SUPREME COURT OF QUEENSLAND

CITATION:	*Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd & Ors* [2020] QCA 250
PARTIES:	**GLADSTONE PORTS CORPORATION LIMITED** ACN 131 965 896 **(appellant)** **v** **MURPHY OPERATOR PTY LTD** ACN **088 269 596** **(first respondent)** **TOBARI PTY LTD** ACN **010 172 237** **(second respondent)** **SPW VENTURES PTY LTD** **ACN 135 830 036** **(third respondent)** **LCM OPERATIONS PTY LTD** ACN **616 451 033** **(fourth respondent)**
FILE NOS:	Appeal No 11156 of 2019 SC No 7495 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton – [2019] QSC 228 (Crow J)
DELIVERED ON:	13 November 2020
DELIVERED AT:	Brisbane
HEARING DATE:	20, 21 July 2020
JUDGES:	Sofronoff P and Morrison JA and Davis J
ORDER:	**Dismiss the appeal with costs.**
CATCHWORDS:	TORTS – ABUSE OF LEGAL PROCESS – LAW OF MAINTENANCE AND CHAMPERTY – GENERALLY – where the appellant dredged waterways, excavated soil, and placed the materials dredged or excavated into various other places around the port of Gladstone – where the first, second and third respondents are plaintiffs in a class action brought pursuant to Part 13A of the *Civil Proceedings Act* 2011 (Qld) – where the respondents allege that, due to the appellant's negligence and failure to comply with certain statutory obligations, the waters surrounding the port of Gladstone were polluted and they suffered loss of profits as a result – where the respondents' solicitor was able to obtain the

agreement of the fourth respondent (the Funder) to fund the class action – where there were several agreements entered into by the respondents' solicitors, the Members of the class actions and the Funder – where the appellant sought an order that the respondents provide security for costs – where the appellant contended before the learned judge of first instance that the funding agreement between the claimants and the Funder was champertous and unenforceable and, as a consequence, there was a "risk" that the security deed would be "tainted" and therefore also unenforceable – where the learned judge did not decide this question of law – where there was no appeal against the security for costs order – where the respondents then sought an order joining the Funder as a respondent to the application and also sought a declaration that the Representative agreement and the Member agreement were "not, by reason of maintenance, champerty or public policy, unenforceable" – where the respondents sought an order by the learned judge to refer the question to the Court of Appeal for its "opinion" pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 483(2) – where the respondents are seeking an advisory opinion from the Court – where the appellant at this appeal did not submit that entry into the agreements constitute, or that anything done or likely to be done under them would constitute, an abuse of the court's process – where the appellant submits that the funding agreements were tantamount to an impermissible assignment because their effect was to confer upon the Funder the practical control of the litigation – whether the agreements are unenforceable as being against public policy

Civil Proceedings Act 2011 (Qld), Part 13A
Uniform Civil Procedure Rules 1999 (Qld), r 483(2)

British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006; [1908] UKLawRpKQB 46, cited
Brown v Howard (1701) 21 ER 960, cited
Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386; [2006] HCA 41, considered
Findon v Parker (1843) 11 M & W 675; [1843] EngR 786, considered
Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd (2005) 63 NSWLR 203; [2005] NSWCA 83, considered
Harris v Brisco (1886) 17 QBD 504; [1886] UKLawRpKQB 104, considered
Hichens v Congreve (1828) 38 ER 917 (Ch); [1829] EngR 100, cited
JC Scott Constructions v Mermaid Waters Tavern Pty Ltd [1984] 2 Qd R 413, considered
Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (2007) 164 FCR 275; [2007] FCAFC 200, cited
Prosser v Edmonds (1835) 91 Y & C (Ex) 481; [1835] EngR 1073, cited

Ram Coomar Coondoo v Chunder Canto Mookerjee (1876) LR 2 App Cas 186; [1876] UKPC 54, cited
Strange v Brennan (1846) 47 ER 1018; [1846] EngR 957, considered
Strange v Brennan (1846) 60 ER 652; [1846] EngR 894, considered
Trendtex Trading Corporation v Credit Suisse [1982] AC 679, cited
Victoria Insurance Co v King (1895) 6 QLJ 202, cited
Victoria Insurance Co v King [1896] AC 250; [1896] UKLawRpAC 12, cited
Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, cited
WorkCover Queensland v AMACA Pty Ltd [2013] 2 Qd R 276; [2012] QCA 240, cited

COUNSEL: J D McKenna QC, with S B Hooper, for the appellant
L W L Armstrong QC, with M J May, for the first to third respondents
P J Dunning QC, with C Jennings, for the fourth respondent

SOLICITORS: King & Wood Mallesons for the appellant
Clyde & Co for the first to third respondents
Piper Alderman for the fourth respondent

[1] **THE COURT:** The port of Gladstone lies about 500 kilometres north of Brisbane. It is Queensland's largest commodity port. In 2010 the State published a plan for the further development of the port. Gladstone Ports Corporation Limited, who is the appellant, is a government owned corporation[1] and it began to implement the State's new plan. In execution of this plan, the appellant dredged waterways, excavated soil, and placed the materials dredged or excavated into various other places on the site. The first, second and third respondents are plaintiffs in a class action brought pursuant to Part 13A of the *Civil Proceedings Act* 2011 (Qld). According to the plaintiffs, this disruption of the natural soils carried the risk that the water in the adjacent waterways and seas might be polluted. The plaintiffs allege that, due to the appellant's negligence and failure to comply with certain statutory obligations, the surrounding waters were indeed polluted. The plaintiffs and the other members of their class are, on the whole, persons whose livelihood is drawn from fishing operations, including by catching fish and other kinds of marine life, processing them and selling them. They allege that the appellant has damaged the waters in which they fish and that this has degraded the quality of fish in the area, it has reduced the number of species of fish and has also reduced the number of fish overall. They allege that they have suffered a loss of profits as a result. There are "177 odd" claimants who are parties to the suit and the total of all claims is in the order of between $112 million and $150 million.

[2] According to the plaintiffs' solicitor, Mr Maurice Thompson of the firm Clyde & Co, the causes of action arose in late 2011. His firm began to look into the viability of a class action in June 2015. He approached a few funders all of whom were, ultimately, unwilling to take the risk. After these false starts, Mr Thompson was

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1 Previously incorporated under the *Government Owned Corporations Act* 1993 (Qld) and now constituted as a company under the *Corporations Act* 2001 (Cth).

able to obtain the agreement of LCM Operations Pty Ltd to fund a class action. That company is the fourth respondent to this appeal.

[3] The arrangements entered into between Clyde & Co, the class Members and LCM Operations Pty Ltd, whom we will call "the Funder", are as follows.

[4] Each of the Members has entered into a retainer with Clyde & Co styled the "Conditional Client Engagement Letter". The only parties to the Engagement Letter are each Member and Clyde & Co. Clause 4.1 of the Engagement Letter provides that Clyde & Co act for the "Claimant" identified in the Letter and that the firm does "not act for anyone other than the named clients". Clause 7.4 states that fees are payable by the client only in accordance with the Engagement Letter. The same clause also provides that those fees will actually be paid by the Funder, who will pay 75 per cent of such fees as they are incurred as well as 100 per cent of disbursements as the expenditures are made. The remaining 25 per cent of the fees charged by Clyde & Co are to be paid only upon the successful recovery of damages. Clause 8.1 provides that Clyde & Co will send monthly invoices to the Funder, rather than to the Members. Clause 9 furnishes an estimate of the likely costs. These estimates are:

> Lawyers' fees (as to 75 per cent): $4 to 5 million
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> Lawyers' fees (as to 25 per cent deferred): $1 to 1.25 million
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> Barristers' fees: $2.2 to 2.8 million
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> A possible success uplift of 25 per cent: $2.1 to 2.662 million

[5] Clause 10.1(d) authorises the solicitors to conduct the proceeding as they consider appropriate in consultation with the Funder subject to the terms of the Funding Agreements, which will be discussed below. Clause 10.1(e) provides that the solicitors will take their instructions from the Funder save where in their reasonable professional opinion separate instructions are required from the Member. Clause 11.1 provides that the Funder will pay any adverse costs order in accordance with one of the "Member Agreements" discussed below. Clause 12.2 provides that settlement of the action is to be negotiated by Clyde & Co on instructions from the "Representatives", appointed under yet another agreement, the "Representative Proceeding Funding Agreement", also discussed below. Any disagreements on this score are to be determined pursuant to a dispute resolution procedure provided by the Member Agreement. Clause 14 entitles the solicitors to terminate their retainer in certain circumstances. Relevantly, a right to terminate will arise if the Funder ceases to fund, the lawyers cease to be "the Lawyers in the Action", if the client terminates the Funding Agreements and if Clyde & Co come to the view that there are no longer any reasonable prospects of success or if the prospects of recovery is of a sum which no longer justifies the commercial investment being made in the proceeding. Clause 2.3 of the Engagement Letter provides that it is to be read in conjunction with the Funding Agreements, referred to below. Clause 2.1 provides that, unless the context otherwise requires, all defined terms have the meaning "proscribed" [*sic*] by the Funding Agreements.

[6] The second of the agreements that constitute the contractual arrangement between the parties is constituted by the "Member Agreement" between each Member and the Funder. That document contains two parts. The first part is the "Terms Sheet".

[7] The terms contained in the Terms Sheet constitute a "Scheme" to which the Members and the Funder are parties.[2] Term 3 of the Terms Sheet contains an acknowledgment by the Member who is a party to the Member Agreement that an opportunity has been afforded for that Member to seek independent legal advice about the Member Agreement. A schedule to the Terms Sheet states the Funder's reward upon a successful outcome to the action. Item 5 in the Schedule provides that the Funder is to be paid the greater of the following sums.

[8] The first possible payment is styled the "Funder's Share" and is calculated this way:

(a) If the recovery arises before the Funder has incurred costs of $1 million, the "Funder's Share" will be 15 per cent of the recovered amount.

(b) If the recovery arises after the Funder has incurred more than $1 million but less than $9.5 million, the share will be 35 per cent of the recovered amount.

(c) If the costs incurred are above $9.5 million, the share will be 40 per cent.

(d) If the recovery arises after the commencement of an appeal, the share will be the sum applicable above plus 5 per cent.

[9] The second possible payment is styled the "Recovery Premium" and is to be three times the aggregate of the "Outstanding Funding" as at the date of distribution of the recovered damages.

[10] The second part of the Member Agreement is called the "Rules of the 2017 Gladstone Fisheries Scheme".

[11] Relevantly, clause 2.22 defines "Member" to mean a claimant who is a party to a Member Agreement. Clause 8 provides that a Member has no right to interfere in the prosecution of the Member's claim until common questions have been decided and as the Rules allow. Clause 9 provides that a Member will be bound by judicial findings on common questions of fact raised in the action. Clause 2.26 defines "Representative" to mean those Members in whose names the action has been brought. Clause 13 provides that only Members are qualified to be Representatives. Clause 15 stipulates that a Representative has the function of instructing the "Lawyers", a term that is itself defined by clause 2.20 to mean the lawyers "retained by the Representative with the approval of the Funder". Presently that is Clyde & Co. Clause 18 provides that the Lawyers act for the Members. Clause 20 empowers the Funder to terminate the retainer of the Lawyers and that the Funder may require the Representative to terminate the retainer. Clause 21.3 states that the Funder will "direct the steps to be taken, or not taken, in preparing, conducting, abandoning, postponing or resolving the Claims". Clause 31 prohibits the Members waiving or compromising their Claims. Clause 35 obliges the Funder and Representatives to agree upon the strategy and tactics that will be applied in prosecuting the claim. Clause 35.1 provides that these two parties must also agree upon any settlement. Any disagreement about strategy, tactics or settlement is to be resolved pursuant to the dispute resolution provisions in Part 18 of the Agreement. Those provisions provide for the usual kind of steps to be taken to resolve a dispute, culminating in a binding arbitration conducted by an independent arbitrator. Clause 39 provides that the Lawyers and the Funder will agree to a "Cost Limit", which is defined in clause 2.9 to mean the maximum sum that the Funder is willing

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2 Term 1.

to risk for the purposes of the Scheme. The amount of that sum is to be kept confidential to the Funder and the Lawyers.

[12] Third, the Funder and the Representatives, who are currently the named plaintiffs in the action, are parties to a "Representative Proceeding Funding Agreement – Representative". Clause 3.5 obliges the Representatives to prosecute the action diligently and clause 3.7 obliges them promptly to provide the Lawyers with "information, documents and full, frank and honest instructions" and to "do all things necessary to enable the Lawyers" to prosecute the action. Clause 8 prohibits the Representatives instructing the Lawyers to retain any barrister without the Funder's consent. The Funder may instruct the Representatives to instruct the lawyers to terminate the retainer of a barrister or to appoint a particular barrister.

[13] Finally, the named plaintiffs, Clyde & Co and the Funder are parties to a "Retainer Agreement". Clause 1 provides that, as between these Representatives and the Funder, the Member Agreement and the Representative Agreement will prevail to the extent of any inconsistency with the terms of the Retainer. Clause 5 provides that the Representatives retain the Lawyers pursuant to the Retainer to provide advice and legal services in relation to the action. To the extent of any inconsistency, however, the terms of the Client Engagement Letter will prevail. Clause 6 acknowledges that the Funder is not a client of the Lawyers, although the Lawyer owes obligations to the Funder. The clause states that the Funder "does not have control over the Action" but that it may make "day to day decisions in respect of the Action". The obligations owed by the Lawyers to the Representatives as clients are modified to the extent that they are inconsistent with the Retainer. Clause 7 provides that the Representatives may provide instructions to the Lawyers, who will act in accordance with those instructions to the extent that they are not inconsistent with the obligations that the Lawyers owe to the Funder under the Retainer. Clause 8 provides that the Funder or the Representatives may take objection to a particular member of the Lawyers' staff working on the case and, in that event, that member of staff will be removed from involvement in the matter. Clause 10 obliges the Representatives to give the Lawyers clear and prompt instructions. Clause 11 obliges the Lawyers to inform both the Funder and the Representatives as soon as they become aware of any material developments in the proceeding, such as a change in the prospects of success or the costs budget. Clause 13 obliges the Lawyers not to undertake certain steps without the consent of the Funder, such as settlement, or steps that are likely to have a material effect on the action or on costs. Clause 15 provides that the Lawyers will not undertake any settlement discussions without the written approval of the Representatives and the Funder. Clause 17 contains the Lawyers' acknowledgement that they owe fiduciary duties and duties of care to the Representatives and that they owe a duty of care to the Funder. Clause 18 entitles the Funder and the Representatives to have copies of any written advices prepared by the Lawyers or by counsel. Clause 20.2 obliges the Lawyers not to act in any manner that "places the Lawyers in a position of actual or apparent legal conflict". Clause 62 entitles the Funder to terminate the Retainer upon giving 30 days written notice but only if Clyde & Co agree or that firm has been replaced. Similarly, Clyde & Co may terminate the Retainer in certain limited circumstances.

[14] This appeal has come about in the following way.

[15] The defendant sought an order that the plaintiffs provide security for costs. The plaintiffs offered a deed by which a third party (whose ability to pay was not in issue) irrevocably promised to pay the defendant a sum of money (up to a certain limit) by way of costs.[3] The learned judge at first instance, Crow J, found that security in that form would be adequate. However, the defendant contended that the funding agreement between the claimants and the Funder was champertous and unenforceable and, as a consequence, there was a "risk" that the security deed would be "tainted" and therefore also unenforceable. Crow J did not decide this question of law as, with respect, his Honour ought to have done. Instead his Honour assessed the likelihood that it was correct. Crow J found that "the risks of the deed of indemnity, which provides a direct right of access on an unconditional and irrevocable basis, is judged as having low risk of being unenforceable"[4] and ordered security be provided as described above.

[16] There was no appeal against that order.

[17] The plaintiffs then made the application that has led to this appeal. They sought an order joining the Funder as a respondent to the application. By way of principal relief in the application, the plaintiffs also sought a declaration that the Representative agreement and the Member agreement were "not, by reason of maintenance, champerty or public policy, unenforceable". The plaintiffs sought an order by Crow J to refer the question to the Court of Appeal for its "opinion" pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 483(2). That provision unhappily does use the term "opinion" but the word is to be understood in its context. Under the rule the role of the Court of Appeal is not to offer an opinion; it is to decide a question of law that is controversial between the parties and that it is desirable to resolve in order to progress the litigation.

[18] At the hearing of this matter the Court raised with the parties whether the issues were hypothetical. In this case, no party to the agreements challenged their enforceability. Indeed, both the Funder and the plaintiffs urged that the agreements were enforceable and neither of them reserved its position or gave any reason to think that the agreements might one day, under certain circumstances, be repudiated by one or the other of them. It seems then, that the plaintiffs are seeking an advisory opinion from the Court.

[19] With certain very special exceptions, such as advice to trustees, the Supreme Court does not give advisory opinions. This aversion has deep roots. In the field of public law, the willingness of the Supreme Court to give an opinion to the Executive would involve the risk of the Court, as the impartial third arm of government, becoming identified as an advisory adjunct of the Executive with a consequential degradation of the Court's independence.[5] In the sphere of private litigation the same risk does not exist. There is the same reluctance to engage in deciding hypothetical issues, because of the risk that hypothetical facts might change or that, absent a dispute, the grant of relief would grant no purpose.

[20] However, as the learned editors of Meagher, Gummow and Lehane's *Equity*: *Doctrines and Remedies* point out:[6]

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3 *Murphy v Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255 at [16]-[19].
4 *Ibid*, at [62].
5 See *A History of English Law*, Sir William Holdsworth (heareafter "Holdsworth"), Vol V at 350-352.
6 R Meagher, D Heydon and M Leeming, 4th ed. at [19-120], 632.

> "It is of particular importance that the courts recognise and liberally use their power to make declarations in appropriate cases which present merely theoretical issues, as such issues often raise matters of doubt and difficulty of a much more real and pressing nature than do many "genuine" disputes."

[21] The learned editors also observed that it would be a "grave mistake" to say, as some judges and text writers in the past have done, that the courts have no power to make declarations about theoretical issues. The cases have demonstrated that occasions may arise in which parties are being obstructed in the conduct of their legitimate affairs by a doubt raised concerning a legal question and, despite the question raised being strictly hypothetical, it may yet be a proper exercise of discretion to grant relief.[7]

[22] In this case it is understandable why the parties to the agreement, both of whom are *ad idem* as to the validity of their contractual arrangements, nevertheless pressed the court to make a declaration. If the agreements are unenforceable, that would, at the very least, practically prevent the further progress of the litigation and, at worst, cause the Funder to lose a massive amount of money, expose the representative plaintiffs to an adverse costs order for which they are unprepared and, as the appellant has threatened, expose Clyde & Co to a liability to pay costs. It is the defendant who has alleged that the agreements are unenforceable. In a letter dated 13 February 2019 the solicitors for the appellant wrote to the plaintiffs' solicitors to remind them of the following statements by Crow J in his reasons delivered on 1 February 2019 dealing with the application for security for costs:

> "[32] With the redaction of cl 8.3 and the retention in the litigation funder of an ability to control or direct the representatives in a manner in which they refuse to disclose can only reasonably lead to a conclusion that there is sufficient control such as to enable the agreement to be considered, as Davies JA said in *Elfic*, as champertous.
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> …
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> [38] Thus in the case that the plaintiffs do fail, and currently because of the lack of evidence from the plaintiffs concerning cl 8.3 and Item 5 of the funding agreement, it may be concluded that the defendant may have a cause of action in the torts of maintenance and champerty against LCM, however, it cannot be concluded that a stay would be issued to prevent the primary litigation."

[23] The appellant's solicitors claimed that there "would appear to be a basis for" saying that the funding agreement might be unenforceable, that the appellant might be entitled to sue someone for damages for the torts of maintenance and champerty and that Clyde & Co have participated in implementing the tortious arrangements. The appellant's solicitors referred the reader of the letter to *Knight v FP Special Assets Ltd*[8] a case in which a person who was not a party to the litigation was ordered to pay the costs of the successful party. The solicitors then warned that, in the event of their client's success in the proceeding, their client might look to the Funder or to

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7 *Trustees of Church Property of Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 at 400-401 per Dixon CJ.

8 (1992) 174 CLR 178.

Clyde & Co to satisfy costs. The Funder is prepared to carry the costs but, of course, only as the risk involved in trying to win a profit. In a subsequent letter, dated 26 February 2019, the appellant's solicitors asserted once more that the agreements were champertous and were "an unlawful and legally unenforceable arrangement". In a third letter dated 7 March 2019 their threat went further:

> "The funding agreement has been determined by the Court to be champertous and, therefore, unenforceable. As such, the funder is not able to claim a premium under the agreement and therefore, it would seem to us, likely to have little interest in continuing the proceeding. Indeed, the class would not have the comfort of an agreement dealing with the payment of costs and adverse costs orders. As a consequence, our concern is more directed to the future funding of the case."

[24] The first sentence is incorrect. No court has held the agreement to be unenforceable.

[25] The appellant has the benefit of security for costs and it is at liberty to apply for further security if that becomes warranted. It has been proceeding to defend the litigation upon the Funder's express representation contained in the agreements, which was published to the Court, that the Funder will meet any adverse costs order. In those circumstances, it is difficult to see how the appellant could plausibly think or maintain that it might be exposed to a risk that its costs would be unpaid or that the security ordered might be "tainted" and unenforceable, as it was put. If it really thought that that was so, it could apply for remedies by way of more trenchant orders for security for costs but, instead, it instructed its solicitors to write letters questioning the validity of contractual arrangements to which it is not a party. The propriety of such conduct in running litigation was not argued and we shall not, therefore, consider that aspect of the matter.

[26] It is perfectly understandable that, in the face of the risk that a substantial and well-resourced opponent has seriously if, as will appear, baselessly, questioned the financial foundation for this proceeding, the plaintiffs wish to have the issue determined. This point having been asserted, it would be unfair to the plaintiffs and their Funder to continue to conduct this onerous, complicated, expensive and important litigation with this tactical threat remaining alive.[9] In my view the case is not hypothetical. It is also relevant that no party to the proceeding submitted that the Court should not determine the substantive issue in the appeal.

[27] It is now possible to make the following observations.

[28] This will be a very complicated, and therefore expensive, proceeding. The appeal on this interlocutory issue alone occupied two days and involved senior and junior counsel for all parties.

[29] If a single Member were to bring an individual claim, it would be necessary for that plaintiff to engage a number of experts to give evidence about the alleged lack of conformity by the appellant to reasonable technical standards in conducting its activities. In respect of duty, breach of duty and the alleged causation of harm to marine life, this would require calling as witnesses experts in construction, engineering,

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9 *cf. Edwards v Santos Ltd* (2010-2011) 242 CLR 421 at [37]-[38].

soils, hydrology, marine biology and, no doubt, others. This prospect would be daunting to even the most litigiously minded citizen. The estimates of fees and disbursements given by Clyde & Co in the Letter run into the many millions and the appellant did not challenge the reasonableness of those estimates. The low end of the range is $8.4 million. The high end of the range is above $13 million. It may be inferred that the costs that will be incurred by the appellant will also be of that order, although perhaps of a lower amount as the defendant. The Funder has, therefore, agreed to carry a massive financial risk because it has agreed to meet all of those costs if ordered by the Court to pay them. The Funder has agreed also to provide valuable security for costs and has done so. It is true that the sum that the Funder is prepared to risk is limited to the confidential limit. However, that limit must be, logically, of the order shown in the estimate together with any estimate of adverse costs. Clyde & Co has also agreed to carry a financial risk because, unless the action is successful, they will only ever be paid 75 per cent of their fees.

[30] The Agreements give the Funder the power to guide the day to day progress of the case and also give it a crucial voice in settlement discussions. However, the agreements assert in several places that Clyde & Co acts for the Members and only for the Members, notwithstanding that they might owe contractual duties to the Funder. There is no power in the Funder to override the Members as far as "strategy and tactics" or settlement are concerned because any disagreement between the Funder and the Members, who have equal say, will be resolved by arbitration. Clyde & Co are required to keep their clients fully informed about material matters as the action proceeds. This is the usual duty of solicitors. They also have a contractual duty to keep the Funder informed but that cannot prejudice the Members. The Representatives may not have a say in "day to day" matters but the Funder and the Representatives, who represent the Members' interests, are obliged to agree upon general strategy and upon tactics. Thus, Clyde & Co owe their clients, the Members, the ordinary fiduciary duties of a solicitor, as well as the duty of care that all solicitors owe their clients. They will receive their day to day instructions from the Funder although subject to the oversight of the Representatives and subject to receiving joint instructions from the Funder and the Representatives about strategy and tactics. The Members, as clients, are also protected because, as has been said, the Engagement Letter takes precedence over the other agreements.

[31] With that understanding of the contractual relations between the Members, the Funder and Clyde & Co it is possible to consider the appellant's submissions.

[32] Mr McKenna QC, who appeared for the appellants with Mr Hooper of counsel, did not submit that entry into the agreements constitute, or that anything done or likely to be done under them would constitute, an abuse of the court's process. Rather, he submitted that the Funder had "overreached itself" because it did not owe any duty of care to anyone, it had power to terminate a claimant's status as a Member, to terminate the solicitors' retainer, to terminate a Member's position as a Representative and to require the solicitors to retain particular counsel or to terminate the retainer of counsel. The appellant submitted that these "Draconian powers" raise a question of whether the provisions conferring the power would be enforceable and also a question as to what would happen if the "parties fell out". The appellant points to the likelihood that the Funder will, by dint of the close working relationship that it will inevitably develop with the solicitors as well as by virtue of its commercial power as the Funder, develop power that "swamps" the

Members' power. What this means in fact was not explained. The appellant submitted that the history of the difficulties that were faced in persuading anyone to fund the action meant that the Funder, who was the last of several funders who had been approached and who was the only willing one, would have been keenly aware of its power to demand terms as the only available funder in a market of reluctant funders. The appellant styled this practical ability to control as "soft power". The appellant submitted that an agreement of this kind is a "*de facto* assignment of a cause of action" and points out that a tort claim is not assignable. As we understood the argument, the agreements were tantamount to an impermissible assignment because their effect was to confer upon the Funder the practical control of the litigation. When pressed to articulate the vice that was inherent in these contractual arrangements, Mr McKenna QC submitted that what is expected is that litigants should conduct litigation to benefit themselves yet here control or influence is vested in a party whose interest is not to get just compensation for a wrong but who is, rather, seeking to get a return for its money. Such a person, it was submitted, might continue a case longer than the litigants themselves might wish or, on the other hand, might settle for a quick early return when the litigants would not themselves have been willing to do so.

[33] The averment of opprobrious slogans does not aid thought. They merely describe categories of indeterminate references which cannot be used in performing a legal analysis. The appellant did not submit that the contract, constituted by the agreements read together, was void for maintenance or for champerty or that a tort had been committed. Nor did the appellant submit that the proceeding was rendered an abuse of the court's process by reason of the existence of these contractual arrangements. Rather, the appellant submitted that certain features of the agreements render them unenforceable because they are against public policy. It was submitted that this made the contract unenforceable as a matter of public policy and it was this "core concept" that the appellant's case addressed. The appellant submitted that the level of control of the litigation that lies in the hands of the Funder is against public policy. The appellant did not identify any ingredient of public policy with which the funding agreement clashes.

[34] As to the nature of "public policy", in *Re Jacob Morris*[10] Jordan CJ said that "public policy" means the ideas which, for the time being, prevail in a community as to the conditions necessary to ensure its welfare. His Honour observed that public policy is not fixed or stable but changes from generation to generation because ideas as to what is necessary or injurious also fluctuate over the course of years.[11] When an appeal is made to "public policy" in a case like the present, it constitutes an appeal to *legal* policy and is addressed to the question whether the policy of the law may affect the public good in a detrimental way. It can address no wider question than that, those wider questions of policy being the province of the legislature.

[35] The appellant's summoning in aid the elements of public policy that inform the law of torts in relation to maintenance and champerty requires the policy behind these torts, referred to in the old texts and cases, to be examined. When one analyses these old authorities, it is vital to be aware of contemporary apperceptions in order

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10 (1943) 43 SR (NSW) 352 at 355-356.

11 "In the law, policy can be difficult magic": French J, as his Honour then was, quoted in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (see below) at [118]; in *Richardson v Mellish* (1824) 2 Bing. 229 at 252 Burrough J said that arguments based upon public policy are never made but when other points fail.

to ensure that the real principles that underlie the decisions are recognised and defined accurately.

[36] As long ago as 1890, an English academic suggested that the English law of maintenance and champerty is founded on old statutes which were based on a condition of society now entirely passed away and that the modern rule is no longer dependent upon any considerations of justice and policy.[12] There has been a lively but esoteric debate concerning whether the crimes of maintenance and champerty had a common law or statutory origin.[13] For the purposes of deciding this appeal it is not necessary to descend into that unprofitable train of inquiry. The important thing is to identify the mischief which the law sought to address because the identification of that mischief will illuminate the public policy that sustained the torts.

[37] The source of these torts is to be found in the early struggle to uphold the integrity of the system of administration of justice against the abuses being perpetrated by powerful figures. Sir William Holdsworth said:

> "In a relatively primitive society private war is the natural and most congenial remedy of those who are or think they are wronged; and, when the strength of the law makes a recourse to this expedient dangerous or impossible, when those who are wronged are compelled to have recourse to the law, much of the unscrupulousness and trickery which accompany the waging of a war are transferred to the conduct of litigation. The courts are besieged with angry litigants who fight their lawsuits in the same spirit as they would have fought their private or family feuds. This, as we have seen, is a phenomenon which recurs in many nations at many periods: but it was specially apparent in mediaeval England. The victory won by royal justice in the thirteenth century was somewhat premature. The legal and political ideas held by the royal judges were too far in advance of a society which was still permeated by feudal ideas of a retrograde type. And so, contemporaneously with the growth of the power of the royal courts, we get the growth of many various attempts to pervert their machinery; and, when the royal power weakened, these attempts were so frequently and successfully made that the law was subverted and civil war ensued."[14] (footnotes omitted)

[38] Men learned the rules of litigation as they learned the rules of sword play, said Holdsworth.[15]

[39] In his *Constitutional History of England*[16] Bishop Stubbs wrote that the end of feudalism did not immediately extinguish the desire of powerful barons to "support a vast household of men armed and liveried as servants, a retinue of pomp and splendour, but ready for any opportunity of disturbance; he could bring them to the

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12 *The Law of Maintenance and Champerty*, A H Dennis (1890) 6 LQR 169 at 187-188.

13 *The History of Maintenance and Champerty*, P H Winfield (1919) 35 LQR 50 at 56-59; *The History of Conspiracy and Abuse of Legal Procedure*, (hereafter "the History") P H Winfield, Cambridge University Press, 1921, 131-150.

14 *Holdsworth*, Vol III, at 394-395.

15 *Holdsworth*, Vol II, at 416.

16 Oxford Clarendon Press, 1880 (hereafter "Stubbs").

assizes to impress the judges, or to parliament to overawe the king".[17] Such a magnate "could lay his hands, through them, on disputed lands and farms, and frighten away those who had a better claim. He could constitute himself the champion of all who would accept his championship, maintain their causes in the courts, enable them to resist a hostile judgment, and delay a hazardous issue."[18] Bishop Stubbs said that the English of the middle ages were an extremely litigious people but that litigation was costly and it was far easier for a man who wished to maintain his own right or to attack that of his neighbour to secure the advocacy of a baron who could and would maintain his cause for him on the understanding that he had the rights of a patron over his client.[19]

[40] The problem was inflamed by the willingness of powerful figures to take on litigation brought by others. In medieval days and well past the time of Henry VIII land was the only form of substantial wealth and so the subsidisation by the rich and powerful of legal claims to land in exchange for a share of the estate became a big business. Powerful nobles could use this as a way to increase their own estates.[20] In some cases, such persons could seize the land of some unfortunate victim and keep it by force of arms and, when the victim appealed to the courts, he would find the law to be powerless in the face of intimidation, perjury or bribery, or all of these.[21] Sometimes, a powerful lord would enter the fray only after litigation had started in order to influence the result. One device was to purport to enfeoff the land to a powerful noble who would then defend an action for ejectment by the rightful owner in return for a part of the estate.[22]

[41] The very term "champerty" comes from this practice by way of the Latin word "campus", a field, or the Norman French equivalent, "champs", coupled with the Latin word "partus", or the French word "partie".[23] The word "maintenance" was defined by Sir Edward Coke as follows:

> "Maintenance, *manutenetia*, is derived of the verbe *manutenere*, and signifieth in law a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right …"[24]

[42] Sir John Baker has pointed out that these abuses became a serious threat to the uniform enforcement of the law[25] and became, moreover, almost a private war in which local chiefs could challenge the authority of the very monarch.[26] These depredations by the powerful became so virulent over the whole of England[27] that in 1381 the House of Commons complained that maintainers "are as Kings in the country".[28] So lucrative was this practice that a lord's maintainer came to occupy

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17 Stubbs, Vol III, at 573.
18 *Ibid*.
19 Stubbs, Vol III, at 574.
20 M Radin, 'Maintenance by Champerty' (1935) 24 *California Law Review* 48 at 64.
21 *The Law of Maintenance and Champerty*, (hereafter "Bodkin") E H Bodkin, Stevens and Sons, 1935, at 1.
22 Bodkin, *supra*, at 2.
23 *cf.* Radin, *supra*, at 62-63.
24 *Coke on Littleton*, Law Book Exchange Ltd, Reprinted in 2010, Vol II at 368.b; the word "manus" means "hand" in Latin and "tenere" means "to hold".
25 Sir John Baker, *The Oxford History of English Law*, (hereafter "Baker") Vol VI, Oxford University Press, 2003, at 69.
26 *cf.* Radin, *supra*, at 65.
27 *The History*, *supra*, at 155.
28 *Ibid*, at 156; "Country" meant "other than the town" in this context.

a distinct office within the lord's retinue of retainers and would wear a special livery.[29] At a time when literacy was rare, the emblems of a retainer's livery, the maintainer's uniform, constituted a badge of service.[30] The wearing of livery had two vices. First, there was an immediate political problem because liveries became the badges of the great factions at court[31] thereby tending to destabilise the authority of the monarch. Second, a maintainer's livery was an effective security to a malefactor because the power that it implied blunted "the edge of the law".[32]

[43] Abuses by maintainers retained by powerful nobles also extended to the improper influencing of sheriffs, jurors and even judges. A sheriff could be bribed to choose sympathetic jurors and jurors could be bribed or intimidated directly.[33] This was why Sir Thomas More said:

> "I never saw the day yet but that I durst as well trust the truth of one judge as of two juries".[34]

[44] Effective measures required a statute and the first attempt to quell these evils by statute was in 1275 by the enactment of the *First Statute of Westminster* during the reign of Edward I.[35] This Act addressed a large number of discrete social and legal issues but, prominent among these, were the various forms of public corruption that had a tendency to degrade the authority of the State. Cap. V made it an offence to "[disturb] any to make free election". Cap. X sought to ensure the appointment of men of integrity to the office of coroner. Closer to the subject at hand, Cap. XXIV prohibited sheriffs and bailiffs from seizing lands under colour of his office without a warrant.

[45] Cap. XXV was as follows:[36]

> "*None [shall] commit champerty, to have part of the thing in question.*
>
> No officer of the King by [themselves], nor by other, [shall] maintain pleas, [suits], or matters hanging in the King's courts, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them; and he that doth, [shall] be [punished] at the King's [pleasure]." (emphasis in original)

[46] Cap. XXVI prohibited the taking of "any reward to do his office" by any "[sheriff], nor other the King's officer". Cap. XXVII prohibited court clerks "tak[ing] any thing" for doing their duty. Cap. XXVIII prohibited maintenance by any of the "clerk of any [justicer], or sheriff".

[47] Cap. XXX provided:

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29 Bodkin, *supra*, at 2.
30 Stubbs, *supra*, Vol III, at 574.
31 *Ibid*, at 577.
32 *Ibid*, at 578; rather like the "patches" worn by outlaw motorcycle gangs.
33 Baker, *supra*, at 69, 352.
34 Baker, *supra*, at 352, quoting *The Apologye of Syr Thomas More*, ed. A L Taft (1930), 150; More, *The Debellacyon of Salem and Bizance* (1533), sig. G7v, rpr. in *Complete Works of More*, x. 135, line 18.
35 3 Edw. 1, *The Statutes at Large*, Vol I at 74; *Halsbury's The Complete Statutes of England*, Vol 4 at 261.
36 In the English translation, the statute itself having been written in Old French.

"*Extortion by [justices] officers*

And [forasmuch] as many complain [themselves] of officers, cryers of fee, and the [marshals] of [justices] in Eyre, taking money wrongfully of [such] as recover [seisin] of land, or of them that obtain their [suits], and of fines levied, and of jurors, towns, [prisoners], and of others attached upon pleas of the crown, [otherwise] than they ought to do, in divers manners; (2) and [forasmuch] as there is a greater number of them than there ought to be, whereby the people are [sore] grieved; The King commandeth that [such] things be no more done from henceforth; (3) and if any officer of fee doth it, his office [shall] be taken into the King's hand; (4) and if any of the [justices' marshals] do it, they [shall] be [grievously punished] at the King's [pleasure]; (5) and as well the one as the other [shall] pay unto the complainants the treble value of that they have received in [such manner]." (emphasis in original)

[48] Cap. XXXIII provided:

"*No maintainers of quarrels [shall] be [suffered]*

It is provided, That no [sheriff shall suffer] any barretors or maintainers of quarrels in their [shires], neither [stewards] of great lords, nor other ([unless] he be attorney for his lord) to make [suit], nor to give judgements in the counties, nor to pronounce the judgements, if he be not [specially] required and prayed of all the [suitors], and attornies of the [suitors], which [shall] be at the court; and if any do, the King [shall punish grievously] both the [sheriff] and him that [so] doth." (emphasis in original)

[49] The vice constituted by the wearing of liveries by maintainers employed by powerful lords was addressed by a statute of 1377 which provided that "henceforth no such livery be given to any man for maintenance of quarrels or other confederacies upon pain of imprisonment".[37]

[50] The mischief addressed by this Act was the abuse of the court's processes in the way described. It was, therefore, logical for Professor Winfield to entitle his monograph, half of which concerns maintenance and champerty, "The History of Conspiracy and Abuse of Legal Procedure".[38] Holdsworth also described and explained the later statutory developments for the suppression of champerty and maintenance.[39] These culminated in an Act passed in 1540 during the reign of Henry VIII which punished:

"… maynetenance embracerie champartie subornacion or witnesses sinistre labour buying of titles and pretensed rightes of personnes not being in possession, wheruppon greate pjury hathe ensued and muche unquietnes oppression vexacion troubles wrongis and

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37 *History of the Criminal Law of England*, Sir James Fitzjames Stephen, Macmillan and Co, 1883, Vol III, at 236.

38 In early times the term "conspiracy" was employed to describe a combination formed "falsely and maliciously to indite [or cause to indite] or falsly [*sic*] to move or maintain Pleas": see *The History* at 1.

39 As well as embracery, barratry and perjury: see Holdsworth, Vol III, at 397 *et seq*. The later statutes included the *Statute of Conspirators*, passed in 1293, which conferred a private right to sue conspirators, and the *Articuli super Cartas*, enacted in 1300 and which authorised the issue of a writ out of Chancery.

> dishenheritaunce hath folowed amongst his moste loving subjectis, to the great displeasure of Allmighty God the discontentacion of his Majestie and to the greate hinderaunce and lett of justice within this his realme".[40]

[51] By 1716, when *Hawkins' Treatise of Pleas of the Crown* was first published, maintenance came to be defined as:

> "an unlawful taking in Hand, or upholding of Quarrels or Sides, to the [Disturbance] or Hinderance of common Right".[41]

[52] Hawkins identified two forms of maintenance. The first form involved a person assisting another "in his [Pretensions] to certain Lands, by taking or holding the [Possession] of them for him by Force or Subtilty, or where one [stirs] up Quarrels". This form was maintenance "*in ruralis*", that is to say, in the country. The second form was "*in curialis*", namely, in court. This latter took three forms. The first occurred when one person assisted another with money or other help to carry on a suit. The second occurred when such assistance was given for a share of the proceeds. The third was constituted by bribing or intimidating jurors.[42] In *Stephen's Digest of the Criminal Law*,[43] maintenance, champerty, barratry and conspiracy to defeat justice are all dealt with in the same chapter.[44]

[53] By the time E H Bodkin came to write his textbook on the subject in 1935,[45] the long-ago social evils practised in the days of Edward I and later English monarchs had long ceased to be. Yet, as in other domains of the common law,[46] the tort that designed only to remedy particular evils had taken root and it continued to flower. Because the tort had lost its justification, exceptions to the rule burgeoned. Bodkin cites over a dozen such exceptions in which maintenance could be justified, including test actions,[47] contracts of indemnity,[48] beneficiaries and trustees,[49] creditors who assist their debtors to recover debts owed by others[50] and charitable assistance.[51] All but the last of these were utterly unknown in the days when the prohibition against maintenance was born.

[54] Moreover, the scope of the tort dwindled so that, as it was put by Lord Abinger in 1843,[52] the law of maintenance was confined to cases where:

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40 Stat. (1540), 32 Hen. 8, C. 9; *Halsbury's The Complete Statutes of England*, Vol 4 at 301; quoted in its original form.

41 *Hawkins' Treatise of the Pleas of the Crown* (1716), reprinted by Professional Books Ltd, London, 1973, at 249.

42 *Ibid*.

43 *A Digest of the Criminal Law (Indictable Offences)*, Sir James Fitzjames Stephen, Sweet & Maxwell, London, 9th ed, 1950.

44 Chapter XVIII at 149.

45 Bodkin, *supra*.

46 Such as the rule in *Rylands v Fletcher* [1868] UKHL 1; [1868] CR 3; (1868) LR 3 HL 330, as to which, see *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; and the liability of local authorities for a failure to maintain roads, as to which see *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512.

47 *Supra*, at 26.

48 *Ibid*, at 30.

49 *Ibid*, at 24.

50 *Ibid*, at 25.

51 *Ibid*.

52 *Findon v Parker* (1843) 11 M & W 675; [1843] EngR 786 at 682.

> "a man *improperly*, and *for the purpose of stirring up litigation* and strife, encourages others either to bring actions, or to make defences *they have no right to make*." (emphasis added)

[55] In *Harris v Brisco*[53] Wills J said that it was for the alleged maintainer to justify the interference in order to render it lawful:

> "There is good reason for this, for, if unlimited licence was allowed to litigious and cantankerous people, who rejoice in stirring up strife, and to whom an atmosphere of litigation is as the breath of life (and there are such people in the world),[54] to make other people's quarrels their own, and to take the chance of success without incurring the liabilities of failure, a great many persons would be harassed and vexed by unjust and improper litigation".

[56] In 1984, the Full Court of the Supreme Court of Queensland upheld a trial judge's finding that the defendant had engaged in maintenance. The learned trial judge, McPherson J, as his Honour then was, defined maintenance as "the procurement, by direct or indirect financial assistance, of another person to institute or carry on or defend civil proceedings, *without lawful justification*" (emphasis added).[55] His Honour referred to statements in the authorities that the interference must be "officious", that is to say, without any legal justification on the part of the alleged maintainer for the interference.[56] These *dicta* raise the question of what is meant by "without lawful justification". The facts in *JC Scott v Mermaid Waters*[57] were that the contract by which the plaintiff had agreed to build the defendant's tavern had come to an end. The defendant wished to continue construction and wanted to use several of the plaintiff's, as yet unpaid, subcontractors for that purpose. Instead of taking an assignment of their debts owed to them by the plaintiff in return for payment or undertaking various other conventionally available methods to secure the services of the subcontractors while seeing that they were paid their due by the plaintiff, the defendant chose instead to lend the subcontractors the amounts that the plaintiff owed them on condition that each of them would then sue the plaintiff by a multitude of separate actions and enforce judgment, including by seeking a winding up. It was only to the extent of any recovery that the amounts lent to the subcontractors by the defendant would become recoverable. The defendant vigorously enforced the subcontractors' obligation to pursue the plaintiff, instructing its solicitors to keep "a close watch over the subcontractors' adherence to the agreement"[58] – at least until the plaintiff delivered its statement of claim seeking damages for maintenance "when … enthusiasm waned."[59] The defendant was held liable for committing the tort of maintenance.

[57] There were no exceptions that could make champerty lawful even in cases in which the litigant could not afford to maintain a good suit. This could, seemingly, have unjust consequences. In *Strange v Brennan*[60] a legatee, Mrs Brennan, living in

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53 (1886) 17 QBD 504; [1886-90] All ER 564 at 505-506.
54 As all judges know too well.
55 *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 at 428.
56 *Ibid*, at 429.
57 *Ibid*.
58 *Ibid*, 428.
59 *Ibid*, at 438 per Connolly J.
60 [1846] 60 EngR 652.

Ireland was entitled to a residuary estate being administered in England. Mrs Brennan sought the services of solicitors to act for her, being herself unable to fund the proceedings, and the expenses of the suit being anticipated to be substantial, but she was unsuccessful. She had no money and nobody was prepared to take the risk. The plaintiff, however, agreed to act as her solicitor in Ireland and retain an English solicitor to take proceedings in England. Mrs Brennan agreed to pay him his expenses and 10 per cent of the proceeds. At his own expense, the plaintiff engaged English solicitors to act and the proceeding was successful. Mrs Brennan then repudiated the agreement claiming that it was void for champerty. The Vice-Chancellor agreed and, on appeal, the Lord Chancellor also agreed, saying:

> "… The agreement was champerty, and considering that the Plaintiff Strange was an attorney and solicitor, and that the Defendant was his client … it was champerty of a shocking kind."[61]

[58] His Lordship emphasised that the agreement would have been void even if Strange, the solicitor, had been regarded as a mere agent.[62]

[59] On the other hand, in a different jurisdiction, in *Ram Coomar Coondoo v Chunder Canto Mookerjee*,[63] it was held that a champertous agreement, made in order to fund litigation to benefit a plaintiff who could not otherwise afford to litigate, would be regarded as furthering right and justice and necessary to resist oppression. So too in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd*,[64] Fletcher Moulton LJ said that the old decisions that gave rise to the doctrines of maintenance and of champerty were based on notions that no longer had any value and had long since passed away. His Lordship perceived that the modern form of the doctrine was the result of an attempt by the courts to carve out of the old law of maintenance such remnant as was consonant with modern notions of public policy. Maintenance as a civil wrong was directed against "wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse."[65]

[60] The validity of an agreement to fund the litigation of a claim, by a party otherwise uninterested in the claim, was upheld in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[66] in which, as in this case, the appellant attacked the funding agreement on the grounds that the funder had sought out potential claimants whom it induced to join in a class action, had offered terms that would give the funder control of the litigation as well as a significant profit in the event of success. The agreement was, of course, champertous yet Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ held this did not mean that the agreement was contrary to public policy. Gummow, Hayne and Crennan JJ cited the *dicta* quoted above from *Ram Coomar Coondoo v Chunder Canto Mookerjee* and *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* with evident approval and, concerning these archaic torts, quoted the following *dictum* from *Edwards v Attorney-General (Can)*:[67]

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61 *Strange v Brenann* [1848] 2 Ch 1018, at 1019.
62 *Ibid*.
63 *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) LR 2 App Cas 186 at 210, on appeal from India.
64 [1908] 1 KB 1006 at 1013-1014.
65 *Ibid*, at 114.
66 (2006) 229 CLR 386.
67 [1930] AC 124 at 134; and *cf. Clyne v Bar Association (NSW)* (1960) 104 CLR 186 at 203.

> "Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared."[68]

[61] The extinction of the law of maintenance after it had ceased to be needed was hampered by judicial deliberation on the nature of the assignment of choses in action. This phenomenon has been explained by Sir Frederick Pollock[69] and, later, with a greater of explication, by Holdsworth. The latter described the early development of the law relating to obligations, tortious or contractual, as being moulded and constrained by narrow notions of privity. Thus, a contractual relationship gave rise to mutual obligations that were seen as being entirely personal and so a right of action based upon a contract or a tort was "an essentially personal thing"[70] or, as Coke put it, consisting only "in privity".[71] Inherently, such obligations could not be property of a kind that was capable of assignment. Commercial necessity led common lawyers to find different ways to assign debts, such as constituting the assignee the attorney of the assignor for the purpose of the recovery of the debt[72] or by assigning the fruits of the action rather than the right of action,[73] this latter even in cases of claims for unliquidated damages in tort because these fruits of the action were not regarded as being an unassignable chose in action but instead were said to constitute "future property identified by reference to an existing chose in action",[74] a fine distinction indeed.

[62] The judges of the courts of equity, from the earliest times, "thought the doctrine too absurd for them to adopt".[75] Equity always recognised that equitable property could be assigned and it also gave relief to assignees for valuable consideration of legal choses in action on the basis that equity treats as done that which ought to be done.[76] An assignee of equitable property could sue in his or her own name in Chancery and an assignee of a legal chose in action could use the name of the assignor to sue because equity would compel the assignor to lend his or her name to the action.[77] Ultimately, s 25(6) of the *Judicature Act* 1873 (UK) made "any debt or other legal chose in action" assignable at law.

[63] However, at the time when there was a justified fear of maintenance, the scope for abuse by employing the device of assigning choses in action meant that the law regarded choses in action as unassignable for this doctrinal reason also. Coke said that:

> "… the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression

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68 *Clyne v Bar Association* (*NSW)*, *supra*, at 203.

69 *Pollock's Law of Contract*, (8th ed.) at 229; Holdsworth, Vol VII at 520-539.

70 Holdsworth, Vol VII, at 520.

71 *Ibid*, at 525, quoting Coke in *Winchester's Case* (1583) 3 Co. Rep. at f. 2b.

72 *Ibid*, at 537.

73 *Ibid*, at 538.

74 *Glegg v Bromley* [1912] 3 KB 474 at 489 *per* Parker J.

75 *Master v Miller* (1791) 4 TR 320 at 340 *per* Buller J; see also discussion in *Fitzroy v Cave* [1905] 2 KB 364 at 372 *et seq.* per Cozens-Hardy LJ.

76 See generally, *Snell's Equity*, J McGhee, P V Baker and E H T Snell, 2000, Sweet & Maxwell, 30th ed., at 82 *et seq; Assignment of Choses in Action in Australia*, J G Starke, 1972, Butterworths, at 12 *et seq.*

77 *Snell's Equity*, *supra*, at 82.

> of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice".[78]

[64] Recently, the High Court referred to the connection between champerty and the rule that certain choses in action are not capable of being assigned, describing the denial of recognition of the assignability of "bare right of action" as "best treated as having achieved an independent life of its own".[79]

[65] In modern times, it has been said, dyslogistically, that the assignment of a "bare right of action" was impermissible because it "savoured" of maintenance and champerty.[80] In *Prosser v Edmonds*,[81] certain interests in the estate of a testator had been assigned to the defendant in circumstances that rendered the assignment liable to be set aside for fraud. The same interest was then lawfully assigned to the plaintiff who sued to set aside the fraudulent assignment. In a *dictum* that has often been quoted, it was said of an attempt to assign a right to set aside a transaction:

> "What is this but a purchase of a mere right to recover? It is a rule – not of our law alone, but that of all countries – that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated and is against good policy".

[66] Recently, in *WorkCover Queensland v AMACA Pty Ltd*[82] this Court reaffirmed the rule that, in general, a chose in action in tort was not assignable. Gotterson JA, who wrote the leading judgment, observed that in modern times there had been a growth in the number of exceptions to that rule. These included cases in which the right was "annexed" to a property or to a proprietary chose in action and cases in which the assigned had a "genuine substantial or commercial interest".[83] His Honour observed:

> "The incoherent nature of the rationales for the personal action rule, originally resting only upon the nature of the rights themselves, but then later, upon the policy against maintenance, explains the lack of coherence of the exceptions to the prohibition."[84]

[67] His Honour concluded that these excuses were founded upon the "law's opposition to maintenance" and they raised for examination the modern policy of the law regarding maintenance.[85] His Honour referred to *Brownton Ltd v Edward Moore Inbucon Ltd*[86] in which Lloyd LJ observed that there was 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. This is reminiscent of the observation made by Gummow, Hayne and Crennan JJ in *Fostif*[87] that, while the distinction between the assignment

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78 *Lampet's Case* (1612) 10 Rep 46 b (77 ER 994), at p. 48a (77 E.R., at p. 997).

79 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 49 498 per French CJ, Crennan and Kiefel JJ citing Lord Mustill in *Giles v Thompson* [1994] 1 AC 142 at 153.

80 See eg. Bodkin, *supra*, at 92-93.

81 (1835) 91 Y & C (Ex) 481 at 496; 41 RR 322 at 333; 160 ER 196.

82 *WorkCover Queensland v AMACA Pty Ltd* [2013] 2 Qd R 276.

83 *Ibid*, at 280 citing *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710*; TS & B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No 3)* (2007) 158 FCR 444.

84 *Ibid*, at 280.

85 *Ibid*, at 281.

86 [1985] 3 All ER 499 at 509.

87 *Supra*, at [74].

of an item of property and the assignment of a bare right to litigate was regarded by the old authorities as fundamental to the application of the law of maintenance and champerty, drawing a distinction was not always easy and it was a distinction whose policy roots were not readily discernible. Their Honours noticed that certain practices that were no different in substance from those that formerly had been roundly condemned had now become commonplace; for example, the sale of the subject matter of a pending action by a trustee in bankruptcy and the doctrine of subrogation.

[68] In *Fostif* the defendant to a class action sought to stay the action on the ground that it was an abuse of process. The appellant here hesitated to go so far. The appellant in *Fostif* failed to persuade the New South Wales Court of Appeal that its arguments were sound. The same arguments failed to convince the High Court that the proceeding was an abuse of process. The appellant here seeks to distinguish *Fostif* on the ground that it was decided according to the law of a place in which the torts of maintenance and champerty had been abolished by the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW). That argument will not do because s 6 of the Act preserved the effect of any rule of law as to the cases in which a contract is to be treated as contrary to public policy and, as will be seen, the effect of that reservation was significant to the decision in the case.

[69] The appellant in *Fostif* submitted that the proceeding against it was an abuse of process because of the terms contained in the funding agreement between the funder and the plaintiffs in the class action. It was submitted that the funder had an effective monopoly in conducting the litigation because it had caused the proceeding to be commenced and the limitation period had then expired so that any claimant wishing to sue had to conform to the funder's conditions. Second, it was submitted that the funder was "trafficking" in the claims because it had the power to pursue them and offered to the claimants to use that power. Effectively, the funder was said to be selling claims to the claimants who would otherwise have no right to bring suit.[88] Third, it was submitted that the control available to the funder created the potential for a conflict of interest to arise.[89]

[70] Those arguments were rejected. In the Court of Appeal Mason P said that the court's power to stay for abuse of process was not based upon solicitude for the economic interests of those whose suit has been maintained.[90] Nor is the court concerned with balancing the interests of the funder and its clients. Rather, said his Honour, "… the court's basal inquiry should be whether the role of the particular funder has corrupted or is likely to corrupt the processes of the court …".[91] His Honour held that the possibility of corruption of the court's processes was foreclosed by the judicial supervision required by the legislation,[92] that the funder's control was not "excessive",[93] that its fees were not excessive[94] and that there was a solicitor on the record.[95] Mason P observed that the law now looks favourably upon funding arrangements that offer access to justice so long as any tendency to abuse of

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88 (2005) 63 NSWLR 203 at [121].
89 *Ibid*, at [136].
90 *Ibid*, at [125].
91 *Ibid*, at [132].
92 *Ibid*, at [137].
93 *Ibid*, at [137].
94 *Ibid*, at [144].
95 *Ibid*, at [136].

process is controlled[96] and in that case the prospect of individuals being able to make their own separate claims was unlikely.[97]

[71] There was an appeal by the unsuccessful defendant to the High Court, which allowed the appeal upon a ground that is immaterial to this case, but affirmed the correctness of the decision of the Court of Appeal otherwise. Gummow, Hayne and Crennan JJ treated the appellant's case as one involving an appeal to public policy or, in the alternative, an appeal to the rules relating to an abuse of the court's process.[98] The case is, therefore, relevant to the present appeal because this case is also based upon an appeal to public policy considerations. Their Honours noted that the law of maintenance and champerty, as expounded in the 20th century depended more upon the assertion of consequences said to follow from champerty than it did upon any close analysis or clear exposition of the policy to which the rules were intended to give effect.[99] After noticing that the *Abolition Act* expressly preserved the law relating to cases in which a contract is to be treated as contrary to public policy,[100] their Honours said that the rule of public policy relied upon in the case "would readily yield no rule more certain than the patchwork of exceptions and qualifications that could be observed to exist in the law of maintenance and champerty at the start of the twentieth century".[101] The same can be said of the arguments of law advanced in this case.

[72] Their Honours rejected the proposition that a funder, whose participation is based solely upon a desire to profit from otherwise *bona fide* litigation and who, in order to make that profit, sought out the class of claimants, was acting contrary to public policy.[102]

[73] Kirby J pointed out the obvious fact that class actions require somebody to marshal substantial resources, gather voluminous (and expensive) evidence, retain and pay competent counsel over a significant period, often provide substantial security for costs (as in this case) and attend to general and specific issues in the litigation.[103] Yet it is these features, which are essential to the running of substantial class actions, to which the appellant in the present case points as conferring "soft power" upon the Funder with the effect, so the argument runs, that the funding contracts are unenforceable as being against public policy. Indeed, the appellant goes further and also identifies the Funder's greater experience and expertise in conducting litigation as exacerbating the affront to public policy.[104] Having made these submissions, the appellant failed to demonstrate how else such a case could be conducted.

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96 *Ibid*, at [105].
97 *Ibid*, at [149].
98 *Fostif*, *supra*, at [39].
99 *Ibid*, at [77].
100 *Ibid*, at [86].
101 *Ibid*.
102 *Ibid*, at [88].
103 *Ibid*, at [137].
104 Appellant's Amended Outline of Outline at [26]; as well as the claimants' inability to start proceedings of their own because of the expiry of the limitation period. The offer by the Funder to carry the case, that otherwise could not be made, *at its own risk*, and on terms acceptable to the commercial entities who are the claimants is said also to weigh in the balance in favour of a conclusion that to allow the claimants to pursue their rights on terms that they find acceptable would be against public policy.

[74] Two observations may be made about this history. First, the evils practised in early times were actions that in modern times would all be regarded as a species of abuse of the court's process. However, rather than legislating to prohibit abuses of process generally, the early legislatures chose to create the specific offences of maintenance and champerty, as well as bribery and other offences. The creation of offences concerning distinct species of abuse of process continues to this day. Section 122 of the *Criminal Code* (Qld) is an example. It is an offence to attempt to influence a juror by threat, intimidation, bribes or promises. However, the offence of maintenance was not continued by the *Code*. The early legislatures might, instead of creating the offences of maintenance and champerty, have created a general offence akin to the modern doctrines of abuse of process and collateral abuse of process. If they had done so, the principle that really underlies these disparate offences would have been apparent. No statute in general terms was possible for two possible reasons. One reason is that, the integrity of the judges themselves being suspect, it was necessary to point to distinct conduct and make it unlawful rather than leaving any scope of misinterpretation. The other reason is that the concept of abuse of process as we understand it had not yet evolved.

[75] Second, it must be borne in mind that the forms of perversion of the course of justice that led to the enactment of the early statutes were only possible because of the immaturity of the system of the administration of justice. The long process that led to an independent judiciary began with the quarrels between James II and Sir Edward Coke and was propelled forward by the passing of the *Act of Settlement* 1701 (UK) which, by guaranteeing judicial tenure, created a stable platform for the growth of an impartial, independent and incorruptible judiciary.[105] However, before that stage was reached, among the problems faced by English monarchs wishing to establish central authority under the rule of law was the unhappy fact that some of the most enthusiastic of the corrupt maintainers were judges, sheriffs and court clerks. A corruptible judiciary nullifies a court's ability and, indeed its willingness, to resort to the modern doctrine of abuse of process described by Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions*[106] as follows:

> "[A] court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. … A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

[76] Modern conditions no longer present the same threats, so much so, that the tort of maintenance has been abolished in England, the Australian Capital Territory, New South Wales, Victoria and South Australia.[107] The evils against which those old laws were directed are now addressed by a variety of other means, including the now accepted power of a court to control its own processes against abuse.

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105 It is not irrelevant to notice that, human nature being universal, the opportunities afforded to humanity's greed and ambition by an immature and, therefore, corruptible judicial system were exploited by maintainers in ancient Greece and in imperial Rome in the same way as, in later centuries, occurred in England. There too, laws were passed in an attempt to suppress the mischief: see *Radin*, *supra*, at 49-55.

106 [1964] AC 1254 at 1301 cited with approval in *Williams v Spautz* (1992) 174 CLR 509 at 518 per Mason CJ, Dawson, Toohey and McHugh JJ.

107 *Criminal Law Act* 1967 (Eng); *Civil Law (Wrongs) Act* 2002 (ACT) s 221; *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW); *Wrongs Act* 1958 (Vic) s 32 (since 1969); *Criminal Law Consolidation Act* 1935 (SA) (since 1993).

[77] And what of the law's condemnation of "trafficking" in choses in action? In *Trendtex Trading Corporation v Credit Suisse*[108] Lord Wilberforce referred to an agreement to assign a chose in action as one that "savour[ed] of champerty" because it involved "trafficking in litigation", which, according to his Lordship, was something that is contrary to public policy. Invalidity on that ground could be avoided, however, if the assignee of a "bare cause of action" had acquired a "property right" and the assigned chose in action was "incidental to that right" or if the assignee had "a genuine commercial interest in taking the assignment and in enforcing it for his own benefit".[109] In that situation, it is said that there is no reason why the assignment of the chose in action should be struck down as "an assignment of a bare cause of action or as savouring of maintenance".[110]

[78] The instinctive aversion of judges to any encouragement of a trade in certain causes of action is justified. The courts of a constitutional democracy are established in order to determine disputes. As the third arm of government, the judiciary applies the law to the facts that it finds and it does so in order to quell disputes over the law as it is enacted by parliament and as it is maintained and executed by the executive government. The judiciary, as a part of the foundation of government, can no more be recruited to become a part of commercial enterprise than the legislature or the executive can be. The courts are not engaged in the business of dispute resolution. They are engaged in that aspect of government that requires an impartial body to apply the rules of law in order to maintain the rule of law when rights have been transgressed.

[79] The word "trafficking" is opprobrious. One "traffics" in dangerous drugs. The law's aversion is not directed against a trade in choses in action; it is directed against a trade in particular kinds of choses in action for shares and debts are freely traded in clearing houses. They are truly trafficked. By the middle of the 18th century, equity had come to recognise the validity of assignments of debts and other legal choses in action and there was no need to show a "special relationship" or a "common interest"[111] and the commercial demand for the assignability of debts resulted in the passing of s 25(6) of the *Judicature Act* 1873 (UK), which was copied in s 199 of the *Property Law Act* 1974 (Qld). That provision makes effective the assignment of "any debt or other legal thing in action". Although in *Victoria Insurance Co v King*[112] Griffith CJ, with whom Chubb and Real JJ agreed, construed this provision as merely procedural, and as not changing the substantive law concerning the kinds of choses in action that can be assigned, on appeal the Privy Council left the question open.[113] Like the law of maintenance itself, the law concerning the assignability of choses in action has developed upon the basis of changing foundations and, in the course of changing apperceptions accompanying changing social conditions, this has resulted in a degree of doctrinal incoherence so that the objection to trading in choses in action came to be limited to any attempt to trade in the so-called "bare causes of action".

[80] The development of litigation in Australia has not yet reached the stage at which there is a general trade in tort claims, for example, by offering for sale of claims for

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108 [1982] AC 679 at 694.
109 *Trendtex*, *supra*, at 703 per Lord Roskill; see also *WorkCover Queensland v AMACA Pty Ltd*, *supra*.
110 *Ibid*.
111 *Holdsworth*, Vol VII, at 536.
112 (1895) 6 QLJ 202 at 203.
113 [1896] AC 250 at 256.

damages for personal injuries or for defamation on an open market underwritten by the judiciary's preparedness to vindicate claims in the hands of plaintiffs whose only interest in the wrongdoing lies in the recoupment of an investment. Such a development would depend upon whether it would affect public confidence in the integrity of the courts if they were to cease to be the place in which an injured party's rights were vindicated and to become, instead, a clearing house for a general speculation in claims. What can be said is that the provision of financial aid on the terms of the contract in this case does not amount in any sense to an assignment of a bare cause of action, it does not "savour of maintenance" and it does not constitute "trafficking" in claims.

[81] It is not necessary in this case to consider the scope of the vestigial content of the tort of maintenance in this day and age, if it has any, because the appellant does not rely upon that tort to claim its relief. However, to the extent that the appellant claims to rely upon the principles that inform, or that once informed, the tort of maintenance, whether champertous or not, this examination has revealed that there are no coherent principles capable of universal application. The proposition stated in *JC Scott Constructions* that the tort is constituted by the procurement, by direct or indirect financial assistance, *without lawful justification*, or the premise of Lord Abinger in *Findon v Parker* that maintenance involves "*a man improperly and for the purposes of stirring up litigation and strife*" encouraging or assisting others to make claims of defences that "*they have no right to make*" do not constitute legal principles capable of application. If these be the true bases for the tort, as a consideration of the authorities suggests, then it is apparent that these *dicta* are conformable with the modern concept of abuse of the process of the court, a concept that could not resolve the problem addressed by the *First Statute of Westminster* 1275 when it arose. A claim of abuse of process can give rise to a claim for immediate relief in the form of a stay[114] or it can give rise to a claim for damages as a tort, as in *Williams v Spautz*.[115] The claim that was made good in *J C Scott Constructions*[116] would have been equally valid as a claim based on the tort of collateral abuse of process: see *Williams v Spautz*.[117] In cases other than those involving an abuse of process, a person who claims to be aggrieved by maintenance might have recourse to the remedies offered by the rules against vexatious claims, the laws governing unconscionable contracts, State and Commonwealth consumer protection laws, the laws of contempt of court and the now sophisticated and written rules restraining the conduct of legal practitioners.

[82] A plaintiff or defendant "maintains" litigation. Under the modern law of abuse of process, it is an abuse of process to maintain an action for an improper purpose. It makes no difference whether the maintainer is a party or a non-party. In *Williams v Spautz* the maintainer of the suit who had the improper purpose was the plaintiff. In *JC Scott Constructions v Mermaid Waters Tavern* the maintainer was a non-party. Unless there is some distinct aspect of public policy that would prohibit a third party's maintenance of an action and renders that conduct, the terms of the modern

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114 As was sought in *Fostif*, *supra*.

115 (1992) 174 CLR 509.

116 *Supra*.

117 *Supra*, at 522-530. The purpose of the defendant's maintenance of the actions brought by the subcontractors was "to embarrass the plaintiff financially and if possible to procure its winding up and so prevent the prosecution of the plaintiff's claim in this action for damages for breach of contract.": see *JC Scott Constructions v Mermaid Waters Tavern*, *supra*, at 430.

definition, "improper", then the law of maintaining has been subsumed in the modern law of abuse of process.

[83] It is necessary to consider this remnant tort in the light of the present proceeding, which is a representative proceeding, a so-called "class action", brought pursuant to Part 13A of the *Civil Proceedings Act* 2011 (Qld). Mr Armstrong QC, who appeared for the plaintiffs, rightly submitted that the provisions of the Act are crucial to the determination of the appellant's case.

[84] A class action may not be brought unless there are at least seven claimants who each have claims that arise out of the same or similar or related circumstances and which give rise to a substantial common issue of law or fact.[118] Any such claimant may begin a class action.[119] The claimant who begins the proceeding has the right to define the class by classifying membership, by defining the nature of the claims being made and by stating the common questions of law and fact raised by the case.[120] Consent to be a group member is not required[121] but any member has a right to opt out of the litigation.[122] The defined class may be "open" or "closed". An open class will be constituted by anyone who has a defined claim. In *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*[123] the defendant submitted that it was "inappropriate" for the class to be defined by reference only to those members who had agreed to enter into a champertous funding agreement. But it was held that this was permissible.[124] This was a "closed class". The decision whether the class will be open or closed is one for the lead plaintiff. That case was decided in 2007 and the Queensland legislation was passed in 2016 and proclaimed in 2017. It can be taken, therefore, that the legislature was aware that under legislation in New South Wales and in the Commonwealth, which were the models for Part 13A, such funding agreements were possible. It is therefore significant that s 103K(1), which empowers the court to terminate proceedings if, *inter alia*, it is "inappropriate" that they be pursued under Part 13A, contains a specific exception in subsection 103K(2)(b), which provides that a proceeding is not to be regarded as "inappropriate" merely because the class is closed by reference to members being parties to "a litigation funding arrangement" – a statutory recognition of the necessary associations of champertous funding agreements and class actions.

[85] The court has an ongoing supervisory role. It fixes the date by which a member may opt out.[125] It may give leave, or withhold leave, to change the class description.[126] It may order the termination of class proceedings which if it thinks that, in the event that the claim is successful, the cost to the defendant in identifying and distributing funds to the class would be disproportionate to the likely award of damages.[127] In the same way, the court can terminate proceedings if the cost of the proceedings would be disproportionate to the costs incurred by separate proceedings and also for other stated reasons but also if, as discussed above, "it is otherwise

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118 Section 103B.
119 Section 103C.
120 Section 103F.
121 Section 103D.
122 Section 103G.
123 (2007) 164 FCR 275.
124 *Supra*.
125 Section 103G.
126 Section 103H.
127 Section 103J.

inappropriate" to continue proceedings as a class action.[128] The court's role extends to decisions to change the lead plaintiffs if those nominated are failing adequately to represent the class[129] and the Act makes other provision for court supervision.[130]

[86] Most importantly, a class action may not be settled or discontinued without the approval of the court.[131] The courts are familiar with such a procedure, one that is frequently invoked in cases of plaintiffs who lack capacity. In the case of class actions, a much more elaborate procedure has been developed to ensure that advantage is not taken of members. This even includes a scrutiny of the position of members *inter se* to ensure that the lead plaintiffs do not score an unjustified advantage.[132]

[87] Members generally cannot be liable to pay costs, subject to irrelevant exceptions.[133] On the other hand, in the absence of a costs order that wholly indemnifies a successful plaintiff, there will likely be a deficit in the amount of standard costs recovered. Section 103ZC empowers the court to order the satisfaction of such a deficit out of the proceeds of recovery but only at the successful conclusion of the proceedings. While general members of the class cannot be made liable for costs, the representatives who are the named plaintiffs are exposed to this liability.

[88] The statutory regime contained in Part 13A of the *Civil Proceedings Act* 2011 (Qld) is not the product of a wholly new idea. The Court of Chancery, that repose of flexible and imaginative judges, conceived a similar idea as long ago as 1701. In *Brown v Howard*[134] certain tenants of "Greystock Manor" brought proceedings to determine the quantum of fees paid to the lord of the manor upon the transfer of the tenants' holdings upon death or other assignment. The defendant complained that only some of the tenants were parties to the suit and that, as a consequence, the remaining tenants would not be bound by the result in cases of future assignments. The Court held that they would be bound, foreshadowing class actions as we know them by 300 years:

> "… all were bound, though only a few Tenants [are] Parties; else, where there are such Numbers, no Right could be done, if all must be Parties; … *and it is no Maintenance for all the Tenants to contribute*, for it is the Case of all." (emphasis added)

[89] The end of the agricultural era and the coming of the Industrial Revolution, and with it the rise of the joint stock company, saw a different reason arise why classes of litigants might more conveniently sue as a group. In 1824, in *Hichens v Congreve*[135] a group of investors in a joint stock company sued to recover a secret profit made by the company's promoters. The remedy sought was to restore the money "to the company with interest at 5 per cent … and that such sum, with interest, might be paid to the bankers of the company, to the company's account and for the company's use". The defendants sought the dismissal of the proceeding on

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128 Section 103K.
129 Section 103P.
130 Sections 103M, N, O, P, Q, U, V and W.
131 Section 103R and 103S.
132 See generally *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 in which Moshinsky J gave a detailed exposition of the factors that a judge had to consider.
133 Section 103ZB and 103ZC.
134 [1701] 21 ER 960.
135 [1828] 38 ER 917 (Ch): in what would now be a derivative action by some shareholders on behalf of all through the legal fiction of "the company".

the ground that not all shareholders were parties to it. Lyndhurst LC dismissed the challenge:

> "Are two hundred bills to be filed, in order to do justice in this matter? … to require all the shareholders to be parties, or to leave each shareholder to file a separate bill to redress his own wrong, would, in substance, be a denial of justice".[136]

[90] The difference between these early cases and cases like the present is that in *Brown v Howard* the plaintiffs were bound by a unity of community within the manor and in *Hichens v Congreve* they were all shareholders in the same company. A modern class action contemplates the possibility that the *only* thing that the plaintiffs have in common is that all the individual claims arise out of the same, similar or related circumstances and give rise to a substantial common issues of law of fact. The class action has come into being because of conditions that are inherent in the modern industrial and post–industrial conditions of society and because of the judgment of the legislature that such proceedings are of a benefit to the public. The problem of litigation management, both forensically and in terms of *res judicata*, addressed by modern class actions are similar to those that were addressed in *Brown v Howard* and by Lord Lyndhurst in *Hichens v Congreve*. However, class actions are much more complicated than earlier forms of representative proceedings. One difference is that the question of litigation funding is much more difficult and pressing when the action is brought on behalf of people who have nothing in common with each other except that they all claim to have been hurt in a similar way. This is a fact of life that is attendant upon conditions of mass litigation in what McHugh J described as the Age of Consumerism.[137]

[91] Any claimant thinking about starting an action like this one has to consider how to fund it. If the lead plaintiffs are unable or unwilling to fund the proceeding themselves their choices are limited. Perhaps a firm of solicitors will undertake the case on a no-win no-fee basis. However, as this case illustrates, the necessary funds may be enormous and, as happened in *Strange v Brennan*,[138] it may be that no solicitor will be willing to take such a risk having regard to size of the investment required. There is also the difficulty of an order being made for security for costs and the possibility of an adverse costs order at the end, not to mention interlocutory adverse costs orders. Why would a solicitor undertake such an enormous project, which will take years to bear fruit, if it ever does, for no more than the normal fees chargeable together with a permissible uplift?[139] Nor would such solicitors solve the problem of facing an adverse costs order.

[92] One of the purposes of the statutory system of class actions is that it is intended to serve *bona fide* claimants who are unable to fund an action and who are unwilling to expose themselves to vast liabilities for adverse costs orders.

[93] The second possibility is for the lead plaintiffs to persuade class members themselves to contribute to the payment of costs. This may not be practical and it also has the same problems as solicitors' funding.

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136 *Ibid*, at 922; even in 1828 representative proceedings were not new, for to the same effect was the much earlier case *Chancey v May* [1722] 24 ER 265, which was a case that arose out of the scandal surrounding the South Sea Bubble.

137 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 429.

138 *Supra*.

139 See *Legal Profession Act* 2007 (Qld), s 324.

[94] That leaves open only a champertous agreement with a rich litigation funder who is willing to speculate on the litigation.

[95] The contractual arrangements between the Members, Clyde & Co and the Funder have already been described. The appellant submitted that the degree of control over the litigation that the Funder might exercise rendered the agreements void as against public policy. When pressed to articulate the vice that was inherent in these contractual arrangements, Mr McKenna QC submitted that what is normally expected is that litigants will conduct litigation to benefit themselves yet here control or influence is vested in a party whose interest is not to get just compensation for a wrong but whose interest is to "get a return for its money".

[96] How this is different from the position of an insurer defending a claim, or suing for recovery under a right of subrogation, was not explained.

[97] In truth, a great degree of control of the litigation by a funder is inevitable given the nature of a class action and this is so for two reasons. First, while each member's claim will be different, the *raison d'etre* of a class action is the capacity of this form of proceeding to ensure the efficient litigation of those parts of the claim that all members have in common. Individual factual instructions to solicitors from members before such instructions are needed would result in inefficiency. This case shows why. Paragraphs 6 to 15 of the Further Amended Statement of Claim describe the dredging and construction project carried on by the defendant. Paragraphs 16 to 41 concern the defendant's obligations under various statutory authorities and paragraphs 42 to 45 allege common law duties owed to the Members by the defendant. Paragraphs 46 to 84 allege the various things that the defendant did in the course of its project. Paragraphs 85 and 86 allege that in various respects the things done by the defendant constituted negligence. Paragraph 87 alleges that the effect of these negligent acts was to pollute the surrounding waters and to kill fish life.

[98] All of those are things about which the Members could not have much useful to say. They may well be aware of the facts generally, but proof of the case concerning what the defendant did and concerning and the effect of those acts upon the environment will not be found in evidence given by the Members. It will be found in expert and other evidence of a technical kind, including documentary evidence.

[99] It is only when one comes to paragraphs 89 to 91 that there is anything which will have to be proved by the Members. These paragraphs allege that, but for the depletion of fish in the area, which will be proved, no doubt, largely by expert evidence, the Members would have caught more fish than they did and, by reason of their reduced catch, which they will have to prove, they have suffered loss. Their personal business histories and their experiences will then be important.

[100] It is impossible to see what practical role the Members could have, or would wish to have, in controlling the largely technical part of the litigation concerning proof of liability. On the other hand, having regard to the reward which the Funder expects to gain, it is not too much to expect that it ought to devote the necessary human resources to ensure that the solicitors are supported by adequate instructions and consultations in the course of taking the many steps that they will have to be taken before the issue of liability is ready for determination.

[101] Nevertheless, the agreements make provision throughout to ensure that the essence of the orthodox relationship between client and solicitor will be maintained and that ultimately, although in some cases subject to arbitration, it is the Members who have the final say. Nor should it be overlooked that, apart from the professional obligations owed to the Members by Clyde & Co, which there is not the slightest reason to doubt they will be faithfully fulfilled, as has been pointed out, this category of proceeding is uniquely under the supervision of the court, to a much greater extent even than litigation undertaken on behalf of those lacking capacity.

[102] Second, the motivation of the Members and of the Funder are exactly the same, namely to recover as much money as can properly be recovered. As in any field of human endeavour, this lure of money might constitute a temptation to misbehave. But it is difficult to see why a court should presume that a professional litigation funder, who undoubtedly wishes to remain in business beyond a single case, and who must therefore maintain a reputation for probity, would be more prone than the plaintiffs themselves to misbehave. Further, the proposition that a funder under a champertous agreement would be more likely than an actual litigant to engage in unlawful behaviour does not stand scrutiny. There is no reason to think that such a funder, who is doing business for profit, perhaps running numerous cases at once, would be more motivated to secure a favourable or an undeserved outcome than a desperate plaintiff in a personal injuries suit for whom an award of damages may almost be tantamount to the difference between life and death. We reject the contention that a funder would be more likely to misconduct litigation than anyone else just because the funding agreement is champertous. In any event, the appropriate medicine for that ill, if there is a risk of its manifestation, is not to render void the funding agreements needed by the Members who have *bona fide* claims, but to seek a remedy in the court's procedures, in the civil and criminal law, and in a well-justified dependence upon the integrity of Australian solicitors.

[103] In Queensland the recent statutory provisions allowing class actions were enacted after many years of successful experience by the courts in other States of cases conducted under similar legislation. Although the appellant in this case, like the appellant in *Fostif*, based its case wholly upon an invitation to the court to find a risk of a corrosion of the court's integrity, those submissions were unable to condescend to a single specific real danger that might eventuate. Nor, as we have said, did the submissions identify how, other than on terms similar to those in the present contract, the Funder and claimants could possibly conduct such litigation efficiently for the benefit of all while affording the Funder, who is risking millions of dollars, to be able adequately to oversee and protect its investment. It is true that the Funder has day to day control over the litigation. Somebody has to exercise that control and instruct solicitors who, otherwise, can take not a single step in the case. That person ought to be, and is, a person who has an interest in seeing a successful conclusion to the litigation.

[104] The appellant's appeal to public policy fails. Those aspects of society which rendered it desirable to criminalise acts of maintenance, thereby making them tortious also, have long since vanished. On the other hand, the current policy of the law, as found in the Queensland statute, not only recognises the public benefit to be derived from class actions which must depend upon champertous agreements for their efficacy, but that recognition has been reached in social conditions within which, in other Australian jurisdictions, there has by now been a long history of such litigation without any of the appellant's predicted ills having been experienced.

[105] The agreements are not unenforceable as being against public policy.

[106] For these reasons we would dismiss the appeal with costs.