Judicial views on litigation funding

The following paper was delivered by the Hon Justice RI Barrett at the INSOL International Annual Regional Conference in Singapore on 15 March 2011.

One form of funding of litigation by liquidators and trustees in bankruptcy is of long standing in Australia. For more than a hundred years[1], liquidators and trustees have been able to ask the court to give a preferred position in the application of assets to a creditor who has financially assisted recovery proceedings[2].

It was in insolvency recovery litigation and consumer class action litigation – fields where available resources were almost by definition unequal to the task – that the need for external funding first came to be recognised. The Australian Law Reform Commission recommended[3] 23 years ago that there be legislative approval of litigation funding for class actions. The government did not act on the recommendation. But, as things turned out it did not need to.

In decisions of 2006 and 2009 (the *Fostif* case[4] and the *Jeffery & Katauskas* case[5]), the High Court of Australia has placed its seal of approval very firmly on what had become a growing but hesitant judicial acceptance of the general concept of commercial funding of proceedings by strangers to the litigation.

And so today, Australia has a well-established litigation funding industry. A major funder is listed on the Australian Securities Exchange. It issues regular reports to the market[6]. We find, for example, a market announcement of 28 February of the failure of a mediation in proceedings involving Lehman Brothers; and on 21 February there is an announcement of a conditional settlement of litigation against Babcock & Brown, complete with a reference to the amount the company is to receive and the profit derived for shareholders.

In the *Fostif* case in 2006, the High Court came to grips squarely with the competing claims of access to justice and the protection of judicial process through the traditional prohibitions on champerty and maintenance. The result was that access to justice won and champerty and maintenance (no longer torts in most Australian jurisdictions) lost.

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The majority said, quite simply, that a litigation funding agreement – under which an outside party provides the finance for litigation and takes a share of the spoils – is not per se objectionable. Blanket disapproval was replaced by two ad hoc control mechanisms – abuse of process and public policy.

To mention these particular instruments of control, as the High Court did, is to conjure up various possibilities. But on examination, the possibilities all seem to fall away. It is not an abuse of process or contrary to public policy that the funder is entitled to a share of the proceeds; or that the funder has control of the litigation; or that the funding acts as a stimulus to the bringing of an action that would otherwise not have been brought; or that the lawyers take their instructions from the funder.

In one area, concern remained – that the funder who stands to gain a share of financial fruits of victory is not exposed to the risk of the financial consequences of defeat. This, of course, is real under our system where the loser is generally ordered to pay the winner's costs of the action.

It was argued in the High Court case of Jeffery & Katauskas in 2009 that a tendency to abuse of process can arise if the plaintiff is impecunious and the funder controlling the proceedings has no potential liability for the defendant's costs if the defendant wins. The argument did not succeed. The general rule is that costs cannot be ordered against a non-party, so insulation of the non-party funder from the risk of costs liability is no more than a working out of the litigation process in the ordinary way.

The matter of external funding does tend to become prominent when the court is asked to order at an early stage that a plaintiff provide security for the defendant's costs. It was said in the *Green*[7] case in 2008 – after the High Court decision in Fostif – that a court should be more willing to make an order for security for costs against a plaintiff funded by a non-party whose interest is solely to make a commercial profit. In the exercise of the discretion they have on security for costs, judges are I think now inclined to seek ways to ensure that

the funder recognised in advance as responsible for any costs liability that the funded litigant might come to owe to the other party.

Another area where skirmishes can develop is over access to litigation funding agreements. The opponent of the funded party understandably wants to know the details of the funding. The general approach of the courts is that, unless the funded party somehow puts it in issue, information about the war chest is privileged and entitled to protection on broader bases of the proper administration of justice.

were spectacularly unsuccessful and, on his assessment, might not have been brought – or at least pursued in the way they were pursued – had it not been for the funder's presence and influence. His general thesis is that funding can produce excesses that even the most assiduous case management cannot control, despite the reality that a funder has no interest in spending good money on a hopeless case.

If one were to attempt to sum up the judicial attitude to litigation funding in Australia today, it would be something like this:

... funding can produce excesses that even the most assiduous case management cannot control, despite the reality that a funder has no interest in spending good money on a hopeless case.

But the matters I have mentioned are truly skirmishes. The big picture is settled, but not without disquiet. That disquiet emerges starkly from the powerful dissenting judgments[8] in both *Fostif* and *Jeffery & Katauskas*. It also finds expression in an October 2009 address to a judges' conference by Justice Patrick Keane (then of the Queensland Court of Appeal and now chief justice of the Federal Court of Australia)[9]. He was not at all comfortable with the idea that, as in the *Hall v Poolman* case[10], it is acceptable for a funded liquidator to prosecute to conclusion proceedings that yield only enough to pay the lawyers, the funder and the liquidator himself. He also traced the history of two other pieces of mega-litigation, both externally funded (and one of which was brought by a liquidator), which

- *first*, the desirability of ready access to justice justifies third party funding;
- *second*, it is a distortion, but not a fatal one, for decision-making about the course of the litigation to be effectively out of the hands of the person who has the cause of action;
- *third*, the playing field should be levelled so that an assisted plaintiff's externally provided financial support is available to secure the plaintiff's potential costs liabilities in the same way as if it were the plaintiff's own resources;
- *fourth*, generally speaking, it is likely to be more in line with the interests of justice for the opponent not to have access to the plaintiff's funding arrangements;
- *fifth*, the concepts of abuse of process and public policy are always in reserve to deal with any particular excess that may emerge in a particular case;
- *sixth*, the fear that those sleeping dogs may wake imposes its own discipline; but
- *seventh* there is a danger that funded litigation may turn into a wild beast beyond the realistic control of those particular dogs.

Endnotes

1. See for example *Re Manson; Ex parte the Official Assignee* (1897) 18 LR (NSW) (B & P) 45.
2. See now *Corporations Act 2001* (Cth), s 564; *Bankruptcy Act 1966* (Cth), s 109(10).
3. Australian Law Reform Commission, Report No 46, 'Grouped Proceedings in the Federal Court'.
4. *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41.
5. *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43.
6. See announcements at http://www.imf.com.au/announcements.asp
7. *Green v CGU Insurance Ltd* [2008] NSWCA 148.
8. The joint judgment of Callinan J and Heydon J in *Fostif* and the judgment of Heydon J in *Jeffery & Katauskas*
9. P A Keane, 'Access to Justice and Other Shibboleths', a paper presented to the Judicial Conference of Australia on 10 October 2009, accessible at http://www.jca.asn.au/attachments/2009AccesstoJustice.pdf
10. *Hall v Poolman* [2009] NSWCA 64.