not be brought. If a competent and fully informed adult who has obtained independent legal advice makes a financially unsound deal, there is no justification for limiting a plaintiff's freedom of contract.

4.3.2.2 Funding agreements bordering on trafficking in litigation

Although litigation funding is an investment, it should not be treated as any other investment in the market where an investor may choose to be as risk-tolerant as she wishes. If a funder is insisting on an 80% portion of the fruits of litigation, due to a case's chance of success being so low, this may make a funding agreement frivolous or vexatious. If a case's chance of success is so remote, funders would be promoting unmeritorious litigation that should not have been commenced. The courts ability to strike out meritless claims is a control mechanism to prevent this.[229] Maintenance and champerty do not need to be relied upon.

---

[228] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [226] per Callinan and Heydon JJ.

[229] High Court Rules 2016, r 15.1.

Recommendation

No definitive figure has emerged in jurisprudence for an acceptable funder's fee. No issue was taken with the 42.5% funders share in *PricewaterhouseCoopers.*[230] In Australia, funders are commonly charging between 25% and 40% of any settlement or damages awarded.[231]

An arbitrary percentage cap should not be implemented due to the broad range of funded cases. A funder's remuneration is a negotiated contractual term. Recipients of litigation funding can be divided based on their sophistication. Funding can be provided to sophisticated commercial parties, armed with the capacity and resources to negotiate the terms of the funding agreement. Alternatively, personal actions may be brought by unsophisticated plaintiffs for whom litigation funding offers the only means by which the action can be brought.[232] A mere inequality of bargaining power between the funder and the plaintiff is unlikely sufficient to deploy doctrines that limit freedom of contract, particularly in a commercial context.[233]

Arbitrary percentage caps are also undesirable as meritorious claims may go unfunded if funders perceive the litigation risk to be greater than the percentage cap. As illustrated in *Harcus Sinclair v Buttonwood Legal Capital Ltd*,[234] there is scope for reasonable disagreement about litigation's prospects of success. Concrete guidelines mandating risk be correlated with reward would likely prove difficult to enforce.

The diversity of funded cases and inherent uncertainty in litigation risk evaluation may mean a disclosure-based approach to funding arrangements is the only practical way forward. Oversight of funding agreements and fees charged will enable unmeritorious claims and windfall fees to be identified. Abuse of process and the High Court Rules are able to address these concerns. Moreover, with new market entrants and increased competition in the litigation funding market, funders fees may stabilise to a reasonable level.

---

[230] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [21].

[231] Damian Grave, Ken Adams & Jason Betts *Class Actions in Australia* (2nd ed, Thompson Reuters, Sydney, 2012) at 2-23.

[232] Poonam Puri "Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System" (2014) 55.1 Can. Bus. L.J. at 36.

[233] The threshold for unconscionable bargains and undue influence is high. See generally *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773; [2001] 4 All ER 449; [2-001] 3 WLR 1021; *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735.

[234] *Harcus Sinclair v Buttonwood Legal Capital Ltd* [2013] EWHC 1193, Ch.

4.4 Commodifying justice?

The moral implications of litigation funding have sparked debate among scholars and in the press. Some fear that litigation funding will be socially corrosive by commodifying justice.[235] Others feel a moral obligation to improve access to justice, thereby vindicating the rights of injured and oppressed citizens; and they view litigation funding as a promising mechanism to fulfil this moral obligation.[236]

It has been argued that litigation funding will improve fairness in civil justice systems where a large proportion of cases settle before trial.[237] Molot argues that settlements can be skewed away from the merits of a case and are largely determined by parties' tolerance for risk. An imbalance in risk preferences can arise where one party is a repeat player and the other is a one-time participant. The one-time risk averse participant may be more fearful of proceeding to trial, more eager to settle and in a weaker bargaining position. Molot therefore argues that if the settlement process is to value lawsuits accurately, settlements ought to be about the merits of a claim rather than externalities such as risk aversion and funding. Litigation funders fortify the weaker party to counter the stronger party's bargaining advantage in settlement talks. Underpinning this argument is the assumption that the defendant is a powerful, well-funded party. Funders therefore improve the workings of the legal system by increasing access to justice, although notably only for those who have something to exchange for the funding.

Conversely, litigation funding can be seen as suspicious, and even distasteful.[238] Wendel attempts to unpack the "ick factor" that is often cited in discussion of litigation funding.[239] Opponents of litigation funding argue it turns a courtroom into a stock exchange and litigation into a commodity.[240] It brings money into a part of life where we intuit that money does not belong.[241] When money can buy things that we consider beyond price, such as children or citizenship, it changes how we value them, and in that sense corrupts the values they represent to us.[242] Justice is high on that list.

---

[235] Michael J. Sandel *What Money Can't Buy: the Moral Limits of Markets* (Farrar, Straus & Giroux, New York, 2013) at 9.
[236] See generally Andrew Watson and Michael Donnelly "Financing Access to Justice: Third-Party Litigation Funding and Class Actions in Australia" (2014) 55 Can. Bus. L.J. 17.
[237] Jonathan T. Molot "Litigation Finance: A Market Solution to a Procedural Problem" (2010) 99 Geo. L.J. 65 at 68.
[238] Roger Parloff "Have You Got a Piece of This Lawsuit?" *Fortune* (New York, 13 June 2011) at 75.
[239] W. Bradley Wendel "Alternative Litigation Finance and anti-Commodification Norms" (2014) 63 DePaul L. Rev. 655 at 657.
[240] At 659.
[241] Lincoln Caplan "Lawyers and the Ick Factor" *The New Yorker* (online ed, New York, 9 July 2015).
[242] Michael J. Sandel *What Money Can't Buy: the Moral Limits of Markets* (Farrar, Straus & Giroux, New York, 2013) at 9.

4.4.1 Evaluation

The concern that litigation funding commodifies justice is not a problem unique to litigation funding. A vast array of practices commodify lawsuits by bundling up rights and trading them, without being condemned as single-handedly corrupting the value of the judicial system. Assignment of a debt, even in circumstances where it is foreseen that litigation will be necessary in order to recover the debt, is permissible.[243] The factoring of debts is a common form of commercial financing, and courts have noted this should not be discouraged or impeded.[244] By deeming factoring as a security interest, the Personal Property Securities Act 1999 is giving statutory recognition to the common commercial practice.[245] The assignment of distressed debt is not unusual.[246] The assignment of a thing in action (defined as "a right to receive payment of a debt") is expressly provided for in s 50 of the Property Law Act 2007.[247] Similarly, the assignment of debt secured by a GSA can be an uncontroversial commercial transaction, even where the GSA provides for the secured party to be able to pursue claims of the debtor in order to recover money owing to the secured party in the event that enforcement of the security becomes necessary.[248] Insurance subrogation is not tainted by the uneasy "ick factor."

More generally, the legal system routinely values personal relationships, harms, and remedies in monetary terms.[249] The value of justice has long been corrupted by making it more accessible to those who can pay to fight for their side of a dispute. Inbuilt into our legal system is the practice of using money to represent justice. De-commodification our legal system could be achieved by radically going back to *lex talionis* (an eye for an eye) and using retaliatory compensation practices; or finding non-monetary methods to act as a deterrent for wrongdoing and compensation for victims.[250]

To object to litigation funding as commodifying justice would require a more comprehensive objection to other features of the legal system as well, or for a distinction to be drawn between acceptable and unacceptable commodification.

---

[243] *Camdex International Ltd v Bank of Zambia* [1998] QB 22, [1996] 3 All ER 431 (EWCA Civ) at 39.
[244] See *Pricewaterhousecoopers* at [78].
[245] Personal Property Securities Act 1999 s 17(1)(b) – security interest includes the transfer of an account receivable.
[246] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [78].
[247] "Thing in action" defined in s 48 Property Law Act 2007.
[248] *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [78].
[249] Margaret Jane Radin *Contested Commodities* (Harvard University Press, Cambridge, Massachusetts, 1996), at 184-205.
[250] W. Bradley Wendel "Alternative Litigation Finance and anti-Commodification Norms" (2014) 63 DePaul L. Rev. 655 at 668.

As Wendel noted, "we live in a market society whose legal system has evolved alongside other capitalist institutions."[251] Litigation funding is not the cause of commodification of justice. Rather, the demand for litigation funding is a symptom of the legal system's pre-existing commodification of justice: access to courts is an expensive privilege.

[251] W. Bradley Wendel "Alternative Litigation Finance and anti-Commodification Norms" (2014) 63 DePaul L. Rev. 655 at 661.

CONCLUSION

Litigation funding has been subjected to judicial scrutiny and debate for the past several years. It is gradually gaining acceptance by legal professionals, courts, policymakers and the general public. There remains a need to clarify the legal principles under which it operates and mechanisms to prevent concerns materialising into problems. This dissertation contributes to the topic by addressing specific areas of concern.

Due to the diversity of funded claims, it is difficult to articulate clear rules to apply in all cases. This dissertation proposes a disclosure-based approach to litigation funding agreements. Wide disclosure will help limit many abuses.

Maintenance and champerty are not barriers to properly drafted litigation funding agreements. The prohibition on the assignment of a bare cause of action means a funder cannot control litigation. Control must be limited in three specific circumstances: settlement, termination grounds and litigation strategy. Lawyers should not act for both the funder and plaintiff. Defendants must not be costs prejudiced – adverse costs, security for costs and capital adequacy requirements will address this concern. Lastly, courts have adequate mechanisms to protect their processes.

The concerns discussed are not insurmountable, but the current unregulated litigation funding industry in New Zealand is problematic. Without oversight or clear guidance, there is a risk of unprincipled players exploiting vulnerable plaintiffs, prejudicing winning defendants' costs or undermining court processes for commercial gain. Clear, simple and enforceable guidance on what constitutes unobjectionable litigation funding arrangements would benefit the industry. A strong, well-financed, accessible litigation funding industry would enhance access to justice, enable vindication of rights, and help keep other industries accountable. Impecunious members of society may be less prone to exploitation by other industries if a strong litigation funding industry is in place to help vindicate their rights. New Zealand should reap the benefits of not needing to learn from its own mistakes by setting off on the right foot.

BIBLIOGRAPHY

A CASES

1. New Zealand

AMP Capital Investments No 4 Ltd v IBS Group Ltd (in liquidation) [2009] NZCCLR 19.
Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council [2008] 1 NZLR 838 (HC).
Bligh v Earthquake Commission & IAG [2018] NZHC 2392.
Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd and BC 2009 Ltd [2014] NZHC 1514, [2014] 3 NZLR 758.
Body Corporate 187242 v Auckland City Council CIV-2005-404-001597, 20 July 2006.
Brownie Wills v Shrimpton [1998] 2 NZLR 320 (CA).
Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All ER 499 (CA)
Chatfield & Co Ltd v Commissioner of Inland Revenue [2016] NZCA 614, (2016) 27 NZTC 22-084
Connell v Odlum [1993] 2 NZLR 257.
Contractors Bonding Ltd v Waterhouse [2012] NZCA 399, [2012] 3 NZLR 826.
Credit Suisse Private Equity LLC v Houghton [2014] NZSC 37.
Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2) [2004] UKPC 39, [2005] 1 NZLR 145.
Gustav & Co Ltd v Macfield Ltd [2008] NZSC 47, [2008] 2 NZLR 735
Houghton v Saunders [2015] NZHC 548.
Intercity Group (NZ) Ltd v Nakedbus NZ Ltd [2013] NZHC 1054.
New Zealand Rail Ltd v Port Marlborough New Zealand Ltd [1993] 2 NZLR 641 (CA).
PricewaterhouseCoopers v Walker [2016] NZCA 338.
PricewaterhouseCoopers v Walker [2017] NZSC 151, [2018] 1 NZLR 735.
Re Gellert Developments Ltd (in liquidation) (2001) 9 NZCLC 262,714 (HC).
Re Nautilius Developments Ltd (in liquidation) [2000] 2 NZLR 505 (HC).
Reekie v Attorney-General [2014] NZSC 63.
S H Lock (NZ) Ltd v New Zealand Bloodstock Leasing Ltd [2011] NZCA 675.
Saunders v Houghton [2009] NZCA 610, [2010] 3 NZLR 331.
Saunders v Houghton [2012] NZCCLR 31.
Saunders v Houghton [2013] NZHC 1824.
Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd [2016] NZHC 245.
Strathboss Kiwifruit Ltd v Attorney-General [2015] NZHC 1596.
Walker v Forbes [2017] NZHC 1212.
Waterhouse v Contractors Bonding Ltd [2012] NZHC 566.
Waterhouse v Contractors Bonding Ltd [2013] NZHC 2100.
Waterhouse v Contractors Bonding Ltd [2013] NZSC 89, [2014] 1 NZLR.

2. Australia

Campells Cash and Carry Pty Ltd v Fostif Pty Ltd [2006] HCA, (2006) 229 CLR 386.

Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd [2008] NSWCA 148; (2008) 67 ACSR 105.
Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] HCA 43.
Poulton v The Commonwealth (1953) 89 CLR 540.
QPSX Ltd v Ericsson Australia Pty Ltd (2005) 219 ALR1.
Stevens v Keogh (1946) 72 CLR 1, (1946) 20 ALJR 161 (HCA).

3. England and Wales

Arkin v Borchard Lines Ltd [2005] 1 WLR.
Bailey v Glaxosmithkline UK Ltd [2017] EWHC 3195 (QB).
Bristol and West Building Society v Mothew [1998] Ch 1.
Brownton Ltd v Edward Moore Inbucom Ltd [1985] 2 All ER 499 (CA).
Camdex International Ltd v Bank of Zambia [1998] QB 22 (CA).
Camdex International Ltd v Bank of Zambia [1998] QB 22, [1996] 3 All ER 431 (EWCA Civ).
Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 QB 101, [1964] 1 All ER 216 (QB).
County Hotel and Wine Co v London & North-Western Railway Co [1918] 2 KB 251 at 258.
Giles v Thompson [1993] 3 All ER 321.
Giles v Thompson [1994] 1 AC 142 (HL).
Glegg v Bromley [1912] 3 KB 474 (CA).
Harcus Sinclair v Buttonwood Legal Capital Ltd [2013] EWHC 1193, Ch.
May v Lane (1894) 64 LJ (QB) 236.
Prosser v Edmonds 160 ER 196.
R (Factortame) v Secretary of State for Transport, Environment and the Regions (No 8) [2003] QB 381.
Royal Bank of Scotland Plc v Etridge (No 2) [2001] UKHL 44; [2002] 2 AC 773; [2001] 4 All ER 449; [2001] 3 WLR 1021.
Stocznia Gdanska SA v Latvian Shipping Co (No 2) [1999] 3 ALL ER 822.
Trendtex Trading Corporation v Credit Suisse [1980] QB 629 (CA).
Trendtex Trading Corporation v Credit Suisse [1980] QB 629; [1980] 3 All ER 721.
Trendtex Trading Corporation v Credit Suisse [1982] AC 679 (HL).
Wild v Simpson [1919] 2 KB 544 (CA).

B LEGISLATION

1. New Zealand

Contract and Commercial Law Act 2017.
Court of Appeal (Civil) Rules 2005.
Credit Contracts and Consumer Finance Act 2003.
District Court Rules 2014.
Evidence Act 2006.
Financial Service Providers (Registration and Dispute Resolution) Act 2008.
High Court Rules 2016.
Insurance (Prudential Supervision) Act 2010.
Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Lawyers and Conveyancers Act 2006.
Non-bank Deposit Takers Act 2013.
Personal Property Securities Act 1999.
Property Law Act 2007.
Reserve Bank of New Zealand Act 1989.
Residential Tenancies Act 1986, s 44(3).

2. Australia
Abolition of Obsolete Offences Act 1969 (Vic).
Civil Law (Wrongs) Act 2002 (ACT).
Crimes Act 1958 (Vic).
Criminal Law Consolidation Act 1935 (SA).
Maintenance, Champerty and Barratry Abolition Act 1993 (NSW).

3. United Kingdom
Civil Procedure Rules 1998.
Criminal Law Act 1967.

C BOOKS
Leslie Perrin (ed) *The Third-Party Litigation Funding Law Review* (Gideon Roberton, London, 2017).
Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016)
Robert Merkin, Chris Nicoll (eds) *Collinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at 671.William J Baumol and Alan S. Binder *Economics Principles and Policy* (5th ed, Harcourt Brace Jovanovich, Inc., Orlando, 1979).
G E Dal Pont *Law of Costs* (2nd ed.,LexisNexis, Sydney, 2009) at
Damian Grave, Ken Adams & Jason Betts *Class Actions in Australia* (2nd ed, Thompson Reuters, Sydney, 2012)
Michael J. Sandel *What Money Can't Buy: the Moral Limits of Markets* (Farrar, Straus & Giroux, New York, 2013) at 9.
Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016).
Burrows, Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012).
Paul Michalik, Christopher Boys *Insurance Claims in New Zealand* (LexisNexis, Wellington, 2015).

D JOURNAL ARTICLES
Andrew Barker "Ideas on the Purpose of Civil Procedure" (2002) NZ L Rev 437.
Andrew Watson and Michael Donnelly "Financing Access to Justice: Third-Party Litigation Funding and Class Actions in Australia" (2014) 55 Can. Bus. L.J. 17.
Anthony J. Sebok "Litigation Investment and Legal Ethics: What are the Real Issues?" (2014) 55 Can.Bus. L.J. 111.
Anthony J. Sebok "Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards" (2015) 56 Wm. & Mary L. Rev. 833.
Camille Cameron, Jasminka Kalajdzic "Commercial Litigation Funding: Ethical, Regulatory and Comparative Perspectives" (2014) 55 Can.Bus. L.J. 1.

Charles Silver "Litigation Funding versus Liability Insurance: What's the Difference?" (2014) 63 DePaul L. Rev. 655.
Colin Fife "Third-party litigation funding" (2009) NZLJ 250.
David Capper "Third Party Litigation Funding in Ireland: Time for Change?" (2018) 26 CJQ 193.
Douglas R. Richmond "Other People's Money: the Ethics of Litigation Funding" (2005) 56 Mercer L. Rev. 649.
Jasminka Kalajdzic, Peter Cashman & Alana Longmoore "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding" (2013) 1 The American Journal of Comparative Law 93.
Jonathan T. Molot "Litigation Finance: A Market Solution to a Procedural Problem" (2010) 99 Geo. L.J. 65.
Justice Winkelmann "Access to Justice – Who Needs Lawyers?" (Ethel Benjamin address, 7 November 2014) (2014) 13 Otago L Rev 229.
Margaret Jane Radin *Contested Commodities* (Harvard University Press, Cambridge, Massachusetts, 1996).
Michael Legg and others "The Rise and Regulation of Litigation" (2011) 38 Northern Kentucky L. Rev. 625.
Michelle Boardman "Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation" (2012) 8 J.L. Econ. & Pol'y.
Peta Spender "After Fostif: Lingering Uncertainties and Controversies About Litigation Funding" (2008) 18 JJA 101.
Peta Spender "After Fostif: Lingering uncertainties and controversies about litigation funding" (2008) 18 JJA 101.
Poonam Puri "Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System" (2014) 55.1 Can. Bus. L.J. 34.
Rachael Mulheron, "England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments" (2014) 73 CLJ 570.
Roland Kirstein and Neil Rickman "Third Party Contingency Contracts in Settlement and Litigation" (2004) 160 Journal of Institutional and Theoretical Economics 160 555.
Saskia Righarts and Mark Henaghan "Public perceptions of the New Zealand court system: an empirical approach to law reform" (2010) 12(2) Otago L Rev 329.
Thurbert Baker "Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding" (2013) 23 Widener L.J. 229.
Vicki Waye "Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 BLR 225.
Victoria Stace "Supreme Court takes cautious approach to litigation funding arrangement by liquidator" (2017) NZLJ 384.
Victoria Stace "When can litigation funding by liquidators be challenged as an "abuse of process"?" (2017) NZLJ 152.
W. Bradley Wendel "Alternative Litigation Finance and anti-Commodification Norms" (2014) 63 DePaul L. Rev. 655.

E REPORTS

Australian Government Productivity Commission *Access to Justice Arrangements – Productivity Commission Inquiry Report* (Australian Government Productivity Commission, Canberra, 2014)
Law Reform Commission of Ireland *Issues Paper: Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Law Reform Commission of Ireland, Dublin, 2016).
New Zealand Law Commission *Subsidising Litigation* (NZLC R72, 2001), at 11.
Rupert Jackson *Review of Civil Litigation Costs: Final Report* (Ministry of Justice, United Kingdom, 2010) ch 11.
Victoria Law Reform Commission *Access to Justice – Litigation Funding and Group Proceedings Report* (Victoria Law Reform Commission, Victoria, 2018)
Victoria Law Reform Commission *Access to Justice – Litigation Funding and Group Proceedings Consultation Paper* (Victoria Law Reform Commission, Victoria, 2017)

F INTERNET RESOURCES

James Greenland "Seven litigation funding services in NZ" (5 May 2016) New Zealand Law Society <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/seven-litigation-funding-services-in-nz>.
Michael Velchik and Jeffery Zhang "Islands of Litigation Finance" (25 April 2017) Harvard Law School < http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Zhang_71.pdf> .
Matthias Schwartz "Should you be allowed to invest in a lawsuit?" (22 October 2015) New York Times Magazine <https://www.nytimes.com/2015/10/25/magazine/should-you-be-allowed-to-invest-in-a-lawsuit.html>.
Wayne Attrill "Funding justice: the role of litigation funders in class actions" (1 July 2015) < http://classic.austlii.edu.au/au/journals/PrecedentAULA/2015/51.html>.
Wayne Attrill "Ethical issues in litigation funding" (16 February 2009) <https://www.imf.com.au/docs/default-source/site-documents/ethical-issues-paper-imf09---globalaw-conference>.
Association of Litigation Funders "Code of Conduct for Litigation Funders" (January 2018) Association of Litigation Funders < http://associationoflitigationfunders.com/documents/>.
The Rules Committee "Minutes of meeting held on 26 February 2018" (26 February 2018) Courts of New Zealand < https://www.courtsofnz.govt.nz/about-the-judiciary/rules_committee/meetings/RC_260218.pdf>

G SPEECHES

Sir Douglas White, President of the Law Commission "Setting the Scene: The law reform project and the current review of class actions and litigation funding" (The Future of Class Actions Symposium, University of Auckland Business School, Auckland, 15 March 2018).
Justice Stephen Kós "Civil Justice: Haves, Have-nots and What to Do About Them" (An address to the Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016).

H OTHER RESOURCES

Roger Parloff "Have You Got a Piece of This Lawsuit?" *Fortune* (New York, 13 June 2011) at 75.
Lincoln Caplan "Lawyers and the Ick Factor" *The New Yorker* (online ed, New York, 9 July 2015).
Class Actions Practice Note 2016 (GPN-CA) (FCA), cl 6.4(b).

Australian Securities & Investments Commission *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest* (2013)