SUPREME COURT OF QUEENSLAND

CITATION:	*Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228
PARTIES:	**MURPHY OPERATOR PTY LTD (ACN 088 269 596)** (first plaintiff/first applicant) **TOBARI PTY LTD (ACN 010 172 237)** (second plaintiff/second applicant) **SPW VENTURES PTY LTD (ACN 135 830 036)** (third plaintiff/third applicant) **v** **GLADSTONE PORTS CORPORATION LIMITED (ACN 131 965 896)** (defendant/first respondent) **LCM OPERATIONS PTY LTD** (second respondent)
FILE NO:	SC No 7495 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	13 September 2019
DELIVERED AT:	Rockhampton
HEARING DATES:	18 and 19 July 2019
JUDGE:	Crow J
ORDER:	**1. The agreement titled "*Representative Proceeding Funding Agreement, Representative, The 2017 Gladstone Fisheries Scheme*" between LCM Operations Pty Ltd, Murphy Operator Pty Ltd, Tobari Pty Ltd and SPW Ventures Pty Ltd is not, by reason of maintenance, champerty or public policy, unenforceable; and** **2. The agreements titled "*Representative Proceeding Funding Agreement, Member, The 2017 Gladstone Fisheries Scheme*" between LCM Operations Pty Ltd and funded group members are not, by reason of maintenance, champerty or public policy, unenforceable.**
CATCHWORDS:	TORTS – LAW OF MAINTENANCE AND CHAMPERTY – CHAMPERTY – where plaintiffs seek declarations that the

litigation funding arrangements are not by reason of maintenance, champerty or public policy, unenforceable – where first respondent and plaintiffs argue that the torts of maintenance and champerty no longer exist as part of the common law of Australia – whether maintenance and champerty still exist as part of the common law of Australia

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – REPRESENTATIVE PARTY OR PROCEEDINGS – where plaintiffs seek declarations that the litigation funding agreements are not by reason of maintenance, champerty or public policy, unenforceable – where plaintiffs argue s 103K(2)(b) of the *Civil Proceedings Act* (Qld) 2011 authorise the litigation funding agreements – whether s 103K(2)(b) of the *Civil Proceedings Act* (Qld) 2011 authorise the litigation funding agreements

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – ILLEGAL AND VOID CONTRACTS – CONTRACTS CONTRARY TO PUBLIC POLICY – OTHER CONTRACTS – where plaintiffs seek declarations that the litigation funding agreements are not by reason of maintenance, champerty or public policy, unenforceable – where plaintiff argues that there is lawful justification for the litigation funding agreements and therefore are enforceable – where defendant argues that there is no lawful justification therefore the entry into the agreements is a civil wrong and the agreements are unenforceable as contrary to public policy - whether the agreements are lawfully justified and are therefore enforceable

EVIDENCE – ADMISSIBILITY - GENERAL PRINCIPLES – where plaintiffs seek declarations that the litigation funding agreements are not by reason of maintenance, champerty or public policy, unenforceable – where defendant argues that the first respondent exercises impermissible control of the proceedings – where defendant tendered invoices issued by the plaintiffs' solicitors seeking to demonstrate impermissible control of the proceedings – where first respondent objects to the admissibility of the invoices on the basis that they are evidence of post-contractual conduct – where issue was left to be decided in judgment - whether the invoices are admissible

Civil Proceedings Act 2011 (Qld) s 103ZA, s 103R, s 103K, 103B, 103D, s 103A, s 103L, s 103I, s 103J, s 103P, s 103R

Legal Profession Act 2007 (Qld) s 324, s 308

Criminal Code Act 1899 (Qld)

Federal Court of Australia Act 1976 (Cth) s 33N

Supreme Court Act 1986 (Vic) Part 4A

Civil Procedure Act 2005 (NSW) s 166(2)

Wrongs Act 1958 (Vic) s 34(2)

Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd (No 3) [2019] QSC 118

Falzon v Gladstone Ports Corporation & Anor [2012] QPEC 50

Falzon v Gladstone Ports Corporation [2014] QPEC 37

Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337

Giles v Thompson [1993] 3 All ER 321

Regina (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No 8) [2003] QB 381

Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors [2019] QSC 163

REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd (2017) 95 NSWLR 458

Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215

Blatch v Archer (1774) 98 ER 969

Bradlaugh v Newdegate (1883) 11 QBD 1

Fischer v Kamala Naicker (1860) 8 Moo. Ind. App. 170

Findon v Parker (1843) 11 M. & W. 675

Hutley v Hutley (1873) LR 8 QB 112

Stanley v Jones (1831) 131 ER 143

Sprye v Porter (1856) 26 L.J. QB. 64

Knight v FP Special Assets Ltd (1992) 174 CLR 178

Neville v London 'Express' Newspaper Limited [1919] AC 368

Wallis v Duke of Portland (1797) 3 Ves Jun. 494

WorkCover Queensland v AMACA Pty Limited [2013] 2 Qd R 276

Magic Menu Systems v AFA Facilitation (1997) 72 FCR 261

Martell v Consett Iron Co Ld [1955] 1 Ch 363

British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] KB 1006

In re Trepca Mines Ltd (No.2) [1963] 1 Ch 199

Davey v Money [2019] EWHC 997 (Ch)

Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89

Clyne v Bar Association (NSW) (1960) 104 CLR 186

Elfic Ltd v Macks [2003] 2 Qd R 125

Roux v Australian Broadcasting Commission [1992] 2 VR 577

Jeffery & Katauskas v SST Consulting (2009) 239 CLR 75

Deloitte Touche v JP Morgan (2007) 158 FCR 417

IMF (Aust) v Meadow Springs (2009) 253 ALR 240

Taylor & Anor v Hobson & Ors [2016] QSC 226

Trendtex Trading Corporation v Credit Suisse [1982] AC 679

PGA v The Queen (2012) 245 CLR 355

Trident General Insurance Co Limited v McNiece Bros Pty Ltd (1988) 165 CLR 107

Burragubba v Queensland (2015) 236 FCR 160

Multiplex Funds v P Dawson Nominees (2007) 164 FCR 275

Brewster v BMW Australia Ltd [2019] NSWCA 35

Brookfield Multiplex v ILFP (2009) 180 FCR 11

Unruh v Seeberger (2007) 10 HKCFAR 31

Westpac Banking v Lenthall (2019) 366 ALR 136

BMW Australia Ltd v Brewster (2019) 366 ALR 171

COUNSEL: L W L Armstrong QC and M J May for the applicants
D B O'Sullivan QC and S B Hooper for the first respondent
P J Dunning QC and C Jennings for the second respondent

SOLICITORS: Clyde & Co for the applicants
King & Wood Mallesons for the first respondent
Piper Alderman for the second respondent

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1. Introduction

[1] On 1 April 2019 the plaintiffs, applied for declarations that funding agreements between the plaintiffs and the second respondent ('**LCM**') and funding agreements between the group members and LCM are "not, by reason of maintenance, champerty or public policy, unenforceable". Alternatively the plaintiffs sought a common fund order in respect of the funding agreements pursuant to s 103ZA of the *Civil Proceedings Act* 2011 (Qld) ('**CPA (Qld)**').

[2] The application also sought ancillary orders, they are the subject of the judgment in *Murphy Operator Pty Ltd & Ors v Gladstone Ports Corporation Ltd (No 3)* [2019] QSC 118. Pursuant to the orders recorded in that judgment, notices have been provided to group members, the Funding Application was duly advertised and all procedural issues have been complied with. These reasons determine the hearing of the Funding Application filed 1 April 2019 and referred to in paragraph 16 of the orders made on 14 May 2019.

[3] At the return date of the Funding Application on 18 July 2019 no group member provided a notice of intention to appear at the hearing. In response to the advertisement one further claimant has joined the group members, taking the total number of group members to 168 group members who join the three named plaintiffs seeking to bring a class action against the first respondent ('**GPC**').

2. Background

[4] GPC, who is responsible for the management of the Port of Gladstone, undertook dredging in Gladstone Harbour to improve the shipping lanes during 2011 and 2012. The spoil created by the dredging was deposited behind a bund wall. The plaintiffs contend that the dredge spoil was known to be acidic after being exposed to air, and that GPC was on notice that the bund wall was unlikely to be effective to contain the spoil. The plaintiffs allege large volumes of spoil escaped the defective bund spread across a wide geographic area and from early September 2011 seriously depleted the quantity and quality of commercial seafood species in waters affected by the spoil. The plaintiffs and group members wish to bring a claim in negligence and public nuisance against GPC, alleging that the plaintiffs and the group members suffered economic loss and damage from the reduction of the catch of seafood products from the affected waters.

[5] Mr Barry Murphy is a director of the first plaintiff. From 1985 the first plaintiff has operated a fleet of trawlers in Queensland waters typically from Fraser Island to north of Yeppoon. During 2011 and 2012 the first plaintiff operated ten vessels focusing on trawling for scallops and prawns. Mr Murphy deposes that one of the most important scallop replenishment zones utilised by his fleet of trawlers was at Bustard Head, commencing approximately 25 kilometres from the entrance to Gladstone Harbour. Mr Murphy deposes from in and about late 2011 skippers of the vessels being operated by the first plaintiff reported catching diseased fish in waters off Gladstone, then from early 2012 the catch from the Bustard Head scallop replenishment area decreased considerably.

[6] Mr Christopher Thompson is a solicitor and director of the law firm Law Essentials of 65 Torquay Road, Pialba, Hervey Bay. Mr Christopher Thompson and his partner at the firm, Mr Michael Garrahy have, for more than 15 years, acted in a range of matters for fishers, fishing businesses, fish wholesalers and fish processors in and around the Gladstone and Hervey Bay area. In 2008 and 2009, Law Essentials acted for the majority of the Gladstone Fishing Industry.

[7] Mr Christopher Thompson deposes, and it is not disputed, that from in and around 2010 many of Law Essentials' fishing clients, including the plaintiffs in the current proceedings, approached Law Essentials raising concerns about the proposed significant dredging and port reclamation project proposed to be undertaken in Gladstone Harbour by GPC. Mr Christopher Thompson deposes that:[1]

> "From or about 2010 Law Essentials was retained by a number of commercial fishing operators based in Gladstone in relation to the compensation scheme established as a part of the Western Basin and Dredging and Disposal Project in Gladstone harbour. At the same time we began to investigate the impacts of that project on our client base, and sought to widen the then proposed compensation scheme as more of our clients were saying that they would be impacted."

[8] Mr Christopher Thompson further deposes that, "[d]ue to the large number of potential claimants and the potential size of the potential claims, on or about 20 December 2011

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[1] Affidavit of Christopher John Thompson filed 11 June 2019.

Law Essentials assisted Shine Lawyers to act on behalf of our fishing clients to seek compensation or damages from GPC."[2] One of Law Essentials' clients, Mr Trevor Falzon, lent his name to an application brought in the Planning and Environment Court of Queensland on behalf of the 58 other persons seeking compensation in respect of the dredging. That application was unsuccessful. On 30 August 2012, Searles DCJ ordered the further amended originating application filed 26 April 2012 be struck out with costs and liberty to apply in respect of amendments.[3] A second attempt at pleading by way of a points of claim document was also struck out by Andrews SC DCJ on 11 July 2014.[4]

[9] Mr Christopher Thompson deposes that following the failure of the Planning and Environment Court proceedings, he approached his brother, Mr Maurice Thompson, a partner at Clyde & Co, and enquired whether Clyde & Co would be willing to act in a representative proceeding on behalf of Law Essentials' fishing clients against GPC. Mr Christopher Thompson deposes that over the course of late 2015 and early 2016 he assisted a number of Law Essentials' fishing clients, including the second and third plaintiffs, to enter into confidential agreements and client agreements with Clyde & Co directly. At the time Queensland did not have a class action regime. On 11 November 2016 the *CPA* (Qld) was amended to include Part 13A which introduced class actions to Queensland.

[10] Mr Richard Whittingham is a director of the second plaintiff. Mr Simon Whittingham is a director of the third plaintiff and is the son of Mr Richard Whittingham. The second and third plaintiffs jointly conduct businesses under the name of Gladstone Fish Market and Hervey Bay Fisheries. Mr Richard Whittingham on behalf of both the second and third plaintiffs deposes[5] that part of the business operated by the second and third plaintiffs was the operation of the scallop processing vessel 'MV Processor 1'. The vessel had been owned and operated by the second and third plaintiffs for 25 years prior to the cessation of operations in 2012.

[11] From in or about 2004 the business of the second and third plaintiffs had sourced seafood around the Gladstone region to process on their vessel, which was situated in the Gladstone Harbour. The venture of the second and third plaintiffs provided full-time employment for up to 80 individuals processing scallops, which included shucking the scallops and treating them in water from the Gladstone Harbour. Mr Richard Whittingham deposes that when large-scale dredging projects began in Gladstone Harbour in or around late 2010 he observed water in the harbour became murky and brown. Mr Whittingham deposes that from April 2011, the business started to receive significant numbers of obviously sick fish. Gladstone Harbour was then compulsorily closed to all fishing activity between 16 September 2011 and 7 October 2011, at which point the second and third plaintiffs ceased trading in seafood product altogether.

[12] Mr Whittingham further deposes[6] that around the time of these events, that is, the closure of the harbour, he spoke to and engaged Mr Christopher Thompson and Mr Michael Garrahy of Law Essentials to act for the second and third plaintiffs in relation to potential and actual losses suffered as a result of the harbour dredging and developmental project. Mr Whittingham deposes, "[i]t has always been my wish that

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2 Affidavit of Christopher John Thompson filed 11 June 2019.
3 See *Falzon v Gladstone Ports Corporation & Anor* [2012] QPEC 50.
4 *Falzon v Gladstone Ports Corporation* [2014] QPEC 37.
5 Affidavit of Richard Edward Whittingham filed 11 June 2019.
6 Affidavit of Richard Edward Whittingham filed 11 June 2019.

the Second and Third Plaintiffs would pursue the Defendant (GPC) in relation to that loss".

[13] Both Mr Barry Murphy and Mr Richard Whittingham depose that prior to executing the funding agreements, which are the subject of the Funding Application, they sought and received advice from Mr Chris Thompson of Law Essentials.[7] Mr Barry Murphy and Mr Richard Whittingham depose that they are aware that the proceedings are likely to be complex, and involve very significant legal costs and expenses such that absent a third party funder such as LCM, they would be unable to bring proceedings against GPC. Mr Barry Murphy and Mr Richard Whittingham, were not cross-examined and accordingly I accept their unopposed evidence.

[14] Mr Christopher Thompson verifies[8] that on 7 February 2018, prior to the plaintiffs or any other Law Essentials' fishing clients entering into any funding agreements, he met with Mr Barry Murphy of the first plaintiff, at his place of business at Hervey Bay and provided advice regarding entry into the funding agreements. Mr Christopher Thompson also met with Mr Simon Whittingham and Mr Richard Whittingham of the second and third plaintiffs at the offices of Law Essentials in Hervey Bay and also provided advice to them regarding entry into the funding agreements.

3. Funding Agreements

[15] Maurice Thompson, partner of Clyde & Co, deposes that his firm began investigating the merits of commencing a class action on behalf of the plaintiffs in June 2015 on a strictly no win, no fee basis.[9] In December 2015, Clyde & Co commenced discussions with a litigation funding company to fund the class action. That first company investigated the matter and after approximately one year of protracted negotiations, the first company decided that the claim did not meet its criteria for funding and chose not to proceed.

[16] On 8 December 2016, upon being notified that the first company did not wish to proceed, Clyde & Co approached two other international funding companies, both of whom conducted due diligence into the claim and both of whom made indicative offers to provide the necessary funding for the entire proceeding. Clyde & Co recommended acceptance of an offer from Harbour Fund III LP ('**Harbour Fund**') to fund the proceeding. On 6 February 2017, Clyde & Co entered into a "Relationship Agreement with Harbour". From 8 February 2017, Clyde & Co commenced to sign up the plaintiffs, who had entered into a funding agreement with Harbour Fund. Mr Maurice Thompson explains that as the reclamation bund at Fisherman's Landing, Gladstone Harbour, was completed on or about 21 July 2011, and as the claims sought damages for economic loss, it was necessary to commence proceedings by 21 July 2017 to avoid being statute-barred. Harbour Fund were well aware of the time limitation to commence proceedings, however, on 15 July 2017, Harbour Fund advised Clyde & Co that it would not be continuing to fund the proceedings and purported to terminate the relationship agreement. I infer that from Saturday, 15 July 2017, Harbour Fund provided no further funding to Clyde & Co in respect of the class action.

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7 Affidavit of Barry John Murphy filed 11 June 2019 and Affidavit of Richard Edward Whittingham filed 11 June 2019.

8 Affidavit of Christopher John Thompson filed 11 June 2019.

9 Affidavit of Maurice Thompson filed 21 July 2017.

[17] On 21 July 2017, proceedings were commenced by the filing of a claim and statement of claim in the Supreme Court of Brisbane. On the same day the plaintiffs filed an application for a stay of proceedings supported by the affidavit of Maurice Thompson filed 21 July 2017. A concern of Mr Thompson's expressed in his affidavit was, that at the time of the filing of the claim and statement of claim, the plaintiffs did not have the support of any litigation funder who would be subject to directions as contemplated by Practice Direction Number 2 of 2017 ('**Representative Proceedings Practice Direction**')[10], which requires close case management from the outset. As the plaintiffs did not have the financial resources to fund the class action in the absence of a litigation funder, the action could not proceed. In his affidavit of 21 July 2017, Mr Maurice Thompson swears that at that date Clyde & Co was in contact with two international litigation funding companies with a view to securing alternative funding to allow the class action to proceed.

[18] On 27 July 2017, Mullins J made orders to the effect that no step be taken in the proceeding any earlier than 27 October 2017, the plaintiffs serving the claim and statement of claim on the defendant or as otherwise ordered by the court, and fixing the date for the first case management conference for a date after 27 October 2017. Mr Maurice Thompson deposes that from 27 July 2017, Clyde & Co continued to negotiate with five litigation funding companies including LCM.[11]

[19] In his affidavit sworn 7 June 2019, Mr Maurice Thompson swears that on 7 February 2018, he attended at the office of Law Essentials in Hervey Bay to execute the various funding agreements with LCM, and a new client engagement letter with Clyde & Co.[12] Mr Chris Thompson of Law Essentials had a meeting in a separate room with Simon and Richard Whittingham prior to Simon and Richard Whittingham signing the agreements for and on behalf of the second and third plaintiffs.

[20] Mr Christopher Thompson left Law Essentials at Hervey Bay and attended upon Mr Barry Murphy of the first defendant at his place of business in Hervey Bay to discuss the funding agreements in person.[13] I conclude that the directors of the first, second and third plaintiffs received independent legal advice from their longstanding solicitor, Mr Christopher Thompson, prior to entering into the funding agreements in respect of the class action. Mr Barry Murphy[14] and Mr Richard Whittingham[15] swear that their companies cannot afford to litigate against GPC absent the funding arrangement provided by LCM. Mr Murphy swears that without the indemnities provided by LCM would have "no option but to immediately withdraw as a plaintiff".[16] Mr Whittingham similarly swears that the second and third plaintiffs will have "no option but to seek to cease the proceedings".[17]

[21] There are four documents which set out the terms of the funding agreements relevant to the class action ('**Funding Agreements**'). They are the:

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[10] Paragraph 8.2 of the Practice Direction requires disclosure of "any agreement" by which a litigation funder is to pay or contribute to the costs of the proceeding.
[11] Affidavit of Maurice John Thompson filed 23 October 2017.
[12] Affidavit of Maurice John Thompson filed 11 June 2019.
[13] Affidavit of Christopher John Thompson filed 11 June 2019.
[14] Affidavit of Barry Murphy filed 11 June 2019 (paragraphs 10 and 11).
[15] Affidavit of Richard Whittingham filed 11 June 2019 (paragraph 9).
[16] Affidavit of Barry Murphy filed 11 June 2019 (paragraph 11).
[17] Affidavit of Richard Whittingham filed 11 June 2019 (paragraph 9).

1. Client Engagement Letters;

2. Member Agreements;

3. Representative Agreements; and

4. Retainer Agreements.

3.1 Client Engagement Letters

[22] Exhibited to the affidavit of Paul Hopwood filed 21 June 2019 is the conditional client engagement letter of the first plaintiff.[18] It is indicative of the client engagement letters entered into by the second and third plaintiffs and the 168 group members. Clause 2.3 requires the client engagement letter to be read in conjunction with the funding agreements. The funding agreements are defined as the member agreement, the representative agreement and the retainer agreement. Clause 3.1 provides that the agreement is a 'no win, no fee' and 'conditional' costs agreement. The scope of the work of the client agreement is defined in paragraph 5.1 as a retainer "to act on your behalf and to take all reasonable and necessary steps in connection with … [the] Claims and in preparing for, conducting and resolving the Claims and Action." Clause 7.4 records that the funder will pay 75 per cent of Clyde & Co's charges for professional fees and 100 per cent of all disbursements, with the remaining 25 per cent of the charges for professional fees (referred to as the 'deferred fees') only payable if there is sufficient recovery. Clause 8.3(c) provides for an uplift of 25 per cent of the total charges for professional fees which is permissible pursuant to s 324(1), (4) and (5) of the *Legal Profession Act* 2007 (Qld).

[23] Clauses 8.6 to 8.12 record the agreements in respect of pre-retainer work, being that necessary work incurred prior to the date of the signing of the client engagement letter on 8 February 2018. Clause 9 of the agreement complies with s 308 of the *Legal Profession Act* 2007 (Qld) in providing an estimate of the likely action costs, as far as possible, which range between $8.4 million to $10.65 million, with a further possible uplift on fees of $2.1 to $2.662 million. Clause 9.1 provides a claim estimate value of the collective claims in the range of $112 million to $150 million. Clause 10 provides for the client to authorise and direct Clyde & Co to, amongst others things, enter into a retainer agreement with the funder, provide the funder and its agents with confidential updates on the progress of the action and to conduct the action as Clyde & Co consider appropriate "in consultation with the Funder, subject to any terms in the Funding Agreements".

[24] Importantly, clause 10.1(e) provides that the client authorises and directs Clyde & Co:

> "to take and act upon instructions from the Funder, save where, in our reasonable professional opinion, separate instructions are required from You".

[25] Clause 12 is also an important provision, dealing with the matter of settlement and settlement negotiations. Clause 12 provides:

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[18] Exhibit PAH-9.

> "12.2 Settlement of the Action may be negotiated by Us acting on instructions from the Representatives … subject to the terms of the Member Agreement (and any relevant legislation governing such settlement).
>
> 12.3 Any proposed Group Settlement will be communicated to all Funded Plaintiffs by us, together with an opinion on the proposed Group Settlement from Us or counsel, in order to determine whether a Group Settlement can be reached in accordance with the relevant regime specified in the Member Agreement relevant to settlement of such claims.
>
> 12.4 Any disagreements over whether a settlement is fair and reasonable in all the circumstances will be resolved by reference to an opinion from senior counsel in accordance with the process at Part 18 of the Member Agreement."[19]

[26] Clause 13 of the client engagement letter includes an irrevocable instruction from the client to Clyde & Co to disburse the proceeds of any recovery in accordance with clause 58 of the member agreement. Clause 16 of the client engagement letter provides for a security over the claim proceeds in favour of Clyde & Co. Attached to the client engagement letter is a terms of business document. Importantly, the client engagement letter at clause 3.4 also provides that:

> "You agree if there is any inconsistency between the terms of this Client Engagement Letter and the Funding Agreements, to the extent of any inconsistency, the terms of the Funding Agreements are to prevail."

[27] The funding agreements are defined in recital H of the client engagement letter as the member agreement, the representative agreement and the retainer agreement.

3.2 Member Agreements

[28] The three plaintiffs and the 168 group members have entered into a member funding agreement.[20] The full title of the member agreement is the "*Representative Proceeding Funding Agreement – Member - The Gladstone Fisheries Scheme*". The member agreement is comprised of the terms sheet and the rules of the scheme. Clause 2 of the terms sheet provides that the terms sheet takes priority over the rules of the scheme ("**the Scheme**").

[29] Item 5 of the schedule to the terms sheet defines the funder's interest as the greater of the funder's share or the recovery premium which is further defined. The funder's share is defined in item 5.2 of the schedule and provides for a funder's share of the recovery which slides from 15 per cent up to 40 per cent depending upon the level of action costs incurred by the funder. The funder's share is 40% of the recovery after the incurring of action costs exceeding $9.5 million. If recovery occurs after the commencement of an appeal then there is an additional 5 per cent paid in respect of the funder's share. Item

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[19] My underlining (the reference to relevant legislation being a reference to s 103R of the *CPA* (Qld) as discussed at [158]).

[20] Exhibits PAH-6, PAH-7, PAH-8 to the Affidavit of Paul Hopwood filed 21 June 2019.

5.4 defines the recovery premium as three times the aggregate of the outstanding fees as at the date of distribution of the recovery in accordance with rule 58.2 of the Scheme.

[30] The Scheme contains 73 clauses referred to as rules. Rule 9 of the scheme provides that the members are bound by judgments or findings on common questions, and any (court approved) settlement. Rule 8 provides that a member has no right to interfere in the prosecution of their claim until common questions are decided. Rule 11 of the scheme records that members are not at financial risk in respect of the Scheme. Rule 12 provides "[n]one of the Scheme, the Lawyers, the Funder or their respective officers, employees or consultants offer any assurance as to any economic benefit to a Member from participating in the Scheme." Part 4 of the Scheme, rules 13 to 17, sets out the important role of the representatives in the class action. Rule 14 provides that representatives, (who must be members), are chosen by the Lawyers after consultation with the funder, and the member chosen as a representative. Rule 15 of the Scheme details the representatives' role as, lending their name to the action, instructing lawyers for the purpose of prosecuting the claims, and generally (but subject to rule 10) binding all members to any steps to be taken, or not taken, in prosecuting, abandoning, postponing or settling the claims.

[31] Rule 20 of the Scheme records that in accordance with the retainer agreement, the funder may terminate and require the representative to terminate the retainer agreement and replace the lawyers then acting, conditional upon the incoming lawyers and the representative entering into a further retainer agreement. Part 6 of the Scheme, rules 21 to 23, ensures that the funder is a party to the scheme and is required to pay the action costs and any adverse costs, and meet any order for security for adverse costs. Rules 21.3 provides that the funder "[w]ill direct the steps to be taken, or not taken, in preparing, conducting, abandoning, postponing or resolving the claims". This includes:

> "21.3.1 Discussing the prosecution of the Claims with the Lawyers with no Member present;
>
> 21.3.2 Having access and input to documents being prepared by the Lawyers for an Action or to be put in evidence;
>
> 21.3.3 Attending and speaking at meetings with the Lawyers and any Defendant or insurer as regards the disposal of the claims."

[32] Importantly, rule 22 provides as follows:

> "**Funder's Risk:** The Funder bears the risk of loss of the whole or part of its Outstanding Funding to the extent that the recovery (if any) is insufficient to repay the Outstanding Funding."

[33] Part 7 deals with exit from the Scheme and allows the ability for a member to opt out in accordance with the applicable law or rules of the court. Rule 25 of the Scheme gives the funder power to expel a member of the Scheme and rule 26 sets out the circumstances in which the funder may terminate the agreement.

[34] Part 11, clause 35 of the Scheme provides as follows:

> "**35 Management of Actions**:

> The Funder and the Representative must agree as to the strategy and tactics of prosecuting the Claims in the Action including in respect to:
>
> 35.1 Any matter related to settlement of the Action, including any decision as to the making or acceptance of an offer of settlement or compromise and whether to put the Claims to mediation before or after an Action is commenced;
>
> 35.2 The Defendant/s to any action;
>
> 35.3 The forum for trial of the merits [of] an Action (a Court, arbitration, referral to an expert);
>
> 35.4 Filing and service of any Action;
>
> 35.5 Any step proposed to be taken that is likely to have a material effect on the Action, the Recovery, the Action Costs and/or the Adverse Costs;
>
> 35.6 Whether to proceed as a "test case" on any issues of fact or liability common to all Claims, or on a full trial of all Claims; and
>
> in the absence of agreement between the Funder and the Representative, the provisions of Part 18 shall apply."

[35] Part 14 of the Scheme provides for ATE (After the Event) insurance and allows the funder to procure ATE insurance for the benefit of, and at a cost to the Scheme. Part 16 deals with resolution of the claims. With respect to offers to settle, rule 53 of the Scheme requires that if there is a dispute between the representatives and the funder as to whether offers ought to be made or accepted, senior counsel's opinion needs to be obtained and acted upon.

[36] Finally, part 18 of the Scheme sets out a dispute resolution procedure for all disputes other than disputes relating to offers to settle. The procedure requires disputes to be negotiated between the disputants in an attempt to reach a consensus, failing which the dispute is resolved by an independent arbitration.

3.3 Representative Proceeding Funding Agreement – Representative

[37] Exhibited[21] to the Affidavit of Paul Andrew Hopwood filed 21 June 2019 is the "Representative Proceeding Funding Agreement - Representative – The 2017 Gladstone Fishing Scheme" **('the Representative Agreement')** of the first plaintiff. It mirrors the Representative Agreement of the second and third plaintiffs. Clause 3 sets out the role of the representatives. Specifically, clause 3.2 provides that the representatives "generally, has those rights and obligations of a representative stated in Parts 4 and 11 of the Rules". Part 4 of the rules of the Scheme is contained in rules 13 to 17 and importantly sets out the representatives' function "to instruct Lawyers for the purposes of prosecuting the Claims". However, the key provision contained in part 11 of the rules is rule 35, management of actions, and is set out above in paragraph 34. It records that the representatives are involved in all important decisions relating to the strategy and tactics of prosecuting the claims. This includes any matter relating to settlement,

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[21] Exhibit PAH-4 (First Plaintiff) and PAH-5 (Second and Third Plaintiffs) to the Affidavit of Paul Andrew Hopwood filed 21 June 2019.

and "[a]ny step proposed to be taken that is likely to have a material effect on the Action, the Recovery, the Action Costs and/or the Adverse Costs". In short, it is the contractual role of the representatives (the first, second and third plaintiffs) to act diligently and provide instructions in respect of all matters important or likely to materially affect the action.

[38] Clause 5 of the Representative Agreement contains the indemnity with respect to adverse costs.

[39] Clause 6 gives the funder a discretionary power to enter into an ATE insurance policy and agrees that the ATE insurance policy is an action cost.

[40] Clause 7 requires the funder to provide security for costs.

[41] Clause 3.9 of the representative agreement requires the representative to agree to "comply with any direction given by the Funder pursuant to clause 8.3".

[42] Clause 8.3 provides the funder may direct the representatives to:

> "8.3.1 Instruct the Lawyers to terminate the retainer of any barrister or other professional retained by the Lawyers in relation to the Action; and/or
>
> 8.3.2 Instruct the Lawyers to retain a barrister or other professional selected by the Funder."

[43] Clause 8.5 provides "[t]he parties acknowledge and agree that if there is any inconsistency between the terms of the Retainer Agreement and this Representative Agreement, the terms of this Representative Agreement will prevail".

3.4 Retainer Agreements

[44] Exhibited[22] to the Affidavit of Paul Andrew Hopwood filed 21 June 2019 is the Representative Proceeding Retainer Agreement **('Retainer Agreement')** as referred to in clause 8.5 of the Representative Agreements. It also mirrors the Retainer Agreements of the first and second Plaintiffs. Clause 1 of the Retainer Agreement records that "[a]s between the Representatives and the Funder, the terms of the Member Agreement and the Representative Agreement prevail to the extent of any inconsistency with the Retainer." The Retainer Agreement is a tripartite agreement between Clyde & Co, the representative plaintiffs and LCM which, as a result of clause 1, is subservient to the Member Agreements and the Representative Agreements. Importantly, clause 6 and 7 of the Retainer Agreement provide:

> "6. The Parties acknowledge that while the Funder owes obligations to the Lawyers under this Retainer, the Funder is not a client of the Lawyers under this Retainer or in relation to the Action. The Lawyers owe obligations to the Funder pursuant to this Retainer, but the Lawyers have no obligation to provide legal services to or for the Funder pursuant to its Retainer or in relation to the Action. The Funder does not have control over the Action, but may make day to day decisions

[22] Exhibit PAH-1 (First Plaintiffs) PAH-2 (Second Plaintiffs) and PAH-3 (Third Plaintiff) to the Affidavit of Paul Andrew Hopwood filed 21 June 2019.

in respect of the Action. The Representatives agree that the duties of the Lawyers to the Representatives as the clients of the lawyers are modified to the extent they are inconsistent with this Retainer.

7. The Representatives may provide instructions to the Lawyers, and the Lawyers will act in accordance with the Representatives' instructions, to the extent that those instructions are consistent with the obligations of the Lawyers to the Funder under this Retainer."

[45] Clause 11 requires the lawyers to communicate immediately with the representative and/or the funder in respect of important matters to the litigation.

[46] Clause 13 of the Retainer Agreement is set out as follows:

> "13. The Lawyers will not implement any of the following without the agreement of the Funder:
>
> 13.1. Any matter related to settlement of the Action, including any decision as to the making or acceptance of an offer of settlement or compromise and whether to put the Claims to mediation before or after an Action is commenced;
>
> 13.2. Any change to the Defendant/s to any action;
>
> 13.3. Filing and service of any interlocutory application in any action;
>
> 13.4. Any step proposed to be taken that is likely to have a material effect on the Action, the Recovery, the Action Costs and/or the Adverse Costs;
>
> 13.5. Whether to proceed as a "test case" on any issues of fact or liability common to all Claims, or on a full trial of all Claims; and
>
> 13.6. The engagement of barrister/s and/or experts."

[47] Clause 17 of the Retainer Agreements provides that "[t]he lawyers acknowledge that they owe a duty of care and fiduciary duty to the Representatives and owe a duty of care to the Funder in respect of the Action".

[48] It may be observed that a prohibition upon Clyde & Co implementing the representative plaintiffs' instructions in respect of the matter as set out in clauses 13.1 to 13.6 is similar to the powers reposed in the representatives as contained in rule 35 of the Scheme. The prohibition acknowledges the primacy of the representative plaintiffs in providing instructions on all important matters relating to the conduct of the claim, but requires agreement of the funder before doing so. Clause 13 prevents Clyde & Co from acting upon those instructions without the agreement of the funder. However, as discussed above, clause 1 of the Representative Agreements affords primacy to the terms of the Member Agreement, and the Representative Agreements, and part 18 of the Scheme provides for a dispute resolution procedure in respect of any conflict.

[49] The Agreements in the Scheme therefore afford primacy to the representative plaintiffs upon all important aspects of the conduct of the class action but prevents Clyde & Co

automatically carrying out those instructions without the agreement of LCM. If there is a disagreement about settlement, it is resolved by senior counsel under rule 53 of the Scheme. If there is any other dispute, including a dispute about instructions, then part 18, (the dispute resolution procedure of the rules of the Scheme) provides for the resolution of the issue. If the parties cannot agree on a particular issue, it is eventually decided by an arbitrator selected independently of the parties and by the President of the Queensland Law Society.

4. Factual issues

[50] On the issue of control the defendant tendered a bundle of invoices issued by Clyde & Co to LCM in respect of the action (**'Invoice Bundle'**).[23] The Invoice Bundle contains 987 pages of invoices, some of which are redacted as they contain information subject to legal professional privilege. Accompanying the Invoice Bundle is a 31 page summary of the 987 pages of invoices in the Invoice Bundle ('**Invoice Bundle Summary'**).[24]

4.1 Admissibility of the Invoice Bundle

[51] Senior counsel for LCM objects to the admissibility of the Invoice Bundle.[25] As there was no suggestion of any cross-examination of the witnesses at the hearing, the parties agreed that the usual rule, requiring an immediate determination of the objection[26] did not apply and that the issue of admissibility be decided as a part of this funding application decision. LCM submits that the invoices which are capable of being construed as evidence of post-contractual conduct are not admissible. GPC contends the invoices are admissible because they are relevant to the issue of control, and generally, the declaration sought by paragraph 6 of the Funding Application, that the Representative Agreements and the Member Agreements are not unenforceable by reason of maintenance and champerty, or public policy.

[52] It is accepted that evidence of the surrounding circumstances to the funding agreements is relevant to resolve any ambiguity.[27] However, no ambiguity is alleged here.[28]

[53] In the context of unenforceability, in *Giles v Thompson*[29] the Court of Appeal said:

> "The correct approach is not to ask whether, in accordance with contemporary policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. And this question requires the closest attention to the nature and surrounding circumstances of a particular agreement."

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23 Exhibit 5.
24 MFI-A.
25 Exhibit 5.
26 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 640 [135].
27 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352 per Mason J.
28 There is ongoing debate as to whether ambiguity is required. This issue has recently been considered by Jackson J in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors* [2019] QSC 163.
29 [1993] 3 All ER 321, 333.

[54] The passage from *Giles v Thompson* was cited with approval by the English Court of Appeal in *Factortame.*[30] The Court of Appeal concluded that "in any individual case, it is necessary to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant". This passage is apposite as *Factortame* considered the lawfulness of an agreement supporting litigation.

[55] In *REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd*[31] Macfarlane JA (with whom Beazley P and Gleeson JA, agreed) said:

> "Under the general law 'the court will not enforce [a] contract at the suit of a party who has entered into [it] with the object of committing an illegal act' … Where the contract cannot be [performed] otherwise than illegally, the contract will be treated as unenforceable, irrespective of the parties' knowledge and intention … However that is not what occurred in the present case because the respondent, upon whom the obligation to pay stamp duty lay, could have chosen to pay the requisite duty in accordance with the *Duties Act* 1997 (NSW). Thus the contract could have been performed lawfully."

[56] In determining the lawfulness of the funding agreements I consider that the approach in *Giles* and *Factortame* ought to be followed, namely, the question to be asked is whether the agreement has the tendency to corrupt public justice, and that this question requires the closest attention to the nature and surrounding circumstances of the particular agreement. It is thus necessary to examine the Funding Agreements and any relevant surrounding circumstances at the time of the entry into the agreements.

[57] With the exception of portions of documents 1 and 2 in the Invoice Bundle, being the documents identified as document 1, PLF.018.001.0001 and document 2, PLF.018.001.0039, which make reference to the meetings held on 7 February 2018, the Invoice Bundle deals with post-contractual conduct.

[58] On the issue of post-contractual illegal conduct, in *Fitzgerald v FJ Leonhardt Pty Ltd*[32] Dawson and Toohey JJ said:

> "Thus if the contract were to be affected by illegality it could only be because it was in the fourth category enumerated by Gibbs ACJ in *Yango,* namely, that although lawful according to its own terms, it might be performed in the manner which the Act prohibited. That category, however, does not stand for the proposition that a contract, which is itself legal, will be unenforceable if something illegal is done in the course of its performance."

[59] In my view, it is correct to determine whether the contract is legal by having reference to the terms of the contract and in cases of ambiguity, the nature and surrounding circumstances of the contract at the time of formation, and not by reference to

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[30] *Regina (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381, 401-403.
[31] (2017) 95 NSWLR 458.
[32] (1997) 189 CLR 215, 219-220.

subsequent acts of the parties. I conclude that the invoices are inadmissible. In case I have erred in this conclusion, I have considered the invoices.

4.2 Consideration of Invoice Bundle

[60] The Invoice Bundle Summary shows that Mr Chris Thompson or Mr Michael Garrahy of Law Essentials had communications with the representative plaintiffs on 7, 9 and 27 February 2018, on 16, 17, 23 May 2018, on 4 June 2018, on 25 July 2018, on 6, 13 and 28 September 2018, on 2, 8, 15, 16 and 17 October 2018, on 30 January 2019, on 8, 11, 13, 14, 26 February 2019, 6 and on 26 March 2019. Mr Chris Thompson and Mr Michael Garrahy have had numerous other communications with group members.

[61] Mr Maurice Thompson and other personnel from Clyde & Co have had numerous communications with LCM. In addition Clyde & Co has had communications with the representative plaintiffs on 7 February 2018, on 10, 11, 14 May 2018, on 25 and 26 June 2018, on 23 July 2018, on 12, 15 October 2018, on 7, 8, 11, 12, 13, 14, 19, 26, 27 and 28 February 2019, on 1, 5, 6, 7, 8, 15 and 18 March 2019, on 2 April 2019, and on 8, 14, 15, 28, 29 May 2019.

[62] The Invoice Bundle Summary shows that in the period between 1 February 2018 and 31 May 2019, Law Essentials had 37 communications with the representative plaintiffs and no communication with LCM. The Invoice Bundle Summary shows that Clyde & Co had approximately 93 communications with the plaintiffs but over 200 communications with LCM. The Invoice Bundle shows that there has been considerable contact between Clyde & Co, Law Essentials and the plaintiffs but more communication or contact between Clyde & Co and LCM.

[63] It is submitted on behalf of GPC that the communication in the Invoice Bundle leads to an inferential finding that LCM has practical control over the litigation as there is far more communication between Clyde & Co and LCM than the communication between the plaintiffs and Clyde & Co and Law Essentials. GPC submit that if the litigation funder has no practical control over the conduct of the plaintiffs' proceedings, and its role is confined to consultation, then it is likely that the Funding Agreements will be valid and enforceable.[33] Whether control is relevant at all, and if it is relevant, whether LCM possess the requisite control over the proceeding will be discussed later in these reasons.

[64] The Invoice Bundle does show that there is more contact or communication between Clyde & Co and LCM than there is contact or communication between Clyde & Co and Law Essentials and the plaintiffs. However, I do not conclude that this in itself leads to a conclusion that LCM has control over the proceeding. I consider that the content of the invoices do nothing more than evidence the contractual obligation of Clyde & Co to keep the funder fully informed of the action, and to seek and receive instructions from the funder on minor day to day matters as required in clause 6 and 11 of Retainer Agreements. In my view there is nothing inconsistent in the invoices to suggest that the Funding Agreements referred to above are being conducted other than ordinarily, in accordance with the terms of those agreements.

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[33] Paragraph 6 of GPC's Written Submissions.

[65] As set out above, the agreements repose considerable power to conduct proceedings in the hands of the representative plaintiffs but prevent the plaintiffs' solicitors, Clyde & Co, acting upon those instructions in respect of important matters absent the consent of LCM as funder.

[66] In the present case the most important step which has been taken is the institution of the class action on 21 July 2017. It occurred at a time several months prior to the involvement of LCM and without the assistance of any commercial litigation funder. Of course, the fact that LCM were not involved in the proceeding at its commencement, does not defeat the allegation of practical control, but it does weaken the submission.

[67] The larger amount of communication or contact between Clyde & Co and LCM is consistent with the contractual right of LCM to provide instructions with respect to day to day matters in the conduct of the litigation. The high degree of contact and communication between Clyde & Co, Law Essentials, and the plaintiffs corresponds with the representative plaintiffs' substantive litigation rights, in particular their rights to direct the management and tactics of the proceeding.

[68] It must be borne in mind that the more complex and complicated the litigation is, the more likely it is for lay plaintiffs to rely upon the advice of their solicitors. By any standard, the current proceedings are complex and complicated such that, it would be expected that there would be a higher degree of reliance by the plaintiffs on the advices of their solicitors in providing general instructions as to the important matters of management and strategy.

[69] The defendant submits that adverse inferences, pursuant to the principle in *Blatch v Archer*[34] ought to be drawn against the plaintiffs and LCM because of their failure "to call evidence describing who has day to day practical control of the preparation and prosecution of the proceedings, and who has practical control of key decisions about the proceedings, in circumstances where that is a matter peculiarly within their own knowledge and in issue on the pleadings …"[35]. In my view it is neither necessary nor appropriate to draw any adverse inferences in this regard. The Invoice Bundle evidences communication with the representative plaintiffs prior to steps in the proceeding. An example is the filing of the Amended Statement of Claim on 9 May 2018 which was preceded by communication with the plaintiffs on 7 February 2018.

[70] Whilst the evidence discloses that the meetings between Mr Maurice Thompson and the plaintiffs on 7 February 2018 related to the signing of the agreements, this does not suggest that other matters were not discussed on that date. Mr Maurice Thompson, Mr Christopher Thompson Mr Barry Murphy and Mr Simon Whittingham all swore affidavits in this matter and were available for cross-examination. No requests were made to cross-examine Mr Maurice Thompson, Mr Christopher Thompson, Mr Barry Murphy or Mr Simon Whittingham.

[71] The Amendments made on 9 May 2018 add a claim in nuisance, widen the definition of "Affected Waters" and add some further particulars. The amendments were settled by senior counsel, the first Statement of Claim was not settled by senior counsel. Prior to the filing of the Further Amended Statement of Claim on 27 July 2018, the "clients"

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34 (1774) 98 ER 969.

35 Paragraph 50 of GPC Written Submissions.

received correspondence from Mr Maurice Thompson on 23 July 2018. Prior to the provision of Further and Betters Particulars by the plaintiffs on 26 October 2018, meetings were held by Mr Maurice Thompson and Mr Paul Hopwood with the representative plaintiffs. Those meetings also preceded the filing of the Reply on 5 November 2018. The better inference from the Invoice Bundle is that the proceedings have been conducted in accordance with the agreements as analysed above and I have no evidence upon which to conclude that the Funding Agreements have not been adhered to.[36]

5. Maintenance and Champerty

[72] The plaintiffs and LCM submit that the ancient torts of maintenance and champerty no longer exist in the common law of Australia, and if they do, the torts ought to be offered "a decent common law burial".[37] Although the torts of maintenance and champerty have their roots in Grecian and Roman law, it is not necessary, desirable or possible to trace the formation of the law of maintenance and champerty over the last 2,000 years. It is necessary however, to examine the developments of the torts and the public policy behind the torts with reference to more 'modern' English authorities.

[73] A useful starting point, is one of the comparatively more 'modern' decisions on champerty being the 1883 decision of Lord Coleridge CJ in *Bradlaugh v Newdegate*.[38] The plaintiff, Mr Bradlaugh, was a newly elected member of the House of Commons who voted in and sat in the House of Commons during a debate after the speaker had been chosen, without having subscribed to the oath. The penalty for such infraction, under s 5 of 29 and 30 Vict. C. 19 was £500. Mr Newdegate was an opposition member of Parliament who 'indemnified a man of straw', a Mr Clarke, to sue Mr Bradlaugh in respect of his infringement in failing to take the oath with the intention of having Mr Bradlaugh financially ruined by the imposition of the penalty. Lord Coleridge CJ records in respect of the principal action:[39]

> "The House of Lords dismissed Mr. Clarke's action with costs, on the ground that he, according to the words of the Lord Chancellor, 'has not any right to or interest in' the penalty he sued for."

[74] As Mr Clarke was a man with no assets and as Mr Clarke had been induced to sue and indemnified by Mr Newdegate, Mr Bradlaugh sued Mr Newdegate for the tort of maintenance. The facts were agreed, as was the measure of damages, namely, the amount expended by Mr Bradlaugh in defence of the claim. Accordingly the jury were discharged.[40] The important question of law to be determined by Lord Coleridge CJ was whether an action for maintenance still existed.[41] Lord Coleridge CJ:

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36 See discussion of *Davey v Money* [2019] EWHC 997 (Ch) at [117].

37 T2-17/27 – PETER DUNNING QC: "My side ask you to do nothing more today than Boddice J was unexceptionally asked to do in *Taylor v Hobson*, to deal with the case in the same way. We make the point that it should now be said in terms that the torts are dead. But, in terms of substantive difference, somebody yesterday suggested we were asking to put a sword to it. We're just asking for the same result in *Taylor v Hobson* but pointing out the torts are now dead and simply offering them a decent common law burial."

38 (1883) 11 QBD 1.

39 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 4.

40 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 2.

41 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 4.

> "My judgment is, as I was informed, to be appealed from, and I was therefore inclined to send the respondent, whoever he might be, to the Court of Appeal un-weighted by any reasons of mine. But, as the subject of the action is not common, and the authorities which deal with it are not familiar to everyone, I have thought it best upon the whole to state not only my judgment but the grounds of it."[42]

[75] Lord Coleridge CJ said:[43]

> "Mr. Bradlaugh's admission to the House of Commons, however, is a question in which a large number of persons have persuaded themselves that religion is involved; no one the least acquainted with human affairs but must have seen again and again the strange obliquities of which men, absolutely honourable in all other matters, will be guilty in what they think defence of what they think religion; and suppose Mr. Clarke, the man of straw, is content to become bankrupt and be ruined himself, while he half ruins Mr. Bradlaugh, what redress has Mr. Bradlaugh? He cannot himself sue on a bond to which he is no party, he cannot sue in Mr. Clarke's name nor compel Mr. Clarke to sue, for his benefit, in his own. It is probable, indeed, that by the agency of the Court of Bankruptcy this bond of Mr. Newdegate could be realized as an asset; and there are, I know, authorities which shew that, under certain circumstances, this could be done. But it would be a remedy troublesome and expensive and after all not absolutely certain. How the facts may turn out in the result it is, I think, immaterial to inquire. The first question is, will the action lie?"

[76] Lord Coleridge CJ then referred to the many definitions of maintenance including Blackstone's definition as "an officious intermeddling in a suit in which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it" and Coke's definition of maintenance that it "signifieth in law a taking in hand, bearing up, or upholding of a quarrel, or side, to the disturbance or hindrance of common right".[44] Lord Coleridge CJ noted:

> "There is, perhaps, the fullest and completest of all to be found in *Termes de la Ley*, 'Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance'."[45]

[77] Lord Coleridge CJ then referred to the American jurist, Joseph Story's definition of maintenance:

> "To the same effect is another American authority, Mr. Story. 'Maintenance is the officious assistance by money or otherwise, proffered by a third person to either party to a suit, in which he himself

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42 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 2.
43 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 5.
44 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 5.
45 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 5.

> has no legal interest, to enable them to prosecute or defend it': Story on Contract, ch. vii. s. 578. Jacob's Law Dictionary is to the same effect as the other authorities I have quoted."

[78] Lord Coleridge CJ continued:[46]

> "I have been thus full in my citation of authorities, because I conceive it to be important to keep in view the original idea conveyed by the word in order to see whether modern authority has qualified or altered it, and to interpret the phraseology of modern decisions by principles which the judges who pronounced those decisions would undoubtedly have recognised. And it seems to me that, unless maintenance is to be struck out of digests and law dictionaries for the future, it is impossible to avoid the conclusion that Mr. Newdegate has been guilty of it. If this is to be done, it must be done by some higher authority. I have not the power, and, if I had, I have not the wish, to abolish an action which may be in some cases the only way of redressing very cruel wrongs."

[79] Lord Coleridge CJ continued further:[47]

> "What is the state of the authorities on this subject? It is not useful to go very far back, because no doubt things were held to be maintenance some centuries ago which would not be held to be maintenance now. It may be that the danger of the oppression of poor men by rich men, through the means of legal proceedings, was great and pressing; so that the judges of those days, wisely according to the facts of those days, took strict views on the subject of maintenance. I do not pretend to the historical knowledge which would enable me to say with certainty whether or not this was so: at least it is very possible."

[80] Lord Coleridge CJ reflected upon the Privy Council's decision in *Fischer v Kamala Naicker*[48] where Sir John Coleridge delivered the opinion of the judicial committee and added to the general statement of maintenance that a requirement that "the acts of the maintainer must be immoral, and that the maintainer must have been actuated by a bad motive". Lord Coleridge also considered the proposition arising from *Findon v Parker*[49] and *Hutley v Hutley*[50] "that if he has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, cease to be so."

[81] Lord Coleridge CJ reflected upon this and said:[51]

> "The words are remarkable 'it (i.e., maintenance), must be something against good policy and justice, something tending to promote

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46 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 6.
47 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 7.
48 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 9 citing *Fischer v Kamala Naicker* (1860) 8 Moo. Ind. App. 170, 187.
49 (1843) 11 M. & W. 675.
50 (1873) LR 8 QB 112.
51 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 10.

> unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary'."

[82] Lord Coleridge CJ explained that condition as follows:

> "At least in any view it must mean as much as this, that to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive. In this sense I do not hesitate to call Mr. Newdegate's conduct immoral and his motive bad. The language used is *obiter* only, for the judgment is in an Indian case, holding that the Sudder Adawlut could not decide a case upon the ground of champerty which the pleadings did not raise, but that, if they could, the champerty or maintenance which would invalidate a contract in India must have the qualities attributed to champerty and maintenance by the English law, that is to say — and then follows the passage which I have quoted. *Obiter dictum*, however, or not, I entirely accept it, and intend to decide this case in accordance with its language."

[83] Lord Coleridge CJ continued:[52]

> "As a general rule there is no doubt that such common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. Brooke, Fitzherbert, Rolle, Hawkins Viner, Comyns, to cite no more, all concur in this. Buller, J., in his celebrated judgment in *Master v. Miller* strongly insists upon it. But then the instances they give shew the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, e.g., as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them."

[84] Lord Coleridge CJ reflected:[53]

> "It is true that this action is of the rarest; very few examples of it in any modern books are to be found. As a rule the doctrines and principles applicable to maintenance are discussed and laid down in judgments upon pleas, defences to actions of the more ordinary kinds, in which the defendant has sought to set aside a contract, or to be relieved from an

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[52] *Bradlaugh v Newdegate* (1883) 11 QBD 1, 11.

[53] *Bradlaugh v Newdegate* (1883) 11 QBD 1, 14 citing *Stanley v Jones* (1831) 131 ER 143 and *Sprye v Porter* (1856) 26 L.J. QB.

> obligation, on the ground that the contract was void or illegal, or the obligation not binding, because founded upon what was, or what savoured of, maintenance. But I think it has been shewn, not only from old abridgments and digests and text-writers, but by a chain of authorities from Lord Loughborough and Lord Eldon down to the present time, that the doctrine of maintenance is a living doctrine, and the action of maintenance is one which, in a fit case, the Courts of this day will support."

[85] Lord Coleridge CJ points out on page 8, arguments that maintenance were obsolete or exploded (redundant) were not previously accepted by the Court of Common Pleas nor the Queen's Bench in cases as early as 1831.[54] *Bradlaugh v Newdegate* and the cases cited therein, evidence the fact that 188 years ago it was argued that the torts of maintenance and champerty were obsolete and were no longer representative of English law.

[86] The justifications for the tort are now subject to jurisprudence which has developed over the last century relating to the laws of abuse of process. As Lord Coleridge CJ reflected at page 5 the purposes of the tort of maintenance and champerty is to recover litigation costs from the party providing the maintenance hiding behind a 'man of straw'. Even in 1883, as Lord Coleridge CJ noted, there was an alternative method of recovery available through the Courts of Bankruptcy. 136 years later, this remains the case. Nowadays, under the modern law of bankruptcy, it is likely that a declaration of bankruptcy and enforcement of an indemnity against a maintaining party is less troublesome and expensive than a suit for the torts of maintenance or champerty.

[87] Moreover, since the High Court's decision in *Knight v FP Special Assets*[55] it is plain that there is a much more certain, inexpensive and efficient means of curing the evil referred to. Nowadays, a party injured by maintenance may directly seek costs from the maintaining party under a third party costs order. In England third party costs orders have been made against a litigation funder[56] and may be ordered against a 'champertous' funder on an indemnity basis.[57]

[88] To embark upon a separate action for the tort of maintenance or champerty would be as Lord Coleridge CJ said to embark upon "a remedy troublesome and expensive."[58] Lord Coleridge CJ thought that the law of maintenance had changed through the centuries such that it could not be considered that the class of exceptions is closed.[59] In 1883, it was settled law that a brother, a son-in-law and a brother-in-law could maintain each other in an action. If the law was static it would be unlawful for a sister, daughter-in-law or sister-in-law to provide maintenance to their sibling or sibling-in-law. It is difficult to accept that the prerequisite qualification for acceptance into a lawfully acceptable category of a maintainer must depend upon 'consanguinity', 'affinity', 'charity' or 'compassion' as the test measured by statements of English courts over 100 years ago. *Bradlaugh v Newdegate*, although, often later referred to, is a decision of first instance, and must be read, subject to later authority of the House of Lords.

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54 *Sprye v Porter* (1856) 7E & B 58; 26 LJ. QB 64 and *Stanley v Jones* (1831) 131 ER 143.
55 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.
56 *Arkon v Borchard Lines Ltd* [2005] EWCA Civ 655.
57 *Davey v Money* [2019] EWHC 997 (Ch).
58 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 5.
59 *Bradlaugh v Newdegate* (1883) 11 QBD 1, 14.

[89] In the House of Lords decision of *Neville v London 'Express' Newspaper Limited*[60] Lord Finlay LC said:

> "The action for maintenance is, in my opinion, one which can be sustained only if special damage has been occasioned to the plaintiff by the maintenance. The maintenance may be punishable as an offence, but to give a right of action the commission of the offence must have caused damage to the plaintiff … But the action for maintenance at common law is not, in my opinion, an action for the invasion of a right; it is an action in respect of an offence which causes damage to the plaintiff … The criminal law prohibits and may punish the act, but in the absence of damage the remedy is not by civil action."[61] (my underlining)

[90] In this case, the plaintiff Mr Neville was a developer of a new housing estate at Essex. In promoting the land development Mr Neville advertised a competition and offered a prize of £100 for submissions for the most suitable name for the new south coast resort, eventually entitled "New Anzac-on-Sea". Mr Neville also offered 50 consolations prizes stated to be "splendid freehold building plots worth £50" each, subject to the proviso that the winners each pay 3 guineas for the conveyance of each plot. The defendant newspaper not only published a series of articles alleging the competition was not *bona fide* and that the consolation prizes were really sales of land at a profit, but went further and offered to fund and take legal proceedings at the newspaper's expense, on behalf of all prize winners against Mr Neville.

[91] 125 persons who were prize winners joined in actions. It was decided that the plaintiffs to those actions were induced to enter into the contracts by the fraudulent misrepresentation of Neville who was ordered to return the monies paid to the defrauded purchasers. Neville brought actions against the defendant newspaper for maintenance and also in libel. In respect of the action for maintenance Lord Finlay LC said:[62]

> "in the common law action for damages he is liable only if damage be proved. In the present case there is no damage. The plaintiff, it is true, has had to repay money which he had obtained by fraud and to pay costs in respect of his having resisted payment. It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them. If it were otherwise the consequences would be extraordinary.
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> …
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> As there was no damage in the present case, I am of opinion that the action for maintenance must fail and that judgment must therefore be entered for the defendants on this head of claim."

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60 [1919] AC 368.
61 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 379-380.
62 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 380.

[92] Lord Shaw of Dunfermline and Lord Phillimore agreed with Lord Finlay LC. Viscount Haldane questioned, whether the tort of maintenance, survived at all. Viscount Haldane pointed out with reference to the statute 1 Edw. III, Stat. 2, c. 14:[63]

> "Various statutes have made maintenance a criminal offence and have prescribed penalties for that offence. But it is clear from the authorities that, throughout, the breach of this law has been treated as a civil wrong for which damages were recoverable. The only question is, as I have pointed out, whether actual pecuniary damage arising from the suit having been maintained unjustifiably need be proved."

[93] Viscount Haldane continued:[64]

> "My Lords, I think that the right to protection against maintenance is an absolute one. The statutes say nothing about justification of the suit maintained. The maintenance of any suit is forbidden, and the only excuse which the authorities have recognized is that of a common interest of that defined nature which prevents the act done from coming within the category of maintenance by a stranger. In the present case, if I am right, the excuse does not prevent what was done from being maintenance by a stranger, and it follows from the other conclusions at which I have arrived that Mr. Neville had a right of action against the newspaper company.
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> But it does not follow that he was entitled to the damages in the shape of costs which the Lord Chief Justice assessed. These were costs in which he was justly condemned for resisting a proper legal claim. The real cause of the expenditure to which he was put was his own improper resistance, and not the mere fact of the actions brought in order to overcome it. He ought to have paid back all the money without compelling resort to proceedings in court. Under these circumstances I think he was entitled to no more than nominal damages for the violation of his right, and that the jury ought to have been directed to this effect. I think that justice will be done if judgment on the claim for maintenance is entered for him for merely nominal damages, unless the jury on a new trial think that exemplary damages should be given. No direction suggesting such damages should be given."

[94] Lord Atkinson said:[65]

> "In dealing with the assignment of a bare right to litigate [Lord Abinger in *Prosser v Edmonds*] says: 'What is this but the purchase of a mere right to recover ? It is a rule not – not of our law alone, but of that of all countries – that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowehere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which

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63 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 390.
64 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 392-393.
65 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 397-399.

others are not disposed to enforce.' That statement of the law has been many times approved of in modern cases, such as *Alabaster v. Harness*, *British Cash and Parcel Conveyors v. Lamson Store Service Co*. If Sir Ernest Pollock be right, Lord Abinger should have qualified his statement of the law by confining it to unsuccessful litigation. As far as I have been able to discover, no learned judge who ever quoted this passage with approval, and they are numerous and distinguished, ever suggested it should be so narrowed. Ancient statutes, eight in number, ranging from the 3 Edw. I. to the 32 Hen. VIII. c. 9, have been cited in argument. The last is possibly the widest in reach and the most instructive. Lord Abinger, in giving judgment in *Prosser v. Edmonds*, said of it that it was a short and useful statute, consistent with the general policy and principles of courts of law and equity. In the case of *Pechell v. Watson*, which has been many times approved of, it was, according to the headnote of the case, decided that maintenance is at common law a wrongful act, that the several statutes relating to it are merely declaratory of the common law, and that because of this a declaration in a case for maintenance need not charge that the maintenance was committed *contra formam statuti*. The object to effect which this statute of Hen. VIII. was passed appears from the preamble in s. 1. It is there stated to be that 'there is nothing within this realm which conserveth his loving subjects in more quietness, rest, peace and good concord, than the due and just ministration of the laws, and the true and indifferent trials of such titles and issues as have been tried according to the laws of the realm.' It is then stated that these things are greatly hindered by maintenance, embracery, champerty, subornation of witnesses, sinistre labour, buying titles, and pretended rights of persons not in possession, whereupon great perjury hath ensued, and much unquietness, oppression, vexacious troubles, wrongs, and disinheritances have followed amongst the King's subjects …. to the great hindrance of justice within his realm. Then it is enacted that 'for the avoiding of all which misdemeanours … all statutes heretofore made concerning maintenance, champerty and embracery, or any of them now standing and being in full strength and force, shall be put in due execution, according to the tenures and effects of the same statutes.'

Sect. 2 deals with the buying or selling of, or bargaining for, any right in land if the seller be not in possession, and by s. 3 it is enacted that no person shall thereafter unlawfully maintain or cause or procure any unlawful maintenance in any action demand or complaint in the King's Courts of Chancery, the Star Chamber, Whitehall, or elsewhere …. upon pain of forfeiture for every such offence of a certain sum named. Some argument has been directed to the use in this statute of the word 'unlawfully.' I think from what is laid down in the cases I am about to refer to, the word is used to denote maintenance by persons who are not influenced by those motives of charity, nor are possessed of those interests in the subject-matter of the litigation, which justify their interference. The important consideration in relation to the point I am now dealing with is the entire absence from the statute of any distinction between successful and unsuccessful litigation, the reason apparently

> being that both kinds tend equally to disturb the 'quietness, rest, peace, and good concord' of the King's subjects.

[95] Lord Atkinson explained the effect of the latter statute as follows:[66]

> "The statute 32 Hen. VIII. c. 9 does not expressly or impliedly take away the right to sue for the tort of maintenance in a common law action on the case, though it turns the tort into a crime and imposes a penalty on the commission of the crime. The case then would seem to fall within the first or, if not, the second of the three classes mentioned by Willes J. in his judgment (*Wolverhampton New* Waterworks *Co. v. Hawkesford*), namely, the class (1.) where there was liability existing at common law, and that liability is affirmed by a statute, which gives a special and peculiar form of remedy different from the remedy which existed at common law. There, unless the statute contains words which expressly exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy."

[96] Lord Atkinson concluded that an action for the tort of maintenance could be brought even when the primary litigation (that which is maintained) is successful.[67] However, he noted that in those circumstances the measure of damages which may be awarded against the maintainer for his support of the successful litigation was limited to nominal damages.

[97] The eight English statutes passed between 1275 and 1540 were analysed in the judgment of Lord Shaw of Dunfermline. Lord Phillimore and Lord Finlay LC expressly agreed with Lord Shaw. As Lord Shaw pointed out, the facts showed that 125 persons fell into Mr Neville's trap after reading his advertisement and all succeeded in their suit against Mr Neville.[68] The litigants also succeed in having declarations made in their favour, that the plaintiffs were induced to enter into the contracts by Mr Neville's fraudulent misrepresentations. Those persons achieved their justice with the assistance and financial aid of the London Express Newspaper Limited.

[98] It is necessary to set out, in some length, the compelling reasons of Lord Shaw, in order to properly understand the history and development of maintenance and champerty in English law as it stood in 1919. In this respect Lord Shaw said at page 407 - 420:

> "The actions were maintained for the plaintiffs by the respondents against Mr. Neville. The result was that justice was done, injustice was defeated, and by the aid of the maintenance given the law was put in force to achieve right, and right was achieved. In my opinion it is no part of the common law of England to make it possible to construct out of this maintenance either a wrong in itself or a wrong sounding in damages.
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> The learned judges in the courts below have, however, deferred to the view that this is possible. This has made an independent examination of the statutes and authorities necessary.

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66 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 405.
67 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 406.
68 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 407.

By 3 Edw. I. c. 25, passed in the year 1275, it was provided that '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.'

This enactment is plainly directed against a pactum de quota litis, against champerty and nothing else, and that on the part or behalf of the King's officers.

The first real reference to maintenance as such does, however, occur in the statutes of this Parliament. It is in chapter 28, and is as follows: 'And that no clerk of any justicer, or sheriff, take part in any quarrels of matters depending in the King's court, nor shall work any fraud, whereby common right may be delayed or disturbed; and if any so do, he shall be punished by the pain aforesaid, or more grievously, if the trespass do so require.'

It is true that the maintenance here condemned is maintenance by the King's officers: but it is, in my opinion, not without importance to observe that even with regard to them, and so early as the thirteenth century, the ratio of such legislation and the essential quality of the practice condemned — that quality without which no offence can be constituted — are expressed in this: 'whereby common right may be delayed or disturbed.' I think, my Lords, that this quality is vital. It was vital then, and in my opinion it is after six centuries vital still.

By 28 Edw. I. c. 11, passed in the year 1300, it is provided: 'And further, because the King hath heretofore ordained by statute, that none of his ministers shall take no plea for maintenance, by which statute other officers were not bounden before this time; the King will, that no officer nor any other, for to have part of the thing in plea, shall not take upon him the business that is in suit.' This was again a statute directed against the *pactum de quota litis* — against champerty, and does not affect the doctrine of maintenance as such.

By the 33 of Edw. I., passed in the year 1305, an Ordinance was made against conspirators: 'Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that everyone of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas.' Up to this point the essential quality of the contravention is falsehood and malice, that is to say, the malice of the maintainer and the falsehood of the plea. But the 'conspirators' also include others, namely, 'such as retain men in the country with liveries or fees for to maintain their malicious enterprises, and to drown the truth; and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.'

I think, my Lords, that the error which appears occasionally in the treatment of this subject finds its origin here. The later part of this Ordinance taken by itself would appear to strike — in the case of maintenance by the servants or retainers of great lords — at maintenance by them as such. It appears to me on the contrary that the Ordinance must be read as a whole; and if it be so read it is in line with what has preceded it on the Statute Book; the essential quality of the illegality is set forth, and that quality must be present — namely, that those charged were maintaining 'their malicious enterprises' and to drown the truth. Whether this last phrase has escaped certain later authorities or not I do not know, and it is notable that the words themselves only appear in a footnote in the Revised Statutes. But there was no reason for this omission from the main text. For the original of the statute contains quite plainly the vital words '*et pur verite esteindre*.' The attempt accordingly to divorce the act of maintenance from its quality of 'drowning the truth,' or in the language of the earlier Acts something 'whereby common right may be delayed or disturbed,' is to turn an act which may be promotive of justice, and a righteous act, into something wrongful and penal, that is to say is to upset the foundations on which the Ordinance is based.

This view is strongly confirmed by the language of the statute 1 Edw. III. c. 14, passed a quarter of a century afterwards — namely, in 1326–7. 'Because the King,' says the Act, 'desireth that common right be administered to all persons, as well poor as rich; he commandeth and defendeth, that none of his counsellors, nor of his house, nor none other of his ministers, nor no great man of the realm, by himself nor by other, by sending of letters, nor otherwise, nor none other in this land, great nor small, shall take upon them to maintain quarrels nor parties in the country, to the let and disturbance of the common law.' What in short is to be accomplished is the impartial administration to poor and rich alike, and what alone prohibited is maintenance of "quarrels and parties" "to the let and disturbance of the common law."

Then comes fifty years afterwards — namely, in 1377, chapter 4 of 1 Rich. II. It deals with penalties, and it is prefaced undoubtedly with prohibitive language thus: 'It is ordained and established, and the King our lord straitly commandeth, that none of his counsellors, officers, or servants, nor any other person within our realm of England, of whatsoever estate or condition they be, shall from henceforth take nor sustain any quarrel by maintenance in the country, nor elsewhere, upon a grievous pain': the pain upon the King's officers to be ordained by him, other officers to lose their services, other persons to be imprisoned and so on. I have very considerable doubt whether the intendment of this statute was the maintenance of suits of law. Primarily it was directed to promoting the civil peace in the country districts or elsewhere, and preventing the spreading of embroilments destructive of public order. This doubt is not resolved by the inclusion of this Act among the statutes which are confirmed by the 15th of 7 Rich. II. (1383), which bears to be 'for the grievous complaint that is made of maintainers of quarrels, and

champertors.' This doubt is confirmed, and in my opinion a point of much obscurity and difficulty is set at rest by the statute of Hen. VIII. to which I am about to refer.

The statute was passed in the year 1540, and is the 32 of Hen. VIII. chapter 9. It deals specifically with legal administration and with the various forms in which that may be impeded or distorted to evil ends. In the preamble, or rather in s. 1, this is made clear. The King calls to his remembrance that 'there is nothing within this realme that conserveth his loving subjects in more quietness rest peace and good concorde than the due and juste ministration of his lawes, and the true and indifferent triall of suche titles and issues as ben to be tried according to the lawes of this realme, which his most roiall Majestie perceyveth to be gretely hindered and lettid by mayntenance embracerie champertie subornation of witnesses sinistre labour buying of titles and pretensed rights of personnes not being in possession, wheruppon greate perjury hathe ensued, and muche unquietnes oppression vexacion troubles wrongis and dishenheritaunce hath followed amongest his most loving subjects, to the greate displeasure of Almighty God the discontentacion of his Majestie and to the greate hinderaunce and lett of justice within this his realme.'

The third section of the Act provides that no person 'doo herafter unlaufully maineteyn or cause or procure any unlaufull mayntenance in any action demaunde sute or complainte in anny of the Kings Courts' …. and also that no person 'doo herafter unlaufully reteigne, for maintenance of any sute or plea, any persone …. or embrace any freholders or jurours, or suborne any witnes …. for to maineteigne any matier or cause, or to the distourbance or hinderaunce of justice, or to the procurement or occasion of any maner of perjury by false verdict, or otherwise in any maner of Court aforesaid.'

My Lords, I have seen occasion to point out that these statutes from the thirteenth century onwards do not condemn maintenance of suits as such, but they do condemn and alone condemn such maintenance of suits as is to the delaying or disturbing, the hindrance or denial of justice, and that accordingly to bring within their range a maintenance which is and may be clearly and demonstrably shown to be promotive of justice and in support of right is an erroneous construction.

This last cited Act supplements and confirms and in my view gives plain Parliamentary sanction to what appears to me to be the more reasonable and sensible and sound view.

What is aimed at is the just and due administration of the laws. The maintenance which has displeased God and made the King and his subjects discontented is the maintenance which is to the great hindrance and let of justice. And it is this sort of thing, and no other maintenance, which is struck at by s. 3; unlawful maintenance, procuring any unlawful maintenance, unlawful retaining for maintenance or getting a false verdict through perjury or similar nefarious means.

I ask myself what is the use of all this language about 'unlawful' maintenance if by the common law of England all maintenance was in itself unlawful. The laws are directed against robbery, arson, theft, or murder: how curious would be the language if it were directed against unlawful robbery, unlawful arson, unlawful theft, unlawful murder. If maintenance were unlawful in itself, the law would, one would have thought, have prohibited it simpliciter; and the simple truth as I view it, and as I think the Legislature viewed it, is that that maintenance alone is unlawful which is to the delaying, the interference with, the distortion or the prevention of justice in the courts of the realm.

The attempted answer to this appears to be that when these statutes were enacted or put into force the common law of England had already made exceptions, and that it was only the cases that did not fall within the exceptions that were unlawful. This brings me to examine the institutional writers referred to. Commenting on the 25th of the first Parliament of Westminster — against champerty — Coke in the Second Part of his Institutes, p. 208, observes that Bracton, who wrote before its date, rehearsing the articles enquirable by the justices in Eyre, speaks of the sustaining by a champerter '*per quod* justitia *et veritas occultetur*.' He adds: 'and Fleta agreeth with him, where it is said, *per quod justitia et veritas occultetur*; it appeareth that the end of champerty and maintenance is to suppresse justice and truth, or at least to work delay, and therefore it is *malum in se*, and against the common law.' In a further paragraph he says: 'An action of maintenance did lie at the common law, and if maintenance in genere was against the common law, a fortiori champerty, for that of all maintenances is the worst.'

Commenting further upon the 28th of this Parliament, against maintenance, it is in my view nowhere to be found that Coke places maintenance on a different foundation or describes it as having any wider scope under the common law than it had simply under this statute where it was described as something 'whereby common right may be delayed or disturbed.' Coke puts the matter thus: 'Maintenance is an unlawfull upholding of the demandant or plaintife, tenant or defendant in a cause

….

This maintenance (as hath been said) is *malum in se*, and against the common law, and that is notably proved by this Act, for hereby maintenance is branded with this quality that thereby common right is delaied, or disturbed, and consequently against the common law.'

…

So far, in short, as Coke is concerned he appears to give no countenance to the proposition that a maintenance which, say, assists or promotes or procures justice would fall within that 'unlawful' maintenance which is struck at. Nor does it support the condemnation of all and every maintenance as 'unlawful.' On the contrary Coke appears to treat that

maintenance and that alone as unlawful which is branded with the quality of delaying or disturbing common right. And it must in conclusion be added that Coke does not deal with the general question of maintenance at all. His observations are and are alone upon statutes affecting officers of the King or of the Courts, and even with regard to them they are of the guarded character described. So far Coke.

Blackstone says of the offence of maintenance that it is 'an officious intermeddling in a suit that no way belongs to one.' …. 'This,' he says, 'is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression …… A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity.'

Here is, in this last sentence, what in other treatises and text-books is called the list of exceptions, but which upon examination are not exceptions to officious interference, but are defences to it. As Hawkins (I. 456) treats it, it is 'in what respects some acts of this kind may be justified.' A man may be as officious as he likes in assisting his sons or other kinsmen, or in helping the poor in their litigations. These litigations may even tend to turning the law into an oppression; but yet he will have a defence for his action if his conduct sprang from kinship, service, charity or compassion. But this defence throws no light upon the question whether an interference which is not officious, and does not pervert the law into an engine of oppression, but on the contrary helps the law to be an instrument of justice — whether such an interference could ever be construed as an offence or fall within the denomination of 'unlawful.'

The search in Hawkins' Pleas of the Crown would yield a rich reward to those who inquired as to the extraordinary lengths to which in certain ages, and by certain authors, the doctrine of maintenance was carried. As, for instance, this: Maintainers, it is said, include all such as assisted 'by opening the evidence to the jury; or by giving evidence officiously without being called upon to do it; or by speaking in the cause as one of the counsel with the party; or by retaining an attorney for him; or perhaps by barely going along with him to inquire for a person learned in the law.' It was as if law courts were a plague-ridden or infected area, to help another into which was an injury and a crime. Needless to say, these things, once claimed as being part of the common law of England, have long since disappeared. They are repugnant to sensible and modern ideas. What remains of the doctrine deserves, in these circumstances, a scrupulous examination; and I am of opinion that the test of maintenance is the test of the quality of the act itself as it bears upon the attainment of justice in the particular case, and that the test either of tort or of offence is primarily whether it contains that quality which is essential both by the statute and the common law of England.

Everything, in short, which Hawkins opines must, in my view, be governed by his major definition. 'Maintenance,' he says, 'is commonly

taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hinderance of common right.' And I cannot but think that Hawkins' statement 1, 27, 43, 'that it is not material, whether the plaintiff …. were non-suited, or recovered in the action,' must be subject to the same qualification — namely, that it was to the disturbance and hindrance of common right. But upon that topic I content myself with referring to and adopting the judgment of my noble and learned friend, Lord Phillimore.

Finally, Hawkins considers the general point, 'how far offences of this kind are restrained by the common law.' And of this he says: 'It seemeth, that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said, that all offenders of this kind are not only liable to (a) an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be (b) indicted as offenders against public justice.'

This is a civil suit. I am of opinion, my Lords, that in any civil action in respect of maintenance it is necessary to establish these two things — namely, (1.) that the maintenance was unlawful in the sense above described both in statutes and in text-books; that is to say, that it was to the hindrance or disturbance of common right, to the delay or distortion or withholding of justice; and (2.) that the plaintiff in an action of maintenance shall have suffered actual injury by reason thereof, for which injury alone and to the extent of it is the maintenance answerable.

…

If, my Lords, by the Common Law of England maintenance of suits was by itself either an offence against the law or was by itself a tort, then it appears to me to be inconceivable that a style of indictment in this form could have been formed. Presumably it was composed as expressing a statement of the elements relevant and necessary to the action of maintenance. If maintenance was per se unlawful what more was necessary than to libel the fact, and to state that thereby the law per the statute had been broken. This is not the style, and one asks and sees plainly from it wherein the gravamen of the offence or tort consists. What was it that had been done unlawfully, what was it that was in contempt of the Queen? It was that an action of debt had been maintained with these two essential qualities: (1.) 'to the manifest retardation and disturbance of justice; and (2.) to the serious loss of the foresaid' plaintiff. This last expression ("grave damnum") in my humble opinion excludes the idea of merely nominal damages; the damages must be real and actual.

As has been seen, this is the kernel of the whole matter, and these two essentials the common law of England has, in my opinion, never abandoned.

It, therefore, follows that where the action maintained has succeeded, no suit for damages can lie by the party against whom the action was maintained. Justice was not denied: it was done: the cause maintained was won at law: how can a man in a court of law be heard to say that thereby he was wronged? If under the common law of England such a right existed, then in my opinion the books would have shown many such. Rich crops of litigation might have remained to litigants, including fraudulent and dishonest litigants, who had most justly lost their causes, for damages against those who had helped to that end by maintaining, from wholly disinterested motives and with entire success, the cause of just dealing between man and man. And no doubt Parliament would long ago have taken some action in the matter. There is no such rich crop, nor any.

Much reliance was not unnaturally placed upon what, in my opinion, is the only decided case in which the fact of the success of the process maintained was brought forward. It is *Wallis v. Duke of Portland*. The Duke was said to have agreed with the solicitor for Mr. Tierney to support him with funds for contesting a Mr. Jackson's election for Colchester and declaring that the seat was won by Mr. Tierney. The petition succeeded. Tierney was declared elected: but upon the solicitor presenting his bill to the Duke, the latter refused payment. The solicitor sued, and the point before the Court of Chancery was as to a discovery of documents. In the course of the argument by the Attorney-General, Mansfield, four points at least were taken by way of demurrer which may be shortly put as (1.) nothing calling for answer; (2.) a step in a maintenance suit, therefore to be refused; (3.) against a Standing Order of House of Commons; and (4.) no writing by the Duke. In the Court of Chancery, Lord Loughborough (Lord Chancellor) upheld the second point — namely, maintenance — and opined that maintenance was *malum in se*. The case went to the House of Lords, and the appeal failed: but there is no record of any pronouncement by their Lordships as to the grounds of judgment. I am humbly of opinion, that this authority — a point of discovery in an action by a solicitor against an alleged client who was a party to an election petition — does not cover an ordinary action for maintenance by an unsuccessful suitor against the maintainer of a successful suitor.

It is notable that the cases cited by Bullen and Leake on this topic are *Flight v. Leman and Pechell v. Watson*. But in each of these cases the fact was that the plaintiff (maintained) had been nonsuited. The former case was raised in order to recoup the plaintiff for the costs to which he had been put by resisting the suit — which costs he could not recover from his former antagonist. The allegation was that the defendant had ‘unlawfully, maliciously and without probable cause’ stirred up and maintained. In short, it was for recovery of costs against the *veritable dominus litis*.

So was *Flight v. Leman*. But there, although the action maintained had also failed, a suit against the maintainer failed on the further and express ground that it did not contain an allegation of want of reasonable or probable cause on the part of the maintainer. Such a case it was held — by Patteson and Coleridge JJ. — was 'in strict analogy with actions for malicious prosecution or arrest.'

In short, these cases, if they bear on the question of any liability on the part of the maintainer of a good and a successful suit, bear in a negative direction. They form no support whatever for such liability.

Nor, my Lords, does *Bradlaugh v. Newdegate*. The attempt to make Mr. Bradlaugh liable in penalties for having voted in the House of Commons without having taken the Oath failed, and accordingly the judgment of Lord Coleridge C.J. was pronounced against the maintainer of a suit which had been held by your Lordships' House to be without legal warrant. In these circumstances, the judgment is substantially occupied with two considerations — namely, whether maintenance in any circumstances (for the competency of any suit for maintenance was broadly challenged) can ground an action of damages; and secondly, were the facts of the case such as to enable him to answer the point of casuistry as he did — namely, that 'to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive'? He reached the conclusion that 'in this sense' Mr. Newdegate's conduct was immoral and his motive bad.

It is no part of my judgment in the present case that in no circumstances can an action of damages in respect of maintenance lie. Nor does the second point arise here, for the cause maintained was not illegal but was won: and it would have been interesting to see whether the learned judge would, upon the same reasoning, have felt forced to the conclusion that had the litigation reached a different end and the cause succeeded, the motive of the maintainer would have been held to be good. One may conjecture what would have been his view upon that and upon the actual question for decision in the present case by the warm approval with which he cites the words of Lord Abinger in *Findon v. Parker*, and the adoption thereof by Blackburn J. in *Hutley v. Hutley*. These words are well known: 'The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make.' In my opinion that is still the law of England. This is unquestionably not one of those cases. Not only had the plaintiffs a right to bring their actions, but they succeeded therein, and no Court can question this outstanding and vital fact.

The same view was, I think, entertained by Wills J. in *Harris v. Brisco*, in which he held that the maintainer should 'have some sort of reasonable ground for his interference' where he has no legal interest, or 'some reasonable ground for his belief that he is furthering the cause of justice.' The Court of Appeal in no way questioned this, but the reversal

> in the course of which the valuable citation of authorities was made by Fry L.J. was put on the ground that the case was one of charity, and that howsoever unreasonable it might have been the maintenance being done out of charity could not be made a ground of action.
>
> I have nothing to add to the review of the recent case of *Oram v. Hutt* and to the conclusion thereon of my noble and learned friend Lord Phillimore.
>
> But I submit to your Lordships that light is derivable upon the present question from the views expressed in this House in *Metropolitan Bank v. Pooley*, and in particular from the opinion of Earl Selborne, upon a point which has been far too little attended to — namely, the broad and conclusive effect of decisions of Courts of law on the merits of the root question — namely, the rights or wrongs of the legal proceeding which was maintained. My Lords, upon the other view a maintainer, — however highminded he be, or however prompted by a sense of justice or a reprobation of deceit, and however successful he be in having justice done and deceit exposed, — such a maintainer is civilly responsible in damages for what he has done and furthermore he is a criminal offender. To my mind it is fairly clear that such a doctrine is as morally reprehensible as it is legally indefensible, and, as I have said, I do not think it ever was the law of England."[69] (my underlining)

[99] Lord Shaw of Dunfermline concluded:[70]

> "The ground of the action thus fails. But upon the further point as to whether a suit might lie for merely nominal damages my opinion is in the negative. I entirely agree with the judgment upon that topic of my noble and learned friends the Lord Chancellor and Lord Phillimore. In my opinion, for the reasons given on the authorities cited, the damages in all cases of maintenance are only such as are answerable to the wrong caused by the maintenance and thereby suffered by the plaintiff. Where accordingly it is ab ante demonstrable that no actual wrong has been caused or suffered an action thus necessarily for only nominal damages for maintenance will not lie. This demonstration is, in my opinion, afforded by the successful result of the suit alleged to have been maintained."

[100] Lord Phillimore who joined with Lord Finlay LC and Lord Shaw of Dunfermline in entering judgment for London Express Newspaper Limited said:

> "The law of maintenance is stated in the text-books to be in itself part of the common law though affirmed or declared and supported by various ancient statutes. These, as I gather, at any rate those which were brought to your Lordships' notice, are the following:—
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> 3 Edw. I. cc. 25, 28.

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[69] My underlining the "vital words *et pur verite esteindre*" from French meaning 'the pure truth extinguished or hidden'.

[70] *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 421.

20 Edw. I. Ordinance concerning conspirators.

28 Edw. I. c. 11.

1 Edw. I. c. 11.

4 Edw. III. c.11.

1 Rich. II. c. 4.

7 Rich. II. c. 15.

32 Hen. VIII. c. 9,

which have been analyzed by my noble and learned friend, Lord Shaw, and to which I would add 3 Hen. VII. c. 1.

A perusal of these statutes shows that in the days when they were enacted the ordinary subject of the King found great difficulty in procuring a fair trial when his adversary was in some privileged position. Sometimes the King's officers were induced by a bribe or by the offer of a share of the spoil to favour his adversary. Sometimes great men gave countenance to his adversary, sometimes confederacies were formed to support unjust claims or defences. And the statutes are directed against maintenance, champerty and confederacy or conspiracy, while embracery and subornation of perjury were some of the means used to secure these unlawful ends.

Great men gave liveries to large bodies of retainers and supported them in their unjust quarrels. A convenient summary of the state of society in England during this period can be found in Hallam's Middle Ages, Vol. III., Part III., Chap. VIII., pp. 245, 246 (ed. of 1829), and in his Constitutional History, Vol. I., Chap. I., pp. 69–73 (ed. of 1829); and the Act 3 Hen. VII. c. 1, already referred to, created a special Court consisting of certain great officers of State and judges which sat in the Star Chamber for the express purpose of correcting and preventing such miscarriages of justice.

So mischievous might maintenance be that the statutes strike against it in general or absolute terms. But the judges construed them, as they interpreted the common law, as not being so absolute, but as admitting of exceptions and as permitting a subject to maintain another's suit or defence when the relations were such that there was a common interest, or the master was helping his servant, or even when the act was done out of charity to a poor man.

There is no warrant in any of the statutes for many of these exceptions. The only warrant for any exception is to be found in 28 Edw. I. c. 11, known as '*Articuli super Chartas*.' This allows a man to have counsel of '*ses prochaines amis*.'

How then were the judges enabled to make these exceptions? It appears to me, my Lords, that it can only have been because all maintenance was not evil."

[101] Lord Phillimore continued:[71]

> "Except in so far as the passage in Fitzherbert with its reference which cannot be traced and the two cases in the Year Books which I have translated may be held to support the proposition, I find no case that decided that it is unlawful to maintain a just cause or a just defence before *Wallis v. Duke of Portland*, and query as to that case."

[102] Lord Phillimore then explained that *Wallis*[72] ought to be confined to its facts in pointing out that there "may be a wide distinction between an action and an election petition".[73]

[103] Lord Phillimore continued:[74]

> "There remain the institutional writers of the eighteenth century, Hawkins and Blackstone, whose language has been quoted by Lord Shaw.
>
> In their view the evil of maintenance lay in the stirring up of strife. My Lords, I think this was bad archaeology. Maintenance is on a par with champerty, conspiracy and embracery. The doctrine was established to prevent injustice.
>
> These writers cite no other material cases than those which have been mentioned, and all that need be said is that, there being a good reason for the origin of an established rule of law, they supposed a wrong reason which would, if the case had arisen in their time, have led them too far.
>
> My Lords, if the view which I have indicated be correct, the defendant company did no unlawful act. It did indeed maintain a suit, but the justification or excuse is to be found in the righteousness of the suit and the proof of its righteousness is its success.
>
> But even if it were otherwise the plaintiff Neville has yet to prove that he sustained any private injury, such as the law recognizes as some invasion of his rights as a citizen by reason of the unlawful act of the defendant company.
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> My Lords, I conceive that if it be an offence to promote a just action or support a just defence, there is still no private injury which ensues therefrom. Conceive of things otherwise?
>
> I take the case of a defence as no doubt the more striking. If the law were to be as suggested it would be the right of a bully to say, keep out of the way, form a ring, let me knock the other man down, if you interfere I shall send for the police.

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71 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 431.
72 *Wallis v Duke of Portland* (1797) 3 Ves. Jun. 494.
73 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 432.
74 *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 433.

> A close parallel can be drawn from the law of libel. It was (and still is subject to a statutory qualification) unlawful and indictable to publish in writing or print defamatory matter of an individual. But if the defamatory matter be true the individual has no right of action. He cannot complain of that which he has brought upon himself by his own conduct.
>
> So a man who does not pay his just debts or make good his torts cannot complain that he has been compelled (howsoever) to pay or make good.
>
> Still less can he complain if he has been successfully resisted when he was making an unjust claim.
>
> The case could be put on a lower but still sufficient ground. Your Lordships are all agreed that the plaintiff Neville cannot, in this action, recover either the costs which he had to pay or those which he had to bear in the Chancery action. *A fortiori* he cannot recover the damages which he was adjudged to pay. There are then no damages on which he can lay his finger, which he has suffered.
>
> And so it must be in every case where the suit or defence maintained has been right."

[104] It is apparent from an analysis of *Neville v London Express Newspaper* that in 1919, the common law of England required as an essential element for the tort of maintenance, the commission of an offence, either at common law or pursuant to statute. Lord Shaw and Lord Phillimore considered that in order to commit the offence the test is "the quality of the act itself as it bears upon the attainment of justice in the particular case".[75] Lord Finlay explained that the "quality of the act itself as it bears upon the attainment of justice" required an analysis of whether the maintenance (for not all maintenance is unlawful) tends to interfere or distort the curial process of the court. The 'vital words' '*et pur verite esteindre'* (to extinguish the truth) are critical to a proper understanding of maintenance. Lord Finlay LC, Viscount Haldane and Lord Atkinson did not share that view, opting for a broader view that all maintenance is unlawful unless it fell within one of the historical patchwork of exceptions.

[105] Since the commencement of the *Criminal Code Act* 1899 (Qld), on 1 January 1901, maintenance and champerty have not been crimes within the State of Queensland.[76] As the *Criminal Code* has codified the criminal law of Queensland, the ancient common laws which preceded the earlier English statutes from 1275 to 1540 cannot operate to cause maintenance and champerty to be categorised as a criminal act within the State of Queensland (at least since 1 January 1901). In the words of Lord Finlay LC, in Queensland, since 1 January 1901, the common law has been incapable of prohibiting and punishing any act of maintenance however so defined.

[106] In *Martell v Consett Iron Co Ld*[77] Jenkins LJ (in the Court of Appeal) said as follows:

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[75] *Neville v London 'Express' Newspaper Limited* [1919] AC 368, 414.

[76] *WorkCover Queensland v AMACA Pty Limited* [2013] 2 Qd R 276 per McMurdo P at 287-5 (Footnote 5) and *Magic Menu Systems Pty Ltd & Anor v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 per Lockhardt, Cooper and Kiefell JJ.

[77] *Martell v Consett Iron Co Ld* [1955] 1 Ch 363, 398-399.

"The earlier authorities on this curious branch of the law are reviewed in the judgment of Lord Coleridge C.J. in the famous case of *Bradlaugh v. Newdegate*, and I do not propose to refer to them at length. It is, however, worth noting that whereas in *Wallis v. Duke of Portland*, one finds Lord Loughborough L.C. roundly declaring that 'maintenance is not *malum prohibitum*, but *malum in se*: that parties shall not by their countenance aid the prosecution of suits of any kind; which every person must bring upon his own bottom and at his own expense,' and qualifying this general statement only by reference to the established specific exceptions, Lord Abinger in *Findon v. Parker*, uses much less sweeping language. 'The law of maintenance,' says Lord Abinger, 'as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make.' It will be seen that this definition makes impropriety in the motive or purpose of the maintainer an essential element in the offence. The same notion appears in other definitions noticed by Lord Coleridge C.J. in *Bradlaugh v. Newdegate*. Thus Blackstone is there cited as calling maintenance 'an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend 'it':' (Bl. Comm. book iv, c. 10, s. 12) and Story as terming it the 'officious assistance by money or otherwise, proffered by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it' (Story on Contract, ch. vii, s. 578).

On the authorities as they now stand, I think that Lord Loughborough's general condemnation of all aid by third parties in suits of any kind, except in cases falling within one or other of the established specific exceptions, must be regarded as too wide, while Lord Abinger's more cautious definition of the offence as confined to cases where there is some impropriety of motive or purpose on the part of the maintainer must be regarded as too narrow. In the present state of the authorities, the right view appears to be that the <u>crime of maintenance</u> is committed whenever a third party aids the prosecution or defence of an action in the absence of circumstances sufficing in law to justify the giving of such aid, whatever the motive or purpose of the person giving such aid may have been, the element of impropriety or officious intermeddling being supplied by the fact of interference in the suit by giving aid to one party or the other, coupled with the absence of legal justification for so doing; while, on the other hand, the giving of such aid will not be criminal if it is justifiable in law by reference to one of the specific exceptions, the existence of which I have already noticed, or if the person giving such aid has such an interest in the action as can be held in law sufficient to justify him in giving it." (my underlining)

[107] Jenkins LJ said in respect of an argument brought in the case: "[h]e could not prove the tort without proving the crime, which is the basis of the tort, and it is enough for the purposes of his argument if he can prove the crime."[78]

[108] Jenkins LJ cited with approval the judgment of Fletcher Morton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd*[79] as follows:[80]

> "Fletcher Moulton L.J. said: 'The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings. Those notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete. As pointed out by the present Master of the Rolls in *Fitzroy v. Cave*, the purchase of a chose in action amounted to maintenance in the olden times, and therefore was not only a civil wrong but a crime. Yet for hundreds of years such transactions have been held valid, and the rights arising out of them have been enforced by the Courts of Equity and are now enforceable in all the courts of the realm. Similarly in olden times it was maintenance to give evidence without being subpoenaed so to do. To-day it is looked upon as part of the duty of citizens to be ready and willing to assist the administration of justice by giving evidence when they can do so usefully. In the presence of changes such as these it appears to me to be idle to look upon the courts as administering the old common law as to maintenance. The present legal doctrine of maintenance is due to an attempt on the part of the courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy. The position of the courts in this respect is not unlike that which may be observed in their treatment of contracts in restraint of trade, though the change of view with regard to maintenance is far more complete. Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful. They suffer from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day, and these old definitions are sought to be made serviceable by strings of exceptions which are neither based on any logical principle nor in their nature afford any warrant that they are exhaustive. These exceptions only indicate such cases as have suggested themselves to the mind of the court, and it is impossible to be certain that there are not many other exceptions which have equal validity.' Then after a reference to *Holden v. Thompson*, which Sir Andrew criticizes on the ground that the Lord Justice mistakenly treated that case as having decided that community of religion constituted a sufficient common interest for the purposes of the law of maintenance, Fletcher Moulton L.J. continued: 'That there is still

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78 [1955] 1 Ch. 363, 407.
79 [1908] KB 1006, 1013-1014.
80 *Martell v Consett Iron Co Ld* [1955] 1 Ch. 363, 410-411.

> such a thing as maintenance in the eye of the law and that it constitutes a civil wrong and perhaps a crime is undoubted, and the general character of the mischief against which it is directed is familiar to us all. It is 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. But in my opinion it is far easier to say what is not maintenance than to say what is maintenance'." (my underlining)

[109] Jenkins LJ continued:[81]

> "I appreciate the force of Sir Andrew's argument and, speaking for myself, I find it impossible to hold that we would be justified in regarding ourselves as no longer bound by *Alabaster v. Harness* and *Oram v. Hutt* on the strength of the changes in public policy or in social or economic conditions which are said to have taken place since those cases were approved in the year 1918 by a majority of the House of Lords in *Neville v. London 'Express' Newspaper Ld*. They were in fact followed as recently as June, 1954, by Lynskey J. in *Baker v. Jones*. But it is an abuse of authorities to extract from judgments general statements of the law made in relation to the facts and circumstances of particular cases and treat them as concluding cases in which the facts and circumstances are entirely different and which raise questions to which their authors were not directing their minds at all."

[110] In *In re Trepca Mines Ltd (No.2)*[82] a solicitor, having found to have actively participated in the drawing of a champertous agreement was denied his right to recover his fees and disbursements. With respect to maintenance and champerty Lord Denning MR said:[83]

> "Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time, the limits of 'just cause or excuse' were very narrowly defined. But the law has broadened them very much of late (see M*artell v. Consett Iron Co. Ltd*.) and I hope they will never again be placed in a strait waistcoat. But there is one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty. Champerty is derived from *campi partitio* (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds: see the definitions collected by Scrutton L.J. in *Haseldine v. Hosken*. The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than

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81 *Martell v Consett Iron Co Ld* [1955] 1 Ch. 363, 414.
82 [1963] 1 Ch. 199.
83 *In re Trepca Mines Ltd (No.2)* [1963] 1 Ch. 199, 291.

> enforce the law, and I may observe that it has received statutory support, in the case of solicitors, in section 65 of the Solicitors Act, 1957."

[111] On 25 October 1966 the Law Commission, chaired by The Honourable Mr Justice Scarman (as he then was) published the Law Commission's Proposals for Reform of the Law Relating to Maintenance and Champerty (Law Com. No 7). The Law Commission Report included the following:

> "1. Under the heading 'Miscellaneous matters involving anomalies, obsolescent principles or archaic procedures' the Law Commission's approved programme singled out a number of matters for examination upon the grounds, amongst others, that they seemed to rest upon outdated considerations of public policy. The crimes and torts of maintenance and champerty were included amongst these.
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> 2. The English law of maintenance was the product of particular abuses which arose in the conditions of mediaeval society and later led to a series of statutes reinforcing the common law by imposing penalties for the offences of maintenance and champerty.
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> …
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> 7. Maintenance and champerty as crimes are a dead letter in our law. There are no records of any prosecution for either for many years past. They do no more today than add unnecessarily to the length of legal textbooks and the statute book. To rid the law of these crimes would be merely to clear away lumber discarded in practice, though not in theory destroyed.
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> …
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> 9. The modern view of maintenance is that it consists of the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings, without lawful justification. The tort of champerty is that of maintaining a civil action in consideration of a promise of a share in the proceeds of the action, if successful. The Court of Appeal in *In re Trepca Mines Ltd*. (No. 2) [1963] Ch. 199 showed that the offence extended to civil proceedings other than actions strictly so called: it has, however, no application to criminal proceedings.
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> 10. It is difficult to reconcile the decided cases as to what constitutes a 'lawful justification'. It is established that charitable motives or an 'interest' on the part of the maintainer provide a defence; but the authorities conflict as to what, for this purpose, constitutes 'interest'. Without entering into a detailed analysis of the cases, it may be said that the trend of judicial decision has been to increase the number of interests which the courts are prepared to accept as lawful justification. A master has been held justified in maintaining his servant's litigation, and a member of a family in maintaining an action by another member of the family. One who has a proprietary interest, actual or prospective, in the

subject matter of the litigation has also been held justified in maintaining litigation to which he was not a party. In 1955 members of an angling club were held to have lawful justification in supporting an action brought to prevent the pollution of a river, the plaintiffs in the action being riparian owners and members of the club.

11. Even if the plaintiff in an action of maintenance manages to show that the defendant was without lawful justification in maintaining the litigation of which he complains, his difficulties are only beginning. For to succeed in his action he must go on to show that he has suffered actual damage as a result of the defendant's unjustifiable maintenance. In *Neville v. London 'Express' Newspaper Ltd*. [1919] A.C. 368 the House of Lords decided that where the maintained litigation has succeeded, the burden of costs falling upon the party against whom the litigation was maintained does not constitute recoverable damage in an action of maintenance brought by him. By a further development of the law, in the case of *Wm. Hill (Park Lane) v. Sunday Pictorial* ('*Times*' newspaper April 15th 1961) it was decided that where the maintained action had failed, a claim for damages for maintenance also failed, unless it could be shown that the maintained action would not have been brought or continued without the assistance of the maintainer. Obviously the factor of damage is almost impossible of proof. In the light of the cases on lawful justification and proof of damage, our conclusion is that the action for damages for maintenance is today no more than an empty shell.

12. Further, it is doubtful whether the retention of maintenance as a tort is consistent with other developments in the practice of litigation. Today trade unions, trading associations, many friendly and benefit societies, provide their members with financial assistance in pursuing claims or defences in certain classes of civil action.

13. Similarly, there is widespread throughout our society the beneficent practice of third party liability insurance, under which insured persons are entitled to indemnity against damages and costs awarded against then in actions based upon negligence, nuisance or breach of statutory duty and under which the conduct of the proceedings is normally in the hands of the insurers.

…

15. The truth is that today the great bulk of the litigation which engages our courts is maintained from the sources of others, including the state, who have no direct interest in its outcome but who are regarded by society as being fully justified in maintaining it. When one further reflects how little is the scope left to the action for damages for maintenance and how formidable the difficulties of proof, one is bound to ask whether its retention in the law serves any useful purpose.

16. There is, however, one field in which that particular species of maintenance [and] champerty plays an effective role. There is a

> substantial body of case law to the effect that champertous agreements (including in this context 'contingency fee' agreements) are unlawful as contrary, to public policy; see, e.g. *Laurent v. Sale & Co.* [1963] 1 W.L.R. 829. This rule has an important bearing upon the practice of solicitors. For instance, section 65 of the Solicitors Act 1957 reflects the rule when it declares that nothing in the Act is to be treated as giving validity to
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> > '(a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or
> >
> > (b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding.'
>
> And it is clear that a client can apply pursuant to section 61 of the Act to set aside a champertous agreement made with his solicitor for the conduct of litigation."

[112] The committee concluded in paragraph 19:

> "Suffice it to say that the ancient and unused misdemeanours and the ancient and virtually useless torts with which we are at present concerned can be consigned to the museum of legal history without prejudice to further discussion of such questions and with advantage to the form and clarity of our law." (my underlining)

[113] The recommendations of the Law Commission of 1966 were adopted. Section 14 of the *Criminal Law Act* 1967 (UK) abolished both the offences and the torts of maintenance and champerty. Section 14(2) did however reflect the concerns based in paragraph 16 of the report and it stipulated that the abolition of civil and criminal liability for maintenance and champerty did "not affect any rule of [the law of England and Wales] as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."[84]

[114] In *Giles v Thompson*[85] Lord Mustill (with whom Lord Keith of Kinkel, Lord Ackner, Lord Jauncey of Tullichettle and Lord Lowry agreed) said:[86]

> "My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the

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84 *Criminal Law Act* 1967 (UK) s 14(2).
85 [1994] 1 AC 142.
86 *Giles v Thompson* [1994] 1 AC 142, 153.

resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, recourse was often required.

As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation. In the most recent decades of the present century maintenance and champerty have become almost invisible in both their criminal and their tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a 'bare right of action.' The former survives nowadays, so far as it survives at all, largely as a rule of professional conduct, and the latter is in my opinion best treated as having achieved an independent life of its own.

It therefore came as no surprise when Parliament, acting on the recommendation of the *Law Commission Report on Proposals for Reform of the Law relating to Maintenance and Champerty* (1966) (Law Com. No. 7), abolished the crimes and torts of maintenance and champerty: section 14 of the *Criminal Law Act* 1967. After this, it might be supposed that the ancient crimes and torts would have disappeared from general view, of interest only to any legal historian who might aspire to build on the foundations laid by Sir Percy Winfield and Sir William Holdsworth. Remarkably, this has proved not to be the case, and we find that 25 years after the Act of 1967 they are being ascribed a vigorous new life, in a context as far away from the local oppressions practised by overweening magnates in the 15th century as one could imagine: namely, the temporary provision of substitute private cars to motorists whose own vehicles have been put out of commission by road accidents. The possibility of contending that a recovery of a particular head of damage in the most everyday running down case is barred by this ancient doctrine has been opened up by the qualifying words in section 14(2) of the Act of 1967 which stipulated that the abolition of civil and criminal liability

> 'shall not affect any rule of [the law of England and Wales] as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal'." (my underlining)

[115] Lord Mustill continued at page 161:

"My Lords, on these simple facts it appears to me to make no difference how precisely one expresses what is left of the law of champerty, for the answer must inevitably be the same. It is sufficient to adopt the description of the policy underlying the former criminal and civil

sanctions expressed by Fletcher Moulton L.J. in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908] 1 K.B. 1006, 1014:

> 'It is directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse.'

This was a description of maintenance. For champerty there must be added the notion of a division of the spoils."

[116] Lord Mustill continued further on page 164:

> "As Steyn L.J. has demonstrated, the law on maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose: see per Danckwerts J. in his important judgment in *Martell v. Consett Iron Co. Ltd*. [1955] Ch. 363, 382. It is possible, although I believe rather unlikely, that new areas of law will crystallise, with their own fixed rules which are invariably to be applied to any case falling within them. Meanwhile, 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, in the terms expressed by Fletcher Moulton L.J. in the passage already quoted from in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd*. [1908] 1 K.B. 1006, 1014, there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.
>
> My Lords, for my part I am unable, any more than in *Devlin v. Baslington*, to accept that there was anything officious or wanton about the intervention of the hire company in the motorist's litigation. The question must be looked at first in terms of the harmfulness of this intervention, which in turn calls for separate consideration of the risks to the administration of justice and to the interests of the motorist. Is there any realistic possibility that the administration of justice may suffer, in the way in which it undoubtedly suffered centuries ago? None, so far as I can see, or at any rate none with which the skills and coercive powers of the contemporary judge are unable to grapple. Only two areas of the litigation might be regarded as imperilled. First, the witnesses. It is said that those called for the motorist may be encouraged to try too hard. Frankly speaking, this idea seems to me fanciful." (my underlining)

[117] With respect to the second issue Lord Mustill concluded on page 165: "[i]n these circumstances I find the perils to the proper administration of justice much exaggerated". Lord Mustill's reasons, which met with the unanimous agreement of the

House of House of Lords, very much, in my respectful view, accord with the logic of the reasons of Lord Shaw (and Lord Phillimore) in *Neville v London 'Express' Newspaper* and represents the 'modern' English view. The modern English approach was recently set out by the Court of Appeal in *Davey v Money* [2019] EWHC 997 (Ch):

> 76. In that regard, on the facts I reject any suggestion that the involvement of ChapelGate in this case was champertous. The modern approach to the doctrine of champerty appears to be concerned with asking whether an agreement with a non-party as regards the conduct of litigation would tend to undermine or corrupt the process of justice; and in that context, the crucial issue appears to be whether the non-party can exercise excessive control or influence over the conduct of the proceedings in such a way as, for example, to suppress evidence, influence witnesses, or procure an improper settlement: see *Sibthorpe v Southwark LBC* [2011] 1 WLR 2111 at [35]-[36] per Lord Neuberger MR, referring to cases such as *Factortame v. Secretary of State* (No.8) [2003] QB 381.
>
> 77. In this case, the terms of the Funding Agreement are clear that Ms. Davey was to have control over the proceedings, albeit that key decisions could only be taken after notice to ChapelGate and receipt of advice from MdeR. I have no evidence upon which to conclude that the Funding Agreement was not adhered to in practice, and the responsible partner at MdeR (Mr. Michael Armstrong) confirmed by email that there was never any attempt by ChapelGate to exert control or influence over him. He also indicated, for example, that a 'without prejudice save as to costs' offer made to Ms. Davey in February 2016 had simply been rejected by Ms. Davey 'out of hand', without any input from ChapelGate. I have no reason to doubt that account of events. (my underlining)

[118] The test postulated by Lord Mustill, and unanimously accepted by the House of Lords, represented the modern position in England. The test calls for the examination of the "harmfulness of [the] intervention" as determined by reference to "the risks to the administration of justice and to the interests of the" maintained parties.

6. Australian Approach to Maintenance and Champerty

[119] The leading Australian authority is the High Court's decision of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[87]. It is convenient however, to commence with the decision of the Full Court of the Federal Court decided a decade earlier. In *Magic Menu Systems v AFA Facilitation*[88] Lockhart, Cooper and Kiefel JJ (as the Chief Justice then was) critiqued the development of the law:

> "**Maintenance and champerty**

[87] (2006) 229 CLR 386.
[88] (1997) 72 FCR 261.

Maintenance, which consisted of the assistance or encouragement of a party to an action in which the maintainor had no interest, was regarded by the English law, from an early time, as a crime punishable by fine or imprisonment. It later became recognised as a civil wrong. (See generally Blackstone's Commentaries (5th ed), Book IV, p 134.)

Champerty was a species of maintenance, on terms that the maintainor and the plaintiff would share in the outcome of the action. It was especially feared because the champertor's financial stake in the litigation provided a strong temptation to suborn witnesses and pursue worthless claims (see Barratry, Maintenance and Champerty, New South Wales Law Reform Commission Discussion Paper 36, May 1994). These concerns have been reiterated in *Re Trepca Mines Ltd* (No 2) [1963] Ch 199, *Trendtex Trading Corporation v Credit Suisse* [1980] 1 QB 629 at 653 and in more recent cases, to which we shall refer.

It may be said that public policy considerations shaped the attitude of the Courts towards agreements to maintain litigation. The concern early expressed was that the remedial processes of the law might be used as tool of oppression, as indeed they were by powerful nobles and officers (NSWLRC Discussion Paper, par 2.9 and see Blackstone, p 134). What maintained actions were thought likely to produce, and which was inimical to the public interest, altered over the course of time and with changing social conditions, as did the recognition of interests which were sufficient to justify interference in another's litigation by supporting it: see *Hill v Archbold* at 694; *Trendtex; Condliffe v Hislop* [1996] 1 WLR 753 at 759; [1996] 1 All ER 431 at 437 and *Roux v Australian Broadcasting Commission [*1992] 2 VR 577 at 607. It may now be observed, for example, that concerns expressed earlier this century, as to the potential for the maintenance of actions to give rise to an increase in litigation, might now be considered of lesser importance than the problems which face the ordinary litigant in funding litigation and gaining access to the Courts. In the latter respect, by the time *Martell v Consett Iron Co Ltd* [1955] Ch 363 came before Danckwerts J, his Honour was able to observe that support of legal proceedings based upon a bona fide common interest, financial or philosophical, must be permitted if the law itself was not to operate as oppressive. The Courts today, in our view, are likely to take an even wider view of what might be acceptable, particularly if procedural safeguards are present or able to be applied.

There does not however seem to have been any detailed discussion or debate as to these matters and, relevant to this appeal, as to whether champerty will now be tolerated, and if so, on what conditions. We do not suggest that practices in the United States of America would necessarily, or even likely, be viewed as desirable. On the other hand, cases in the United Kingdom such as *Grovewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80 and *McFarlane v EE Caledonia Ltd* (No 2) [1995] 1 WLR 366 proceed upon the basis that such agreements are prima facie unlawful. In any event, this appeal does not, for reasons to which we later refer, require the resolution of these larger questions.

> Both the offence and tort of maintenance, and of champerty, were abolished in the United Kingdom in 1967, shortly after judgment was delivered in *Hill v Archbold* and following a report to the Parliament by The Law Commission (*Proposals for Reform of the Law Relating to Maintenance and Champerty*) in 1966. They were abolished in Victoria in 1969, in South Australia in 1992 and in New South Wales in 1995 by the *Maintenance and Champerty Abolition Act* 1993 (NSW). The latter legislation was intended to pave the way for the provision of contingency fees in that State. In Queensland solicitors are now permitted to fix their fees by an agreement which may stipulate for a percentage (s 23 of the *Legal Practitioners Act* 1995 (Qld)). Maintenance and champerty however remain torts actionable in Queensland (see *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413), although they were never included as offences in the Criminal Code Act 1899 (Qld).
>
> It is plainly unsatisfactory that maintenance of litigation remains a civil wrong in some, but not all, states in Australia. Whether there remain valid reasons for the retention of the tort at common law has not been addressed, although it has long been considered obsolete and in *Clyne v Bar Association (NSW)* (1960) 104 CLR 186, the High Court suggested that it may be necessary to consider whether it ought now be so regarded. Mason CJ, in *Halliday v Sacs Group Pty Ltd* (1993) 67 ALJR 678 at 680-681 also appears to have assumed that the status of the tort was questionable.
>
> That is not to say, however, that the policy considerations which gave rise to the offence and tort have lost all significance today. The ability of the Courts to treat agreements for maintenance as contrary to public policy, and therefore illegal, remains unaffected by the statutory provisions: see *Trendtex Trading* at 653; *McFarlane v EE Caledonia* (No 2) at 370; *Roux v ABC* at 605; *Giles v Thompson* [1994] 1 AC 142. The giving of financial assistance to a litigant by a non-party will not however conclude the question as to whether it is unlawful on this ground (see *Condliffe v Hislop*). Questions of public policy with which the Courts will be concerned, as Byrne J observed in *Roux v ABC* at 605, are those which have regard to litigation and its funding in the contemporary world." (my underlining)

[120] Despite the lack of legislative congruence between the states in abolishing the torts of maintenance and champerty, there is but one common law of Australia which is declared by the High Court as the final court of appeal.[89] As the plurality pointed out in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[90], Australian courts are bound to follow 'considered opinions' of the High Court whether or not those opinions are expressed as part of the *ratio* of a case or by way of *obiter*.[91]

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89 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.
90 (2007) 230 CLR 89.
91 (2007) 230 CLR 89, 150-151.

[121] In 1960, the High Court, unanimously said in *Clyne v Bar Association (NSW)*:[92]

> "For the interesting history of the subject reference may be made to *Holdsworth, A History of English Law* vol. 8, pp. 397-402 and to an article by *Winfield, The History of Maintenance and Champerty* (1919) 35 L.Q.R. 50. At one time maintenance was a term with a very wide denotation, and was a crime at common law and by virtue of a number of statutes. It became in due course also a civil wrong. It was at one time a crime of great importance, but the reasons for its importance disappeared centuries ago. Though the conception of what is comprehended within the term has greatly narrowed, maintenance is still a civil wrong, and there are several modern instances of civil proceedings for maintenance, though it may be mentioned that *Winfield* (1919) 35 L.Q.R., at p. 233 refers to the action for maintenance as being today 'rather a disreputable mode of paying off a score against another man than a symbol of the venality of officials or of the oppression of great nobles'.
>
> It may be necessary some day to consider whether maintenance as a crime at common law ought not now to be regarded as obsolete."

[122] Some 46 years later, in *Fostif* , Gummow, Hayne and Crennan JJ said:[93]

> "What this brief and incomplete survey of the state of the English law, as it stood by the early years of the twentieth century, may be understood as revealing is that the law of maintenance and champerty depended more upon assertion of consequences said to follow from the existence of the common law criminal offences of maintenance and champerty, than it did upon any close analysis or clear exposition of the policy to which the rules were intended to give effect. Thus, in *Alabaster v Harness*, Lord Esher MR said:
>
> > "The doctrine of maintenance, which appears in the Year Books, and was discussed briefly by Lord Loughborough in *Wallis v Duke* of Portland, and more elaborately by Lord Coleridge CJ, in *Bradlaugh v Newdegate*, does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. *I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful*. Lord Loughborough, in *Wallis v Duke of Portland*, says that the rule is, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense'." (my underlining)

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92 (1960) 104 CLR 186, 203-4.

93 *Campbells Cash snd Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 429 [77].

[123] As demonstrated in paragraph 105 above, since 1 January 1901 Queensland's criminal law has been codified and there is no longer the criminal offence of maintenance and champerty in Queensland. *Clyne v Bar Association (NSW)* confirmed that the crimes of maintenance and champerty were dead at common law half a century ago. Absent the necessary criminal offences there can be no assertion of criminal consequences said to flow.

[124] Gummow, Hayne and Crennan JJ said in *Fostif* at page 431:

> "By ss 13 and 14 of the *Criminal Law Act 1967* (UK) criminal and tortious liability for maintenance and champerty were abolished but, like s 6 of the Abolition Act, any rule of law as to the cases in which a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal was preserved. In 1981, in *Trendtex Trading Corporation v Credit Suisse*, the House of Lords held that an agreement permitting a bank, which had guaranteed the costs of a party to litigation in which the bank itself was also interested, to sell the party's claims in the litigation ''savours of champerty,' since it involves trafficking in litigation – a type of transaction which, under English law, is contrary to public policy'. Accordingly, the assignment of the cause of action was held to be void. Yet effect was given to so much of the agreement as conferred exclusive jurisdiction on a Swiss Court over disputes regarding 'its conclusion, interpretation or fulfilment', by staying the action in England with a view to the Swiss Court deciding what effect the invalidity of the assignment, according to English law, had upon the agreement as a whole."

[125] Gummow, Hayne and Crennan JJ reflecting upon the lack of clarity in the earlier English cases said as follows:

> "86 First, and foremost, s 6 of the Abolition Act preserved any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. It preserved no wider rule of law. The Abolition Act abolished the crimes, and the torts, of maintenance and champerty. By abolishing those crimes, and those torts, any wider rule of public policy (wider, that is, than the particular rule or rules of law preserved by section 6) lost whatever narrow and insecure footing remained for such a rule. As Fletcher Moulton LJ had rightly said, nearly a century ago, the law of maintenance and champerty, even then, suffered: 'from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day.' Secondly, the asserted rule of public policy 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. As Fletcher Moulton LJ had also said, it was then 'far easier to say what is not maintenance than to say what is maintenance'. No certain rule would emerge because neither the content nor the basis of the asserted public policy is identified more closely than by the application of condemnatory expressions

like ‘trafficking’ or ‘intermeddling’, with or without the addition of epithets like ‘wanton and officious’.

87 In the present matters, the appellants pointed to a number of matters which together were said to be important. First, there was Firmstones' seeking out of claimants, which the appellants described as ‘officious intermeddling’. Secondly, there was the degree of control which Firmstones would have over the proceedings, the litigants' interests being said to be ‘subservient’ to those of the ‘intermeddler’. Firmstones' retainer of a solicitor to act for the plaintiffs and represented parties was said not to lessen Firmstones' control of the proceedings but to give rise to possible conflicts of duty for the solicitor. Thirdly, it was said that Firmstones bought rights to litigate and did so with a view to profit. Firmstones was, so it was submitted, ‘a speculative investor in other persons' litigation’.

88 Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstones' seeking out those who may have claims, and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.

89 As Mason P rightly pointed out in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none could be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining an action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction otherwise is regularly invoked?

90 Two kinds of consideration are proffered as founding a rule of public policy – fears about adverse effects on the processes of litigation and fears about the ‘fairness’ of the bargain struck between funder and intended litigant. In *Giles v Thompson*, Lord Mustill said that the law of maintenance and champerty could best ‘be kept in forward motion’ by looking to its origins; these his Lordship saw as reflecting ‘a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants’.

91 Neither of these considerations, whatever may be their specific application in a particular case, warrants formulation of an overarching rule of public policy that either would, in effect, bar the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement. To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears.

92 It is necessary to bear steadily in mind that questions of illegality and public policy may arise when considering whether a funding agreement is enforceable. So much follows from s 6 of the Abolition Act. Further, to ask whether the bargain struck between a funder and intended litigant is 'fair' assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity. Neither assumption is well founded.

93 As for fears that 'the funder's intervention will be inimical to the due administration of justice', whether because '[t]he greater the share of the spoils … the greater the temptation to stray from the path of rectitude' or for some other reason, it is necessary first to identify what exactly is feared. In particular, what exactly is the corruption of the processes of the Court that is feared? It was said, in *In re Trepca Mines Ltd* [No 2] , that '[t]he common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses'. Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.

94 The appellants submitted that special considerations intrude in 'class actions' because, so it was submitted, there is the risk that such proceedings may be used to achieve what, in the United States, are sometimes referred to as 'blackmail settlements'. However, as remarked earlier in these reasons, the rules governing representative or group proceedings vary greatly between courts and it is not useful to speak of 'class actions' as identifying a single, distinct kind of proceedings. Even when regulated by similar rules of procedure, each proceeding in which one or more

named plaintiffs represent the interests of others will present different issues and different kinds of difficulty.

95 The difficulties thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages but which, to defend, would take a very long time and very large resources, is a problem that the courts confront in many different circumstances, not just when the named plaintiffs represent others and not just when named plaintiffs receive financial support from third party funders. The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be observed principally in actions where a plaintiff represents others, that is a problem to be solved, in the first instance, through the procedures that are employed in that kind of action. It is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against that defendant." (my underlining)

[126] Gleeson CJ expressly agreed with Gummow, Hayne and Crennan JJ.[94] Kirby J said at paragraph 125:

"*The applicable rules*: The history of maintenance and champerty in the law of England is described in the reasons of Gummow, Hayne and Crennan JJ. The origins and course of development of that body of law are illustrated there, with reference to the differing practice of common law and of equity; the different approaches deemed proper in England and at least one of its colonies; and the gradual realisation that some of the earlier judicial strictures against maintenance and champerty were in need of reconsideration in the light of modern conditions, analogous legal developments, practices in particular jurisdictions and the real impediments that commonly exist to affordable access to justice. I will not repeat any of this material. It is usefully supplemented in the reasons of Mason P in the Court of Appeal."

[127] Kirby J continued:

"146 *No abuse of process*: When the foregoing considerations are taken into account, I agree with the conclusion reached on this issue in the reasons of Gummow, Hayne and Crennan JJ. In these appeals the appellants failed to demonstrate an abuse of process to warrant the primary judge's conclusion that they were entitled to a permanent stay on that basis.

147 I also agree with the reasons given by the Court of Appeal on this issue. In those reasons, Mason P successively rejects the arguments advanced by the appellants to sustain the primary judge's conclusion that the proceedings, in their existing form,

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[94] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 429 [125].

> constituted an abuse of process. Thus, Mason P dismissed the criticisms addressed to the role of Mr Firmstone and his company. He was unconvinced by the criticisms voiced as to the involvement of the solicitor retained by the funder, Mr Richards. He rejected the generalised complaints that the proceedings were likely per se to lead to an abuse of process, were contrary to public policy, as such, and constituted an impermissible 'trafficking in litigation'. He faced squarely the fact that it was inconceivable that the individual retailers, with an average claim of $1,000, would hazard the litigious risks and costs of pursuing their legal rights, were it not for the litigation funding that permitted this to happen and organised it so that it would.
>
> 148 I find all of the general and specific reasons in the Court of Appeal's decision convincing. I would endorse the reasons in the terms in which they are stated. They reinforce the conclusion on this issue expressed in the reasons of Gleeson CJ and the reasons of Gummow, Hayne and Crennan JJ in this Court. Moreover, they suggest the need for a facultative approach to the representative procedures envisaged by the rules. As I will show, that approach is missing from the reasons of the majority in this Court, when they turn to the second issue. With respect, it is wholly missing from the reasons which Callinan and Heydon JJ have written. In my opinion those reasons disclose an attitude of hostility to representative procedures that is a left-over of earlier legal times. They are incompatible with the contemporary presentation of multiple legal claims. And, most importantly, they are fundamentally inconsistent with the rules made under statutory power and the need to render those rules effective." (my underlining)

[128] I consider it neither necessary nor desirable to consider in detail all Australian authorities prior to the High Court's decision in *Fostif,* based, as they must be, upon the 'troubled' development of English law over several hundred years.

[129] However, one case preceding *Fostif* deserves some attention as it is critical to GPC's case as advanced. It is submitted by GPC that the Queensland Court of Appeal decision of *Elfic Ltd v Macks*[95] is binding on this court unless either *Fostif* has changed the law or there is a cognate statutory authority provided by section 103K of the *CPA* (Qld).[96] *Elfic v Macks* was concerned with an appeal from a decision refusing to enjoin the continued performance of a liquidator's funding arrangements. The relevant issue was whether section 477(2) of the *Corporations Law* (now repealed) authorised a liquidator to enter into a transaction that may have constituted maintenance and champerty. Davies JA (with whom Cullinane J agreed) acknowledged champerty as an issue of public policy but found that section 477(2) provided a statutory exception to the rule.[97]

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95 [2003] 2 Qd R 125.
96 T2-60/24-33.
97 *Elfic Ltd v Macks* [2003] 2 Qd R 125, 175.

[130] GPC, in effect, say that as in *Elfic* the plaintiffs have assigned the fruits of the litigation in exchange for a level of control but unlike the role of section 477(2) in *Elfic,* s 103K of the *CPA* (Qld) does not provide a statutory exception to the rule such that the Funding Arrangements in this case render the agreements unenforceable as contrary policy. GPC argue that absent statutory authorisation, and *Fostif* not changing the law, *Elfic* binds this court. I do not accept this submission. *Elfic* precedes *Fostif,* and did not concern itself with a cause of action based on the torts of maintenance and champerty, as that was not pursued in the Court of Appeal.[98] I consider the reasoning in *Elfic* as *obiter* because the only relevant issue was the proper construction of section 477(2) of the *Corporations Law,* and *Elfic* is subject to the later statements of general principle by the High Court in *Fostif.*

[131] It is plain that the *crimes* of maintenance and champerty in Queensland have not existed since the commencement of the *Criminal Code* in 1901. The *torts* of maintenance and champerty have been "lying in state" since that time and the reasoning of the majority in *Fostif* support the submission that the torts ought to be offered a "decent common law burial". However, as in *Elfic Ltd v Macks,* the present application does not bring any cause of action based upon the tort of maintenance or champerty. As *Fostif* demonstrates it is necessary however, to survey the earlier authorities to attempt to identify any public policy considerations which may be relevant to the questions proposed by the application, namely, whether the funding agreements are unenforceable. It is not necessary to decide whether the torts still exist at common law in the absence of legislation abolishing them.

[132] As Gummow, Hayne and Crennan JJ said in *Fostif*, when considering a funding agreement is enforceable it is necessary to bear in mind that questions of illegality and public policy arise.[99]

[133] In accordance with the recommendations of the Law Commission each of the statutes in England, New South Wales, Victoria and South Australia have preserved a statutory carve out, in terms of the UK section 14(2) exempting from the operation of the amendment "any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal".

[134] The Victorian equivalent of section 14(2) is section 34(2) of the *Wrongs Act* 1958 (Vic) in respect of which Byrne J said in *Roux v Australian Broadcasting Commission*:[100]

> "In Victoria, by the *Abolition of Obsolete Offences Act* 1969, based on the English *Criminal Law Act* 1967, the criminal offences and the civil torts of maintenance and champerty were abolished, but by s 4(2) which is now s34(2) of the *Wrongs Act*, it is provided:
>
> > '(2) The abolition of criminal and civil liability for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as being otherwise illegal and any contract which would have been illegal and void before the commencement of the *Abolition of Obsolete Offences Act* 1929 on the ground that its making or performance

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98 *Elfic Ltd v Macks* [2003] 2 Qd R 125 per Davies JA [35].
99 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 434 [92].
100 [1992] 2 VR 577, 605.

> involved or was in aid of maintenance of champerty shall continue to be illegal and void after the said commencement'."

The position then in England and Victoria is that the illegality of contracts of maintenance and champerty is preserved, notwithstanding that the criminal and civil law foundation for this illegality has been swept away. The illegality, therefore, to the extent that it exists, must again depend upon public policy. This public policy is not that of medieval times, but a modern public policy which must have regard to litigation and its funding in the contemporary world (*Stevens v Keogh* (1946) 72 CLR 1, at 28, per Dixon J), but it is of some assistance to look at the abuses which the mediaeval lawyers sought to remedy by the application of the criminal law proscribing maintenance, champerty and barratry: see Winfield, 'The History of Maintenance and Champerty' (1919) 35 LQR 50. It is difficult to escape the impression from this analysis that the vice of both maintenance and champerty was not so much the support of litigation, but the illicit expectation of the maintainer of some improper gain from it.

Even before the passage of the English legislation of 1967, the courts in that country and in Victoria had been troubled by the ambit of the offences of maintenance and champerty. What circumstances sufficed in law to justify the support of litigation by a third party? What is the real and bona fide interest in litigation which would justify a stranger in intermeddling in it? These have been questions of great difficulty in which decisions, even of 50 years ago are of limited assistance. Any modern formulation must have regard to currently accepted notions at a time when much private litigation is funded by the State, by insurance companies or by trade unions; where class actions may involve the introduction of outside funding; where book debts are assigned or factored; where contingency fees are not looked upon with unqualified dismay: *Sheehan v Sheehan* (1990) FLC 92-129. It must cope with the acceptance by the community that the preparedness of a solicitor to fund an action for an impecunious client and to agree to recoup this expenditure from the proceeds of the action is in most cases seen as a commendable public service consistent with the best traditions of the profession: *Clyne v NSW Bar Association* (1960) 104 CLR 186, at p. 203-4. On the other hand, there is an obvious difficulty where an impecunious nominal plaintiff is funded by a wealthy supporter which has an interest in the outcome of the litigation without any risk of paying costs if the maintained plaintiff fails. Furthermore, such a maintainer is not easily amenable to the ordinary processes of the court, such as discovery or interlocutory directions: see, for example, *Hill v Archbold* [1968] 1 QB 686, at 695, per Lord Denning MR, and *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, at 690 (arguendo). Finally, the court would doubtless be astute to prevent any practice that smacked of trafficking in or speculating in causes of action. It may be that for these reasons public policy will play a different role where the maintenance takes the form of indemnity or funding rather than that of

assignment: YL Tan, 'Champertous Contracts and Assignments' (1990) 106 LQR 657.

The general consequence of these considerations has been a liberalisation of the law in this area, so that normally accepted funding arrangements are not treated as tortious or criminal acts. In a judgment which has commanded wide-spread approval, Danckwerts J in *Martell v Consett Iron Co Ltd* [1955] Ch 363, at 386-7, summed up the modern view stated at a time before the English legislation: 'A doctrine which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary. If it is right for members of a trade union to combine to assert the right of a trade unionist to his wages, and it is right for a number of manufacturers to combine to protect the freedom of an individual trader to make his goods, why is it wrong for persons whose livelihood or recreation will be adversely affected by pollution of waters to combine to defeat an aggression against the rights of one or more of them? What is the interest recognised by the law, and to be distinguished from 'a sentimental interest,' which exists in the cases of trade unionist and the persons who carry on a similar trade, but does not exist in the case of persons who possess fishing rights or who wish to preserve the purity of the waters of country's rivers or streams? In all these cases, persons combined, as Sir George Jessel said, lest they might be attacked in detail and they might lose all their cases owing to the great expense of defending them effectually . . . One is familiar with the former false 'legal aid societies,' usually consisting of one man, that supplied legal aid and advice for a percentage of the sum recovered. But the remedies of champerty and barratry should be competent to deal with that evil. Support of legal proceedings, based on a bona fide community of pecuniary interest or religion or principles or problems, is quite different and, in my view, the law would be wrong and oppressive if such support were to be treated as a crime or a civil wrong. But I do not believe that the law is in that condition.'

The position since abolition, cannot be less liberal: *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, at 702, per Lord Roskill." (my underlining)

[135] *Fostif* was applied and explained by the High Court in *Jeffery & Katauskas v SST Consulting*[101]. French CJ, Gummow, Hayne and Crennan JJ said as follows:[102]

"*Abuse of process*

25 The history of sanctions for abuse of process dates back to Anglo-Saxon times when the focus was largely on false accusations and the sanctions included loss of the accuser's tongue. By the time of Edward I, there was provision made by the Statute of Champerty

[101] *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75.
[102] *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75, 92 – 94.

for remedies against 'Conspirators, Inventors and Maintenors of false Quarrels, and Partakers thereof, and Brokers of Debates'. It seems that combination was not necessary to the action. Champerty, maintenance and barratry also featured prominently as early species of abuse of process.

26 The common law offences and torts of maintenance and champerty were abolished in the United Kingdom in 1967 and in New South Wales in 1995. The New South Wales legislation expressly provides that the Act 'does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act'. And the abolition of the offences and torts did not preclude the possibility that non-party funding of legal actions for reward or otherwise might give rise to an abuse of process. But to acknowledge that possibility is not to hold non-party funding of a litigant for reward to be an abuse of the process of the court. That proposition could not stand with the decision of this Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*.

27 An early statement of the power of any court to prevent abuse of its processes is found in an 1841 case, *Cocker v Tempest*:

> 'The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.'

That statement foreshadowed the contemporary approach in the United Kingdom and Australia which takes no narrow view of what can constitute 'abuse of process'. Nevertheless, certain categories of conduct attracting the intervention of the courts emerged in the nineteenth and twentieth centuries and included:

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

…

> 29 In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, Gummow, Hayne and Crennan JJ (with whom Gleeson CJ agreed in this respect) declined to formulate an overarching rule of public policy that would, in effect, bar the prosecution of an action involving an agreement to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation. Nor would they accept that there should be a rule which would bar the prosecution of some actions according to whether the agreement met some standards relating to the degree of control or the amount of the reward the funder might receive under the agreement. It was not shown that apprehensions that the funder might improperly interfere with the conduct of the proceedings could not sufficiently be addressed by 'existing doctrines of abuse of process and other procedural and substantive elements of the court's processes'.
>
> 30 It follows that an agreement by a non-party, for reward, to pay or contribute to the costs of a party in instituting and conducting proceedings is not, of itself, an abuse of the court's processes." (my underlining)

[136] As their Honours noted, abuse of process is not limited to the categories listed in paragraph 27, nor to those instances where the conduct constitutes the torts of maintenance or champerty. As their Honours also point out, abuse of process has a long history, and its development in our courts has seen it become a broader remedy than that which may have been available with respect to the torts of maintenance and champerty. Furthermore, the existence of a commercial funding agreement is not per se an abuse of the court's process.[103] Thus it is left open in an appropriate case for a defendant to seek to stay a commercially funded class action as an abuse of process. However, no such orders are pursued in the present case.

[137] The other procedural and substantive elements of the court's processes alluded to by their Honours in paragraph 29, include the court's power to make direct costs orders against commercial litigation funders, the requirement ordinarily imposed for the payment of substantial security for costs, the ability of the defendant to seek an order for early termination of the proceedings either as an abuse of process where such proceedings are manifestly groundless or without foundation or which serve no useful purpose, and finally, an application for summary judgment.[104] However, as their Honours recognised, there is no overarching rule of public policy which in effect bars the prosecution of actions funded by commercial litigation funders.

[138] French CJ, Gummow, Hayne and Crennan JJ summarised the position as follows:[105]

> "Once it is recognised first, that the UCPR precludes ordering costs against a non-party save in exceptional cases, and secondly, that the plaintiff's inability to pay costs goes only to questions of security, the

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[103] *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75, 94 -95.
[104] *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75, 94 -95 [31] – [32].
[105] *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75, 98 [42].

appellant's contention that prosecution of the proceedings constituted an abuse of process can be seen to depend upon one of two propositions:

- a general proposition condemning the funding for reward of another's litigation;

- a proposition that despite the provisions and principles governing security for costs and the UCPR's general inhibition against ordering costs against non-parties, those who fund another's litigation for reward must agree to put the party who is funded in a position to meet any adverse costs order.

As discussed earlier in these reasons, a general proposition of the kind first mentioned is not consistent with what was decided in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*. The second, more particular, proposition should not be accepted."

[139] In respect of *Fostif* , Heydon J said:[106]

"The court's procedure exists primarily to serve the function of enabling rights to be vindicated rather than profits to be made. *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* recognised that it was legitimate for third parties having no prior concern with the subject of the litigation to fund that litigation in return for profit, but it dealt only with circumstances where the funder had indemnified the plaintiffs against their liability for costs to defendants in a manner that would be practically effective."

[140] In *Deloitte Touche v JP Morgan*[107] Tamberlin and Jacobson JJ said in respect of Fostif as follows:[108]

"37 The majority Justices in *Fostif* approved, either expressly or impliedly, the views stated by Mason P in the Court of Appeal; per Gleeson CJ at [1], Gummow, Hayne and Crennan JJ at [63], [65]; Kirby J at [147].

38 Mason P observed at [132] that the Court's 'basal enquiry' is whether the role of the funder has corrupted, or is likely to corrupt, the processes of the Court to a degree that attracts the extraordinary jurisdiction to dismiss or stay the proceedings as an abuse of process; see also at [114].

39 This approach is reflected in the reasons of Gummow, Hayne and Crennan JJ at [91], [93] and [95]. Those reasons may be summarised as follows:

- There is no overarching rule of public policy that bars the prosecution of funded litigation by reference to the share of

[106] *Jeffery & Katauskas v SST Consulting* (2009) 239 CLR 75, 124 [111].
[107] (2007) 158 FCR 417.
[108] *Deloitte Touche v JP Morgan* (2007) 158 FCR 417, 423-424.

the proceeds or the degree of control over the litigation extended to the funder.

- The relevant question to ask is not whether the agreement, of itself, discloses champerty or maintenance; rather, it is necessary to identify what exactly is feared; in particular, what exactly is the corruption of the Court processes that is feared. By way of example, their Honours referred to such matters as inflaming damages, suppressing evidence or suborning witnesses.

- The question of whether there is an abuse of process is not solved by identifying a general rule of public policy that may be invoked by a defendant; each case must be determined on its own facts.

40 In our view, the approach urged upon us by the appellants is inconsistent with the principles stated by the majority. The appellants did not point to any specific way in which the arrangements were inimical to justice. This is because the appellants sought to characterise the Letter Agreement as an attempt to effect an invalid assignment of a bare right of action. Elsewhere in their submissions the appellants called it a de facto assignment.

41 But the reasons why equity would not permit the assignment of a bare right of action on the ground of public policy was that it savoured of maintenance; *Glegg v Bromley* [1913] 3 KB 474 at 489-490; *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 at 702.

42 The entire thrust of the reasons of the majority in *Fostif* is to reject the notion that a plaintiff can invoke maintenance and champerty as a general ground for the identification of an abuse of process. Yet that is precisely what the appellants seek to do in the present proceeding.

43 It is true, as the appellants submit, that strictly speaking, the reasons of the majority on the abuse of process issue were *obiter*. This is because the appeal was allowed upon the basis that the proceeding did not satisfy the rules for representative proceedings in the Supreme Court of New South Wales.

44 However, it would be unrealistic and impractical to suggest that the carefully considered views of the majority on the question of abuse of process can be ignored." (my underlining)

[141] *Fostif* was also considered by the Full Federal Court of Australia in a joint judgment of North, Emmett and Rares JJ in *IMF (Australia) Limited v Meadow Springs Fairway Resort Ltd*[109]. Their Honours said:[110]

> "While an arrangement with a litigation funder and the associated cost incurred in a case such as this was almost certainly not in contemplation of the High Court when the Universal Distributing Principle was propounded, no argument was advanced in the appeals that the remuneration to be received by IMF under the IMF Funding Agreement is outside the Universal Distributing Principle, by reason of its being tainted by champerty or maintenance. That is to say, no argument was advanced that the consideration that a liquidator agrees to pay to a litigation funder in realising a cause of action is unreasonable by reason of the doctrines of champerty and maintenance or some public policy against them. Such an argument, if it were advanced, would have little prospect of success in the present day (see *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at [1], [88], [92] and [137])."

[142] Recently, in *Taylor & Anor v Hobson & Ors*[111] Boddice J said:

> "[29] Although the historical reasons for the development of the principles of maintenance and champerty have little relevance in modern litigation, Courts remain vigilant to ensure, in the interests of public policy, there is no trafficking in litigation or speculating in causes of action for improper gain.
>
> [30] However, the increasing burden associated with the high costs of litigation has led to a recognition by Courts that principles of access to justice requires the allowance of funding of litigation in support of bona fide proceedings by third parties with no interest in the outcome, other than repayment and profit from that litigation.
>
> [31] As a consequence of these developments, the mere fact the proceeding is funded by a third party with no interest in the proceeding, beyond repayment, is itself insufficient to justify the intervention of the Court. Therefore, Lexon's funding of the proceeding in exchange for a share in any judgment or settlement sum is insufficient to warrant a stay or dismissal or the proceeding.
>
> [32] A stay or dismissal of proceedings will not be granted unless the interests of justice demand it. The focus in any application for dismissal or a stay of proceedings, on the grounds of abuse of process, is whether the arrangement corrupts or is likely to corrupt the Court process to such a degree as to justify the extraordinary jurisdiction of dismissal or stay of proceedings for abuse of process.

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[109] (2009) 253 ALR 240.
[110] *IMF (Aust) v Meadow Springs* (2009) 253 ALR 240, 258 [78].
[111] [2016] QSC 226.

[143] The learned author of *Heydon on Contract* provides a succinct statement as to the current status of the law in Australia:[112]

> "Formerly contracts involving trafficking in litigation, by which a third party agrees to fund the initiation of legal proceedings by a plaintiff against a defendant in return for a share of the proceeds (if any), were thought to be against public policy as involving maintenance or champerty.[113] This is not now so, at least where there is no abuse of process."

[144] I accept that passage is a short summary reflecting the law and that it is supported by the reasons of Tamberlin and Jacobson JJ in *Deloitte Touche v JP Morgan*.[114] The relevant question in respect of a commercial funding litigation agreement is to identify what exactly is feared and in particular "what exactly is the corruption of the court processes that is feared". The three examples given by Tamberlin and Jacobson JJ are the fear of inflammation of damages, a fear of suppression of evidence or a fear of suborning witnesses.[115]

[145] In the present case, GPC does not submit it holds any fear of suppression of evidence or suborning witness but does raise a fear of an inflammation of damages. GPC has attempted to demonstrate this by reference to the amendments to the Further Amended Statement of Claim which widened the area of affected waters significantly. Beyond the bare assertion of an inflammation of damages by reference to an amendment to the pleading there is no factual material or anything else to support the suggestion that damages have been inflamed. It may be that GPC is fearful that damages may be inflamed however that fear may be met firstly, by the appropriate particularisation of the damages claim, and secondly, by the necessity to disclose any expert evidence on the issue of the quantification of damages.

[146] The submission of GPC with respect to public policy is that the action brought on behalf of the plaintiffs funded, as it is, by a commercially motivated litigation funder has a tendency to "distort the curial process".[116] It is accepted that if there was an improper distortion of the curial process promoted by any contract then the contract would be held unenforceable. As is demonstrated above, courts look to the statutes of parliament for guidance upon public policy. That the courts must have regard to statutory intervention and its effect upon the common law is well accepted. In *PGA v The Queen*[117] French CJ, Gummow, Hayne, Crennan and Kiefel JJ said:[118]

> **"***Inductive and deductive reasoning*
>
> 29 This creative element of both inductive and deductive reasoning in the work of the courts in Australia includes the taking of such steps as those identified by Sir Owen Dixon in his address 'Concerning Judicial Method'. In his words, these are: (i)

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[112] JD Heydon, *Heydon on Contract*, Lawbook Co, 2019, 803 [20.660].
[113] Citing *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 694.

[114] *Deloitte Touche v JP Morgan* (2007) 158 FCR 417, 424 [39].
[115] *Deloitte Touche v JP Morgan* (2007) 158 FCR 417, 424 [39].
[116] T2-56/15.
[117] (2012) 245 CLR 355, 372-373.
[118] *PGA v The Queen* (2012) 245 CLR 355, 372 [29] - [30].

> extending 'the application of accepted principles to new cases'; (ii) reasoning 'from the more fundamental of settled legal principles to new conclusions'; and (iii) deciding 'that a category is not closed against unforseen instances which in reason might be subsumed thereunder'.
>
> 30 To these steps may be added one which is determinative of the present appeal. It is that where the reason or 'foundation' of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the case law, is no longer maintained, the first rule has become no more than a legal fiction and is not to be maintained."

[147] In *Trident General Insurance Co Limited v McNiece Bros Pty Ltd*[119] Mason CJ and Wilson J said:

> "Moreover, as we have seen, the traditional rules, which were adopted here as a consequence of their development in the United Kingdom, have been the subject of much criticism and of legislative erosion in the field of insurance contracts. Regardless of the layers of sediment which may have accumulated, we consider that it is the responsibility of this Court to reconsider in appropriate cases common law rules which operate unsatisfactorily and unjustly. The fact that there have been recent legislative developments in the relevant field is not a reason for continuing to insist on the application of an unjust rule as it stood before its alteration by the *Insurance Contracts Act 1984* (Cth)."

[148] In *Burragubba v Queensland*[120] Edelman J said:

> "19 Another example, which might be a progeny of the first limb of the equity of the statute, is the role of statute in developing the common law. In *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [24], Gleeson CJ, Gaudron and Gummow JJ quoted with approval from Lord Diplock in *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743, albeit noting the context of a nation with a single Parliament:
>
> > 'Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.'
>
> 20. An application of this approach differs from the form and style of reasoning in many of the older cases involving the equity of the statute. It does not purport to be an application of the statute to the facts of a case. Rather, it is a legitimate recognition that the

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[119] (1988) 165 CLR 107, 123.
[120] (2015) 236 FCR 160 [19] – [21].

> common law has always been developed, incrementally, by reference to underlying, and structural, norms and principles. The existence of uniform Australian legislation on a subject is undoubtedly a potential source of such structural societal norms.
>
> 21. Nevertheless, caution should be applied before identifying some underlying norm in uniform legislation which is capable of general application to develop the common law. The need for caution arises because the statute has not itself extended to that area of common law. It may be that the legislative intention, revealed by the terms of the statute, involved a positive decision to create a rule of limited application rather than one supporting a new underlying norm capable of general application."

[149] As discussed above, in the present application it is not necessary to decide whether the common law has developed such that the torts of maintenance and champerty might properly be considered obsolete, and I decline to offer them a burial. However, it is necessary to have reference to the effect of statutes upon the asserted public policy ground for striking down the funding agreements, namely, "the tendency to distort the curial process".[121]

[150] GPC argue that the failure of Queensland Parliament to enact legislation similar to that which has been enacted in England, New South Wales, Victoria and South Australia extinguishing the crimes and torts of maintenance and champerty, supports their submission that their remains a public policy against contracts for commercial litigation funding which may distort the curial process. The difficulty with this submission is, as expressed above, firstly, that the *crimes* of maintenance and champerty need not be extinguished by any further statute, because they have been extinguished by the *Criminal Code* upon enactment. Secondly, the current application does not bring a cause of action based on the *torts* of maintenance. More importantly however, as reflected in the cases discussed above, all of the legislation which extinguishes the torts and crimes of maintenance and champerty have preserved their effect with respect to contracts, and provide that nothing in the legislation affects any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. An inquiry as to what is the public policy must be considered in light of the provisions of Part 13A of the *Civil Proceedings Act* (Qld) 2011.

7. Part 13A of the *Civil Proceedings Act* 2011 (Qld)

[151] Part 13A of the *CPA* (Qld) came into effect on 11 November 2016. Part 13A is titled "Representative Proceedings in Supreme Court" and allows for a class action regime to be implemented in Queensland adopting largely the New South Wales class action scheme. Pursuant to s 103B if seven or more persons have claims against the same persons and the claims arise out of similar or related circumstances giving rise to substantial common issues of law or fact, a class action proceeding may be started. The effect of s 103D(1) (in conjunction with the definition of group member in s 103A) is that all persons who fit into the class become group members subject to the right of the group member to opt out at a date fixed by the court.[122]

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[121] This is the same argument acknowledged in *Fostif* at [90] and discarded at [91] and [93].
[122] *Civil Proceedings Act* (Qld) s 103G.

[152] Section 103J provides protection to a defendant against low value nuisance claims, for example where the costs to the defendant of identifying the group members and distributing to them any amounts ordered to be paid is excessive having regard to the total of the amounts to be ordered.

[153] Section 103K is an important section. It provides:

> "**103K Discontinuance of proceeding in particular circumstances**
>
> (1) The court may, on application by the defendant or on its own initiative, order that a proceeding no longer continue under this part if it considers it is in the interests of justice to do so because—
>
> (a) the costs that would be incurred if the proceeding were to continue under this part are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
>
> (b) all the relief sought can be obtained by way of a proceeding other than a proceeding under this part; or
>
> (c) the proceeding will not provide an efficient and effective way of dealing with the claims of the group members; or
>
> (d) a representative party is not able to adequately represent the interests of the group members; or
>
> (e) it is otherwise inappropriate that the claims be pursued by way of a proceeding under this part.
>
> (2) For subsection (1)(e), it is not inappropriate for claims to be pursued by way of a proceeding under this part merely because the persons identified as group members for the proceeding—
>
> (a) do not include all persons on whose behalf the proceeding might have been brought; or
>
> (b) are aggregated together for a particular purpose including, for example, a litigation funding arrangement.
>
> (3) If the court dismisses an application under this section for a proceeding under this part, the court may order that no further application under this section be made by the defendant in the proceeding except with the leave of the court.
>
> (4) For subsection (3), leave may be granted subject to the conditions about costs the court considers just."

[154] Section 103L provides:

> "**103L Effect of discontinuance order under this part**
>
> If the court makes an order under section 103I, 103J or 103K that a proceeding no longer continue under this part –

(a) the proceeding may be continued as a proceeding by the representative party on the party's own behalf against the defendant; and

(b) on the application of a person who was a group member for the proceeding, the court may order that the person be joined as an applicant or plaintiff in the continued proceeding."

[155] As set out in s 103L where orders are made pursuant to s 103I (where there are fewer than seven group members) or 103J (where there are nuisance claims) or 103K (the interests of justice test) the court may order the proceeding be discontinued as a representative proceeding pursuant to Part 13A and continued as an ordinary action. Section 103K(1) vests broad powers in the court to stop a representative proceeding or class action. In particular s 103K(1)(c) shows that it is the aim of Part 13A proceedings to provide an efficient and effective way of dealing with large scale litigation involving multiple plaintiffs, one defendant and the same or similar issues which cause common questions to arise.

[156] Section 103K(1)(e) provides a very broad discretion for the court to stop a class action "if it considers it is in the interests of justice to do so because it is … inappropriate that the claims be pursued by way of a proceeding under this part". More importantly section 103K(2)(b) makes it plain that it is parliament's intent that persons may be identified as group members and grouped together for a particular purpose which includes "a litigation funding arrangement".

[157] It is noteworthy that a litigation funding arrangement is not defined in the Act. Consequently, there is no guidance as to what degree of control, if any, is permissible for a litigation funder to have. Nor is there any indication, as to what level of commercial remuneration a litigation funder is entitled to in funding a group of members.

[158] Section 103P allows any group member to apply to the court to remove a representative party and substitute another group member as a representative party or alternatively make any other orders considered appropriate. The key provision, however, in Part 13A is section 103R which provides:

"**103R Settlement and discontinuance**

(1) A representative proceeding may not be settled or discontinued without the approval of the court.

(2) If the court gives approval under subsection (1), it may make any orders it considers just for the distribution of money paid under a settlement or paid into the court.

[159] The ability of the Supreme Court to make "any orders it considers just for the distribution of money paid under settlement or paid into court" is a significant power to ensure that class action litigation is conducted for, and in the interests of, the group members and not for, and in the interests of, a litigation funder. The power reposed in the court pursuant to s 103R(2) to determine what proportion of a settlement sum is paid to a litigation funder prevails over any validly constituted contractual contract with respect to the remuneration of the litigation funder.

[160] Section 103ZA also provides the court with a broad general power to make orders. Furthermore, the Representative Proceedings Practice Direction requires representative proceedings to be closely managed by the presiding judge.

[161] Sections 103ZB and 103ZC set out the powers of the court to make costs orders.

[162] It is noteworthy that s 103K(2) differs from the Federal Court equivalent in section 33N of the *Federal Court of Australia Act* 1976 (Cth) in only one aspect, namely, section 33N does not contain a provision similar to s 103K(2). The Federal Court class action regime commenced with amendments to the *Federal Court of Australia Act* which took effect from March 1992. Several years later Victoria amended the *Supreme Court Act* 1986 (Vic) to adopt the Federal Court class regime with the introduction of Part 4A in the Victorian Act.

[163] The New South Wales *Civil Procedure Act* 2005 (NSW) ('**CPA (NSW)**') was substantially amended in 2010 to update the New South Wales class action regime. Importantly, and for the first time, section 166(2) was introduced in the same wording as section 103K(2) of the *CPA* (Qld). That is, the Queensland legislative scheme expressly adopted the New South Wales approach in accepting as appropriate the aggregation of persons together as a 'group' by entering into a litigation funding arrangement.

[164] The explanatory notes to the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill* 2016 (Qld) does not draw a distinction between the difference in approaches in favouring the New South Wales legislation over the Federal Court and Victorian legislation. The Queensland explanatory memorandum rather reads generally as follows:

> "The amendments to the CP Act will enact a statutory regime modelled on substantially similar legislative schemes in place in the Federal Court of Australia (under the *Federal Court of Australia Act 1976* (Cth) (Part IVA)); in Victoria (under the *Supreme Court Act 1986* (Vic) (Part 4A)) and in New South Wales (under the *Civil Procedure Act 2005* (NSW) (Part 10)).
>
> This new statutory regime will enhance access to justice and promote efficiency in the administration of justice by providing a clear and comprehensive set of procedures for the conduct and management of representative proceedings. It provides for matters which include the threshold requirements to commence a representative proceeding, standing, group (or class) membership, settlement, discontinuance of proceedings, costs, distribution or payment of money to group members and appeals."

[165] The Explanatory Memorandum for the Bill introducing Part 10 of the *CPA* (NSW) explained that the variation to the Federal legislation was intended to affirm the effect of the decision in *Multiplex Funds v P Dawson Nominees* (2007) 164 FCR 275. The *Courts and Crimes Legislation Further Amendment Bill* 2010 (NSW) sets out the following:

> "Proposed section 166 (2) makes it clear that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the view taken by the Full Court of the Federal Court in relation to the operation of Part IVA of the *Federal Court of Australia Act 1976* of the Commonwealth in *Multiplex Funds Management Limited v Dawson Nominees Pty Limited* [2007] FCAFC 200."

[166] Of the new s 166(2), the second reading speech, the New South Wales Attorney-General (The Honourable John Hatzistergos) recorded in the New South Wales legislative council Hansard 24 November 2010 provides:

> "Two additional procedural rules also have been included. The first additional rule clarifies that representative proceedings may be taken against several defendants, even if not all group members have a claim against all defendants. The provision overcomes the contrary view of the Commonwealth expressed in relation to the operation of part IVA of the *Federal Court of Australia Act* 1976 in *Philip Morris (Australia) Ltd v Nixon* [2000] 170 ALR 487.
>
> The second rule clarifies that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the view taken by the Full Court of the Federal Court in relation to the operation of the Federal part IVA in *Multiplex Funds Management Limited v Dawson Nominees Pty Limited* [2007] 244 ALR 600. The Government has taken the opportunity to prescribe this view in legislation to avoid unnecessary interlocutory battles and appeals on this point. Both of these new procedural rules arose out of the 2009 Commonwealth Attorney-General's Department's report on access to justice and the Victorian Law Reform Commission's report, "Civil Justice Review", in 2008. The new regime established by these amendments will give the New South Wales Supreme Court an efficient and effective procedure to deal with representative proceedings. The broad consistency between this bill and the existing Federal and Victorian regimes also will provide New South Wales litigants with a greater degree of certainty and clarity."

[167] Given that Queensland Parliament largely adopted the New South Wales class action regime it must be taken to have been aware of the differences between the New South Wales class action regime and the Federal and Victorian class action regimes, and in particular, the reason for the introduction of s 166(2) of the *CPA* (NSW).

[168] In *Multiplex Funds v P Dawson Nominees*[123] French J (as his Honour then was) said:[124]

> "There may be policy questions, for consideration by the legislature, relating to the role of litigation funders in representative proceedings. The Court is given a discretion under s 33N(1)(d) to order that a proceeding no longer continue under Pt IVA of the *Federal Court of*

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[123] (2007) 164 FCR 275.

[124] *Multiplex Funds v P Dawson Nominees* (2007) 164 FCR 275, 277 [1].

Australia Act 1976 (Cth) where it is satisfied that it is in the interests of justice to do so because '… it is otherwise inappropriate that the claims be pursued by means of a representative proceeding'. The broad evaluative judgment permitted by the term 'otherwise inappropriate' is not, in my opinion a charter to introduce a quasi legislative rule effectively excluding from representative proceedings groups defined by reference to accession to an agreement with a litigation funder."

[169] In *Multiplex* Jacobson J explained the factual background of the as follows:[125]

"39 On 18 December 2006, P Dawson Nominees Pty Ltd ('Dawson') commenced representative proceedings under Pt IVA of the Federal Court of Australia Act 1976 (Cth) ('the Act') against Multiplex Ltd ('Multiplex') and a related company, Multiplex Funds Management Ltd ('MFM'). The proceedings arise out of substantial cost over-runs and delays in the construction of the Wembley Stadium in the United Kingdom, by a subsidiary of Multiplex.

40 On 18 December 2006, P Dawson Nominees Pty Ltd ('Dawson') commenced representative proceedings under Pt IVA of the Federal Court of Australia Act 1976 (Cth) ('the Act') against Multiplex Ltd ('Multiplex') and a related company, Multiplex Funds Management Ltd ('MFM'). The proceedings arise out of substantial cost over-runs and delays in the construction of the Wembley Stadium in the United Kingdom, by a subsidiary of Multiplex.

41 The essential question which arises on these appeals is whether Finkelstein J erred in refusing to make an order, sought by Multiplex and MFM under s 33N(1) of the Act, that the proceeding no longer continue as a representative proceeding under Pt IVA.

42 The principal contention of the Multiplex parties was that his Honour ought to have been satisfied that it was in the interests of justice to make an order under s 33N(1)(d) because it was 'otherwise inappropriate' that Dawson's claims be pursued by means of a representative proceeding.

43 The question of the appropriateness of the representative proceeding was said to turn upon the definition of the class represented by Dawson. The definition of the class comprised three elements. The Multiplex parties contended that the third element of the definition was inconsistent with the terms and policy of representative proceedings under Pt IVA.

44 The third element of the definition brought within the class, as an essential precondition for membership, investors who had, at the

[125] *Multiplex Funds v P Dawson Nominees* (2007) 164 FCR 275, 283-284 [39] – [47].

commencement of the representative proceeding, entered into a litigation funding agreement with International Litigation Funding Partners Inc ('ILF').

45 The Multiplex parties made two principal grounds of attack on the compulsory litigation funding requirement. The first was that it required group members to take the positive step of 'opting in' to the proceeding and was therefore contrary to the 'opt out' nature of representative proceedings under Pt IVA of the Act.

46 The second objection was that the litigation funding agreement to be entered into between group members and ILF imposed a real and substantial fetter upon their ability to opt out of the proceeding if they chose to do so. This was said to be contrary to their rights under s 33 J of the Act.

47 The Multiplex parties also contended that the discretion under s 33N(1)(c) was enlivened because the representative proceeding would not provide an efficient means of dealing with the claims of group members. This was because, it was argued, the Multiplex parties will be exposed to the potential of other representative proceedings by other investors who may enter into different funding arrangements made by firms of solicitors other than those who have been retained by the Dawson group members."

[170] In dismissing the arguments of the *Multiplex* parties Jacobson J concluded as follows:

"194 First, I do not consider that the funding criterion imposed an 'opt in' requirement. This is because s 33J(2) relates only to existing proceedings. There is nothing in Pt IVA which precludes persons from reaching agreement, prior to the commencement of the proceeding, as to the definition of the group, apart from the threshold requirements of s 33C(1). At the risk of repetition, this allows a proceeding to be commenced by less than the entirety of the potential class.

195 Second, for reasons given above, I do not consider that the practical impediments to opting out, created by the funding agreement, contravene s 33J(2).

196 Third, the thrust of the other submissions of the Multiplex parties as to the 'inappropriateness' of the proceeding stemmed from the definition of the class and its implications for the course of the proceedings. However, the implications, to which the Multiplex parties objected, were theoretical and not demonstrated by evidence.

197 The principal implication to which the Multiplex parties pointed was the risk of other representative proceedings. There was some overlap on this issue with the 'inefficiency' ground.

> 198 There is force in the submission that the narrowness of the group and its self-interest may provide legitimate concerns for the administration of justice. But the regime laid down in Pt IVA permits such proceedings to be commenced. What is required to enliven the discretion to order a discontinuance under s 33N(1)(d) is that the risks have been established to the extent necessary for the Court to attain the requisite state of satisfaction." (my underlining)

[171] The insertion of section 166(2) of the *CPA* (NSW) represents the New South Wales Parliament's statutory approval of the approach of the Full Federal Court in *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd* as representative of contemporary public policy.[126] The adoption in Queensland of precisely the same words in section 103K(2) similarly represents the Queensland Parliament's statutory adoption of the *Multiplex* decision as representative of contemporary public policy. It is important to note that Multiplex satisfied the definition of a class by reference to membership of a group member with a commercial litigation funder.

[172] As the Queensland Parliament specifically adopted the wording of section 166(2) of the *CPA* (NSW) in section 103K(2) of the *CPA* (Qld), it may be concluded that that the regime laid down by Part 13A *CPA* (Qld) permits class action proceedings to be commenced and continued in circumstances where the class is defined by reference to entry as a group member, on the basis of the acceptance by the group member, of a commercial litigation funding arrangement. Naturally, s 103K(2) ought not to be read alone but together with the balance of Part 13A and in particular section 103R which prevents a commercial litigation funder from enforcing the provisions with respect to remuneration in the commercial litigation funding agreement without the express approval of the court. Furthermore, the terms and conditions of the litigation funding agreement are required to be disclosed by the parties to the defendant. The requirement to disclose the provisions of the litigation funding agreement are imposed by clause 8.2 of the Representative Proceedings Practice Direction.

[173] Recently, in *Brewster v BMW Australia Ltd*[127], the New South Wales Court of Appeal said:

> "Thus, by s 166(2), the Legislature has unambiguously precluded any submission that the default open class policy reflected in Part 10 is incompatible with a class defined by a particular funder. It has also in terms recognised litigation funding in the context of representative proceedings."

[174] In *Giles v Thompson*[128] Steyn LJ (in the Court of Appeal) said "[a]nd there is, of course, no more cogent evidence of a change in public policy than the expression of the will of Parliament". The proposition that legislation "reflects Parliament's assessment of the present state of public policy" is well accepted.[129]

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126 *Multiplex Funds Management Limited v Dawson Nominees Pty Ltd* (2007) 164 FCR 275.
127 [2019] NSWCA 35 [74].
128 [1993] 3 All ER 321, 331.
129 *R (Factortame Ltd) v Secretary of State for Transport* [2003] QB 381, 407 [61].

[175] The public policy which is evidenced in Part 13A of the *CPA* (Qld) and in particular sections 103K to 103R, to paraphrase the reasons of Jacobson J in *Multiplex*[130], is that Part 13A lays down a regime that permits class action proceedings to be funded by a commercial litigation funder. There is nothing in evidence to suggest that the funding agreements are not what they appear to be, namely, a standard commercial litigation funding agreement. The terms of the agreement as analysed above, are sufficiently similar to the agreements in *Multiplex.* This may be observed by referring to paragraph 170 to 188 of (the later) decision *Brookfield Multiplex v ILFP*[131]. Even if the terms were different, that would not be a basis in public policy, to suggest the agreements were unlawful.[132] Paragraphs 86 and 92 of *Fostif*, do not support the conclusion that "control" or "improper control" is an element of the remnants, if any, of the torts of maintenance and champerty.

[176] If I am wrong in this conclusion, I do not consider that the litigation funding agreements provide any level of unlawful or improper control in LCM.

[177] The agreements do not assign any cause of action to LCM nor assign any existing fruits of any litigation but rather effect a contractual promise, subject to court supervision (s 103R), to share in a potential fund, which may or may not ever come into existence. This might properly be viewed as a partial assignment of future proceeds. Such a partial assignment is not against public policy, it is permitted in class actions by Part 13A.

[178] GPC's central submission is that *Fostif* provides no guidance in Queensland as Queensland has not introduced legislation abolishing the torts of maintenance and champerty. GPC support this submission by reliance on the reasons of Gummow, Hayne and Crennan JJ at paragraph 85 in *Fostif* underlined below. Paragraph 85 however ought not to be read alone and ought to be considered with the entirety of the judgment of Gummow, Hayne and Crennan JJ. In paragraphs 83 to 86 of the judgment their Honours said as follows:

> "83 In the present matters, the appellants did not contend that maintenance or champerty provided any defence to the claims made against them. But they did contend that the nature of the funding arrangements made and to be made by Firmstones with retailers warranted the conclusion reached by Einstein J that those arrangements constituted an abuse of process.
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> 84 The appellants sought to encapsulate their submissions on this aspect of the appeals by describing Firmstones' conduct as 'trafficking' in the litigation. Expressed in that way, the appellants' submission may be understood as conflating two separate propositions: first, that the funding arrangements constituted maintenance or champerty and, secondly, that for the maintainer to institute and continue proceedings, in the name of or on behalf of plaintiffs who were thus maintained, was an abuse of process which could be avoided only by ordering a stay of the proceedings. The second of these propositions, about abuse of process, assumed that maintenance and champerty give rise to

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130 *Multiplex Funds v P Dawson Nominees* (2007) 164 FCR 275, 300 [198].
131 (2009) 180 FCR 11.
132 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 434 [92].

public policy questions beyond those that would be relevant when considering the enforceability of the agreement for maintenance of the proceedings as between the parties to the agreement.

85 In jurisdictions where legislation has been enacted to the same effect as the Abolition Act, the premise for the second proposition identified is not valid; there are several reasons to reject it. It is neither necessary nor appropriate to decide what would be the position in those jurisdictions where maintenance and champerty may remain as torts, perhaps even crimes.

86 First, and foremost, s 6 of the Abolition Act preserved any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. It preserved no wider rule of law. The Abolition Act abolished the crimes, and the torts, of maintenance and champerty. By abolishing those crimes, and those torts, any wider rule of public policy (wider, that is, than the particular rule or rules of law preserved by s 6) lost whatever narrow and insecure footing remained for such a rule. As Fletcher Moulton LJ had rightly said, nearly a century ago, the law of maintenance and champerty, even then, suffered: 'from the vice of being based upon definitions of ancient date which were framed to express the law at a time when it was radically different from what it is at the present day.' Secondly, the asserted rule of public policy 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. As Fletcher Moulton LJ had also said, it was then 'far easier to say what is not maintenance than to say what is maintenance'. No certain rule would emerge because neither the content nor the basis of the asserted public policy is identified more closely than by the application of condemnatory expressions like 'trafficking' or 'intermeddling', with or without the addition of epithets like 'wanton and officious'." (my underlining)

[179] In this regard GPC adopted the position which found success in New Zealand as a 'non-abolition State' that the reasoning of *Fostif* does not apply.[133] It is one thing to accept that by paragraph 85 the logic of Gummow, Hayne and Crennan JJ in *Fostif* is *obiter* in Queensland, it is another to accept that the reasons are unpersuasive or irrelevant in Queensland. The two conflated propositions referred to in paragraph 84 in *Fostif* must be examined. The first is controversial, namely that where a commercial funding agreement exists it would ordinarily constitute both maintenance and champerty. The second proposition, namely, that maintenance is an abuse of process which may only be avoided by ordering a stay of proceedings, does not accord, as their Honours reasoned, with powers vested in courts in modern times. More importantly, in attempting to ascertain the public policy questions said to found the torts of maintenance and champerty, and the public policy questions relevant to an abuse of process, their Honours reflected that the asserted public policy considerations underpinning

[133] See *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91 [37] and [38] per Elias CJ, McGrath, William Young and Glazebrook JJ and *PricewaterhouseCoopers v Walker* (2018) 1 NZLR 735 [57] per Glazebrook, Arnold, O'Regan and Ellen France JJ and by Elias CJ [117].

maintenance and champerty are incapable of closer identification, at least in modern times.[134]

[180] The description of the evil the policy was meant to cure as "trafficking or intermeddling" with or without the epitaphs "like wanton and officious" do not assist at all. Abuse of process has developed its own jurisprudence. As their Honours point out, even if the litigation funder has control of litigation and is expected to reap a significant profit from litigation those elements do not "alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process."[135] As set out above, and as commented by their Honours, the abolition acts always included the statutory carve out with respect to contracts.[136] As the House of Lords has held,[137] an essential element for the existence of the tort was the statutory declaration of maintenance and champerty as a crime, the tort coming into existence after the commission of the crime and the suffering of special damage.

[181] If *Neville's* case accurately represents the law of maintenance and champerty in England, and as the crimes of maintenance and champerty do not exist in Queensland, then the logical conclusion is the torts of maintenance and champerty no longer exist in Queensland. The difficulty with a willing acceptance of that proposition is that the older English cases and the modern English cases do not easily sit together. Hence the necessity for the vague and unhelpful expressions which were identified in paragraph 86 by the High Court in *Fostif*. The present application however deals only with a representative proceeding or class action pursuant to Part 13A and for the reasons expressed, a commercial litigation funding arrangement entered into with a commercial litigation funder in respect of a Part 13A proceeding is a lawful arrangement.

[182] I do not accept that the New Zealand authorities provide any useful assistance but rather I take guidance from the High Court in *Fostif*. Hong Kong, like Queensland, does not have an abolition statute yet its Court of Final Appeal similarly took guidance from *Fostif*. In *Unruh v Seeberger*[138], Ribeiro PJ, with (whom Li CJ, Bokhary PJ, Chan PJ and McHugh NPJ said:

> 94. Clearly, this 'common interest' category is not closed. Public policy is likely to regard groups and associations pursuing legitimate objectives as possessing a sufficient common interest in related litigation to warrant their exclusion from the scope of maintenance and champerty. One example is *Martell v Consett Iron Co Ltd* where it was held that an association formed to protect fisheries and to prevent the pollution of rivers had a sufficient common interest for it lawfully to support an action brought by members who claimed that their fishery was being polluted by effluents from the defendant's ironworks.
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> 95. A second excluded category involves what might today be referred to as cases involving 'access to justice' considerations. In Hong Kong, Article 35 of the Basic Law recognizes access to the

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[134] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 433 [86].
[135] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 433 [88].
[136] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 433 [86].
[137] See discussion of *Neville's* case at [181] above.
[138] (2007) 10 HKCFAR 31.

courts as a fundamental right. It has never been a defence to an action nor a ground for a stay to show that the plaintiff is being supported by a third person in an arrangement which constitutes maintenance or champerty. Neither does liability for maintenance or champerty depend on the action or the defence being bad in law. It follows that an attack on an arrangement said to constitute maintenance or champerty could well result in a claim which is perfectly good in law being stifled where the plaintiff, deprived of the support of such an arrangement, is unable to pursue it. This is a powerful argument for such cases to be excluded from the ambit of maintenance and champerty. This was recognized by the Privy Council in *Ram Coomar Coondoo v Chunder Canto Mookerjee* where their Lordships stated:

> '... a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.'

96. Lord Phillips of Worth Matravers MR in *R (Factortame Ltd) v Transport Secretary* (No 8) recently placed conditional fees in the same context, stating:

> 'Conditional fees are now permitted in order to give effect to another facet of public policy – the desirability of access to justice. Conditional fees are designed to ensure that those who do not have the resources to fund advocacy or litigation services should none the less be able to obtain these in support of claims which appear to have merit.'

97. It is again obvious that this access to justice category is not static. The development of policies and measures to promote such access is likely to enlarge the category and to result in further shrinkage in the scope of maintenance and champerty. Different measures, whether statutory or judicial, may be taken in different jurisdictions. Here in Hong Kong, a litigant who is funded by the Supplementary Legal Aid Scheme is required to make a contribution out of recovered proceeds for the benefit of the Fund. In England and Wales, conditional (but not contingency) legal fee agreements have received statutory support in certain types of cases. This has entailed the development of after the event insurance against adverse costs orders. The development of multi-party litigation or class actions raises questions concerning the conduct of promoters and funders of such litigation.

98. Thirdly, there exists a miscellaneous category of practices accepted as lawful even though, as pointed out by Gummow,

Hayne and Crennan JJ in the recent decision of the Australian High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*, such practices do not differ in substance from practices which have traditionally been roundly condemned. Their Honours refer to the sale and assignment by a trustee in bankruptcy of an action commenced in the bankruptcy to a purchaser for value; and the development of the doctrine of subrogation as applied to contracts of insurance as instances.

C.5D The current approach to maintenance and champerty

99. The foregoing discussion shows that the thrust of legal development has been (as Fletcher Moulton LJ pointed out) to carve out areas of conduct for exclusion from liability, forming what was referred to in *Campbells Cash and Carry* as a 'patchwork of exceptions and qualifications'. But by what criteria is one able to determine that certain conduct *does* attract liability under those heads? That question translates into one asking: What are the considerations of modern public policy which result in conduct being characterised as maintenance or champerty? In particular, what public policy considerations result in a contract being vitiated on grounds of maintenance or champerty? I would make four points in answer.

100. In the first place, the traditional legal policies underlying maintenance and champerty continue to apply although they must substantially be qualified by other considerations. Thus, the mischief to be discouraged by the law of maintenance is still 'officious intermeddling' in litigation, in particular where this results in oppression of the person against whom the action is brought and possibly if it may result in the general encouragement of litigiousness. Thus, the Privy Council in *Ram Coomar Coondoo v Chunder Canto Mookerjee*, recognized that funding a poor person's litigation might advance the cause of justice, but their Lordships added that such funding agreements 'ought to be carefully watched' because of the risk, among other things, that the arrangement may involve 'abetting and encouraging unrighteous suits, so as to be contrary to public policy'."

101. The public policy against champerty has traditionally involved two concerns and continues to do so.

> (l) The first is that an agreement to share in the spoils of litigation may encourage the perversion of justice and endanger the integrity of judicial processes. As Lord Denning MR put it in *In re Trepca Mines Ltd* (No 2): 'The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.'

(m) Next, a champertous arrangement may be objectionable in that it involves a stranger to the litigation in 'trafficking' or 'gambling' in the outcome of the litigation. Thus, in *Trendtex Trading Corporation v Credit Suisse*, an assignment was struck down as champertous because it "... involved the possibility, and indeed the likelihood, of a profit being made, [by a third party with no genuine commercial interest in the transaction] out of the cause of action … [which] manifestly 'savours of champerty,' since it involves trafficking in litigation – a type of transaction which, under English law, is contrary to public policy." Such activity is obviously unacceptable to the court which sees its role as the administration of justice and not the provision of a market for speculators in litigation.

102. Secondly, the fact that an arrangement may be caught by the broad definitions of maintenance or champerty is not in itself sufficient to found liability. The totality of the facts must be examined asking whether they pose a genuine risk to the integrity of the court's processes. In *R (Factortame Ltd) v Transport Secretary (No 8)*, Lord Phillips MR stated: '... one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.' It is not enough simply to say that it is the type of agreement which "savours of" champerty.

103. Thirdly, countervailing public policies must be taken into account, especially policies in favour of ensuring access to justice and of recognizing, where appropriate, legitimate common interests of a social or commercial character in a piece of litigation. The traditional public policies against intermeddling in litigation must be weighed against such competing values and if the balance is in favour of the latter, the conduct complained of should not be regarded as contrary to public policy.

[183] With the acknowledgement that Queensland does not have an 'Abolition Act' as such but has both the *Criminal Code* 1899 (Qld) and Part 13A of the *Civil Proceedings Act* 2011 (Qld), the funding agreement cannot be found to be unlawful. I am of the view that s 103K(2)(b) of the *Civil Proceedings Act* does not impliedly, and for all purposes, abolish the torts of maintenance and champerty but I do take the view that s 103K(2)(b) together with the balance of Part 13A, authorises commercial litigation funding agreements in respect of "class actions" in Queensland.

8. Common Fund Order

[184] The applicants seek an alternative order with the granting of a common fund order. As the applicants have succeeded on a primary relief it is unnecessary to make a common fund order.

[185] Had I concluded that the agreements were unenforceable then I would have adopted the approach of the Full Court of the Federal Court in *Westpac Banking Corporation v Lenthall*[139] and the New South Wales Court of Appeal in *BMW Australia Ltd v Brewster*[140]. I would have considered it appropriate to make a common fund order in terms of the order sought.

9. Conclusion

[186] The funding agreements which are the subject of the application do not involve unlawful conduct or purpose and are not prejudicial to the administration of justice. To the contrary the funding agreements accord with the public policy of Part 13A of the *Civil Proceedings Act* 2011 (Qld). In those circumstances I make the following declarations:

1. The agreement titled "*Representative Proceeding Funding Agreement, Representative, The 2017 Gladstone Fisheries Scheme*" between LCM Operations Pty Ltd, Murphy Operator Pty Ltd, Tobari Pty Ltd and SPW Ventures Pty Ltd is not, by reason of maintenance, champerty or public policy, unenforceable; and

2. The agreements titled "*Representative Proceeding Funding Agreement, Member, The 2017 Gladstone Fisheries Scheme*" between LCM Operations Pty Ltd and funded group members are not, by reason of maintenance, champerty or public policy, unenforceable.

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[139] (2019) 366 ALR 136.
[140] (2019) 366 ALR 171.