

# Litigation Funding in Australia

Identifying and Addressing Conflicts of Interest for Lawyers



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## Introduction

Litigation funding in Australia is a contractual arrangement whereby a third party (usually a corporate entity and not a legal practitioner) provides financing and some level of management of the dispute, and in return, if the case succeeds, receives a percentage of the proceeds.<sup>1</sup> Litigation funding has been argued to be an important and legitimate development that provides access to justice, allows for the spreading of the risk of complex litigation and can improve the efficiency of litigation by bringing commercial considerations to bear.<sup>2</sup> Equally there have been concerns that litigation funding results in the Court's processes being misused for commercial gain.<sup>3</sup>

Since the High Court gave its ruling in *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd.* (2006) 229 CLR 386, the Australian litigation funding industry has enjoyed significant growth. However, the operation and proper constraints on litigation funding remain a live issue. Of particular concern for this paper is the impact of litigation funding arrangements on lawyers<sup>4</sup> and their duties to their clients.<sup>5</sup> The litigation funding arrangements create a tripartite arrangement between the funder, lawyer and the funded entity which may give rise to conflicts of interest for the lawyer. This paper explains the operation of litigation funding in Australia and the lawyer's duties to their client under Australian law as background to the above issue. The paper then explores the case law on litigation funding and lawyers' conflicts of interest by looking at *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd.* (2006) 229 CLR 386 and key cases before and after this seminal decision. The paper also describes three litigation funding agreements from different litigation funders so as to shed light on how conflicts of interest are addressed contractually. The paper then concludes by seeking to identify specific conflicts of interest that litigation funding arrangements may create and how, if at all, they might be addressed.

The issue takes on heightened importance because at present it has been suggested that the lawyer for the plaintiff, or the applicant and group members in a class action, will act as a form of protection against a litigation funder's conduct creating an abuse of process or acting to the detriment of the actual litigant because of the duties arising from the solicitor-client relationship.<sup>6</sup> However, lawyers may find themselves in positions of conflict because of their much more lucrative and ongoing relationship with the funder.

## What is Litigation Funding?

### Background

Historically improperly encouraging litigation (referred to as 'maintenance') and funding another person's litigation for profit (referred to as 'champerty') were torts and/or crimes in all Australian jurisdictions. The common law prohibition of litigation funding was justified in part by a doctrinal concern, namely that the judicial system should not be the site of speculative business ventures. However, the primary aim was to prevent abuses of court process (vexatious or oppressive litigation, elevated damages, suppressed evidence, suborned witnesses) for personal gain. Today, legislation in the Australian Capital Territory, New South Wales, South Australia and Victoria has expressly abolished maintenance and champerty as a crime and as a tort.<sup>7</sup> It also seems likely that maintenance and champerty are obsolete as crimes at common law.<sup>8</sup>

Since 1995 under statutory powers of sale,<sup>9</sup> insolvency practitioners may contract for the funding of lawsuits, if these are characterized as company property.<sup>10</sup> Many such actions are for voidable transactions or misfeasance by company officers. Litigation funding companies emerged to service this market. Litigation funding has also been used in commercial litigation such as disputes over intellectual property rights<sup>11</sup> and breach of directors' duties.<sup>12</sup> More recently, litigation funding has been used to finance and manage class actions, particularly in the securities and competition law (antitrust) areas.<sup>13</sup> In *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd.* (2006) 229 CLR 386 (discussed below) the High Court declined to stay proceedings for being contrary to public policy and/or an abuse of process due to the presence of a litigation funder.

Since the High Court gave its ruling in *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd.* (2006) 229 CLR 386, the Australian litigation funding industry has enjoyed significant growth. There are a number of funding

companies operating in Australia at present, including two (IMF (Australia) Limited and Hillcrest Litigation Services Limited) listed on the Australian Securities Exchange, two overseas entities (Comprehensive Legal Funding LLC, a Nevada limited liability company and International Litigation Funding Partners, Inc / International Litigation Funding Partners Pte. Ltd.. which was based in Canada but appears to be now based in Singapore) and a number of smaller Australian incorporated entities (for example Litigation Lending Services Limited, Quantum Litigation Funding Pty Ltd.. and LCM Litigation Fund Pty Ltd..).

Litigation funding has also become an Australian export with IMF (Australia) Ltd.. funding proceedings in South Africa, New Zealand, the United States and United Kingdom.<sup>14</sup> In August 2011 IMF (Australia) Ltd. announced that it was incorporating a wholly-owned subsidiary Bentham Capital LLC to operate in the U.S. litigation funding market from offices in New York.<sup>15</sup>

### Costs Rule in Australian Litigation

The attraction of litigation funding is closely linked to the costs rule that operates in Australian litigation. The usual costs rule in Australian litigation is that a losing party is liable for the other side's costs, albeit only a portion of the costs actually incurred.<sup>16</sup> This is referred to as "the loser pays" or "costs follow the event" and is usually given effect procedurally through an adverse costs order.<sup>17</sup> The rule is modified in relation to class actions as the costs rule applies to the representative party only and not to the group members.<sup>18</sup> This approach to costs has been raised as a disincentive to the commencement of litigation as the plaintiff, or representative party in a class action, is liable for the costs of their opponent if they are unsuccessful. Equally, the approach discourages unmeritorious litigation to the extent that the risk of paying the other side's legal costs creates a financial disincentive to commence the litigation.<sup>19</sup>



The fee arrangements between lawyers and clients are less permissive in Australia than in the U.S., with fees determined as a percentage of the client's recovery (ie contingency fees) currently being disallowed. Australian lawyers may take cases on a "no win no fee" basis and, in some Australian states, if they are successful, charge their base rate multiplied by some factor or a specified additional amount.<sup>20</sup> This provides a mechanism to address the disincentive to commencing legal proceedings because a plaintiff cannot afford to pay his own legal costs. The availability of a "no win no fee" cost arrangement will depend on a lawyer's assessment of the risk of the proceedings and ability to bare non-payment for the period of the litigation. It does not address the disincentive associated with an adverse costs order.

Litigation funding covers a plaintiff's own legal costs and the risk of a plaintiff being liable for adverse costs orders. Moreover, litigation funders are not inhibited by the prohibition on contingency fees that applies to lawyers.

### **Typical Funding Arrangements**

In a typical litigation funding arrangement, the funder (usually a commercial entity) will enter into an agreement with one or more potential litigants. The funder pays the costs of the litigation (such as the lawyer's fees, disbursements, project management and claim investigation costs) and usually accepts the risk of paying the other party's costs in the event that the claim fails through providing the plaintiff with an indemnity. In return, if the claim is successful, the funder will receive a certain percentage of any funds recovered by the litigants either by way of settlement or judgment, and the litigants will assign the funder the benefit of any costs order they receive. The share of the proceeds is agreed with the litigants, and is typically between one third and two thirds of the proceeds (usually after reimbursement of costs).<sup>21</sup>

For a litigation funder to determine whether to fund an action he must calculate the risk associated with the litigation, that is, the prospects of success. He must also quantify the amount of a successful recovery and its potential liability for the costs of the proceedings (the expenses he incurs bringing the suit and the risk of having to pay the defendant's costs if the action fails). In simple terms, litigation funders will fund litigation when the probability of a successful outcome multiplied by the amount they stand to recover is greater than the probability of an unsuccessful outcome multiplied by the costs they are liable for. The percentage of the recovery going to the funder should reflect the risk inherent in the proceedings. The riskier the proceedings the greater the share of the proceeds that will need to be payable to the funder to make the investment attractive.<sup>22</sup> However, the litigation funder is able to spread the risk associated with a particular proceeding by adopting a portfolio approach to its inventory of cases.<sup>23</sup> If the funder is going to fund a claim involving novel theories of liability and therefore take a greater risk, it can offset the risk by also funding a low risk case where liability is clear. In summary, litigation funding is a business which decides whether to fund cases based on risk and return.<sup>24</sup>

Litigation funding does not just make available the financing needed for identifying and prosecuting potential law suits. Litigation funders also engage in some level of project management. The level of management undertaken would seem to vary depending on the sophistication of the client and the role played by the lawyers. For example, central to class action litigation is the entrepreneur who can identify the potential law suit, undertake the due diligence to determine the feasibility of litigation, organize a representative party and group members, provide financing to fund the costs that are incurred and coordinate the resources needed to achieve a favourable settlement or judgment. The litigation funder frequently performs this role, although assisted, more or less, by the lawyers for the representative party.<sup>25</sup>



At present in Australia, litigation funders tend to use two distinct business models. The first is to be a company incorporated in Australia that obtains the funds to be invested in litigation from debt and equity sources. Under this model, the company is listed on a stock exchange and as such will comply with prospectus requirements in obtaining equity and the usual requirements for listed public corporations such as continuous disclosure obligations. The second model involves the funder sourcing funds from Australian and/or overseas high wealth individuals, corporations or hedge funds. The second model is more opaque and in some instances may operate offshore so as to take advantage of favourable tax regimes. The interaction between investors and litigation funders has generally not attracted a great deal of attention, as compared to the interaction between the funder and the litigant receiving the funding (including group members in class actions).





## Lawyers' Duties to their Clients

The lawyer's legal duties to the client may be summarised into three main categories:<sup>26</sup>

- Competence (i.e. skill and care which are generally enforced through the law of contract and tort);
- Loyalty (fostered mainly through fiduciary duties<sup>27</sup>); and
- Confidentiality.

The duty of main concern here is the duty of loyalty,<sup>28</sup> or when placed in the negative, the duty to avoid conflicts of interest.<sup>29</sup> Although confidentiality is also of significance because a funder may seek access to the client's information and advice received from the lawyer.

The duty of loyalty may be explained as requiring that a person must not, except with the informed consent of the person to whom the fiduciary duties are owed, place himself in a position where there is or may be a conflict:

- between his duty as a fiduciary and his own interest (a duty-interest conflict); or
- between his duty as a fiduciary to one person and his duty as a fiduciary to another person (a duty-duty conflict).

These proscriptions may be referred to as a no-conflict duty. There also exists a prohibition on a person profiting from the relationship giving rise to fiduciary duties, except with the informed consent of the person to whom those duties are owed. This is referred to as the no-profit duty and may be seen as a subset of the no-conflict duty.<sup>30</sup> In the context of lawyers, the above fiduciary duties are strictly applied so as to ensure both zealous and loyal representation of the client but also to ensure confidence in the legal system.<sup>31</sup>

In *O'Reilly v. Law Society (NSW)* (1988) 24 NSWLR 204 the strictness of the approach was explained by Mahoney JA as follows:<sup>32</sup>

In principle, a solicitor owes to his client the duty to tell him of everything of which he knows which will be of assistance to the client in relation to the matters within his retainer. And, within such limits, he is to do what he can to further the client's interests. The extent of a solicitor's obligation in relation to these two matters have long been recognised. In *Tyrrell v. Bank of London* (1862) 10 HLC 26; 11 ER 934, Lord Westbury LC said (at 39-40; 939-940):

"My Lords, the decision which I shall advise your Lordships to pronounce in this case rests, in my opinion, on very clear principles and rules of conduct, of which it would be in the highest degree mischievous to impair the force or weaken the application ... The principle is that the solicitor shall not be permitted to make a gain for himself at the expense of his client. The client is entitled to the full benefit of the best exertions of the solicitor. The relation of solicitor and client involves, of course, the relation of principal and agent. The duties of the first relation include all of those of the second and something more; ..."

Subsequently, the Lord Chancellor (at 44; 941):

"... it is abundantly clear that two of the most important principles to be evermost sedulously preserved in considering the cases in which there is any breach of the high duties that are incident to the relation of solicitor and client, have plainly been violated by Tyrrell. It was his bounden duty to tell his clients what he had done. It was his bounden duty to give his clients the benefit of those exertions which he had employed for his own advantage. He forgot the first duty of a solicitor in the concealment and falsehood which were practised. My Lords, there is no relation known to society, of the duties





of which it is more incumbent upon a court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client; and I earnestly hope that this case will be one of the many which vindicate that rule of duty which has always been laid down, namely, that a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled.”

Further, President Kirby put the need for strict observance of avoiding conflicts of interest in terms of the impact on the legal profession:<sup>33</sup>

Quite apart from the ethical reasons for candour, full disclosure and the provision of the best possible advice to clients, uncontaminated by the risk of personal interest, there are practical reasons which support what I have said. Clients trust solicitors to provide them with neutral and beneficial advice. They do so because it is the requirement of the law and the rule of the profession that the solicitor must not put himself or herself into a position where any lesser standard is observed. If it became common, or even regularly the case, that solicitors made undisclosed private gains, directly or indirectly, from finance companies or other sources with which they were associated, the faith of the community in the integrity and trustworthiness of solicitors would be seriously shaken. That would affect adversely honourable members of the profession. It would reflect adversely upon the profession’s reputation for integrity. It will therefore not be tolerated by the court.

In the litigation funding context the duty of loyalty is of particular significance for two reasons. If the funder is also the lawyer’s client, this may create a duty-duty conflict because the lawyer would owe fiduciary duties to the

funder as well as the client.<sup>34</sup> In circumstances where the funder is not the lawyer’s client the lawyer must still ensure that his own self-interest does not conflict with the client’s interest. The concern here is that the lawyer’s self-interest includes promoting the funder’s interests because the funder is the repeat player who pays the lawyer’s fees.<sup>35</sup> The lawyer’s ability to be paid by the funder on the method agreed and the funder’s interest in having access to information and being consulted on the conduct of the proceedings necessitates the lawyer obtaining informed consent to these arrangements.

In relation to informed consent Chief Justice Street observed:<sup>36</sup>

Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material may positively mislead. Thus for a solicitor merely to disclose that he has an interest, without identifying the interest, may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position better to protect the client’s interest.

Full disclosure may mean ensuring that the client understands that a conflict exists and the ramifications of the conflict for the client. The degree of sophistication of the client will be a relevant factor in determining whether informed consent has been given.<sup>37</sup>

However, *Riley’s Solicitors Manual* observes that even with complete disclosure by the lawyer the following concerns remain:<sup>38</sup>

- it may prove difficult for the lawyer, because of the conflict, to proffer totally unbiased advice to the client for this purpose;



- a lay client may place trust in the lawyer's superior legal knowledge, and so be willing to unquestioningly accept the lawyer's assurances;
- there may be an appearance to the community that lawyers can take advantage of lay clients.

As a result it may be necessary for the lawyer to advise the client to seek, and perhaps even facilitate the obtaining of, independent legal advice.<sup>39</sup> In *Maguire v. Makaronis* (1997) 188 CLR 449, a High Court majority observed that the circumstances of some conflicts of interest may require the "obtaining of independent and skilled advice from a third party."<sup>40</sup>

The Professional Conduct Rules in Australia applicable to lawyers also address conflicts of interest. For example, in New South Wales, the Solicitors' Rules deals with both duty-duty conflicts and duty-interest conflicts as follows:<sup>41</sup>

9.1 For the purposes of Rules 9.2 and 9.3 -

"proceedings or transaction" mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.

"party" includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction.

"practitioner" includes a practitioner's partner or employee and a practitioner's firm.

9.2 A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:

(a) may be, thereby, prevented from -

(i) disclosing to each party all information, relevant to the proceedings or transaction, within the practitioner's knowledge, or,

(ii) giving advice to one party which is contrary to the interests of another; and

(b) will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.

9.3 If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties

10.1 A practitioner must not, in any dealings with a client -

10.1.1 allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client;

10.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client;

10.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

## Lawyer-Funder Relationships Prior to *Campbells Cash and Carry Pty. Limited v. Fostif Pty. Ltd.*

Most of the reported legal decisions in Australia dealing with litigation funding have focussed on whether litigation funding is an abuse of process or contrary to public policy. The duties of the lawyer in relation to their client are usually examined in the context of the role of the lawyer in the litigation funding arrangement.

In *Clairs Keeley (A Firm) v. Treacy* (2003) 28 WAR 139 a majority of the Court of Appeal of the Supreme Court of Western Australia granted a stay of proceedings on the basis that a funding agreement between the litigation funder, Insolvency Management Fund Ltd. ("IMF") and the plaintiffs was champertous and that there were features of the agreement and a retainer agreement between the plaintiffs, their solicitors at Solomon Brothers and IMF which were contrary to public policy: there had been a de facto assignment of the plaintiffs' causes of action to IMF, which was, in effect, trafficking in litigation. Further, Solomon Brothers had placed themselves in a position in which their interest conflicted with their duty to the plaintiffs and had breached their fiduciary duty to the plaintiffs. The latter concern is of interest here.

The funding arrangement was in essence that IMF would bear the legal costs, and if proceedings were successful a plaintiff would pay 35% of the recovery to IMF and reimburse IMF for the legal costs incurred. IMF retained the solicitors as agent for the plaintiffs. The plaintiffs were able to give instructions to the solicitors, including in relation to settlement, but IMF protected its investment through the following provisions in the funding agreement:

(a) entitled to receive from the Solicitors a monthly report on the progress of any litigation commenced by the Solicitors on behalf of the plaintiff and of any negotiations carried out in relation to the litigation;

(b) had to be advised immediately by the Solicitors of any proposal for settlement; and

(c) provided with access to the Solicitors' file held in respect of the litigation.

Further in relation to settlement a client who wished to settle would be obliged to notify IMF in writing. If IMF agreed with the proposal, it would be accepted. If not, the matter would be referred to a Queen's Counsel for independent review. If counsel's opinion was that the settlement proposal was inadequate, the client could nevertheless accept it, but the 35% commission would be increased to 45%.

The issue that arose from a conflict of interest perspective was that the lawyers and IMF agreed that if IMF did not make a recovery under its funding agreement with a client then the lawyers would charge 20% below their standard rates. However, if IMF did make a recovery then the lawyers would charge 25% above their standard recovery. On the basis of the terms of the funding agreement outlined above this meant that IMF could pass the 25% increase in legal costs onto the plaintiffs as they were obliged to reimburse IMF for legal costs if the claim was successful. The retainer agreement was not sent to the plaintiffs nor did the plaintiffs authorise IMF to enter into a costs agreement on their behalf. Indeed there was no evidence that the retainer agreement had been disclosed to the plaintiffs.<sup>42</sup>

The Court of Appeal found that the solicitors had acted contrary to their fiduciary duty to a client by not advising a plaintiff that it was contrary to their interest to pay legal fees above the scale.<sup>43</sup> Further the plaintiffs had not received proper advice as to the operation of the retainer agreement.<sup>44</sup> To try and overcome the criticisms of the



funding and retainer agreements IMF sought to amend the agreements so that IMF would be liable for the 25% increase rather than the plaintiffs. The Court of Appeal also found fault with this as a conflict of interest arose. IMF's commercial interests and the plaintiffs' interests may not coincide as one may wish to settle and the other proceed or vice versa in that the lawyers may prefer IMF's interests over their client's interests so as to achieve the uplift in fees. Further, the lawyer had a personal interest in the outcome of the litigation and may act in furtherance of that interest rather than the interests of the client.<sup>45</sup>

IMF sought to lift the stay of proceedings by adducing new evidence in *Clairs Keeley (a firm) v. Treacy* (2004) 29 WAR 479. Solomon Brothers sought to amend the existing retainer to address the issues identified above. The Western Australian Court of Appeal observed that the existing retainer was unenforceable as a result of its earlier finding but that Solomon Brothers had not advised their clients of this but rather had sought to have their clients enter into new agreements committing another breach of their fiduciary duty.<sup>46</sup> Further Solomon Brothers agreed to give up the 25% uplift in exchange for receiving its earlier work being paid at 100% of its standard rate rather than the previously agreed 80%. The Court of Appeal observed that as the retainer was unenforceable the agreement to give up the 25% uplift amounted to illusory consideration.<sup>47</sup> The Court of Appeal also took issue with both the lawyers and funders explanation as to what the Court of Appeal had previously decided. The existence of misunderstanding coupled with misinformation to the plaintiffs led to the stay being maintained. The Court of Appeal observed:<sup>48</sup>

We would have been prepared to accept the risk [of an abuse of process] if it was clear that the plaintiffs had made a fully informed decision to proceed with IMF and Solomon Brothers; and if Solomon Brothers had demonstrated a fuller appreciation of their obligations to the plaintiffs.

Regrettably, we are not confident this is so. It is clear that the plaintiffs have not been fully informed about their options or, for that matter, about the decision of the Full Court which closely affected their rights and obligations. Nor is it apparent that Solomon Brothers have themselves understood the consequences of their breach of fiduciary obligations found by the Full Court and their obligations which follow from those consequences.

The Western Australian Court of Appeal also observed in the context of determining whether there was an abuse of process:<sup>49</sup>

There can be no doubt that one of the most important considerations in this context, is the position of the solicitors. The Court can be more confident that its processes will not be abused by a litigation funder if the solicitor acting for the funded party is independent of the funder, is alive to the possibility of abuse or conflict and is fully aware of his fiduciary obligations to his client.

A further application to lift the stay was considered in *Clairs Keeley (a firm) v. Treacy* [2005] WASCA 86. The application was made after Solomon Brothers wrote to its clients expressly advising that the Court of Appeal had found that it had breached its fiduciary duties and failed to provide adequate information. The letter also stated that plaintiffs should obtain independent legal advice.<sup>50</sup> The plaintiffs were then asked to return a direction in which they (1) continued with funding from IMF and legal representation from Solomon Brothers; (2) discontinued their action; or (3) continue the action with new solicitors but without funding from IMF. IMF was not prepared to fund plaintiffs with other solicitors.<sup>51</sup> The Court of Appeal lifted the stay.

The interaction between an applicant, the lawyer for the applicant and a funder is further illustrated by *QPSX Ltd. v. Ericsson Australia Pty Ltd. (No 3)* (2005) 219 ALR 1.

The decision does not expressly deal with the conflicts of interest that a lawyer may face. However, it indirectly addresses the issue by examining whether the control of the proceedings exerted by the funder could amount to an abuse of process. QPSX, QPSX Communications and QPSX Europe (the applicants) were engaged in the business of licensing or otherwise commercializing intellectual property. The Applicants commenced proceedings against the Respondents for breach of a patent licensing agreement and misleading conduct. The Respondents sought to stay the proceedings because of the presence of a third party litigation funder. Justice French summarized the provisions of the funding agreement dealing with the lawyers as follows:<sup>52</sup>

Clause 6.1 of the agreement provides:

The Lawyers are instructed by QPSX, Communications and Europe and not by IMF. The Legal Costs and Disbursements, however, will be paid on behalf of QPSX, Communications and Europe directly by IMF. The retainer of the Lawyers to conduct the Proceedings on behalf of QPSX, Communications and Europe will be at QPSX, Communications and Europe's sole discretion.

Control of the proceeding will be in the hands of the applicants and the lawyers: cl 6.2. IMF has no standing to give any instructions to the lawyers and may not exercise any control of the proceedings: cl 6.3. IMF agrees to provide assistance in respect of the proceedings as the lawyers reasonably request from time to time: cl 6.4.

Clauses 6.6 and 6.7 provide:

6.6 In recognition of the fact that IMF has an interest in the Resolution Sum, if QPSX, Communications and Europe want to settle the Proceedings for less than IMF considers appropriate, or if QPSX, Communications and Europe do not want to settle the Proceedings when IMF considers it appropriate

for QPSX, Communications and Europe to do so, each party must seek to resolve the dispute by referring it to an independent party, mutually chosen, for advice and, if the dispute continues, it must be referred to a mediator to be nominated by the Australian Commercial Dispute Centre.

6.7 If the dispute referred to in clause 6.7 (sic) is not resolved within 2 weeks of its first arising, QPSX, Communications and Europe retain an unfettered power to conduct and settle the Proceedings.

There is a requirement under cl 6.8 for the provision to IMF of regular reports on the progress of the proceedings and immediate notice of any proposals for settlement. There is an acknowledgment by IMF that any such written reports are provided solely on the basis that IMF and the applicants have a common interest in the proceedings and that any written reports are to be treated with "the utmost confidentiality". Under cl 9, there is a continuing obligation of disclosure thus:

If after the date of this Agreement QPSX, Communications and Europe become aware of any information which has or may have a material impact on the outcome of the Proceedings or the potential for any Resolution Sum to be recovered, they will immediately disclose that information to IMF.

Justice French found no abuse of process. His Honour relied on the fact that the Applicants were sophisticated corporate litigants and the solicitors were required to take their instructions from the applicants.<sup>53</sup>

A comparison between *QPSX* and *Clairs Keeley* illustrates very different attitudes by the Courts to litigation funding, but also, quite different relationships between the lawyers and, on the one hand, the plaintiffs/applicants, and on the other, the litigation funder. This illustrates that litigation funding arrangements can be structured in very different



ways so as to give the funder more or less control, including its ability to direct, influence or encourage the lawyers to take a particular course. While the legality of litigation funding was determined by the High Court in *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd.* (2006) 229 CLR 386 the Clairs Keeley decisions sound a warning that a lawyer's duties to their client may be compromised in litigation funding arrangements, especially where the plaintiff or representative party is not a sophisticated user of legal services. The decisions after *Campbells Cash and Carry Pty Limited v. Fostif Pty. Ltd.* (2006) 229 CLR 386 demonstrate that this warning remains prescient.



## ***Campbells Cash and Carry Pty. Limited v. Fostif Pty. Ltd.***

### **Background**

Until August 5, 1997, there existed in each Australian State and in the Australian Capital Territory a legislative scheme the effect of which was to impose a tax on the wholesale sale of tobacco products. On 5 August 1997 the High Court in *Ha v. New South Wales* (1997) 189 CLR 465 held the ad valorem component of the licence fee to be invalid as contrary to s90 of the Australian Constitution. In *Roxborough v. Rothmans of Pall Mall Australia Ltd.* (2001) 208 CLR 516, licensed retailers who had bought tobacco in New South Wales from a licensed wholesaler between July 1, 1997 and August 5, 1997 successfully recovered the licence fee that they had paid before the decision in *Ha* was announced.

The instant proceedings were representative actions brought by retailers against licensed wholesalers in the wake of *Roxborough*. Each of the proceedings was funded by Firmstones Pty Ltd. trading as Firmstone & Feil Consultants (Firmstone) on the basis that Firmstone would:

- (a) pay all costs associated with the representative proceedings, including the cost of any appeals;
- (b) meet all costs orders made against the plaintiffs (including the represented retailers) in the representative proceedings;
- (c) receive 33% of any amounts recovered by the plaintiffs (including the represented retailers) from the defendants;
- (d) retain any amounts awarded as costs to contribute to the costs otherwise borne by Firmstone.

The proceedings were challenged on a number of bases, including that the proceedings be dismissed or stayed on the basis that the third party litigation funding arrangements were an abuse of process or contrary to

public policy. The focus is on the Courts' approach to the role of the lawyer in the funding arrangements.

### **Lower Courts**

At first instance, Einstein J in *Keelhall Pty Ltd. t/as 'Foodtown Dalmeny' v. IGA Distribution Pty. Ltd.* (2003) 54 ATR 75; [2003] NSWSC 816 found that the funding arrangement was an abuse of process. Einstein J found that Firmstone had retained Robert Richards and Associates as solicitors for the project. Further, Einstein J described the letter of retainer from the solicitor to Firmstone dated April 6, 2001 which provided:<sup>54</sup>

- "Whilst you are acting for your client you have engaged me as principal and not as agent for your clients.
- You will be responsible for the day-to-day carriage of the matters. However you make copies of all documents (in respect of the matters) between yourself and your clients available to Mr Richards. You will inform me of all material oral communications between yourself and your clients;
- You will liaise with your clients. I will not directly liaise with your clients;
- You will provide sufficient staff to support any court hearings including attendance at court to assist Counsel and to liaise with witnesses.
- I understand that you have notified your clients as to my involvement in the matter and they have agreed to me representing them."

Einstein J relied upon the documentary evidence and was not persuaded by oral testimony to the contrary by Mr. Firmstone. The solicitor did not give evidence.<sup>55</sup> Einstein J then commented:<sup>56</sup>



In any event and insofar as the retainer letters concern Robert Richards being retained to act on behalf of the plaintiffs and the target opt-in group, to my mind it is an extraordinary proposition that in this particular situation a firm of solicitors accepts a retainer upon the basis that they will not directly liaise with their clients. Problems which come to mind in relation to such an arrangement would include the following:

- Where a conflict-of-interest may arise as between interests of Firmstone and the interests of the plaintiffs or the target opt-in group it would seem inimical to the interests of the plaintiffs or the target opt-in group for the solicitor acting for both groups of parties to permit Firmstone alone to liaise with the plaintiffs or the target opt-in group. Such a conflict-of-interest may conceivably arise for various reasons including, for example, an occasion when an offer may be made by a group of relevant defendants to settle proceedings on the basis of payment in kind rather than payment in cash. Whilst it is all very well to suggest that Firmstone would not be disadvantaged in that form of settlement and would take its share of the proceeds by way of 33 1/3% of the value of the payment in kind, all sorts of problems relating to how that value would be ascertained could obviously arise. Likewise when the questions of the actual mode of running the proceedings would arise, it would be in the interests of Firmstone to keep the expenditure on legal fees to a minimum whereas the interests of the plaintiffs and the target opt-in group may very well be to prepare the case comprehensively even though such expenditure on legal fees may be involved. This particular type of issue would likely concern whether each of the individual plaintiffs and the target opt-in group was to give evidence presumably by statement. I reject Mr Gageler's submission that the interests of Firmstone on the one hand and of the plaintiffs on the target opt-in group on the other hand are "exactly the same" or "coincident."

- The well-known obligations of solicitors in relation to communicating to and dealing with their clients to ensure that the discovery processes are understood and complied with may very well be impeded where the solicitors have undertaken not to directly liaise with the clients for or on behalf of whom they act.

Einstein J relied on the tenuous relationship between the plaintiffs and the solicitor on the record, the lack of communications between plaintiffs and solicitor, the contractual constraint on direct communication between the solicitor and the plaintiffs and the solicitor's engagement by Firmstone as a principal and not as agent for Firmstone's clients in finding an abuse of process.<sup>57</sup>

Einstein J's judgment was appealed to the New South Wales Court of Appeal in *Fostif Pty. Ltd. v. Campbells Cash & Carry Pty Ltd.* (2005) 63 NSWLR 203. The Court of Appeal overturned Einstein J's decision and found that the funding arrangements did not justify a stay of proceedings. President Mason stated that Einstein J "drew too long a bow in his condemnation of the retainer arrangement. There is no finding and no basis on the evidence for a finding that this retainer had some particular tendency towards abuse of process."<sup>58</sup> President Mason interpreted the retainer as not preventing the solicitor from communicating with his clients but rather stating an intention that Firmstone would be involved in client liaison.<sup>59</sup> Further, the facts showed that the solicitor had "communicated directly with his clients as the need arose and the correspondence shows both awareness of and attention to professional obligations."<sup>60</sup>

President Mason went further and saw the presence of a solicitor on the record as being a factor that "should have been placed in the scales against the findings of abuse and tendency to abuse directed at Firmstone."<sup>61</sup>

## High Court of Australia

In *Campbells Cash and Carry Pty Limited v. Fostif Pty. Ltd.* (2006) 229 CLR 386, Australia's highest court considered the legality of litigation funding for the first time.<sup>62</sup> The High Court held 5:2 that litigation funding was not an abuse of process or contrary to public policy. The joint judgment of Gummow, Hayne and Crennan indicated that existing doctrines of abuse of process and the courts' ability to protect their processes would be sufficient to deal with a funder conducting themselves in a manner 'inimical to the due administration of justice.'<sup>63</sup> The joint judgment also explained that in jurisdictions which had abolished maintenance and champerty as crimes and torts, New South Wales, Victoria, South Australia and the Australian Capital Territory, there were no public policy questions beyond those that would be relevant when considering the enforceability of the agreement for maintenance of the proceedings as between the parties to the agreement.<sup>64</sup> In other words, once the legislature abolished the crimes and the torts of maintenance, these concepts cannot be used to found a challenge to proceedings which are being maintained. Their only relevance is in a dispute between plaintiff and funder about the enforceability of the agreement. The Court did not decide the position for those states where legislation had not abolished maintenance and champerty as crimes and torts (Western Australia, Queensland, Tasmania and the Northern Territory).

The joint judgment also considered a range of factors specific to the instant litigation, that alone or in combination were not contrary to public policy or led to an abuse of process. The factor of particular relevance here was the finding that in the arrangement under consideration the funder's retainer of a solicitor to act for the plaintiffs and represented parties did not give rise to a conflict of duty for the solicitor. The plurality observed:<sup>65</sup>

In the present matters, the appellants pointed to a number of matters which together were said to

be important. First, there was Firmstones' seeking out of claimants, which the appellants described as "officious intermeddling." Secondly, there was the degree of control which Firmstones would have over the proceedings, the litigants' interests being said to be "subservient" to those of the "intermeddler." Firmstones' retainer of a solicitor to act for the plaintiffs and represented parties was said not to lessen Firmstones' control of the proceedings but to give rise to possible conflicts of duty for the solicitor. Thirdly, it was said that Firmstones bought rights to litigate and did so with a view to profit. Firmstones was, so it was submitted, "a speculative investor in other persons' litigation".

Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstones' seeking out those who may have had claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process. ...

if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.

The plurality's position on the solicitor followed from it accepting the Court of Appeal's view of the facts rather than the findings of the trial judge.<sup>66</sup>

In contrast the dissent of Callinan and Heydon JJ focused on the role of the solicitor in the instant case as allowing for the funder to have greater control of the plaintiffs' claims which they saw as conducive to an abuse of process when considered with the other characteristics of the funding arrangement. The dissent



found that the plaintiffs could not choose their own solicitor, the solicitor Robert Richards who was on the record was retained by the funder as principal, not as agent for the plaintiffs and he was not to liaise directly with the plaintiffs.<sup>67</sup>

The observations of Callinan and Heydon JJ illustrate why a solicitor acting in the interests of the plaintiffs is to be championed:<sup>68</sup>

Normal litigation is fought between parties represented by solicitors and counsel. Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the courts. They can readily be controlled, not only by professional associations but by the court. The court is in a position to deploy, speedily and decisively, condign and heavy sanctions against practitioners in breach of ethical rules. The appearance of solicitors is recorded on the court file. Institutions like Firmstone & Feil, which are not solicitors and employ no lawyers with a practising certificate, do not owe the same ethical duties. No solicitor could ethically have conducted the advertising campaign which Firmstone & Feil got Horwath to conduct. The basis on which Firmstone & Feil are proposing to charge is not lawfully available to solicitors. Further, organisations like Firmstone & Feil play more shadowy roles than lawyers. Their role is not revealed on the court file. Their appearance is not announced in open court. No doubt sanctions for contempt of court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners. In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control. ...

The limited role of Robert Richards & Associates, who appeared on the record as solicitors for the retailer plaintiffs, is relevant to the question whether Firmstone & Feil's role created an abuse of process because it is relevant to the issue of control. The authorities have seen as a factor pointing against abuse the fact that the solicitors for plaintiffs are not chosen by the funder, that instructions were given to those solicitors by the plaintiffs and not the funder, and that the retainers of the solicitors were made by the plaintiffs and not the funder.<sup>69</sup> The respondents questioned whether solicitors of this kind lessened the potential for abuse of process, but they did not challenge these authorities. The presence of an independent solicitor dealing directly with the plaintiffs tends to reduce control of the litigation by the funder and leave it in the hands of the plaintiffs.

The distinction between the High Court majority and dissent, like the judges below, in relation to the role of the lawyer turned on factual findings. However, the plurality and dissent make it clear that the lawyer's fiduciary duties to their clients, including the prohibition on conflicts of interest, apply in the litigation funding context. Consequently, lawyers who find themselves in a position of conflict, absent informed consent, will breach their duty. Thus, even if on the above facts where there was no abuse of process those factors such as who chooses the lawyer, who pays the lawyer and who instructs the lawyer will be relevant to whether a conflict of interest arises.

The factual dispute about the role performed by the solicitor also illustrate the difficulties that may arise in detecting whether a lawyer is acting in the client's interest or is preferring the interests of the funder because that is in the lawyer's interests.

## Lawyer-Funder Relationships after *Campbells Cash and Carry Pty. Limited v. Fostif Pty. Ltd.*

In *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd.* (2005) 147 FCR 394 the Federal Court of Australia considered whether the funding agreement in a shareholder class action was an abuse of process and whether the group definition that had been adopted was in accordance with the requirements of the Federal Court of Australia Act 1976 (Cth). In the course of the discussion about abuse of process Stone usefully summarized the operation of the funding agreement as follows:

### The retainer and funding agreements

[10] As the group definition shows (see [3] above), in order to be a member of the group on whose behalf the present proceeding is brought, a person must instruct the applicant's solicitors, MBC. I shall refer to this requirement as the "MBC criterion." MBC, however, only accepts instructions on the person entering into a retainer agreement with it. It is a term of the retainer agreement that the person also enter into a funding agreement with Insolvency Litigation Fund Pty Ltd. (ILF), which is a wholly owned subsidiary of IMF (Aust) Ltd. (IMF). Unless it is necessary to distinguish between the two companies, I will refer to ILF and IMF together as "the funders."

[11] In summary, in order to be a group member for the purposes of this proceeding, a person must enter into a tripartite retainer and funding agreement with MBC and ILF. Although the applicant and some group members executed what is termed a "yellow retainer and funding agreement," the applicant recently executed a new retainer and funding agreement (the green retainer and funding agreement). The change from the yellow to the green retainer and funding agreement was implemented specifically to take account of a group member's statutory right to opt out of the proceeding.

It is accepted by all parties that in due course all the group members will execute a green retainer and funding agreement. It is this agreement that is of particular relevance to the issues presently before the court, and references in these reasons to the retainer and funding agreement are to this agreement unless otherwise specified.

[12] It is also pertinent to note that six of the group members have executed modified green retainer and funding agreements with MBC and ILF. These modified agreements differ in terms of the percentage of any settlement that the group member must pay to ILF as consideration for funding the proceeding.

### The retainer agreement

[13] Under the retainer agreement, MBC is appointed to act for the group member (referred to as the appointor) in the proceedings against Aristocrat and is authorised to make "day to day decisions" concerning the conduct of the proceedings. Clause 1 provides that the retainer agreement is entered into in contemplation of ILF agreeing to fund, and continuing to fund, the appointor. The retainer agreement also provides that:

- MBC will provide initial advice on the appointor's claim and on the funding agreement once the appointor accepts the retainer: cl 5.
- ILF has agreed to pay MBC's costs incurred in the proceedings: cl 8.
- MBC is authorised to provide ILF with confidential updates of the progress of the proceedings: cl 11.





- The appointor is required, inter alia, to accept MBC's "reasonable legal advice, including advice as to settlement offers" and not have any communication with Aristocrat about the claims without MBC's approval: cl 17.
- MBC does not act for ILF "in its own capacity" and does not take instructions or directives from ILF: cl 18.
- MBC is authorised to receive any amount for which the claims of the group members are settled or for which judgment is given (not including costs recovered) and to disburse that amount in accordance with the funding agreement: cl 22.
- MBC is entitled to terminate the retainer agreement on 7 days' written notice if ILF gives notice under the funding agreement that it is terminating that agreement: cl 25.
- The appointor may terminate the retainer on 7 days' written notice and the receipt of a notice of opting out (under s 33J of the Act) shall constitute such notice: cl 26.
- MBC will be retained by and act for the appointor but will be paid directly by ILF during the proceedings: cl 2.2, cl 2.3.
- MBC will act for the appointor not ILF, and ILF may not control or direct the conduct of the proceedings or the terms of any settlement other than as provided in the funding agreement: cl 2.3, cl 2.4.
- As this is a representative proceeding MBC may negotiate a settlement on instructions from the "representative party subject to the relevant legislation": cl 3.1.
- The appointor must not communicate directly with Aristocrat or its agents in respect of their claims: cl 3.6(a).
- Any amount (not including costs) obtained in respect of the appointor's claims against Aristocrat or in respect of the group claims against Aristocrat, whether by judgment or settlement (the resolution sum), is to be delivered to MBC to be distributed in accordance with the terms of the funding agreement even if the funding agreement is terminated (unless the termination is pursuant to ILF's "serious breach"): cl 3.6(b), cl 4.2, cl 5, cl 9.3.
- The appointor may terminate the funding agreement on 7 days' written notice and the receipt by MBC of a notice of opting out (under s 33J of the Act) shall constitute such notice: cl 9.1.

## The funding agreement

[14] Clause 2.1 of the funding agreement provides that ILF will pay "all legal costs and disbursements of the appointor reasonably incurred by the Solicitors for the sole purpose of the commencement, and prosecution, of the Proceedings". It adopts the definitions used in the retainer agreement (cl 1.1) and also states that there shall be no variation or amendment to the terms of the funding agreement except in writing signed by both the appointor and ILF (cl 1.4). The funding agreement also provides that:

- The appointor may withdraw from the retainer and the funding agreement within 14 days of receiving the initial advice provided by MBC pursuant to cl 5 of the retainer agreement: cl 1.6.
- (a) An amount equal to the Appointor's share of the total monies paid by ILF pursuant to clause 2 of this Funding Agreement and the equivalent clause in the Funding Agreements between ILF and other

[15] Payment to ILF from the resolution sum is governed by cl 5.1 which provides that the appointor shall pay the following:



Clients, such share to be determined by reference to the proportion that the Appointor's Gross Recovery bears to the total gross recovery of all Clients; plus,

- (b) An amount equal to a percentage of the Resolution Sum where that percentage is determined by reference to the number of Aristocrat shares purchased by the Appointor in the Relevant Period |PO and
- (c) If, pursuant to clause 12, ILF funds an appeal, or the defence of an appeal, or any further appeal or defence of any further appeal, a further 5% of the Resolution Sum in respect of each appeal so funded.

[16] Clauses 8 and 9 of the funding agreement concern termination. Clause 8.1 states that ILF is entitled, at its sole discretion, to terminate its obligations under the funding agreement, other than obligations accrued, by giving 7 days' written notice to the appointor specifying that its obligations are terminated. Clause 8.2 provides that if ILF terminates the funding agreement pursuant to cl 8.1 it will not be entitled to any commission or other payment unless the appointor receives payment of any costs order or costs agreed in respect of the proceedings, in which case the appointor is required to pay to ILF that portion of the costs recovered which were paid by ILF pursuant to cl 2 of the funding agreement relating to the period of the funding agreement.

[17] Clause 9 deals with termination by the appointor and the obligations that survive such termination:

9.1 The Appointor may terminate this Agreement at any time upon 7 days' written notice to ILF. Without limiting the generality of the foregoing, receipt by the Solicitors of a Notice of Opting Out executed by the Appointor shall constitute such written notice.

9.2 If the Appointor terminates the Retainer or this Funding Agreement other than pursuant to clause 9.3 and there is a resolution of the Claims of the Appointor at that time or a later time, clause 3.6 will continue to apply and the Appointor is liable to pay to ILF from the Resolution Sum the amounts set out in clause 5.1 of this Funding Agreement. The obligations in this clause are continuing and survive any termination of this Agreement other than pursuant to clause 9.3.

9.3 If ILF commits a serious breach of this Agreement and does not remedy this breach with 30 days after written notice from the Appointor, the Representative Party or the Committee as the case may be requiring it to do so, the Appointor may terminate this Agreement forthwith by written notice to ILF. The Appointor will then not be required to make any payment to ILF under clause 5 of this Funding Agreement.

Evidence was also given by affidavit that:<sup>70</sup>

Neither IMF nor ILF are controlling, nor have they at any stage controlled, the proceeding. Neither IMF nor ILF determine the steps to be taken in the proceeding. IMF and ILF leave it to the applicant and MBC to determine the conduct of the proceeding in the applicant's interest.

Further the solicitor for the applicant deposed to the fact that the ILF had not tried to control the proceedings and stated:<sup>71</sup>

ILF has from time to time expressed views about issues arising in the course of the proceeding but I have never known ILF to purport to give a direction or instruction about any issue arising in the course of this proceeding. On every occasion when views expressed by ILF have been different to those of the legal representatives of the Applicant in this proceeding, it is the views of the legal representatives that have



determined the course to be followed after obtaining instructions from the Applicant.

The Federal Court determined to follow the NSW Court of Appeal in *Fostif* rather than the Western Australia Court of Appeal in *Clairs Keeley* and found no abuse of process.<sup>72</sup>

The Aristocrat funding arrangements illustrate how conflicts of interest have been addressed. First, the possibility of a duty-duty conflict for the lawyer is addressed by specifying that the client (the appointor) retains the lawyers and there is no retainer between the funder and the lawyer. Second, the lawyers are authorized to make day-to-day decisions and the litigation funder is prohibited by controlling or directing the conduct of the proceedings. Presumably this is to try and remove the possibility that the lawyers may take actions in the funder's interest so as to carry favor with the funder. Third, the lawyers obtain permission from the client to provide information to the funder. This avoids both a breach of both the fiduciary duty to avoid conflicts and the duty of confidentiality.<sup>73</sup> The funder is able to protect its investment by having access to the information and, in a worst case scenario, being able to terminate the funding agreement.

The issue of a conflict of interest came to the fore in another shareholder class action, *Kirby v. Centro Properties Limited* (2008) 253 ALR 65. In 2008 three class actions were filed against the Centro Group. Richard Kirby, as the representative party, commenced two actions, one brought against Centro Properties Limited (CPL) and CPT Manager Limited covering a period of 9 August 2007 to 15 February 2008 and another one against Centro Retail Limited and Centro MCS Manager Limited relating to a period from 7 August 2007 to 15 February 2008. The Kirby proceedings adopted a closed group definition, which means the group was defined by reference to each group member having entered into a litigation funding agreement. The proceedings comprised 955 members. The solicitor on the record was Maurice Blackburn Pty

Ltd. and the proceedings were funded by IMF (Australia) Ltd. (IMF). The third action was issued by Nicholas Vlachos, Monatex Pty Ltd. and Ramon Franco, as the representative parties, and has all four Centro companies as respondents. This proceeding was a traditional opt out class action but excluded those entities in the Kirby class actions. It covers shares purchased in the period from April 5, 2007 to February 28, 2008. Slater & Gordon are the solicitors for the applicants and the proceedings were funded by Commonwealth Legal Funding LLC.<sup>74</sup> The respondents with the support of Mr. Kirby, sought to have the Vlachos class action stayed.<sup>75</sup> The steps that lead up to the application for a stay of the Vlachos action are of significance as they form the basis for the allegations of a conflict of interest:

- The Kirby actions were filed on May 9, 2008. Maurice Blackburn was aware that Slater & Gordon were also planning to commence a class action.
- On May 13, 2008, Maurice Blackburn advised Slater & Gordon that IMF would fund Slater & Gordon's clients if they agreed to join the Kirby actions. The proposal was discussed but did not eventuate.
- On May 23, 2008 the Vlachos action was filed.
- On July 9, 2008 the solicitors for CPL and CPT Manager wrote to all the other parties suggesting that either the Kirby actions or the Vlachos action be stayed pending the determination of the other action.
- On July 21, 2008 Maurice Blackburn and Slater & Gordon responded. Maurice Blackburn stated that it did not propose to comment on whether the Vlachos action should be stayed but provided reasons why the Kirby actions should not be stayed. Slater & Gordon's response was that none of the actions should be stayed because of the differences in the pleadings and the group members in the various actions did not overlap.

- On August 8, 2008 the solicitors for CPL and CPT Manager advised Maurice Blackburn that their clients would apply for a stay of the Vlachos action if the Kirby actions were expanded to include the Vlachos group members and the pleadings were amended to incorporate the allegations that were peculiar to the Vlachos action.
- On the same day Maurice Blackburn replied and advised that their client, Mr Kirby, now supported a stay of the Vlachos action as he was “concerned that the existence of the Vlachos proceeding will result in delays, extra expenses and inefficiencies in the resolution of his proceedings”. Further, if the Vlachos action were stayed Mr Kirby would amend the group definition in the Kirby actions to create an “open class” so that Vlachos group members who were not clients of IMF would become members of the Kirby group free of any obligation to pay commission to IMF.<sup>76</sup>

Justice Finkelstein expressed concerns that these developments created a risk that Maurice Blackburn and IMF had a conflict between their personal interests of depriving their competitors of the opportunity to offer a competing class action and their duty to their clients to not make the settlement of the proceedings more costly and difficult. Settlement may become more difficult because respondents are reluctant to settle when there is uncertainty and a lack of finality as to quantum which may arise if the Kirby proceedings were altered to incorporate the Vlachos action thus moving from a closed class to an open class.<sup>77</sup>

The Centro decision illustrates how a duty-interest conflict may arise even where the funding arrangements are structured to try and prevent conflicts or seeks informed consent to what would otherwise be a conflict of interest. The lawyer’s interest in promoting their own financial or business interests, which may include promoting the interests of the litigation funder, can conflict with the interests of the client. This potential for conflicts is explored further below in section 8.



## Three Case Studies of Litigation Funding Agreements

The above analysis has identified a range of concerns about the conflicts of interest that lawyers retained in litigation funded by third parties may face. This section examines three sample funding agreements to see how the contractual arrangement between funder, lawyer and client is structured, including if conflicts of interest are recognized and addressed. The funding agreements are from three different third party funders but all are in relation to the same type of proceedings, namely a shareholder class action involving claims of breach of the continuous disclosure obligation and the prohibition on misleading or deceptive conduct.<sup>78</sup> As the agreements are samples the actual terms of the agreements entered into by a plaintiff/applicant/group member may vary from the sample.

### Case Study A

The funding arrangements in Case Study A consist of a Funding Agreement between the Funder and each Funded Entity and a Retainer between the Lawyer and each Funded Entity. The Funding Agreement makes provision for the proceedings to be structured as either a class action under Part IVA of the Federal Court of Australia Act 1976 (Cth) or as a representative action under Federal Court Rules 2011 (Cth) r 9.21 or the now repealed Uniform Civil Procedure Rules 2005 (NSW) r 7.4.

The Funding Agreement provides for the Funder to pay:

- (a) The Projects Costs which are defined as the costs of investigating and working up the claims, costs of project managing the proceedings, lawyers' costs and disbursements, and any security for costs or costs orders; and
  - (b) Remaining Costs which are further legal costs and interest. The Remaining Costs are a proportion of the lawyers' costs that only become payable if the case is successful. It therefore provides a mechanism by which the lawyers can bear some but not all of the risk of the proceedings.
- Upon "Resolution" a Funded Entity is obliged to pay to the Funder:
- (a) A proportionate share of the Project Costs;
  - (b) A proportionate share of the Remaining Costs;
  - (c) An amount equal to the GST paid or payable by the Funder;
  - (d) A percentage of the Resolution Sum (less the proportionate share of Project Costs) based on the number of shares held and the date on which Resolution occurs (the percentage increases the lower the shareholding and the longer the dispute lasts); and
  - (e) The percentage of the Resolution Sum will be increased by 5% for each appeal that the Funder funds.
- Resolution is a defined term which effectively means when all or any part of the "Resolution Sum" from any proceeding is received. Resolution Sum is also a defined term which means money or the value of goods, services or benefits for which (1) claims are settled, (2) judgment is given, including costs and interest, and (3) any ex gratia payments. The Funded Entity's obligations are only triggered if the proceedings achieve a recovery.
- The Funding Agreement is structured so that the Funded Entity retains the Lawyer through the Retainer Agreement but the Funder is solely liable to pay the Lawyer's costs and disbursements.
- This position is reinforced by the Retainer Agreement which provides that no fees, costs or disbursements of

the Lawyer incurred by the Funded Entity will be payable by the Funded Entity except by the Funder in accordance with the Funding Agreement. The Lawyer therefore bears the risk of the Funder becoming insolvent in relation to legal fees and disbursements.

To allow the Funder to direct the proceedings on a day to day basis and presumably to also provide a degree of control over those who enter into a Funding Agreement, the Funded Entity is required to accept the following obligations:

- Funded Entity instructs Lawyers, in consultation with the Funder, to determine the Defendants against whom proceedings should be commenced, the form of the proceedings and the claims to be pursued;
- Funded Entity must follow Lawyer's reasonable legal advice;
- Funded Entity cannot communicate with Defendants; and
- Funded Entity authorises Lawyer to keep the Funder fully informed and take directions from the Funder on day to day matters.

The Funding Agreement provides a framework for the Lawyer to receive instructions. If a Class Action is commenced, then a representative nominated by the Funder will give instructions, or if a Representative Action is employed, then a committee of three persons will be nominated by the Funder to give instructions.

The procedure for obtaining instructions in relation to a settlement offer varies depending upon whether a Class Action, Representative Action or no proceedings are in place: (a) Class Actions can be settled if the court gives approval; (b) Representative Actions can be settled if 50% by value of funded persons who are party to that action vote for settlement and advice is received from either the Lawyers or counsel retained by the Lawyers that the proposed settlement is reasonable; and (c) claims prior to

proceedings being commenced can be settled if 50% by value of funded persons whose claims are the subject of the proposed settlement vote for settlement and advice is received from either Lawyers or counsel retained by the Lawyers that the proposed settlement is reasonable.

Where the Funder on one side, and either the representative or the committee, on the other, disagree as to whether a claim should be settled the disagreement will be dealt with by having senior counsel advise. If senior counsel is of the opinion that the settlement is reasonable then the Lawyer is to be instructed to settle the Class Action, Representative Action or claims provided that: (a) for a Representative Action 50% by value of funded persons who are party to that Representative Action vote for settlement; and (b) for a Class Action the approval of the Court is sought and obtained.

The Funder may terminate the Funding Agreement on 7 days written notice. The Funder remains liable for obligations accrued prior to the date of termination but not for any obligations arising after that date. The Funder ceases to be eligible for a percentage of any recovery but is entitled to recover costs incurred during the duration of the Funding Agreement. The Funded Entity may terminate for a serious breach that remains unremedied for 30 days. Where the Funded Entity terminates for serious breach the Funder is ineligible for any recovery but remains liable for obligations accrued prior to the date of termination. Where the Funding Agreement is otherwise terminated then the Funded Entity remains liable to pay a proportionate share of the legal costs and disbursements paid by the Funder and a percentage of the Resolution Sum if there is a Resolution of the Funded Entity's claims.

### Case Study B

The funding arrangements in Case Study B consist of a Funding Agreement between the Funder and each Funded Entity and a Retainer between the Lawyer and each Funded Entity. The Funding Agreement makes provision



for the proceedings to be structured as a class action (which includes claims being pursued through Part IVA of the Federal Court of Australia Act 1976 (Cth) or as a representative action under Federal Court Rules 2011 (Cth) r 9.21, Supreme Court Rules (Vic) Order 18 or the now repealed Uniform Civil Procedure Rules 2005 (NSW) r 7.4), or as a group action which is a proceeding in which the Funded Entity is named as claimant, or as a test case.

The Funding Agreement provides for the Funder to pay:

- (a) All legal costs and disbursements including the cost of any expert; and
- (b) Any costs order made against a Funded Entity.

Upon Resolution a Funded Entity is obliged to pay to the Funder:

- (a) A proportionate share of the legal costs and disbursements paid by the Funder;
- (b) A percentage of the Resolution Sum based on the number of shares held and the date on which Resolution occurs (the percentage increases the lower the shareholding and the longer the dispute lasts); and
- (c) The percentage of the Resolution Sum will be increased by 5% for each appeal that the Funder funds.

Resolution is a defined term which effectively means when all or any part of the “Resolution Sum” from any proceeding is received. Resolution Sum is also a defined term which means the amount for which a claim is settled or for which judgment is given, including the value of any favourable terms of future supply of goods or services. It includes interest but excludes costs pursuant to a costs order. The Funded Entity’s obligations are only triggered if the proceedings achieve a recovery.

The Funding Agreement is structured so that the Funded Entity retains the Lawyer through the Retainer Agreement but the Funder is solely liable to pay the Lawyer’s costs and disbursements. The Funding Agreement has a specific acknowledgement that “the Funder accepts that the Lawyers professional duties are owed to the Claimant and not to the Funder”.

This position is reinforced by the Retainer Agreement which provides that no fees, costs or disbursements of the Lawyer incurred by the Funded Entity will be payable by the Funded Entity except by the Funder in accordance with the Funding Agreement. The Lawyer therefore bears the risk of the Funder becoming insolvent in relation to legal fees and disbursements.

To allow the Funder to direct the proceedings on a day to day basis and presumably to also provide a degree of control over those who enter into a Funding Agreement, the Funded Entity is required to accept the following obligations:

- Funded Entity irrevocably directs the Lawyers to consult with the Funder with regard to any significant issue in the proceedings and to properly consider its views as to the conduct of the proceedings;
- Funded Entity must provide full and honest instructions to the Lawyers;
- Funded Entity must conduct the proceedings so as to avoid unnecessary cost and delay;
- Funded Entity must follow Lawyer’s reasonable legal advice;
- Funded Entity will not disclose any information provided to it by the Lawyers or the Funder to any other person without their written consent;
- Funded Entity cannot communicate with Respondents; and



- Funded Entity authorises Lawyer to promptly respond to any reasonable request from the Funder for information about the proceedings and to provide the Funder with information communicated to or by potential and actual witnesses.

The Funder agrees not to retain the Lawyers for any purpose connected with the Funding Agreement or the proceeding being funded pursuant to the Funding Agreement. However, the Lawyers may be retained for an unrelated purpose provided the Funder discloses the retainer to the Funded Entity.

The provision of instructions to the Lawyers varies depending on the procedure used to pursue the claims. For a class action the representative party instructs the Lawyers. For a group action a committee is formed. For a test case the Lawyers may form a committee to seek instructions for any settlement negotiations. Otherwise the plaintiff in the test case instructs the Lawyers.

In relation to settlement, the Funding Agreement provides for the Lawyers to advise the Funder of any settlement negotiations and to invite the Funder to attend, to report on settlement discussions to the Funder and consult with the Funder on the terms of any proposed settlement. If a disagreement as to settlement arises between the Funder and those instructing the Lawyers then the Funder and Funded Entity agree that the disagreement will be resolved through the Lawyers briefing a barrister who is a senior counsel to advise on whether the settlement is reasonable. The advice of senior counsel is binding on the Funder and Funded Entity.

The Funder may terminate the Funding Agreement on 7 days written notice. The Funder remains liable for obligations accrued prior to the date of termination but not for any obligations arising after that date. The Funder ceases to be eligible for a percentage of any recovery but is entitled to recover costs incurred during the duration of the Funding Agreement. The Funded Entity may terminate

for a serious breach that remains unremedied for 30 days. The Funded Entity is taken to have terminated the Funding Agreement if it (1) rejects a settlement that has been (a) approved by a Court or (b) said to be reasonable by a senior counsel and accepted by 50% of other Funded Entities; or (2) opts out or fails to opt in to proceedings conducted as a class action. Where the Funded Entity terminates for serious breach the Funder is ineligible for any recovery but remains liable for obligations accrued prior to the date of termination. In the other scenarios where the Funding Agreement is terminated then the Funded Entity remains liable to pay a proportionate share of the legal costs and disbursements paid by the Funder and a percentage of the Resolution Sum if there is a Resolution of the Funded Entity's claims.

The Retainer Agreement effectively mirrors the structure of the Funding Agreement. The Retainer agreement provides that the Lawyers are instructed to provide the legal services that the Lawyer considers reasonably necessary to settle or litigate the claims. The Lawyer is authorised to make the day-to-day decisions for the conduct of the matter, but may seek specific instructions from a representative party, plaintiff, committee or Funded Entity as necessary.

### Case Study C

The funding arrangements in Case Study C consist of a Funding Agreement between the Funder and each Funded Entity, which has as an annexure the Terms of Engagement between the Funder and the Lawyers, and a Retainer between the Lawyer and each Funded Entity.

The Funding Agreement provides for the Funder to pay:

- (a) All legal costs and disbursements including any associated taxes; and
- (b) Any costs order made against a Funded Entity.



However the obligations have two important qualifications. First the amount to be paid must not exceed a pre-determined funding limit. Second, the reference to all legal costs is qualified in that the Funder is obliged to pay 75% of the Lawyer's fees as they fall due but the remaining 25% only becomes payable if there is a recovery through a judgment or settlement. As the 25% is only payable from recoveries the Funder never actually makes this payment.

Upon a successful recovery a Funded Entity is obliged to pay to the Funder:

- (a) A proportionate share of the legal costs and disbursements including any associated taxes paid by the Funder;
- (b) A proportionate share of the 25% of legal fees owed to the Lawyers;
- (c) A percentage of the recovery.

The percentage of recovery varies based on a number of factors. A flat rate applies to all Funded Entities to a certain date and then after that date varies by shares held (the more shares the lower the percentage), net recoveries (a discount increases the greater the recovery) and the date the recovery is achieved (a discount decreases the longer the dispute lasts).

To allow the Funder to direct the proceedings on a day to day basis and presumably to also provide a degree of control over those who enter into a Funding Agreement, the Funded Entity is required to accept the following obligations:

- Funded Entity consents to the Funder receiving information and reports from the Lawyers, as well as access to documents, witness statements, discovery and instructions to the Lawyers;
- Funded Entity consents to the Funder communicating directly with the Lawyers;
- Funded Entity must provide full and honest instructions to the Lawyers;
- Funded Entity must cooperate in the preparation of the claim and conduct the proceedings so as to avoid unnecessary cost and delay;
- Funded Entity must provide all information and documents to the Lawyers relevant to the claims;
- Funded Entity must follow Lawyer's reasonable legal advice;
- Funded Entity will not disclose any information provided to it by the Lawyers or the Funder to any other person without their written consent; and
- Funded Entity cannot communicate with Respondents.

The Lawyers are appointed by the Funder to represent the Funded Entities. The Funded Entity agrees that the Representative, the representative party or lead applicant in a class action, will provide instructions to the Lawyers. The funding agreement specifies that the Funder does not have control over or the right to make decisions in the litigation. The funding agreement also provides a procedure for a Funded Entity or the Funder to disagree with significant decisions made by the Representative, such as settlement or appeal. The procedure involves the appointment of an independent barrister to advise on whether the decision is reasonable or not. If found to be reasonable the decision must be implemented and if not then the decision is not implemented. The Lawyers may also instruct an independent barrister to advise where the Lawyers believe they may be in a position of conflict in relation to obligations owed to a Funded Entity and the Funder. The Funder will pay the costs of the independent barrister.

The Funder may terminate the Funding Agreement on 30 days written notice. The Funder remains liable for



obligations accrued prior to the date of termination but not for any obligations arising after that date. The Funder ceases to be eligible for a percentage of any recovery but is entitled to recover costs incurred whilst the Funding Agreement was on foot. The Funded Entity may terminate for a serious breach that remains unremedied for 30 days. Where the Funded Entity terminates for serious breach the Funder is ineligible for any recovery but remains liable for obligations accrued prior to the date of termination. The funding agreement also terminates if the Lawyers appointment is terminated by the Lawyers or the Funder, and the Funder does not appoint replacement lawyers.

The case studies, along with the above court decisions, are analysed further in the next section.



## Conflicts of Interest for a Lawyer Arising from Litigation Funding Arrangements

The above case law and descriptions of litigation funding arrangements demonstrate that the terms on which litigation funding is provided, including the role of the lawyer, may vary from matter to matter. As a result in any particular funding arrangement the prospect of conflicts and the steps taken to address those conflicts may vary. Thus for a court or a client seeking to ascertain if the lawyer may have a conflict of interest requires close attention to the specific funding arrangements that are in place. Nonetheless, there are some common conflicts and some common responses. There are also some potential areas of conflict that require further consideration.

The conflict of interest that can arise when both the funder and the funded entity are clients of the same lawyer has been addressed in funding arrangements by providing that no retainer exists between the funder and the lawyer. The possibility of a duty-duty conflict may be avoided by ensuring that a fiduciary duty to the funder does not arise. However, the High Court in *United Dominions Corporation Ltd v. Brian Pty. Ltd.* (1985) 157 CLR 1 stated that “a fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them.”<sup>79</sup> As a consequence the lawyer must ensure that he/she does not cultivate a relationship of trust and confidence with the funder that creates a fiduciary relationship regardless of there being no formal retainer. Alternatively if the lawyer’s relationship with the funder prior to any contractual exclusion may be fiduciary then informed consent is required, rather than just a statement in a contract between the funder and the funded entity (that the lawyer is not a party to) that there is no fiduciary relationship, for the exclusion to be effective.<sup>80</sup>

Even though the relationship between the funder and lawyer may not be fiduciary, the relationship is still a close one. This can follow from the funder selecting the lawyer, so that from a client’s perspective the lawyer and funder are a package deal. The funder’s role as financier who pays the lawyer’s fees, sometimes with some form of success fee, creates a relationship of economic dependence by the lawyer on the funder. The economic relationship being summarised by the aphorism “He who pays the piper calls the tune.” Where the funder performs the role of the litigation entrepreneur that identifies the cause of action, collects evidence, conducts the due diligence on the case and creates the litigative entity, such as the group for commencing a class action, the funder may be an important source of knowledge necessitating collaboration between the lawyer and funder.

The need for a relationship between funder and lawyer also follows from the funder’s need for some level of control over the proceedings. The amount of control may vary from high as in *Clairs Keeley and Fostif* to much lower as in *QPSX*. However, all funding arrangements provide for at least some sharing of information, a say on settlement and a right for the funder to terminate at will, albeit after giving notice. Some go further providing for the client to instruct the lawyer in consultation with the funder (case study A), irrevocably directing the lawyer to consult with the Funder on significant issues and properly consider the Funder’s views (case study B), or the client consenting to the Funder communicating directly with the lawyer (case study C). Where the funder is a more sophisticated user of legal services then the client may defer to, or even completely delegate, decision making to the funder so that it is the funder and lawyer who are really running the litigation. Indeed in many class actions the lawyers and funder will have more at stake than the representative party or group member.

The litigation funder is able to exert influence on the lawyer, even if they are not the lawyer's client. Equally the lawyer has incentives to ensure that the funder is satisfied with the lawyer's performance. This combination of influence and incentives may give rise to a conflict of interest for the lawyer. The potential areas of conflict, that will be discussed below, include:

- The terms of a funding agreement that a lawyer may advise on as the agreement may be more or less favourable to the funder or client.
- Litigation strategy including
  - Structure of the proceedings eg class action or test case and within a class action whether it is an open or closed group definition
  - Employment of alternative dispute resolution mechanisms
  - Responding to or making settlement offers
  - Appeals
- Termination of the funding agreement
- Acting in other litigation funded by the same litigation funder

The terms of the funding agreement includes financial and non-financial elements. The financial elements include the percentage to be paid to the funder and the method for calculating the percentage. The non-financial elements include obligations on the funded entity to incur costs to assist with discovery, provide witnesses or information, some of which may be commercially sensitive such as investment strategies, and restrictions on communication with an opponent or terminating the funding agreement. Indeed the funding agreement also contains the provisions giving the funder the ability

to exert control over the litigation such as a right to information and participation in settlement negotiations. The allocation of rights and responsibilities under the funding agreement must create a conflict for a lawyer who is both running the litigation and advising the client on the funding agreement. The higher the percentage to be paid to the funder the better the arrangement for the funder and the worse for the client. A lawyer acting in the client's best interest would strive to obtain funding on the best terms possible which in most cases would be at the lowest price available. However, if the lawyer fights too hard for the percentage to be paid to be reduced then a funder may decide another case is more attractive and the lawyer loses the ability to run the case for which they will be remunerated. Further, a profitable funder will be a going concern that may fund future cases for which it will need legal representation.

Anecdotal evidence suggest that funders and lawyers recognise this conflict and so advise clients to seek independent legal advice on the terms of the funding agreement. While this may avoid the present conflict it also begs the question of how is it that the lawyer can be said to act for the client if they are unable to advise on the fundamental contractual arrangement between the client and the funder. Moreover how can a lawyer be said to meet his/her duty of loyalty if they do not even try to bargain with the funder over the percentage to be paid but instead simply recommend independent legal advice.

A related concern was voiced extra-curially by Chief Justice Keane of the Federal Court of Australia who stated:<sup>81</sup>

May I also suggest that it is not taking an unduly pessimistic view of human nature to say that advice from a lawyer asked to advise on the prospects of success of litigation proposed to be undertaken as part of the business of a litigation funder is apt to be, no doubt unconsciously, less astute to possible weakness in the proposed case than advice from a lawyer whose client is concerned only to get justice and must incur the expense



and risk of the proceedings necessary in that regard. Getting to run a piece of mega-litigation should not be able to be seen as a reward for positive advice as to prospects.

So far as the ongoing debate about litigation funding is concerned, surely there should be, in any legislative framework, an insistence on a strict demarcation between the lawyers who advise the funder that a claim is truly worthwhile in terms of prospects of success and likely recovery, and the lawyers who actually run the case.

The structure of the proceedings may also present a conflict between the funder's interests and client's interests with the lawyer being required to act in the client's interests. It is to be expected that both funder and client would wish to maximise claim value. As a result where a class action is available it would seem to be an attractive vehicle because it both combines claims so as to increase the stakes but also presents the opportunity for economies of scale and other efficiencies.<sup>82</sup> However, in Australia the class action may be structured in the following ways:<sup>83</sup>

- The opt out model which is commenced without the express consent of the absent class members. All those entities that fall within the group definition are automatically part of the class action but the members are subsequently afforded an opportunity to exclude themselves from the proceedings;
- The opt in model which may be commenced by an applicant alone or on behalf of a group but involves notices being sent to potential group members asking them to participate in the class action by giving their consent to inclusion; and
- The defined class model, determined by way of a limited group, or a closed class. This approach involves a class action being commenced on behalf of a group specifically created for, and prior to, the commencement of the class action.

The opt out and defined class models are available under Part IVA of the Federal Court of Australia Act 1976 (Cth) and NSW and Victorian equivalents.<sup>84</sup> For an opt in approach the proceedings would have to be commenced as a representative action under Federal Court Rules 2011 (Cth) r 9.21 or state equivalents. Typically a litigation funder prefers a defined class as membership of the class or group will be premised on a funding agreement having been executed which ensures that all group members must pay a percentage of their recovery to the funder.<sup>85</sup> From the client's perspective they may be content for such an approach to be adopted because it excludes free-riders and the known quantity of claims may make settlement easier to obtain. The *Centro* decision above assumes this state of affairs in finding a potential conflict between the interests of group members and the interests of the lawyer and funder when they wanted to move from a defined or closed class to an opt-out model.<sup>86</sup> However, an individual client may prefer an opt out model if it would create a larger group with more claims, and even increased uncertainty, thus providing greater leverage for settlement. The opt out model may also be attractive for the individual client if they were able to free-ride on the class action by being part of the group but not executing a funding agreement so that they could be part of a settlement without having to pay a share to the funder.<sup>87</sup> The desire of an individual client to free-ride may also mean a preference for the use of a test case where they are not the plaintiff or exercising a right to opt out in a class action with a view to later relying on any settlement or judgment to pursue their own claim. The latter scenario of opting out would create a difficult conflict for a lawyer to manage as it may reduce the number of group members in the funded class and therefore the financial viability of the proceedings for the funder.

The problem identified here is that the lawyer in a funded class action they may give preference to the wishes of the funder in structuring the proceedings. A breach of the lawyer's fiduciary duty would be difficult to prove as the arguments for and against the various forms of class



action allow for positions to be taken that are arguably in the interests of both funder and client. However, there is significant room for a divergence of interests as well.

The use of alternative dispute resolution or settlement offers may give rise to a conflict for the lawyer when the client and funder have different litigation goals. The funder's aim is to maximise claim value subject to minimising the risk of losing the litigation and being liable for both the funded entities' costs and the opponent's costs. It would be sensible for the funder to accept a lower settlement as the price of removing the uncertainty and risk that accompanies litigation. The funder also has two characteristics that may influence its decision making. The funder will almost always be incorporated and will have investors or shareholders. Like other corporations or investments it will need to generate returns, perhaps even with a short run focus, to avoid investors or shareholders going elsewhere. The funder will also have a portfolio of cases so that it needs to make decisions not just based on an individual piece of litigation but in relation to its entire portfolio. If a case is settled then the revenue from the case can be used to invest in another case. If the return on investment in the instant litigation is lower than that forecast for a planned proceeding then the correct business decision may be to settle promptly.<sup>88</sup> In comparison the client has no risk of exposure due to the funding agreement as its costs are being paid for by the funder. Consequently the client may wish to press on. Alternatively, the client may not be concerned solely with recovering damages. The client may want the day in court so as to obtain the imprimatur of the state through a judicial finding of a breach of the law. Similarly, the client may also want to achieve non-monetary remedies such as an apology or a change in conduct which could include variations to contractual terms or corporate governance changes. Consequently, the desirability of employing alternative dispute resolution or seeking a settlement, as well as the terms of that settlement, may differ between the funder and the client.<sup>89</sup> The lawyer caught in the middle of this situation may be placed in a

conflict because it has both its fiduciary duty to act in the client's best interests but also a business relationship with the funder. The lawyer is paid by the funder regardless of the outcome of the litigation which may discourage settlement.<sup>90</sup> However, some funding agreements provide for the funder to receive an uplift on their hourly rate or to be reimbursed a discount that they had given on their hourly rate if there is a successful resolution. These additional payments may make it in the lawyer's interest to promote a settlement that is acceptable to the funder even if not desired by the client.

The funding agreements described above seek to address conflicts of interest in relation to settlement by providing various mechanisms whereby an independent barrister is briefed to advise on whether the settlement is reasonable. The client fetters their right to instruct their lawyer as to whether or not to settle by allowing a disagreement between the client and funder to be resolved by an independent barrister. As a result the lawyer's conflict as to how to act or advise when there is a disagreement between the client and funder as to settlement is avoided. However, the terms of the mechanism for resolving disagreement are therefore very important thus emphasising the significance of the advice to be given on the terms of the funding agreement. It is instructive to compare the terms of the QPSX funding agreement with that of the funding agreements in each of the case studies. The sophisticated clients in QPSX retained the right to settle if the disagreement could not be resolved while the group members of the class actions have no such right, they are bound by the advice of the independent barrister.<sup>91</sup>

It should also be noted that in relation to a funded class action some protection against the impact of a conflict of interest on a settlement is provided through the requirement for judicial approval of class action settlements.<sup>92</sup> A settlement will only be approved if: (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who



will be bound by the settlement; and (b) the proposed settlement has been undertaken in the interests of group members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s).<sup>93</sup> In class actions a settlement needs to be reviewed because the lawyer for the class is potentially an unreliable agent of the class and the class is unable to effectively monitor the lawyer. In terms of principal (class) and agent (lawyer), the principal has too little at stake to expend resources monitoring the agent and the agent has superior information.<sup>94</sup> However, judicial approval of a class action settlement is not a replacement for a lawyer faithfully observing their duty of loyalty to further the client's interests. The addition of another layer of potential conflict for the lawyer as a result of the presence of a funder creates a further burden for the class action settlement approval process.

Appeals present the potential for conflict in a similar way to settlements. The funder with a portfolio of cases has different incentives to the one-shot client so that a funder may decide not to fund an appeal because it prefers to invest in new case that it regards as more profitable. The lawyer may hope to be retained on that new case. The client does not have the option of moving onto its next case and with no downside risk would prefer to appeal. However, there are other incentives that may see a funder support an appeal such as the additional 5% recovery that it is contractually entitled to under most funding agreements. Indeed the lawyer may prefer this option as they are able to do further work and earn a further fee. Consequently the funder's, client's and lawyer's interests are aligned. However, when the interests are not aligned the lawyer may face a conflict between what is in its interest (and the funder's interest) and what is in the client's interest.

The lawyer asked to advise a client on terminating a funding agreement may find themselves in a similar position to when they are asked to advise on the terms of the funding agreement discussed above. The lawyer's

interest may be in promoting the continuation of the litigation so that they can earn a fee and the funder is able to earn a percentage of the client's recovery. For the lawyer to then advise a client on termination without having their own interests in mind is likely to be exceedingly difficult. A further complication for such advice arises where the termination for a serious breach by the funder means the funder is no longer entitled to recover a percentage of the client's recovery, should there be a recovery, compared with termination for convenience or for some other reason which results in the client still being liable to pay a percentage of their recovery to the funder.

The lawyer who acts in multiple cases funded by the same litigation funder has the same conflicts as discussed above but the magnitude of the conflict may be greater as the lawyer's financial interest is more closely tied to the interests of the funder.

Lastly, it is worth noting that the attenuation of the lawyer's fiduciary duty so as to facilitate the funding of the litigation by a third party requires informed consent from the client. Informed consent requires that there be full and frank disclosure of all material matters by the solicitor to the client of the relevant interest.<sup>95</sup> Further, the onus is on the lawyer to show by way of defence that fully informed consent was obtained in all the circumstances of the particular case.<sup>96</sup> The above discussion demonstrates the difficulty in satisfying this standard when exactly where a conflict of interest arises is only just beginning to be fully appreciated. Lawyer's relying on informed consent thus have a high standard to meet.



## Conclusion

The combination of influence and incentives created by litigation funding arrangements create an array of conflicts of interest for the lawyer. Lawyers have sought to address conflicts of interest through seeking informed consent in the funding arrangements or by recommending the obtaining of independent legal advice. Australian law accepts that a lawyer's fiduciary duty can be attenuated. However, concern remains as to whether lawyers and funders have identified all possible conflicts. The above discussion about the structure of proceedings and appeals suggests they have not. Further, there is a question as to whether clients, especially those less sophisticated in the use of legal services, have truly given fully informed consent. Little is known about what the lawyer discloses to the client but the complexity of the funding arrangements and minefield of conflicts suggest that it is a heavy burden for lawyers to discharge.

There must also be a public policy concern that the overuse of fiduciary duty carve-outs undermines public confidence in the legal profession. On the very issues where a client needs a loyal lawyer - such as understanding the fundamental precepts of the funding arrangements, their rights and obligations as set out in the litigation funding agreement - their lawyer goes missing because the conflict of interest is so stark that their lawyer cannot advise.

Although the High Court in *Campbells Cash and Carry Pty. Limited v. Fostif Pty. Ltd.* (2006) 229 CLR 386 held that litigation funding was not an abuse of process or contrary to public policy, the role of the lawyer in the execution of their fiduciary duty of loyalty and to avoid conflicts with the interests of the client remains an important, outstanding issue for regulation or court determination.



## Endnotes

- 1 See eg *Keelhall Pty Ltd. t/as "Foodtown Dalmeny" v. IGA Distribution Pty Ltd.* (2003) 54 ATR 75 at [3], *In the matter of ACN 076 673 875 Ltd.* [2002] NSWSC 578 at [9], *QPSX Ltd. v. Ericsson Australia Pty Ltd. (No. 3)* (2005) 219 ALR 1 at [39]-[48] and *P Dawson Nominees Pty Ltd. v. Multiplex Ltd.* (2007) 242 ALR 11 at [31]-[33].
- 2 *QPSX Ltd. v. Ericsson Australia Pty Ltd. (No. 3)* (2005) 219 ALR 1 at [54], *Fostif Pty Ltd. v. Campbells Cash & Carry Pty Ltd.* (2005) 63 NSWLR 203 at 226 and *Spatialinfo Pty Ltd. v. Telstra Corp Ltd.* [2005] FCA 455 at [23].
- 3 *Clairs Keeley (a firm) v. Treacy* (2004) 29 WAR 479 at [125] and *Hall v. Poolman* (2007) 215 FLR 243 at [378] ("The facts of this case ... [show] how a mammoth piece of litigation can be instigated, perhaps to the ruin of a defendant, with negligible "access to justice" for those who have suffered a wrong but with lucrative reward for those who make a business of investing in law suits").
- 4 In Australia the legal profession is divided into two main groups: (1) lawyers who practise exclusively as barristers and (2) lawyers who practise as solicitors or as both barristers and solicitors. See *Halsbury's Laws of Australia* (LexisNexis Online) at [250-10]. The main focus of this paper is solicitors as they enter into the retainer with the client for the conduct of litigation. The barrister usually performs the advocacy or court work related to the litigation.
- 5 A related concern is the regulation of litigation funders and how the funder deals with conflicts of interest that may arise between its own interests and the interests of those it is funding. See Michael Legg, "Entrepreneurs and Figureheads - Addressing Multiple Class Actions and Conflicts of Interest" (2009) 32 (3) *UNSW Law Journal* 909 at 925-927.
- 6 See *Clairs Keeley (a firm) v. Treacy* (2004) 29 WAR 479 at [75], *Fostif Pty Ltd. v. Campbells Cash & Carry Pty Ltd.* (2005) 63 NSWLR 203 at [137], *Campbells Cash and Carry Pty Limited v. Fostif Pty Ltd.* (2006) 229 CLR 386 at [87] and *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd. (No 3)* (2009) 71 ACSR 588 at [47]. See also Law Council of Australia, *Submission to Standing Committee of Attorneys-General - Litigation Funding*, 14 September 2006 p 19.
- 7 *Civil Law (Wrongs) Act 2002*, s. 221 (ACT); *Maintenance, Champerty and Barratry Abolition Act 1993*, ss. 3, 4 (NSW); *Criminal Law Consolidation Act 1935*, Sch 11 ss. 1(3), 3 (SA); *Wrongs Act 1958*, s. 32 (Vic.) and *Crimes Act 1958*, s. 322A (Vic.).
- 8 See *Clyne v. NSW Bar Association* (1960) 104 CLR 186 at 203 and *Brew v. Whitlock* [1967] VR 449 at 450.
- 9 See eg the powers of disposal given to a receiver to dispose of a company's property under the *Corporations Act 2001* (Cth) s 420(2)(b) and (g) and the powers of disposal accorded to a liquidator by *Corporations Act 2001* (Cth) s 477(2)(c).
- 10 *Movitor Pty Ltd. (in liq) v. Sims* (1996) 64 FCR 380 and *Re Tosich Construction Pty Ltd.* (1997) 73 FCR 219.
- 11 *QPSX Ltd. v. Ericsson Australia Pty Ltd. (No. 3)* (2005) 219 ALR 1.
- 12 *Chameleon Mining NL v. Murchison Metals Ltd.* [2010] FCA 1129 and *International Litigation Partners Pte Ltd. v. Chameleon Mining NL* (2011) 276 ALR 138.
- 13 Michael Legg, "Shareholder Class Actions in Australia - The Perfect Storm?" (2008) 31 (3) *UNSW Law Journal* 699 at 704-705.
- 14 IMF (Australia) Ltd., *2010 Annual Report* (2010), p. 17.
- 15 IMF (Australia) Ltd., *Release to Australian Securities Exchange - United States Office*, 25 August 2011.
- 16 *Ruddock v. Vadarlis* (2001) 115 FCR 229 at [11] and *Hughes v. Western Australia Cricket Association (Inc)* (1986) ATPR 40-748 at 48,136. See also Victorian Law Reform Commission, *Civil Justice Review - Report 14* (2008) p. 648 estimating that only 60-70% of costs are recovered.
- 17 In the United States this approach is referred to as the "English rule" on costs.
- 18 *Federal Court of Australia Act 1976* (Cth) s 43(1A), *Supreme Court Act 1986* (Vic) s 33ZD and *Civil Procedure Act 2005* (NSW) s 181.
- 19 Michael Legg and Louisa Travers, "Necessity is the Mother of Invention: The Adoption of Third Party Litigation Funding and the Close Class in Australian Class Actions" (2009) 38 *Common Law World Review* 245 at 252-253.
- 20 See e.g. Legal Profession Act 2004, (NSW), s. 323-325; Legal Profession Act 2004, (Vic), s. 3.4.27-3.4.29; *Johnson Tiles Pty Ltd. v. Esso Australia Ltd.* (1999) 94 FCR 167 at 27-31; *Cook v. Pasmenco Ltd. (No. 2)* (2000) 107 FCR 44 at 52.
- 21 Michael Legg, "Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions - The Need for a Legislative Common Fund Approach" (2011) 30 *Civil Justice Quarterly* 52. See *Jeffery & Katauskas Pty Limited v. SST Consulting Pty Ltd.* (2009) 239 CLR 75 for an example of a litigation funding arrangement that did not include an indemnity for adverse costs.
- 22 See *Movitor Pty Ltd. (in liq) v. Sims* (1996) 64 FCR 380 at 393 ("if the business of providing financial support for litigation by others is conducted by reputable organisations who compete with each other for that business, the fees charged by them for the provision of such assistance are likely to be kept to a level which will truly reflect the risk that the particular litigation being assisted may fail and so will provide for no more than a reasonable commercial profit.").
- 23 A portfolio approach means that it is not enough to look at the expected risk and return of one particular investment. Investors can reduce their exposure to individual asset risk by holding a diversified portfolio of assets. Colloquially this is described as not putting all of your eggs in one basket. See Edna Carew, *The Language of Money* (3d ed 1996) 257.
- 24 See Christopher Webb, "A man named sue", *The Sunday Age*, 17 September 2006 p17 and Patrick Coope, "Litigation Funding", *The Australian Institute of Judicial Administration Conference - Affordable Justice*, Adelaide, 15-17 September 2006 at 5 ("Our sole focus is to generate the best possible rate of return on our capital.").
- 25 Michael Legg, "Shareholder Class Actions in Australia - The Perfect Storm?" (2008) 31(3) *UNSW Law Journal* 669 at 707.
- 26 G E Dal Pont, *Lawyers' Professional Responsibility* (4th Ed 2010 Thomson Reuters) p 74.



- 27 The solicitor-client relationship is one of the recognised or per se fiduciary relationships. See *Nocton v. Ashburton* (1914) AC 932, *Hospital Products Ltd. v. United States Surgical Corp* (1984) 156 CLR 41 at 68, *Clark Boyce v. Mouat* (1994) 1 AC 428 at 437 and *Maguire v. Makaronis* (1997) 188 CLR 449 at 463. See also RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed 2002 LexisNexis) at [5-005] and Michael Evans, *Equity and Trusts* (2d ed 2009 LexisNexis) p. 119.
- 28 *Gibson Motorsport Merchandise Pty Limited v. Forbes* (2006) 149 FCR 569 at [11], *Beach Petroleum NL v. Kennedy* (1999) 48 NSWLR 1 at [201] and *Bristol and West Building Society v. Matthew* [1998] Ch 1 at 18.
- 29 *Breen v. Williams* (1996) 186 CLR 71 at 113.
- 30 G E Dal Pont, *Lawyers' Professional Responsibility* (4th Ed 2010) p 77 and *World Medical Manufacturing Corporation v. Phillips Ormonde & Fitzpatrick Lawyers* [2000] VSC 196 at [259].
- 31 *Law Society of New South Wales v. Harvey* (1976) 2 NSWLR 154 at 172 and *Australian Securities Commission v. Bell* (1991) 104 ALR 125 at 129.
- 32 *O'Reilly v. Law Society (NSW)* (1988) 24 NSWLR 204 at 213-214.
- 33 *O'Reilly v. Law Society (NSW)* (1988) 24 NSWLR 204 at 209-210.
- 34 Vicki Waye, *Trading in Legal Claims - Law, Policy and Future Directions in Australia, UK and US* (2008 Presidian Legal Publications) p 229.
- 35 Vicki Waye, *Trading in Legal Claims - Law, Policy and Future Directions in Australia, UK and US* (2008 Presidian Legal Publications) p 51.
- 36 *Law Society of New South Wales v. Harvey* (1976) 2 NSWLR 154 at 170. See also *New Zealand Netherlands Society 'Oranje' Incorporated v. Kuys* [1973] 2 All ER 1222 at 1227, *Commonwealth Bank of Australia v. Smith* (1991) 42 FCR 390 at 393 and *Maguire v. Makaronis* (1997) 188 CLR 449 at 466.
- 37 RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed 2002 LexisNexis) at [5-115].
- 38 G E Dal Pont, *Riley Solicitors Manual* (LexisNexis Online) at [6005.10].
- 39 *Halsbury's Laws of Australia* (LexisNexis Online) at [250-545].
- 40 *Maguire v. Makaronis* (1997) 188 CLR 449 at 466-467. See also *Clark Boyce v. Mouat* [1994] 1 AC 428 at 435-437.
- 41 *The Revised Professional Conduct and Practice Rules 1995* (NSW) rules 9 and 10. See also Law Council of Australia, *The Model Rules of Professional Conduct and Practice 2002* rules 8 and 9.
- 42 *Clairs Keeley (A Firm) v. Treacy* (2003) 28 WAR 139 at [148]-[158].
- 43 Scale fees fix the remuneration that a lawyer may recover for contentious (ie litigation related) work pursuant to rules of court or remuneration orders made under statutory authority. See *Halsbury's Laws of Australia* (LexisNexis Online) at [250-855], *Pryles & Defteros v. Green* (1999) 20 WAR 541 at 549 citing *Clare v. Joseph* [1907] 2 KB 369 at 378.
- 44 *Clairs Keeley (A Firm) v. Treacy* (2003) 28 WAR 139 at [162] and [168].
- 45 *Clairs Keeley (A Firm) v. Treacy* (2003) 28 WAR 139 at [169]-[170].
- 46 *Clairs Keeley (a firm) v. Treacy* (2004) 29 WAR 479 at [87]-[88].
- 47 *Clairs Keeley (a firm) v. Treacy* (2004) 29 WAR 479 at [91]-[95].
- 48 *Clairs Keeley (a firm) v. Treacy* (2004) 29 WAR 479 at [133]-[134].
- 49 *Clairs Keeley (a firm) v. Treacy* (2004) 29 WAR 479 at [75].
- 50 *Clairs Keeley (a firm) v. Treacy* [2005] WASCA 86 at [22]-[23].
- 51 *Clairs Keeley (a firm) v. Treacy* [2005] WASCA 86 at [24]-[25] and [28].
- 52 *QPSX Ltd. v. Ericsson Australia Pty Ltd. (No 3) (2005) 219 ALR 1 at [45]-[46].*
- 53 *QPSX Ltd. v. Ericsson Australia Pty Ltd. (No 3) (2005) 219 ALR 1 at [61].*
- 54 *Keelhall Pty Ltd. v/as 'Foodtown Dalmeny' v. IGA Distribution Pty Ltd. (2003) 54 ATR 75 at [25]-[28].*
- 55 *Keelhall Pty Ltd. v/as 'Foodtown Dalmeny' v. IGA Distribution Pty Ltd. (2003) 54 ATR 75 at [30]-[31].*
- 56 *Keelhall Pty Ltd. v/as 'Foodtown Dalmeny' v. IGA Distribution Pty Ltd. (2003) 54 ATR 75 at [33].*
- 57 *Keelhall Pty Ltd. v/as 'Foodtown Dalmeny' v. IGA Distribution Pty Ltd. (2003) 54 ATR 75 at [64].*
- 58 *Fostif Pty Ltd. v. Campbells Cash & Carry Pty Ltd. (2005) 63 NSWLR 203 at [83].*
- 59 *Fostif Pty Ltd. v. Campbells Cash & Carry Pty Ltd. (2005) 63 NSWLR 203 at [81].*
- 60 *Fostif Pty Ltd. v. Campbells Cash & Carry Pty Ltd. (2005) 63 NSWLR 203 at [84]-[85].*
- 61 *Fostif Pty Ltd. v. Campbells Cash & Carry Pty Ltd. (2005) 63 NSWLR 203 at [87] citing Effic Ltd. v. Macks* [2003] 2 Qd R 125 at 145 [107]; *R (Factortame Ltd.) v. Secretary of State for Transport, Local Government & the Regions (No 8)* [2003] QB 381; *Clairs Keeley (a Firm) v. Treacy* (2005) 29 WAR 479 at 494 [75]-[77]. See also the comments at [137] ("a measure of control is essential if the funder is to manage group litigation and also protect its own legitimate interests (*Clairs Keeley* (2005) (at 502 [124])). The funder's control in the present case is not excessive, especially since there is a solicitor on the record and since these are representative proceedings under judicial supervision.").
- 62 The High Court also considered litigation funding issues in *Mobil Oil Australia Pty Ltd. v. Trendlen Pty Ltd.* (2006) 229 ALR 51, 80 ALJR 1503 which was heard at the same time.
- 63 *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386 at [93].* See also *Jeffery & Katauskas Pty Limited v. SST Consulting Pty Ltd.* (2009) 239 CLR 75 at [26], [29]-[30].
- 64 *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386 at [84]-[86].*
- 65 *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386 at [87]-[88], [93].*
- 66 *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386 at [64]-[65].*
- 67 *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386 at [242]-[245].*
- 68 *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 CLR 386 at [266] and [282].*
- 69 See *Stoczni Gdanska SA v. Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 152 [62]; *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd.* (2005) 147 FCR 394 at [85] and *QPSX Ltd. v. Ericsson Australia Pty Ltd. (No 3) (2005) 219 ALR 1 at [61].*
- 70 *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd.* (2005) 147 FCR 394 at [28].
- 71 *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd.* (2005) 147 FCR 394 at [85].



- 72 *Dorajay Pty Ltd. v. Aristocrat Leisure Ltd.* (2005) 147 FCR 394 at [85], [87].
- 73 G E Dal Pont, *Lawyers' Professional Responsibility* (4th Ed 2010) p 234.
- 74 Michael Legg, "Entrepreneurs and Figureheads - Addressing Multiple Class Actions and Conflicts of Interest" (2009) 32 (3) *UNSW Law Journal* 909 at 911.
- 75 *Kirby v. Centro Properties Limited* (2008) 253 ALR 65 at [25].
- 76 *Kirby v. Centro Properties Limited* (2008) 253 ALR 65 at [14]-[15], [19]-[21].
- 77 *Kirby v. Centro Properties Limited* (2008) 253 ALR 65 at [22]-[24].
- 78 See Michael Legg, "Shareholder Class Actions in Australia - The Perfect Storm?" (2008) 31 (3) *UNSW Law Journal* 699 for a discussion of this type of class action.
- 79 *United Dominions Corporation Ltd. v. Brian Pty Ltd.* (1985) 157 CLR 1 at 11.
- 80 See *Law Society of New South Wales v. Foreman* (1994) 34 NSWLR 408 at 435-436, *Re Morris Fletcher v. Cross' Bill of Costs* [1997] 2 Qd R 228 at 243 and *McNamara Business & Property Law v. Kasmeridis* [2007] SASC 90 at [28] – [31] and RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed 2002 LexisNexis) at [5-115] in relation solicitor's time charging. Even if the exclusion of the fiduciary duty is successful, other duties, such as a duty of due care and diligence might still be owed by the lawyer to the funder. However, to date the author is not aware of any contractual arrangements between the funder and lawyer coming to light in the case law. As a result any duty may need to rest on tort law.
- 81 PA Keane, "Access to Justice and Other Shibboleths", *JCA Colloquium*, Melbourne, 10 October 2009 p14.
- 82 See Michael Legg, "Public and Private Enforcement" in Michael Legg (ed), *Regulation Litigation and Enforcement* (2011 Thomson Reuters) p 156.
- 83 Michael Legg, "Funding a class action through limiting the group: What does Pt IVA of the Federal Court of Australia Act 1976 (Cth) permit?" (2010) 33 *Australian Bar Review* 17 at 18. See also Rachel Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) pp 29–38.
- 84 *Multiplex Funds Management Ltd. v. P Dawson Nominees Pty Ltd.* (2007) 164 FCR 275 at [111], [123].
- 85 Michael Legg, *Case Management and Complex Civil Litigation* (2011 Federation Press) p 214 n40 and 221.
- 86 See section 6 above.
- 87 See Michael Legg, "Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions - The Need for a Legislative Common Fund Approach" (2011) 30 (1) *Civil Justice Quarterly* 52 at 60-61. In the US the ability to free-ride is prevented by use of the common fund approach to legal fees.
- 88 PA Keane, "Access to Justice and Other Shibboleths", *JCA Colloquium*, Melbourne, 10 October 2009 p7 ("The profit-making expectations of the trader who controls the litigation add a special complication to the risk-benefit calculations which inform settlement negotiations").
- 89 See Vince Morabito and Vicki Wayne, "Reining in Litigation Entrepreneurs: A New Zealand Proposal" [2011] *New Zealand Law Review* 323 at 354.
- 90 PA Keane, "Access to Justice and Other Shibboleths", *JCA Colloquium*, Melbourne, 10 October 2009 p7.
- 91 See sections 4 and 7.
- 92 *Federal Court of Australia Act 1976* (Cth) s 33V, *Supreme Court Act 1986* (Vic) s 33V. and *Civil Procedure Act 2005* (NSW) s 173.
- 93 *Pharm-a-Care Laboratories Pty Ltd. v. Commonwealth of Australia (No 6)* [2011] FCA 277 at [20]-[27]. See also Michael Legg, "Public and Private Enforcement" in Michael Legg (ed), *Regulation Litigation and Enforcement* (2011 Thomson Reuters) p158.
- 94 See Michael Legg, "Judge's role in settlement of representative proceedings: Lessons from United States class actions" (2004) 78 *Australian Law Journal* 58 at 68.
- 95 *Law Society of New South Wales v. Harvey* (1976) 2 NSWLR 154 at 170.
- 96 *Maguire v. Makaronis* (1997) 188 CLR 449 at 466.







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