IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-548
[2019] NZHC 802

BETWEEN	RHYS JAMES CAIN AND REES GRAHAM LOGAN AS LIQUIDATORS OF STONEWOOD HOMES LIMITED (IN RECEIVERSHIP AND LIQUIDATION) First Plaintiffs
	RHYS JAMES CAIN AND REES GRAHAM LOGAN AS LIQUIDATORS OF STONEWOOD HOMES NEW ZEALAND LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Second Plaintiffs
	RHYS JAMES CAIN AND REES GRAHAM LOGAN AS LIQUIDATORS OF HOLMFIRTH GROUP LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Third Plaintiffs
AND	BRENT ALFRED METTRICK First Defendant
	JAMES BOULT Second Defendant

Hearing: 19 March 2019

Appearances: M G Colson and JWA Johnson for Plaintiffs
O D Peers for First Defendant
T C Weston QC and G J Ryan for Second Defendant

Judgment: 12 April 2019

JUDGMENT OF MANDER J

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[1] The liquidators of Stonewood Homes Ltd, Stonewood Homes New Zealand Ltd, and Holmfirth Group Ltd (the companies) have commenced proceedings against two former directors. The liquidators' action is supported by a litigation funder. One of the directors, James Boult, seeks disclosure of details regarding the identity of the litigation funder. He claims that while the liquidators have disclosed the "nominal funder", the "real funder" remains unknown.

Background

[2] The companies were placed into receivership and then liquidation. Unsecured creditors are owed some $27 million. The plaintiffs, Messrs Cain and Logan, who are partners of Ernst and Young, were appointed as liquidators of the companies.[1] They seek damages of $25.47 million, alleging various breaches of directors' duties. The claims are defended by both defendants.

[3] The liquidators have disclosed that they are funded by a litigation funder. There are no funds in the liquidation from which any unsecured creditors can be paid and the litigation is dependent on third party funding. The litigation funder has been disclosed as a company called PLF Services Ltd (PLF). It is uncontested that the sole shareholder of PLF is Arkansas Trustees Ltd, the sole shareholder of which is another company, Touchstone Trustees Ltd (Touchstone). The directors of the companies are two solicitors who provide professional trust services using Touchstone. All the companies share the same company address and registered office.

[4] It is Mr Boult's case that the liquidators have failed to discharge their responsibility to disclose the identity of the entity funding the litigation, as opposed to that person's nominee, and that active steps appear to have been taken to disguise that person's true identity. The liquidators' response is that they have complied with their obligations by disclosing the name of the litigation funder and, as required, the location of that entity and its amenability to the jurisdiction of the New Zealand courts.

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1 By order of this Court on 21 April 2016.

[5] In support of their respective positions, both parties rely upon the Supreme Court's decision in *Waterhouse v Contractors Bonding Ltd* .[2]

Waterhouse

[6] The issue before the Supreme Court in *Waterhouse* was whether the funded party should be required to disclose the litigation funding agreement to the non-funded party and, if so, on what terms. In deciding that issue, the Supreme Court held that on the issuing of proceedings, the funded party was required to disclose the fact that there is a litigation funder, the identity and location of the funder and its amenability to the jurisdiction of the New Zealand Courts. It left open the possibility of the Courts ordering disclosure of the funding agreement where its terms may be relevant to particular applications.[3]

[7] In drawing these conclusions, the Supreme Court rejected the proposition that it was the role of the courts to act as general regulators of funding arrangements, and that it certainly was not the courts' role to give prior approval to such arrangements, at least in cases not involving a representative action.[4] The Supreme Court observed that it was the courts' function to adjudicate on any applications brought before them in a proceeding.[5] In that regard, the Supreme Court identified three types of applications where the existence and terms of a litigation funding arrangement had some relevance. The Court accepted that the identity of the litigation funder was relevant to applications for security for costs and non-party costs which should be disclosed at the time the litigation is commenced. A non-funded party would also have to know the existence of a litigation funder in order to decide whether to make an application for a stay on abuse of process grounds.[6]

[8] In reaching its conclusions on the disclosure obligations of the funded party, the Supreme Court stressed that it was dealing in the appeal with the orthodox situation of third party funders who, as in that case, had no prior interest in the proceedings and

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2 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.
3 At [76](a)-(e).
4 At [28] and [76](f).
5 At [29].
6 At [67].

whose remuneration is tied to their success and/or who have the ability to exercise some form of control over the conduct of the proceeding.[7]

The parties' respective arguments

Mr Boult

[9] Mr Weston QC on behalf of the applicant submitted that it was evident that the present case was not the ordinary situation of a third party funder, and that it was apparent from the structuring of PLF that it is but a nominee. The entity that is truly funding the litigation remains undisclosed. He submitted that the identification of PLF as the litigation funder did not meet the Supreme Court's requirements, as set out in *Waterhouse*. A link was drawn with Mr Boult's public profile. It was submitted that he has attracted criticism not only in relation to the insolvency of the companies but also in his role as Mayor of the Queenstown Lakes region. Mr Weston submitted that it is "a distinct possibility" that the person funding the litigation may be motivated by reasons that are other than commercial. When combined with what appear to be the steps taken to disguise the identity of that funder, he submitted there are proper grounds to require the liquidators to disclose the "real parties" to the litigation, as that term was used by the Supreme Court in *Waterhouse*.[8]

[10] Against that background, reliance was placed on the Supreme Court's identification of the type of applications where the existence and terms of a litigation funding arrangement may have relevance. In particular, the Court's jurisdiction to stay a proceeding on the basis of abuse of process. The Supreme Court held that the non-funded party would have to know of the existence of a litigation funder before it can decide whether to make an application for a stay on abuse of process grounds.[9] Further, that as a matter of principle, it considered that the courts and the other party or parties were entitled to know the identity of the "real parties" to the litigation.[10]

[11] Mr Weston emphasised that the application did not allege there had been an abuse of process but that his client was presently unable to properly assess whether

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7 At [24] and [76](a).
8 At [68].
9 At [67].
10 At [68].

such an application was appropriate because he lacked the fundamental information regarding the identity of the funder to make that assessment. He submitted that deficiency conflicted with the reasoning of the Supreme Court in *Waterhouse*, and that the liquidators were therefore in breach of their initial disclosure obligations when issuing the proceeding to identify the actual funder of the liquidators' litigation.

[12] The first defendant, Mr Mettrick, while not a party to the application was, without opposition, briefly heard in support of that argument. Mr Peers stressed certain policy considerations regarding the need to identify third party funders, particularly those with a non-commercial interest in the litigation. He referenced examples of regulatory obligations which required the identification of persons behind the veil of incorporation who control or enjoy beneficial ownership of certain entities.[11]

The liquidators

[13] The liquidators reject they have breached their obligations of disclosure and maintain the matters they have disclosed, which include the funding agreement itself, exceed the requirements set down in *Waterhouse*. Additionally, they have offered security for costs, which it was submitted largely rendered the relevance of the details of the litigation funding irrelevant.[12] Mr Colson on behalf of the liquidators submitted that Mr Boult is engaged in a fishing expedition, that he had provided no evidence himself of his concerns regarding the motives for the litigation and that, in any event, his reliance on *Waterhouse* is misplaced because it is not authority for the proposition that the disclosure of the type he seeks is required by the liquidators.

[14] Mr Colson was critical of the reliance the applicant placed on the Supreme Court's reference in its judgment to "real parties", which it was submitted was simply

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[11] See criteria in Overseas Investment Act 2005, s 15(2)(a)-(c) for establishing who has control of the person seeking to make an overseas investment (and therefore those persons subject to the "good character" test); definition of "associate" under r 4 of Takeovers Code as approved under the Takeovers Regulations promulgated by Order In Council pursuant to s 28(a) of the Takeovers Act 1993; "associated persons" rules in the Income Tax Act 2007, subpart 7B; and the definition of "beneficial owners" in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 5.

[12] *Patel v Patel* [2014] NZHC 1744 at [37]; *White v James Hardie New Zealand* [2019] NZHC 188 at [23].

part of the reasoning of the Court as to why a funded party must disclose that they are funded and the identity of the funder. He argued that it did not constitute "a category of information requiring disclosure". It was noted that the Supreme Court had not included such a concept in the summary of its conclusions setting out its particular findings on the issues it had considered.[13]

[15] Mr Colson argued that if the Court had intended to create some new category of disclosure it would have analysed and explained what it meant by the term "real parties" in some detail, and provided guidance as to how it was to be applied, and the ambit of such a disclosure obligation. He submitted the phrase was inherently subjective, which he sought to highlight by reference to the nature of the orders sought by Mr Boult which referenced such terms as entities who had "control", or who "exercised any decision-making" on the part of the funder.

[16] The liquidators submitted that if such a new disclosure obligation was to be applied, it would logically extend to all litigation, whether funded or otherwise. Mr Colson observed that the Supreme Court had narrowed the amount of information required to be disclosed from that approved by the Court of Appeal. In that regard he noted that, contrary to that Court's position, the Supreme Court held that the financial standing of the funder need not be disclosed because security for costs would provide sufficient protection to the other party. Similarly, no obligation was imposed to disclose the terms by which funding could be withdrawn, because that would provide a tactical advantage to the non-funded party.[14]

Analysis

[17] As I have already noted, both parties argued that *Waterhouse* answered the issue to which the application gave rise in their favour. Mr Boult maintained he was entitled to know the identity of the "real parties", as that term was referred to in the Supreme Court's decision.[15] In contrast, the liquidators' maintained the case explicitly

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13 *Waterhouse*, above n 2, at [16].

14 *Waterhouse,* above n 2, at [71]. However, the Supreme Court left open the possibility that disclosure of the terms of withdrawal of funding may be appropriate in some situations, including if the terms in some way give legal control over the proceeding to the funder and their potential relevance to an application for security for costs, at [72].

15 At [68].

laid down the disclosure obligations of the funded party, and that they had complied with those requirements. In my view, neither approach provides a complete answer.

[18] In *Waterhouse,* the Supreme Court emphasised that, for the purposes of that appeal, it was dealing with the situation of third party funders who, as in that case, had no prior interest in the proceedings and whose remuneration was linked to the success of the proceeding and/or who have the ability to exercise some form of control over its conduct.[16] Initially, Mr Boult placed some reliance on the terms of the funding agreement in support of his argument. However, a later iteration of the agreement was provided. It is not apparent, at least on the face of the agreement, that it is other than a commercial arrangement that has been entered into between the liquidators and the funder.

[19] Mr Weston submitted that even in respect of the amended agreement, the funder retained significant control over the litigation. However, the short point is that the terms of the agreement have been disclosed. Insofar as they may be a potential source of concern and may give rise to argument as to a possible abuse of process in the form of an impermissible assignment of a cause of action to a third party, those arrangements have been disclosed.[17] There is presently no impediment to such an argument being ventilated.

[20] In amplification of the liquidators' argument that the Supreme Court's reference to "the identity of the real parties" is simply part of the reasoning of the Court as to why a funded party should have to disclose the fact and identity of the funder, Mr Colson submitted that the reference was drawn from the Court's analysis of the Privy Council's decision in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* (*Dymocks*).[18] When discussing the relevance of the terms of a litigation funding arrangement to an application for costs against a non-party, the Board outlined the circumstances where third party funders could become liable for a costs order.[19] These included where the litigation would not have been undertaken without the funder's involvement, and where the third party not only funds the proceedings but

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16 At [24].
17 *Waterhouse*, above n 2, [57] and [76](e).
18 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145.
19 At [20] and [25].

substantially controls or benefits from them.[20] In such cases the Board remarked that the non-party is not so much facilitating access to justice by the party funded as gaining access to justice for the funder's own purposes. In the words of the Privy Council, "[h]e himself is the 'real party' to the litigation...".[21] This is to be contrasted with the "pure" or "altruistic" funders who have no personal interest in the litigation and do not stand to benefit from it or seek to control its course.

[21] I accept the Supreme Court's use of the term "real parties" in *Waterhouse* is sourced from *Dymocks*, which was limited to the question of costs awards against non-parties, including litigation funders, and that it forms part of the reasoning which supports the Court's conclusions regarding the information that funded parties may be required to disclose and the timing of such disclosure. However, the term was applied in a wider context when the Supreme Court, having made reference to the applications in respect of which the existence of a litigation funder may be relevant, stated:

> [68] In addition, as a matter of principle, we consider that the courts (and the other party or parties) are entitled to know the identity of the "real parties" to the litigation.

[22] Care is required as to how much weight can be afforded to this more general proposition put forward "as a matter of principle" because the Court's observation was necessarily limited to the issue that was before it and which it was seeking to address at that time. The Supreme Court's conclusion that the non-funded party was entitled to know the "real parties" to the litigation was made in the context of deciding what information regarding a third party funding arrangement should be disclosed to the non-funded party. The question that arises in the present case is not the identification of the "real party" as between the funded party in whose name the action is being brought and the litigation funder, but the question of the identity of the entity that is *truly* funding the litigation.

[23] That issue did not arise in *Waterhouse*, and both parties' reliance upon that case is qualified as a consequence. The liquidators emphasised the absence of the type of "category of information" for which Mr Boult contends in the Supreme Court's careful

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20 *Waterhouse*, above n 2, at [64].
21 At [25](3).

summary at the end of its judgment of the details required to be disclosed by the funded party.[22] However, such an obligation was neither considered by the Court of Appeal nor argued before the Supreme Court. It did not arise as an issue in the circumstances of that case.

[24] I do not accept Mr Colson's argument that the disclosure requirement sought by Mr Boult would logically apply to all litigation. A plaintiff in bringing its cause of action would necessarily have to disclose the narrative upon which it is based in its pleading. A necessary prerequisite to a successful claim is the linkage between the named plaintiff in which the proceeding is brought and the allegations upon which that claim rests. Absent that connection the claim will fail. However, I accept there is potential difficulty in identifying with precision the particular entity which should be accepted or recognised as the "real party" or, as Mr Weston put it, the "economic party" who stands behind the litigation. As Mr Colson observed, how far down the "chain" must one travel to find this "economic party"?

[25] The line may be difficult to draw. Mr Colson argued that if the application was granted it would create a precedent that funded parties would be under an obligation to disclose a spectrum of potential entities. These may include the ultimate legal or beneficial owner of the funder; the entity from which the funds used in the litigation have ultimately been sourced, or possibly the names of officeholders or management who have a decision-making role in respect of the proceeding. It was submitted this would create difficulties in practice. Funders may have complex and everchanging shareholdings and external funding arrangements involving financial institutions. Taken to its logical end, it was submitted the application could potentially extend to a financial institution, or even its depositors.

[26] Mitigation of these potential difficulties may lie with the making of appropriately worded orders but, as earlier noted, the liquidators argue that the type of subjective descriptors sought to be used in the current draft orders are problematic. The proposed orders which refer to the identification of persons who exercise

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22 At [76].

"control" and/or have a "decision-making" role lack objective precision and may be unworkable.

[27] I consider these concerns are well-founded. However, aside from the critique of the proposed wording of the particular draft orders in this case, those considerations tend to underline the need for caution before widening the category of information required to be disclosed as a matter of course by funded parties. In large measure they provide good reason for not making any further standard rules of disclosure of the type the Supreme Court set out in *Waterhouse.* It is an aspect which is relevant to the present application but I do not consider such difficulties should prevent the Court from considering the merits of additional disclosure of the type sought in the circumstances of the individual case.

[28] I acknowledge the absence of evidence provided by Mr Boult regarding his concerns and suspicions as to the motivation of persons who may have been instrumental in funding the litigation. While the concerns that have been expressed through counsel no doubt have a good faith basis, in the absence of an evidential foundation, the weight that can be afforded to Mr Boult's personal position is limited. I do not overlook Mr Weston's submission that, at this stage in the proceeding there is no abuse of process application before the Court, and that the information is sought because it is viewed as an appropriate and essential preliminary step to allow Mr Boult to consider whether any such prospective application should be advanced. However, as I have already noted, subject to argument regarding the funder's level of control, the funding agreement does not appear to be other than of a commercial nature.[23]

[29] Mr Colson drew my attention to case law which he submitted demonstrated that any prospective abuse of process application based upon the ulterior motives of those funding the litigation could only ultimately fail. The motivations of persons associated with the funding of the litigation through PLF could not, it was submitted, be imputed to the liquidators on any principled basis. They are bringing the claim for the benefit of unsecured creditors and are officers of the Court.[24] Reliance was placed

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[23] Above, at [17].

[24] *Strategic Finance Ltd (in rec & in liq) v Bridgman* [2013] NZCA 357, [2013] 3 NZLR 650 at [108].

on observations made by Bridge LJ of the English Court of Appeal in *Goldsmith v Sperrings Ltd*, which doubted whether a litigant with a genuine cause of action who could be shown to also have an ulterior purpose to achieve a desired byproduct from the litigation, could be barred from proceeding as a result.[25]

[30] Mr Colson submitted that Bridge LJ's opinion had been cited with approval by the High Court of Australia and by this Court.[26] Counsel also referred to the observations of the learned authors of the *Law of Torts in New Zealand*, who noted that "[c]ertainly, the genuine pursuit of a good cause of action for reasons of spite could hardly be an actionable tort".[27] It followed, in Mr Colson's submission, that even if the funder has non-financial motives, as Mr Boult speculates, that would not be of any consequence.

Decision

[31] Mr Colson's analysis was put forward to meet that part of Mr Boult's argument which relied upon the relevance of the identity of the litigation funder to an application for abuse of process. However, it does not address the more fundamental question which arises in the circumstances of this case as to whether the true identity of the non-party funding the litigation should be disguised not just from the parties being sued but the Court itself. It appears from the way the vehicle for the funding has been structured that it has been specifically designed to achieve that outcome. PLF is not a known litigation funding company and a reasonable inference can be drawn from the structuring of PLF and its related companies through the use of professional trustees, that the identity of the funder(s) is being deliberately concealed from the defendants and from the Court. It was not contended otherwise.

[32] In *Waterhouse*, the Supreme Court held that it was not the role of the courts to act as general regulators of litigation funding arrangements.[28] The role of the courts is to adjudicate on any applications brought before them in a proceeding.[29] However,

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25 *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (CA) at 503.
26 *Williams v Spautz* [1991-1992] 174 CLR 509 at 522; *Solicitor-General v Siemer* HC Wellington CIV-2010-404-8559, 13 May 2011 at [63].
27 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at 1071.
28 *Waterhouse*, above n 2, at [28].
29 At [29].

those statements do not qualify the jurisdiction of this Court to protect its own processes and to ensure they are not abused. This was explicitly recognised by the Supreme Court when it accepted that the power under the High Court Rules or the inherent powers of the Court to stay a proceeding for abuse of process is not limited to the narrow tort of abuse of process.[30] The Court's jurisdiction extends to preventing misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.[31]

[33] The categories of the kinds of circumstances in which the Court may have a duty to exercise its power to protect its own processes are not proscribed.[32] In *Waterhouse*, the Supreme Court cited with approval the decision of the majority of the High Court of Australia in *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd*, which identified a number of categories of conduct that would attract the intervention of the Court on abuse of process grounds.[33] This included proceedings where the process of the Court has not been fairly or honestly used but is employed for some ulterior or improper purpose, or in an improper way. While there is no suggestion that the liquidators' actions are other than bona fide in bringing their claims against the former directors of the companies, the Court's obligation to prevent an abuse of process in relation to judicial proceedings extends not just to the conduct of a party but also to that of a non-party.[34]

[34] As previously recognised, funding arrangements that amount to an assignment of a cause of action to a third party funder in circumstances where that is not

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30 The bringing of proceedings for an ulterior purpose (such as extortion or oppression) or some collateral advantage for which the legal process is not designed. See Stephen Todd "Abuse of Legal Procedure" in Todd, above n 27, at [18.5.01].

31 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536, cited in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [61], per Elias CJ, Gault and Keith JJ, and at [165], per Tipping J.

32 Above n 31.

33 *Jeffrey & 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. See also *Price Waterhouse Coopers v Walker & Ors* [2017] NZSC 151, [2018] 1 NZLR 735 at [58].

34 *Waterhouse*, above n 2, at [32], citing *Jeffrey & Katauskas Pty Ltd*, above n 33, at [28], citing *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27, (2006) 226 CLR 256 at [14], per Gleesen CJ, Gummow, Hayne and Crennan JJ.

permissible can, without more, amount to an abuse of process.[35] In assessing whether such funding arrangements amount to an impermissible assignment, the Court can have regard to the funding arrangements between the funder and the funded party. That will include an assessment of the level of control able to be exercised by the funder and the profit share of that entity.[36] Importantly, it is an issue that can be assessed from the terms of the disclosed agreement. However, the Court's wider jurisdiction to protect its own processes from abuse may be compromised if, in the situation of funded litigation, the non-party funder is permitted to be concealed from the non-funded party and, importantly, from the Court by the employment of a nominee company.

[35] The Supreme Court held in *Waterhouse* that the non-funded party would have to know of the existence of a litigation funder before it can decide whether to make an application for a stay on abuse of process grounds.[37] It must follow that to make an informed decision about whether to take such a course the identity of the funder is required to be known. Where that identity is being suppressed not only is the non-funded party's ability to make a proper assessment qualified but the jurisdiction of the Court to ensure its processes are not being abused is undermined.

Result

[36] In the circumstances of the present case, I consider the defendant and the Court are entitled to greater information regarding the identity of the litigation funder beyond the name of the nominee company, PLF. In principle therefore, I consider Mr Boult's application should succeed.

Orders

[37] I have acknowledged the difficulties regarding the making of appropriate orders that give effect to a finding that Mr Boult's application should succeed. Various

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35 *Waterhouse*, above n 2, at [57]; the origins of this jurisdiction to prohibit assignments of causes of action in tort and other personal actions (with certain exceptions) had its origins in the torts of maintenance and champerty; *Waterhouse*, above n 2, at [57], citing Stephen Todd "Parties" and Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers Ltd, Wellington, 2013) ch 23 at [23.12].

36 At [57].

37 At [67].

formulations have been suggested by Mr Boult in an attempt to obtain comprehensive disclosure of the details of the "natural person(s)" who may ultimately carry the burden of funding the litigation. However, such orders would have to be premised on me being satisfied that there are natural persons who stand behind the litigation who are funding the liquidators' claim. At this stage, that can only be a matter of speculation.

[38] To illustrate the point, on the known facts it remains possible that an otherwise recognised "arm's length" litigation funder which considers that it is in its interests to remain anonymous may be providing the funding for commercial purposes. Disclosure of that entity would not, without more, require the furnishing of information about natural persons who have a beneficial interest in the financial returns of that company, or who control or are involved in its decision-making or are otherwise responsible for its funding.

[39] I consider the following orders should suffice in the circumstances. The liquidators are to disclose to Messrs Mettrick and Boult:

(a) the person(s) beneficially entitled to the shares in PLF Services Ltd and Arkansas Trustees Ltd;

(b) the person(s) beneficially entitled to the *Services Fee* which PLF is entitled to receive from the *Resolution Sum* as those terms are defined in the Litigation Funding Agreement of 14 December 2016 between PLF and the companies; and

(c) the location of the person(s) identified in (a) and (b) and those person(s) amenability to the jurisdiction of the New Zealand courts.

[40] Mr Colson submitted that it is conceivable that the liquidators may not know this information. He noted they have no right under the funding agreement to either request or require such information. In the absence of being able to obtain the information, it was submitted the Court should not and cannot make orders that are incapable of being enforced.

[41] Whether the liquidators possess the information the subject of the orders or have the means to acquire such information is within their knowledge. No evidence was filed by the liquidators nor any representation made on their behalf that they did not have such knowledge or would be unable to access such information. Having regard to the details of the orders sought in Mr Boult's notice of application, it would have been my expectation that the liquidators, as officers of the Court, would have informed me on the hearing of the application if they were not able to give effect to the proposed orders being sought, lest the Court be placed in the position of making orders that cannot be enforced. As experienced liquidators, I proceed on the basis that they would not allow that situation to arise.

[42] In the event that confidence is misplaced, the liquidators will need, as a matter of urgency, to bring that state of affairs to the attention of the Court. As a precaution, the orders at [39] are made subject to any such advice being communicated to the Court within three working days from the release of this judgment. Thereafter, absent any such notice, the orders will issue.

[43] If the liquidators give notice of being unable to comply with the orders because of a lack of knowledge or an inability to obtain such knowledge, that must be considered as an acknowledgment that the identity of the funder beyond the nominee company, PLF, is unknown to the funded party. Messrs Mettrick and Boult will be entitled to proceed as they see fit on the basis of that concession.

Costs

[44] As the successful party on the interlocutory application, Mr Boult is entitled to costs in the ordinary way on a category 2B basis.

Solicitors:
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Wynn Williams, Christchurch