IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2428
[2016] NZHC 2400

IN THE MATTER	of GN Networks Limited (in liquidation)
IN THE MATTER	of Sections 301, 302 and 304 of the Companies Act 1993 and s 237 of the Insolvency Act 2006
IN THE MATTER	of the Declaratory Judgments Act 1908
BETWEEN	KENNETH PAUL DAY Plaintiff
AND	THE OFFICIAL ASSIGNEE AS LIQUIDATOR OF GN NETWORKS LTD (IN LIQUIDATION) First Defendant
	BABBELBEK FINANCE LIMITED Second Defendant
	ANTHONY JOHN McCULLAGH and STEPHEN MARK LAWRENCE Third Defendants
	SHIPWRECK TRADERS LIMITED Fourth Defendant

Hearing:	16 and 19 September 2016
Counsel:	MJ Matthew for plaintiff KM Wakelin for first defendant AE Simkiss and S Bao for second defendant
Judgment:	10 October 2016

JUDGMENT OF FAIRE J

This judgment was delivered by me on 10 October 2016 at 10 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar ..... Date.....

Contents

The application

[1] The second defendant applies for orders which in summary are as follows:

(a) That the plaintiff's statement of claim be struck out in its entirety as an abuse of process because the bringing of the proceeding and the funding arrangement amount to maintenance and champerty. In the alternative, the second defendant seeks an order that the proceeding be stayed on the same grounds;

(b) That portions of the statement of claim be struck out on the grounds of issue estoppel because they plead matters which have been determined by the High Court in a final judgment given in *Williams v Hill*;[1]

(c) That portions of the statement of claim be struck out because they do not properly plead fraud and there is insufficient support for the pleading of fraud against the second defendant;

(d) That a portion of the statement of claim that attempts to invoke the provisions of the Insolvency Act 2006 be struck out because there is no proper basis for invoking the provisions of that Act; and

(e) An increase in the current security for costs in respect of the disposal of the remaining parts of the statement of claim.

[2] The second defendant also sought an order striking out the application for declaratory relief contained in the statement of claim. That relief has since been abandoned by the plaintiff.

Background

[3] Throughout this judgment reference will be made to a number of entities by either initials or by short form reference as follows:

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[1] *Williams v Hill,* HC Auckland CIV-2010-404-505, 4 August 2010.

(a) GN Networks Ltd ("GNN")

(b) ASOTV Wholesalers Ltd ("ASOTV")

(c) Retail Distribution Ltd, now known as Shipwreck Traders Ltd ("RDL")

(d) Babblebek Finance Ltd ("Babblebek")

(e) Solpro Ltd ("Solpro").

[4] In the course of the hearing counsel conferred and as a result provided the Court with a summary of the relevant background facts, which I adopt and which I now set out.

The "rescue"

1. In or around early 2007 GNN and its subsidiaries (GN Group), and in particular, ASOTV fell into financial difficulty.

2. In May 2007 the GN Group sold their business and all intellectual property to RDL.

3. Babbelbek agreed to provide finance to RDL, GNN and ASOTV, taking over the then secured creditor's (ANZ) position and its general security interests and guarantees. Babbelbek had the ability to appoint an Administrator to operate the bank accounts established by the GN Group borrowers.

Management Services Agreement

4. All in the GN Group companies entered into a Management Services Agreement (MSA) under which:

    a. RDL engaged the GN Group to provide management services.

    b. RDL agreed to pay a management fee to GNN for those services based on 80% of RDL's gross margin.

    c. RDL and GNN would keep each other fully informed of matters arising out of the MSA.

    d. GN shall report directly to John Williams at RDL.

RDL

5. At all relevant times RDL was owned by Logan Sears on trust in equal shares for the benefit of:

    a. The trustees of the KCW Trust;

    b. John Williams;

    c. Greg Barclay; and

    d. Employees of GNN, including Rajendra Ranchhod.

6. RDL's directors were:

    a. At all relevant times John Williams was a director and Greg Barclay was a de facto director.

    b. Between 28 November 2007 and 30 August 2010, Jeremy Kirk-Smith was a director.

Babbelbek

7. At all relevant times Babbelbek was owned by the trustees of the KCW Trust.

8. At all relevant times John Williams was a director of Babbelbek and Greg Barclay was a de facto director.

9. Babbelbek was not a shareholder of RDL.

Solpro

10. A company beneficially owned by John Williams that provided administration services to RDL and Babbelbek.

GNN/ASOTV

11. At all relevant times Rajendra (Raj) Ranchhod was the sole director of GNN and ASOTV.

12. GNN had a number of shareholders, one of which was Raj Ranchhod.

The rescue failed

13. The business of GNN and RDL did not go well.

14. RDL and GNN remained insolvent.

15. In 2008, an unsecured creditor of GNN applied to liquidate it.

16. Babbelbek appointed a receiver to GNN on 21 November 2008 as a secured creditor. It claimed to be owed $1,966,704m.

17. There was a dispute between RDL and the receivers of GNN about the amount of management fees owing by RDL to GNN.

18. On 5 March 2009, under a settlement agreement, the receivers agreed to a payment of $1.48m from RDL, which was paid to Babbelbek as secured creditor.

19. The payment of 1.48m was for unpaid management fees through to 4 May 2008. Settlement was without prejudice to the ability of the liquidator of GNN to dispute any amounts said to be owed above the amount paid.

20. Babbelbek claimed the balance owed to it in the liquidation of GNN ($480k).

21. The Official Assignee as liquidator declined to make a decision as to whether to accept or reject Babbelbek's creditor claim (as he was entitled under s 254 CA 93).

22. No creditors agreed to indemnify or fund the liquidation to investigate Babbelbek's claim.

23. Mr Ranchhod did not take up the offer of the Official Assignee of an assignment of rights so that he (a bankrupt) could bring a claim.

[5] To that summary I add the following:

(a) GNN was placed into liquidation on 25 March 2009 on the application of Mr Alan Towers, a creditor. It remains in liquidation;

(b) The plaintiff brings his claim as an unsecured creditor of GNN relating to services and expenses provided to GNN and its subsidiary, GN Automotive Ltd, in the period 1 May 2006 to 31 March 2007;[2]

(c) By a deed of assignment of debt dated 11 September 2015, Mr Towers assigned all of his interests in his debt, which was owed by GNN as an unsecured creditor, to the plaintiff; and

(d) Mr Ranchhod was adjudicated bankrupt on 17 September 2009.

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2 The plaintiff's status as a creditor is disputed by the second defendant.

Affidavit of Jing-Jing Lang, sworn 2 September 2016

[6] Objection was taken to my reading this affidavit because it had not been served in time. Ms Simkiss did not press that I read it. Accordingly, I ruled that I did not read it for the purpose of this application.

Procedural history of the proceeding

[7] I will now set out the procedural history, which makes very unhappy reading. Unfortunately, the matters that I am now required to deal with may not necessarily advance the matter either to a conclusion or to the position where an early fixture can be allocated for the proceeding. The history is also the reason why, at the conclusion of this judgment, I make a request to the Chief High Court judge that this file be assigned to a judge for case management for its disposal.

[8] The plaintiff commenced this proceeding by filing a statement of claim on 12 September 2014. The Official Assignee, as liquidator of GNN, was named as defendant. The prayer for relief required the Official Assignee to modify the decision to neither admit nor reject a claim made by Babbelbek Finance Ltd (the current second defendant) as a creditor and to reject it. The basis of the claim was pleaded to be in reliance on s 302 of the Companies Act 1993 and s 237 of the Insolvency Act 2006.

[9] The plaintiff filed, with that statement of claim, a without notice application for directions. He sought an order directing service on the Official Assignee as liquidator of GNN, the current third defendants as receivers of GNN and the current second defendant. The application asserted that the proceedings concerned an application under s 284(1) of the Companies Act 1993 which permits, if leave is granted, a creditor's application for an order reversing or modifying an act or direction of a liquidator and s 304, which requires a liquidator to admit or reject a claim.

[10] On 19 September 2014, Associate Judge Bell dealt with the without notice application on the papers. He granted leave to the plaintiff to proceed under s 284 of the Companies Act. His minute further recorded the following:

> [3] In his proceeding, the plaintiff is challenging the secured debt claimed by Babbelbek Finance Limited. At this stage, I am not sure whether the plaintiff has chosen quite the correct proceeding in which to make that challenge. I accept that the matter obviously arises in the liquidation of the company. I invite the plaintiff to review the statement of claim.
>
> [4] As the plaintiff intends to seek orders that will bind both the receivers and Babbelbek Finance Ltd, the appropriate procedure is to join them as defendants. Their presence is required before the Court to determine the matters put in issue by the plaintiff. Accordingly they should be named as defendants as well. As a consequence they will need to be served also.
>
> [5] Accordingly I give directions for an amended statement of claim to be filed and served, naming both the receivers and Babbelbek Finance Limited as defendants. All defendants are to be served.

[11] On 23 September 2014, the plaintiff filed an amended statement of claim which purported to comply with Associate Judge Bell's minute.

[12] The plaintiff next filed a memorandum on 4 November 2014. The memorandum advised the Court that the first, second and third defendants had conferred with the plaintiff. The parties had agreed that a further amended statement of claim would be filed, which provided additional particulars sought by the second defendant and removed references to ss 284 and 304 of the Companies Act 1993. It was anticipated that that document would be filed and served by 7 November 2014. Counsel for the plaintiff requested that the matter be placed in the Miscellaneous Companies List in December, by which time it was anticipated that the first, second and third defendants would have had an opportunity to file statements of defence to the further amended statement of claim.

[13] As anticipated in counsel's memorandum, a document entitled *Second Amended Statement of Claim*, which was dated 6 November 2014, was duly filed on 10 November 2014.

[14] In the meantime, and in response to the plaintiff's counsel's memorandum, Associate Judge Doogue, dealing with the matters on the papers, issued a minute on 6 November 2014 in which he placed the proceeding in the Miscellaneous Companies List on 12 December 2014. He then recorded:

> The plaintiff is to file and serve the amended statement of claim by 13 November 2014. Statements of defence are to be filed and served by 11 December 2014. At the next mention, the parties should be in a position to address the Court concerning any interlocutory orders that are required. They should confer on that issue well in advance of the next mention.

[15] A memorandum was filed on 8 December 2014 in which the Court was invited to give directions that:

(a) The first, second and third defendants are to have until 23 January 2015 to file their statements of defence and any affidavits in support; and

(b) The matter is to be allocated a new mention date after 23 January 2015.

[16] Associate Judge Christiansen dealt with that matter on the papers and made orders relating to the filing and service of the statements of defence as sought and directed that the matter be placed in the Miscellaneous Companies List on 13 March 2015.

[17] The next development occurred with the plaintiff filing a memorandum on 9 March 2015, which advised the Court that a further amended statement of claim was to be filed and that the first, second and third defendants have further time, as set out in the High Court Rules, to file their statements of defence and that the matter be removed from the Miscellaneous Companies List on 13 March 2015. That memorandum was dealt with by Associate Judge Sargisson, who made orders as requested in the plaintiff's memorandum and directed that the matter be listed in the Miscellaneous Companies List on 15 May 2015.

[18] The next development occurred with the filing of a document entitled *Third Amended Statement of Claim* on 4 May 2015. A memorandum of counsel was filed on 11 May 2015. It advised that the third amended statement of claim had been filed, none of the defendants had filed statements of defence with the agreement of the plaintiff, the third defendants had taken no steps and the plaintiff did not seek any form of relief against the third defendants and, finally, that the plaintiff and the

second defendant requested that the matter be removed from the Miscellaneous Companies List and be relisted in late July.

[19] Associate Judge Sargisson dealt with that matter on the papers and adjourned the proceeding listing it in the Miscellaneous Companies List on 17 July 2015.

[20] On 9 June 2015, the second defendant applied for security for costs. The Court was advised by memorandum that the parties had reached agreement on that issue and invited the Court to make the following orders by consent:

(a) That the plaintiff was to provide security for costs in respect of its claim against the second defendant in the amount of $30,000 to be paid into Court; and

(b) That the proceeding was to be stayed until such security was given; and

(c) That leave was to be reserved to the second defendant to apply to vary the amount of security at any time before the proceeding was determined.

Consent orders were made by Associate Judge Doogue on 10 July 2016.

[21] On 2 July 2015, the first defendant filed an appearance for ancillary purposes.

[22] The next development occurred with counsel for the parties filing a memorandum on 17 July 2015, which recorded that the plaintiff and the second defendant were endeavouring to resolve matters concerning particulars and discovery. It set out the position relating to the other parties. It invited the Court to remove the matter from the Miscellaneous Companies List on 17 July 2015 and allocate a date in September 2015. Associate Judge Bell dealt with the matter on the papers and vacated the call on 17 July 2015 and ordered that the matter be called on 4 September 2015.

[23] Following the filing of a joint memorandum, Associate Judge Bell removed the matter from the Miscellaneous Companies List on 4 September 2015 and directed a telephone case management conference on 3 December 2015. He directed that:

(a) The plaintiff was to file and serve a further statement of claim by 11 September;

(b) Statements of defence were to be filed and served within 20 working days of the new statement of claim being served; and

(c) Tailored discovery orders against the first defendant were made requiring the first defendant to file and serve an affidavit of documents by 30 October.

[24] The plaintiff filed a document called *Fourth Amended Statement of Claim* on 11 September 2015.

[25] There were yet further developments which were signalled to the Court in a joint memorandum of counsel filed on 28 September 2015. Associate Judge Bell dealt with that memorandum by a minute issued on 30 September 2015. He noted that the first defendant needed until 13 November 2015 to complete discovery. He noted that with respect to discovery between the plaintiff and the second defendant, counsel were to confer as to the making of a tailored discovery order and were to file and serve a joint memorandum before 13 October 2015 as to the form of order to be made. If the parties were unable to reach agreement, an application was to be filed before 13 October 2015 seeking directions as to discovery and pleading. He advised that the conference for 3 December 2014 would be retained.

[26] Counsel then filed memoranda: one from the plaintiff's counsel and one from counsel for the second defendant. Associate Judge Bell directed that the matter be listed in the Miscellaneous Companies List on 30 October 2015 to consider the position advanced in the memoranda, by a minute dated 27 October 2015.

[27] A joint memorandum was then filed by counsel. As a result, Associate Judge Bell made a non-party discovery order against Shipwreck Traders Ltd (Shipwreck) who, at that stage, was a not party to the proceeding. There were also directions for the filing and service of a further affidavit of documents and for a yet further amended statement of claim to be filed and served by 2 February 2016. The Judge set a time for a statement of defence to be filed and served, being 29 February 2016 and ordered that the matter be listed in the Miscellaneous Companies List on 16 March 2016.

[28] The next advice received by the Court concerned problems regarding compliance by Shipwreck with the order for discovery and the payment of its costs for same. Shipwreck instructed the second defendant's solicitors on the matter. I need not recount the resolution of this in detail, other than to record that on 16 March 2016 Associate Judge Bell ordered that the plaintiff pay Shipwreck's costs in complying with the order for discovery in the sum of $9,309.12 and he directed that production of the documents for inspection was not required until the costs were paid.

[29] A joint memorandum was filed on 28 April 2016. It referred to discovery issues. It requested that a Miscellaneous Companies List mention on 29 April 2016 be vacated and a new date be allocated. Associate Judge Doogue made orders in accordance with the joint memorandum on 28 April 2016. The Registrar acted in accordance with the Judge's direction and advised counsel that the matter would be listed on 1 July 2016.

[30] The next step was the filing, on 30 June 2016, of a document incorrectly entitled *Fourth Amended Statement of Claim* which was in fact the fifth amended statement of claim.

[31] Associate Judge Bell expressed, in a minute issued on 30 June 2016, his concern about the "spasmodic progress" of the proceeding and ordered an appearance on 1 July 2016.

[32] On 1 July, Associate Judge Bell made further orders and directions regarding the proceeding. He made an order joining Shipwreck as a defendant and ordered that all defendants, including Shipwreck, file and serve statements of defence by 29 July 2016. He set a time for the filing of affirmative replies as 12 August 2016. He noted counsel's advice that there were still some discovery issues and requested that they endeavoured to resolve them. He also noted that the second defendant wished to apply to strike out and/or seek summary judgment. He expressed the view that there might be some advantage in airing issues if a strike out/summary judgment application were made by the second defendant. He therefore set a time for such application to be filed by 29 July, notice of opposition and affidavits by 12 August, replies by 26 August and a hearing on 16 September 2016. In addition, he set a timetable for the exchange of submissions. He recorded issues which had been raised regarding Mr Ranchhod's position as a litigation funder and recorded that he did not intend, at that time, to give any directions regarding it. He recorded the position that if the case was not resolved by the applications to be heard on 16 September it was his hope that directions could be given for an early disposal of the proceeding.

[33] A further development occurred when the plaintiff filed the sixth amended statement of claim on 20 July. Counsel sought amendments to the directions given in relation to the interlocutory applications earlier referred to. That joint memorandum was placed in the Duty Judge List. Palmer J made orders in terms of the joint memorandum filed and confirmed the fixture for 16 September.

[34] The application and supporting papers were filed on 5 August. A notice of opposition was filed on 19 August with supporting affidavit and, as a result of a joint memorandum revised directions for the filing and service of submissions were then made by Associate Judge Bell on 5 September. The Court next received a document in draft form only containing tracked changes on 13 September, which is marked as *Seventh Amended Statement of Claim*. That was received less than three working days before the fixture.

The relevant statement of claim

[35] The hearing proceeded on the basis that the plaintiff would file a seventh amended statement of claim, a draft of which was provided to the Court on 13 September 2016. That document shows a number of tracked changes, where amendments have been made with a view to meeting the issues raised by the second defendant's application. With some adjustment to counsel's written submissions, the application proceeded as an application to strike out this draft seventh amended statement of claim.

[36] The plaintiff is an unsecured creditor of GNN. He pleads two causes of action against the second defendant. In the first cause of action he seeks:

> (a) Inquiring into the conduct of Babbelbek, as de facto director, manager or administrator of GNN during the period 31 May 2007 to 2 April 2009 under s 301(1)(a) of the Companies Act 1993;
>
> (b) An order requiring Babbelbek to repay and/or restore to GNN up to $1,421,551,00, being the amount received by it from GNN out of funds paid in by RDL in the receivership of GNN, in an amount sufficient to compensate GNN for Babbelbek's breaches of duty or trust, as pleaded in paragraphs 31 to 33 above, and/or to contribute such sum to the assets of GNN by way of compensation, together with interest, as the Court thinks just under s 301(1)(b) of the Companies Act 1993.

[37] In the second cause of action the plaintiff seeks an order directed at both the first and second defendants as follows:

> (a) An order rejecting Babbelbek's creditor claim under s 237 of the Insolvency Act 2006 and s 302 of the Companies Act 1993…;
>
> …
>
> (c) Such other orders or directions as the Court may, in its discretion, consider appropriate.

In each of the causes of action the plaintiff seeks costs against the second defendant.

The statutory basis for the relief sought in the statement of claim

[38] I look briefly at the statutory basis for each of the causes of action that are pleaded, before analysing the second defendant's application. The first cause of

action has as its basis, as is gleaned from the prayer for relief, s 301 of the Companies Act 1993. Section 301 provides:

> **301 Power of court to require persons to repay money or return property**
>
> (1) If, in the course of the liquidation of a company, it appears to the court that a person who has taken part in the formation or promotion of the company, or a past or present director, manager, administrator, liquidator, or receiver of the company, has misapplied, or retained, or become liable or accountable for, money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company, the court may, on the application of the liquidator or a creditor or shareholder,—
>
> (a) inquire into the conduct of the promoter, director, manager, administrator, liquidator, or receiver; and
>
> (b) order that person—
>
> (i) to repay or restore the money or property or any part of it with interest at a rate the court thinks just; or
>
> (ii) to contribute such sum to the assets of the company by way of compensation as the court thinks just; or
>
> (c) where the application is made by a creditor, order that person to pay or transfer the money or property or any part of it with interest at a rate the court thinks just to the creditor.
>
> (2) This section has effect even though the conduct may constitute an offence.
>
> (3) An order for payment of money under this section is deemed to be a final judgment within the meaning of section 17(1)(a) of the Insolvency Act 2006.
>
> (4) In making an order under subsection (1) against a past or present director, the court must, where relevant, take into account any action that person took for the appointment of an administrator to the company under Part 15A.

[39] The plaintiff relies on his status as a creditor to invoke s 301.

[40] What is more problematic is how the second defendant fits within the persons in respect of whom the section applies. The issue is not required to be addressed by the second defendant's application. The prayer for relief asserts that the second defendant is "a de facto director, manager or administration". The term "administrator" was added to s 301 with the legislative package that introduced the

voluntary administration regime, that is Part 15A, by the Companies Amendment Act 2006.

[41] The problem with the current statement of claim is that it is unnecessarily prolix, comprising approximately 209 paragraphs and subparagraphs, relating only to the first cause of action against the second defendant.

[42] The second cause of action seeks relief, which is primarily against the Official Assignee as liquidator of GNN, but includes the second defendant because the specific relief sought is rejection of the second defendant's proof of debt. This matter is the subject of express relief sought in the second defendant's application and accordingly will be further analysed at that time.

[43] I now consider each basis upon which orders are sought by the second defendant.

Is there an abuse of process justifying the strike out of the whole statement of claim because the bringing of the proceeding and the funding arrangement amount to maintenance and champerty?

[44] In the course of the hearing I granted leave to Ms Matthew to file and serve two further affidavits. They have a direct bearing on this issue. The first is an affidavit from the plaintiff. The second is an affidavit from the funder, Mr RB Ranchhod.

[45] The plaintiff, Mr Day, deposed:

(a) That the proceeding has been funded by Mr Ranchhod;

(b) He has read and agrees with the content of Mr Ranchhod's affidavit;

(c) Mr Ranchhod has been actively involved in every step in the proceeding;

(d) Mr Ranchhod dealt with the expert who was instructed;

(e) Mr Day retains the power to make all judgment calls in relation to the proceeding. That includes any direction as to the course of the proceeding and includes the power to discontinue the proceeding;

(f) Mr Ranchhod is not expecting any direct return except possibly to the extent that there might be a cost recovery;

(g) Unless the liquidator is able to claw back funds paid to the second defendant as a preferential creditor and unless all debts are satisfied by the liquidator, Mr Ranchhod personally does not stand to gain anything other than being able to presumably take GNN out of liquidation and pursue additional remedies;

(h) Mr Day expects Mr Ranchhod to honour his commitment to him to cover any adverse costs; and

(i) Mr Ranchhod is a very close personal friend.

[46] Mr Ranchhod has filed an affidavit in which he deposed as follows:

(a) He confirms that he is funding the legal costs and disbursements for the proceeding and that, except to the extent that there might be a cost award, he does not expect to get any direct return. In particular, he is not expecting Mr Day to pay him back;

(b) The position of his company's led to his financial ruin. He was adjudicated a bankrupt on a creditor's petition on 17 September 2009 with a result that all his interests vest in the Official Assignee;

(c) He has given an outline of the steps that he has taken since the collapse, including working with creditors' committee of GNN with a view to seeking that the second defendant prove its debt of $1,966,704;

(d) That he was informed by the liquidator of GNN that because he was a former bankrupt, he could not request the Court to make an order in terms of accepting or rejecting the debt of the second defendant;

(e) His purpose in attempting to resurrect GNN was the hope that he could reignite the business and challenge the debt of the second defendant because he claimed the second defendant did not have a proper foundation for alleging that its debt was a priority debt and that therefore it was a preferential creditor;

(f) The funds for this proceeding have come from money he has borrowed from friends and family;

(g) In the event that the claim is successful, any funds will go back to the liquidator first. Unless there are excess funds after paying all creditors' and liquidator's fees he does not personally stand to gain anything other than ensuring creditors have an opportunity of getting back their money;

(h) He has been assisting with the proceeding but does not have the power to control them; and

(i) The plaintiff, Mr Day, has been involved in all major decisions in respect of the proceedings and has the power to settle on any terms he likes with parties, or to discontinue the claim at any time.

[47] There are two separate issues that require consideration in relation to this ground. The first is the fact that Mr Day is being funded in this litigation by Mr Ranchhod and other bodies associated with him. The second is that Mr Day sues, in part, as an assignee of the creditor's rights of Mr Towers.

[48] The second defendant submits that the whole proceeding should be struck out because it is an abuse of the Court's process because:

(a) It amounts to maintenance and/or champerty because of the funding arrangement; and

(b) To the extent that the plaintiff relies on the assignment of debt dated 11 September 2015 from Mr Towers, that assignment is an assignment of a bare right to sue and is illegal and void as champertous.

[49] If only point 48(b) above is accepted for the purpose of the strike out application, the result would be that the strike out of paragraphs 2.1.2 and 2.3 of the seventh amended statement of claim would be ordered.

[50] The Court's jurisdiction to consider an application to strike out a statement of claim based on an abuse of process is contained in r 15 of the High Court Rules. The relevant parts of r 15.1 are as follows:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> …
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[51] The first issue to be resolved under this ground of strike out is whether Mr Ranchhod's funding of Mr Day's legal costs in relation to this claim amounts to maintenance and/or champerty and is an abuse of the process of the Court, which justifies either the striking out of the proceeding or the stay of the proceeding.

[52] It is helpful to refer to the definition of the torts of maintenance and champerty. The authors of *The Law of Torts of New Zealand* define them in the following way:[3]

> The tort of maintenance is committed where a person, without lawful justification, assists a party to a civil action to bring or to defend the action, thereby causing damage to the other party. Champerty is that form of maintenance in which the person giving the assistance does so in consideration of his or her receiving a share of anything that may be gained as a result of the proceedings.

[53] That said, it is important to record that the Court is not dealing with an action in maintenance or champerty. Rather, the Court is asked to determine whether it should intervene in this case and either strike out or stay the proceeding because of the funding arrangements that are in place. In *Waterhouse v Contractors Bonding Ltd* the Supreme Court had to consider the circumstances in which a litigation funding agreement could be an abuse of the Court's process.[4] Glazebrook J noted that in those Australian jurisdictions where the torts have not been abolished, stays have been granted to enable the funding party to modify the terms of its funding arrangement to the court's satisfaction.[5] Glazebrook J also observed that in England and Wales, where the torts of maintenance and champerty have been abolished, courts have interpreted the saving provisions of the legislation as requiring the courts to scrutinise agreements for maintenance and champerty although the Supreme Court's research showed that "most of the cases have allowed the funded party to proceed".[6]

[54] Ms Simkiss drew attention to the Court of Appeal decision in *Saunders v Houghton*.[7] That was a case involving a representative action and may therefore involve different considerations to that which applies to a proceeding commenced as authorised pursuant to r 4.24 of the High Court Rules. Although the relief sought by the plaintiff in this case could affect the position of other creditors of GNN, the proceeding itself has not been framed as a representative proceeding.

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3 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [18.4.01] (footnotes omitted).
4 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.
5 At [38].
6 At [39]–[40].
7 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331.

[55] In *Waterhouse v Contractors Bonding Ltd,* the Supreme Court declined to accept counsel's submission that the Court was required to exercise a general supervisory position over litigation funding arrangements for proceedings other than representative actions.[8]

[56] Even if one was to consider the application of *Saunders v Houghton* to this case, it is appropriate to record that Baragwanath J, who gave the judgment of the Court of Appeal, said:[9]

> We have concluded that, like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where:
>
> (a) the court is satisfied there is an arguable case for rights that warrant vindicating;
>
> (b) there is no abuse of process; and
>
> (c) the proposal is approved by the court.

[57] What is apparent in this case is that the second defendant has applied for, in respect of other matters, a partial strike out only. No attempt has been made to found a strike out case on the basis that there was no reasonable cause of action available to the plaintiff in any of the causes of action pleaded. The next point to make is that the funder, Mr Ranchhod, has no power of control over the proceeding and will not share in any profits except, perhaps, in the case of a favourable costs award. That remains, on the evidence placed before the Court, entirely in the hands of the plaintiff. No basis has therefore been made out to suggest that the arrangement would constitute champerty.

[58] The next issue is whether the arrangement constitutes maintenance. In *Body Corporate 16113 v Auckland City Council,* Heath J observed:[10]

> Maintenance may not operate to prevent litigation being pursued to its conclusion, but can give rise to a counterclaim based on the tort of maintenance.

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8 At [27].
9 At [79].
10 *Auckland City Council as Assignee of Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [12].

[59] The authors of *The Law of Torts in New Zealand* summarised the position:[11]

> The fact that proceedings are being maintained by another is not itself a defence to those proceedings, and as a general rule a court will not on this ground grant a stay at the suit of the other party to the proceedings. The maintenance of an action says nothing about the validity of that action. However, where more is involved than a concern as to costs, and where there may be the real potential for an abuse of the court's processes, a stay may sometimes be justified. But normally the remedy, if maintenance can be made out, is to bring an action for damages.

[60] I conclude that the fact the Mr Ranchhod is paying Mr Day's costs under an arrangement whereby he has no right to the fruits of the litigation and has no control of the litigation do not, in the circumstances of this case, justify a striking out of the entire proceeding because the proceeding is an abuse of process. Further, I can think of no specific additional requirements that the Court might impose on those funding arrangements that might justify a stay while those arrangements are put in place.

[61] The second defendant has submitted that there is no access to justice issue in this case which would justify the Courts' acceptance of what it says is maintenance or champerty. Given what I have stated above, I do not consider that it is necessary to consider that issue in detail except to note that the other alternatives referred to are not other means by which Mr Day could seek to vindicate his rights, but rather other people who may have been willing to bring an equivalent action.

Should that part of the statement of claim which pleads an assignment of the Towers debt be struck out?

[62] I now pass to consider the second aspect of the challenge to the proceeding based on maintenance and champerty. This is the assignment to Mr Day of the debt owed by GNN to Mr Towers. The issue here is whether that position adds a further consideration which might lead to a partial striking out of that part of the statement of claim that relies on the Towers debt for status to seek the relief sought under the relevant provisions of the Companies Act.

[63] Counsel acknowledged that the reason for the assignment was to cover any challenge to Mr Day's standing as a creditor of GNN and thus his entitlement to the

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[11] At [18.4.03] (footnotes omitted).

specific relief sought under the provisions of the Companies Act. Mr Towers had been the petitioning creditor in the application to wind up GNN. He is described in the seventh amended statement of claim as a judgment creditor of GNN.

[64] Pursuant to the deed dated 11 September 2015, Mr Towers assigned to the plaintiff all his rights as an unsecured creditor and as petitioning creditor in the liquidation of GNN, in consideration for the plaintiff agreeing to pay Mr Towers the next $30,000 he receives from the liquidator in the liquidation of GNN within seven days from the receipt of it.

[65] Ms Simkiss submitted that, in respect of this assignment, it is contrary to public policy to permit what, on its face, is a champertous assignment to be dressed up as a legitimate transaction. Counsel submitted that, viewed as a whole, the assignment is an assignment of a bare right to sue and, accordingly, is void as the law does not permit trading in causes of action.

[66] Ms Simkiss referred to the judgment in *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd.*[12] That case is distinguishable from the present proceeding in that the assignee in that case had no prior arguable pre-existing commercial interest in the matters that gave rise to the cause of action assigned at the time the proceeding was issued. Whether that proves to be the case in this proceeding will only be resolved at trial when the Court rules on Mr Day's status as a creditor. The Supreme Court has confirmed that assignments of a bare cause of action, subject to certain exceptions, are not permitted in New Zealand.[13] That position reflects the conclusion of the House of Lords in *Trendtex Trading Corporation v Credit Suisse.*[14]

[67] The House of Lords considered champerty and maintenance in relation to assignment in *Trendtex Trading Corporation v Credit Suisse*. Lord Roskill stated:[15]

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12 *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd* [2014] NZHC 1514, [2014] 3 NZLR 758.
13 At [57].
14 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL).
15 At 703.

> … an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance.

[68] Lord Roskill stated further:[16]

> 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 had a genuine commercial interest in taking the assignment and in enforcing it for his 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.

[69] Assignment of contractual rights was considered in *Brownton Ltd v Edward Moore Incuban Ltd*. The Court considered what Lord Roskill had meant by a 'genuine commercial interest".[17] In that case Sir John Megaw stated:[18]

> Looking, in accordance with Lord Roskill's injunction, at the totality of the transaction, one finds that, although the contracts between EMR and Man and between Man and Cossor are separate contracts, they arise out of the same commercial transaction. EMR are liable to Man for the damages caused by EMR's breach of contract which resulted in Man making their contract with Cossor. If Cossor were in breach of that contract with Man, whereby Man suffered all or part of the damages claimed by them in the action, it must follow that the loss suffered by Man would have been less if Cossor had duly performed their contract. Hence the damages payable by EMR would have been less. It is, of course, true that if Man had pursued their action themselves against both defendants and if both were held liable and damages were awarded, in some amount, against each, it would (subject to one possible, recondite, argument put forward on behalf of EMR based on R.S.C. Order 47 rule 1) be in the discretion of Man whether they executed the whole of their overlapping judgments against EMR or Cossor, or partly against one and partly against the other. But that does not, in logic or common sense, provide an argument against EMR having had, immediately before the assignment, a genuine commercial interest in taking the assignment, because so to do would, in certain events and to an unpredictable extent, reduce the amount of EMR's loss arising out of its contract with Man and the breach of that contract.

[70] As to the 'assignment of a bare right to litigate', Lloyd LJ stated:[19]

> Thus the difference between the House of Lords and the Court of Appeal in *Trendtex* comes to this: the Court of Appeal held that, subject to very limited exceptions, any cause of action for breach of contract is assignable, as being

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16 At 703.
17 *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499 (CA).
18 At 505–506.
19 At 507.

> in itself a 'property right', whether or not there is also a genuine commercial interest in enforcing the cause of action. The rule against assigning a bare right to litigate should, they held, be confined to personal claims, mainly in tort. The House of Lords, on the other hand, held that not every cause of action for breach of contract is assignable. Such a cause of action can only be assigned if the assignee has a genuine commercial interest in enforcing the claim. The prohibition against assigning a bare right to litigate should therefore be confined to cases where there is no such genuine commercial interest.

[71] The principles from *Trendtex* were summarised by Lloyd LJ as:[20]

> (i) Maintenance is justified, inter alia, if the maintainer has a genuine commercial interest in the result of the litigation. (ii) There is no difference between the interest required to justify maintenance of an action, and the interest required to justify the taking of a share in the proceeds, or the interest required to support an out and out assignment.(iii) A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine commercial interest. (iv) In judging whether the assignee has a genuine commercial interest for the purpose of (i) - (iii) above, you must look at the transaction as a whole. (v) If an assignee has a genuine commercial interest in enforcing the cause of action it is not fatal that the assignee may make a profit out of the assignment. (vi) It is an open question whether, if the assignee does make such a profit, he is answerable to the assignor for the difference.

[72] In this case, Mr Day has taken the assignment in order to settle the dispute of whether he is a creditor and to put his standing beyond reproach. Mr Day's claim was already in progress when Mr Towers assigned his debt to Mr Day. Mr Day thus obtained an additional right to that which he pleads he already had at the time of the assignment. I do not consider he was purchasing a bare right to sue as such. Firstly, he took an assignment of a debt which, as Hobhouse LJ explained in *Camdex International Ltd v Bank of Zambia*, is not invalid even if the necessity for litigation to recover it is contemplated.[21] I consider that he also obtained a property right by the assignment. I accept that it is arguable, however, whether that property right he obtained was only, in reality, ancillary to the right to sue. Nonetheless, I do not consider that the assignment is contrary to public policy on the grounds of maintenance or champerty as I consider that Mr Day has a genuine commercial interest in the litigation. This is not a case where a party is meddling in affairs which

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20 At 509.

21 *Camdex International Ltd v Bank of Zambia* [1998] QB 22 (CA) at 39. See, also, s 50 of the Property Law Act 2007.

do not concern him. I do not consider that there is mischief here which the Court must seek to prevent.

[73] Therefore, the second defendant's application in relation to the assignment of the Towers' debt fails.

Should portions of the statement of claim be struck out on the grounds of issue estoppel because they plead matters which have been determined by the High Court in a final judgment given in *Williams v Hill*?

[74] The second defendant seeks to strike out those portions of the statement of claim which plead that management fees payable to GNN by RDL were unpaid, or underpaid and that this was concealed from the plaintiff and that this action was undertaken on behalf of the second defendant. The statement of claim pleads the person physically involved in this action was Mr Williams. The second defendant says that is significant because he was the plaintiff in the proceeding which the second defendant says justifies the estoppel defence.

[75] Attempts to relitigate matters already determined have long been held to be an abuse of process.[22] What is necessary, then, is an analysis of the position to determine whether the prior decision in fact creates an estoppel so that it would be an abuse of the Court's process to permit the matter to be repleaded and litigated again.

[76] What is self-evident from the names of the parties is that the parties involved in this litigation are different from those who were involved in *Williams v Hill*.

[77] *Williams v Hill* involved an application by Mr Williams for summary judgment against Mr Hill and others based on indemnities which were given to Mr Williams by the defendants in a deed. The defendants were, in fact, the beneficial owners of shares in GNN. They did not wish their shareholding to be public knowledge. Mr Williams was appointed their trustee. The terms of the deed provided as follows:

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[22] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541 (HL); *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC).

1. Trusteeship

1.1 The Indemnifiers acknowledge that Williams has accepted office as a trustee at their request.

1.2 The indemnifiers hereby jointly and severally, personally indemnify Williams for any loss or liability which he may sustain or incur in:

(a) executing or omitting to exercise any function, duty or power as a trustee;

(b) purporting, in good faith, to exercise as trustee any function, duty or power which is not authorised or which may be a breach of trust;

unless such loss or liability is attributable to the fraud, dishonesty or to the wilful commission or omission by Williams or of an act known by Williams to be a breach of trust.

2. Directorship

2.1 The Indemnifiers acknowledge that Williams has agreed to assume office as a director of GN Networks Ltd ("Company") at their request.

2.2 The Indemnifiers hereby jointly and severally, personally indemnify Williams for any loss or liability that he may sustain or incur in accepting the directorship or acting as a director of the Company or any related company unless such loss or liability is attributable to the fraud, dishonesty or the wilful commission or omission by Williams of an act known by Williams to be in breach of the Companies Act 1993.

[78] The defendants argued that Mr Williams had control of the affairs of GNN and RDL in such a way as to intentionally deprive GNN of funds and, therefore, he should not be able to recover under the indemnity. Although judgment was given against the defendants, it is appropriate that I record that the judgment recorded the following matters not resolved by it:[23]

[57] There is contested evidence about the operation of the rescue package and the management services agreement. Some of the matters cannot be resolved on a summary judgment application:

(a) the extent of Mr Williams' alleged control of GN Networks Ltd: Mr Hill says that he was a shadow director, Mr Williams admits to controlling accounts and expenditure:

(b) when the management services agreement came to an end: Mr Williams says he gave notice on 4 April 2008, but there is also evidence showing that it ran on longer; and

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[23] *Williams v Hill*, above n 1.

(c) alleged tax advantages arising from the operation of the rescue package.

…

[65] … whether Retail Distribution Ltd effectively terminated the management services agreement under its letter of 4 April 2008 is in contention and cannot be resolved in this application.

[79] And, in answer to an equitable set-off claim, the Judge recorded:[24]

> … It is no answer to the claim made on him under the indemnity that someone else, not connected with him, a company in liquidation, might have some other claim against Mr Williams. I see no reason in this case not to apply the normal approach of requiring identity of parties.

[80] The plaintiff cites two authorities for the proposition that issue estoppel requires a previous decision which is binding on the parties. The Court of Appeal recently stated, in *van Heeren v Kidd*:[25]

> [1] An issue estoppel arises where a judgment has determined an issue as an essential and fundamental step in the logic of the judgment and without which it could not stand. The issue so determined may not be contested in subsequent litigation between the two parties. The rule rests on two foundations:
>
> (a) the interest of the community in the determination of disputes and the finality and conclusiveness of judicial decisions; and
>
> (b) the protection of individuals from repeated suits for the same cause.

[81] The elements of issue estoppel were recorded concisely by Duffy J in *Victoria Street Apartments Ltd (in liq) v Sharma*, her Honour stated:[26]

> A checklist of the technical elements required to establish an issue estoppel is conveniently given in CEF Rickett "The Travails of Issue Estoppel" (1992) 22 VULR 115 at 116:
>
> (i) a final judgment;
>
> (ii) between the same parties and/or their privies;
>
> (iii) litigating in the same capacity;
>
> (iv) on the same issue;

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24 At [80].

25 *van Heeren v Kidd* [2016] NZCA 401 (footnotes omitted).

26 *Victoria Street Apartments Ltd (in liq) v Sharma* HC Auckland CIV-2009-404-8377, 14 December 2011 at [15].

(iv) which must be pleaded."

[82] There is also a helpful summary of the principles which apply on an alleged abuse of process by Fisher J in *Russell v Taxation Review Authority* where he said:[27]

> The Commissioner's first ground for striking out that pleading is that the matter is res judicata in the strict sense, the subject of issue estoppel and/or an abuse of process having regard to prior litigation. Proceedings can be dismissed in whole or in part as an abuse of the process of the Court where the cause of action pleaded could not succeed because of the existence of an issue estoppel with respect to one or more of the essential elements of the cause of action (see for example *Shiels v Blakeley & Ors* [1986] 2 NZLR 262 (CA), *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA)) or where the pleaded cause of action represents an attempt to litigate or re-litigate issues which ought properly to have been included in the previous proceedings (*Meates v Taylor* [1992] 2 NZLR 36 (CA), *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA)) or where the pleaded cause of action is statute-barred (*DFC New Zealand Ltd v McKenzie* [1993] 2 NZLR 576 at pp 578, 579, *G v GD Searle and Co* [1995] 1 NZLR 341 at pp 346, 347), *Hamed Abdul Khaliq Al Ghandi Co v NZ Dairy Board* (1999) 13 PRNZ 102 at p 107.
>
> Of the two possible forms of res judicata the important one here is issue estoppel. The effect of the authorities appears to be as follows:
>
> (a) The public policy principles underlying cause of action estoppel and issue estoppel are that it is in the public interest that there should be an end to litigation, that there is hardship to an individual in being vexed twice for the same cause (*Lockyer v Ferryman* (1877) 2 App Cas 519 at p 530) and that it is undesirable to create an opportunity for different courts to pronounce differently upon the same issue (*House of Spring Gardens Ltd v Waite* [1991] 1 QB 241 at p 255 C (CA)).
>
> (b) Issue estoppel will apply where (i) a final decision has been made by a court of competent jurisdiction (ii) deciding the same question (iii) between the same parties or their privies (*Carl Zeiss* supra at p 935B per Lord *Guest*). Each must be considered in turn.
>
> (c) There is a final decision for present purposes where a New Zealand Court of competent jurisdiction has determined the issue as an essential step in the logic of the judgment without which it could not stand (Spencer Bower & Turner: *Res Judicata* 3rd ed (1996) para 182 pp 88–89). [15930]
>
> (d) For present purposes a case involves the same parties if the party in the second proceeding has such a mutuality of interest with the party in the first proceeding that estoppel would produce a fair and just result having regard to the underlying purposes of the doctrine (*Shiels v Blakeley* supra at p 268 line 40).

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[27] *Russell v Taxation Review Authority* (2000) 19 NZTC 15,924 (HC) at [19] and [20].

(e) For present purposes the second proceeding involves the same question as the first where the issue raised in the second proceedings could with reasonable diligence have been raised in the earlier proceedings: *Henderson v Henderson* (1843) 3 Hare 100 at pp 114–115, [1843–60] All ER Rep 378 at pp 381–382, *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 at p 47 C–H (HC) ("Every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time" per *Wigram* VC in *Henderson* supra), *New Zealand Social Credit Political League Inc v O'Brien* supra at p 95.

(f) In special circumstances the Courts may depart from the foregoing principles and decline to recognise an issue estoppel where it would otherwise create a clear injustice, for example where important fresh material has become available which could not with reasonable diligence have been adduced in the earlier proceedings: *Arnold v National Westminster Bank plc* supra at p 50E–F; [1991] 2 AC 93 at p 109, *X v Y* supra at p 213, *Nippon Credit Australia Ltd v Girvan Corporation New Zealand Ltd* (1991) 5 PRNZ 44 at p 60 ("There were in my opinion understandable and acceptable reasons why the Maronis did not embark on a full-scale action raising all three possible challenges when it is a matter of fending off a threatened mortgagee's sale").

[83] Fisher J also had helpful comments to make on the question of mutuality of interest and said:[28]

> … each case needs to be examined to see whether there is any difference between company and shareholders in substance (see, for example, *Matai Industries Ltd v Jensen* at first instance (1988) 4 NZCLC 64,522 at pp 64,546, 64,547; [1989] 1 NZLR 525 at p 552). Section 99 is not limited by the corporate veil (*Miller* v *C of IR*; *McDougall* v *C of IR (No 1)* (1997) 18 NZTC 13,001). The parties who ultimately stood to gain by the taxation scheme were the original proprietors. They were the guiding hand behind the trading company and they represented the original equity interest in it. They would not have embarked upon the scheme if they had not thought that it would ultimately be for their benefit. At the end of the loop they retained the right to re-purchase the business assets of, or in some cases the shares in, the original trading company. It is artificial to suggest that in substance there was a conflict of interest between the original proprietor/managers on the one hand and the trading companies on the other.

[84] The parties to the present case are Mr Day, the Official Assignee as Liquidator of GNN, Babbelbek, Anthony John McCullagh and Stephen Mark Lawrence, the receivers of GNN, and Shipwreck (referred to as RDL). The parties to *Williams v Hill* were Timothy John Williams, Stephen Anthony Hill, Rajendra Bhai

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28 At [31].

Ranchhod, Murray John Willis and Angela Maria Bricknell. Mr Ranchhod was bankrupt.

[85] Counsel for the second defendant made submissions in oral argument that the parties to this proceeding are privies to those in *Williams v Hill*. That submission relied, in part, on the fact that Mr Ranchhod is the 'true plaintiff' in this case. In my view that is not correct. These parties are not the same. Nor, in my view, are they even privies.

[86] In addition, having regard to the passages that I have referred to in this judgment, it is difficult to see how one could conclude that the judgment in *Williams v Hill* is on the same issues as are pleaded in the instant case. The very issues which are central to this case were matters declared by the judge in *Williams v Hill* as not being resolved by his judgment. Accordingly, I reject this ground for striking out portions of the statement of claim.

Should portions of the statement of claim be struck out because they do not properly plead fraud and there is insufficient evidential support for the pleading of fraud against the second defendant?

[87] The second defendant relies on r 5.17 in respect of the ground to strike out. Rule 5.17 provides:

> **5.17 Distinct matters to be stated separately**
>
> (1) Distinct causes of action and distinct grounds of defence, founded on separate and distinct facts, must if possible be stated separately and clearly.
>
> (2) If a party alleges a state of mind of a person, that party must give particulars of the facts relied on in alleging that state of mind.
>
> (3) A state of mind includes a mental disorder or disability, malice, or fraudulent intention but does not include mere knowledge.

[88] The principles relating to pleadings of fraud were summarised by the Court of Appeal in *Schmidt v Pepper New Zealand (Custodians) Ltd*:[29]

> Allegations of fraud or dishonesty are very serious. They must be pleaded with care and particularity. As the authors of *Bullen* & *Leake* & *Jacobs*

[29] *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565 at [15] (footnotes omitted).

> Precedents of Pleadings emphasise, counsel must not draft any originating process or pleading containing an allegation of fraud unless they have reasonably credible material which, as it stands, establishes a prima facie case of fraud — that is, material of such a character which would lead to the conclusion that serious allegations could properly be based upon it. Fraud cannot be left to be inferred from the facts — fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong the words may be appear to be, are insufficient to amount to a proper allegation of fraud.

[89] Ms Simkiss submitted that there was no proper evidential foundation for an allegation of fraud in this case. One of the difficulties in analysing this part of the case is that it has not been proceeded by any notice for further particulars, pursuant to r 5.21. In addition, although this has been filed as a Part 18 proceeding, the obligation to file affidavits in support does not arise for this type of proceeding until the close of pleadings date: rr 9.69 and 18.15. The plaintiff submits that not all evidence is before the Court. Rather than considering evidence that supports the pleading the Court is required to ascertain whether the particulars contained in the statement of claim are themselves capable of supporting the allegation of fraud which is made.

[90] The problem arises directly from the relief sought. I have earlier referred to that in this judgment in [36] and following. The relief sought seeks recovery of what is allegedly owed to GNN so that the benefits can be received by the creditors of GNN. Section 301 of the Companies Act 1993 is essentially a procedural provision. It envisages potential claims and, in this case, in respect of:

(a) Money of GNN;

(b) Property of GNN;

(c) Or damages due to GNN caused by:

(i) Negligence; or

(ii) Default; or

(iii) Breach of duty; or

(iv) Breach of trust

by a person who fits within the category of persons referred to specifically in s 301.

[91] The statutory basis for seeking relief does not require proof of fraud.

[92] The predecessor to s 301 of the Companies Act 1993 was s 321 of the Companies Act 1955. In *Arataki Properties Ltd (in liq) v Craig* the Court of Appeal held that the predecessor to s 301 does not create a new cause of action but rather provides a procedural mechanism through which various claims which could have been brought at common law or in equity could be determined.[30] The High Court in *Benton v Priore* held that the words used in s 301 were in all material respects the same as those used previously and, accordingly there was no basis for a conclusion that Parliament had intended to change the character of the rights contained in the section.[31] Therefore, it was appropriate that the law as stated in *Arataki Properties Ltd (in liq) v Craig* still applied.

[93] The present statement of claim does not identify with sufficient clarity what the causes of action that the plaintiff seeks to pursue in reliance on s 301 of the Companies Act are. He mistakenly falls into the misconception that s 301 itself creates the cause of action, when clearly it does not. What is required is a pleading which identifies each cause of action which fits within s 301, which the plaintiff pursues. Each cause of action must comply with r 5.26(a) and (b), that is, it:

> (a) must show the general nature of the plaintiff's claim to the relief sought; and
>
> (b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action;
>
> …

In addition, it must comply with r 5.27 and in particular sub-r (2) which provides:

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30 *Arataki Properties Ltd (in liq) v Craig* [1986] 2 NZLR 294 (CA).
31 *Benton v Priore* [2003] 1 NZLR 564 (HC) at [46].

> If the statement of claim includes 2 or more causes of action, it must specify separately the relief or remedy sought on each cause of action immediately after the pleading of that cause of action

[94] Section 301 of the Companies Act does not specifically refer to a cause of action for fraud. However, one would have expected that if the section is procedural only, and there is appropriate justification for it, that such a cause of action could be pursued. No submission has been addressed by counsel on this point. I therefore resist the temptation to explore that issue further without that assistance in this interlocutory application. Suffice to say, one would expect that if an action in fraud is to be pursued in this proceeding, that it would [32]

> … usually include one or more following distinct causes of action:
>
> (1) fraudulent misrepresentation or deceit;
>
> (2) conspiracy;
>
> (3) unlawful interference/inducing breach of contract;
>
> (4) bribery;
>
> (5) money had and received;
>
> (6) constructive trust: knowing receipt and dishonest assistance.

[95] My conclusion and the problems that I have identified in this section of the judgment were not specifically addressed by counsel in argument. While the Court does have jurisdiction to strike out even though the specific basis for doing so is not contained in a formal application, [33] that course, in my view, is not appropriate in this case. What is appropriate is that I require the plaintiff to replead, yet again, a statement of claim which takes into account the specific directions that I have made under this section of the judgment.

[96] Regarding the Court's decision in *Arataki*, the plaintiff would be wise to consider whether or not his claims are subject to a time limitation bar.

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[32] *Bullen & Leake & Jacob's Precedents of Pleadings* (18th ed, Sweet & Maxwell, London, 2016) at [57-01].

[33] *Siemer v Stiassny* [2011] NZCA 1 at [14].

Should those portions of the statement of claim that attempt to invoke the provisions of the Insolvency Act 2006 be struck out because there is no proper basis for invoking the provisions of that Act?

[97] This matter was largely resolved by agreement. Because the prayer for relief will remain but subject to a different statutory basis and expressed differently, I will discuss the issue briefly.

[98] I have set out in [38] and [42] the relief sought and its effect in relation to the third cause of action.

[99] The plaintiff's initial submission proceeded, in summary, as follows:

(a) Section 302(1) of the Companies Act 1993 provides:

> **302 Application of bankruptcy rules to liquidation of insolvent companies**
>
> (1) Subject to this Part, the rules in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt apply in the liquidation of a company that is unable to pay its debts to—
>
> (a) The rights of secured and unsecured creditors:
>
> …;

(b) The reference in s 302 to "this Part" is a reference to Part 16 of the Companies Act 1993 which contains s 302;

(c) Therefore, s 237(2) of the Insolvency Act 2006, subject to what is in Part 16 of the Companies Act 1993, can apply if a company is in liquidation;

(d) Section 237(2) of the Insolvency Act 2006 provides:

> **237 Notice to Assignee to admit or reject creditor's claim**
>
> …
>
> (2) If, after 10 working days after receiving the notice, the Assignee has not made a decision admitting or rejecting the creditor's claim, on the application of the bankrupt or the creditor the court may—

(a) admit or reject the claim; or

(b) make any other order that it thinks appropriate.

(e) Thus, if Part 16 of the Companies Act provides for a relevant matter, then the equivalent section of the Insolvency Act should not be applied having regard to the saving provision in s 302 of the Companies Act 1993;

(f) Part 16 contains s 284. Section 284 permits the Court to

> give any direction in relation to any matter arising in connection with the liquidation, or confirm, reverse or modify any act or decision of a liquidator
>
> …

(g) Section 254 prescribes that an Official Assignee is not required to carry out any duty, or exercise any power in connection with the liquidation if to do so would, or would be likely to, involve incurring any expense. That provision applies in respect of a company put into liquidation under s 241(2)(c), with the liquidator appointed being the Official Assignee, and the company having no assets available for distribution to creditors. There is no direct corresponding provision giving the Court power to admit or reject a claim in a company liquidation if s 254 applies; and

(h) The second defendant submitted that the reference to s 237 in the statement of claim was an attempt to circumvent the provisions of s 254 of the Companies Act 1993.

[100] Counsel for the plaintiff, second defendant and Official Assignee conferred in the course of breaks in this hearing and advised their agreement on an amendment which would address the issue raised by this section of the strike out application in relation to the third cause of action.

[101] The solution is that, in respect of the third cause of action, the relief sought should be modified so that it seeks relief as follows: namely

> That the Court direct that the issue of whether the second defendant's proof of debt be admitted or rejected be determined by Court direction under s 284(1)(a) of the Companies Act 1993 on the basis that the Court applies by analogy s 237 of the Insolvency Act 2006 so that the Court may admit or reject the claim of the second defendant in the liquidation of GNN or make such order that it thinks appropriate.

[102] In addition, an amendment to paragraph 41 of the seventh amended statement of claim is required by deleting s 237 of the Insolvency Act 2006 and replacing it with s 284 of the Companies Act 1993.

[103] I shall make orders amending the prayer for relief in the third cause of action and paragraph 41 accordingly. The result is that it is unnecessary to consider any further in this judgment the challenge to the fourth cause of action.

Security for costs

[104] On 9 June 2015, the second defendant applied to the Court for an order that the plaintiff give security for costs. The parties filed a joint memorandum shortly thereafter. That led Associate Judge Doogue to make an order by consent as follows:

> (a) The plaintiff provide security for costs in respect of its claim against the second defendant in the amount of not less than $30,000 to be paid into the Court;
>
> (b) The proceeding is stayed until such security is given;
>
> (c) Leave is reserved to the second defendant to apply to vary the amount of security at any time before the proceeding is determined.

[105] The plaintiff paid the security as ordered. The second defendant seeks an uplift in the amount of security by payment by the plaintiff of a further $30,000. That is opposed by the plaintiff.

[106] The application was made before a statement of defence has been filed.

[107] The second defendant's application annexes a schedule which calculates costs to the date of filing of the application which, with one exception, has been calculated on the basis of Category 2 Band B, totalling $21,408. The one exception is for the filing of the interlocutory application, which is the subject of this hearing, in respect

of which a claim of Band C is made. In addition, a list of anticipated disbursements, totalling $1,210 is provided and a list of anticipated costs to the conclusion of the proceeding, making a grand total of anticipated costs of $71,668.

[108] Counsel for the plaintiff submits that the current security paid into Court is sufficient and appropriate for the stage that the proceeding has reached. Counsel contests the following:

(a) Whether the initial application for security was required, no forewarning of it having been made;

(b) No first case management conference following the filing of statement of defence has been held;

(c) Many of the claims in the schedule are inflated. It is noted that costs are claimed where joint memoranda have been filed which have, in some cases, been prepared by counsel for the plaintiff; and

(d) If one excludes the claim in respect of the filing of the application which is currently being considered by the Court the current costs, based without any other deduction as contained in the second defendant's schedule, total $16,948. The result is that there is significant security held, having regard to the current stage of the proceeding.

[109] The jurisdictional basis for making an order for security for costs pursuant to r 5.45 is met in this case by virtue of the order made by consent. The issue which I must address is whether the circumstances are such that the Court should exercise its discretion to award further security.

[110] My assessment of the position to date and assuming that the plaintiff is able to file an amended statement of claim that properly pleads the causes of action intended to be pursued under s 301 of the Companies Act, the current security is sufficient. The short point is that the current application is premature. The issue of

what amount and how the discretion should be exercised can be determined when an amended pleading and a statement of defence to it is filed by the one defendant who appears to be the only party opposing the plaintiff's position. For that reason I decline, at this stage, to make any order on the application for security for costs as sought by the second defendant.

Summary of the conclusions reached

[111] My conclusions, in summary, are as follows:

(a) The application to strike out the claim as an abuse of process on the grounds that the funding arrangements amount to maintenance and/or champerty arising from Mr Ranchhod's payment of the costs of Mr Day is dismissed;

(b) The application to strike out that part of the claim relating to the assignment of Mr Towers' debt on the grounds that it is an assignment of a bare cause of action or as savouring of maintenance is dismissed;

(c) The application to strike out portions of the statement of claim on the grounds that the matters have already been determined in the High Court judgment in *Williams v Hill* and therefore an issue estoppel is said to arise, is dismissed;

(d) The application to strike out those paragraphs of the statement of claim which plead fraud is adjourned so that the Court is able to consider whether a properly pleaded amended statement of claim making such allegations meets the requirements of the High Court Rules and, in particular, the requirements where fraud is pleaded;

(e) The plaintiff must plead his statement of claim so that he identifies precisely which of the causes of action, which are referred to in s 301 of the Companies Act 1993, he relies upon. If there is more than one cause of action, each cause of action must be pleaded separately and

must specifically comply with rr 5.26 and 5.27 of the High Court Rules;

(f) Amendments are approved to the first cause of action against the first defendant, and which is the second cause of action against the second defendant, as specified in this judgment;

(g) It is premature to deal with the application for increased security for costs. That part of the application is adjourned and may be brought back before the Court once an amended statement of claim is filed and a statement of defence to it is filed by the one defendant who has indicated a desire to oppose the plaintiff's claim; and

(h) This judgment has proceeded on the basis that the pleadings seeking declaratory relief have been abandoned.

Assignment of this proceeding to a Judge for supervision

[112] The procedural history of this case, which I have set out in this judgment, coupled with the misunderstanding as to what is appropriate in respect of pursuit of claims based on s 301 of the Companies Act 1993, lead me to make a recommendation to the Chief High Court Judge that this proceeding be assigned to a Judge for future supervision.

Orders

[113] For the reasons set out above, I order as follows:

(a) The application to strike out the claim as an abuse of process on the grounds that the funding arrangements amounted to maintenance and/or champerty arising from Mr Ranchhod's payment of the costs of Mr Day is dismissed;

(b) The application to strike out that part of the claim relating to the assignment of Mr Towers' debt on the grounds that it is an assignment

of a bare of cause of action or a savouring of maintenance is dismissed;

(c) The application to strike out portions of the statement of claim on the grounds that the matters have already been determined in the High Court judgment in *Williams v Hill* and therefore an issue estoppel is said to arise is dismissed;

(d) The application to strike out those portions of the statement of claim which plead fraud is adjourned to a case management conference to a date to be advised by the Registrar; and

(e) The application for increased security for costs is adjourned to a case management conference to a date to be advised by the Registrar.

Costs

[114] The application has failed with the majority of orders sought. Nevertheless, the Court has identified significant problems with the statement of claim requiring amendment to the pleadings. In addition, the provisions of r 7.77 of the High Court Rules dealing with an amendment to pleadings are engaged. Having regard to those matters and taking into account the specific provisions of rr 14.2(a) and 14.7, my preliminary view is that no order for costs should be made on the application. Because Counsel may require the opportunity to address the issue and because it may not be possible to determine the issue of costs myself, I reserve costs. In the event that a party seeks an order, memoranda in support, opposition and reply shall be filed and served at seven day intervals.

JA Faire J

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