HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

Matter No S167/2009

JEFFERY & KATAUSKAS PTY LIMITED APPELLANT

AND

SST CONSULTING PTY LTD & ORS RESPONDENTS

Matter No S168/2009

JEFFERY & KATAUSKAS PTY LIMITED APPELLANT

AND

RICKARD CONSTRUCTIONS PTY LIMITED (SUBJECT TO DEED OF COMPANY ARRANGEMENT) & ORS RESPONDENTS

Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd
Jeffery & Katauskas Pty Limited v Rickard Constructions Pty Limited (Subject to deed of company arrangement)
[2009] HCA 43
13 October 2009
S167/2009 & S168/2009

ORDER

Matter No S167/2009

Appeal dismissed with costs.

Matter No S168/2009

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with J A Steele for the appellant in both matters (instructed by Colin Biggers & Paisley)

B W Walker SC with T G R Parker SC and R E Steele for the respondents in S167/2009 and for the fourth to seventh respondents in S168/2009 (instructed by J Biady & Associates)

No appearance for the first respondent in S168/2009

Submitting appearance for the second and third respondents in S168/2009

CATCHWORDS

Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd
Jeffery & Katauskas Pty Limited v Rickard Constructions Pty Limited (subject to a deed of company arrangement)

Practice and procedure – Costs – Order against non-party – Where non-party, for a contingency fee, funded impecunious corporate plaintiff without providing plaintiff with indemnity against adverse costs orders – Whether power of Supreme Court of New South Wales to order costs against non-party enlivened – Whether non-party had committed abuse of process of the court within the meaning of Uniform Civil Procedure Rules 2005 (NSW), r 42.3(2)(c).

Words and phrases – "abuse of process of the court", "occasioned by".

Uniform Civil Procedure Rules 2005 (NSW), r 42.3.
Civil Procedure Act 2005 (NSW), s 98(1).

FRENCH CJ, GUMMOW, HAYNE AND CRENNAN JJ.

Introduction

1 The costs of civil proceedings in the Supreme Court of New South Wales are "in the discretion of the court". Section 98(1)(a) of the *Civil Procedure Act* 2005 (NSW) ("CP Act") so provides. Power expressed in those terms extends to the award of costs against non-parties[1]. However, the power given by s 98(1)(a) of the CP Act is expressed to be "[s]ubject to rules of court"[2]. One of those rules, r 42.3(1) of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR"), provides that "the court may not, in the exercise of its powers and discretions under section 98 of the [CP Act], make any order for costs against a person who is not a party"[3]. A qualification to that prohibition follows immediately in r 42.3(2), which provides:

> "This rule does not limit the power of the court:
>
> …
>
> (c) to make an order for payment, by a person who has committed contempt of court or an abuse of process of the court, of the whole or any part of the costs of a party to proceedings occasioned by the contempt or abuse of process …"

These appeals raise the question whether the Supreme Court of New South Wales has power to order costs against a non-party which, for a contingency fee, has funded an impecunious corporate plaintiff without providing the plaintiff with an indemnity for adverse costs orders. Whether the Court has the power depends upon whether the litigation funder has "committed … an abuse of process of the Court", thus attracting the application of r 42.3(2)(c).

2 For the reasons that follow, the power of the Court to make an order for costs against a litigation funder who is not a party to the proceedings was not enlivened in this case.

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1 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 190 per Mason CJ and Deane J, 203 per Dawson J, 205 per Gaudron J, McHugh J contra at 217; [1992] HCA 28.

2 CP Act, s 98(1).

3 This is expressed to be subject to r 42.27 which is not material to this appeal.

Factual and procedural history

3 On 23 April 1998, Rickard Constructions Pty Limited ("Rickard Constructions") and SST Consulting Services Pty Ltd ("SST") (then Port Botany Container Park Pty Ltd) entered into a contract for the construction of pavement at a container terminal at Port Botany. The pavement was designed by Rickard Hails Moretti Pty Ltd. Jeffery & Katauskas Pty Ltd ("Jeffery & Katauskas") provided geotechnical services. SST assigned its interest in the contract to Mayne Nickless Ltd ("Mayne Nickless") as part of the sale of its business to Mayne Nickless and MPG Logistics Pty Limited ("MPG Logistics"). The pavement failed on 29 August 1999, three days after practical completion. On 3 May 2000, Rickard Constructions agreed to undertake rectification works in consideration of an assignment from Mayne Nickless and MPG Logistics of any rights they might have against parties involved in the design of the pavement and the supervision of its construction[4].

4 Rickard Constructions commenced proceedings against Jeffery & Katauskas and others in the Supreme Court of New South Wales on 5 September 2000. On 13 October 2000, Rickard Constructions entered into a deed of charge over all of its assets and undertaking in favour of SST. The deed recited a debt of $200,000 owed by Rickard Constructions to SST "arising from a loan to fund litigation concerning failed pavement and working capital". The loan was said to have been "on the date of this Deed". The charge nevertheless secured payment of a sum of $930,000 and interest.

5 On 19 October 2000, an administrator was appointed to Rickard Constructions by resolution of the directors. On 22 December 2000, a deed of company arrangement ("DOCA") was entered into between Rickard Constructions, its director (Charles Rickard), the administrator and two companies together designated "the Secured Creditor", namely SST and SST Services Pty Ltd.

6 Upon execution of the DOCA, control of Rickard Constructions was to revert to its director[5]. The administrator was to establish a fund designated "the Fund"[6]. The administrator was to appropriate to the Fund the property of the

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4 Two subsequent assignments were made in order to perfect Rickard Constructions' rights. Their efficacy is not in issue.

5 DOCA, cl 2.2.

6 DOCA, cl 4.

company, defined as "the whole of the assets and undertaking"[7], together with part of a sum advanced to the company by Mr Rickard and the Secured Creditor[8]. The administrator was also to appropriate to the Fund "the amount of any settlement or verdict obtained by [Rickard Constructions] in the Construction List proceedings in accordance with clause 15.7"[9].

7 Clause 15.1 of the DOCA provided that Mr Rickard and SST would "jointly covenant and agree to pay all legal fees and expenses incurred in the conduct of the Construction List proceedings by [Rickard Constructions]". This was expressed to be subject to a limit not defined in terms, but to be inferred from cl 15.2, which provided:

> "The Director and the Secured Creditor will fund the Construction List proceedings to an amount of $150,000 or until 31 March 2001, whichever first occurs. The Director and Secured Creditor may at any time source litigation insurance or other funding to further fund the continued conduct of the Construction List proceedings. Such litigation insurance or other funding shall be subject to the agreement or approval of the Administrator which shall not be unreasonably withheld. Fees and expenses incurred in consequence of an increase in the monetary limit or the extension of the period of the conduct of the Construction List proceedings will form part of the amount payable under sub-clause 6.1.2 of this Deed."

In the event that the monetary or time limits prescribed in cl 15.2 were exceeded, the administrator could decide, in his "complete discretion", whether or not to accept litigation insurance "to further fund" the proceedings[10]. The company was to report to the administrator on the conduct of the proceedings[11] and not to "capitulate in, settle or compromise" the proceedings without the prior written approval of the administrator, which was not to be unreasonably withheld[12].

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7 DOCA, cl 1.1.

8 DOCA, cll 4, 7.

9 DOCA, cl 4.

10 DOCA, cl 15.3.

11 DOCA, cl 15.4.

12 DOCA, cl 15.5.

Mr Rickard undertook to provide all reasonable assistance to the company and to its legal advisers in prosecuting the Construction List proceedings[13].

8 Clause 15.7 provided:

> "15.7 The Company will pay into the Fund all amounts recovered by way of settlement or a verdict in the Construction List proceedings. The Company shall only be obliged to pay into the Fund the net amount actually received by the Company after deducting:
>
> 15.7.1 the amount of any cost order made against the Company in the Construction List proceedings
>
> 15.7.2 the amount of any legal costs or other costs incurred in the conduct of the Construction List proceedings in addition to the funding by the Director and the Secured Creditor under clause 15.2
>
> 15.7.3 the amount paid to any litigation insurance funder or other funder agreed or approved by the Administrator under clause 15.3."

9 SST was prohibited from enforcing its charge during the currency of the DOCA[14]. It was to surrender its security[15] on the basis that it would receive payment of $350,000 in priority to unsecured creditors but after payment, inter alia, of the fees and expenses incurred in the conduct of the proceedings and the administrator's fees and expenses. Its entitlement to the further sum of $300,000 was to rank equally with other creditors. Payment of the balance secured by the charge was to be deferred until after payment of other creditors.

10 Jeffery & Katauskas obtained orders for security for costs of the trial, as to $47,750 by order of Rolfe J on 15 December 2000 and as to $140,000 by order of the trial judge (McDougall J) made on 6 October 2004, the day after commencement of what became a 19 day trial. An order for security in the amount of $50,000 in favour of another defendant, Allianz Australia Insurance

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13 DOCA, cl 15.6.

14 DOCA, cl 20.1.

15 DOCA, cl 20.2.

Ltd ("Allianz Australia") had been made by McClellan J on 15 November 2002. During the trial, on 11 October 2004, the trial judge dismissed an application by Allianz Australia for further security.

11 The action was dismissed[16]. The shortfall between the costs of Jeffery & Katauskas of the trial and the security provided was in excess of $450,000.

12 Rickard Constructions appealed against the judgment dismissing its action, but the appeal was dismissed[17]. Orders for security for the costs of the appeal were also made.

13 Meanwhile, the successful defendants in the proceedings sought from the trial judge, McDougall J, orders for the costs of the trial against SST and its directors under UCPR, r 42.3(2)(c). Allianz Australia also sought an order for costs against Mr Rickard. The applications were dismissed[18].

14 It is necessary to say something further about the arrangements made between SST and Rickard Constructions for the prosecution of the primary proceedings against Jeffery & Katauskas and others. It is convenient to do that by the reference to findings made by the primary judge on the applications by the successful defendants for costs orders against SST and its directors (and by Allianz Australia against Mr Rickard). The primary judge found that the principal of $930,000 referred to in the deed of charge, which SST and Rickard Constructions made soon after commencement of the primary proceedings, included advances made to the date of that deed and "a balance unexplained by any advances"[19]. There was evidence that the sum actually advanced by SST to Rickard Constructions was $300,000, rather than the $200,000 loan recited[20]. If

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16 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267.

17 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWCA 356.

18 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724.

19 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 733 [37].

20 The submissions for Jeffery & Katauskas in this Court proceeded on the basis, said to be favourable to the respondents, that the larger figure was correct.

the advance was $300,000 there remained an unexplained balance of $630,000. This unexplained balance was characterised before his Honour as a "success fee"[21]. This characterisation reflected an arrangement that the balance of the "unadvanced principal" would be paid to SST by Rickard Constructions in the event that it was successful in the litigation.

15 His Honour made a number of other findings of fact, not in issue on the appeals. They included the following[22]:

1. Mr Rickard and SST funded the proceedings until 31 March 2001 on the basis and subject to the monetary limits set out in cl 15.2 of the DOCA. SST funded the litigation thereafter.

2. Mr Rickard gave instructions on behalf of Rickard Constructions in relation to the litigation and there was no evidence that SST was involved in the decision-making in that regard. Nor was there any evidence that Mr Rickard was trammelled in giving instructions by any agreement or arrangement between him or Rickard Constructions and SST.

3. SST could have brought the litigation to an end at any time after 31 March 2001 by ceasing to provide further funding.

The decisions of the Court of Appeal

16 Jeffery & Katauskas and the other successful defendants sought leave to appeal to the Court of Appeal of New South Wales. That Court granted leave to appeal but dismissed the appeals and also a motion by the successful defendants for an order that SST and its directors pay the costs of the appeal brought by Rickard Constructions against the substantive decision of the primary judge[23].

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21 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 733 [35].

22 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 736 [51].

23 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283.

17 As refined before the Court of Appeal, the submission on behalf of Jeffery & Katauskas and the other defendants in the primary proceedings was that[24]:

> "an abuse of process would occur where a non-party with a commercial interest in the fruits of the litigation funds proceedings by an insolvent plaintiff without providing the plaintiff with an indemnity against cost orders in favour of successful defendants".

18 Gyles AJA, with whom Giles and Tobias JJA agreed, rejected this proposition[25].

19 On 19 June 2009, this Court granted one of the defendants, Jeffery & Katauskas, special leave to appeal against the orders of the Court of Appeal dismissing its appeal, and against the orders dismissing its motion seeking orders in respect of the costs of the appeal against the substantive decision of the primary judge. The notices of appeal subsequently filed named "SST Consulting Pty Ltd" as first respondent in the first of these matters and fourth respondent in the second. Leave was sought, and is granted, so that the relevant respondent in each matter is SST. Allianz Australia was a respondent in the second matter but took no active part in the proceedings in this Court.

The issue on the appeals

20 In this Court the grounds of appeal identified the abuse of process which it is said ought to have been found by the Court of Appeal thus:

> "by funding the proceedings and/or by assisting the assignment and prosecution of invalidly assigned bare causes of action in negligence and under s 82 of the *Trade Practices Act* by an insolvent plaintiff without provision to the plaintiff of an indemnity against a costs order in favour of successful defendants."

As presented, however, the argument on the appeals did not rely upon any alleged invalidity of the assignment to Rickard Constructions of the causes of action in respect of the pavement design and construction. The abuse of process was reformulated by reference to two elements:

1. The success fee arrangement.

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24 [2008] NSWCA 283 at [44].

25 [2008] NSWCA 283 at [67].

2. The failure by SST and its directors to provide Rickard Constructions with an indemnity for the costs of any successful defendants.

The questions for determination

21 The power of the Supreme Court of New South Wales to make an order for costs against SST and its directors depended upon the answers to two questions:

1. Whether they had committed an abuse of process of the Court.

2. Whether some or all of the costs of Jeffery & Katauskas in the proceedings had been occasioned by that abuse of process.

The Rules of Court

22 The precursor of UCPR, r 42.3 was to be found in Pt 52, r 4 and later in Pt 52A, r 4 of the Supreme Court Rules 1970 (NSW). They contained provisions almost identical in terms to UCPR, r 42.3.

23 There is a dispensing power in respect of the UCPR. Section 14 of the CP Act provides:

> "In relation to particular civil proceedings, the court may, by order, dispense with any requirement of rules of court if satisfied that it is appropriate to do so in the circumstances of the case."

This Court raised with counsel for Jeffery & Katauskas whether the general power given by s 14 of the CP Act could not have been engaged in this case. Counsel's response made it clear that the case advanced was based entirely on UCPR, r 42.3(2)(c). It is no doubt arguable that the reference to "any requirement of rules of court" in s 14 limits its application to rules imposing some duty on parties and does not extend it to a rule imposing limitations on the power of the court to order costs. The parties did not pursue the matter in these appeals. They fall to be decided on the construction and application of UCPR, r 42.3.

24 The rule-making powers conferred by the *Supreme Court Act* 1970 (NSW) and by the CP Act, authorised the making of rules which may limit the powers

conferred by those Acts to award costs[26]. The purpose of Pt 52A, r 4 was the same as its precursor, Pt 52, r 4, which was introduced by amendment to the Supreme Court Rules in 1993[27]. That purpose was "to restrict the power of the Court in making a costs order against a person who is not a party"[28]. It applies also to UCPR, r 42. As was said in *Wentworth v Wentworth*[29], the effect of the amendment was "to abolish several traditional categories of jurisdiction to order costs against non-parties" which had been discussed by this Court in *Knight v FP Special Assets Ltd*[30].

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[31] 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 for remedies against "Conspirators, Inventors and Maintenors of false Quarrels, and Partakers thereof, and Brokers of Debates"[32]. It seems that combination was not necessary to the action[33]. Champerty, maintenance and barratry also featured prominently as early species of abuse of process[34].

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26 *Wentworth v Wentworth* (2000) 52 NSWLR 602 at 607-608 [12] per Fitzgerald JA; see also *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 183-184 per Mason CJ and Deane J, 205 per Gaudron J.

27 Supreme Court Rules (Amendment No 274) 1993 (NSW).

28 *New South Wales Government Gazette*, No 65, 25 June 1993 at 3296; and see *Wentworth v Wentworth* (2000) 52 NSWLR 602 at 635-636 [162] per Heydon JA.

29 (2000) 52 NSWLR 602 at 635-636 [162] per Heydon JA.

30 (1992) 174 CLR 178 at 182-193 per Mason CJ and Deane J, 205 per Gaudron J.

31 Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, (1921) at 4.

32 33 Ed I Stat 3.

33 Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, (1921) at 60.

34 Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, (1921) at 131.

26 The common law offences and torts of maintenance and champerty were abolished in the United Kingdom in 1967[35] and in New South Wales in 1995[36]. The New South Wales legislation expressly provides[37] 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*[38].

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*[39]:

> "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[40] and Australia[41] which takes no narrow view of what can constitute

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35 *Criminal Law Act* 1967 (UK), ss 13, 14.

36 *Maintenance and Champerty Abolition Act* 1993 (NSW) which came into force on 12 May 1995 and was later renamed the *Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW). See also *Abolition of Obsolete Offences Act* 1969 (Vic), s 4(2); *Statutes Amendment and Repeal (Public Offences) Act* 1992 (SA), s 10.

37 *Maintenance, Champerty and Barratry Abolition Act* 1993, s 6.

38 (2006) 229 CLR 386; [2006] HCA 41.

39 (1841) 7 M & W 502 at 503-504 per Alderson B [151 ER 864 at 865].

40 For example, in the United Kingdom, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536; *Bhamjee v Forsdick (Practice Note)* [2004] 1 WLR 88 at 92-93 [11]-[15] and cases cited therein.

"abuse of process". Nevertheless, certain categories of conduct attracting the intervention of the courts emerged in the 19th and 20th centuries and included[42]:

> "(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."

28 The term "abuse of process", as used in Australia today, is not limited by the categories mentioned above or those which constitute the tort. It has been said repeatedly in the judgments of this Court that the categories of abuse of process are not closed[43]. In *Walton v Gardiner*[44] the majority adopted the observation in *Hunter v Chief Constable of the West Midlands Police*[45] that courts have an inherent power to prevent misuse of their procedures in a way which, although not inconsistent with the literal application of procedural rules of court, would nevertheless be "manifestly unfair to a party to litigation … or would otherwise bring the administration of justice into disrepute among right-thinking people". This does not mean that abuse of process is a term at large or

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41 *Hamilton v Oades* (1989) 166 CLR 486 at 502; [1989] HCA 21; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 25-26; [1989] HCA 46; *Walton v Gardiner* (1993) 177 CLR 378 at 393-394; [1993] HCA 77; *Rogers v The Queen* (1994) 181 CLR 251 at 255, 286-287; [1994] HCA 42; *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75; [1995] HCA 66; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265 [9], 266-267 [14]; [2006] HCA 27.

42 Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 *Current Legal Problems* 23 at 43.

43 See n 41, above.

44 (1993) 177 CLR 378 at 393.

45 [1982] AC 529 at 536.

without meaning[46]. Nor does it mean that any conduct of a party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party. It is clear, however, that abuse of process extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging" or "productive of serious and unjustified trouble and harassment"[47].

29 In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[48], Gummow, Hayne and Crennan JJ (with whom Gleeson CJ agreed in this respect[49]) 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[50]. 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"[51].

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.

31 Does the failure by a funder to provide an indemnity for the costs awarded against the party funded constitute an abuse of process? The question is not answered for present purposes by reference to cases, such as those cited by the appellant, in which orders have been made that non-party funders, who have not indemnified the funded party, pay the successful party's costs. Those cases were

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46 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 247; [1988] HCA 32; *Ridgeway v The Queen* (1995) 184 CLR 19 at 75 per Gaudron J; *Batistatos* (2006) 226 CLR 256 at 267 [14].

47 *Batistatos* (2006) 226 CLR 256 at 267 [14] (footnotes omitted).

48 (2006) 229 CLR 386 at 434 [91].

49 (2006) 229 CLR 386 at 407 [1].

50 (2006) 229 CLR 386 at 434 [91].

51 (2006) 229 CLR 386 at 435 [93].

decided in the exercise of the general discretion of the court to award costs against non-parties which was discussed in *Knight v FP Special Assets Ltd*. Mason CJ and Deane J recognised a general category of case in which such orders should be made[52]:

> "That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

32 In a decision relying in part on what was said in *Knight*, the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* held that[53]:

> "generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails."

33 These authorities and the cases cited in them did not require characterisation of non-party funding arrangements, which attracted the discretion to award costs against the non-party, as an abuse of process. The requirement for that characterisation in this case is imposed by UCPR, r 42.3.

34 It was submitted for Jeffery & Katauskas that prima facie a funding arrangement involving a "success fee" where the funder fails to provide an indemnity will constitute an abuse of process. A number of authorities were cited which did not give definitive support to the submission. They began with 19th century cases in which an impoverished nominal party was used by a non-party to bring proceedings in the non-party's interests. The cases all concerned the power of the courts to order that the "real party" pay the costs[54]. The only

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52 (1992) 174 CLR 178 at 192-193.

53 [2004] 1 WLR 2807 at 2817 [29]; [2005] 4 All ER 195 at 206.

54 *Doe Dem Masters v Gray* (1830) 10 B & C 615 [109 ER 579]; *R v Greene* (1843) 4 QB 646 [114 ER 1042]; *Hutchinson v Greenwood* (1854) 4 El & Bl 324 [119 ER 125].

direct reference to the characterisation of such arrangements as an abuse of process appeared in *Hutchinson v Greenwood*, a case involving a nominal defendant. Lord Campbell CJ said[55]:

> "The principle is that the individuals who order an appearance to be entered in ejectment, in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs."

Wightman J agreed. Bowen LJ also made reference to the position of the nominal plaintiff in *Cowell v Taylor*[56] when he qualified the common law rule that poverty is no bar to a litigant referring to "an exception introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security"[57]. He referred to the nominal plaintiff as "a mere shadow". Observations by Megarry VC in *Pearson v Naydler*[58] and by Ipp JA in *Project 28 Pty Ltd v Barr*[59], invoked on behalf of Jeffery & Katauskas, were to like effect.

35 In *Green v CGU Insurance Ltd*, a case concerned with security for costs, Hodgson JA said[60]:

> "Although litigation funding is not against public policy, the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails." (citation omitted)

This does not amount to a characterisation of such arrangements or the absence of an indemnity for costs as an abuse of process.

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55 (1854) 4 El & Bl 324 at 326 [119 ER 125 at 126].

56 (1885) 31 Ch D 34.

57 (1885) 31 Ch D 34 at 38.

58 [1977] 1 WLR 899 at 902; [1977] 3 All ER 531 at 533.

59 [2005] NSWCA 240 at [115].

60 (2008) 67 ACSR 105 at 120-121 [51].

Whether there was an abuse of process

36 The aspects of the funding arrangement between SST and Rickard Constructions, said to constitute the abuse of process in this case, had no bearing on the merits of the proceedings, nor the way in which those proceedings were conducted. Rickard Constructions was not in any sense a nominal plaintiff and it was not suggested that the proceedings were conducted by or in the name of that company for any improper purpose. Rather, the abuse of process was identified in the combination of two circumstances:

- a plaintiff unable to meet an adverse costs order;
- the provision of that plaintiff with funds to litigate by a person who would not be liable to meet an adverse costs order.

These circumstances were said to render the prosecution of the proceedings "seriously and unfairly burdensome, prejudicial or damaging"[61]. Particular emphasis was given to the notion of "unfairness".

37 Two points may be made at once. Neither was controverted. First, the bare fact that a plaintiff may be unable (even will be unable) to meet an adverse costs order does not mean that further prosecution of proceedings by that plaintiff is an abuse of process. Secondly, the fact that, absent a finding of abuse of process or contempt of court, the funder of the litigation would not be liable to meet an adverse costs order is a product of the applicable rules of court (UCPR r 42.3) cutting down the otherwise general power given to the courts in New South Wales by s 98(1) of the CP Act.

38 The difficulties presented for a defendant by a plaintiff's impecuniosity have led to the identification of an inherent jurisdiction[62], and the development of rules of court and statutory powers, under which a plaintiff may be ordered to provide security for costs. In general, the bare fact of impecuniosity is not of itself reason to order a plaintiff who is a natural person to provide security for

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61 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 247; *Ridgeway v The Queen* (1995) 184 CLR 19 at 75; *Batistatos* (2006) 226 CLR 256 at 267 [14].

62 See, for example, *J H Billington Ltd v Billington* [1907] 2 KB 106 at 109.

costs[63]. But a corporate plaintiff may be ordered to provide security where it is shown that it will not be able to meet the defendant's costs[64]. It is neither necessary nor appropriate to consider the extent to which those two general propositions should be elaborated or qualified. Neither is intended as a comprehensive or definitive statement of the applicable principles. What is presently important is that by providing for security for costs[65] the UCPR (and in this case the applicable provisions of the *Corporations Act* 2001 (Cth)[66]) deal directly with at least some part of the first element of what was said to be the relevant unfairness. The reference to "some part" of the first element should be explained.

39 Because security for costs will not always be ordered against an impecunious plaintiff, it cannot be said that a defendant, faced with proceedings by such a plaintiff, can always obtain the protection of security for costs. There are cases where successful defence of an action will come at a considerable cost to the defendant. But the extent to which that possibility exists and the extent to which there is a resultant "unfairness" to a defendant is a product of the provisions and principles that govern security for costs. Neither the existence of the possibility nor its scope suggest that there is some more general rule that to prosecute proceedings without reasonable prospects of being able to meet an adverse costs order is an abuse of process. Whether or to what extent the possibility that a defendant will succeed in defending proceedings only at a cost not recoverable from the plaintiff suggests some need to revisit the provisions or the principles governing security for costs is a large question. It was not the subject of argument and is a question about which no view is expressed.

40 The second element of the unfairness alleged in this case was that the proceedings would not have been prosecuted to trial without their being funded by a non-party on terms giving possible profit to that non-party, but without it assuming one of the central risks ordinarily attending litigation: the risk of having to meet an adverse costs order. Here the plaintiff was a corporation and security for costs could be ordered. Orders were made in the sequence described earlier in these reasons, and the defendants' inability to recover the shortfall in

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63 See, for example, *Melville v Craig Nowlan & Associates Pty Ltd* (2002) 54 NSWLR 82 at 101-109 [80]-[101] per Heydon JA.

64 *Corporations Act* 2001 (Cth), s 1335(1).

65 UCPR, r 42.21.

66 *Corporations Act*, s 1335(1).

costs *from the plaintiff* was a product of the ways in which the applicable provisions and principles governing security for costs had been engaged. Although the defendants in the proceedings pointed to the fact that the provision of funds permitted the proceedings to be prosecuted to trial when otherwise they would not, the defendants' ability to recover the costs of the successful defence of that litigation *from the plaintiff* was neither greater nor less than it would have been had there been no funding arrangement. Capacity to recover *from the plaintiff* depended upon the amount of security that was provided. And, as has already been noted, the capacity of the defendants to recover costs *from the non-party* was governed by the UCPR.

41 In deciding whether there has been an abuse of process, proper weight must be given to the fact that under the UCPR the general rule is that costs are not to be ordered against a non-party. In deciding whether prosecution of the proceedings was in this case an abuse of process, it is, of course, not sufficient to point to the fact that, but for the engagement of r 42.3(2)(c) of the UCPR, costs cannot be recovered from a non-party. Nor is it sufficient to point to the fact that the plaintiff is and was impecunious. This last fact was relevant to the provision of security for costs.

42 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 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.

43 The proposition that those who fund another's litigation must put the party funded in a position to meet any adverse costs order is too broad a proposition to be accepted. As stated, the proposition would apply to shareholders who support a company's claim, relatives who support an individual plaintiff's claim and

banks who extend overdraft accommodation to a corporate plaintiff. But not only is the proposition too broad, it has a more fundamental difficulty. It has no doctrinal root. It seeks to take general principles about abuse of process (and in particular the notion of "unfairness"), fasten upon a particular characteristic of the funding arrangement now in question, and describe the consequence of that arrangement as "unfair" to the defendant because provisions and principles about security for costs have been engaged in the case in a particular way and the rules will not permit the ordering of costs against the funder unless the principles of abuse of process are engaged. For the reasons stated earlier, that proposition is circular. And to point to the particular feature of a funding arrangement that the funder is to receive a benefit in the form of a success fee or otherwise, adds nothing to the proposition that would break that circularity of reasoning or otherwise support the conclusion that there is an abuse of process.

Conclusion

44 SST was not shown to have committed an abuse of process of the court. The power of the Supreme Court of New South Wales to order costs against SST or its directors was not enlivened. The appeals should be dismissed with costs.

45 HEYDON J. The circumstances are fully set out in the majority judgment.

The essential facts

46 On 5 September 2000 Rickard Constructions Pty Ltd ("the plaintiff") commenced proceedings against various defendants. The appellant was the second of these defendants ("the defendant"). Monies were advanced by SST Consulting Pty Ltd ("the funder") for the purpose, inter alia, of prosecuting those proceedings. Those advances, or some of them, took place before 13 October 2000, when a Deed of Charge was granted by the plaintiff to the funder to secure those and other advances[67]. At all material times, the plaintiff was unable to meet any order which might be made that it pay the defendant's costs of the proceedings[68]. The funder had not given any indemnity to the plaintiff against any liability that the plaintiff might come to have to the defendant under an order of that kind. The financial arrangements between the plaintiff and the funder appeared to be neither fully nor clearly evidenced before the primary judge. On one view of the murk, the funder had advanced $300,000 on terms that if the litigation succeeded it would be repaid that sum, together with a further $630,000 "success fee", to use the defendant's mild expression. On another view, the advance was only $200,000 and the success fee $730,000. The defendant succeeded in some aspects of its applications for security for costs but not in others: in total it obtained security for $187,750. The plaintiff failed at the trial. The plaintiff was ordered to pay the defendant's costs of the trial, which totalled $653,470.71. That left the defendant out-of-pocket, once the security had been realised, in an amount of over $450,000. The defendant sought an order pursuant to r 42.3(2)(c) of the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") that the funder pay it that shortfall[69].

Two errors in the Court of Appeal

47 Mr D F Jackson QC, who appeared for the defendant in this Court, contended that there were two key errors in the reasoning of the Court of Appeal. It is desirable to deal with them at the outset.

48 *Is abuse of process limited to the actual conduct of the proceedings?* The primary judge proceeded on the basis that r 42.3(2)(c) only applied to an abuse of process arising by reason of some aspect of the actual conduct of the

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67 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 733 [34]-[35].

68 See [74]-[75] below.

69 See [1] above.

proceedings. Thus he saw it as "dispositive" to inquire: "how can there be an abuse of process if there were no relevant abuse in the conduct of the proceedings?" He took as examples of relevant abuse "lack of restraint, excess in the conduct of the litigation, unscrupulous manipulation, or careless or irresponsible actions."[70] The Court of Appeal shared that view. It said that the primary judge was "correct in holding that an actual abuse of process must have been committed in order for an order for costs to be made against the third party."[71] Mr Jackson QC submitted that it was incorrect to hold that the defendant's application must fail merely because there had been no relevant abuse of process in the actual conduct of the proceedings. That submission is sound. No doubt r 42.3(2)(c) extends to particular instances of abuse in the actual conduct of proceedings. But it goes further. Rule 42.3(2)(c) provides that the court has power to make an order in relation to not only part of a party's costs of the proceedings, but the whole of them. As the primary judge said himself: "An abuse of process may infect the whole of proceedings, or some part only."[72] The rule assumes that the institution of the proceedings and the totality of their conduct thereafter can be an abuse of process, and that "abuse of process" is not limited to particular instances of lack of restraint, excess in the conduct of the litigation, unscrupulous manipulation, or careless or irresponsible actions. Grants of power to a court are not to be construed as subject to a limitation not appearing in the words of the grant[73]. The funder contended that this issue only arose because, it said, the defendant had conducted its case more narrowly in the courts below. In oral argument the funder seemed to retreat from this contention. Is that contention correct? Although it is unnecessary to decide the issue, its correctness seems very doubtful. But whether or not that contention is correct, Mr Jackson QC's submission remains sound. The funder also argued that the defendant had exaggerated the distinction which it attributed to the primary judge and the Court of Appeal. To the contrary, Mr Jackson QC's construction of the reasons for judgment is correct. The error is significant because the unduly narrow approach to the construction of r 42.3(2)(c) that it explicitly betokens appears implicitly to underlie the Court of Appeal's conclusion in other ways too.

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70 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 743 [94]. See also 743-744 [96] and 744 [100]. The courts below considered but rejected various allegations by one of the other persons sued by the plaintiff of particular abuses in the conduct of proceedings. These were not relied on in this Court.

71 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283 at [75].

72 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 740 [72].

73 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205; [1992] HCA 28.

49 *Is the Campbells case fatal?* The Court of Appeal stated that even if the widest view of r 42.3(2)(c) were taken, the decision of this Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[74] "makes success on an argument that litigation funding with or without control constitutes an abuse of process extremely difficult if not impossible"[75]. That statement overlooks two things. First, the statement overlooks distinctions between particular types of litigation funding. The arrangements under which the litigation funding in the *Campbells* case was made available included a contractual promise by the funder to indemnify the plaintiffs against adverse costs orders; there was no reason to doubt the funder's capacity to meet the indemnity[76]. Further, it was not shown that the plaintiffs were insolvent. This Court in the *Campbells* case was not directing its attention to cases like the present, where there was no indemnity for costs should the defendant succeed, and where the plaintiff was at all times incapable of paying the defendant's costs. Secondly, the Court of Appeal's statement overlooks the express recognition by the majority in the *Campbells* case that misconduct by litigation funders could be met by "existing doctrines of abuse of process"[77]. One of those existing doctrines is found in r 42.3(2)(c). How, then, did the Court of Appeal reach its conclusion that the decision in the *Campbells* case made success in an argument about litigation funding in this case extremely difficult or impossible? The Court of Appeal relied on three matters.

50 First, the Court of Appeal pointed to certain passages in the *Campbells* case[78]. But these do not support the conclusion it reached.

51 Secondly, the Court of Appeal said that the indemnity in the Campbells case "is not referred to by any of the judges who considered the matter" in this Court[79]. That statement is incorrect. As Mr Jackson QC pointed out, Gummow,

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74 (2006) 229 CLR 386; [2006] HCA 41.

75 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283 at [79].

76 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 216 [52], 219 [70], 235 [135] and 237 [148].

77 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 435 [93] per Gummow, Hayne and Crennan JJ.

78 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 432-436 [83]-[95] and 451-452 [146]-[148].

79 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283 at [81].

Hayne and Crennan JJ, in summarising the offer from the funder to the potential plaintiffs, said "if costs were awarded against the retailer, [the funder] would bear those costs."[80] Gleeson CJ agreed with that part of their judgment[81]. Kirby J referred to the description given by Mason P in the Court of Appeal to the terms of funding which included reference to the costs indemnity and asserted that it was not possible to understand that Court's conclusions "without a full appreciation of the entire project, as described by Mason P". Kirby J incorporated that description in his own reasons, and said that the facts required the most careful examination[82]. In the dissenting judgment the indemnity was quoted in full[83] and discussed[84]. It would have been truer for the Court of Appeal in this case to have said that the indemnity was not referred to by the majority judges as a factor central to their conclusion that the proceedings did not involve an abuse of process merely by reason of the litigation funding arrangement. It does not follow from the silence of the majority judges in that respect that the absence of an indemnity may not be significant in assessing whether there is an abuse of process in another type of case.

52 Thirdly, the Court of Appeal in this case said of the indemnity in the *Campbells* case: "such an undertaking or indemnity is for the protection of the plaintiff participants not for the benefit of the defendants."[85] But the protection which the indemnity gave to each plaintiff in the *Campbells* case as a matter of practical substance enured for the benefit of the defendants.

53 The funder eventually accepted that the *Campbells* case did not produce victory for it; said that it did not enlist it in its argument; and said that what was said about it in the Court of Appeal was surplusage, was not "central" to its reasoning, was "inconclusive", was beside the point and did not matter.

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80 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 413 [26].

81 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 407 [1].

82 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 439 [109].

83 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 477 [239].

84 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 489 [270].

85 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283 at [81].

However, it does matter in this different sense: the Court of Appeal's error is more than a passing one, and this suggests that it had at least some influence on the erroneous conclusion to which that Court came. That remains true despite the funder's desire, by taking a blue pencil to the *Campbells* passages, to create a new judgment it feels it can defend in place of the actual judgment which it abjures in part.

54 The funder advanced another flawed submission about the *Campbells* case: that it "contains no support for the [defendant's] contention." That is not correct. Although the present controversy did not arise in the *Campbells* case, Mason P (with whom Sheller and Hodgson JJA agreed) said: "Defendants … may obtain special costs orders against funders if the proceedings fail."[86] The "special costs orders against funders" can only be orders under r 42.3(2)(c): Mason P is thus assuming that the stance of the defendant in these proceedings on the construction of that rule, even in cases where there is an indemnity by the funder, is correct.

Entitlement to costs

55 Some systems of law, including some common law systems, deal with questions of costs in civil proceedings differently from our own. But in our system, an "important principle" of justice between the parties in civil litigation has been stated by McHugh J in *Oshlack v Richmond River Council* as follows[87]:

> "subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy … The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation."

He continued[88]:

> "As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating

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86 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 230 [120].

87 (1998) 193 CLR 72 at 97 [67]; [1998] HCA 11 (footnote omitted). McHugh J was dissenting, but not on this point.

88 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [68].

> commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resources of the publicly funded system of justice."

Abuse of process: general principles

56 In *Hunter v Chief Constable of the West Midlands Police*[89] Lord Diplock said that the court had inherent power "to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people." That statement has been approved in this Court by Mason CJ, Deane and Dawson JJ as stating the law "correctly"[90]. They also said that abuse of process arises in "all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness."[91] They quoted certain statements by Richardson J pointing to two aspects of the public interest. One was that the "public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly"[92]. The second aspect of the public interest lay "in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."[93] "Abuse of

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89 [1982] AC 529 at 536.

90 *Walton v Gardiner* (1993) 177 CLR 378 at 393; [1993] HCA 77. See also *Rogers v The Queen* (1994) 181 CLR 251 at 256; [1994] HCA 42; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 28 [74]; [2005] HCA 12; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 264 [6]; [2006] HCA 27. The last named case was one which the funder went to considerable lengths to distinguish as concerned, not with third party costs orders, but with a stay of proceedings from the outset. That there are differences between the two procedures does not negate the significance of the width given by the discussion in cases like *Batistatos's* case to the words "abuse of process".

91 *Walton v Gardiner* (1993) 177 CLR 378 at 393.

92 *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481.

93 *Moevao v Department of* Labour [1980] 1 NZLR 464 at 481. This passage was quoted in *Walton v Gardiner* (1993) 177 CLR 378 at 394 and *Jago v District Court (NSW)* (1989) 168 CLR 23 at 30; [1989] HCA 46. See also *Williams v Spautz* (1992) 174 CLR 509 at 520; [1992] HCA 34.

process" extends to proceedings that are "seriously and unfairly burdensome, prejudicial or damaging"[94] or "productive of serious and unjustified trouble and harassment."[95] There is a "general principle empowering a court to dismiss or stay proceedings which are … an abuse of process and the rationale for the exercise of the power to stay is the avoidance of injustice between parties in the particular case."[96] A stay or dismissal prevents abuse of process: "[t]he counterpart of a court's power to *prevent* its processes being abused is its power to *protect* the integrity of those processes once set in motion."[97]

57 The power of a court to deal with abuse of its process is one aspect of its more general power to control its own process. The exercise of the power to deal with abuse of process "is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands."[98] Further, the power to control abuse of process by granting a permanent stay "should be seen as a power which is exercisable if the administration of justice so demands, and not one the exercise of which depends on any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand."[99] There is no reason why any nice distinction of that kind should be drawn in relation to r 42.3(2)(c) either.

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94 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 247 per Deane J; [1988] HCA 32, approved in *Hamilton v Oades* (1989) 166 CLR 486 at 502; [1989] HCA 21; *Ridgeway v The Queen* (1995) 184 CLR 19 at 75; [1995] HCA 66; and *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 267 [14].

95 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 247 per Deane J, approved in *Hamilton v Oades* (1989) 166 CLR 486 at 502; *Ridgeway v The Queen* (1995) 184 CLR 19 at 75 and *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 267 [14].

96 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554 per Mason CJ, Deane, Dawson and Gaudron JJ; [1990] HCA 55.

97 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; [1997] HCA 33 (emphasis in original).

98 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 74 per Gaudron J, approved in *Walton v Gardiner* (1993) 177 CLR 378 at 394 per Mason CJ, Deane and Dawson JJ.

99 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 74 per Gaudron J, approved in *Walton v Gardiner* (1993) 177 CLR 378 at 394.

58 Words like "unfair", "unjust", "oppressive", "seriously and unfairly burdensome, prejudicial or damaging", "productive of serious and unjustified trouble and harassment" and "bring the administration of justice into disrepute among right-thinking people" are not words of exact meaning. Nor are the words "abuse of process" themselves. That notion is not "very precise"[100]. Hence it is not surprising that, as Lord Diplock said, "[t]he circumstances in which abuse of process can arise are very varied"[101]. "What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues."[102]

Abuse of process: funding litigation without indemnifying the plaintiff

59 It is convenient to turn from these general statements to examine the language used in the authorities in relation to the liability of non-parties who have supplied funds to plaintiffs for the conduct of litigation from which they hope to profit, but who have not indemnified the plaintiffs against their potential liability to pay the defendants' costs. Although only one of those authorities relates directly to r 42.3(2)(c), they all have some relevance to its construction.

60 *Non-party costs cases.* There are cases in, or emanating from, the New Zealand courts which discuss the making of costs orders against non-party funders. In *Arklow Investments Ltd v MacLean* Fisher J, sitting in the High Court of New Zealand, said[103]: "[I]t is *wrong* to allow someone to fund litigation in the hope of gaining a benefit without a corresponding risk that that person will share in the costs of the proceedings if they ultimately fail." In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* the Privy Council quoted that passage with approval[104]. The Privy Council also said, after describing instances where a costs order would not be made against a non-party, that where[105]:

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100 *Ridgeway v The Queen* (1995) 184 CLR 19 at 75 per Gaudron J. See also *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 267 [14].

101 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536.

102 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 265 [9] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

103 Unreported, 19 May 2000 at [21] (emphasis added).

104 [2005] 1 NZLR 145 at 157 [26].

105 [2005] 1 NZLR 145 at 156 [25] (3) (emphasis added).

> "the non-party not merely funds the proceedings but … is to benefit from them, *justice will ordinarily require* that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation".

The defendant submitted that to be a "real party" a funder did not need to exercise exclusive control over the litigation, and that it sufficed if it had a "role as one of the actors in the scene in important and critical respects."[106] The Privy Council also approved[107] the following statement of Tompkins J in *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)*[108]:

> "Where proceedings are initiated by and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, such as a receiver or manager appointed by a secured creditor, a substantial unsecured creditor or a substantial shareholder, it would rarely be *just* for such a person pursuing his own interests, to be able to do so *with no risk to himself* should the proceedings fail or be discontinued."

These references to wrongness and injustice suggest that the judges who used this language had abuse of process in mind.

61 *Security for costs cases.* Then there are cases in which the funding of litigation by non-parties has stimulated consideration of the justice of making security for costs orders. Mr Jackson QC placed particular stress on *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*[109]. In relation to an application for security for costs by a defendant against a liquidator plaintiff in litigation financed by a litigation funder, Hodgson JA said:

> "a court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder or creditor of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation. Although litigation

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106 Citing *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 at [113] per Beaumont, Sundberg and Hely JJ.

107 [2005] 1 NZLR 145 at 156 [25] (4).

108 [1992] 3 NZLR 757 at 765 (emphasis added).

109 (2008) 67 ACSR 105 at 120-121 [51].

> funding is not against public policy …[110], the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and … courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails."

The funder in this appeal attempted to distinguish this passage as being concerned with the species of which *Green's* case is an example – a "trafficking" case. The funder stressed the word "solely" in the first sentence. But neither that word, nor the word "purely" in the second sentence, should restrict Hodgson JA's reasoning to a point short of cases like the present. Here the funder was hazarding $300,000 (or $200,000) to gain the return of that money plus a $630,000 (or $730,000) success fee. The funder was not a professional litigation funder or a "trafficker", but the extent to which it was a creditor of the plaintiff before the litigation was not something upon which the plaintiff's evidence cast much light[111]. Hodgson JA's reasoning is equally applicable to cases like the present, where a non-trafficker funding an impecunious plaintiff is substantially or primarily motivated by a desire for commercial profit but has not assumed responsibility for the costs which the impecunious plaintiff is ordered to pay when the litigation fails. If the court system is "primarily there" to enable rights to be vindicated rather than to enable commercial profits to be made, it follows that a non-plaintiff who funds the plaintiff with the primary purpose of making commercial profits out of the litigation is behaving extraneously to the proper function of litigation, at least where the funder avoids responsibility for the costs of the defendant. It is behaviour outside the purpose which the process is supplied to serve. It is not making a legitimate use of that process. Rather it abuses that process.

62 The extent to which Hodgson JA's thinking is adverse to the funder's stance in this case may be appreciated from the submission which his reasoning rejected. The submission was[112]:

> "the circumstance that someone other than a plaintiff who is a natural person stands to gain, along with the plaintiff, from success in the proceedings was not an important factor which could justify an order for security … [T]his was particularly so where this other entity had indemnified the plaintiff against costs ordered to be paid to the defendant,

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110 Hodgson JA referred to *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at 433-436 [87]-[95].

111 See [46] above.

112 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 120 [49].

> and thus could be made liable to pay them at the instance of the defendant."

Hodgson JA's rejection of that submission reveals a concern that a non-party who funded litigation purely for commercial profit, should not avoid responsibility for costs if that litigation fails, even where the litigation funder had indemnified the plaintiff against costs ordered to be paid to the defendant. Hence he ordered security for costs. That order operated as a supplement, so to speak, to the indemnity. Had there been no indemnity, the case for an order for security for costs would have been much stronger.

63 Hodgson JA referred to *Fiduciary Ltd v Morningstar Research Pty Ltd*[113]. Austin J there said, in ordering two corporate plaintiffs to provide security for costs where they were backed by a litigation funder not shown to be incapable of providing security: "[I]t is fair for the courts to proceed on a basis which reflects the proposition that those who seek to benefit from litigation should bear the risks and burdens that the process entails." Austin J relied on, and Hodgson JA referred to[114], an observation by Young CJ in Eq in *Chartspike Pty Ltd (in liq) v Chahoud*[115]. It was part of the Chief Judge's reasons for making an order that the plaintiff provide security for costs to the effect that where an insolvent corporate plaintiff had contracted to have litigation funded by a third party in return for that third party receiving a share of the verdict. He said: "it is appropriate that the third party bear part of the risk." Young CJ in Eq's evident contemplation was that the third party funder would arrange for the security to be provided. He made the order even though the funding agreement had given indemnities to the plaintiff against adverse costs orders.

64 Similarly, the primary judge in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*, Einstein J, spoke of "the disinclination of the Court to permit a win-win situation for an outside party: that is to say to permit a lender who stands behind the [plaintiff] awaiting to benefit from a success in the proceedings to avoid having a fair responsibility for the costs of the [plaintiff] in the event that the proceedings fail"[116].

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113 (2004) 208 ALR 564 at 584 [83].

114 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 109 [7] (9).

115 [2001] NSWSC 585 at [5].

116 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 26 ACLC 323 at 330 [26].

65 *Orders that non-party funder indemnify plaintiff against costs payable to defendant.* There are cases stating that security for costs may be ordered with a view to preventing "abuse" of process if an insolvent person sues as nominal plaintiff for the benefit of someone else[117]. Mr Jackson QC pointed to *Project 28 Pty Ltd v Barr*[118], where the New South Wales Court of Appeal used those cases to go further. Hodgson JA, Ipp JA and Campbell AJA ordered a stay of proceedings until a litigation funder, which was in control of the proceedings, provided the plaintiffs in the proceedings with an indemnity against any costs they might be obliged to pay the defendant. This was not in terms an order that the plaintiffs provide security for costs, but the Court of Appeal relied on the security for costs cases based on the need to avoid abuse of process[119]. The Court of Appeal saw a significant difference between an order that the plaintiff provide security and the order it actually made: an order that the plaintiff provide security would not ensure the existence of the "normal checks and balances that the system would impose on [the funder], were it to be potentially liable for [the plaintiff's] costs"[120]. By "normal checks and balances" the Court meant[121]:

> "the discipline imposed by the knowledge that an unsuccessful party is likely to be ordered to pay the costs of the successful party. This rule provides a bridle against lack of restraint in taking points that are hardly arguable, or not arguable at all, and against other possible excesses in the conduct of litigation. It provides a measure of protection to those involved in litigation, and to the Court itself, against unscrupulous attempts to manipulate the system. It provides an incentive to act carefully in a measured way."

66 Thus the Court of Appeal appeared to act on the view that the proceedings would have been an abuse of process unless it made the specific order that it did. In reaching that view, it relied on the analogy of cases in which abuse of process is avoided by ordering impecunious nominal plaintiffs to provide security for costs. It also relied on the potential hardship to the defendant of being faced with litigation conducted by a funder not faced with the discipline of being liable to

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117 Eg *Cowell v Taylor* (1885) 31 Ch D 34 at 38 per Bowen LJ; *Pearson v Naydler* [1977] 1 WLR 899 at 902; [1977] 3 All ER 531 at 533 per Sir Robert Megarry V-C.

118 [2005] NSWCA 240 at [113]-[116].

119 *Cowell v Taylor* (1885) 31 Ch D 34 at 38; *Pearson v Naydler* [1977] 1 WLR 899 at 902; [1977] 3 All ER 531 at 533.

120 *Project 28 Pty Ltd v Barr* [2005] NSWCA 240 at [118].

121 *Project 28 Pty Ltd v Barr* [2005] NSWCA 240 at [112].

pay the costs of the plaintiff whom it controlled if the proceedings failed. That case of course differed from the present. In that case a stay was ordered at the outset pending the grant of an indemnity, in this case costs are sought at the end because there is no indemnity. In that case the funder controlled the proceedings in a full sense, in this case it had less power. But, as Mr Jackson QC submitted, the case does illustrate the proposition that there can be an abuse of process where a funder supports proceedings, seeks to gain from them, but provides no indemnity to the plaintiff in relation to costs.

67 *Authority on r 42.3(2)(c).* The above decisions are not decisions specifically on the construction of r 42.3(2)(c). However, that topic was examined by Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd*[122], a decision considered by the primary judge in these proceedings[123], and mentioned by the Court of Appeal[124].

68 Einstein J pointed to English authority exemplifying the following reasoning[125]. The principle that in the ordinary way costs follow the event is "of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions they [are] likely to lose."[126] The court is entitled to protect its own procedures against abuse of process[127]. It can be an abuse of process justifying a stay for a third party to give financial support to one side in litigation without accepting liability for the costs of the other side if the supported party were to lose[128]. However, the better course in relation to that abuse of process is to let the action proceed to trial and then consider the powers of the court to make a third party costs order under the relevant statutory

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122 [2004] NSWSC 695.

123 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 740 [75], 741 [81] and 742 [90]-[91].

124 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2008] NSWCA 283 at [34].

125 *Idoport Pty Ltd v National Australia Bank Ltd* [2004] NSWSC 695 at [82]-[85].

126 *Roache v News Group Newspapers Ltd* [1992] TLR 551 at 551 quoted by Kennedy LJ in *Condliffe v Hislop* [1996] 1 WLR 753 at 762; [1996] 1 All ER 431 at 440.

127 *Condliffe v Hislop* [1996] 1 WLR 753 at 762; [1996] 1 All ER 431 at 440, as explained in *Abraham v Thompson* [1997] 4 All ER 362 at 375.

128 *Condliffe v Hislop* [1996] 1 WLR 753 at 762; [1996] 1 All ER 431 at 440.

power[129]. Underlying the reasoning in these English cases is an assumption that, even though the statutory power to make a costs order against a third party may be wider in England than under r 42.3, there is power to make a costs order in relation to that form of abuse of process which is involved in a non-party funding one party without making provision for that party's liability in costs to the other party if the funded party loses.

69 Einstein J also pointed to the fact that in Canada maintenance has been described as an abuse of process "because a person who should be taking the risk of the lawsuit is not explicitly recognizing that it is liable for the successful party's costs, and, to the extent that it seeks to avoid that result, it seeks to avoid bringing itself within the framework of the discipline of costs."[130]

70 In the light of those authorities, the authorities in this Court on abuse of process in general[131] and the principles stated by McHugh J in *Oshlack v Richmond River Council* as to costs[132], Einstein J concluded that it was arguable that Pt 52A r 4(5)(d) of the Supreme Court Rules 1970 (NSW) (the precursor to r 42.3(2)(c)) could be construed so as to empower the making of costs orders against the funders of impecunious plaintiffs incapable of meeting a costs order made against them in favour of the defendant[133].

The funder's arguments in summary

71 Some of the cases just discussed are not directly in point. Some contain no more than dicta. In many of them, the problem under debate was being viewed from a different perspective than that which the present case requires. But they offer a measure of support for the defendant's stand. It is necessary now, therefore, to consider the many arguments advanced by the funder against the defendant. They may be grouped as follows.

72 First, there are arguments designed to support the conclusion that the appeal should be dismissed because insufficient factual findings have been made

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129 As was done in *McFarlane v E E Caledonia Ltd (No 2)* [1995] 1 WLR 366 at 373: see *Condliffe v Hislop* [1996] 1 WLR 753 at 762; [1996] 1 All ER 431 at 440.

130 *155569 Canada Ltd v 248524 Alberta Ltd* (1999) 176 DLR (4th) 479 at 501 [50] per Veit J, sitting in the Alberta Court of Queen's Bench.

131 See above at [56]-[58].

132 (1998) 193 CLR 72 at 97 [67]: see above at [55].

133 *Idoport Pty Ltd v National Australia Bank Ltd* [2004] NSWSC 695 at [156].

or a factual foundation for the defendant's contentions is lacking[134]. Secondly, there are arguments designed to reduce the contention of the defendant to absurdity[135]. Thirdly, there are arguments that the defendant's stance cuts across the existing principles of, and the balance of interests struck by, the current law in a manner not open to a court, but only to a legislature[136]. Fourthly, the funder denied that it had the necessary "control" over the litigation which it said was necessary if persons in its position were to be subject to r 42.3(2)(c)[137]. Fifthly, the funder said[138] that r 42.3(2)(c) was to be construed as being narrower than the law as stated in *Knight v FP Special Assets Ltd*[139]. Sixthly, the funder said that the defendant was incorrectly seeking to recognise "contingent" or "retrospective" abuses of process[140]. Seventhly, the funder contended that the defendant's argument involved circular reasoning[141]. These seven groups of arguments were directed to the proposition that r 42.3(2)(c) gave the court no power to make a costs order in favour of the defendant against the funder. But even if it did, the funder said, eighthly, that no order should be made as a matter of discretion[142]. Ninthly, the funder queried the quantum to be ordered[143].

First argument – deficiency in factual findings or absence of factual foundation

73 *Insolvency of the plaintiff?* The funder submitted that the defendant's contention was that the liability of the funder depended on the insolvency of the plaintiff. The funder submitted that this contention raised various questions. When was the plaintiff's inability to pay the defendant's costs to be judged? Was it when the proceedings began? Was it when the funding arrangement was made? Was it when the time to pay costs arrived? Did the plaintiff's inability to

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134 See below at [73]-[79].

135 See below at [80]-[89].

136 See below at [90]-[94].

137 See below at [95]-[99].

138 See below at [100]-[103].

139 (1992) 174 CLR 178, particularly at 192-193.

140 See below at [104]-[106].

141 See below at [107]-[108].

142 See below at [115]-[118].

143 See below at [119].

pay costs have to be total or only partial? If partial inability sufficed, to what degree? How much knowledge or foresight on the part of the funder of the plaintiff's inability to pay costs was required? The funder submitted: "These questions are of significance, given that the [defendant] seeks costs orders for the whole of the proceedings even though there is no evidence that the plaintiff was insolvent at the time the proceedings were commenced." Indeed the funder contended that there was no finding by the primary judge that at any relevant time the plaintiff could have been unable to meet the defendant's costs.

74 The factual submissions in the last two sentences are of the type usually described as "bold". Even if they are formally correct, which they are not, they are wrong in substance. They did not deal with six matters. The first matter is that they contradict a correct assumption of insolvency underlying the funder's argument in another respect[144]. The second matter is that the Deed of Company Arrangement entered into on 22 December 2000 records that on 19 October 2000 an administrator was appointed to the plaintiff by resolution of its directors pursuant to s 436A of the Corporations Law: the directors could only have so resolved if in their opinion the plaintiff was "insolvent" or was "likely to become insolvent at some future time" (s 436A(1)(a)). The third matter is that on 15 December 2000 Rolfe J in the Supreme Court of New South Wales ordered the plaintiff to provide security for the defendant's costs pursuant to s 1335 of the Corporations Law. That order depended on there being reason to believe that the plaintiff would be unlikely to pay the defendant's costs if the claim made in the litigation failed, and Rolfe J was satisfied on that score. Indeed he said that the defendant's financial position was "parlous". The fourth matter is that the primary judge ordered the plaintiff to provide further security for the defendant's costs pursuant to s 1335 on 6 October 2004, the day after the trial commenced. That order, too, depended on there being reason to believe that the plaintiff would be unable to pay the defendant's costs if the claim failed. The fifth matter is that on 27 July 2007 a liquidator was appointed to the plaintiff. The sixth matter is that the funder admitted that the plaintiff was insolvent throughout the proceedings before the Court of Appeal (which began on 7 December 2006).

75 In the end, however, the funder admitted in oral argument that the plaintiff had become insolvent at "some stage" – "certainly at the stage that matters for the [defendant's] capacity to be paid".

76 It follows that while in some cases counsel may wish to argue that there is no power to make an order against a funder under r 42.3(2)(c) because the plaintiff funded was able to pay the costs at some stage but not another, there is no room for that argument here. Whatever the findings of the primary judge, it is plain from the evidence that the plaintiff had no capacity to pay the defendant's

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144 See below at [81]-[85].

costs at any relevant time. Indeed, without the support of the funder, it had no capacity to pay its own costs. These incapacities were total: it never actually paid any of the defendant's costs, since all the defendant recovered comprised monies derived from the security for costs arranged by the funder, and there is no reason to suppose that the plaintiff had any capacity to pay any of the defendant's costs had it been called on to do so at an earlier time. Finally, the arrangements into which the funder entered made it plain that it knew of the plaintiff's incapacity to pay the defendant's costs at all relevant times. It follows that the questions which the funder raises in relation to the insolvency integer of the test advocated by the defendant do not arise, and there is no factual obscurity in that respect preventing acceptance of the defendant's arguments.

77 *Indemnity from funder*. It was central to the defendant's case before the primary judge, and the Court of Appeal, that the funder had not provided any indemnity to the plaintiff against any liability it might have for the defendant's costs. The funder submitted in this Court that it had in fact provided an indemnity. It put the matter in two ways – one in writing, another orally.

78 First, it relied on cl 15.2 of the Deed of Company Arrangement[145]. However, that clause does not create any indemnity. Even if it did, it expired on the day when $150,000 had been provided or on 31 March 2001 (whichever first occurred), and the plaintiff had been advised by its solicitors to the knowledge of the funder that the Deed did not include any "trial factor", since no trial would be held by 31 March 2001. The figure of $150,000 would be consumed well before the time for payment by the plaintiff of any of the defendant's costs. As Mr Jackson QC said, to speak of cl 15.2 giving an indemnity "seems a matter of some enthusiasm …, rather than, with respect, reality."

79 The second way by which the funder alleged it had provided an indemnity depended on cl 15.7 of the Deed[146]. It dealt with the Fund composed of amounts received by the plaintiff by way of settlement or verdict in the proceedings. The plaintiff was only obliged to pay into the Fund the net amount actually received after deducting "the amount of any cost order made against" the plaintiff. Hence, said the funder, the "success fee" would only become available after payment in full of any successful opposing party's costs. This misses the defendant's essential point. That point was that if the plaintiff *lost* the proceedings and the defendant obtained an order that the plaintiff pay its costs, there was no indemnity to cover those costs from the funder. The point is not answered by relying on cl 15.7, which could only operate if the plaintiff *won* the proceedings but incidentally suffered some adverse costs order. In the end the funder conceded this.

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145 See above at [7].

146 See above at [8].

Second argument – reduction to absurdity

80 *The funder's contribution to security for costs.* The funder submitted that it had a substantial exposure to the plaintiff's liability for costs payable to the defendant because it had funded the security which the Supreme Court had ordered the plaintiff to provide. The funder said that the defendant "must therefore contend for the extreme proposition that anything less than *total* responsibility for [the plaintiff's] costs gives rise to a liability for third party costs". This submission does not reduce the defendant's argument to absurdity. It is not necessary in this appeal to decide whether a funder failing to accept total responsibility for the costs which a plaintiff might be ordered to pay to a defendant is liable to a third party costs order: for in this appeal the plaintiff was not in a position to take up any responsibility for the costs the primary judge ordered it to pay the defendant, and the only issue is whether the liability of the funder is limited to the relatively small fraction it assumed when it procured security or whether the liability of the funder extends to the whole.

81 *Anomalous benefit in direct costs order.* The funder submitted:

> "[I]f, in the present case, [the funder] had indemnified [the plaintiff] against [the plaintiff's] liability to the [defendant], the benefit of that indemnity would have flowed to the general body of [the plaintiff's] creditors. It would be surprising if [the funder's] failure to give a (full) indemnity resulted in the [defendant] being put in the far better position of receiving the benefit of a direct costs order against [the funder]."

The assumption as to the plaintiff's insolvency which underlies this submission is inconsistent with the funder's claim, discussed earlier[147], that there was no evidence of its insolvency when it commenced the proceedings, and no finding of its inability to meet the defendant's costs. It is the present assumption which is correct, not the claim rejected above.

82 To that virtue in the submission may be added another. It casts light on what is meant by the word "indemnity" in the defendant's contention that an abuse of process takes place where a non-party with a commercial interest in the fruits of litigation funds proceedings brought by an insolvent plaintiff without giving an indemnity against costs orders in favour of a successful defendant. By "indemnity" must be meant "indemnity which is practically effective to protect the defendant". Indemnity means not merely "personal promise by the funder to the plaintiff", but also, if necessary, "promise by the funder to the plaintiff which is effective against other creditors of the plaintiff".

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147 Above at [74]-[75].

83 If the insolvent plaintiff has no creditors or prospective creditors other than the funder, and, contingently on defeat in the proceedings, the defendant, then a personal promise by the funder to the plaintiff to indemnify the plaintiff against the plaintiff's costs liability to the defendant is likely to be an effective protection of the defendant's position. Any attempt by the funder to enforce its debts (whether they arose out of the advancing of the funds employed to conduct the litigation, or otherwise) would nullify the funder's promise to indemnify, because it would precipitate the bankruptcy or liquidation of the plaintiff, and in that collapse the defendant would not be fully paid. In a practical sense, the indemnity would be effective to protect the defendant's position. The funder, by its promise to indemnify the plaintiff, agreed by implication to do all things necessary to enable the plaintiff to have the benefit of the contract[148], and one of those things was to behave in a way which would give effective precedence to the funder's rights in relation to its advances to the plaintiff over the funder's duty to the plaintiff in relation to the defendant's costs.

84 If, on the other hand, the insolvent plaintiff has creditors other than the funder and the defendant, an indemnity will not be effective to protect the defendant's position unless some additional technique is employed, such as an undertaking to the court by the plaintiff to assign the benefit of the indemnity to the defendant or to hold it and its proceeds in trust for the defendant[149].

85 No doubt matters would become more complicated if at the time the funder supplied the plaintiff with funds to conduct the litigation the plaintiff was solvent, but the plaintiff later became insolvent as the litigation proceeded. A question would arise whether what was not originally an abuse of process from this point of view might become one. That question can be postponed to a case in which its resolution is vital. In this case the argument of the funder which is currently under consideration fails: the funder's failure to give what the argument calls "a (full) indemnity" means that since the funder has not given a practically effective indemnity, its support of the litigation involves participation in an abuse of process and gives the court power to make a r 42.3(2)(c) costs order.

86 *Funding defendants.* The funder submitted that if the defendant's submission is correct in cases where a funder supports a plaintiff against a defendant, a question arises whether it is also correct where a funder supports a defendant against a plaintiff. A distinction may arguably be available between

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148 *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71.

149 As suggested by Barrett J in *The Australian Derivatives Exchange Ltd v Doubell* [2008] NSWSC 1174 at [24]-[25].

cases where impecunious plaintiffs are funded by funders, and cases where impecunious defendants are funded by funders, on the basis that in the latter category the plaintiff must always take a chance on the solvency of the defendant. And it is strongly arguable that r 42.3(2)(c) is not limited to abuse of process by the funding of a plaintiff, and nor is the common law[150]. In either event there is no absurdity. But the question need not be answered in this case.

87 *Wide impact on third party funders.* The funder submitted that:

> "[the funder] stood to benefit in the sense that success in the litigation would have permitted [the plaintiff to repay], at least in part, … the funds it had previously lent to the plaintiff; and such repayment would have received a degree of preference over the plaintiff's ordinary unsecured creditors … The [defendant's] case must be that such a benefit is sufficient to make [the funder] amenable to a third party cost order."

Hence, said the funder, anyone – financier, friend, relative, lawyer, trade union – who lent money to a litigant or supplied, or procured the supply of, legal services without charge, in order to allow the litigant to conduct litigation would become amenable to a third party costs order if repayment depended on the result of the litigation. This wide impact on third party lenders would not only affect them, but would make it harder for impecunious persons to litigate their claims.

88 This submission overlooks the fact that the defendant's case does not rest on the capacity of the funder to be repaid monies previously lent if the litigation succeeds; it rests in part on the "success fee" – the fact that in return for advances of $300,000 (or $200,000), success in the proceedings would bring it not only repayment of that sum, but payment of a further $630,000 (or $730,000). That feature of the case distinguishes it sharply from the circumstances of lenders who advance money at no more than commercial rates of interest and lawyers who agree to provide their services on the basis that they will be paid normal professional fees if they win (or normal fees plus a relatively small "uplift"[151]) and nothing if they lose. To charge a fee of two or three times the amount lent is not a practice of non-commercial litigation lenders in general, or of banks in particular. And any lawyer who did so would be struck off.

89 The funder more correctly submitted at a later stage that it is not necessary in this case to consider the operation of r 42.3(2)(c) in relation to shareholders

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150 *Hearsey v Pechell* (1839) 5 Bing (NC) 466 at 468-469 [132 ER 1179 at 1179-1180] (where Tindal CJ noted authority to the effect that "a master was compelled to pay costs for his servant, whom he had put forward as a Defendant instead of himself").

151 For New South Wales, see *Legal Profession Act* 2004, ss 323-328.

supporting their companies; creditors, particularly bankers, supporting debtors; insurers supporting insured persons; partners; relatives and friends supporting a plaintiff; solicitors and their clients; trade unions and their members; and supporters of a cause aiding those who wish to vindicate that cause. Assessment of the meaning of an expression as general as "abuse of process" in r 42.3(2)(c), in this as in other respects, is a task to be undertaken from case to case in the light of specific circumstances and precisely argued concrete controversies arising from those circumstances.

Third argument – cutting across existing principles and balances of interest

90 The funder submitted that the interest of defendants in enforcing costs orders in their favour was not the only relevant interest to be considered. There was also the interest of plaintiffs in obtaining access to justice. The funder submitted that:

> "the law [does not] have any general policy of restricting a litigant from conducting litigation unless the litigant will be in a position to pay the other party's costs. Indeed, the general principle is that poverty is no bar to a litigant. The rules relating to security for costs are an apparent exception to this, but only to a very limited degree. Security is not available against a defendant, and even against a plaintiff it is available only in restricted circumstances. There are thus many situations where the successful party may be left with a costs order which is of no, or limited, practical value. The law tolerates this because of the need to balance a party's interest in recovering its costs (if successful) against other interests, particularly the overriding principle of open access to justice."

The funder submitted that the defendant's contention would overturn this balance of interests. The funder submitted that the defendant's submission would outflank a supposed immunity of some plaintiffs from giving security. And it submitted that the defendant's submission would enable those who had failed to apply for security, or failed to get it because of their own conduct (for example, their delay), or failed to get enough security to cover the eventual costs, to escape those consequences of their failure by seeking a third party costs order against the funder, exposing the funder to potentially unlimited liability. The funder said that the defendant was impermissibly asking the court "to adopt an essentially legislative task: to introduce a new set of rules which would cut across existing principles and re-strike the balance". Finally, the funder said that it was for the legislature, not the court, to control any problem which arose from persons funding litigation in return for an excessive share of the spoils of victory or which arose from successful defendants not being able to recover costs from impecunious plaintiffs supported by funders.

91 The first problem in these submissions is that they exaggerate the supposed immunity of impecunious litigants. Ever since the *Joint Stock*

Companies Act 1856 (Imp), s 69, impecunious companies have had no immunity from the obligation to give security for costs: see now r 42.21(1)(d) of the UCPR and s 1335 of the *Corporations Act* 2001 (Cth). Persons resident outside the jurisdiction, impecunious or not, have been subjected to orders for security for costs since the late 18th century[152]: see now r 42.21(1)(a). Orders for security may be made against plaintiffs, whether natural persons or not, who have, with intent to deceive, failed to state or misstated their addresses in the originating process (r 42.21(1)(b)). Orders for security may be made against a plaintiff, natural person or not, who has, with a view to avoiding the consequences of the proceedings, changed his, her or its address after the proceedings have commenced (r 42.21(1)(c)). And r 42.21(1)(e) provides that where it appears to the court that a person is suing, not for his, her or its own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so, the court may order the plaintiff to give security for costs. Mere impecuniosity is not an absolute barrier to ordering security for costs against a natural person, although it is a factor against doing so[153]. In particular, there are instances additional to those listed in r 42.21(1)(a)-(c) and (e) where it can be done. They include the vexatious conduct of litigation by a plaintiff who had failed to set aside an earlier judgment[154], instances where the plaintiff has dissipated assets and/or not paid previous costs orders (particularly costs orders in favour of the defendant)[155], instances where the plaintiff brings a weak case to harass the defendant[156] and instances where the plaintiff brings a case for the benefit of others, but not solely for that benefit[157]. Hence the supposed "general principle … that poverty is no bar to a litigant" is a severely qualified one. So is the "overriding principle of open access to justice" (or, more realistically, at least access to the courts).

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152 *DSQ Property Co Ltd v Lotus Cars Ltd* [1987] 1 WLR 127 at 129.

153 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 108 [7] (6).

154 *Weger v Boola Boola Petroleum and Natural Gas Co (No Liability)* [1923] VLR 570; *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 119 [45] (3).

155 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 119 [45] (3).

156 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 119 [45] (3).

157 *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105 at 119 [45] (3).

92 The second problem in the funder's submissions is that they characterise litigation brought by a plaintiff which is funded by another person as a standard case of attempted enforcement of an impecunious plaintiff's rights. The plaintiff here is not a natural person; and its action is very far from having been maintained solely to enforce the plaintiff's rights, for the action would not have lasted long if the funder had not been enticed into providing the funds needed for its continuance by ensuring that it would make a large profit in the event of success.

93 The third problem in the funder's submissions is that they assume that the facility of obtaining security for costs is the sufficient and sole remedy for this type of abuse. But it is not a sufficient remedy, and that suggests that it cannot be the sole remedy. Defendants are frequently in a dilemma. If they seek security speedily they are accused of applying too early. If they do not seek it speedily they may obtain security only for the future, not the past, and may not even obtain security for the future. Judges are reluctant to order security for costs in large amounts, perhaps fearing that this will simply prolong the litigation in an ill-disciplined way. "The amount awarded as security is no more than an estimate of the future costs and it is not reasonable to expect a defendant to make further applications to the court at every stage when it appears that costs are escalating so as to render the amount of security previously awarded insufficient."[158] The lack of judicial generosity is one of several signs that applications seeking security for costs have little attraction for judges. In part that is because they are interlocutory, satellite and hypothetical. Their interlocutory character is repellent to courts eager to deal with trials but hard pressed to do so. They are satellite in character because they often involve spending significant time examining complex questions of solvency which are irrelevant to the main proceedings. They are hypothetical in character because their point depends on the hypothesis, which may or may not be realised, that the defendant will succeed, so that through them stalks the fear in many instances that they are a waste of time. They generate additional costs of their own. To treat security for costs as the exclusive remedy for what would otherwise be an abuse of process encourages this type of litigation which, even if it is thought necessary, is an evil; and it prevents a defendant who judges that the litigation funder will be solvent and good for a third party costs order at the end of the proceedings from adopting the prudent, more expeditious and more economical course of waiting until that time to utilise that remedy, should it become necessary to do so. "The availability of an order for security for costs at an earlier stage of the litigation would, in many situations, be a strong argument for

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158 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 190-191 per Mason CJ and Deane J.

refusing to exercise a discretion to order costs against a non-party, but discretion must be distinguished from jurisdiction."[159]

94 The defendant is not asking the Court to work a legislative revolution. It is simply asking the Court to conduct the judicial task of construing the words "abuse of process" in r 42.3(2)(c).

Fourth argument – control

95 The funder submitted that no third party costs order had been made in any Australian case against a third party funder save where that funder had an "element of control" over the litigation. It was on that basis that it distinguished *Knight v FP Special Assets Ltd*[160]. By "control" the funder meant "the giving of instructions", "the considering of advice", "guiding", and taking "an active part in the conduct of the litigation." The funder said the mere capacity to "turn off the tap of money" was not enough.

96 If an "element of control" is in any sense necessary to a finding of abuse, the funder's submissions gave that expression too narrow a meaning. Even if "abuse of process" as used in r 42.3(2)(c) in its application to litigation funding requires that the funder have an "element of control" over the litigation, that element is found here.

97 In this regard the funder relied heavily on the primary judge's finding[161] that the funder was not involved in the decision-making processes leading to the giving of instructions in relation to the litigation. That was a finding which does not sit well with the primary judge's earlier finding that one of the directors and shareholders of the funder, Mr Peter Sweeney, was present in court for most of the 19 day hearing[162]. That gentleman's ordinary life must have been dreary and dull indeed if time hung so heavily on his hands that he found it desirable to while away those 19 days attending litigation – admittedly litigation as full of arresting human drama as a building case about a pavement – over which neither he, nor the other controllers, nor the funder, had sufficient influence to be

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159 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 191 per Mason CJ and Deane J.

160 (1992) 174 CLR 178.

161 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 736 [51] (2).

162 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 734 [43].

involved in decisions about instructions. But as the defendant did not challenge the primary judge's finding in this respect, it must be accepted.

98 However, the primary judge did find that, at all times after 31 March 2001, the funder "had the ability to bring the litigation to an effective halt by withdrawing, or ceasing to provide further, funding for its continuation."[163] The defendant rightly pointed to the trial judge's further findings that Mr Peter Sweeney "was involved in numerous conferences relating to the proceedings and was provided with copies of advices from time to time given to [the plaintiff] and of relevant correspondence. [He] was … the person who made decisions, and gave instructions, in relation to matters of funding."[164]

99 There is no reason to suppose that it is necessary to establish any control beyond the level of participation indicated. The vice in the conduct lies in the role of the funder in creating the injustice which flows from a defendant persuading a court that no breach of the law has taken place, but having to pay large legal costs because the plaintiff who is ordered to pay them cannot, and the funder who made the injustice possible has not indemnified the plaintiff in that respect. The damage to that defendant's position is causally linked to the conduct of the funder in supplying money; it is not necessary that that causal link take the form of control by the funder of the litigation.

Fifth argument – the effect of r 42.3(2)(c) on *Knight v FP Special Assets Ltd*

100 The funder contended that the purpose of r 42.3 was to codify the power to make third party costs orders and to abolish the power to make third party costs orders in the following "general category of case" recognised in *Knight v FP Special Assets Ltd*[165]:

> "where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

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163 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 735 [49]. See also at 736 [51] (4), (7), (8) and (9).

164 *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2006) 66 NSWLR 724 at 734-735 [44].

165 (1992) 174 CLR 178 at 193.

The funder submitted that the defendant's proposition in this appeal "is even less stringent than the *Knight* proposition. Still less, therefore, can the [defendant's] proposition amount to an abuse of process for the purpose of the rule." [166]

101 Underlying the funder's submission are several fallacies. The funder submitted that the common law jurisdiction asserted by the courts to make costs orders against third parties was "carefully circumscribed". That is not so[167]. It may be accepted that r 42.3 represents an attempt at careful circumscription or codification. It does not follow that the new code circumscribes the court's power to make third party costs orders within limits which are either narrower than what was contemplated in *Knight v FP Special Assets Ltd* or wider. An area can be carefully circumscribed without that area necessarily being narrow, or narrower than a less carefully circumscribed area. In particular, it does not follow that the expression "abuse of process" in r 42.3(2)(c) was used in a narrow sense. Although the test in *Knight v FP Special Assets Ltd* was not put in terms of "abuse of process", there are passages in authorities referred to in that case and in what Mason CJ and Deane J said about them[168] which suggest that underlying the question of third party costs orders under the general law there are notions of "abuse of process". It follows that the use of the expression "abuse of process" in the rule does not necessarily point to a narrowing of the meaning of that expression, and in particular does not necessarily point to the conclusion that its meaning is narrower than the "general category of case" described in *Knight v FP Special Assets Ltd*. "Abuse of process" itself is not a particularly precise expression, depending as it can on the operation of indeterminate factors. For that reason the use of that expression may not have been an ideal means by which to define a jurisdiction to order costs. But its want of precision by itself points against narrowness.

102 The crucial question is not what was said in *Knight v FP Special Assets Ltd*, but what "abuse of process" means in r 42.3(2)(c). In some applications r 42.3(2)(c) could have a narrower result than that which would be obtained by applying the "general category of case" test stated in *Knight v FP Special Assets Ltd*, with its somewhat general reference to "the interests of justice". In some it

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166 The funder referred to *Wentworth v Wentworth* (2000) 52 NSWLR 602 at 636 [162], a case dealing not with the precursor to r 42.3(2)(c), but the precursor to r 42.3(2)(g).

167 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 189; *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 217.

168 (1992) 174 CLR 178 at 187 (quoting *Mobbs v Vandenbrande* (1864) 33 LJQB 177 at 180), 188 (quoting *Ram Coomar Coondoo v Chunder Canto Mookerjee* (1876) 2 App Cas 186 at 212) and 190.

could have a wider result. The "general category of case" test is not in those terms mentioned in r 42.3 and as a discrete test it has been abolished by the rule. It does not follow that what is entailed in "abuse of process" does not restore part of the "general category of case" test, and possibly widen some aspects of it. The expressions used to define the "general category of case" are different from the expression "abuse of process". The content of the expressions is overlapping but not necessarily co-extensive[169].

103 In a sub-category of the submissions it advanced in this respect, the funder submitted that the general law jurisdiction to make costs orders against third parties was limited to instances where the third party was engaged in "trafficking in litigation" and where the third party was the "real party". There is no warrant for this submission. *Knight v FP Special Assets Ltd* is against it. And whatever the general law jurisdiction, there is no reason to suppose that r 42.3(2)(c) is to be read in the limited manner submitted.

Sixth argument – "contingent" or "retrospective" abuse of process

104 The funder submitted that r 42.3(2)(c) required an identification of each particular occasion on which a third party committed an abuse of process and of what costs were occasioned by the abuse. Once this happened r 42.3(2)(c) gave the court immediate power to make an award of costs against the third party. The funder submitted that the defendant's argument was that there was "some sort of contingent abuse of process in the event of: (1) the [defendant] successfully defending [the plaintiff's] claim; (2) the [defendant] being awarded costs against [the plaintiff]; and (3) the [plaintiff] being unable to satisfy such an order." The funder submitted that the defendant's argument, so characterised, should not be accepted. "The third party either abuses the process of the Court by its conduct on a particular occasion or it does not. There is no room in the rule for a 'wait and see' approach which would allow conduct of the third party to be judged retrospectively as an 'abuse of process' depending upon later events in the proceedings." The funder submitted that r 42.3(2)(c) did not "enable the court, in the event of a particular outcome of the proceedings, to characterise retrospectively the conduct of [the] third party as an abuse of process." Finally, the funder submitted that *Batistatos v Roads and Traffic Authority of New South Wales*[170] did not support the defendant.

105 In circumstances exemplified by the present proceedings, unlike other types of abuse of process, the entitlement to an order under r 42.3(2)(c) is only

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169 See *Idoport Pty Ltd v National Australia Bank Ltd* [2004] NSWSC 695 at [93]-[94].

170 (2006) 226 CLR 256.

likely to arise when an order is made against the plaintiff funded that it pay a defendant's costs, and that order is not, or is not likely to be, complied with. The rule contemplates that when the preconditions of its operation are satisfied, a defendant may apply for a third party costs order, and the court will examine the totality of the relevant circumstances at that point. Beyond the need for a costs order in favour of a defendant against a plaintiff, there is no process of judging conduct retrospectively as an abuse of process, and it is a mischaracterisation to call this a "contingent abuse of process".

106 Finally, while it is true that *Batistatos v Roads and Traffic Authority of New South Wales*[171] does not in its actual decision support the defendant, or damage the funder's position, that is because it concerned a stay on the ground of that form of abuse of process to be found in delay. However, the breadth of the language employed affords general support for the defendant[172].

Seventh argument – circularity

107 The funder submitted that the defendant's reasoning was circular: it started from the fact that r 42.3 precluded the ordering of costs against third parties, it said that that was unfair and an abuse of process, and it said that that abuse was an exception to the general rule of preclusion.

108 There is no circularity. The question is whether funding an impecunious plaintiff in return for a success fee without giving an effective indemnity to the plaintiff against costs, which a court may later order the plaintiff to pay the defendant, constitutes an "abuse of process" within the meaning of r 42.3(2)(c). A court seeking to answer that question must avoid assuming an answer – either that the rule does extend so far, or that it does not. But the parties submitted that the court is entitled to take into account the consequences of concluding either that the rule does extend so far, or that it does not. Thus the funder pointed to possible undesirable results if the rule does extend so far, for example, hardship for funders, a drying up for plaintiffs of funding support, and an outflanking of the security for costs rules. The defendant pointed to possible undesirable results if the rule does not extend so far, for example, injustice to defendants. The process of treating, among other considerations, the factors to which the defendant pointed as outweighing those to which the funder pointed is not, whatever other flaws it may have, to reason in a circle.

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171 (2006) 226 CLR 256.

172 See above at [56]-[58].

Conclusion on the funder's seven arguments as to the power conferred by r 42.3(2)(c)

109 Rule 42.3(2)(c) gave power to the primary judge to order the funder to pay to the defendant the difference between the costs ordered against the plaintiff and the money realised from the security provided under orders for security for costs. That is so for the following reasons.

110 The provision by the state of courts in which subjects may conduct litigation, and of rules by which the litigation is to be conducted, is no doubt a central pillar of the rule of law. But a plaintiff who invokes the facility of litigation, even if it fails, is invoking the massive power of the state against the defendant. Unless defendants, by not appearing, are prepared to run a grave risk of letting the case go against them by default, they must comply with demands of the state, through its statutes, its rules of court and its judges, to conduct the litigation in a certain way, to produce for public scrutiny documents and transactions they may wish to keep private, and to attend hearings at which they and their witnesses may be publicly exposed to much captious and false criticism. The compliance of defendants with these state commands, on pain of punishment for contempt, can bring many costs, including the need to pay lawyers a great deal of money. Hence litigation is something capable of causing immense harm unless its use is properly controlled and unless those who institute it and prosecute it are subject to legitimate pressures generating a measure of discrimination. The liability of a plaintiff to pay the defendant's costs if the plaintiff's allegations against the defendant are rejected by the courts is one of the mechanisms for alleviating (though only partially) the harm which the plaintiff has caused the defendant by bringing litigation based on unfounded allegations. That liability is also one of the legitimate pressures generating a measure of discrimination in conducting that litigation.

111 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*[173] 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. Those circumstances do not exist here[174]. The authorities, scattered and directed to other questions though they

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173 (2006) 229 CLR 386.

174 Whether, as the Court of Appeal assumed in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at 230 [120] (see [54] above), it is open to a successful defendant to obtain a costs order against a funder even where the funder

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generally are, evince a repugnance for third party litigation funding of the type which leaves defendants at risk of not being able to enforce costs orders in their favour. As a matter of fairness and justice, the successful party to litigation is ordinarily entitled to an order for costs in its favour[175]. To the extent that that order is not complied with, the successful party will have been treated unfairly and unjustly.

112 It is true that not every unfair and unjust outcome signifies an abuse of process. But the unfair and unjust outcome of these proceedings for the defendant was generated by an abuse of process: the maintaining of litigation a primary purpose of which was the gaining of a very large "success fee" for the funder without any effective indemnity from the funder for the plaintiff's liability to the defendant**.**

113 The funder's "success fee" was on one view more than double the sum advanced and on another more that treble that sum. If viewed as interest on a loan to support proceedings conducted with proper expedition, it would be extortionate to a degree, beyond the dreams of the greediest usurer. If charged by a lawyer, it would cause that lawyer to be barred from practice. It is an abuse of process, in several senses, for a non-party funder to fund the plaintiff's prosecution of proceedings in which the funder has that kind of financial interest without giving a practically effective indemnity to the plaintiff against its liability to the defendant for costs in the event that the plaintiff loses. It is manifestly and grossly unfair and unjust to the defendant. It is seriously burdensome, prejudicial and damaging to the defendant. It is productive of serious and unjustified trouble and harassment: for it caused the defendant to be vexed by baseless proceedings without being indemnified against the costs of demonstrating their baselessness. It is "unjustifiably oppressive" to the defendant[176]. If the funder's conduct in this case became an institutionalised practice in the administration of justice, it would be an institutionalised practice by which injustice is constantly and inevitably caused. An institutionalised practice of that kind would bring the administration of justice into disrepute. Bringing the administration of justice into disrepute is a touchstone of abuse of process. The funder was telling the defendant[177]:

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has provided an indemnity to the plaintiff can be left for consideration to a case in which the issue arises.

175 See *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67]; see [55] above.

176 *Rogers v The Queen* (1994) 181 CLR 251 at 286 per McHugh J.

177 *Hamilton v Al Fayed (No 2)* [2003] QB 1175 at 1183 [11]: the language is that of Elizabeth Gloster QC. In the case in which it was advanced, that argument failed; but in that case the funder was to receive nothing but the costs. In this case, what is

(Footnote continues on next page)

> "[Y]ou … have no choice about whether to play this game; we are going to provide the means to start and continue it; if our side wins, you pay us; but if you win we will not pay you."

The funder wished to take the chance of financial gain by backing a horse to win without being responsible for paying a component of the sum wagered if the horse lost. The funder wanted to obtain insurance monies without paying a key part of the premium. The funder wanted the palm without much of the dust. A funder who funds litigation instituted by an impecunious plaintiff for the purpose of large personal profit without giving an indemnity to that plaintiff against its liability for the defendant's costs in a manner which will protect the defendant is, in the light of our forensic mores and standards, a funder who commits an abuse of process.

114 It is now necessary to turn to the funder's eighth and ninth arguments in relation to the r 42.3(2)(c) order sought by the defendant: an argument as to discretion and an argument as to quantum.

Eighth argument – discretion

115 The funder submitted that even if, contrary to its primary position, there was jurisdiction to make third party costs orders, those orders should not be made as a matter of discretion for the following three reasons. First, the discretion to make a third party costs order should only be exercised "in unusual circumstances". Secondly, it was said, citing *Knight v FP Special Assets Ltd*[178], that if security for costs could be obtained against the plaintiff, that is "generally" a factor against making a costs order against a third party standing behind the plaintiff. Here the defendant was in a position to find out about the funder's role because the Deed of Company Arrangement was lodged with the Australian Securities and Investments Commission and hence was a public document, and the funder's role was made explicit in an application by another defendant for security for costs on 15 November 2002. Indeed the defendant had made a successful application for security for costs on 15 December 2000, and a partially successful one on 6 October 2004. Thirdly, the defendant did not warn the funder or its controllers that third party costs orders could be sought against them.

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to be paid if "our side" wins is not only the costs of "our side", but money, a large part of which was to go to the funder.

178 (1992) 174 CLR 178 at 191.

116 As to the first submission, the general law did not suggest that third party costs orders should only be made in unusual circumstances. Nor do the terms of r 42.3.

117 As to the second submission, Mason CJ and Deane J in *Knight v FP Special Assets Ltd* did not say that the availability of security for costs was "generally" a factor against a third party costs order. They did say that that availability "would, in many situations, be a strong argument for refusing to exercise a discretion to order costs against a non-party, but discretion must be distinguished from jurisdiction." As those words suggest, the passage concludes a paragraph rejecting an argument that the availability of security for costs deprived the court of jurisdiction to make third party costs orders. That paragraph described some of the difficulties facing claimants for orders relating to security for costs[179]. The reasons for judgment did not have to analyse, and did not analyse, which situations would make the argument in question "strong". It is far from clear why what was said should apply under r 42.3(2)(c). There is no reason why the remedies cannot be cumulative, and why a failure to obtain security, in view of the difficulties and unattractive consequences of seeking security, should operate as a *strong* discretionary factor against a costs order. Further, abuse of process causing financial loss to a victorious defendant is the type of conduct which, once found, is unlikely to be permitted lightly to go without remedy on discretionary grounds.

118 As to the funder's third submission, there is no obligation on a defendant early in the proceedings to warn a plaintiff or the person funding the plaintiff that the defendant may apply for a third party costs order at the end of the proceedings.

Ninth argument – quantum of recovery

119 In this case it is appropriate for the whole of the costs shortfall to be paid for by the funder. That is because without the funding provided by the funder the proceedings would probably not have continued beyond a very early point. The funding agreement was entered into only five weeks after the proceedings began. The funder conceded that but for the funding the litigation would probably not have continued from that time.

Costs against the directors and shareholders of the funder

120 In view of the fact that the defendant ought to succeed in obtaining a costs order as against the funder, it would ordinarily not be necessary to consider whether one should be made against the directors and shareholders – the

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179 See above at [93].

controllers – of the funder, Messrs Peter Sweeney, Paul Sweeney and Denys Truman. The need for the defendant to make an application for that order arose out of the following circumstances.

121 The funder was a $3 company. Each controller owned one share. The funder operated as a de facto partnership between the three controllers. In the three years that ended 30 June 2004, 30 June 2005 and 30 June 2006 the funder had a deficiency of assets in relation to liabilities of $188,291, $916,112 and $864,764 respectively. In each year there were debts owed by the plaintiff to the funder of $791,594, $1,987,469 and $2,167,018 respectively. The financial position of the plaintiff at all material times meant that those debts were not recoverable by the funder[180]. Hence the accumulated losses each year were much greater to that extent. The defendant submitted that these considerations showed the funder to be insolvent from at least 30 June 2004. The funder and its controllers submitted "that the fact that the financial statements of [the funder] disclose an excess of liabilities over assets is not, without more, probative of (or at least sufficient to prove) [the funder's] insolvency, in accordance with the test for insolvency prescribed by section 95A of the Corporations Act 2001 (Cth)." However that may be, the asset position of the funder is so parlous as to make it necessary to consider the defendant's application for a costs order against the controllers.

122 The primary judge found that while there was no evidence that the controllers would benefit "directly" from any success enjoyed by the plaintiff in the litigation, they had provided the funder with the funds it advanced to or on behalf of the plaintiff. He also found that any recoveries made by the funder from the litigation would have flowed back to the individuals through their loan accounts with the funder. As noted above, the primary judge additionally found that Mr Peter Sweeney spent most of the 19 day trial in court, attended numerous conferences relating to the proceedings, was provided with copies of advices from time to time given to the plaintiff and relevant correspondence, and made decisions and gave instructions on matters of funding[181]. In short, the controllers provided the money to the funder which it used to fund the plaintiff, they thus ensured that the proceedings would be prosecuted, and they were to receive, in substantial measure, the benefits of the litigation. The interposition of a corporate veil between them and the funder, on which the controllers relied, is in the circumstances no barrier to the making of costs orders against them pursuant to r 42.3(2)(c). The facts suggest that the responsibility for the abuse of process is to be laid primarily at their feet.

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180 See [74]-[75] above.

181 See above at [97]-[98].

Costs of appeals

123 The conclusion that third party costs orders should have been made against the funder and Messrs Sweeney, Sweeney and Truman in relation to the trial applies equally to the appeal to the Court of Appeal. Correctly, neither the funder and its controllers nor the defendant submitted otherwise. They should also be made in relation to the costs of the present appeals.

Orders

124 The appeals should be allowed with costs and consequential orders should be made.