IN THE SUPREME COURT OF NEW ZEALAND

SC 89/2016
[2017] NZSC 151

BETWEEN	PRICEWATERHOUSECOOPERS Appellant
AND	ROBERT BRUCE WALKER AND JOHN MARSHALL SCUTTER AS LIQUIDATORS OF PROPERTY VENTURES LIMITED (IN LIQUIDATION) AND ROBERT BRUCE WALKER AS LIQUIDATOR OF FIVE MILE HOLDINGS LIMITED (IN RECEIVERSHIP AND LIQUIDATION), MONTECRISTO CONSTRUCTION COMPANY LIMITED (IN LIQUIDATION), CASTLE STREET VENTURES LIMITED (IN RECEIVERSHIP AND LIQUIDATION) AND LIVINGSPACE PROPERTIES (IN RECEIVERSHIP AND LIQUIDATION) First Respondents
	PROPERTY VENTURES LIMITED (IN LIQUIDATION) Second Respondent

Cont'd next page

Hearing:	16 March 2017 (Further submissions received 11 September 2017)
Court:	Elias CJ, Glazebrook, Arnold, O'Regan and Ellen France JJ
Counsel:	B D Gray QC, P M Fee and M D Atkinson for Appellant J B M Smith QC, R S May and T G H Smith for Respondents D R Bigio QC for SPF No. 10 Limited as Intervener
Judgment:	6 October 2017

FIVE MILE HOLDINGS LIMITED
(IN RECEIVERSHIP AND
LIQUIDATION)
Third Respondent

CASHEL VENTURES LIMITED
(IN LIQUIDATION)
Fourth Respondent

TAY VENTURES LIMITED
(IN RECEIVERSHIP AND LIQUIATION)
Fifth Respondent

LIVINGSPACE PROPERTIES LIMITED
(IN RECEIVERSHIP AND
LIQUIDATION)
Sixth Respondent

BEECHNEST VENTURES LIMITED
(IN LIQUIDATION)
Seventh Respondent

TUAM VENTURES LIMITED
(IN RECEIVERSHIP AND
LIQUIDATION)
Eighth Respondent

CASTLE STREET VENTURES LIMITED
(IN RECEIVERSHIP AND
LIQUIDATION)
Ninth Respondent

LICHFIELD VENTURES LIMITED
(IN RECEIVERSHIP AND
LIQUIDATION)
Tenth Respondent

92 LICHFIELD LIMITED
(IN RECEIVERSHIP AND
LIQUIDATION)
Eleventh Respondent

ST ASAPH VENTURES LIMITED
(IN LIQUIDATION)
Twelfth Respondent

MONTECRISTO CONSTRUCTION
COMPANY LIMITED
(IN LIQUIDATION)
Thirteenth Respondent

JUDGMENT OF THE COURT

A Leave is granted to the respondents and the intervener to adduce new evidence.

B The appeal is dismissed.

C We make no award of costs.

REASONS

	Para No.
Glazebrook, Arnold, O'Regan and Ellen France JJ	[1]
Elias CJ	[98]

GLAZEBROOK, ARNOLD, O'REGAN AND ELLEN FRANCE JJ
(Given by O'Regan J)

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Introduction

[1] The respondents commenced proceedings against (among others) the appellant, PricewaterhouseCoopers (PwC). They allege that PwC was in breach of contract and negligent in carrying out its functions as auditor of the second respondent, Property Ventures Limited (in liquidation) (PVL) and other respondents and that they have suffered loss as a result.[1] The other defendants in the respondents' proceeding are certain directors of PVL.

[2] PVL received litigation funding from SPF No. 10 Limited (SPF) under a funding agreement, the details of which are set out below.[2] We will refer to this as the Funding Agreement. SPF also took an assignment of a general security agreement over the assets and undertaking of PVL and other respondents. Details of this arrangement (the Allied Assignment) will also be described more fully below.[3]

[3] PwC applied to the High Court to stay the proceedings on the basis that the combined effect of the Funding Agreement and the Allied Assignment (together, the SPF Documents) was that SPF had effectively taken an assignment of PVL's cause of action against PwC (and the other defendants) and that this was an abuse of process. Brown J dismissed the application.[4] His decision was upheld by the Court of Appeal.[5] This Court granted leave to appeal, the approved question being: "Did

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1 There are two proceedings, one commenced by the liquidators of PVL and a subsidiary, Five Mile Holdings Ltd, and another by other respondents. They have been consolidated. For simplicity, we will refer to PwC as appellant and PVL as respondent, unless the context requires otherwise. And we will refer to the other defendants in the respondents' proceedings as the other defendants.

2 At [18]–[31]. The Funding Agreement was executed on behalf of PVL by one of the liquidators, Mr Robert Walker. As is apparent from the intituling, there are, in fact, two liquidators of PVL. However, the argument focused on one of the liquidators, Mr Walker. For convenience, we will refer from now on to "the liquidator".

3 At [32]–[33].

4 *Walker v Forbes* [2015] NZHC 1730, [2015] 3 NZLR 831 [HC judgment].

5 *PricewaterhouseCoopers v Walker* [2016] NZCA 338 (Randerson, Wild and Miller JJ) [CA judgment].

the Court of Appeal err in upholding the High Court's refusal to stay the proceeding?".[6]

Settlement

[4] Since the hearing of the appeal, PwC and the respondents have settled the dispute between them. The Court sought submissions as to whether judgment in the present appeal should be delivered. Having considered those submissions, the Court decided to deliver the judgment, with amendments to reflect the fact that the respondents' claim against PwC has been settled. We have done this because the appeal involves important issues, on which the Court has heard full argument. PwC as appellant submitted that the judgment should be delivered. The underlying proceeding to which PwC's application for stay related remains on foot against other defendants. Some of those other defendants supported the delivery of the judgment. One of the other defendants had filed a memorandum in the High Court supporting PwC's application and reserving his right to be heard in relation to the application including any appeal. Delivery of the judgment will cause no detriment to the respondents. Because the parties have settled, we will formally dismiss the appeal and make no costs award. The remainder of this judgment sets out what we would have done if there had been no settlement.

Intervener

[5] SPF was given leave to intervene in the present appeal. It adduced evidence, with the Court's leave, and its counsel, Mr Bigio QC, made both written and oral submissions. It had not intervened in the High Court or Court of Appeal but an affidavit by Mr J N Woodhams, the executive director of SPF and its parent company, LPF Group Limited (LPF), was in evidence in the High Court. In that affidavit, Mr Woodhams responded to submissions made by PwC's counsel in the High Court.

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6 *PricewaterhouseCoopers v Walker* [2016] NZSC 165. The Court also asked for submissions on the propriety of the actions of the liquidators of PVL, given the unsecured creditors were unlikely to receive any of the proceeds, should the claim be successful.

Background

[6] PVL and its associated companies were involved in the development of a large site near Queenstown. The driving force behind PVL and its associated companies was Mr David Henderson. The development failed. One of the companies associated with PVL, Five Mile Holdings Limited (Five Mile), had borrowed considerable sums from Hanover Finance Limited (Hanover), secured by a general security agreement over Five Mile's assets, including the land on which the development was to take place. PVL and others guaranteed Five Mile's indebtedness to Hanover. PVL's obligations to Hanover were secured by a general security agreement over the assets and undertakings of PVL.

[7] The GSA executed by PVL in favour of Hanover was assigned by Hanover to Allied Farmers Investments Limited (Allied) in 2009, as part of a wider transaction under which Allied acquired the assets of Hanover in exchange for shares in Allied issued to holders of debt securities issued by Hanover. At that time, Five Mile owed approximately $98 million to Hanover and was in receivership. For ease of reference, we will refer to this GSA as the Allied GSA.

[8] Five Mile was placed into receivership in July 2008. The receivers sold the real property owned by Five Mile and other saleable assets, leaving approximately $39 million owing to Allied. Allied appointed receivers of PVL in March 2010 and PVL went into liquidation in July 2010.[7] Mr Walker, as one of the liquidators of PVL, reported in April 2012 that there were no realisable assets left in PVL: any realisations would be through legal action. The receivers confirmed this position in their final report dated June 2013. In the same report, they say the total debt of PVL was $69.3 million, of which approximately $68.3 million was secured, $311,000 was preferential and $745,000 was unsecured.[8] The receivership concluded in June 2013.

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[7] The liquidation was stayed by a court order until February 2012.

[8] In his submissions, Mr Smith QC said the amount owed to unsecured creditors was much greater than disclosed in the receivers' final report. He said PVL had issued $25 million worth of subordinated mandatory convertible notes in respect of which it was in default and owed $7 million to a preferential creditor, the Inland Revenue Department. He did not point to any evidence of either, however.

[9] Mr Walker said in his April 2012 report that his purposes for the conduct of the liquidation were to maximise returns for unsecured creditors and "to show how New Zealand's corporate regime has become profoundly corrupted".

[10] SPF entered into the Funding Agreement with PVL in October 2012. The Funding Agreement was conditional on SPF entering an arrangement with Allied and the receiver appointed by Allied in which SPF would obtain a first ranking security over PVL's assets and undertaking.

[11] The present proceedings were filed in November 2012 and April 2013.[9]

[12] The Allied Assignment was executed in March 2013. Allied assigned, among other things, the Allied GSA and Allied's debts and securities and all rights, including "rights of action" against various parties including PVL's auditors to SPF. SPF paid a fee of $100,000 to Allied and agreed to pay five per cent of the payment made to SPF by PVL in the event of a successful claim.

[13] SPF's reason for acquiring the Allied GSA from Allied was, according to the evidence of Mr Woodhams, because Mr Henderson was making efforts to acquire it. He said SPF's reason for acquiring the Allied GSA was to prevent Mr Henderson from acquiring it, thereby getting control over any claims made by PVL.[10]

[14] The amount claimed by PVL against PwC is significant. The essence of the claim is that the respondents allege that PwC was negligent in its performance of its role as auditor of the PVL Group and adviser to PVL on its adoption of international reporting standards. They say if PwC had not been negligent, PVL's operations would have been wound up earlier than they were, and PVL's ongoing losses and deepening insolvency would have been avoided. They estimate the loss suffered by PVL is between $256.9 million and $302.7 million up to July 2010. In addition, they claim "interest at the contractual rates accruing on PVL's debts and liabilities" for the period since July 2010. The High Court judgment records that the penalty interest

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[9] See above at n 1.
[10] Mr Henderson is one of the defendants in the respondents' proceedings.

rates applicable to the loans secured by the Allied GSA are in the order of 21 per cent per annum.[11]

[15] Mr Gray QC, for PwC, said the accrual of compounding interest at penalty rates on the sums owed by PVL that are secured by the Allied GSA leads to an exponential increase in the amount secured by the Allied GSA and a corresponding escalation in the amount of the claim against PwC. He said the effect of this is that the longer the claim takes to resolve, the greater the potential exposure for PwC in respect of the claim becomes. That exposure is to the holder of the Allied GSA, now SPF, not the unsecured creditors of PVL, meaning the amount of recovery required to yield some return to the unsecured creditors of PVL (in the absence of some voluntary ceding of priority by SPF as holder of the Allied GSA) is also increasing exponentially.[12] Mr Gray argued that the exponential escalation of the claimed amount puts pressure on PwC to settle.

[16] There will be issues of foreseeability, causation and mitigation of loss that will need to be addressed to determine whether loss arising from the escalating effect of compounding penalty interest in these circumstances is recoverable. Such issues cannot be decided at this stage of the proceeding.

[17] We now set out the details of the SPF Documents.

Funding Agreement

[18] Under the Funding Agreement, SPF agrees to provide to PVL investigative, management and other expertise to assist PVL in pursuing the claims against PwC and the other defendants.[13]

[19] SPF also agrees to pay such Project Costs as are agreed by it in writing to PVL. "Project Costs" are defined to include court costs, legal fees, witness and investigator fees, security for costs, and adverse costs orders. The payment of Project Costs is in the form of a loan which becomes repayable when PVL receives

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11 HC judgment, above n 4, at [12].

12 See below at [36].

13 See below at [28] for more detail. There are detailed provisions outlining what this obligation entails.

money pursuant to a settlement or a successful outcome in the litigation against PwC.

[20] PVL must pay SPF a "Services Fee". The Services Fee is the greater of a percentage of the Net Resolution Sum (the percentage fee) or two times the Project Costs (the double cost fee), plus, in each case, GST.

[21] If the percentage fee applies, the Services Fee will be between 25 per cent and 42.5 per cent of the Net Resolution Sum, depending on the length of time taken to resolve the dispute and the amount expended on Project Costs. At the present time, a rate of 42.5 per cent will apply. The "Net Resolution Sum" is the gross amount of money received by PVL in respect of the funded claim and/or proceedings, less Project Costs. Thus, if PVL is successful, SPF's entitlement under the Funding Agreement will be to have its Project Costs repaid and then to receive 42.5 per cent of the remainder. In addition, if SPF funds an appeal (whether PVL is appellant or respondent) there is provision for an increase of the Services Fee by five per cent "in respect of any Resolution Sum from and relating to any Appeal so funded".

[22] If the double cost fee applies, SPF will be entitled to recoup the Project Costs and then receive an additional amount equal to 200 per cent of the Project Costs.

[23] PVL grants to SPF a security interest over PVL's assets to secure the amounts payable to SPF under the Funding Agreement.

[24] PVL undertakes to "conduct the Proceedings fully and to the best of its ability".

[25] Clause 2.3 deals with PVL's control over the claim. It provides that:

> All final decisions in respect of the continuance of the Proceedings and the management of the Proceedings and the Claims shall be decisions for [PVL] and not SPF, except in relation to settlement matters or any proposed discontinuance of the Proceedings, to which clause 14 applies.

[26] Clause 14 provides SPF with a certain measure of control in respect of settlement offers and decisions about whether to discontinue proceedings. SPF can request that PVL make or accept an offer of settlement, but PVL is not obliged to act on the request. However, PVL cannot make or accept a settlement offer, or discontinue proceedings, without SPF's prior written consent. If PVL and SPF cannot agree on making or accepting an offer, or on discontinuing the claim, the dispute is referred to an Expert, who will make the decision. The "Expert" is defined as a named insolvency practitioner, but SPF may require a different Expert and if PVL does not agree with the person proposed by SPF, SPF may appoint the Expert after consulting PVL.

[27] SPF is entitled to advance notice if PVL intends to meet or communicate with any other party in relation to settlement or discontinuation, and a representative of SPF may attend any such meeting and must approve any such communication.

[28] SPF has full consultation rights, which allows it to have a reasonable amount of input into how the claim is conducted. SPF agrees to provide expertise in relation to:

(a) advice on strategy;

(b) selection and retention of service providers relevant to the proceedings (including lawyers and witnesses);

(c) assistance in considering legal advice; and

(d) facilitating non-litigious means of resolving the claims,

and PVL is required to consult fully with SPF on all of the above matters.

[29] SPF also has rights of access to certain documents. Clause 2.1(d) provides:

> [PVL] hereby authorises SPF to seek and obtain any information and documentation which SPF reasonably believes may be relevant to the Claims from the Lawyers and from any person or entity, in furtherance of SPF assisting [PVL] under or in connection with this Deed.

[30] PVL may appoint lawyers for the conduct of the proceedings with SPF's prior written approval. SPF has the right to nominate additional or substitute lawyers and to require any lawyers to cease acting, and PVL is required to act on the written instructions of SPF if it chooses to exercise those rights. PVL is required to get an undertaking from its lawyers to the effect that the lawyers owe SPF a duty of care in relation to the proceedings. The lawyers are required to address any advice to SPF (in addition to PVL) so that the lawyers assume a duty of care to SPF in relation to that advice.

[31] The Funding Agreement was conditional. The first condition was that SPF's due diligence investigation of the claim yielded an acceptable result to SPF. The second was that SPF entered into a satisfactory arrangement with Allied under which SPF obtained a first ranking security interest over PVL's property. Both conditions were satisfied.

Allied Assignment

[32] The Allied Assignment satisfied the latter condition. Under the Allied Assignment, Allied assigned all its rights against PVL (and its subsidiaries), Mr Henderson and related parties to SPF. "Rights" meant all debts owing to Allied by PVL and its subsidiaries, the securities over those debts, and all the rights, including rights of action, acquired by Allied in connection with those debts and securities. The essence of the transaction was the assignment of the Allied GSA to SPF.

[33] As mentioned earlier, the assets of value in the PVL group of companies had been sold by the receivers before the Allied Assignment was entered into. The only asset remaining was any rights PVL and its associated companies had against PwC and the other defendants.

Allied GSA

[34] The GSA between Hanover and PVL was executed on 6 July 2006. Hanover acquired a first-ranking security interest over all of PVL's present and after-acquired property, including rights of action and accounts receivable. Clause 6.3 provided

that, if an event of default occurred, one of the enforcement powers that could be exercised by Hanover was a power to "bring, defend, submit to arbitration, negotiation, compromise, abandon or settle any claim or proceeding, or make any arrangement or compromise, in relation to the Secured Property".

[35] As PVL was in default when the Allied Assignment was entered into, Allied had that power when it entered into the Allied Assignment and SPF therefore acquired that power when it became the secured party under the Allied GSA. The power under cl 6.3 is not subject to the same limitations as the control powers given to SPF under the Funding Agreement.[14]

[36] Once SPF became the secured party under the Allied GSA, it became entitled to the proceeds of any successful claim, up to the extent of the amount of PVL's indebtedness.[15] In the High Court, Brown J set out a table showing what the outcome would be in a hypothetical scenario where the claim yielded $334 million. In that scenario, he said SPF would receive $319 million and unsecured creditors would receive $209,000.[16] In his evidence in the High Court, Mr Woodhams said SPF would work with the liquidator (Mr Walker) "to allocate proceeds of any Allied loan recoveries to appropriate interested parties", though he made it clear that SPF had made no legal commitment to do so. He added that SPF and the liquidator had "not seen the need to engage in the complex process of reaching agreement until such time as there is something to allocate".

New developments

[37] In the time between the date of the Court of Appeal judgment and the hearing of the appeal, there were some new developments. We gave leave to the respondents and SPF to adduce evidence of these developments. The first was that SPF acquired the rights of Dominion Finance Group Limited (Dominion) under agreements relating to a secured finance facility provided by Dominion to associated companies

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[14] See above at [24]–[30].

[15] Under cl 3.2 of the Allied GSA, any accounts receivable of PVL are assigned to the holder of the GSA, now SPF. Mr Gray said this clause meant that, if the claim is settled or judgment is entered, any amount payable to PVL would automatically be assigned to SPF. We do not see that as adding anything to SPF's entitlement to receive any proceeds as secured creditor, up to the amount secured.

[16] HC judgment, above n 4, at [16].

of PVL, guaranteed by PVL. The second was that SPF made undertakings to this Court in written submissions and in an affidavit filed in relation to the present appeal.

Dominion Assignment

[38] SPF entered into a deed of transfer of debt and securities with Dominion. We will call this the Dominion Assignment. SPF acquired all of Dominion's rights in relation to the debts and securities transferred, including those arising from a GSA granted to Dominion by PVL (the Dominion GSA). The debts transferred by Dominion were owed by companies associated with PVL and are guaranteed by PVL.[17]

[39] We were not provided with a copy of the GSA granted by PVL to Dominion and so do not know if it contains a clause like cl 6.3 of the Allied GSA.

Undertakings in written submissions of counsel for SPF

[40] The undertaking (expressed as a "confirmation") in the written submissions of Mr Bigio, for SPF, dealt with cl 6.3 of the Allied GSA.[18] In those submissions, counsel said that:

(a) SPF has not at any point sought to rely on its powers of enforcement under cl 6.3 of the Allied GSA;

(b) SPF considers itself bound by its contractual obligations under the Funding Agreement; and

(c) if SPF were to assert its power of enforcement under the Allied GSA in those circumstances, that would be a breach of good faith.

[41] In the same submissions, SPF's counsel stated that SPF "confirms to PVL and this Court by these submissions that it will not seek to rely on cl 6.3". We were

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17 A schedule to the Dominion Assignment indicates that the total owed to Dominion was in the vicinity of $240 million as at 30 November 2016.

18 See above at [34].

told that this confirmation had not been formalised in any written agreement between SPF and PVL. Counsel also stated that SPF was prepared to take steps to modify the Allied GSA to the Court's satisfaction if the Court considered that cl 6.3 was an impermissible limit on the liquidator's right to control the proceedings.

Undertaking by affidavit

[42] The undertaking given by affidavit relates to the amount to be received by the liquidator in the event of a successful claim. Before setting out its terms, it is necessary to give some background as to the provisions in the SPF Documents and other relevant documents on that topic.

[43] As explained above, upon payment of proceeds in relation to the claim, SPF will be entitled to:

(a) receive a refund of the Project Costs;

(b) take its Services Fee (now 42.5 per cent of the remainder);[19]

(c) exercise its first ranking security pursuant to the Allied GSA; and

(d) exercise its security pursuant to the Dominion GSA.

[44] SPF has, however, entered into commitments to make certain payments to Allied, Dominion, and the unsecured creditors. In an affidavit filed in this Court in support of SPF's application for intervener status, Mr Wilson, the chairman of the board of LPF Group Limited (the parent company of SPF), pointed to these arrangements as evidence that creditors of PVL other than SPF will benefit in the event the claim is successful.

[45] Under the terms of the Allied Assignment, SPF agreed to pay to Allied five per cent of the "net amount". The net amount is the gross amount receivable by

[19] See above at [20]–[22] for the detail on how the Services Fee is calculated. If the double cost fee applied, the Services Fee would be an amount equal to 200 per cent of the Project Costs.

PVL in respect of the claims, less the Project Costs, Services Fee, and liquidator's costs.

[46] Under the terms of the Dominion Assignment, SPF agreed to pay to Dominion either a flat fee of $500,000 or, if Dominion so elects, all proceeds remaining, up to a maximum of $1.65 million, after deduction of the Project Costs, Services Fee, liquidator's costs, and the amount owing to Allied.

[47] In the Allied Assignment, liquidator's costs were excluded from the "net amount". However, in cl 3.1.5 of the Dominion Assignment, the payments were expressed as having priority in the following order:

(a) costs (including Project Costs);

(b) Services Fee;

(c) payment to Allied (five per cent of Net Proceeds);

(d) payment of Liquidator Costs; and

(e) payment of any amount remaining, up to a maximum of $1.65 million, to Dominion.

[48] In the Dominion Assignment, "Liquidator Costs" were defined as "the fixed amount of $1,000,000 to be paid by SPF to Robert Walker in his capacity as liquidator of PVL and its subsidiaries for his remuneration, costs and expenses".[20]

[49] In his affidavit, Mr Wilson outlined that SPF had, since the Court of Appeal judgment, undertaken to pay to the liquidator, after the deduction of the Project Costs and Services Fee, a minimum of the following payments:

(a) an amount equal to 10 per cent of the first $75 million of net proceeds of the secured creditor claims received by SPF. The "net proceeds" in

[20] We were not told what the basis for this proposed payment is and it is not mentioned in the Funding Agreement.

this context will be the amount received by SPF in its capacity as secured creditor in relation to the debts acquired from Allied and Dominion after deduction of any costs or taxes payable by SPF on those receipts; and

(b) 50 per cent of any net proceeds received from the same above $75 million.[21]

[50] We were told that the undertaking had not been formalised in a written contract or deed between SPF and PVL. In his affidavit adduced in this Court, Mr Walker confirmed this undertaking had been made and emphasised that the payment SPF undertook to pay was a minimum and that he intended to ask for more for the unsecured creditors if the claim is successful.

[51] We were not told what is meant by "any costs or taxes payable by SPF on those receipts". It is not clear to us from the documents before us whether the payments to Allied and Dominion under the Allied Assignment and the Dominion Assignment respectively will take priority over payment to the liquidator for the benefit of the unsecured creditors in the event that the proceeds of the claim are insufficient to meet all of the claims of the parties listed above at [47].

Impact of new developments

[52] The new developments appear to have changed materially the scenario under consideration by the High Court and Court of Appeal. The existence of the Dominion GSA does not appear to have been considered by those Courts at all. The Dominion Assignment removes a party that would, on normal principles, have had a prior ranking claim to the proceeds of the claim than the unsecured creditors, but there is now the obligation to pay Dominion out of the claim proceeds.[22] The undertakings remove SPF's ability to rely on cl 6.3 of the Allied GSA, thus limiting its rights to control the litigation and provide a base level return to unsecured

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21 Mr Smith said the effect of this on the hypothetical scenario described above at [36] was to increase the return for unsecured creditors from $209,000 to $58 million.

22 Mr Wilson said in his affidavit filed in this Court that the receivers of Dominion were asserting that Dominion had priority over some of the proceeds of the litigation.

creditors, as well as (based on the reference in the Dominion Assignment) a payment of $1 million to Mr Walker as liquidator for his remuneration, costs and expenses.[23]

[53] The fact that these changes occurred after the Court of Appeal's consideration of the case means, in effect, that the current arrangements are being considered for the first time in this Court. We will revert to the implications of this later.[24]

Waterhouse v Contractors Bonding Ltd

[54] PwC did not argue that the Funding Agreement on its own amounted to an abuse of process. Its counsel, Mr Gray, accepted that litigation funding is permitted under this Court's decision in *Waterhouse v Contractors Bonding Ltd*.[25] He did not ask this Court to review the appropriateness or otherwise of the Funding Agreement. Counsel for the respondents, Mr Smith QC, described the Funding Agreement in his submissions as a "market-standard funding agreement".[26]

[55] In *Waterhouse*, this Court determined that it is not the role of the courts to act as general regulators of litigation funding arrangements or to give prior approval to such arrangements, at least in cases not involving representative actions.[27] Nor was it the Court's role to assess the fairness of a funding arrangement as between the funder and the claimant party.[28] However, a court may exercise jurisdiction to stay for abuse of process.[29]

[56] Categories of conduct that would attract the intervention of the court on traditional abuse of process grounds include proceedings that: deceive the court, are fictitious, or a mere sham; those that use the process of the court in an unfair or dishonest way or for some ulterior or improper purpose or in an improper way; those

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23 See above at [48].

24 We think it is unfortunate that the nature of the arrangements seem to have been drip fed to the Courts considering the stay application, and in some cases the arrangements are a moving target, changing in response to concerns expressed by the Court. Even now, we do not know if there are any other secured creditors, and what we were told by Mr Smith about the level of preferred creditors ($7 million owed to the Inland Revenue Department) does not correspond at all with the evidence set out above at [8].

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

26 There was, however, no evidence on this.

27 *Waterhouse*, above n 25, at [27]–[29].

28 At [48].

29 At [57].

that are manifestly groundless, without foundation or serve no useful purpose; and those that are vexatious or oppressive.[30]

[57] The Court declined to apply a decision of the High Court of Australia to the effect that the litigation funding arrangements can be challenged only on traditional abuse of process grounds.[31] In addition to the traditional grounds, it found that if a funding arrangement effectively assigns the cause of action in circumstances where that is impermissible, that would also be an abuse of process.[32] When considering whether a funding arrangement is effectively an assignment of a bare cause of action, the court should have regard to the arrangement as a whole, including the level of control and profit share of the funder, as well as the role of the lawyers acting.[33]

High Court

[58] In the High Court, PwC apparently argued its case on a broader basis than it does now. Its arguments based on traditional grounds of abuse of process were rejected by Brown J.[34] As they were not pursued in the Court of Appeal or this Court, we need say no more about them. In relation to the argument pursued by PwC before us, Brown J found that there was no impermissible assignment of the cause of action in the assignment of the Allied GSA from Allied to SPF.[35] He rejected an argument that the assignment was impermissible because SPF had no antecedent commercial interest in Allied or the Allied GSA. He considered SPF's commercial interest was inherent in the assignment of the Allied GSA.[36] Brown J also discussed PwC's contention that the combination of the Funding Agreement and the Allied GSA gave SPF an excessive profit share. He did not accept that the whole was greater than the sum of its parts.[37]

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30 At [31], citing *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [27] per French CJ, Gummow, Hayne and Crennan JJ who were in turn citing IH Jacob "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at 43.

31 At [56], declining to apply *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386.

32 At [57]. The Court did not comment on situations where assignments of personal causes of action may be permissible: at [62].

33 At [57] and [76](e).

34 HC judgment, above n 4, at [62].

35 At [80]–[90].

36 At [82].

37 At [90].

Court of Appeal

[59] The Court of Appeal said the key issue before it was whether the SPF Documents were in substance a bare assignment of a claim in tort or personal claim, noting that such assignment remains unlawful after this Court's decision in *Waterhouse*.[38]

[60] The Court accepted the SPF Documents had to be considered together;[39] that SPF had no antecedent commercial interest in PVL;[40] and that the Allied Assignment would not have been agreed to but for the Funding Agreement.[41] But it did not accept the SPF Documents amounted to an assignment of a bare cause of action. Its reasons were:[42]

(a) The funding was not in form an assignment: the liquidator remained as the party prosecuting the claim.

(b) There was no objection to the Funding Agreement on its own.

(c) Although the liquidator had to account to SPF for the net proceeds of the claim, SPF would receive those proceeds as a creditor of PVL, not as a litigation funder.

(d) Even if the Allied Assignment and the Funding Agreement were treated as a single transaction, the Court was not prepared to draw the inference that SPF would be paid too much, relative to its investment in the litigation. It was not possible to do so without knowing how much would be recovered and what costs would be incurred in achieving that recovery.

[61] The Court said a secondary issue was, assuming there had been an assignment of a bare cause of action, whether it was nevertheless unobjectionable

38 CA judgment, above n 5, at [16].
39 At [17].
40 At [25].
41 At [26].
42 At [27]–[32].

because a liquidator is permitted by statute to assign a cause of action.[43] Given its conclusion on the key issue it did not need to resolve the secondary issue.[44]

PwC's case

[62] The essence of the case for PwC was that the combined effect of the SPF Documents was an assignment of PVL's bare causes of action that was, to use the words of *Waterhouse*, "impermissible". Such an assignment is, as stated in *Waterhouse*, an abuse of process.[45]

[63] The Court in *Waterhouse* said that in determining whether an arrangement is effectively an assignment of a bare cause of action, the Court must have regard to the arrangement as a whole which, in this case, is the combination of the Funding Agreement and the Allied Assignment. The Court in *Waterhouse* said that it was necessary to consider the level of control held by the funder, the profit share of the funder and the role of the lawyers acting.

[64] Mr Gray argued that the assignment was impermissible in *Waterhouse* terms. The causes of action pursued by PVL against PwC are claims based on breach of a duty of care in tort and contract, not claims for a debt. Assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand.[46] We consider that applies equally to the claim for breach of contract in this case.

[65] The exceptions relied on by the respondents were an assignment to a party that had a genuine commercial interest in taking the assignment and enforcing the assigned claim for its own benefit[47] or an assignment of a cause of action by a

43 At [16].
44 At [33].
45 See above at [57]. Mr Gray also argued the Allied Assignment itself was a bare assignment of a cause of action and unlawful in terms of *Waterhouse*. We do not see that argument as requiring separate consideration as, on our view of the case, the argument relating to the combined effect of the SPF Documents is the stronger argument (and the one on which Mr Gray focused most of his submissions).
46 *Waterhouse,* above n 25, at [57].
47 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) at 703 per Lord Roskill.

liquidator for the benefit of unsecured creditors.[48] Mr Gray accepted these were exceptions but said neither applied in this case.

[66] In addition, Mr Gray argued that there were strong public policy reasons supporting a stay. He described the arrangement as a form of trafficking in litigation, which is champertous. He noted that SPF had no genuine or commercial interest in the subject matter of the proceedings, and that the conduct of the proceedings did not now provide any scope for vindication of the rights of the allegedly wronged party (which he equated with the unsecured creditors of PVL) because there was no contractual commitment ensuring that unsecured creditors would receive any of the proceeds of a successful claim. He also argued that the liquidator had entered into the arrangement for an improper purpose.[49] He argued that the continuing accrual of compound interest at penalty rates put undue pressure on PwC to settle the claim.[50] He said it was unlikely the claim would have been brought, but for the champertous arrangement.

[67] Mr Gray argued that, notwithstanding that the Allied Assignment was, in form, the assignment of a debt and the security for the debt, it was, when read together with the Funding Agreement, an assignment of PVL's cause of action against PwC, at least in substance.[51] That assignment was a bare assignment because it did not involve an assignment of the cause of action that was ancillary to a genuine assignment of a debt.

[68] In support of his submission that the SPF Documents amounted to an assignment of PVL's cause of action against PwC and other defendants, Mr Gray highlighted:

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48 Companies Act 1993, sch 6, para (g) which permits the liquidator to sell or otherwise dispose of the property of the company (applicable by virtue of s 260(2)). See *ALF (No 9) Pty Ltd v Ellis* [2010] NZCA 529 at [48]–[58]; and *Re Oasis Merchandising Services Ltd* [1998] Ch 170 (CA).

49 See above at [9].

50 See above at [15].

51 The Funding Agreement was, as mentioned earlier, conditional on SPF obtaining a first ranking security, which involved acquiring the Allied GSA. This made it appropriate to read the Funding Agreement and the Allied Agreement together.

(a) the likelihood that the proceeds of the claim would accrue to SPF, with only a theoretical possibility that unsecured creditors could benefit;[52] and

(b) the high level of control that SPF had in relation to the conduct of the litigation, in particular the broad power given to SPF under cl 6.3 of the Allied GSA.[53]

[69] Mr Gray said the assignment was a bare assignment because:

(a) At the time the Allied Assignment was entered into, the realisable assets of PVL and the PVL group had been realised by the receivers. PVL was in default and so Allied's power to conduct litigation in PVL's name under cl 6.3 of the Allied GSA had been triggered.

(b) The fact that all realisable assets of PVL had been sold meant that the only asset of significance in PVL was its causes of action against PwC and the other defendants. This is stated in Mr Walker's April 2012 report, in which he made it clear that there were no realisable assets left in PVL and that any realisations would be through legal action, and confirmed in the receiver's final report dated June 2013.[54]

(c) SPF had no commercial relationship with PVL: rather it was a stranger that had entered into a litigation funding arrangement and had entered into the Allied Assignment in pursuit of its objective to make money out of the provision of litigation funding.

The respondents' position

[70] The essence of the respondents' position was that there was no assignment of a cause of action at all. They said each of the Funding Agreement and the Allied

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52 See above at [36].
53 See above at [34]–[35].
54 See above at [8].

Assignment was unobjectionable in itself. As Mr Smith put it, they were "two unobjectionable transactions that have occurred in parallel".

[71] The respondents argued that, even if there was an assignment of a cause of action, it was ancillary to an assignment of a debt and therefore permissible.

[72] If that was not accepted, the respondents argued that the assignment was not impermissible because it should be seen as an assignment by a liquidator, which means the assignment is not impermissible in *Waterhouse* terms.

[73] Mr Smith said that PwC's argument ignored the distinction between "assignments of a property right which are in principle valid, and assignments of bare causes of action which are in principle invalid unless the assignee can show a sufficient interest in the right assigned", citing *Camdex International Ltd v Bank of Zambia*.[55] In *Camdex*, Hobhouse LJ cited with approval the following summary of the law by Lord Roskill in *Trendtex Trading Corporation v Credit Suisse*:[56]

> The Court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee has a genuine commercial interest in taking the assignment and in enforcing it for its own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.

[74] Mr Smith said the Allied Assignment was from Allied to SPF and could not therefore be an assignment of a cause of action. That is because the claim has been brought, and the proceedings are being conducted by the liquidator, not by Allied. He said SPF had never exercised control in terms of the Allied GSA and it was doubtful whether it could do so given the specific terms of the Funding Agreement.

[75] The respondents highlighted the benefits arising from litigation funding of the kind provided by SPF in this case, in particular enhancing access to justice, encouraging the availability of finance (by facilitating sale of debt) and the utility of allowing a liquidator to assign an insolvent company's claims.

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55 *Camdex International Ltd v Bank of Zambia* [1998] QB 22 (CA) at 39 per Hobhouse LJ.
56 *Trendtex*, above n 47, at 703.

[76] Finally, the respondents and SPF argued that the undertakings given in this Court answered any possible concerns.[57]

Our analysis

Was there an impermissible assignment of a bare cause of action?

[77] The essential issue is whether the SPF Documents amount to the assignment of a bare cause of action. If they do, the question that must then be addressed is whether such assignment is "impermissible" in *Waterhouse* terms, which it would be unless it fell within one of the recognised exceptions, identified by the respondents as either an assignment to a party that had an antecedent commercial relationship with the assignor or an assignment by a liquidator.

Was there an assignment of a bare cause of action?

[78] *Camdex* is authority for the proposition that assignment of a debt even in circumstances where it is foreseen that litigation will be necessary in order to recover the debt is not problematic.[58] More generally, the factoring of debts is a common form of commercial financing which should not be discouraged or impeded. The assignment of distressed debt is also not unusual. The assignment of a thing in action (defined as "a right to receive payment of a debt") is specifically provided for in s 50 of the Property Law Act 2007.[59] Similarly, the assignment of debt secured by a GSA can be an uncontroversial commercial transaction, even where the GSA provides, as the Allied GSA did in the present case, for the secured party to be able to pursue claims of the debtor in order to recover money owing to the secured party in the event that enforcement of the security becomes necessary.[60] The assignment of the Allied GSA from Hanover to Allied was a commercial transaction of this kind.

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57 See at [40]–[51] above.

58 As Hobhouse LJ put it in *Camdex*, above n 55, at 39: "An assignment of a debt is not invalid even if the necessity for litigation to recover it is contemplated. Provided that there is a bona fide debt, it does not become unassignable merely because the debtor chooses to dispute it. Suing on an assigned debt is not contrary to public policy even if the assignor retains an interest. What is contrary to public policy and ineffective is an agreement which has maintenance or champerty as its object; such a consequence will not be avoided by dressing up a transaction which has that character and intent as an assignment of a debt".

59 The definition of "thing in action" is in s 48 of the Property Law Act 2007.

60 In most debt factoring transactions, the assignment occurs when the debtor is not in default, so the ability of the secured party to conduct litigation in the debtor's name (as cl 6.3 of the Allied GSA permitted) will not be operative.

[79] That said, it is clear from the judgment of Hobhouse LJ in *Camdex* that an agreement can be seen as champertous "whether or not it is dressed up as an assignment, even an assignment of debt".[61]

[80] The assignment of the Allied GSA by Allied to SPF is in a different category from the assignment from Hanover to Allied. The Funding Agreement is linked to the assignment because the latter satisfied a condition of the former. Without the Allied Assignment, the Funding Agreement could not be effective because Allied would, as holder of the Allied GSA, have had a prior claim to the proceeds of a successful claim than that of SPF as funder. We do not think it is realistic to view the Funding Agreement and the Allied Assignment as separate transactions that have happened in parallel with each other, as Mr Smith submitted. The Funding Agreement would not have come into effect without the Allied Assignment (or a similar arrangement with the same effect) and PVL entered into the Funding Agreement on the explicit basis that it would come into effect only if the Allied Assignment (or a similar arrangement) was entered into by SPF. Conversely, the Allied Assignment would not have occurred if SPF had not entered into the Funding Agreement.

[81] We accept Mr Gray's submission that the Allied Assignment must be considered alongside the Funding Agreement and against two important aspects of the background to the assignment. The first is that the present proceedings were already on foot and were being funded by SPF when the assignment occurred. The second is that all realisable assets of PVL and the PVL group had been realised prior to the assignment.

[82] When the Allied Assignment is considered in the light of those factors, it is arguable that the SPF transaction constitutes an assignment of the bare cause of action pursued by the liquidator against PwC and the other defendants. The basis for the argument in the present case is that the combination of the rights given to SPF under the Funding Agreement and those given to SPF as holder of the Allied GSA give SPF: (a) control in a legal sense over the liquidator's claim against PwC; and

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61 *Camdex*, above n 55, at 38–39. It is not necessary for us to decide the nature of the arrangements that would fit this description.

(b) an entitlement to all or substantially all the proceeds of a successful claim.[62] We will consider each of these in turn.

Does cl 6.3 give SPF control?

[83] Both Mr Smith and Mr Bigio argued that cl 6.3 of the Allied GSA did not give SPF greater control over the litigation that it had under the Funding Agreement. Mr Bigio argued that SPF's rights under cl 6.3, as a power under a security agreement, must be exercised in good faith and only for the purpose of recovering the debt owing. He said the good faith requirement must be evaluated against SPF's other contractual obligations to PVL, including under the Funding Agreement, in particular cl 2.3, which confirms the liquidator retains control of the proceedings subject to special provisions relating to discontinuance and settlement.[63]

[84] We accept that the apparently broad power in cl 6.3 cannot be considered in isolation. We doubt that the requirement that a secured creditor act in good faith would be a significant constraint on the power, however. But it is arguable that the provisions of the Funding Agreement relating to the liquidator's control of the proceedings constrain SPF's power under cl 6.3.

[85] Clause 6.3 gives SPF as secured creditor the broad power described above when an event of default has occurred.[64] But cl 6.3 does not oblige SPF to bring or conduct proceedings, so the power given to SPF under cl 6.3 is discretionary and, like any contractual right, may be waived.

[86] The Funding Agreement was conditional on SPF entering into satisfactory arrangements with Allied to ensure SPF obtained a first ranking security over PVL's assets. So the situation under which SPF became the holder of the Allied GSA was expressly contemplated. Clause 9.1(c) of the Funding Agreement requires PVL to instruct the lawyers engaged for the proceeding to provide information to SPF and

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[62] This approach is in accordance with *Waterhouse,* above n 25, at [57] where it was stated that the Court needs to have regard to the funding arrangement as a whole, including the level of control, the profit share of the funder and the roles of the lawyers acting.

[63] See above at [24]–[26].

[64] See above at [34].

then continues: "it being acknowledged and accepted by the parties for all purposes that [PVL] (and no other person) will instruct the lawyers".

[87] It could be argued that the specific provisions of the Funding Agreement as to the liquidator's role in the conduct of the proceedings and, in particular the acknowledgment "for all purposes" that the liquidator will instruct the lawyers constrain SPF's power under cl 6.3 of the Allied GSA.

[88] It is not necessary for us to reach a concluded view on that because of the confirmation that SPF would not seek to rely on cl 6.3 and the offer to modify the Allied GSA to ensure it could not do so. If SPF entered into an enforceable contractual commitment not to exercise its power under cl 6.3, that would resolve this issue. We are not able to say whether the Dominion GSA contains a similar power to cl 6.3 of the Allied GSA. If it does, the undertaking would need to have dealt with that too.[65]

Is SPF entitled to the proceeds of the claim?

[89] As mentioned earlier, SPF as holder of the Allied GSA, would, absent any agreement to the contrary, be entitled to all of the proceeds of a successful claim, up to the (considerable, and continuously increasing) amount secured by the Allied GSA. Mr Smith highlighted the fact that SPF had undertaken to work with the liquidator to allocate some of the proceeds to the liquidator, though we note that this did not involve any commitment by SPF to actually pay anything to the liquidator for the benefit of unsecured creditors.[66] We do not think that unilateral undertaking by SPF was sufficient to avoid the conclusion that the SPF Documents entitled it to the proceeds of the claim.

[90] Again, however, SPF undertook in this Court to pay a proportion of the proceeds to the liquidator for the benefit of the unsecured creditors of PVL.[67] We see that as a significant shift in position on its part and as meeting the concern that

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[65] The same comment applies to any other GSAs granted by members of the PVL group that have been assigned to SPF.

[66] See above at [36].

[67] See above at [49].

the SPF Documents entitle SPF to effectively all the proceeds of a successful prosecution of the claim.

Effect of SPF's undertakings: no bare assignment

[91] In light of the undertaking given by SPF in relation to cl 6.3 of the Allied GSA and the payment of a proportion of the proceeds of the claim to the liquidator, the concern that the SPF transaction may amount to an assignment of a bare cause of action is removed.

Exceptions

[92] Our conclusion that, having regard to the undertakings given in this Court, the SPF Documents do not amount to an assignment of a bare cause of action makes it unnecessary to determine whether either of the exceptions identified above at [77] applies.

[93] It was unsatisfactory that SPF and the liquidator resolved the issues of concern in this case only at the time the present case reached this Court. The informal nature of the undertakings given in this Court – one in Mr Wilson's affidavit and one in Mr Bigio's submissions, was also unsatisfactory.

[94] If the parties had not settled their dispute, we would have directed that SPF and the liquidator enter into a contractually enforceable document (possibly, but not necessarily, an amendment to the Funding Agreement) recording:

(a) SPF's agreement to the distribution of proceeds as outlined in Mr Wilson's affidavit (and summarised above at [49]);

(b) SPF's covenants with PVL/the liquidator that it would not exercise any power in the Allied GSA (and the Dominion GSA, if applicable) that would give it greater control over the proceedings than was provided for in the Funding Agreement.[68]

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[68] The same commitment would be required in relation to any other GSA assigned to SPF, as noted above at n 65.

[95] We would have also have required that a copy of the document be filed in the High Court and served on PwC.

Result

[96] For the reasons given, we would have allowed the appeal only to the extent that we would have varied the decision of the Court of Appeal to require compliance with [94] and [95] above.

Costs

[97] As the parties have settled their dispute, we do not need to decide costs. We record, however, that we would not have made a costs award in favour of the respondents, as the successful parties. That is because the argument before us was substantially influenced by the undertakings belatedly given by the respondents and SPF. It is undesirable that this Court is presented with a position that differs materially from that presented in the Courts below. We accept, of course, that there were some developments that occurred after the Court of Appeal decision, such as the Dominion Assignment, which could not have been addressed earlier. But the sharing of the proceeds of a successful claim could and should have been dealt with earlier, as should the obvious issue arising from cl 6.3 of the Allied GSA. In those circumstances we consider the appropriate outcome would have been that there be no award of costs in this Court. We would not, however, have disturbed the costs awards made in the High Court and the Court of Appeal.

ELIAS CJ

[98] PricewaterhouseCoopers has been unsuccessful in the High Court and the Court of Appeal in its application to stay claims brought against it by Property Ventures Limited (in liquidation) and subsidiary companies.[69] The claims by the Property Ventures companies are for losses said to have been suffered through breach of duties of care owed to them by PwC as auditors. PwC maintains that the litigation is an abuse of process and ought to be stayed because it is being funded for profit by a commercial litigation funder, SPF No. 10 Limited, in circumstances

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[69] *Walker v Forbes* [2015] NZHC 1730, [2015] 3 NZLR 831 (Brown J); and *PricewaterhouseCoopers v Walker* [2016] NZCA 338 (Randerson, Wild and Miller JJ).

which PwC says amount to an effective assignment of the Property Ventures causes of action. Such assignment is said to be contrary to the law of maintenance and champerty[70] as recognised in *Waterhouse v Contractors Bonding Ltd.*[71] After PwC's appeal to this Court was heard but before judgment, the litigation was settled between the parties. Whether the proceedings should be stayed is therefore a question that has been overtaken and is now moot.[72]

[99] I differ from other members of the Court in being of the view that we should not deliver judgment following settlement, in large part because of the way in which the appeal has been argued. PwC did not contend that the litigation funding agreement in itself amounts to an impermissible assignment of the Property Ventures cause of action.[73] Rather, it contended that it became so in combination with the powers SPF has obtained under assignments of General Security Agreements over the assets and undertakings of Property Ventures and its associated companies (the Allied and Dominion GSAs described above at [34]–[36] and [38]–[39]).

[100] I am of the view that PwC's apparent concession (that the litigation funding agreement in itself was unobjectionable) should not be treated as determinative. I think it well-arguable that the litigation funding agreement in issue here is contrary to law, even though PwC did not invite the High Court or Court of Appeal to treat it as objectionable in itself. I am influenced in this view by the extent of control over the litigation permitted to SPF under the funding agreement and the extent to which it remains in control of the funding to be provided. My assessment of the facts is provisional, because the matter was not argued.

[101] I would not acquiesce in the assumption that the litigation funding agreement in itself was unobjectionable because I am of the view that it extends the scope of

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70 "Maintenance" is generally concerned with supporting litigation brought by others. "Champerty" involves accepting a share of the proceeds obtained through litigation. "Champerty" is a particular form of maintenance. See *Camdex International Ltd v Bank of Zambia* [1998] QB 22 (CA) at 29 per Hobhouse LJ.

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

72 Other defendants similarly situated to PwC have not made similar applications (although one filed a memorandum in support of PwC's application in the High Court). Their ability to apply for stay is unaffected on the approach I take. They could not be constrained by the way in which PwC has framed its arguments.

73 As noted also by Brown J in the High Court at [7] and [64]; and by the Court of Appeal at [23] and [28].

what was considered by this Court to be permissible in *Waterhouse*. Any such extension requires care and should not I think be undertaken by the Court without full argument. In *Waterhouse*, the litigation funding agreement itself was not before the Court.[74] Although in declining to order stay the Court gave some indication of the considerations that would be relevant in deciding whether a commercial litigation funding agreement might be contrary to public policy,[75] it was not necessary for it to apply the considerations identified to the actual arrangements.

[102] The other members of the Court are content to deal with the appeal on the basis that it was argued. Had the litigation not settled, that approach might have been warranted (although my preference would still have been to invite further argument on the litigation funding agreement). As it is, however, I consider that it is undesirable for us to give judgment after settlement when the controversy between the parties is no longer a live one and when the scope of the argument has been so constrained.

Other loose threads which make the case unsuitable for determination

[103] In addition to the view that judgment is not appropriate on the basis of the central concession that the litigation funding agreement is not objectionable in itself, the case raises three subsidiary points of real difficulty which must be touched on because of the arguments addressed to us. These also in my view make the case unsuitable for determination following settlement. The first and second points are linked because they are the subject of undertakings treated as material to the conclusion reached by the majority.[76] The first concerns questions of recovery in the liquidation, should the claim be successful. The second concerns the scope of the enforcement powers obtained by SPF under the Allied GSA. The third point, one that the Courts below found it unnecessary to determine, concerns the power of a liquidator to assign actions under the provisions of the Companies Act 1993.

[104] As a secured creditor, SPF will not only have priority of recovery in the liquidation over unsecured creditors and shareholders if the litigation is successful

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74 *Waterhouse* at [74].
75 At [41]–[59].
76 See above at [40]–[53] and [83]–[91].

but also has broadly expressed enforcement rights under cl 6.3 of the Allied GSA (including the rights to "bring, defend, submit to arbitration, negotiation, compromise, abandon or settle any claim or proceeding, or make any arrangement or compromise in relation to the Secured Property"). PwC argued these powers under the Allied GSA would enable SPF to take over the litigation notwithstanding restrictions on its control of the litigation under the litigation funding agreement itself.[77] O'Regan J's assessment that the overall arrangements (under the funding agreement and the GSAs assigned to SPF) are not contrary to the law of maintenance and champerty is expressed to be dependent on the undertakings given by SPF in this Court. The first undertaking would permit some recovery by unsecured creditors if the litigation is successful. The second is that SPF will not resort to the enforcement powers under cl 6.3 of the Allied GSA to conduct the negligence claim in the name of the Property Ventures companies against PwC.

[105] I do not agree with the view that the two undertakings were material and changed matters from the position as it was in the High Court and Court of Appeal.[78] In the first place, I consider that priority in payment in liquidation is a distinct matter which does not bear on whether proceedings which might obtain assets for the liquidation offend the policies behind the law of maintenance and champerty. The undertaking is in my view irrelevant to the question whether there has been an assignment of the company's personal cause of action to the litigation funder. It does not matter that, should the claim brought by the company be successful, the litigation funder as holder of rights under the GSA is prepared to waive some of its potential entitlement in the liquidation in favour of the unsecured creditors.

[106] Secondly, I doubt the suggestion implicit in O'Regan J's reliance on the undertaking not to resort to cl 6.3 that the enforcement power under cl 6.3 could have been relied on by the holder of the GSA to bring or maintain the claim in negligence against PwC. I would not accept without further argument that the cl 6.3 GSA powers permit the holder of a security to maintain an action that is not ancillary to the property right secured (as I provisionally think the present action in negligence

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77 Whether there is a similar right in the Dominion GSA is not known because its assignment to SPF was notified to this Court only after leave to appeal had been granted and was not considered in the lower Courts. The terms of the Dominion GSA are not before the Court.

78 Compare above at [52] and [90].

is not).[79] And if not within the enforcement powers ancillary to the debt, I consider this undertaking too, given by SPF as the security holder, is irrelevant to the question whether a bare cause of action belonging to the company has been assigned to the litigation funder. In that question I do not consider that the fact that the litigation funder has acquired rights under the GSA matters at all.[80] In this view I differ from the approach taken by the majority in linking the funding agreement and the assignment of the Allied GSA to SPF. I do not accept that the fact the funding agreement was conditional on the assignment of the GSA from Allied to SPF affects the nature of the rights obtained.[81] I am of the view that there is no difference between SPF and Allied in the interests under the GSA and that neither as successive security holders either obtained rights to undertake the claim in negligence or were prevented by the litigation funding agreement in exercising any rights obtained under the GSA.

[107] The third point that arises concerns the application of s 260(2) of the Companies Act. It was argued that even if the litigation funding arrangement constitutes an assignment of the cause of action, it is within the statutory powers of the liquidator under s 260(2) of the Companies Act[82] to assign such cause of action, including to a litigation funder, under what is described as an "exception" to the law of maintenance and champerty. It was not necessary for the Court of Appeal to consider this additional argument and the majority in this Court does not find it necessary to consider it because of the conclusion they come to that the litigation funding arrangements and the funder's interest in the GSA are not objectionable. On the view I take, it would have been necessary to deal with the fall-back position based on the liquidator's "exception". In those circumstances I flag reservations about the position that the liquidator's statutory power to sell property operates as an unqualified exception which permits assignment of a personal cause of action not

79 Whether the losses claimed against the auditors in negligence would extend to the amount secured under the GSA (which included compound interest on the debt) may also be doubted but cannot be further considered on the present application.

80 Indeed, to treat SPF in its capacity as security holder as inhibited by its position as litigation funder under an agreement with the liquidator (by requiring the GSA to be seen as part of the litigation funding agreement) seems to me to be to compromise the distinct property interests under the GSA, a position that is potentially corrosive of general law in the factoring of debts.

81 Compare above at [80]–[82].

82 Section 260(2) of the Companies Act 1993 provides that liquidators have the powers set out in sch 6 to the Act. Paragraph (g) of sch 6 provides that liquidators have power to "sell or otherwise dispose of the property of the company".

otherwise allowed by the general law (such as where the cause of action is ancillary to the enforcement of an interest in property). Such authority as there is on this point is mixed and unsatisfactory.[83] Whether the claim is an asset in the liquidation may also be debateable, although the preponderance of authority treats it as property.[84]

Delivery of judgment after settlement

[108] When a case is settled after hearing this Court has held that judgment may nevertheless be delivered if the Court considers it appropriate to do so, irrespective of the attitude of the parties.[85] If the matter in issue is one of general importance not simply to the parties only or if the judgment appealed against ought in any event to be corrected because otherwise it will continue to apply, it may be desirable for the Court to deliver judgment. So in both *Osborne v Auckland Council* and *Zurich Australian Insurance Ltd v Cognition Education Ltd*, failure to issue the judgments would have left uncorrected decisions of the Court of Appeal binding on lower

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83 A number of the cases cited in support of an "insolvency exception" concern liability to pay fixed, non-contingent sums, in many ways comparable to debts (treated as property capable of assignment: *Camdex* at 38–39 per Hobhouse LJ). Examples include *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234 (CA); and *Guy v Churchill* (1888) 40 Ch D 481 (Ch). Some – such as *Seear v Lawson* (1880) 15 Ch D 426 (CA) (see in particular at 432 per Jessel MR and at 434 per James LJ); and *Taylor v Knapman* (1883) 2 NZLR (SC) 265 – are claims for recovery of property or to enforce rights ancillary to property, assignment of which does not offend against the modern law of maintenance and champerty: *Ellis v Torrington* [1920] 1 KB 399 (CA). Others – such as *Ramsey v Hartley* [1977] 1 WLR 686 (CA); *Stein v Blake* [1996] AC 243 (HL); and *Stone v Angus* [1994] 2 NZLR 202 (HC) – concern assignments not to a stranger but to someone with a pre-existing interest in the claim (in relation to which see *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL) at 703 per Lord Roskill). See also *Grovewood Holdings Plc v James Capel & Co Ltd* [1995] Ch 80 (Ch); and Adrian Walters "A modern doctrine of champerty?" (1996) 112 LQR 560 at 566–567.

84 *Ramsey v Hartley* at 692–694 per Megaw LJ, at 697 per Lawton LJ and at 699 per Geoffrey Lane LJ; *Stein v Blake* at 258 per Lord Hoffmann; and *ALF No 9 Pty Ltd v Ellis* [2010] NZCA 529 at [49] per Harrison J (for himself, O'Regan P and Stevens J). See also the discussion in *Ord v Upton* [2000] Ch 352 (CA); and *Mulkerrins v PricewaterhouseCoopers* [2003] UKHL 41, [2003] 1 WLR 1937 at [22] per Lord Walker.

85 *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [39]–[44]; and *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [2]. See also *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [3]. The Court in *Osborne* pointed out that r 39 of the Supreme Court Rules 2004 did not confer on the parties an absolute right to abandon an appeal once the hearing had started: at [41]. The Court was advised that the settlement was conditional on judgment not being released. Both parties opposed delivery of judgment. The Court nevertheless took the view that the public interest in releasing the determination, which was likely to be useful to many litigants, outweighed the advantages to Mr and Mrs Osborne of allowing the settlement to become unconditional: at [43]–[44].

courts when the Supreme Court had reached the view after full argument that they were wrong.[86]

[109] The present appeal arises in quite different circumstances. The judgment on the application does not concern a point of statutory interpretation or question of law likely to recur and where there is evident public interest in authoritative resolution. Nor is it a case where it is necessary to correct error in the Court of Appeal to avoid lower courts being obliged to follow it. The approach to litigation funding taken by this Court in *Waterhouse* was accepted by the parties and applied by the Court of Appeal.[87]

[110] In application of *Waterhouse*, the Court of Appeal concluded that the litigation ought not to be stayed because the litigation funding agreement and the assignment of the GSA did not amount to the "bare assignment" of a personal cause of action (confirmed by *Waterhouse* to be impermissible in New Zealand unless within an established exception to the policies behind the torts of maintenance and champerty). Whether that conclusion on the facts is supportable depends on the terms and particular circumstances of the litigation funding agreement in issue between the plaintiff and the litigation funder. On the view taken by the majority the arrangements as a whole include the background of the GSAs and the undertakings given by SPF in this Court. The judgment resolves a one-off dispute concerning particular agreements between the parties, unlikely to arise or present in similar circumstances again. In addition, there is reason to be especially careful about delivery of judgment in the present case.

[111] First, the initial approach taken by this Court towards litigation funding in *Waterhouse* was tentative and cautious, as the Court of Appeal noted.[88] It is a matter of some controversy whether and when litigation funding arrangements may offend against the policies which are suspicious of the maintenance of litigation for profit.

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[86] *Osborne* concerned the interpretation of s 14(a) of the Weathertight Homes Resolution Services Act 2006, which determined eligibility to have cases heard by the Weathertight Homes Tribunal. *Zurich* was concerned with the interpretation of art 8(1) of sch 1 of the Arbitration Act 1996, derived from the Model Law on International Commercial Arbitration under the New York Convention. In both cases the interpretation adopted in the Court of Appeal was set aside in the Supreme Court.

[87] As discussed by the Court of Appeal at [14].

[88] At [14].

They are the policies of law behind the torts of champerty and maintenance which have not yet been abolished in New Zealand, as *Waterhouse* affirms.[89] In paragraphs [123]–[134] below I explain why I consider that there is reason to doubt the view that the present litigation funding agreement is unobjectionable and reason to doubt that it conforms with the principles treated as unobjectionable in *Waterhouse*. I consider that the effect of approval of the arrangement in the present case extends the scope for litigation funding, despite the fact that the Court was not invited to extend or revisit *Waterhouse*.

[112] Secondly, there are unsatisfactory aspects of the present application which make it an unsuitable vehicle for further consideration of *Waterhouse* and the circumstances in which litigation funding arrangements may be unobjectionable (these have already been described and are repeated in summary here):

(a) PwC did not claim that the litigation funding arrangement between the liquidator and the funder was itself contrary to public policy and that the proceedings ought to be stayed on that account (a concession which, as already indicated, I think in application here extends *Waterhouse* and would not want to endorse without full argument, not put to us in the present appeal).

(b) There was no evidence before the Court about whether the litigation funding agreement is a "market-standard" one, as counsel for the respondents maintained it is. No context was provided to us in which we could assess that assertion and, in particular, in the context of New Zealand conditions (where maintenance and champerty remain tortious and there are no developed rules of procedure concerning litigation funding or representative actions[90]).

(c) The Court has been drawn into consideration of, or assumptions about, the conduct of the liquidation (including the payment of fees

89 *Waterhouse* at [25]–[26].
90 Compare, for example, the rules concerning representative proceedings in Part IVA of the Federal Court of Australia Act 1976 (Cth).

for the liquidator,[91] undertakings by SPF as holder of the Allied and perhaps Dominion general securities as to the extent to which unsecured creditors will benefit from the funded litigation, and the extent to which personal actions can be assigned by a liquidator, which, as has been indicated, may be based on insecure authority and which need to be directly addressed in cases where they arise for determination).

(d) The assignment of the GSAs from Allied and Dominion to SPF is an unusual feature of the case which seems to me to have been a distraction which deflected attention from the policies of law which discourage the conduct of litigation for profit. The emphasis on the undertaking not to rely on cl 6.3 of the Allied GSA assumes an expansive view of the powers of enforcement conferred under the GSA which is highly questionable, as has already been discussed.[92]

[113] For these reasons, I would have declined to issue the judgment. I am of the view it is likely to be treated as an extension of *Waterhouse* by the Court even though we were not asked to undertake any such development.

The policy of the law

[114] Before indicating why I would not accept the concession made that the litigation funding agreement by itself is not contrary to public policy, it is necessary to give some more background as to the law of maintenance and champerty.

[115] The formerly strict policy against maintenance of actions has been greatly relaxed in the past century in New Zealand, as it had been in England and Wales and Australia even before the legislative reforms which have in some jurisdictions (including England and Wales, the Australian Capital Territory, New South Wales,

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91 Referred to by O'Regan J above at [45]–[51].
92 As to which see discussion above at [106].

South Australia and Victoria) removed the torts of champerty and maintenance.[93] Such evolution was inevitable because the law in this area is based not upon fixed rules or principles but on notions of public policy which necessarily adapt to meet changing social circumstances.[94] So provision of financial support by relatives and friends[95] or by trade unions[96] has long been permitted. Subrogation under insurance policies does not offend the principles against assignment of causes of action.[97] And assignment of causes of action which are ancillary to property interests does not offend against the policies behind champerty and maintenance.[98] Much of the case-law concerning modern applications of the law relating to maintenance and champerty has been concerned with the distinction between assignment of property and the rights ancillary to it and the assignment of a "bare cause of action", a line not always easily maintained.[99] No more satisfactory have been attempts to distinguish between support or assignment arising out of an existing proper interest and support or assignment which in substance (if not in form) entails "trafficking in litigation".[100]

[116] Despite some conceptual obscurity, it is however striking that judges continue to acknowledge the legitimacy of concern about litigation funding which amounts to the assignment of a bare cause of action.[101] Even in those jurisdictions which have abolished the civil wrongs of maintenance and champerty, the reforming legislation has explicitly preserved the ability to treat contracts as contrary to public policy. It

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93 Criminal Law Act 1967 (UK), ss 13–14; Statute Law Amendment Act 2002 (No 2) (ACT), pt 3.2; Maintenance, Champerty and Barratry Abolition Act 1993 (NSW), with relevant provisions subsequently transferred to cl 2 of sch 2 of the Civil Liability Act 2002 (NSW); Criminal Law Consolidation Act 1935 (SA), sch 11, cls 1(3) and 3 (inserted in 1992); and Abolition of Obsolete Offences Act 1969 (Vic).

94 *Stevens v Keogh* (1946) 72 CLR 1 at 28 per Dixon J.

95 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41, (2006) 229 CLR 386 at [253] per Callinan and Heydon JJ, citing *Bradlaugh v Newdegate* (1883) 11 QBD 1 (QB) at 11 per Lord Coleridge CJ.

96 The subject of the litigation in *Stevens v Keogh.*

97 *Cia Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 (QB).

98 *Trendtex* at 703 per Lord Roskill; and *Camdex* at 39 per Hobhouse LJ.

99 *Fostif* at [74] and [78] per Gummow, Hayne and Crennan JJ. As Hobhouse LJ recognised in *Camdex* at 38–39, an agreement which has maintenance or champerty as its object is contrary to public policy and ineffective even if dressed up as an assignment of debt.

100 *Trendtex* at 694 per Lord Wilberforce. The Court is required to look past the form of the transaction: see *Trendtex* at 703 per Lord Roskill; and *Camdex* at 37 per Hobhouse LJ, citing *Laurent v Sale & Co* [1963] 1 WLR 829 (QB) at 832 per Megaw J.

101 See for example Kirby J's acknowledgement that there are "some legitimate concerns about representative actions, and litigation funding" in *Fostif* at [139]; *Giles v Thompson* [1994] 1 AC 142 (HL) at 161 per Lord Mustill; *Trendtex* at 694–695 per Lord Wilberforce and at 702–703 per Lord Roskill; *Wild v Simpson* [1919] 2 KB 544 (CA) at 562–563 per Atkin LJ; and *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 All ER 822 (QB) at 830–831 per Toulson J.

has been recognised that there remains public interest in preventing the development of "an unlicensed and unregulated market in litigation for fear of the abuses to which that might lead by attraction of the unscrupulous".[102]

[117] When the High Court of Australia came to consider modern litigation funding in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* in 2006, on appeal from the Court of Appeal of New South Wales, it was against the background that the torts of champerty and maintenance had been abolished in New South Wales in 1993. The High Court acknowledged that the approach it adopted was not to be taken to apply to those Australian jurisdictions which had not legislated to reform the common law.[103] That is the position that applies in New Zealand and was considered by this Court in *Waterhouse*.[104]

[118] In *Waterhouse,* the Court was concerned with a commercial litigation funder. The advent of commercial litigation funders in the business of providing funding for litigants and who take a share of the proceeds of successful litigation is a relatively recent development. Such litigation funders typically have no prior interest in proceedings. They provide funding for profit and their return generally depends on the success of the litigation they fund. Litigation funders usually contract for a degree of control because, as was acknowledged in *Waterhouse*, "some measure of control is inevitable to enable a litigation funder to protect its investment".[105]

[119] As *Waterhouse* affirms, maintenance and champerty are torts which still exist in New Zealand. Their scope is however inevitably affected by how the public policy considerations behind the law are viewed in the circumstances of New Zealand today. In *Waterhouse,* it was not accepted that commercial litigation funding arrangements can be challenged only for traditional abuse of process grounds. We took the view that "assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand".[106] We considered that "if a funding arrangement amounts to an

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102 *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* at 831 per Toulson J.
103 *Fostif* at [85] per Gummow, Hayne and Crennan JJ.
104 *Waterhouse* at [25]–[26] and [35]–[40].
105 At [46].
106 At [57].

assignment of a cause of action to a third party funder in circumstances where this is not permissible, then this would be an abuse of process".[107] *Waterhouse* accepted that participation in any gain obtained through litigation and some control over the litigation to protect the position of the litigation funder of itself does not warrant the view that a commercial litigation funding arrangement is contrary to public policy, justifying a stay of proceedings. Nor is it helpful to ask whether there is "wanton and officious intermeddling with the disputes of others".[108] The fact that the funder "seeks out" plaintiffs to join a representative action is similarly not objectionable in itself.[109] In considering whether litigation funding effectively amounts to an assignment, the court must consider the arrangements as a whole including the level of control and profit share and the role of lawyers.[110]

[120] *Waterhouse* concerned an application for stay on the grounds that the litigation funding arrangement was a commercial one and that the funder had not provided security for costs. The actual litigation funding agreement in that case was not considered and was not before the Court. The circumstances did not strike the Court as different from cases where, for example, someone is advanced money by a relative in order to pay for the costs of litigation and which is not objectionable. It was not necessary in *Waterhouse* to consider at any length the reasons which might make a litigation funding arrangement contrary to public policy although the case suggests that control of the litigation and profit share are likely to be important in any such consideration.

[121] The policy of the law is not only to protect those who obtain litigation funding from unscrupulous funders (although such arrangements may be contrary to public policy on equitable grounds). So it was suggested by Atkin LJ that the policy of the law is "directed primarily, not at the client maintained, but at the other party to the litigation".[111] Such party had, he thought, "the right to be free from litigation conducted by the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opposing litigant". While I would accept

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107 At [57].
108 At [58], declining to adopt the test set out by Lord Mustill in *Giles v Thompson* at 164.
109 *Fostif* at [89] per Gummow, Hayne and Crennan JJ.
110 *Waterhouse* at [57].
111 *Wild v Simpson* at 563.

that the policy of the law may extend also to protection of the person being funded, I am of the view that Atkin LJ was correct to identify the mischief with which the law of champerty and maintenance is concerned as being with the conduct of litigation "for their own interests" by those otherwise unconnected with the claim and with no existing property interest to protect. Where that is for profit, a personal or "bare" cause of action is effectively permitted to be bought and sold for the gain it returns to the funder. That circumstance in the absence of statutory regulation carries sufficient risk of oppression to the other party and risk of misuse of the function of the courts in vindication of wrongs to justify close scrutiny of the terms of the arrangement for consistency with the public policies behind the law of maintenance and champerty in preventing civil claims being treated as negotiable investments.

[122] Some self-interest is permitted to the funder. There would otherwise be no commercial funding for litigants who need it. Where the line is drawn is inevitably in part a matter of degree. The focus is necessarily largely on the incentives and control the litigation funder has under the funding arrangement. They include, as was suggested in *Waterhouse*, control of the litigation, the profit share of the funder and the role of lawyers in the litigation. To be objectionable such control must be beyond that which is reasonable to protect money actually advanced or committed to by the litigation funder.

The litigation funding agreement arguably amounted to a bare assignment

[123] Under the litigation funding agreement there are clauses which provide that matters of control over the litigation are retained by the plaintiff, and not the litigation funder. So, cl 2.3 provides in relation to the "continuance" and "management" of the proceedings that "[a]ll final decisions … shall be decisions for the Plaintiff and not SPF". This is, however, subject to the important qualification that such control is "except in relation to settlement matters or any proposed discontinuance of the Proceedings, to which clause 14 applies".

[124] Clause 14 of the agreement is concerned with "Settlement". Under cl 14, the plaintiff is obliged to "use its reasonable endeavours to maximise settlement or judgment proceeds … including, without limitation, engaging in settlement

discussions". SPF is able to "request the Plaintiff to make or accept an offer of settlement for the Claim" but the plaintiff "is not obliged to do so". On the other hand, the plaintiff may not make or accept an offer of settlement, nor may the plaintiff discontinue the proceedings without prior notification and SPF's written consent. This gives the litigation funder control of settlement and discontinuance of the proceedings because its written consent is required for offers and acceptances of settlement and discontinuance. The plaintiff cannot therefore act unilaterally in such matters. While any decision as to the making or acceptance of a settlement offer or discontinuance of all or part of the proceeding is expressed to require the agreement of the plaintiff and SPF, any dispute is resolved under cl 14.5, which provides for resolution by an expert, ultimately able to be appointed by SPF after "consultation" with the plaintiff.[112]

[125] The litigation funder also has rights to participate in settlement negotiations. The plaintiff is obliged to give notice to SPF of any communications or meetings for settlement purposes and the plaintiff acknowledges it "consents to a representative of SPF being present at any such meetings or approving such communications".[113] Similar provisions cover appeals if SPF wants to pursue an appeal but the plaintiff does not. (Disagreement is again referred for decision to an expert appointed by the litigation funder after consultation with the plaintiff.)

[126] The control able to be exercised by the funder over settlement or discontinuance under the agreement in issue seems on the face of it to be substantial. It may be contrasted with funding agreements which have come before the courts previously where there is an obligation of consultation but the plaintiff retains the right to discontinue or settle.[114] Under the clauses of this funding agreement the plaintiff seems to have substantially relinquished control of continuance or resolution of the litigation.

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[112] "Expert" is defined in cl 1.1 as a named insolvency practitioner "or, if required in writing by SPF, such other independent person agreed between the Plaintiff and SPF, or failing agreement within two Working Days of SPF's written notice, appointed by SPF after consultation with the Plaintiff". The clause further stipulates that "[i]n either case approval may not be unnecessarily withheld or delayed".

[113] Clause 14.3.

[114] As was the case of the agreement in issue in *Re Nautilus Developments Ltd (in liq)* [2000] 2 NZLR 505 (HC) (see at [15] and [23]).

[127] Other provisions in the agreement give SPF powers to direct the conduct of the litigation and the engagement of legal representation. Clause 9 of the agreement is concerned with "information and conduct of proceedings". The plaintiff undertakes to conduct the proceedings "fully and to the best of its ability" (keeping SPF informed and consulting with the funder in relation to all material issues). Clause 9.1(c), dealing with the plaintiff's obligation to instruct the lawyers to provide information to the litigation funder, contains an acknowledgement by the parties "for all purposes that the Plaintiff (and no other person) will instruct the Lawyers". Such acknowledgement has to be seen in the wider context of the control obtained by the litigation funder over the legal representatives. It may suggest that the control of the plaintiff is substantially illusory.

[128] The litigation funder has significant authority under the agreement in relation to the retention of lawyers. The lawyers who represent the plaintiff must be "approved by SPF in writing" under cl 1.1 of the agreement. Under cl 2.4(a) the agreement requires the lawyers to assume a duty of care to the funder in relation to the proceedings and provides that they are to supply the funder with copies of all advice and correspondence between them and the plaintiff in connection with the proceeding. In addition, the funder has the power under cl 2.4(b) to nominate "additional or substitute Lawyers" and to "[require] any Lawyers to cease acting". The effect is that the litigation funder is treated as a client, with access to all material information about the conduct of the litigation by the lawyers. The powers to approve, remove and substitute lawyers seem to give it control of legal representation in the claim and, through it, arguably the conduct of the litigation by the legal representatives despite the acknowledgement in cl 9.1(c).

[129] Although SPF can terminate its obligations on five working days' notice, remaining liable only for accrued project costs approved to that date, the plaintiff may terminate only for "material breach" by SPF (materiality in the event of dispute being determined by expert under the dispute resolution clause in which, ultimately, SPF has the power of appointment of the expert[115]).

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115 See above at n 112.

[130] The funding arrangements under the agreement are set out in the reasons given by O'Regan J at [18]–[22] and do not need to be repeated here. The "project costs" treated as a loan to the plaintiff, which are the litigation funding, are such costs as are "agreed [by the funder] from time to time, in advance, in writing". The funder has no obligation to provide continuing funding for the litigation and, indeed, under cl 11.1(a) SPF at its "sole discretion" can terminate its obligations on five working days' notice, remaining liable only for accrued project costs approved by it up to that date.

[131] The ability of the funder to withdraw from the agreement and the limitation of its provision of funding to the project costs agreed by it in advance in writing in combination with the control reserved to it to approve settlement or discontinuance provides it with substantial control over the litigation and in particular to require settlement or discontinuance. Such control arguably allows the claim to be treated as an investment to be maintained to the extent to which it provides a commercial return to the litigation funder. If so, it is difficult to see that it would not operate as an assignment of the cause of action.

[132] The fees payable under the agreement to the litigation funder also seem to entail effective surrender of much control of the litigation. In addition to repayment of the project costs, SPF is entitled to a fee set either at 200 per cent of the project costs, or a percentage of the recovery net of the project costs, whichever is greater.[116] As is described in the reasons of O'Regan J at [21], the percentage applicable now is 42.5 per cent. In the case of a plaintiff which has no other assets from which to repay the loan of the project costs (for which Property Ventures has given security) and under an agreement in which the funder controls the further funding to be provided and must agree to any settlement or discontinuance, the funder may well be effectively in a position to compel settlement if it is to its commercial advantage and

[116] See above at [19]–[22].

without restriction as to amount even though there is no direct power in the agreement for it to compel Property Ventures to settle.[117]

[133] An indication of the way in which SPF regards the interests it has in the litigation under the agreement may be seen in the agreements it has entered into with Allied and Dominion in obtaining assignment of the GSAs. As described by O'Regan J at [46]–[47] they entail payment to Allied of a fee of five per cent of the net proceeds from the litigation (less project costs, services fee and liquidator's costs) and to Dominion of either a flat fee of $500,000 or all proceeds up to a maximum of $1.65 million after deduction of project costs, services fee, liquidator's costs, and the amount owed to Allied. These obligations may be affected by the undertakings given in this Court, but their assumption in the first place perhaps indicates that SPF saw itself as being able to procure the payments out of any recovery in the litigation.

[134] Because the matter has not been fully argued, my conclusions are provisional. I consider that there is scope on the basis of the arrangements as to funding, legal representation, and control of settlements and discontinuance to take the view that the funder here has been set up to conduct the litigation in its own interests but in circumstances where it has no existing interest in the litigation and in which the action is not ancillary to its property interest under the GSAs. If so, the litigation funding arrangement amounts to the transfer of a bare cause of action for profit and is champertous. It would constitute trafficking in litigation, which I do not think this Court should acquiesce in without further consideration and full argument.

Conclusion

[135] I would decline to issue judgment in this case. The matter has settled so that the question of stay is moot. As argued, the case entails no question of general public importance but only application of the principles discussed in *Waterhouse* to a particular agreement and its context. The case has also been conducted on the basis

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[117] Some comparison is provided by the agreement in issue in *Fostif* (although under the different statutory system in place in New South Wales). There the plaintiffs gave up to the litigation funder an entitlement to one-third of any recovery from the proceeds of any judgment or settlement. Settlement could not however be imposed by the litigation funder for less than 75 per cent of the face value of the claim unless the plaintiffs agreed (see at [239]).

of an apparent concession I consider to be one the Court should not act on. It is likely that the effect will be taken to be that the law has been developed beyond *Waterhouse* even though such development was not the subject of argument. It may well be that the law should be further developed, perhaps by legislation as in other jurisdictions. But any judicial development should occur only after full argument and in a case where the effect of the agreement is in contention. I would have required the parties to address the Court further on whether the funding agreement itself is champertous and if so whether it is contrary to the policy of the law and the proceedings should therefore be stayed.

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