IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2012-409-2486
[2015] NZHC 1730

BETWEEN

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

PROPERTY VENTURES LIMITED (IN LIQUIDATION)
Second Plaintiff

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

CASHEL VENTURES LIMITED (IN LIQUIDATION)
Fourth Plaintiff

TAY VENTURES LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION)
Fifth Plaintiff

LIVINGSPACE PROPERTIES LIMITED (IN RECEIVERSHIP AND LIQUIDATION)
Sixth Plaintiff

BEECHNEST VENTURES LIMITED (IN LIQUIDATION)
Sixth Plaintiff

TUAM VENTURES LIMITED (IN RECEIVERSHIP AND LIQUIDATION)
Eighth Plaintiff

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

LICHFIELD VENTURES LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION)
Tenth Plaintiff

92 LICHFIELD LIMITED(IN RECEIVERSHIP AND LIQUIDATION)
Eleventh Plaintiff

ST ASAPH VENTURES LIMITED (IN LIQUIDATION)
Twelfth Plaintiff

MONTECRISTO CONSTRUCTION COMPANY LIMITED (IN LIQUIDATION)
Thirteenth Plaintiff

AND

AUSTIN JOHN FORBES
First Defendant

ALISTER SPEDDING JOHNSTON
Second Defendant

GORDON LEWIS HANSEN
Third Defendant

DAVID IAN HENDERSON
(A BANKRUPT)
Fourth Defendant

ADOLF DE ROOS
Fifth Defendant

DANIEL JAMES GODDEN
Sixth Defendant

PWC (SUED AS A FIRM)
Seventh Defendant

FRIGHT AUBREY LIMITED
(IN LIQUIDATION)
Eighth Defendant

RICHARD WILLIAMS GIBBONS
Ninth Defendant

AND

VERO LIABILITY INSURANCE LIMITED
Third Party

QBE INSURANCE (INTERNATIONAL LIMITED)
Second Third Party

Hearing:	10-11 June 2015
Counsel:	J B M Smith QC and T G H Smith for Plaintiffs W Palmer for First Defendant Fourth Defendant in Person B Gray QC and P M Fee for Seventh Defendant
Judgment:	28 July 2015

JUDGMENT OF BROWN J

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Overview

[1] In 2006 Property Ventures Ltd executed a General Security Agreement (GSA) in favour of Hanover Finance Ltd securing loans by Hanover to Five Mile Holdings Ltd. Three years later Hanover assigned the GSA to Allied Farms Investments Ltd (Allied).

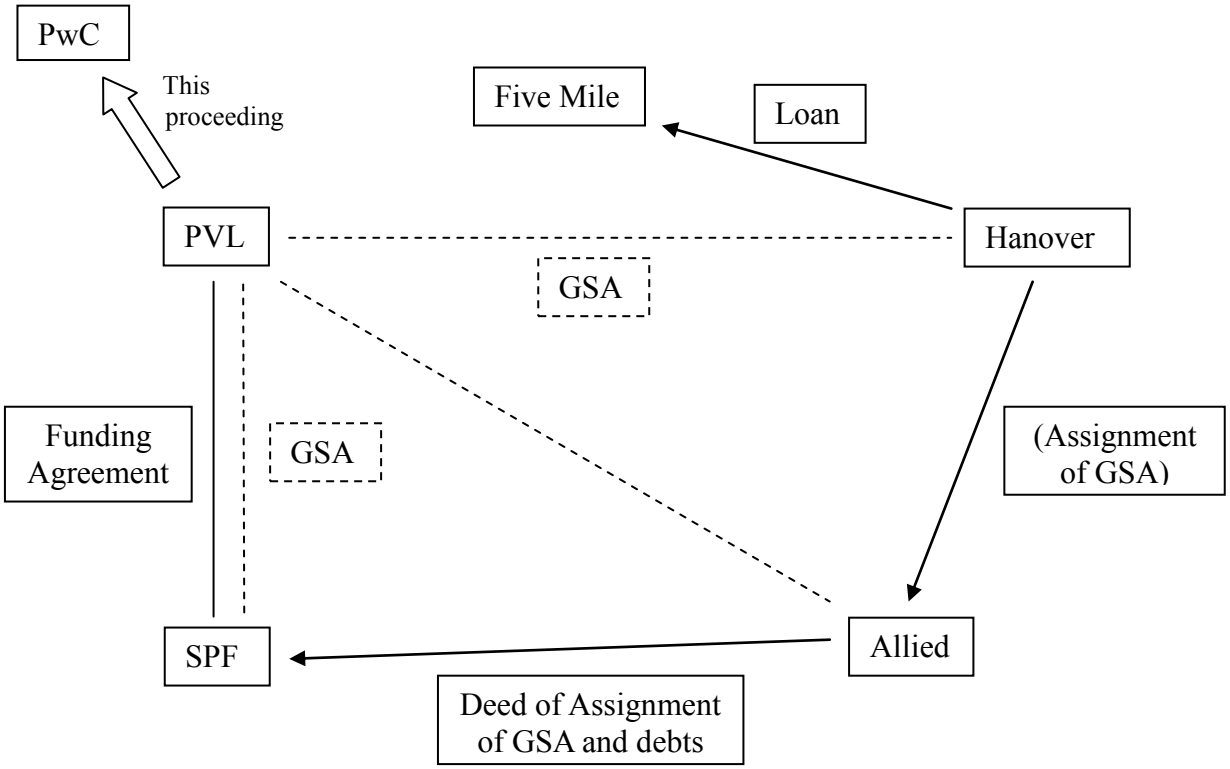
[2] In late November 2009 a receiver was appointed to Five Mile and land in Queenstown secured under the GSA was realised leaving a balance owed to Allied of $39 million. Property Ventures Ltd was placed into receivership in March 2010 and Mr Robert Walker (the Liquidator) was appointed liquidator in July 2010. In November 2012 Property Ventures Ltd (in liquidation) ("PVL") commenced proceedings against the directors of PVL and PVL's auditors, the seventh defendant (PwC).

[3] Shortly prior to the commencement of the proceedings SPF No 10 Ltd (SPF), an investment company, entered into a litigation funding agreement (the Funding Agreement) with PVL whereby SPF was granted a first ranking security interest to secure the amounts due to SPF under the Funding Agreement. It was a condition of the Funding Agreement that:

> 3.1 …
>
> (b) arrangements satisfactory to SPF in all respects being entered into with Allied Finance Limited and Grant Thornton, pursuant to which SPF shall obtain a first ranking security interest over all the assets and undertaking of the Plaintiff (including arrangements as to any assignment of the benefit of their security over the assets and undertaking of the Plaintiff).

[4] In March 2013 Allied and SPF entered into a Deed of Assignment (the Assignment) whereby Allied assigned to SPF the GSA and Allied's debts and securities including "rights of action" against various parties including PwC. SPF paid a fee of $100,000 to Allied and agreed to pay to Allied five per cent of the net amount recovered in the proceeding.

[5] The relationships are displayed in the diagram below:



[6] PwC applies under r 15.1 of the High Court Rules for an order staying the proceeding against it on the ground that the proceeding is funded and maintained by SPF pursuant to an arrangement which is champertous and consequently an abuse of process.

[7] No complaint is made about the GSA. Nor is there any challenge to the Funding Agreement in isolation. Rather the focus of PwC's concern is on the fact of SPF's dual and coincident interests as both the litigation funder and as a secured creditor in its capacity as assignee of the GSA. PwC states there are "broadly two bases for the application", namely:

> The Deed of Assignment (in combination with the Funding Agreement) constitutes trafficking in litigation. Consequently the litigation pursued in furtherance of this arrangement is an abuse of process; and
>
> The Funding Agreement (when viewed in the totality with the Deed of Assignment) is an agreement which is contrary to public policy and/or a misuse of the liquidators' powers. The Funding Agreement will improperly enrich SPF (an entity which became a secured creditor by a champertous assignment) and fails to benefit unsecured creditors.

The different perspectives

[8] Unsurprisingly, the parties scrutinise the arrangements through rather different lenses.

PwC's view

[9] Mr Gray QC emphasises the importance of viewing the arrangement in the round, noting the observation of Lord Mustill in *Giles v Thompson*:[1]

> I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose *the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question* whether … there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatsoever, and where the assistance he renders to one or the other party is without justification or excuse.
>
> [emphasis added]

[10] What one might describe as an holistic approach is reflected in PwC's summary at the conclusion of its written submissions:

> The economic reality of the transaction is that SPF and PVL have entered into an arrangement whereby the litigation will overwhelmingly benefit only SPF, a third party litigation funder with no antecedent interest in the subject matter of the litigation, whose only interest is to make excessive and disproportionate profit. The substance of the arrangement is that SPF has acquired control over the litigation (and its fruits), with little or no benefit to the creditors of PVL. The entry into these arrangements is a misuse of the liquidator's powers under the Companies Act.

[11] That formulation combines the following factors emphasised in the course of PwC's argument:

(a) the holder of the GSA holds security over any cause of action PVL may have against third parties, that right of recovery being PVL's only remaining real asset of value;

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1 *Giles v Thompson* [1994] 1 AC 142 (HL) at 164.

(b) the absence of any genuine commercial interest by SPF in PVL (or Allied or Hanover) independent of the Assignment;

(c) the absence of independence between the litigation funder (SPF) and the assignee of the GSA (SPF);

(d) the effect of the Assignment is that SPF will make a profit which is "excessive and disproportionate".

[12] As to point (d) above, the asserted excessive and disproportionate profit reflects a combination of factors. First, the relief sought in the claim against PwC includes "interest at the contractual rates accruing on PVL's debts and liabilities". The penalty interest rates applicable to the loans to Five Mile are in the order of 21 per cent. Hence it is submitted that the judgment sum which is claimed is growing at an exponential rate due to the effect of compounding interest.

[13] Secondly the consideration for the Assignment under which the GSA was assigned by Allied to SPF was the "modest" sum of $100,000 together with 5 per cent of any recovery from PVL.

[14] Thirdly on PwC's analysis SPF, with the liquidator's connivance, has thereby procured for itself "two bites at the cherry", namely the significant 42.5 per cent of the judgment comprising the Service Fee under the Funding Agreement and the assignment of the debt of the first-ranking security holder.

[15] The extent of SPF's alleged "excessive profiteering" was sought to be demonstrated in a useful addendum to PwC's submissions which explored a number of hypothetical scenarios. It will suffice to refer to the third scenario, the focus of debate in the course of argument, which involves the assumption that, if the secured debt continues to accrue interest compounding monthly, then by a June 2017 trial date the secured debt would be $188 million.

[16] PwC contended that in that scenario the "tipping point" at which creditors other than SPF would make any recovery would necessitate a judgment of $334 million as computed in the chart below:

Claim (Resolution Sum)	$ 334,000,000.00
Less Project Costs (say)	$ 3,000,000
Net Resolution Sum	$ 331,000,000
SPF Services Fee 42.5% of the Net Resolution Sum	$ 140,675,000
Less Liquidation costs (say)	$ 2,000,000
The Net Amount – Available to PVL Creditors	$ 188,325,000
Distribution of Net Amount	
SPF – 1st Secured Creditor	$188,115,226
Other Creditors	$ 209,774
Total Return to SPF	
Services Fee	$ 140,675,000
Repayment of Debt	$ 188,115,226
Less Initial fee to Allied	($ 100,000)
Less Assignment price to Allied (5%)	($ 9,416,250)
Net Return on Deal	$ 319,273,976

[17] From that analysis the distributions from the assumed $334 million recovery were said to be:

(a) Liquidator's and legal costs – $5 million;

(b) SPF's Service Fee – $140 million;

(c) SPF as first-ranking security holder – $188 million;

(d) Allied – $9.5 million (from SPF);

(e) Unsecured creditors – $209,000.

Hence SPF's net return would be $319 million which, on an outlay by SPF to Allied of $9.5 million, is described as a 3,355 per cent return on SPF's "investment".

The plaintiffs' perspective

[18] While acknowledging the requirement to consider a litigation funding arrangement as a whole, the plaintiffs contend that the Assignment is simply not part of the plaintiffs' litigation funding arrangement. In their analysis there are two separate agreements that should not be conflated, namely:

(a) the Funding Agreement between PVL and SPF; and

(b) the Assignment from Allied to SPF.

[19] The plaintiffs say that they had no control over the Assignment or its terms and were not a party to it. As a consequence they say that the Assignment is irrelevant and provides no support for a stay on abuse of process grounds.

[20] Alternatively the plaintiffs say that, even if the Assignment was part of the funding arrangement "as a whole", that arrangement would not constitute the assignment of a cause of action. However if, contrary to that argument, it did, then it was nevertheless an assignment which was permissible in the circumstances.

Relevant principles

[21] As the Court of Appeal recognised in *Saunders v Houghton*, until quite recently common law courts held the firm position that, in the absence of legislation to the contrary, funding of litigation for profit was an abuse of process, offending against ancient doctrines of maintenance and champerty, and was unlawful per se.[2]

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2 *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [24].

[22] The Court explained:

> [77] The common law torts of maintenance and champerty were created in an era before the courts had the capacity to deal with unruly nobles. By the time of *Trendtex* there had not emerged the fact, or perhaps the appreciation, now so evident, that access to justice may not be available without the assistance of funders prepared to fund the litigation in exchange for a cut of the proceeds. The modern Australian approach, seen also in Canada, is to face these realities directly and make a judgment according to the merits of each case. …

[23] Noting that the common law in other jurisdictions had moved on and that access to justice and comity with other states meant New Zealand should follow, the Court said:

> [79] We have concluded that, like the common law of Australia and that of Canada, the common law of New Zealand should refrain from condemning as tortious or otherwise unlawful maintenance and champerty where:
>
> (a) the court is satisfied there is an arguable case for rights that warrant vindicating;
>
> (b) there is no abuse of process; and
>
> (c) the proposal is approved by the court. …

[24] However the Supreme Court in *Waterhouse v Contractors Bonding Ltd* adopted a different approach to the proposition that the courts should exercise a general supervisory control over litigation funding arrangements:[3]

> [28] … It is not the role of the courts to act as general regulators of litigation funding arrangements. If that is considered desirable, it is a matter for legislation or regulation. It is certainly not the courts' role to give prior approval to such arrangements, at least in cases not involving a representative action. Whether or not the courts have a wider supervisory role in a representative action is not before us and we make no comment on it.
>
> [29] The role of the courts is to adjudicate on any applications brought before them in a proceeding. This leads onto a consideration of the type of applications where the existence and terms of a litigation funding arrangement may have some relevance. The other party may, as happened in this case, apply for a stay of the proceeding on the basis that the funding arrangement is an abuse of process. …

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

[25] Two scenarios were identified in which a stay may be granted in respect of litigation funding arrangements:[4]

> A stay on the grounds of abuse of process should only be granted where there has been a manifestation of an abuse of process on traditional grounds or where the funding arrangement effectively constitutes the assignment of a cause of action to a third party in circumstances where such an assignment is not permissible.

[26] Before turning to consider whether PwC's application satisfies one of those scenarios, it is necessary first to examine the transactions in more detail.

Is the Assignment discrete from the litigation funding arrangement?

[27] Although the plaintiffs acknowledge that *Waterhouse* recognises that the litigation funding arrangement "as a whole" must be considered, they contend that the Funding Agreement and the Assignment are two separate agreements. Hence they maintain that the Assignment is irrelevant for the consideration of the abuse of process allegation.

[28] That submission might have gained traction had SPF treated with Allied in isolation from its negotiations with the Liquidator, for example at a point subsequent to SPF's having entered into an unconditional funding commitment. However the plaintiffs' submission that they had no control over the Assignment and were not a party to it does not reflect the complete picture.

[29] As the Funding Agreement recorded,[5] SPF's commitment to provide funding was conditional upon its securing a satisfactory arrangement with Allied. While it may be accurate to say that the Liquidator had no "control" over the Assignment, nevertheless in the Funding Agreement he did agree to lend his support to SPF's securing the arrangement with Allied:

> 3.2 **Satisfaction of conditions**:
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> …
>
> (b) SPF and the Plaintiff shall use its reasonable endeavours to satisfy, or procure the satisfaction of, the Condition in

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4 At [76(e)].
5 At [3] above.

> clause 3.1(b) as soon as practicable after the date of this Deed and in any event no later than 31 October 2012 (or such later date or dates as SPF and the Plaintiff agree).
>
> …
>
> 3.4 **Avoidance rights**: This Deed is voidable by written notice given by SPF at its election if the Conditions are not fulfilled, or waived in accordance with the provisions of clause 3.3, by the date(s) referred to in clause 3.2, and if this Deed is so avoided it will be of no further force or effect and all parties shall be released from their obligations under this Deed.

[30] Consequently I do not accept the plaintiffs' submission that, in considering the implications of the funding arrangement, the Assignment can be ignored. That does not reflect the circumstances of this particular case. The significance to be attributed to the Assignment is another matter.[6]

A manifestation of abuse on traditional grounds?

[31] The ambit of the "traditional grounds" referred to in *Waterhouse* was explained by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*:[7]

> [t]he inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[32] After reference to that dictum, the Supreme Court in *Waterhouse* noted the categories of conduct which have been recognised in Australia:[8]

> [31] In Australia, a majority of the High Court in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* identified the following categories of conduct that would attract the intervention of the court on abuse of process grounds:

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6 That issue is considered at [40]–[41] and [87]–[90] below.

7 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536, referred to by the Supreme Court in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [61].

8 *Waterhouse v Contractors Bonding Ltd*, above n 3, at [31].

(a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

(b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;

(c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose; and

(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[32] The majority also said that, although the categories of abuse of process are not closed, this does not mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party. It does, however, extend to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment".

[33] Mr Smith QC suggested that none of the traditional grounds were engaged in the present case and that it was therefore necessary for PwC to identify a new category. Mr Gray disagreed, contending that maintenance and champerty fall within the second of the *Jeffery* categories.

Use of the Court's process for an improper purpose

[34] The focus of PwC's written submissions was on the improper purpose limb. Its concluding summary emphasised that the courts have the duty to prevent the legal process from being used for "an improper purpose", the contention being that an abuse of process will occur "if the proceedings continue in the context of the arrangements as they currently stand".

[35] The "current arrangements" as explored in argument comprise a number of different features including the degree of control able to be exercised by SPF and the alleged prioritisation of SPFs position over unsecured creditors. However the gravamen of the complaint appears to be the "second bite" at the cherry in the form of the proceeds of the litigation which SPF would obtain as secured creditor in consequence of the Assignment, over and above the already substantial 42.5 per cent of any judgment by way of its Service Fee.

[36] In *Goldsmith v Sperrings Ltd* Scarman LJ addressed the concept of improper purpose in this way:[9]

> In the instant proceedings the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out 'to effect an object not within the scope of the process': *Grainger v Hill* per Tindal CJ. In a phrase, the plaintiff's purpose has to be shown to be not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought: see *Re Majory*.

[37] It may well be the case that the epithet "collateral" could fairly be ascribed to the interest acquired under the Assignment given the condition imposed in cl 3.1(b) upon which litigation funding was to be provided.[10] Even so, the remedy which is being pursued in the litigation remains the same; specifically with reference to PwC, the remedy is in damages for breach of contract[11] and in tort[12] relating to the alleged deficient provision of audit services. An award of damages is an orthodox remedy for the alleged breaches.

[38] As for the quantum of damages, the normal incidents of proof of causation and loss will apply. Those matters are specifically addressed in both the claim and the defence. It is not apparent to me how it can be said that the appropriate award of damages (if any) referable to the causes of action pleaded is in any way affected by the fact that SPF took the Assignment from Allied.

[39] Consequently I do not consider that SPF's dual interest in the potential proceeds of the litigation amounts to a "collateral advantage" as that phrase was employed by Lord Evershed MR in *Re Majory.*[13] As Bridge LJ explained in *Goldsmith v Sperrings Ltd*:[14]

> For the purpose of Evershed MR's general rule, what is meant by a 'collateral advantage'? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him.

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9 *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 (CA) at 582.
10 At [3] above.
11 Seventh cause of action in the consolidated statement of claim dated 11 July 2014.
12 Eighth cause of action.
13 *Re Majory* [1955] Ch 600 (CA) at 623–624.
14 *Goldsmith v Sperrings* Ltd, above n 9, at 586.

> In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject-matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain, but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation. Can he on that ground be debarred from proceeding? I very much doubt it.

[40] It is true, as PwC submits, that, in addition to the potential profit to SPF under the Funding Agreement, SPF stands to also recover an additional share of the proceeds of the litigation by virtue of the Assignment of the GSA from Allied. However that additional share is simply the share to which Allied would have been entitled, less of course the $100,000 payment and the five per cent share which were the consideration for the Assignment.

[41] I recognise that SPF's secondary interest as the holder of the GSA may provide an, or an additional, incentive for it in seeking to maximise the amount of any award of damages either obtained on a judgment or negotiated in a settlement. However accepting, for the purposes of this analysis, PwC's submissions that SPF holds the "purse strings" for the payment of the legal costs in the litigation and has effective control of the litigation, I am unable to see that the acquisition of the secondary interest can amount to an improper purpose of the nature identified by Scarman LJ.

[42] Mr Gray advanced a second strand of argument contending that the Liquidator had misused his powers under the Companies Act 1993 (the Act) by taking steps to advance SPF's financial interests rather than, and to the detriment of, the unsecured creditors. In particular it was submitted that the Liquidator had:

> 96.1 Failed to take steps to require Allied (or SPF) to either assert its security over the right to sue (as a chose in action) or surrender the security;
>
> 96.2 Filed proceedings in the name of PVL (in liquidation);
>
> 96.3 Signed a Funding Agreement which:

(a) Agreed to share almost one half of the recovery with SPF as a litigation funder;

(b) Gave control to SPF;

(c) Was conditional upon SPF becoming the assignee of PVL's first ranking security holder under a GSA and thereby enabling SPF to make a claim to the balance in priority to other (lesser ranked) secured creditors and unsecured creditors.

96.4 Asserted that the amount sued for in the proceedings (which includes the Allied debt) is escalating exponentially due to the effect of compounding interest. The effect of this is to:

(a) Excessively and disproportionately enrich SPF; and

(b) Place extortionate pressure on the defendants to settle.

[43] Clearly the liquidator's principal duty is as stated in s 253 of the Act, namely in a reasonable and efficient manner:

(a) to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and

(b) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4)–

…

The term "creditor" in s 253 does not include secured creditors.[15]

[44] As PwC submitted, the Court of Appeal in *Grant v Waipareira Investments Ltd* explored the distinction made in the Act between secured and unsecured creditors. It noted the confirmation in s 248(2) of the right of a secured creditor to take possession of and realise or otherwise deal with property of the company over which the secured creditor has a charge, and the separate regime in s 305 whereby secured creditors have priority in respect of realisation of their security independently of the liquidation unless they surrender their security.[16]

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15 See the definition of "creditor" in s 240(1).

16 *Grant v Waipareira Investments Ltd* [2014] NZCA 607, [2015] 2 NZLR 725 at [27]–[28].

[45] Section 305(1) sets out three options available to a secured creditor in respect of charged property. Further, under s 305(8) a liquidator may require a secured creditor to elect between those three options and, if a secured creditor fails to make an election within the prescribed time, then the secured creditor is to be taken as having surrendered the charge to the liquidator for the general benefit of creditors.[17]

[46] Attention was also drawn to the following summary from *Heath & Whale: Insolvency Law in New Zealand*[18] which was adopted by the Court of Appeal in *Gibbston Downs Wines Ltd v Property Ventures Ltd*:[19]

> The scheme of part 16 of the Companies Act is to exclude from the ambit of liquidation property which is subject to a charge. The Act contemplates that secured creditors will operate independently of the liquidation, unless they decide to surrender the security in terms of s 305(1)(c). The definition of "creditor" in s 240(1) makes it clear that secured creditors are excluded except for very limited purposes. Section 248(2) makes it clear that the liquidation does not limit the secured creditors' rights of enforcement, and s 253 provides that the liquidator's principal duty is to take possession of the assets and distribute them or their proceeds to "creditors" (which, for this purpose, excludes secured creditors). Similarly, sections 312 and 313, which provide for the payment of creditors by the liquidator, exclude from their ambit secured creditors.

[47] The Court of Appeal went on to discuss s 254 which provides in material part:

> **254 Liquidator not required to act in certain cases**
>
> Notwithstanding any other provisions of this Part,–
>
> (a) except where the charge is surrendered or taken to be surrendered or redeemed under section 305, a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a charge:
>
> …

[48] The Court said:

> [21] … We consider that, given the overall scheme of the litigation and the history of this provision, s 254 should be understood as conferring a residual discretion upon the liquidator to take steps to realise assets subject

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17 Section 305(9).

18 Liesle Theron "The Liquidation Process" in Paul Heath and Michael Whale (eds) *Heath & Whale: Insolvency Law in New Zealand* (Lexis Nexis, Wellington, 2011) at [16.35(b)].

19 *Gibbston Downs Wines Ltd v Property Ventures Ltd* [2013] NZCA 546 at [19].

> to a charge in certain circumstances. The liquidator certainly is not, as the provision makes clear, always obliged to exercise a power in respect of charged property. There would be no sense in the liquidator doing so in the usual course since most of the benefits of the liquidator acting would flow to the secured creditors. Moreover, for the liquidator to officiously intervene in a proposed realisation without good reason could only reduce the available assets for creditors by increasing the liquidator's costs (a preferential claim in both the receivership and liquidation). Circumstances will arise however in which a liquidator will need to exercise this power even though the secured creditor has not surrendered its security – for example, where the secured creditor has indicated that it will take no steps to realise the asset, but does not use the s 305 mechanism to surrender the charge (the situation arising in *Sintel*).
>
> [22] On the other hand intervention by a liquidator in a secured creditor's realisation of assets subject to charge, for no such good reason, may well entail the exercise of the discretion by the liquidator for an improper purpose – namely generating fees for the liquidator.

[49] Mr Gray makes the point that, although the secured property under the GSA is a chose in action, SPF has not exercised its rights under s 305(1)(a) but the proceeding has been brought by the Liquidator. The submission is then made that it would also be an improper exercise of the liquidator's discretion under s 254(a) if the realisation of the asset, namely the litigation, has no genuine prospect of benefiting the unsecured creditors but instead bestows a disproportionate profit on a party that became a secured creditor in order to obtain that profit.

[50] In circumstances such as these, where the Liquidator has not taken steps under s 305(8) to require a secured creditor to make an election as to the exercise of its s 305(1) powers, with the apparent consequence that the holder of the GSA may sit back and receive the net proceeds of the litigation (after payment of the amounts due under the Funding Agreement), the unsecured creditors may well have reason to feel aggrieved. Indeed it is possible that they would have grounds for complaint that the Liquidator has created a conflict of interest for himself so far as the s 305(8) power is concerned by contracting in the Funding Agreement to endeavour to procure the Assignment.[20]

[51] However the fact that it is possible that the Liquidator may have erred in the exercise of his residual s 254(a) discretion and that consequently issues may arise as to the identity of the appropriate beneficiaries of any net proceeds of the litigation

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[20] At [29] above.

does not translate into a conclusion that the bringing of the litigation itself involves the Court's process being employed for an improper purpose. The claim may or may not be sound. But if it is sound and an award of damages against PwC is obtained, the fact that the Liquidator brought the proceedings for the intended benefit of the wrong interested party cannot taint the proceeding itself.

[52] It may have the consequence that ultimately any proceeds may require to be distributed in a manner somewhat differently from the way the Liquidator and SPF envisaged. Or, if such different distribution cannot be effected, then the unsecured creditors may have other remedies such as a claim against the Liquidator or an application to the Court under s 284.

[53] In fact, even absent the Assignment, the same criticism of a failure to exercise the s 305(8) power could have been made where Allied would have been the party entitled to a priority distribution from the proceeds of such litigation. Indeed a similar conflict of interest scenario could have arisen had Allied been the entity who had agreed to enter into a litigation funding arrangement in relation to the proceeding.

[54] Of course Allied was not in a financial position to do so. Hence Mr Gray makes the point that, if SPF had not agreed to fund the litigation, then it would never have been brought. That may well be so.

[55] However, if there is a legitimate cause of action, which is properly the subject of the court's process, it does not follow that the proceeding should be summarily halted because complaint may be able to be made by unsecured creditors as to the ultimate distribution of the proceeds from a successful outcome. The (assumed) irregular conduct of a liquidator with reference to the different interests of secured and unsecured creditors does not constitute an abuse of process on the grounds that the court's process is being employed for an improper purpose.

Use of the Court's process in an improper way

[56] In the course of argument Mr Gray developed the submission by reference to the second limb of category (b) in *Jeffery*,[21] namely the use of the Court's process in an improper way. He cited as a recent example of such use the scenario in *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd*, a leaky building case where the Auckland Council, who was one of the defendants, entered into a settlement with the plaintiff apartment owners whereby they assigned to the Council their claims against other defendants.[22]

[57] Fogarty J there described the dual role of the Council as assignee in this way:

> [101] By the terms of this assignment, the Auckland Council wants to "wear two sets of shoes". It does not want to be, but cannot avoid being in the shoes of a liable tortfeasor, for it has admitted liability. But it also wants to be in the shoes of the plaintiffs, after paying the first $200,000 recovered from the judgment to the assignors, then retaining the next $1.5m plus its solicitor and client costs from the contributing tortfeasors, which, by s 17, must include itself.

[58] The concern voiced by Fogarty J was that he could not be sure that a trial judge during a trial and when fixing contribution after judgment would not be distracted, deflected, or even frustrated by considerations as to the role of the assignee and the weight to be attached to the assignment. He said:

> [149] I do not think there is sufficient merit in this stratagem of the Auckland Council to warrant extending the toleration of such assignments. It is meddling with the common law of torts, and the purpose of the Law Reform Act 1936. It will encourage traffic in assignments of actions and will make a trial judge's duty to do justice between the parties even more difficult, and potentially prevent the judge from applying both the common law and the statute.
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> [150] For these reasons, [the construction company's] challenge to the assignment succeeds on the ground that the assignment is void as contrary to public policy by undermining the law of maintenance and champerty, as well as meddling with the trial process and with the statutory remedy of s 17 of the Law Reform Act 1936. It follows that the Auckland Council's application for leave to file an amended cross-claim is dismissed. The plaintiffs' causes of action remain, but cannot be pursued pursuant to the purported assignment.

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21 At [32] above.

22 *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd* [2014] NZHC 1514, [2014] 3 NZLR 758.

[59] In the present case it is not apparent that SPF's dual interest as litigation funder and assignee of the GSA combine to produce an outcome whereby there is a misuse of the process of the Court. The potential for manipulation of the process, as identified in *Body Corporate 160361*, does not arise in this case consequent upon the Assignment.

[60] That conclusion gains support from a comparison of the alternative circumstances in which the proceeding could be launched:

(a) with SPF (or someone else) as litigation funder and Allied as the GSA holder;

(b) with SPF securing an assignment of the GSA subsequent to and unconnected with the Funding Agreement;

(c) with SPF entering the Funding Agreement conditional upon its securing the Assignment (the present case).

[61] In each of those scenarios the nature and structure of the claim against PwC would be the same: a claim for damages for breach of contract or in tort. The court's process would be, or would be open to be, used in exactly the same way. The manner of use of the court's process does not become improper because SPF obtained the Assignment as a condition of the Funding Agreement. As noted above, absent the Assignment it may be that the proceeding would have languished for want of funding. However there is a critical difference between merely having the capacity to utilise the court's process and utilising that process in an improper manner. In my view the manner of the plaintiffs' utilisation of the Court's process in this proceeding cannot be said to be an improper one.

[62] Consequently I conclude that PwC has not established that the nature of the arrangements in this case amount to an abuse of process on traditional grounds. I turn then to consider the second *Waterhouse* scenario.[23]

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[23] At [25] above.

Does the funding arrangement effectively constitute the assignment of a cause of action to a third party in circumstances where such an assignment is not permissible?

[63] In *Waterhouse* the Supreme Court explained why challenges to litigation funding arrangements should not be confined to traditional abuse of process grounds:[24]

> Assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand. The rule had its origins in the torts of maintenance and champerty but now seems to have an independent existence of its own. That leads to the conclusion that, if a funding arrangement amounts to an assignment of a cause of action to a third party funder in circumstances where this is not permissible, then this would be an abuse of process. In assessing whether litigation funding arrangements effectively amount to an assignment, the court should have regard to the funding arrangements as a whole, including the level of control able to be exercised by the funder and the profit share of the funder. The role of the lawyers acting may also be relevant.

[64] As noted above,[25] there is no suggestion that the Funding Agreement in isolation involves the assignment of a cause of action. The alleged "champertous assignment"[26] is the transaction whereby SPF became a secured creditor.

PwC's argument

[65] PwC commenced its analysis of the assignment issue by differentiating between two scenarios:

> 38. A distinction must be drawn between (on the one hand) a funding agreement *simpliciter* – the object of which is secure to a litigant a source of funding for the cost of litigation and which will be subject to scrutiny by the courts – and (on the other hand) an arrangement which in substance amounts to blatant trafficking in litigation for profit by means of assigning the cause of action to a party which has no genuine antecedent commercial interest. This remains impermissible.

[66] Its submissions noted that it has been recognised that where the assignment of a cause of action is incidental to a genuine commercial interest in the subject

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24 *Waterhouse v Contractors Bonding Ltd*, above n 3, at [57].
25 At [7] above.
26 At [7] above.

matter of the proceedings no issue of maintenance or champerty arises, reciting the following passage from Stephen Todd's *The Law of Torts in New Zealand*:[27]

> It is apparent that an assignment of a right to sue for breach of contract may validly be made where the assignee has a genuine commercial interest in the subject matter of the proceedings, and the same principle has been recognised as applying in the case of a right of action in tort. An instance of a sufficient commercial interest is where the assignee has a property interest to which the cause of action is ancillary.

[67] PwC placed reliance on the observation of Lord Roskill in *Trendtex Trading Corporation v Credit Suisse*:[28]

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

[68] *First City Corporation Ltd v Downsview Nominees Ltd* was noted for the adoption of a similar approach.[29] Gault J there viewed the assignee's acquisition of the causes of action as a genuine commercial interest when they were incidental to the assigned security interest:

> In light of the modern approach to maintenance in general, and paying particular regard to the approach of the House of Lords in *Trendtex*, I conclude that the assignment from First City to First City Finance of the right of action in tort falls within the category of valid transactions. The actions in tort were ancillary to the assignment of the debenture itself – in the words of Scrutton LJ, First City Finance "was not buying in order merely to get a cause of action; [it] was buying property and a cause of action as incidental thereto." The actions in tort are subsidiary matters, assigned with the debenture so that the assignee can protect the property it has received. First City Finance had a genuine commercial interest in the actions, for the reason that as the new debenture holder, it clearly had an interest in protecting the value of the security. …

[69] The plaintiffs would not take issue with those observations in Todd, *Trendtex* and *Downsview*. However PwC's argument was then developed in two ways. First it was submitted there can be no genuine or legitimate commercial interest where property is purchased merely to obtain the cause of action. Secondly they contended

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27 Stephen Todd and others *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [23.12].

28 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) at 703.

29 *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710 (HC) at 757.

that a genuine commercial interest must exist independently from the litigation funding arrangement.

[70] The first proposition is founded on the observations of Scrutton LJ in *Ellis v Torrington*[30] referred to in *Downsview*:[31]

> … So in this case when the respondent, who had bought the freehold, took also an assignment of the right to recover damages for dilapidations against the first lessee, *he was not buying in order merely to get a cause of action*; he was buying property and a cause of action as incidental thereto. That assignment seems clearly to be protected by the principle of *Williams v Protheroe*. (emphasis added)

[71] With reference to the second proposition, the point was made that it would be entirely circular for a loan for the purpose of funding litigation to constitute the genuine commercial interest in the same litigation. Reliance was placed on the following observation of Potter J in *Citic New Zealand Ltd v Fletcher Challenge Forests Industries Ltd*:[32]

> I have, however, a concern with the submission that loans of this kind can found a genuine commercial interest. To be able to loan money for the purpose of funding litigation, then state that this creates a genuine commercial interest sufficient to validate an assignment of that action seems to render the concept of a genuine commercial interest a self-fulfilling prophecy. A debt sufficient to validate an assignment of the cause of action must, in my opinion, have an element independent of the funding of the litigation.

[72] Reference was also made to *Body Corporate 326421 v Auckland Council*[33] in which, it was submitted, Gilbert J cited Lindgren J in *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* as authority for the following propositions:[34]

> – The genuine commercial interest referred to in *Trendtex* is not a nebulous notion of the general commercial advantage of the assignee, but something specific and limited;

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30 *Ellis v Torrington* [1920] 1 KB 399 (CA) at 412–413.
31 At [68] above.
32 *Citic New Zealand Ltd v Fletcher Challenge Forests Industries Ltd* HC Auckland CP 583-SW/99, 1 March 2002 at [136].
33 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.
34 *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* (1995) 132 ALR 514 (FC) at 540.

– It does not embrace an interest arising from an arrangement voluntarily entered into by the assignee (of which the impugned assignment is an essential part) but refers to a commercial arrangement which exists already;

– The impugned conduct was directed to the encouragement of litigation, the proceeds of which will go to themselves, where otherwise there may have been no litigation at all.

The plaintiffs' rejoinder

[73] The plaintiffs respond that the Assignment was of a debt, not a bare cause of action. They invoke the well-established distinction between an assignment of a debt and an assignment of a cause of action, in particular by reference to the decision of the English Court of Appeal in *Camdex International Ltd v Bank of Zambia*.[35]

[74] A Kuwaiti bank assigned to Camdex debts owed by the Bank of Zambia. Rejecting the bank's challenge to the validity and enforceability of the debt, Hobhouse LJ observed:[36]

> … The assignee of a debt is as free as anyone else to choose what he will do with the fruits of any litigation. Similarly, the owner of a debt is entitled to assign that debt to another who may be in a whole range of relationships to him from that of mere trustee through to one who owes no contractual or other obligation to him. The only qualification is that the statutory formalities must have been complied with and the assignment must be an absolute one. There has to be a debt, otherwise there is nothing to assign. However, the fact that the debt may have to be sued for, or that it is expressly contemplated that the debt will have to be sued for, does not alter the position. Suing for an assigned debt raises no question of maintenance.

[75] The plaintiffs then note that the assignability of choses in action, including debts, is sanctioned in New Zealand by s 50 of the Property Law Act 2007 which provides that such an assignment is effective so long as it is absolute and certain formalities have been complied with.

[76] Here, they say, there was simply an assignment of a debt owed to Allied by PVL, properly owned by Allied, assignable in accordance with the Property Law Act and the assignment was willingly entered into by Allied. Any action necessary for

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35 *Camdex International Ltd v Bank of Zambia* [1998] QB 22 (CA).
36 At 33.

SPF to enforce or realise the debt is merely an incident that follows on the assignment of the debt by Allied.

[77] They make the point that *Trendtex* establishes that the mere fact that an assignee with a genuine and substantial interest in the cause of action might make a profit from the assignment is not sufficient to render a transaction champertous. Reference is again made to *Camdex*:[37]

> … If the judgment of Longmore J stands and assets of the defendant can be found which are amenable to execution, the plaintiff may at the end of the day have made a profit on the transaction. But that does not invalidate the assignment of a debt; why else should a commercial entity purchase a debt? (See *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499.)

[78] It is where the profit contemplated is merely the onselling of the cause of action for a higher price that causes the transaction to be considered champertous.[38] They contend that there is no indication that SPF took an assignment of any cause of action in order to onsell it for profit, as in *Trendtex*.

[79] The plaintiffs also note that none of *Trendtex*, *Body Corporate 160361*, *Citic* or *Citibank* involved either an assignment of a debt or a litigation funding agreement. They submit that the further authority cited by PwC, *Laurent v Sale & Co*,[39] has been overruled by *Camdex*.

Discussion

[80] In *Camdex* Peter Gibson LJ observed that it is a normal, and for many in business an essential, incident of modern commercial life that debts are bought and sold. In his view it would be highly unfortunate if such everyday transactions were to be held to be impugnable as champertous save in wholly exceptional circumstances.[40]

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37 At 35.
38 *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499 (CA).
39 *Laurent v Sale & Co* [1963] 1 WLR 829 (QB).
40 *Camdex International Ltd v Bank of Zambia*, above n 35, at 40.

[81] In my view it would be inconsistent with such an approach to insist that an assignee of a debt for value should hold an "antecedent" commercial interest. To the extent that the observations of Lindgren J in *Citibank* suggest otherwise,[41] I respectfully disagree. I prefer the view of Heath J in *Body Corporate 16113 v Auckland City Council*[42] as noted, with apparent approval, by Todd.[43]

[82] Consequently, unless the Assignment can be attacked as not amounting to a genuine assignment, I do not accept that there was a requirement for SPF to have some antecedent commercial interest in Allied or in the GSA which was extant prior to SPF agreeing to take the Assignment. It follows that I do not accept the PwC submission advanced in reliance on *Citic*. That argument assumes that SPF's commercial interest derives from the litigation funding arrangement whereas I consider that it is inherent in the Assignment.

[83] However an assignment of a debt must of course be genuine. As Hobhouse LJ explained in *Camdex*:[44]

> … An assignment of a debt is not invalid even if the necessity for litigation to recover it is contemplated. Provided that there is a bona fide debt, it does not become unassignable merely because the debtor chooses to dispute it. Suing on an assigned debt is not contrary to public policy even if the assignor retains an interest. *What is contrary to public policy and ineffective is an agreement which has maintenance or champerty as its object; such a consequence will not be avoided by dressing up a transaction which has that character and intent as an assignment of a debt*. But, because the assignment of a debt itself includes no element of maintenance and is sanctioned by statute, any objectionable element alleged to invalidate the assignment has to be proved independently and distinctly in the same way as any other alleged illegality has to be proved in relation to a contract which is on its face valid.
>
> (emphasis added)

[84] There is no dispute here that an assignment of the GSA to SPF has taken place. The Assignment is not challenged as a sham. However the clothing of the Assignment is nevertheless sought to be impugned as having a champertous object by virtue of the assignee's alter ego as the litigation funder. I apprehend that it is on

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41 At [72] above.
42 *Body Corporate 16113 v Auckland City Council* [2008] 1 NZLR 838 (HC) at [32].
43 At [23.12].
44 *Camdex International Ltd v Bank of Zambia*, above n 35, at 39.

account of that other role that the proposition is advanced that the GSA was acquired merely to obtain a cause of action.

[85] Viewed objectively it is not apparent why SPF would need to have taken the Assignment merely in order to obtain a cause of action. The proceeding was already on foot. As PwC submissions noted, any attempt by SPF to exercise its security rights over the cause of action against PwC would result in a duplicity of litigation. A "fresh proceeding", it was said, would likely be out of time. In my view, considered objectively, the Assignment was taken in order to assume the favoured stance of secured creditor vis-à-vis the balance of the proceeds of the litigation in the hands of PVL after payment of the sums due under the Funding Agreement.

[86] In the course of the hearing additional affidavit evidence was sought to be tendered on behalf of the plaintiffs. One object of such evidence was to provide the basis for a submission that the acquisition by SPF of the GSA was a defensive move to prevent the acquisition of the security by a third party as opposed to a stratagem to garner all the proceeds of the proceeding for SPF. Mr Gray did not vigorously resist the receipt of such evidence but drily described it as a Mandy Rice-Davies response. Quite apart from the lateness of that evidence, I do not consider that the fate of PwC's challenge falls to be determined by reference to evidence of SPF's subjective intention. Consequently I have not taken that evidence into account.

[87] The thrust of PwC's complaint appears to be directed to the aggregation of interests by SPF in the proceeds of the litigation and the consequent "excessive profiteering". Under that heading in PwC's submissions it was said:

> The mere fact that an assignee stands to make a profit out of the assignment and subsequent successful prosecution of a claim does not render the arrangement champertous. However, the presence of an excessive or disproportionate profit may affect determination of whether any commercial interest is genuine. Further, a "large mathematical disproportion between any pre-existing financial interest and the potential profit of funders may in particular cases contribute to a finding of abuse …

[88] On that point, to my inquiry whether, if SPF had paid what might be viewed as full value for the Assignment, PwC would still complain, Mr Gray responded in the affirmative, observing that price is only one factor.

[89] I recognise the direction in *Waterhouse* to have regard to the funding arrangements as a whole and to the profit share of the funder. However where, as here, the Funding Agreement is not the subject of discrete complaint and the total "return" to SPF (assuming a successful outcome for the plaintiffs in the litigation) is simply the composite of the payments due under that Agreement and the secured debt due under the GSA, I do not consider that it can fairly be said that excessive profit is derived from the funding arrangement as such.

[90] This is not a situation where, in analysing SPF's return, it can be said that the whole is greater than the sum of the parts. And the second of the two parts is the debt owed to the first secured creditor. In circumstances where (prior to the Assignment) Allied would have been entitled to that share of the litigation proceeds, I do not consider that the acquisition by SPF of the entitlement to that share, by means of a bona fide assignment of the GSA, causes the "return" to be objectionable, even where (as here) SPF was only willing to assume the litigation funding obligation on the condition that it succeeded in securing the Assignment.

Conclusion

[91] PwC has not contended that there is, or should be, a general rule that a litigation funder should not be permitted to hold a secondary additional interest in the proceeds of the litigation which it funds. Its application for a stay of this proceeding under r 15.1 proceeds on the ground that the particular arrangement in this case is champertous and consequently an abuse of process.

[92] No complaint is made about the GSA itself. Nor is there any challenge to the Funding Agreement in isolation. However the consequence of the combination of the Assignment and the Funding Agreement is contended to constitute trafficking in litigation and to be contrary to public policy and/or a misuse of the Liquidator's powers.

[93] I have concluded that PwC has failed to establish that either of the scenarios recognised in *Waterhouse*[45] applies in this case; namely:

(a) that the arrangement is a manifestation of an abuse of process on traditional grounds; or

(b) that the arrangement effectively constitutes the assignment of a cause of action to a third party in circumstances where such an assignment is not permissible.

Accordingly PwC's application for an order for a stay of the proceeding is declined.

[94] The plaintiffs are entitled to costs and reasonable disbursements on the application. If the parties are unable to agree on costs, the plaintiffs are to file a memorandum by 21 August 2015 and PwC is to file a memorandum in response by 11 September 2015.

Brown J

Solicitors:
Jones Fee, Solicitors, Auckland

[45] *Waterhouse v Contractors Bonding Ltd*, at [25] above.