

M+R Reporter

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Editor's Note

We have the tobacco industry to thank for the developments covered in this issue of the Reporter. The first article concerns litigation lending and the second, new legislation that introduces serious sanctions for those who destroy documents required in litigation.



Mark Attard
Partner

LITIGATION LENDERS GIVEN GREEN LIGHT

Campbells Cash & Carry Pty. Limited & Ors. -v- Fostif Pty. Limited & Ors.

High Court of Australia

30 August 2006

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The High Court, by majority of 5-2, has recently approved a litigation lending scheme despite stern criticism by the minority. The Appeal to the High Court involved a representative proceeding brought by tobacco retailers seeking a refund of licence fees paid to tobacco wholesalers. In 1997, the High Court held that such licence fees were invalid. Subsequently, the Court held that retailers could recover licence fees paid to wholesalers.

In 2002, some 9,500 smaller retailers brought proceedings against two of the largest tobacco wholesalers however, those proceedings were settled just prior to judgment. This litigation was funded by litigation funder Insolvency Management Fund Limited (IMF).

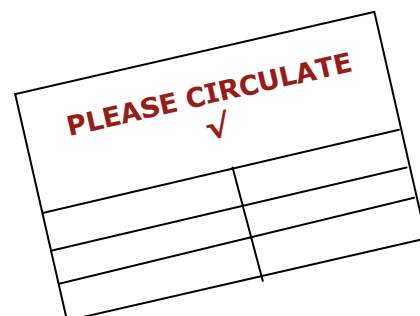
At about the same time, a firm of chartered accountants, Firmstones, another litigation funder, acting for about 900 retailers, commenced recovery proceedings and managed to obtain refunds for their clients. Despite these successes, there was still a significant volume of licence fees that were retained by wholesalers.

Scope of Services:

Professional indemnity
Directors' + officers' cover
Public + products liability
Trade + transport + aviation
General insurance
Self insurance
Construction risk
Medical defence
Contractual + commercial litigation
Employment contracts
Policy drafting + interpretation
Employment law
Equal opportunity
Discrimination law
OH+S

With the limitations period drawing to a close, in 2003, Firmstones engaged solicitors to issue proceedings on behalf of certain retailers seeking a refund of licence fees. The proceedings were representative proceedings pursuant to the New South Wales Supreme Court Rules. Firmstones' solicitors also sought orders for discovery and interrogatories to allow them to identify further Plaintiffs and provide them with an opportunity to "opt in" the representative proceeding. Prospective Plaintiffs were required to accept the following conditions, as set out in the "opt in" notice: -

- + Firmstones proposed to fund the recovery litigation and to cover any costs orders made against the Plaintiffs, should the proceeding be unsuccessful.
- + Firmstones would retain the solicitors on the record for the Plaintiffs and the Plaintiffs would have limited access to these solicitors.



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- + Firmstones would retain one third of any amount recovered, together with all costs awarded to the Plaintiffs.
- + Firmstones were empowered to settle the recovery proceedings, provided the settlement exceeded 75% of the claimed amount.

The Defendant wholesalers challenged the proceeding on two grounds. Firstly, they alleged that there was not sufficient commonality of interest between the Plaintiffs to permit a representative proceeding.

Secondly, the Firmstones' litigation funding arrangement represented an abuse of process and was contrary to public policy.

These submissions were accepted at first instance and the proceeding was dismissed. The New South Wales Court of Appeal upheld an Appeal by Firmstones and ordered that the proceedings be continued as representative proceedings.

The wholesaler Defendants then appealed to the High Court.

The leading judgment of Gummow, Hayne and Crennan JJ. held that the proceeding was not a valid representative proceeding and therefore the Appeal should be allowed. However, they did not take issue with the litigation funding arrangement and did not believe it represented an abuse of process.

Callinan and Heydon JJ. agreed that the Appeal should be allowed but contrary to the decision of all the other Justices, held that the litigation funding scheme was an abuse of process.

In the commentary below, we concentrate on the decisions as they relate to the litigation funding scheme.

The wholesaler Defendants submitted that the litigation funding arrangement constituted maintenance or champerty and that it represented an abuse of process.

The ancient doctrines of maintenance and champerty can be defined as follows. Maintenance is the improper stirring up of litigation by assisting one party to bring or defend a claim, without just cause or excuse. Champerty is a form of

maintenance and occurs when an assisting party insists on a share of the proceeds. Traditionally, the common law has condemned champerty because of the abuses to which it may give rise.

Maintenance and champerty were developed to protect litigants from their funders. In this instance, there was no complaint by the Plaintiffs about their funders, the complaint was made by the opposing side.

"... they were not concerned that Firmstones were involved with a view to profit because many people seek to profit from assisting in the process of litigation ..."

The lead judgment examined the history of maintenance and champerty and they accepted the proposition that it was far easier to say what was not maintenance than to say what is maintenance. They described the practice by using expressions like "trafficking" or "intermeddling" in litigation.

In examining the litigation funding scheme, they were not concerned that Firmstones were involved with a view to profit because many people seek to profit from assisting in the process of litigation. They were also not concerned about the degree of control exercised by Firmstones because they were risking substantial funds in the litigation for the benefit of the Plaintiffs.

They held that public policy considerations were relevant if the funding scheme had an adverse effect on the process of litigation or if there was some unfairness in the bargain struck between the funder and the intended litigant. They held that neither fear was raised in this instance. Examples of abuse arise where funders might be tempted to inflame the level of damages, suppress evidence or influence witnesses.

Gleeson CJ. adopted the reasoning of the lead judgment on this issue.

Kirby J. also had no objection to the funding scheme and expressed his support for such arrangements. He described the advantage of the scheme to the retailer Plaintiffs as follows: -

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"For the retailers, it seems that a bird in (Firmstones') hand was worth two in the (litigious) bush."

He believed that the representative or group proceeding and, by inference, the funding scheme promoted access to justice.

Callinan and Heydon JJ. delivered a stinging criticism of the funding arrangement. They believed the funding arrangement constituted an abuse of process for the following reasons: -

- + Firmstones' involvement was driven by profit. They were not a generous spirited company or exercising any public duty. Their motives were not altruistic. Their involvement was simply a speculative investment in other people's disputes.

"... the gains sought by Firmstones were enormous ... if all retailers opted in, then Firmstones would be entitled to about \$20 million plus costs ..."

- + Firmstones had no interest in the subject matter of the proceeding. The alleged wrong doing by the wholesaler Defendants was not perpetrated on them. Firmstones had no commercial relations with the wholesalers. They were simply meddling in the relations between wholesalers and retailers for their own benefit.
- + Firmstones sought out persons to sue who would not otherwise have done so. They agitated the representative proceeding through a robust marketing campaign that invited retailers to participate in the litigation. Most retailers had not even written to the wholesaler seeking a refund of the licence fee. Some retailers had passed the licence fee onto consumers and were not, in fact, out of pocket. On this issue their Honours said: -

"It is one thing to fund Plaintiffs who wish to sue independently of the persuasion of the funder. It is another thing to fund Plaintiffs who but for the funding, would not have sued at all."

"... the real character of the proceedings was not the vindication of the Plaintiffs' rights but the generating of profit for Firmstones ..."

- + The gains sought by Firmstones were enormous. On the assumption that there were 10,000 retailers each with an average claim of \$4,000.00 and on the assumption that interest would equate to 50% of the principal sum claimed, if all retailers opted in, then Firmstones would be entitled to about \$20 million plus costs. Another estimate was that the recovery would be at least \$100 million in which case Firmstones would get over \$30 million.
- + Firmstones had too much control over the litigation. The Plaintiffs' solicitor was retained by Firmstones and reported to them. Retailers had very limited access to legal advice received by Firmstones. The Plaintiffs were exposed to the significant costs of the proceeding without adequate legal advice.
- + Subversion of the Plaintiffs' interests to those of Firmstones. They feared that the funding arrangement may give rise to conflicts of interest between the funder and the Plaintiffs. The real character of the proceedings was not the vindication of the Plaintiffs' rights but the generating of profit for Firmstones. In these circumstances, Firmstones may exercise their control over the proceeding to their benefit rather than those of the retailers.
- + Firmstones also enjoyed a monopoly position. As the representative proceeding was issued just prior to the expiration of the limitation period, any retailer seeking to recover licence fees would be forced to treat with Firmstones on Firmstones' terms. Retailers did not have any bargaining power as they were not able to issue their own proceedings.
- + Others do not profit from litigation in the same way as Firmstones. They held it was a false analogy to compare the profit enjoyed by lawyers, expert witnesses, printers, couriers, etc. with those sought by funders.
- + Firmstones were not subject to judicial control.

They were not lawyers or officers of the Court and were not subject to disciplinary proceedings or sanctions by the Court. They did not have to comply with the ethical standards and requirements imposed on solicitors.

OVERVIEW

I believe the dissent by Callinan and Heydon JJ. is persuasive. While access to justice is an important objective, some balance must be struck in cases that involve litigation funders. A funder's control of proceedings should not be to the detriment of a Plaintiff's rights.

Consideration should be given to the submissions of the Law Council to the Standing Committee of the Attorneys General (6 October 2005) that suggested that a copy of the funding agreement be filed with the Originating Process so that the extent of the funder's involvement is apparent. The Council also recommended that solicitors be directly retained by the client receiving the funding rather than the funder itself.

Despite the concerns expressed by the minority, it appears litigation funding is here to stay and Defendant interests must be on their guard. Perhaps we will see a greater role played by litigation insurers in future.

DOCUMENT DESTRUCTION

On 1 September 2006, the *Crimes Act (Vic.) 1958* was amended to make it an offence to destroy or conceal any documents that are reasonably likely to be required in evidence in a legal proceeding. This follows the Victoria Court of Appeal decision in *British American Tobacco Australia Services -v- Cowell* (as representing the Estate of Rolah Ann McCabe, deceased). In that case, the Appeal Court held that the destruction of documents by tobacco interests was not necessarily unlawful.

The new section of the *Crimes Act* reads as follows: -

"254. Destruction of Evidence

- (1) A person who –
- (a) Knows that a document or other thing of any kind is or is reasonably likely to be,

required in evidence in a legal proceeding; and

(b) either:

- (i) *destroys or conceals it or renders it illegible, undecipherable or incapable of identification; or*
- (ii) *expressly, tacitly or impliedly authorises or permits another person to destroy or conceal it or render it illegible, undecipherable or incapable of identification and that other person does so; and*

(c) *acts as described in paragraph (b) with the intention of preventing it from being used as evidence in a legal proceeding;*

is guilty of an indictable offence."

The penalties include a maximum five years imprisonment or a fine of \$62,886 for an individual and \$314,430 for a corporation.

The full text of the *Crimes (Document Destruction) Act 2006* can be found at the M+R website, under the "Publications" tab.

**By Mark Attard
Partner**

Interesting Thought

They say each civilisation sows the seeds of its own demise. The Roman Empire prided itself on its plumbing. Lead piping was found in a number of homes of the Roman elite. The Latin for lead (plumbum) provides the source of the word "plumbing". The Romans were aware of the toxicity of lead but this did not prevent the proliferation of lead pipes, throughout ancient Rome. Some historians believe the insanity of the Roman elite may have been caused by lead poisoning. This provides a plausible explanation for the dementia of Roman emperors such as Caligula and Nero.

Did someone say that fossil fuels are responsible for climate change?

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