IN THE COURT OF APPEAL OF NEW ZEALAND

CA475/2015
[2016] NZCA 338

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

Hearing:	21 June 2016
Court:	Randerson, Wild and Miller JJ
Counsel:	B D Gray QC, P M Fee and M Atkinson for Appellant J B M Smith QC and R S May for Respondents
Judgment:	19 July 2016 at 10:30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent one set of costs for a standard appeal on a band A basis with provision for two counsel and usual disbursements.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] Not for the first time in recent history, a defendant wants to stay a claim for damages because the plaintiff is sustained by a litigation funder. The agreement to provide funds in the present case is to enable the respondent liquidator to bring a claim against the appellant (PwC) for alleged breach of duty as auditor of companies in liquidation. The funding agreement was associated with an assignment to the liquidator of a secured creditor's rights. The principal question is whether the funding agreement and the assignment are, in substance, a bare assignment of the secured creditor's rights. A second question is whether the liquidator is acting for an improper purpose by pursuing a claim that, it is said, can benefit only the funder.

Narrative

[2] Property Ventures Ltd (Property Ventures) is the parent company of a property development group that collapsed during the immediate aftermath of the 2008 financial crisis, leaving a large unfinished development at Queenstown.

[3] Property Ventures' wholly owned subsidiary, Five Mile Holdings Ltd (Five Mile), borrowed a large sum from Hanover Finance Ltd (Hanover) in 2006 against the security, inter alia, of a general security agreement (the GSA) granted by Property Ventures. The GSA granted Hanover a first charge over, among other things, choses in action. The charge extends to the claim against PwC.

[4] Late in 2009 Hanover assigned the GSA to Allied Farmers Investments Ltd (Allied). By then Five Mile was in receivership, owing about $98.6 million to Hanover. The receivers disposed of Five Mile's real property, leaving a balance of about $39 million owed to Allied.

[5] On 5 March 2010 Property Ventures went into receivership and on 29 July 2010 it was placed in liquidation by court order. Robert Walker was appointed

liquidator. He reported on 30 April 2012 that no realisable assets were left in Property Ventures; its balance sheet comprised advances to or investments in its own subsidiaries and in his opinion those assets were valueless as matters stood. Any realisations would be achieved through legal action.

[6] On 12 November 2012 Mr Walker brought proceedings against PwC, alleging breach of contractual and tortious duties in PwC's capacity as auditor of Property Ventures and its subsidiaries. The gist of the claim is that had PwC done its work properly the group's insolvency would have become apparent much sooner than it did, avoiding trading losses said to amount to as much as $302 million. The litigation is funded by SPF No 10 Ltd (SPF), a company incorporated on or about 8 November 2012 for that purpose.

[7] The relationship between Property Ventures and SPF is governed by a funding agreement executed on about 31 October 2012, shortly before SPF was incorporated. We will say more about it shortly. For present purposes, we note that it was conditional on SPF acquiring from Allied and Property Ventures' receivers a first-ranking security interest over Property Ventures' assets.

[8] The reference to Property Ventures' receivers is significant because the evidence is that they played a significant role in the funding arrangements for this litigation. That is so because the liquidation had been stayed pending an appeal to this Court and the liquidator did not assume control until February 2012, after the appeal had been abandoned. In the meantime the principal of Property Ventures, David Henderson, had been making attempts to purchase the GSA from the receivers, who did not retire until June 2013. Mr Henderson's efforts were still continuing in August 2012. SPF's executive director, Jonathon Woodhams, deposes that acquiring the Allied loans was a "purely defensive move" to prevent Mr Henderson acquiring them. As noted, the GSA gave the lender power to control any claims that Property Ventures might bring against third parties such as PwC.

[9] In March 2013 Allied and SPF negotiated a deed of assignment (the Assignment), under which Allied assigned to SPF, among other things, the GSA and all Allied's rights. The Assignment expressly included rights of action against

various parties, including Property Ventures' auditors. The price paid and payable to Allied is $100,000 plus five per cent of any proceeds of the litigation.

[10] It is the combination of the Assignment and the funding agreement that PwC finds objectionable. Under the two agreements the proceeds of any judgment or settlement will be used to repay costs and expenses of the litigation, including interest, and a service fee to be paid to SPF representing as much as 42.5 per cent of the net proceeds, with the balance being paid to the liquidator, who must account to SPF under the GSA before paying anything that remains to unsecured creditors.

[11] There is controversy about just how much SPF will receive. It depends, of course, on a number of variables including the amount of any judgment or settlement. It also depends on the time taken to achieve resolution and the quantum of legal costs incurred; these factors influence the percentage SPF receives under the funding agreement. In the meantime interest will presumably continue to accrue under the GSA. PwC says it is not at all likely that the unsecured creditors, in whose interests the liquidator must act, will receive anything, and even if they do, SPF will be paid a sum grossly disproportionate to its "modest" investment, amounting on one scenario to a profit of 3,335 per cent. The following scenario was used in the High Court to illustrate the point:[1]

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

[1] *Walker v Forbes* [2015] NZHC 1730 [High Court judgment] at [16].

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

[12] In this scenario, PwC claim SPF would receive $319 million in total after costs; after Allied took its five per cent the unsecured creditors would be paid just $209,000. If one adopts a much lower figure for a potential judgment sum, say $8-15 million after costs, PwC says the unsecured creditors will get nothing at all.

[13] The affidavit evidence of the liquidator and SPF's chief executive, though, is that the amount to be paid to the liquidator remains to be negotiated. They do not accept that the unsecured creditors will go wholly unpaid. PwC invites us to discount this evidence as speculative and focus on the enormous rewards SPF stands to gain. We note for completeness that under the counterfactual plausibly proposed by the liquidator there would be no litigation and the unsecured creditors would have no hope of any recovery.

Context

[14] The context for this stay application is sufficiently established by the 2013 judgment of the Supreme Court in *Waterhouse v Contractors Bonding Ltd*.[2] The Court took a cautiously permissive stance toward litigation funding, refusing to intervene at the defendant's instance for the funding arrangement's unfairness as between plaintiff and funder, or the funder's right to withdraw funding, or the absence of an indemnity for costs the plaintiff might have to pay, or the conferring of a degree of control commensurate with the funder's investment in the litigation. The case is authority for the following propositions:

(a) The courts do not regulate litigation funding, although a supervisory role in representative actions was not precluded.[3] However, a court may exercise jurisdiction to stay for abuse of process on traditional

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2 *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.
3 At [21].

grounds, or when the arrangement effectively assigns the cause of action in circumstances where that is impermissible.[4]

(b) Subject to certain exceptions, it remains the law that a bare assignment of a cause of action in tort or other personal actions is not permissible in New Zealand.[5]

(c) When considering whether a funding arrangement is in substance a bare assignment of a cause of action a court should consider the arrangement as a whole, including the funder's degree of control and share of profits.[6]

(d) The role of the lawyers acting may be relevant in the inquiry into a funding arrangement. Here the Court instanced a representative action in which the plaintiff's lawyers reported to the funder and in addition to their usual fees took an undisclosed success fee from the funder, conflicting with their duty to act only in their lay clients' interests. These features exacerbated the majority's concern that the funder, which had referred plaintiffs to the lawyers, was trafficking in litigation.[7]

(e) The traditional categories of abusive proceedings include those that deceive the court, are fictitious, or a mere sham, those that use the process of the court in an unfair or dishonest way or for some ulterior or improper purpose or in an improper way, those that are manifestly groundless, without foundation or serve no useful purpose, and those that are vexatious or oppressive.[8]

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4 *Waterhouse v Contractors Bonding Ltd*, above n 2, at [30]–[59].

5 At [57].

6 At [57].

7 At [57], citing *Clairs Keeley (a firm) v Treacy (No 1)* [2003] WASCA 299, (2003) 28 WAR 139 at [129], [167]–[171] and [181]. We observe that intervention for an undisclosed conflict, or in a representative action may be capable of challenge on traditional abuse of process grounds.

8 *Waterhouse v Contractors Bonding Ltd,* above n 2, at [31], citing *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43, (2009) 239 CLR 75 at [27] per French CJ, Gummow, Hayne and Crennan JJ.

[15] In the High Court, Brown J dismissed the application, reasoning that on traditional grounds of abuse of process SPF's secondary interest (its additional share of the proceeds under the Assignment) does not amount to an improper purpose of the nature set out in *Goldsmith v Sperrings Ltd*;[9] the possibility the liquidator may have brought proceedings for the incorrect party's benefit would not taint the proceeding itself if the claim is sound and an award of damages is obtained;[10] and SPF's dual interest as both funder and assignee of the GSA in combination does not provide the opportunity for manipulation so is not a misuse of the process of the Court.[11] He further found that there was no impermissible assignment of the cause of action in the Assignment that made SPF a secured creditor.[12]

The issues

[16] The central question on appeal is whether the Assignment and funding agreement are in substance a bare assignment of a claim in tort or personal claim, which assignment remains unlawful in New Zealand. A secondary question is whether, assuming it is a bare assignment by the company, it is nonetheless unobjectionable on the ground that a liquidator is authorised by statute to assign a cause of action. The arrangement is not now said to be an abuse on traditional grounds.

Has there been a bare assignment of Property Ventures' cause of action against PwC?

[17] We accept Mr Gray QC's submission that the agreements should be considered together, if only because the funding agreement was conditional on the Assignment. It is first necessary, though, to identify their relevant features, beginning with the GSA.

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9 High Court judgment, above n 1, at [41], citing *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 (CA) at 582.
10 High Court judgment, above n 1, at [51].
11 At [59].
12 At [90].

The GSA

[18] The GSA charged all of Property Ventures' assets, including choses in action, by way of security for advances made. Insofar as it was a floating charge, it attached and became immediately enforceable, at latest, when Property Ventures went into receivership. Hanover might then, among other things, "bring … any claim or proceeding … in relation to the Secured Property". In other words, it might without more enforce Property Ventures' cause of action against PwC, in Property Ventures' name.

[19] The GSA was assigned to Allied in or around November 2009, about three months before the receivership of Property Ventures. Mr Gray accepted that the Assignment included Property Ventures' cause of action, but acknowledged it was lawful because the assignment was ancillary to the recovery of a debt.[13]

The assignment to SPF

[20] Although the Assignment was last in time, it is sensible to mention it next. Allied assigned to SPF all of the "Rights", which term was defined to include all moneys owing under any loan agreement, and all securities, and all rights, including rights of action, against Property Ventures or any subsidiary, Mr Henderson, and all related parties (which term was defined to mean any director or advisor, including lawyers and auditors, of Property Ventures or any subsidiary).

[21] As Mr Smith QC submitted, the Assignment transferred a debt, being all moneys owed to Allied, and all securities given to secure it, including the GSA, which charged, among other things, all choses in action. To that extent it was no different from the assignment from Hanover to Allied. As Mr Gray emphasised, the Assignment also specified that it included rights of action and contemplated litigation against related parties, referring to the funding agreement. We were advised that there were two such claims, one against PwC and the other, now resolved, against another advisor. The focus on these particular assets is said to be attributable to the belief that Property Ventures' other assets were valueless. The price paid to Allied was calculated by reference to claims brought under the funding

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13 *Camdex International Ltd v Bank of Zambia* [1998] QB 22 (CA) at 32–33.

agreement; SPF paid $100,000 and will further pay five per cent of the net proceeds of such claims.

The funding agreement

[22] Under the funding agreement SPF advances costs and expenses of the claims, together called "Project Costs", to the liquidator. Interest is payable at a rate of 21.5 per cent per annum. As noted above, the liquidator must pay a fee of as much as 42.5 per cent of the net proceeds. Mr Gray drew attention to other features of the agreement; SPF approves the lawyers who are to conduct the litigation, the lawyers owe SPF a duty of care, the liquidator must consult fully with SPF, and SPF can use any information it derives to decide whether to continue with the claim.

[23] However, Mr Gray also made it clear that but for the Assignment PwC would not be challenging the funding agreement. Specifically, PwC complains that the funding agreement and the Assignment together give SPF excessive compensation and control.

Analysis

[24] Whether there has been a bare assignment of Property Ventures' cause of action is a question of construction of the funding agreement and the Assignment as a whole.[14]

[25] We begin by accepting that SPF had no antecedent commercial interest in Property Ventures. Its interest results from the funding agreement and the Assignment. However, it is not in dispute that a debt may be assigned to a stranger, along with associated causes of action, and that is so even if legal action will be necessary to recover the debt.[15]

[26] We accept too that the Assignment would not have been agreed but for the funding agreement; on the evidence it is a defensive move to protect the funding agreement.

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[14] *Waterhouse v Contractors Bonding Ltd,* above n 2, at [61].

[15] *Camdex International Ltd v Bank of Zambia*, above n 13, at 32–33; and *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) at 703.

[27] However, we do not accept that the agreements together amount to a bare assignment, for several reasons. First, the funding is not in form an assignment of the cause of action — the claim remains with Property Ventures and is being prosecuted by the liquidator — and Property Ventures is not even a party to the Assignment between Allied and SPF.

[28] Second, as noted above the funding agreement is not, in itself, said to be objectionable notwithstanding that Property Ventures is to pay a substantial fee and SPF has a significant degree of control over the litigation. Nothing about the Assignment alters the funding agreement.

[29] Third, the liquidator must account to SPF for the net proceeds of the claim, but that is done in SPF's capacity as a secured lender and owner of the Allied debt. In that capacity SPF will be paid the balance of the amount with interest and costs. Mr Gray emphasised that interest has continued to accrue and compound so that the remaining debt may far exceed $39 million. But it remains the case that SPF will receive any such payment qua lender, not litigation funder, and its recovery is capped by the amount of the remaining debt.

[30] We note that Mr Gray invited us to ignore the affidavit evidence that the Assignment was a defensive move. He submitted that we must construe the documents.[16] But that does not assist PwC; it is obvious from the terms of the GSA that something had to be done to protect the funder from opportunistic exercise of the lender's rights and that meant buying the debt. Indeed, Mr Gray did not really dispute this; his point rather was that having taken an assignment SPF might have valued and surrendered its rights under the GSA. This ignores that fact that SPF bought the debt at a price negotiated with a third party, Allied. The price paid is a small fraction of the face value of the debt, but that reflects Property Ventures' insolvency and it does not change the nature of the transaction.

[31] Finally, even if the Assignment and funding agreement are treated as a single transaction we are not prepared to draw the inference that SPF will be paid too much, relative to its investment in the litigation. It simply is not possible to say so

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16 Compare *Goldsmith v Sperrings Ltd*, above n 9, at 498–499.

without knowing what will be recovered and what will be paid to recover it. PwC compares the price paid for the debt to the amount owed by Property Ventures and the amount claimed in the litigation, but PwC also says that any amount realistically recoverable in this lost opportunity case is a mere fraction of that. And PwC estimates that the litigation may cost Property Ventures as much as $5 million.

[32] For these reasons, we are not persuaded that Property Ventures has assigned its cause of action to SPF, still less that what has happened is a bare assignment. We agree with Brown J, who reached the same conclusion for very similar reasons.

Is the overall arrangement permissible as an assignment by a liquidator?

[33] It is not necessary to address this question, which presumes that the arrangement is a bare assignment by the liquidator of Property Ventures' cause of action to SPF. We do so briefly in deference to the arguments advanced.

[34] Under the Companies Act 1993 a liquidator may assign a cause of action conferred on the liquidator under the Act:

> **260A Liquidator may assign right to sue under this Act**
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> (1) The liquidator may, if the court has first approved it, assign any right to sue that is conferred on the liquidator by this Act.
>
> (2) The application for approval may be—
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> (a) made by the liquidator or the person to whom it is proposed to assign the right to sue; and
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> (b) opposed by a person who is a defendant to the liquidator's action, if already begun, or a proposed defendant.

[35] The object of this provision is to facilitate third-party funding for litigation by liquidators, who may lack the resources to bring litigation.[17] It is consistent with cl (1)(e) of sch 7, which gives preference to a creditor who by payment of money recovers assets of the company for the benefit of its creditors.

[36] As noted, this case does not involve an assignment by the liquidator. The Court's approval was not sought. The point is that s 260A permits a bare

[17] David Flacks and others (eds) *Company Law* (online looseleaf ed, Westlaw) at [CA260A.01].

assignment. Mr Smith submitted that if there was an assignment by the liquidator it was permissible accordingly and public policy militates against a stay.

[37] Mr Gray responded that a liquidator may act only for the benefit of unsecured creditors, who will gain nothing from this litigation. No duty is owed to a secured creditor,[18] and it would be an abuse of power to act for the benefit of a party which became a secured creditor in order to gain a disproportionate profit. This argument suffers from several flaws: it attributes to SPF a motive for acquiring the GSA which is inconsistent with the evidence, it assumes the profit will be disproportionate relative to SPF's risk-weighted investment, and it assumes that the unsecured creditors will recover nothing. With respect to the last of these points, it is premature to conclude that unsecured creditors will not benefit. We accept that a very large sum would be needed to repay the balance of the Allied debt, but we do not know just how much and we cannot rule out a large recovery. And as noted, the evidence from SPF and the liquidator is that there is to be a negotiation about these matters.

Decision

[38] The appeal is dismissed.

Costs

[39] Costs will follow the result. We consider that the appropriate measure is a standard appeal on a band A basis with provision for two counsel and usual disbursements. The appellant must pay the respondent's costs accordingly.

Solicitors:
Fee Langstone, Auckland for Appellant
Luke Cunningham Clere, Wellington for Respondent

[18] *Gibbston Downs Wines Ltd v Property Ventures Ltd (in rec and liq)* [2013] NZCA 546 at [20].