ELFIC LTD *v.* MACKS

[2001] QCA 219

[App. 2407/2000]

Court of Appeal (McMurdo P., Davies J.A., Cullinane J.)

13 – 16 November 2000; 6 June 2001

Corporations — Winding up — Liquidators — Rights and powers — In winding up by Court — Disposal of company property — Litigation funding arrangements involving sale or disposition of prospective recoveries — Corporations Law ss 9, 477(2)(c) (A.Dig. 3rd [280]).

The *Corporations Law* (now repealed) relevantly provided:

"**9 Dictionary**

Unless the contrary intention appears:

…

property means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action."

"**477 Powers of liquidator**

…

(2) Subject to this section, a liquidator of a company may:

…

(c) sell or otherwise dispose of, in any manner, all or any part of the property of the company …"

Held, dismissing an appeal from a decision not to enjoin the continued performance of a liquidator's litigation funding arrangements:

(1) That a disposal of property of a company pursuant to s. 477(2)(c) was exempt from the consequences of champerty.

Re Movitor Pty Ltd (In liq.) (1996) 64 F.C.R. 380; *UTSA Pty Ltd (In liq.) v. Ultra Tune Australia Pty Ltd* (1996) 21 A.C.S.R. 457; *Re Tosich Construction Pty Ltd* (1997) 73 F.C.R. 219; *Re William Felton & Co. Pty Ltd* (1998) 16 A.C.L.C. 1294; *Buiscex Ltd v. Panfida Foods Ltd (In liq.)* (1998) 28 A.C.S.R. 357; *Re Daniel Efrat Consulting Services Pty Ltd (rec. apptd) (In liq.); Ex parte Hawke* (1999) 162 A.L.R. 429 followed.

Seear v. Lawson (1880) 15 Ch.D. 426; *In re Park Gate Waggon Works Company* (1881) 17 Ch.D. 234 considered.

(2) That such a disposal was not limited to presently existing property and could therefore include an equitable assignment of the future proceeds of an action.

Bell Group Ltd (In liq.) v. Westpac Banking Corporation (1996) 18 W.A.R. 21; *In re Oasis Merchandising Services Ltd* [1998] Ch. 170 distinguished.

(3) That for the purpose of s. 477(2)(c) an amount recovered by a liquidator, pursuant to s. 565 of the Law, was property of the company.

Octavo Investments Pty Ltd v. Knight (1979) 144 C.L.R. 360, 372 considered.

N. A. Kratzmann Pty Ltd (In liq.) v. Tucker [No. 2] (1968) 123 C.L.R. 295 distinguished.

In re Yagerphone Ltd [1935] Ch. 392, 396; *Re Starkey* [1994] 1 Qd.R. 142, 154 not followed.

(4) That moneys recovered by a liquidator under ss 588FF or 588M of the Law were property of the company for the purpose of s. 477(2)(c).

Re Movitor Pty Ltd (In liq.) (1996) 64 F.C.R. 380, 392; *Re Tosich Construction Pty Ltd* (1997) 73 F.C.R. 219, 253 followed.

Re Exchange Travel (Holdings) Ltd (In liq.) (No. 3) [1997] 2 B.C.L.C. 579, 587, 596 considered.

In re Oasis Merchandising Services Ltd [1998] Ch. 170 distinguished.

Decision of Williams J. affirmed.

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Bell Group Ltd (In liq.) v. Westpac Banking Corporation (1996) 18 W.A.R. 21.
Bell Group NV (In liq.) v. Aspinall (1998) 19 W.A.R. 561.
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Captain Homemaker Pty Ltd (In liq.); Re (1984) 8 A.C.L.R. 1005.
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Garrard v. Email Furniture Pty Ltd (1993) 32 N.S.W.L.R. 662.
Gasbourne Pty Ltd; Re [1984] V.R. 801.
Giles v. Thompson [1994] 1 A.C. 142.
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Grovewood Holdings Plc. v. James Capel & Co. Ltd [1995] Ch. 80.
Guy v. Churchill (1888) 40 Ch.D. 481.
J. C. Scott Constructions v. Mermaid Waters Tavern Pty Ltd [1984] 2 Qd.R. 413.
M.C. Bacon Ltd; In re [1991] Ch. 127.
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Mineral & Chemical Traders Pty Ltd v. T Tymczyszyn Pty Ltd (In liq.) (1994) 15 A.C.S.R. 398.
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Movitor Pty Ltd (In liq.); Re (1996) 64 F.C.R. 380.
N. A. Kratzmann Pty Ltd (In liq.) v. Tucker [No. 2] (1968) 123 C.L.R. 295.
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Oasis Merchandising Services Ltd; In re [1998] Ch. 170.
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APPEAL

P. A. Keane Q.C., S.-G., with him *J. C. Sheahan S.C.* and *J. D. McKenna*, for the appellants.

E. J. P. F. Lennon Q.C., with him *R. M. Derrington*, for the first to sixty-sixth respondents.

A. J. H. Morris Q.C., with him *M. M. Stewart S.C.*, for the sixty-seventh respondent.

A. J. Meagher S.C., with him *D. C. Andrews*, for the sixty-eighth respondent.

C.A.V.

McMURDO P.: [1] Some of the appellants, companies in the Elders Group (now under the control of Foster's Brewing Group Limited) lent substantial amounts to some of the respondent companies ("the Emanuel

companies"). Before being placed into liquidation for unpaid debts of $304 million, some of the Emanuel companies and their directors, members of the Emanuele family, entered into transactions with some of the appellant companies. The liquidator of the Emanuel companies, the first respondent ("Macks"), questions the legitimacy of these transactions in proceedings against the appellants and Coopers & Lybrand (the Emanuel companies' auditors) to recoup benefits allegedly obtained by some of the appellant companies from some of the Emanuel companies through breaches of the *Corporations Law* ("the Law") and *Companies Code* ("the Code"). If Macks were fully successful in these claims ("the main action"), he could recover many millions of dollars on behalf of the Emanuel companies.

[2] In order to fund the litigation, Macks entered into an arrangement ("the funding arrangement") with the 67th respondent, GIO Insurance Limited ("GIO") and the 68th respondent, the Commonwealth Bank of Australia Limited ("CBA").

[3] The main action was commenced in the Supreme Court of South Australia. Macks sought and obtained the approval of Mansfield J. in the Federal Court of Australia in South Australia to enter into the funding arrangement under s. 479(3) of the Law: see *Re Addstone Pty Ltd (In liq.)*.[1]

[4] The main action was then cross-vested by Debelle J. to the Supreme Court of Queensland: see *Emanuel Management Pty Ltd (In liq.) v. Foster's Brewing Group Ltd*.[2]

[5] The appellants contend that the funding arrangement is champertous. They brought an action in the Trial Division of the Supreme Court of Queensland seeking a declaration that the funding arrangement was void, as contrary to public policy, not authorised by s. 477(2) of the Law and not entered into by Macks bona fide in the interests of the Emanuel companies or their creditors. They also sought an injunction to restrain the respondents from performing the funding arrangement; an order for the removal of Macks as liquidator of the Emanuel companies and an order setting aside the order of Mansfield J. or, alternatively, an order under s. 10 of the *Federal Courts (State Jurisdiction) Act* 1999 and s. 10 of the *Federal Courts (State Jurisdiction) Act* 1999 (S.A.) that the rights and liabilities of the parties in respect of the orders of Mansfield J. be set aside and revoked to the same extent as if those orders had been set aside.

[6] This appeal is from the dismissal of that action by Williams J. (as he then was).

[7] The appellants no longer seek an injunction as a tortious remedy, as they accept they have not established special damage: see *Magic Menu Systems Pty Ltd v. AFA Facilitation Pty Ltd*.[3] Their request for an injunction is now based solely on the court's power to prevent an abuse of its process: see *Grovewood Holdings Plc. v. James Capel & Co. Ltd*;[4] *Abraham v. Thompson*,[5] *Faryab v. Smyth*[6] and *Sa v. Latreefers Inc*.[7]

1 (1998) 83 F.C.R. 583.
2 (1999) 73 S.A.S.R. 303.
3 (1997) 72 F.C.R. 261, 267.
4 [1995] Ch. 80, 87–89.
5 [1997] 4 All E.R. 362, 372–374.
6 [1998] EWCA 3503, 28 August 1999, [26].
7 [2000] EWCA 17, 9 February 2000.

The facts

Background

[8] The Emanuel companies engaged in property development and in 1987 Emanuel Management Pty Ltd acquired an extensive area of land north of Brisbane ("the APM lands") which was to be financed through one of the appellant companies. In May 1987 Lensworth Properties Pty Ltd offered a $43 million facility to Emanuel Management Pty Ltd to be secured by guarantees from other Emanuel companies, company charges and real property mortgages. The offer was accepted and a Deed of Master Agreement was signed on 12 June 1987 which formalised the loan facility and acknowledged receipt of $43 million. The debt was secured by a mortgage debenture by Emanuel Management Pty Ltd; a mortgage debenture and bill of mortgage over the APM lands by Emanuel (No 14) Pty Ltd and guarantees by Emanuel (No 14) Pty Ltd and some other Emanuel companies. Later, mortgage debentures were given by a further five Emanuel companies. The validity of the $43 million debt and the original securities have not been challenged. The securities have not been enforced or realised. On 11 April 1991, Lensworth Properties Pty Ltd and EFG Finance Limited assigned various interests, including the APM lands, to Elfic Limited. [8]

[9] On 11 March 1993, Emanuel Management Pty Ltd and their guarantors acknowledged their default under this and other facilities. The EFG Group and 27 of the Emanuel companies executed a Deed of Orderly Realisation of Securities in which they acknowledged a debt to the EFG Group of $153,144,910.58. The EFG Group issued a specially endorsed writ of summons seeking recovery of $182,272,193.97 against the 27 Emanuel companies, which entered an appearance and defence to the writ.

[10] On 27 February 1995, Thomas J. (as he then was) entered summary judgment in favour of the EFG Group against Guiseppe Emanuele and 27 companies in the Emanuel Group for $186,880,302.71.

[11] On 17 March 1995, 29 companies in the Emanuel group entered into a Deed of Forebearance and Release ("DOFR") with the EFG Group. The DOFR transferred 131 properties to nominees of the appellants for consideration of approximately $47,800,000. It is claimed in the main action that this transfer of property was at an undervalue and that in return the EFG group paid about $6 million to those associated with the Emanuel group.

[12] From June 1995 orders were made for the compulsory winding up of companies in the Emanuel group. Macks was appointed as liquidator of each company.

[13] In September 1995 Macks issued notices to creditors of 16 of the 65 companies in the Emanuel group (but not Emanuel (No 14) Pty Limited), convening meetings and inviting formal proofs of debt. Proofs of debt were executed and lodged in respect of 11 of the 16 Emanuel companies, including Emanuel Management Pty Ltd. These proofs were in identical form and stated the debt owing to the appellant companies as $146,390,078.34, and that no satisfaction or security had been had or received for this sum.

[14] The meeting of creditors of these 16 Emanuel companies was held on 10 October 1995. Macks advised creditors that he had commenced proceedings to recover the payments made by the EFG group to one of the

8 Elfic Limited (known as Elders Finance & Investment Co. Limited), Lensworth Properties Pty Ltd (known as Arrow Properties Pty Ltd) and EFG Finance Limited (now Glenmore Park Estate Limited) are referred to as "the EFG group" for the purposes of later transactions.

Emanuel companies, Simionato. The largest creditors were the EFG Group ($146 million for each company) and the Australian Taxation Office ("ATO") (sums varying from $1,360 up to $14.7 million). Macks noted that the EFG Group's proofs of debt were objected to and admitted them, for voting purposes only, at a deemed value of $1. Mr Thomas, as proxy for the EFG Group, advised that they were holding no security. Macks asked creditors to advise him within 14 days whether they would indemnify him for the costs of various items, including the conduct of public examinations. A committee of inspection was appointed with a representative from the appellants and the ATO.

[15] On 27 October 1995, the EFG Group attempted to clarify the treatment of their proofs of debt.

[16] On 30 October 1995 Macks wrote to the EFG Group seeking particulars of the assets of the Emanuel group over which security was held. During 1995 and 1996 Macks conducted a series of public examinations over a six month period at an approximate cost of $800,000; he was indemnified for part only of this amount by the ATO.

[17] From about March 1996 Macks attempted to obtain funding from creditors other than the appellants for a proposed action against the appellants. Formal requests were made at meetings of creditors at which the appellants were present. The ATO funded investigations to $1.48 million but declined further funding after April 1997.

[18] On 12 March 1996 Macks issued a notice to the creditors of the 16 Emanuel companies of a further meeting of creditors to be held on 28 March 1996 to consider indemnifying Macks in relation to some recovery proceedings. At the meeting which took place on 28 and 29 March, Macks requested indemnities for various costs, including costs of the claim against the appellants. Mr Byrne, on behalf of the EFG group, described their claim on the 16 Emanuel companies as "unsecured"; no dissent is recorded in the minutes of the meeting which refer to a discussion of the effect of the DOFR as extinguishing the appellants' debt.

[19] During May 1996 public examinations resumed. During an examination of an officer of an appellant company, Macks's counsel stated:

> "Can I also indicate for the benefit of my learned friends that whilst at the end of it [this examination] I will be asking for the adjournment of the examinations, if the liquidator should, between now and October, be advised and decides to issue proceedings … of the sort my learned friend indicated, there would of course be no attempt to pursue an officer of [the appellants] or their solicitors by further examination."

[20] On 4 and 10 December 1996 Macks issued further notices to creditors requesting an indemnity to pursue recovery actions and foreshadowing an application to the court to give the ATO priority as a creditor for providing an indemnity in some actions.

[21] The solicitors for the EFG group wrote to Macks on 11 December 1996 requesting reasonable notice of any such application to the court as a major creditor of the Emanuel companies who would be affected by such an order. The EFG group repeated that request two days later. On Friday, 20 December 1996 Macks gave the EFG group notice that the application was to be heard the following Monday.

[22] On 24 December 1996 Macks issued proceedings (the 1996 proceedings) against the EFG group and Coopers & Lybrand in the Supreme Court of South Australia. Macks obtained an ex parte order suppressing the

existence of those proceedings until 24 March 1997, to allow Macks to confidentially continue investigations and pursue funding. Macks obtained subsequent orders in similar terms extending the suppression until March 1998.

[23] Macks issued a separate action against the appellants on 20 March 1998 (the 1998 proceedings). This was not served until June 1998.

[24] On 15 January 1997, the solicitors for the EFG group wrote to Macks:

> "We would also seek your confirmation on one further matter, that is, that you will provide us with reasonable notice (a minimum of seven days) of any further application which the liquidator (or other person) may bring that concerns or may concern the interests of creditors (and in particular, any application pursuant to s 564 of the Corporations Law). It is clear from your material that any such application has the potential to significantly impact upon our client's rights as a creditor. We do not want a recurrence of the position in relation to this application where notwithstanding that the Indemnity Agreement was apparently entered into on 4 December 1996, the application to court was not made until 20 December 1996 on virtually no notice to our client. Could you please confirm that our client will be given reasonable notice of any such application."

[25] Macks responded:

> "We note your request for at least seven days notice of any future applications that may concern the creditors of the companies in liquidation. We undertake to give you such notice where possible."

The Funding Arrangement

[26] In 1996 following the decision in *Re Movitor Pty Ltd (In liq.)*[9] Mr Charles, a member of the firm Phillips Fox, drafted documents to create a scheme for funding liquidators' litigation. Mr Charles approached GIO and encouraged it to become involved in this area of business. Mr Charles developed the precedent documents to be used by GIO in the commercial funding of liquidators' litigation, acted as their legal adviser and also undertook extensive promotion of the litigation insurance scheme. In about February 1997 Mr Charles left Phillips Fox and became a consultant at Ebsworth & Ebsworth. Later he became a member of the firm Charles Fice.

[27] On 27 June 1997 Macks commenced negotiations with GIO through their solicitor, Mr Charles. The precedent documents provided for Mr Charles to receive an additional service fee to the fees charged by others for their legal work. It was elsewhere proposed that Mr Charles, through Liquidators' Expense Insurance Pty Ltd ("LEI"), would receive a copyright licence fee, calculated by reference to a share of the proceeds of the litigation.

[28] Macks, represented by solicitors, Ward & Partners, met and negotiated with Mr Charles, GIO's representative, in November 1997.

[29] At the time the funding arrangement was negotiated, Mr Charles was to receive a licence fee for the copyright documents used in the funding arrangement to be paid out of the brokerage fee paid by GIO to the broker. Macks was unaware of this until he received a facsimile from Mr Charles on 11 March 1998. In that letter, Mr Charles advised Macks that he was a shareholder and director of LEI and the licence or copyright fee, calculated by reference to a share of the proceeds of the litigation, would be paid to

9 (1996) 64 F.C.R. 380.

LEI; although he would resign his interest, his family might retain or acquire a controlling interest; if so, he might have a conflict of interest.

[30] Later Mr Charles's wife became sole director and shareholder of LEI. The copyright claimed on the funding arrangement was in the name of Mr Charles. There is no evidence of any documented sale for proper value of Mr Charles's rights under the licence agreement to LEI.

[31] By 21 December 1998 the terms of the licence agreement between LEI and Mr Charles had been re-negotiated so that, in return for CBA and GIO using Mr Charles's documents, GIO was to pay LEI licence fees of 10 per cent of premiums received by GIO from the claims.

[32] Macks gave evidence at the trial that he believed Mr Charles had divested himself of all interest in LEI before the funding arrangement documents were executed.

[33] Williams J. found it was impossible on the evidence to determine what fees would be paid to either LEI or Mr Charles, who did not give evidence before him.

[34] GIO saw the role of Mr Charles and his firm "to promote the product [of litigation insurance], review proposals, provide advice to GIO on the prospects of success, act for the liquidator (providing the liquidator is agreeable) and monitor work done by other firms where [Mr Charles's] firm is not acting for the liquidator". Macks knew that Mr Charles was working for GIO as a major promoter of GIO's litigation insurance. The solicitor-client relationship between Mr Charles and GIO continued after the funding arrangement became operational.

[35] GIO's offer to fund the main action was conditional upon receipt of legal advice that there was no prior ranking charge over the proceeds of the claim against the appellants and Macks's obtaining a court order that the arrangements contemplated in the funding arrangement were lawful.

[36] GIO was concerned about the potential effect on the funding arrangement of the EFG Group's mortgage debentures over the six Emanuel companies (including Emanuel (No 14) Pty Ltd).

[37] On 9 December 1997, two companies in the EFG group submitted proofs of debt and claimed as security a mortgage debenture from Emanuel (No 14) Pty Ltd, despite the contrary statements made on their behalf at the creditors' meetings on 10 October 1995[10] and 28 and 29 March 1996.[11]

[38] On 2 February 1998 Macks wrote directly to one of the EFG group (not its lawyers) on behalf of each of the six Emanuel group companies over which the EFG Group had a mortgage debenture, referring to those proofs of debt and requesting completion of Corporations Law form 312[12] to update records of the Australian Securities Commission. Macks knew that the EFG group claimed to be secured creditors of Emanuel (No 14) Pty Ltd. Macks did not disclose to the EFG group that the existence of the securities was a concern to GIO because of its involvement in the funding arrangement. Macks conceded, perhaps with hindsight, that forwarding the proofs of debt direct to the appellant companies instead of their lawyers was "somewhat unwise" but maintained he had acted in good faith. The six Emanuel companies did not execute the forms.

[39] The funding arrangement between Macks, GIO and CBA was executed on 18 March 1998. Macks did not seek the approval of the creditors of the Emanuel companies beforehand.

10 These reasons [14].
11 These reasons [18].
12 Notification of Discharge or Release of Property from a Charge.

Terms of the Funding Arrangement

[40] The funding arrangement comprised a loan and guarantee facilities agreement, a deed of charge, an insurance policy, solicitor-client agreement and agency agreement, all of which were copyrighted to Mr Charles.

Loan and guarantee facilities agreement

[41] Under the loan agreement CBA agreed to advance funds to Macks to pursue the main action, to remunerate Macks so that he could pursue the action and defend any applications brought against him and to pay Macks's legal costs and expenses, including those he might be ordered to pay. CBA also agreed to advance Macks the $80,000 premium payable to GIO to insure against the risk that the loan to CBA might not be repaid at the conclusion of the litigation.[13] Macks was to repay CBA its advance from the proceeds of any successful litigation[14] at commercial rates of interest[15] and in return CBA was given a fixed charge over the claim and was protected by GIO's insurance policy.[16] The loan agreement would end if, inter alia, any provision in the insurance policy was declared void.

Deed of charge

[42] The deed of charge gave CBA security over the claim for all moneys owing to CBA under the loan facility. The security was fixed and rated as a first charge.

Insurance policy

[43] Under the insurance policy GIO insured CBA against the risk of non-payment and Macks against liability for his own legal expenses and any legal expenses ordered against him. In return, GIO was to be paid the initial $80,000 premium by CBA and if the litigation was successful would receive approximately 35 per cent of net recoveries as a risk premium.[17] In addition, Macks was to give GIO a share of the proceeds of the claim sufficient to pay or reimburse GIO for the amounts to which it was entitled under the policy.[18] Macks was required to obtain GIO's approval before applying for a trial date (including filing a certificate of readiness for trial); briefing counsel on trial; settling or discontinuing the claim or the legal proceedings and appealing against a final judgment. Failure by GIO to give written approval within a reasonable time enabled Macks to require GIO to join in choosing an independent senior counsel to advise whether the proposed action should be taken; that advice would be binding on the parties.[19]

[44] The insurance policy required Macks to conduct the claim in a proper and responsible way, to obtain professional advice when asked by GIO as to the prospects of success of the claim and whether it should be pursued, compromised or discontinued; to contact GIO immediately upon receiving professional advice to compromise or discontinue the claim or upon becoming aware of anything that significantly affected the risk of not recovering the total amount outstanding and to pay full regard to the professional advice received.[20]

Solicitor-client agreement

[45] Under the solicitor-client agreement Macks appointed Mr Charles's firm as solicitors in the main action.[21] The agreement could be terminated if

13 Loan and guarantee facilities agreement, cl. 2.
14 Loan and guarantee facilities agreement, cl. 15.
15 Loan and guarantee facilities agreement, cl. 11.
16 Loan and guarantee facilities agreement, cl. 25.
17 Op. cit. fn. 1, 589–590; *Elfic Ltd v. Macks* [2000] QSC 18 [20]; insurance policy cl. 1 and schedule item 5.
18 Insurance policy, cl. 15.
19 Insurance policy, cl. 16.
20 Insurance policy, cl. 8.
21 Solicitor-client agreement, cl. 1.

either party committed a serious breach of the agreement.[22] Mr Charles's firm, at Macks's expense, was required to give GIO any advice, information or documents it reasonably required on the main action.[23]

Agency agreement

[46] Under the agency agreement Mr Charles's firm appointed Ward & Partners (Macks's solicitors) to act in the day to day running of Macks's claims but significant matters, including applying for a trial date, briefing counsel on trial, discontinuance of the claim or appeal against a final judgment or settlement, could not be undertaken without the written instructions of Mr Charles's firm;[24] Ward & Partners could not act contrary to any written instruction from Mr Charles's firm; Mr Charles's firm was able to terminate Ward & Partners' appointment for any reason on 30 days notice; Ward & Partners could terminate the appointment of Mr Charles's firm only if there was a serious breach of the agreement or if they had a conflict of interest.[25] Ward & Partners were required to engage as a consultant Mr Rosenzweig, an erstwhile consultant with Mr Charles's firm.[26]

Court Approval of the Funding Arrangement

[47] By February 1998 Macks's pursuit of legal action on behalf of the Emanuel companies had resulted in $2.5 million in unpaid fees to him and $1.1 million in legal fees.

[48] On 17 February 1998 in Adelaide Macks applied to Mansfield J. in the Federal Court of Australia under s. 479(3) of the Law for directions as to whether Macks had power to enter into the funding arrangement. The appellants and other creditors were not given notice of this application. On 20 February 1998, Mansfield J. approved Macks's participation in the funding arrangement and ordered that the application be heard ex parte; the affidavits be sealed;[27] the notice of motion be heard in camera with the transcript remaining confidential; a true copy verified by affidavit be filed upon execution of the document and the liquidator, creditors and contributories of the companies be given liberty to apply. Mansfield J. directed that the affidavits and transcript be sealed and remain confidential.

[49] Macks disclosed to Mansfield J. the undertaking given to the appellants[28] but submitted that it was not appropriate to give notice because the appellants were the proposed defendants in the action. Mansfield J. found there had not been any breach of the undertaking and expressed satisfaction as to the bona fides of the liquidator.

[50] Macks did not disclose to Mansfield J. Mr Charles's relationship as solicitor for both GIO and Macks or that Mr Charles was to receive, through LEI, a percentage of the proceeds of the action against the appellants.[29]

[51] On 11 March 1998, Macks sought a variation of the funding arrangement to extend the limitation period for actions brought under s. 588FF of the Law. Mansfield J. granted the orders sought and additionally gave liberty to apply to the liquidator, creditors and contributories and any party against which proceedings are brought under s. 588FF at any time within two months after service upon it of such proceedings.

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22 Solicitor-client agreement, cl. 18.
23 Solicitor-client agreement, cl. 17.
24 Agency agreement, cl. 4.
25 Agency agreement, cl. 19.
26 Agency agreement, cll. 9–11.
27 Pre-trial directions given by Williams J. in this action allowed much of the transcript of the hearing to be disclosed at the trial.
28 See these reasons [24] and [25].
29 But see these reasons [29]-[33].

[52] Macks sought legal advice about the matters raised by Mr Charles in his facsimile of 11 March 1998.[30] On 17 March 1998 Macks was advised by senior counsel that "ultimately it is not a matter of concern to you how GIO choose to distribute the premium they make from this facility. In the circumstances we believe that you need take no further action in relation to the arrangement Mr Charles has". Macks did not inform Mansfield J. of Mr Charles's fee arrangements or potential for conflict of interest; by 11 March 1998 the varied order had not been taken out and Mansfield J.'s final judgment had not been entered.

[53] The funding arrangement documents were exhibited to an affidavit filed in the Federal Court on 29 May 1998, pursuant to Mansfield J.'s earlier directions. Mansfield J.'s judgment approving the funding arrangement was delivered on 9 June 1998: see *Re Addstone Pty Ltd (In liq.)*.[31]

Subsequent Events

[54] Macks served EFG Finance with the 1996 preference share action on 23 March 1998 after the funding arrangement had been executed. On 9 April 1998 the solicitors for EFG Finance wrote to Macks's solicitors advising they were acting in those proceedings and were arranging for an appearance to be filed; they served a request for documents referred to in the pleading.

[55] At the end of May 1998 CBA commenced funding under the agreement, after receipt of satisfactory legal advice.

[56] On 4 June 1998 Macks wrote to the solicitors for Mr O'Grady and Mr Crosby asking whether they had instructions to accept service in the 1998 proceedings against the appellant companies. On 10 June 1998 the solicitors advised that they had instructions to accept service on behalf of Mr O'Grady and Mr Crosby. On 12 June 1998 *The Financial Review* published an article about Mansfield J.'s approval of the funding arrangement, quoting Macks's statement that it was "probably the largest litigation funding approved by a court in Australia". On 15 June 1998 Macks wrote to the appellants' solicitors advising that the appellants Mr O'Grady and Mr Crosby had already been served with the 1998 proceedings. On 29 June 1998, without giving prior notice, Macks caused judgment in default of appearance to be entered against the appellants in the 1998 proceedings. Macks informed the appellants' solicitors of this on 30 June 1998 and on 1 July 1998 the appellants applied for an urgent stay of the judgment. The default judgment was set aside on 3 July 1999 with a costs order in favour of the appellants.

[57] On 26 February 1999 Debelle J. ordered the consolidated main action be transferred to the Supreme Court of Queensland.[32]

[58] In March 1999 Macks applied ex parte for orders to publicly examine individuals associated with the appellants.

[59] On 7 July 1999 two of the appellant companies applied in the Federal Court to set aside inter alia the orders of Mansfield J. approving the funding arrangement; the application was served on Macks on 9 July 1999.

[60] The decision of the High Court in *Re Wakim; Ex parte McNally*[33] which held invalid Commonwealth legislation purporting to confer State jurisdiction on federal courts, was delivered on 17 June 1999. The Federal Court application to set aside the funding arrangement was adjourned by

30 See these reasons [29].
31 (1998) 83 F.C.R. 583.
32 Op. cit. fn. 2.
33 (1999) 198 C.L.R. 511.

consent to 20 August 1999. On 13 August 1999 the appellants filed the claim in this action.

[61] By 12 October 1999 CBA had advanced over $3.3 million under the funding arrangement.

Maintenance and champerty

[62] This funding arrangement was to conduct civil litigation through the provision of financial assistance by GIO to Macks in return for the receipt by GIO of a proportion of the proceeds. Such an arrangement is prima facie maintenance and champerty.

[63] The essence of the civil tort of maintenance is "… the officious intermeddling in and supporting litigation in which the maintainer has no legitimate interest, the invasion of a person's right not to be harried in courts of justice by litigation".[34]

[64] Any person who without lawful justification assists a litigant in civil proceedings to which that person is not a party, resulting in damage to the plaintiff, commits the tort of maintenance.[35] Champerty is a particular form of maintenance in which a share of the proceeds is the consideration for the assistance given.[36]

[65] The historical reasons for the development of the crime and civil wrong of maintenance and champerty[37] in medieval times have little relevance today but the courts must remain vigilant to ensure in the interests of public policy that there is no trafficking in litigation or speculating in causes of action for improper gain.[38] On the other hand, the courts also recognise the need for innovative but responsible ways of increasing access to justice for the impecunious: see the comments of Danckwerts J. in *Martell v. Consett Iron Co. Ltd*.[39]

[66] If a funding arrangement involves maintenance or champerty it will ordinarily be illegal as contrary to public policy even in those jurisdictions, like Victoria,[40] where the criminal offence and civil tort of maintenance and champerty have been abolished.[41] The fact that an action is illegally maintained and against public policy may make the agreement void and unenforceable as between the parties, but it is no defence to the action which has been commenced: *Skelton v. Baxter*.[42] However, the court has the power to stay proceedings if satisfied they constitute an abuse of process: *Grovewood Holdings Plc. v. James Capel & Co. Ltd*.[43]

[67] The mere fact that proceedings are financed by third parties with no interest in the outcome other than repayment and profit from the litigation is not itself sufficient to invoke the jurisdiction of the court. Courts should be careful not to use that power to deny access to justice to a party who has sought to fund bona fide proceedings in a way which may be contrary to public policy unless that which has been done amounts to an abuse of the

34 *Neville v. London "Express" Newspaper Ltd* [1919] A.C. 368, Lord Atkinson at 395.
35 Ibid., 379.
36 Balkin and Davis, *Law of Torts*, Butterworths 1991, 783; *J. C. Scott Constructions Pty Ltd v. Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd.R. 413, 429.
37 See Winfield, "*The History of Maintenance and Champerty*", 1919, 35 L.Q.R. 50.
38 *Roux v. Australian Broadcasting Commission* [1992] 2 V.R. 577, 606.
39 [1955] Ch. 363, 386–387.
40 The law of Victoria is the law governing the documents constituting a funding arrangement.
41 *Roux v. Australian Broadcasting Commission* [1992] 2 V.R. 577, 605; *Re Movitor Pty Ltd (In liq.)* (1996) 64 F.C.R. 380, 387; *Faryab v Smyth* [1998] EWCA 3503, [19].
42 [1916] 1 K.B. 321, 326.
43 [1995] Ch. 80.

court's own process: *Abraham v. Thompson*,[44] *Faryab v. Smyth*[45] and most recently in *Sa v. Latreefers Inc.*[46] where the Court of Appeal of England and Wales noted:[47]

> "There are many commonplace and unobjectionable circumstances in which modern litigation is funded by those who are not the nominal parties to it. Obvious examples of this are funding by insurers, trade unions or lawyers engaged on legitimate conditional fee arrangements. If an agreement of this general kind is held to be contrary to public policy, it may be unenforceable. That may have a variety of consequences. A claim which depends on the assignment of a bare right of action may fail because the assignment is ineffective. A person who has funded an action champertously may fail to enforce recovery of the agreed proportion of the spoils. A person who has secured a champertous agreement to fund his litigation may be unable to enforce payment of the agreed funds. But the fact that a funding agreement may be against public policy and therefore unenforceable as between the parties to it is by itself no reason for regarding the proceedings to which it relates or their conduct as an abuse.
>
> … the question whether the courts' process is affected or threatened by an agreement for the division of spoils is one to be considered in the light of the facts in each case.
>
> …
>
> Abuse of the courts' process can take many forms and may include a combination of two or more strands of abuse which might not individually result in a stay. Trafficking in litigation is, by the very use of the word 'trafficking', something which is objectionable and may amount to or contribute to an abuse of the process. We think that it is undesirable to try to define in different words what would constitute trafficking in litigation. It seems to us to connote unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation. 'Wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse' may be a form of trafficking in litigation. … A large mathematical disproportion between any pre-existing financial interest and the potential profit of funders may in particular cases contribute to a finding of abuse but is not bound to do so."

[68] In concluding that there was no abuse of process, the court in *Sa* took into account that the funders had undertaken responsibility for the costs of what had already become very expensive litigation and that the conduct of all legal proceedings and settlement negotiations were in the hands of experienced lawyers; the funders therefore had no opportunity to abusively influence the conduct of any proceedings.

[69] The appellants have not sought a stay of these proceedings but have sought an injunction to restrain the respondents from performing the funding arrangement claiming the funding arrangement constitutes an abuse of process.

[70] The trial judge refused to grant this injunction or any other relief sought.

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44 [1997] 4 All E.R. 362, 372–374.
45 [1998] EWCA 3503, 28 August 1999, [26].
46 [2000] EWCA 17, 9 February 2000.
47 Ibid., [59]-[61].

1. Does s. 477(2)(c) of the Law authorise arrangements which might otherwise constitute maintenance or champerty?

[71] Section 199 of the *Property Law Act* 1974 and its earlier equivalents permit the statutory assignment of choses in action including assignments which would have been enforced in equity.[48] The present position is that an assignment may not ordinarily be made of a bare right of action to someone with no genuine pre-existing commercial interest in that right who assists or encourages the litigation (maintenance) in return for a share in the proceeds of the action (champerty).[49]

[72] Mansfield J., in approving the funding arrangement, concluded that it was not champertous because it came within a long established exception based on the power of a trustee in bankruptcy or liquidator to dispose of property pursuant either to s. 134(1)(a) of the *Bankruptcy Act* 1966 (Cth) or s. 477(2)(c) of the Law. Williams J. also accepted that proposition.[50]

[73] Provisions such as s. 134(1)(a) *Bankruptcy Act* 1966 provide a statutory exception to the law of maintenance authorising the trustee in bankruptcy to sell a cause of action: *Seear v. Lawson*[51]; *Citicorp Australia Ltd v. Official Trustee in Bankruptcy*.[52]

[74] The appellants claim that the reasoning in bankruptcy cases does not apply to company liquidations; under the bankruptcy scheme title to all property of the bankrupt vests in the trustee in bankruptcy who has power to sell this property; by contrast, the statutory regime for company liquidations gives the liquidator the right to control the assets of the corporation, including the power of sale but does not automatically divest the company of its property without a specific order.

[75] Section 477(2)(c) of the Law relevantly provides:

> "… a liquidator of a company may:
>
> …
>
> (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company."

[76] The appellants argue that without clear words authorising conduct which would otherwise be unlawful, the Law does not authorise a liquidator to be a party to champerty and maintenance; s. 564 of the Law, which permits the court to give priority to a creditor who has been given an indemnity for the costs of litigation, supports a narrow construction of the words in s. 477(2)(c) as not permitting champerty and maintenance.

[77] There is a substantial body of authority which accepts that the statutory power of a liquidator of a company under s. 477(2)(c) of the Law to "sell or otherwise dispose of … all or any part of the property of the company" empowers the liquidator to enter into funding arrangements which might otherwise offend the rules against maintenance and champerty: see, for example, *In re Park Gate Waggon Works Company*;[53] *Re Movitor Pty Ltd (In liq.)*;[54] *UTSA Pty Ltd (In liq.) v. Ultra Tune Australia Pty Ltd*;[55] *Re*

48 *In re Pain; Gustavson v. Haviland* [1919] 1 Ch. 38, 44–45; *Trendtex Trading Corporation v. Credit Suisse* [1980] Q.B. 629; [1982] A.C. 679; *Federal Commissioner of Taxation v. Everett* (1980) 143 C.L.R. 440, 447 and *Trendtex Trading Corporation v. Credit Suisse* [1982] A.C. 679, 702.
49 *Giles v. Thompson* [1994] 1 A.C. 142, 161.
50 *Elfic Ltd v. Macks* [2000] QSC 18 at [59]-[67].
51 (1880) 15 Ch.D. 426, 432–433.
52 (1997) 71 F.C.R. 550, 557–558.
53 (1881) 17 Ch.D. 234, 239.
54 (1996) 64 F.C.R. 380.
55 [1997] 1 V.R. 667.

Tosich Construction Pty Ltd[56] and *Re Daniel Efrat Consulting Services Pty Ltd (In liq.); Ex parte Hawke*.[57]

[78] The funding arrangement here does not assign the causes of action as in *UTSA* but requires Macks to dispose to GIO "a share of the proceeds of the claim … sufficient to pay or reimburse [GIO] for all amounts to which [GIO] is entitled" under the insurance policy.[58] This disposition is subject to the rights of CBA and Mr Charles's firm to payment. In return, GIO insured CBA against its risk of nonpayment by Macks; Macks and the respondent companies for their legal costs; and Macks for his personal liability for the appellants' or third party costs.

[79] The appellants rely on Templeman J.'s comments in *Bell Group Ltd (In liq.) v. Westpac Banking Corporation*.[59]

> "The word 'property' is defined in s 9 of the *Corporations Law* to mean:
>
> > 'Any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action.'
>
> It is to be noted that the words 'present or future' qualify the words 'estate or interest': not 'property'. The section therefore relates only to property which is presently in existence."

[80] *Bell* involved an application under s. 564 of the Law by creditors funding litigation on behalf of the company in liquidation to receive priority over other creditors in relation to property or expenses to be recovered in the future. Templeman J. understandably distinguished the line of cases I have mentioned in [77] as not directly relevant to applications under s. 564 of the Law.[60]

[81] Whilst the words in parentheses in s. 9 relate to "estate or interest", the "estate or interest" is "in real and personal property"; the words in parentheses therefore relate to "Any legal or equitable estate or interest … in real and personal property". This definition of "property" is broad and encompasses an interest in a cause of action and the fruits of such an action. By contrast, s. 564 applies only where "… property *has been* recovered" (my emphasis). Templeman J.'s comments on s. 9 must be read as applying to the meaning of "property" as qualified by the words of s. 564; in s. 477(2)(c) "property" retains its broad meaning.

[82] *Bell* does not throw doubt on the well-established acceptance by the courts[61] that s. 477(2)(c) of the Law confers power upon a liquidator to enter into transactions on behalf of the company which might otherwise be contrary to public policy and illegal as involving maintenance. As Hayne J.A. (as he then was) said in *UTSA*:

> "In my view there is no warrant for reading down the general words of the law. The reference to sale or disposal 'in any manner' makes plain that it is the intention of the legislature that the powers of the liquidator are to be ample. If a liquidator is to realise the assets of the company in liquidation to the best advantage, it would be surprising indeed if the liquidator were able to sell a particular form of the company's assets (its rights of action) to only a limited class of

56 (1997) 73 F.C.R. 219.
57 (1999) 162 A.L.R. 429.
58 Insurance policy, cl. 15.
59 (1996) 18 W.A.R. 21, 28.
60 *Bell Group Ltd (In liq.) v. Westpac Banking Corporation*, [31]-[32].
61 See *Re Movitor Pty Ltd (In liq.)* (1996) 64 F.C.R. 380, 391, 395; *Re Tosich Construction Pty Ltd* (1997) 73 F.C.R. 219, 236.

persons – those who are already interested in the outcome of the action concerned. Especially is this so when it is to be assumed that the provisions about realisation of the company's assets are to be read in light of the long established rule in relation to bankruptcy which permits the trustee in bankruptcy to sell the bankrupt's rights of action to a third party: see *Seear v Lawson* (1880) 15 ChD 426; *Guy v Churchill* (1889) 40 ChD 481; *Ramsay v Hartley* [1977] 2 All ER 673; 1 WLR 686; *Stone v Angus* [1994] 2 NZLR 202; *Cotterill v Bank of Singapore (Australia) Ltd* (1995) 37 NSWLR 238. In my view nothing turns on the different treatment of property of the bankrupt and a company in liquidation in the bankruptcy and companies legislation. In the former case, the property vests in the trustee but in the latter does not, without special order, vest in the liquidator.

I do not accept that s 477 is to be read, as counsel for the appellant contended, as doing no more than identifying the circumstances in which a liquidator can exercise powers which otherwise would rest in the company. Such a construction wholly ignores that the liquidator is to wind up the affairs of the company and distribute its property: cf s 477(2)(m). The liquidator is not appointed simply as a particular agent or controller of the company who is to set about carrying on the business and affairs of the company as if winding up had not intervened. The liquidator is there to wind up the company's affairs."[62]

[83] Section 477(2)(c) of the Law authorises a liquidator to enter into transactions which would have otherwise constituted maintenance or champerty, to sell or dispose of all or part of the property of the company.

2. Do the terms of this funding arrangement provide for a sale or disposition of property within s. 477(2)(c) of the Law?

[84] The appellants submit that a promise to share the proceeds which may be realised through pending litigation cannot properly be characterised as a sale or other disposition of property of the company within s. 477(2)(c); even if the definition of "property" in s. 9 of the Law includes the disposition of a cause of action or the entire fruits of the action, the funding arrangement does not purport to do this; it gives GIO only a share of the future proceeds of the action.

[85] As has been noted,[63] bankruptcy statutes give the trustee in bankruptcy the statutory power to assign a bare right of action: see *Seear v. Lawson*.[64] Companies legislation also permits the assignment of the company's choses in action by the liquidator: see *In re Park Gate Waggon Works Company*,[65] *Grovewood Holdings Plc.*[66] and *UTSA Pty Ltd (In liq.) v. Ultra Tune Australia Pty Ltd*.[67]

[86] This principle has been extended to allow the trustee in bankruptcy to assign the cause of action on terms that the assignee will account to the liquidator or trustee for a share of the fruits of the action: see *Guy v. Churchill*;[68] *Cotterill v. Bank of Singapore (Australia) Ltd*.[69] In other cases, the liquidator's power to assign to a third party a share of the proceeds

62 *UTSA*, 463–464.
63 These reasons [73].
64 (1880) 15 Ch.D. 426, 433.
65 (1881) 17 Ch.D. 234, 239.
66 [1995] Ch. 80, 84–86.
67 (1996) 21 A.C.S.R. 457, Hayne J.A. (as he then was), 463–464. See also [77] of these reasons and the cases there cited.
68 (1884) 40 Ch.D. 481.
69 (1995) 37 N.S.W.L.R. 238.

recovered in the action in return for assistance with litigation has been recognised: *Re Movitor Pty Ltd (In liq.)*,[70] *Re Tosich Construction Pty Ltd*,[71] *Re William Felton & Co. Pty Ltd*[72] and *In re Oasis Merchandising Services Ltd*.[73]

[87] Lightman J., in *Grovewood Holdings Plc.*,[74] concluded that the provisions of the English Insolvency Act did not extend the statutory exemption for sales of bare causes of action to sales of the fruits of litigation with provision for the purchaser to fund the litigation. *Grovewood* was considered but not followed in Australia in *Re Movitor*, *Re Tosich* and *Re William Felton*. It was also considered and doubted by the English Court of Appeal in *In re Oasis Merchandising Services Ltd*;[75] whether the statutory exemption extends to sales of part of the future fruits of litigation with provision for the purchaser to fund the litigation must always be a question of construction of the statutory power of sale.

[88] Here s. 477(2)(c) of the Law allows a liquidator to "dispose of, in any manner, all or any part of the property of the company"; under s. 9 property means "any legal or equitable estate or interest … (whether present or future …) in real or personal property of any description and includes a thing in action". The plain meaning of those words authorises the liquidator to assign to a third party a share of the future proceeds of the companies' cause of action in return for funding litigation.

3. Are proceeds from causes of action under s. 565 of the Law "property" under s. 477(2)(c) of the Law?

[89] Section 565 of the Law makes preference payments by a company void as against the liquidator. The main action includes claims under s. 565 of the Law.

[90] There is some judicial support for the proposition that when such payments are recovered they do not become part of the property of the company but are held by the liquidator in trust for the creditors. In *Re Yagerphone Limited*[76] Bennett J. said:

> "The right to recover a sum of money from a creditor who has been preferred is conferred for the purpose of benefiting the general body of creditors, … the sum of money, when recovered by the liquidators … did not become part of the general assets of Yagerphone, Ld., but was a sum of money received by the liquidators impressed in their hands with a trust for those creditors amongst whom they had to distribute the assets of the company."

[91] In *N. A. Kratzmann Pty Ltd (In liq.) v. Tucker [No. 2]*,[77] McTiernan, Taylor and Menzies JJ. said, considering *Yagerphone*, that where one company in liquidation was recovering preferences against another company in liquidation:[78]

> "… although the moneys paid as a preference were at the time of payment subject to the charge, the moneys recovered by the trustee are not the same moneys and that they do not, by virtue of payment to the trustee, become moneys of the bankrupt or in any way subject to the

70 (1996) 64 F.C.R. 380, 393.
71 (1997) 73 F.C.R. 219.
72 (1998) 16 A.C.L.C. 1294.
73 [1998] Ch. 170.
74 [1995] Ch. 80, 87.
75 [1998] Ch. 170, 179–180.
76 [1935] Ch. 392, 396.
77 (1968) 123 C.L.R. 295, 302.
78 At 301.

> charge; when recovered they become the moneys of the trustee and his title to them does not depend upon his succession to any title which the bankrupt had. It was, we think, in this sense that Bennett J. meant …" [his words quoted in [90]]

[92] In *Re Starkey* [79] McPherson J.A., with whom Pincus J.A. agreed, said Bennett J.'s use of the word "trust" does not have its full legal meaning. In *Re Fresjac Pty Ltd (In liq.),*[80] Doyle C.J., with whom Matheson J. agreed, adopted those comments of McPherson J.A.

McPherson J.A. in *Re Starkey* added:

> "… while proceeds of payments recovered as preferences in winding up do not become the property of the company, nor the property of unsecured creditors they do form part of the general assets of the company under the administration and control of the liquidator that are available for payment of the costs and expenses of winding up and the claims of unsecured creditors…".

[93] I do not understand McPherson J.A.'s statement, that recovered preference payments do not become part of the property of the company, in context, to mean that such payments are not property within s. 477 of the Law. There is nothing in the provisions of the Law to suggest that moneys recovered under s. 565 of the Law are to be held by a liquidator on terms different to those on which the liquidator holds the general assets of the company. To decide otherwise would be to leave a liquidator with no power to dispose of property other than money recovered by way of a s. 565 action. Such a conclusion is also supported by the terms of the order made by the High Court in *Octavo Investments Pty Ltd v. Knight*[81] which required that the moneys recovered on a voidable preference claim be paid to the company not the liquidators. See also *Re Fresjac*.[82]

[94] Williams J. rightly concluded that proceeds from actions brought under s. 565 of the Law constitute property within s. 477(2)(c) of the Law.

4. The status of proceeds from claims under ss 558FF and 588M of the Law

[95] Similarly, the appellants contend that proceeds received from claims under ss 588FF and 588M of the Law belong to the company, even though the causes of action are vested in the liquidator.

[96] In *Re Movitor*, Drummond J. found that the expected proceeds of an action under s. 588M are part of the property of the company for the purposes of s. 477(2)(c).[83] This conclusion is consistent with the plain meaning of the words used in s. 588M(2): "a debt due to the company". *Re Movitor* has been followed in subsequent Australian cases.

[97] In *Re Tosich Construction Pty Ltd*[84] Lindgren J. applied similar reasoning to the proceeds of an action under s. 588FF. Again, the conclusion that proceeds from claims under s. 588FF are property of the company under s. 477(2)(c) is supported by the plain words of the section which enable an order to be made directing payments or transfer of property "to the company".

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79 [1994] 1 Qd.R. 142, 154.
80 (1995) 65 S.A.S.R. 334, 335, 348.
81 (1979) 144 C.L.R. 360, 372–373; see also *Re Fresjac* at 343 but cf. *Starkey* at 155.
82 At 343. But compare *Starkey* at 155.
83 (1996) 64 F.C.R. 380, 392.
84 (1997) 73 F.C.R. 219, 235.

[98] Since those decisions, the English Court of Appeal has considered a similar issue in *In re Oasis Merchandising Services Ltd*,[85] deciding that "the company's property" in the English companies legislation did not include the fruits of litigation brought by the liquidator arising from rights of action accruing after the liquidation. The court in *Oasis* noted the distinction between s. 214 of the English companies legislation and s. 588M of the Law. The latter allows the liquidator to recover "as a debt due *to the company* an amount equal to the amount of the loss or damage" [my emphasis] resulting from insolvency. That is not the language used in s. 214 which provides:

> "… the court, on the application of the liquidator may declare that that person is to be liable to make such contribution (if any) *to the company's assets* as the court thinks proper". [my emphasis]

The different words are significant and plainly justify the different decisions in the two jurisdictions.The primary judge correctly concluded that any proceeds from claims under ss 588FF and 588M of the Law become part of the property of the company for the purposes of s. 477(2)(c) of the Law.

5. Does the funding arrangement purport to distribute proceeds of claims under s. 565 of the *Companies Code* to persons other than creditors?

[99] Under s. 565(2) of the *Companies Code* ("the Code") a director who wilfully pays or permits to be paid any dividend out of what he knows are not profits is liable to the creditors of the company for that amount which may be recovered by the creditors or the liquidator suing on behalf of the creditors. The proceeds recovered are the property of the creditors, not the company and therefore cannot be disposed of by the liquidator under s. 477(2)(c) of the Law. Proceeds of claims under s. 565 of the Code must be excluded from any disposition to GIO under the funding arrangement but part of GIO's premium is to be calculated by reference to a percentage of all sums recovered in the action by the liquidator, including claims under s. 565 of the Code.

[100] The insurance policy refers to s. 565 claims "for the purpose of calculating … the premium"; it does not and cannot require that proceeds recovered under s. 565 of the Code be used to pay the premium.

[101] Counsel for the appellants, Mr Keane Q.C., points out that a difficulty could arise if 65 per cent or more of the total proceeds of the main action resulted from claims under s. 565 of the Code.

[102] This potential difficulty is resolvable: the insurance policy then has the effect that GIO would only receive an amount up to its entitlement under the insurance policy, always exclusive of recoveries under s. 565. The funding arrangement does not purport to distribute proceeds of claims under s. 565 of the Code to persons other than creditors. The calculation of GIO's premium by reference to s. 565 does not make the funding arrangement invalid, against public policy or an abuse of process.

6. Is the funding arrangement an abuse of process or against public policy because it confers significant control of the main action on GIO?

[103] A transaction under s. 477(2)(c) should not be approved if it is against public policy. A court has the power to stay the proceedings to which the funding arrangement relates, if the funding arrangement consti-

85 [1998] Ch. 170.

tutes an abuse of process, although here the appellants ask for an injunction not a stay. The appellants submit the terms of the funding arrangement confer too much control on GIO and diminish the important role of the liquidator as an officer of the court.

[104] This funding arrangement gives GIO some significant rights to interfere in the conduct of the litigation by subjecting the liquidator to its decisions in matters which the law contemplates would ordinarily be dealt with solely by the liquidator: see *Glegg v. Bromley*;[86] *In re Oasis Merchandising Services Ltd*[87] and *Re Tosich Construction Pty Ltd*.[88] Whilst there are often good reasons to allow funding arrangements, for example, to provide access to justice for companies in liquidation and their creditors, it is not in the interests of public policy to encourage such insurers to actively or aggressively participate in the litigation, because of the potential for abuse.

[105] The cause of action was not sold to GIO and Macks remains responsible under the Law for its conduct. The role of liquidator carries onerous legal responsibilities and is one which must be exercised by the liquidator personally and independently; it must be unfettered and is largely non-delegable but for the exceptions under the Law: *Ah Toy v. Registrar of Companies (N.T.)*;[89] *Commissioner for Corporate Affairs v. Harvey*[90] and *Re Allebart Pty Ltd (In liq.) and the Companies Act*.[91]

[106] On the other hand, in funding such expensive and complex litigation it is not unreasonable that GIO would want some input into its conduct: *Buiscex Ltd v. Panfida Foods Ltd (In liq.)*.[92] Loss of some control does not necessarily make the transaction an abuse of process: see *Re Movitor*.[93]

[107] In this case, the conduct of all proceedings and settlement negotiations is in the hands of experienced lawyers who can be expected not to act improperly or abusively: see *Sa*.[94] This funding arrangement was in many ways similar to that approved by Drummond J. in *Re Movitor*. Regardless of the funding arrangement, Macks can apply to the court for directions at any time.[95] Under the Law any substantial compromise requires approval of the court, committee of inspection, or resolution of the creditors.[96] Under the funding arrangement, any dispute between Macks and GIO is to be resolved by an independent senior counsel.[97] Mansfield J. was satisfied that ultimate control of the litigation under the funding arrangement remained with the liquidator.[98]

[108] A funding arrangement which left greater control of the action with Macks would have been preferable, but I am not persuaded that GIO's potential for limited control of the action under this funding arrangement is against public policy; on the established facts it is not an abuse of process. The learned judge correctly refused the relief sought.

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86 [1912] 3 K.B. 474, 485, 488–489.
87 [1998] Ch. 170, 186.
88 (1997) 73 F.C.R. 219, 236.
89 (1986) 72 A.L.R. 107, 113.
90 [1980] V.R. 669, 691.
91 [1971] 1 N.S.W.L.R. 24, 30.
92 (1998) 28 A.C.S.R. 357, 363.
93 (1996) 64 F.C.R. 380, 449.
94 [2000] EWCA 17, 9 February 2000, [62].
95 Section 479(3) the Law.
96 Section 477(2A) the Law.
97 Insurance policy, cl. 6.
98 *Re Addstone Pty Ltd (In liq.)*, 597.

7. Should non-disclosure in an ex parte application for directions under s. 479(3) of the Law of Mr Charles's pecuniary interest in the outcome of litigation and his potential for conflict of interest have caused Williams J. to set aside the order of Mansfield J.?

[109] The appellants submit that non-disclosure of Mr Charles's percentage pecuniary interest in the outcome of the litigation in an ex parte application for directions unders s. 479(3) of the Law has the result that Mansfield J.'s order should be set aside. Macks knew of Mr Charles's interest on 11 March 1998, before Mansfield J. entered the varied order approving the funding arrangement and long before the delivery of Mansfield J.'s final judgment approving it on 9 June 1998. The appellants claim this non-disclosure should be treated in the same way as non-disclosure on any other ex parte application and the order should be set aside.

[110] There is an obligation on a liquidator as an officer of the court applying for orders under s. 479(3) of the Law to give full and frank disclosure.

[111] The primary judge rightly noted that the application by Macks under s. 479(3) of the Law was not strictly an ex parte application in the traditional sense. The appellants were not a party to the application; nor was any order made against them; they had no right to be heard as prospective defendants to the main action; the application did not determine substantive rights: see *Bank of Melbourne Ltd v. HPM Pty Ltd*.[99] On the other hand, as creditors they had a real interest in the outcome of the application. Mansfield J. attempted to protect the interests of creditors by giving liberty to apply, but this was of limited use because the appellants were not made aware of the order for four months.

[112] Williams J. noted it was not possible on the evidence to determine what fees would be paid to either LEI or Mr Charles, who did not give evidence before him. There is, however, evidence which suggests that Mr Charles, a solicitor, was to be remunerated through LEI, which was controlled by his wife, by reference to the calculation of a percentage of the proceeds of the fruits of the action received by GIO. Whilst the exact position remains unclear, there is a danger that such a scheme could amount to maintenance or offend professional practice rules: see *Clyne v. New South Wales Bar Association*;[100] s. 48D *Queensland Law Society Act* 1952 and s. 99 *Legal Practice Act* 1996 (Vic.).[101]

[113] In addition, the appellants emphasise that Mr Charles has a potential conflict of interest between the maintenance of his commercial relationship with GIO, and his role assisting Macks under the funding arrangement and that this was not plainly disclosed to Mansfield J.

[114] Senior counsel for Macks acknowledged before Mansfield J. that GIO's solicitor, Mr Charles, would provide a member of staff to Macks's instructing solicitors so that the insurer was kept informed as to how the proceedings were conducted and have an opportunity to participate.

[115] Williams J. considered both issues which were not fully disclosed to Mansfield J. His Honour noted that had those matters originally been raised before Mansfield J., modifications could have been made to the funding arrangement; the liquidator's failure to place these matters before Mansfield J. caused him concern. Williams J. decided that there should be

99 (1998) 16 A.C.L.C. 427.
100 (1960) 104 C.L.R. 186, 203.
101 The law of Victoria was the governing law of the various agreements constituting the funding arrangement.

no interference with Mansfield J.'s order because a very substantial sum of money has already been expended under the funding arrangement; the true position of Mr Charles had by then been fully exposed so that all parties were aware of the potential for conflict; and Mr Charles will be subject to the scrutiny of Macks and the appellants who can use the Law to invoke the court's supervisory role.

[116] Portions of this funding arrangement were not ideal. Although it is not possible on the evidence to ascertain the terms of Mr Charles' remuneration, I, too, am concerned that Mr Charles, a solicitor, may be remunerated, even indirectly, by reference to a percentage of the proceeds of the main action. Depending on the precise terms of the remuneration, it is possible that such conduct may amount to maintenance and may offend professional conduct rules. It may be against public policy if it brings the justice system into disrepute through congesting the courts with an unjustified proliferation of cases; or increases the risk that practitioners will place their desire to win litigation and make profits above their professional duties to their client, the court and other practitioners; or is likely to reduce public confidence in the administration of justice. But it is impossible to reach a firm view on the propriety of Mr Charles' remuneration on the evidence here.

[117] The funding arrangement does raise the risk that because of Mr Charles' personal interest in the outcome of the litigation which is linked with those of GIO, then, for reasons which may arise during the litigation, these interests may not always be the same as the interests of Macks or the respondent companies. On the other hand, both Mr Charles and Macks are officers of the court who are now aware of the potential for conflict under the funding arrangement. In the absence of any evidence to the contrary, the Court is entitled to presume they are acting ethically. It seems certain the appellants will be vigilant in this and other respects and will not be slow in seeking the intervention of the court where they believe it is warranted.

[118] This appeal is not an appeal from the decision of Mansfield J. but from Williams J.'s refusal to go behind Mansfield J.'s perfected order. The circumstances in which a court will re-open its orders are very limited and were recently considered by the High Court in *DJL v. Central Authority*.[102] They include cases where an order obtained in the absence of an interested party will be set aside for material non-disclosure: see, for example, *Re South Downs Packers Pty Ltd*[103] and *Garrard v. Email Furniture Pty Ltd*.[104] It is by no means clear that this is such a case. The directions given by Mansfield J. do not bind or substantively affect the rights of the appellants; they protect the liquidator who has made full and fair disclosure to the court of the material facts, from liability for any alleged breach of duty as liquidator to a creditor, a contributory or the company in respect of anything done in accordance with the directions: see *Re G. B. Nathan & Co. Pty Ltd (In liq.)*;[105] *Re Movitor*[106]and *Re Efrat*.[107] Mansfield J.'s order has provided protection to the liquidator whilst acting in accordance with the approved directions. There may be cases where the liquidator's failure to make full and fair disclosure of material facts at the application for directions warrants

102 (2000) 201 C.L.R. 226.
103 [1984] 2 Qd.R. 559.
104 (1993) 32 N.S.W.L.R. 662, 674.
105 (1991) 24 N.S.W.L.R. 674, 679–680.
106 (1996) 64 F.C.R. 380, 383.
107 (1999) 162 A.L.R. 429, 434–435.

the liquidator's losing that protection. On the established facts, this case is not one of them.

[119] In these circumstances, Williams J. was right to refuse to set aside Mansfield J.'s order.

8. Was Mansfield J. deliberately misled by Macks so as to conclude that Thomas J.'s judgment was a consent order?

[120] The appellants also claim that Macks deliberately misled Mansfield J. into concluding that Thomas J.'s order for summary judgment was a consent order. The transcript and counsel's submissions before Mansfield J. do not support that contention, which was rightly rejected by the primary judge.

9. Does Mr Charles's interest in the outcome of litigation, his potential conflict of interest and GIO's control over the main action collectively result in the funding arrangement becoming an abuse of process?

[121] If the funding arrangement constitutes an abuse of process, the proceedings may be stayed pending the parties entering into an amended or new acceptable funding arrangement which does not raise potential conflicts of interest; risk a solicitor being remunerated by a percentage share of the proceeds of the litigation, or give the funder too much control of the main action. The appellants have not sought a stay but seek an injunction on that basis to restrain the respondents from performing the funding arrangement. I have already dealt separately with Mr Charles's pecuniary interest in the outcome of the litigation, his potential conflict of interest and GIO's control over the main action.

[122] The unattractive aspects of the funding arrangement raised by the appellants do not, alone or collectively, persuade me that the funding arrangement was contrary to public policy, let alone an abuse of process. It is significant that the appellants are protected by this costs insurance if Macks's action against them is unsuccessful. Williams J. correctly refused to grant the injunctive relief sought.

10. Was the funding arrangement in the interests of creditors?

[123] The appellants submit that the exercise of power under s. 477(2)(c) of the Law must be in the interests of creditors.

[124] The liquidator must exercise his powers in the interests of the winding up, which include the interests of creditors. The appellants submit the liquidator did not consult with creditors prior to seeking approval to enter into the funding arrangement; did not disclose to the creditors his intention to apply to the court for approval and did not inform the creditors of the offer of funding from GIO so that the creditors could consider whether they wished to indemnify the liquidator on comparable terms.

[125] Drummond J. in *Re Movitor*[108] regarded informed consultation with creditors an essential prerequisite before entering into a funding arrangement. Hansen J. in *UTSA*[109] observed that generally speaking a liquidator should seek the informed consent of creditors and that whilst it may have been preferable for the liquidators to have convened a meeting of all creditors to consider the proposal, the omission did not constitute a reason to refuse approval of the proposed funding scheme.

108 394–395.
109 [1997] 1 V.R. 667, 696–697, 705.

[126] Both Mansfield J. and Williams J. recognised the difficulty for a liquidator in a case such as this where the largest creditor is also the potential defendant in the action sought to be funded. Young J. in *Re Feastys Family Restaurants Pty Ltd (In liq.)*[110] commented in a comparable case:

> "… some significant creditors are the defendants in the litigation so that, commercially speaking, it is not feasible to obtain the consent of the creditors.
>
> …
>
> … where there is a good reason for creditors not to be approached, the court should make an order under s 477(2B) with insured litigation finance agreements almost as of course."

[127] Ordinarily, consultation with the creditors is preferable, even when some creditors are the target of the litigation sought to be pursued.

[128] In the circumstances here, it was understandable that the liquidator did not formally seek the approval of creditors before entering into the funding arrangement. As the learned primary judge noted, the creditors were aware of Macks's wish to prosecute these issues; he had discussions with a number of the major creditors with a view to obtaining funding to commence the main action. No creditor at the meeting on 28 and 29 March 1996 was prepared to become an indemnifying creditor; all creditors, including the appellants, knew of the liquidator's interest in pursuing the claims in the main action and none sought to dissuade Macks from commencing the proceedings or suggested that the claims could not be substantiated. Macks was in a difficult position and acted on the advice of senior counsel.

[129] But the fact that a funding arrangement may not be in the interests of creditors who will be defendants in the action the subject of the funding arrangement is not, in itself, a sufficient ground to limit the liquidator's power of disposition under s. 477(2)(c) of the Law; nor does it provide a basis for concluding the funding arrangement was an abuse of process.

11. The failure to set aside Thomas J.'s judgment before commencing the main action

[130] The appellants also contend that the failure to explain to Mansfield J. that the main action would proceed without first setting aside Thomas J.'s order for summary judgment, was an abuse of process. The pleadings in the main action did not originally seek relief to set aside Thomas J.'s judgment. It is apparent that this is an issue which should be addressed in the main action. The pleadings in the main action have recently been amended and now claim that the judgment entered by Thomas J. was "obtained and entered by fraud" or "by collusion" and should be set aside or declared to be a nullity: see *Emanuel Management Pty Ltd & Ors v. Foster's Brewing Group Limited & Ors.*[111] At the time of the application before Mansfield J., there was no statement of claim. I am far from persuaded that, in all the circumstances, the omission to tell Mansfield J. that the main action would proceed before setting aside Thomas J.'s order for summary judgment was an abuse of process or that it would otherwise warrant going behind Mansfield J.'s order.

110 (1996) 14 A.C.L.C. 1058.
111 [2000] QSC 430, [6].

12. Was the liquidator acting in the interest of the winding up in entering into the funding arrangement?

[131] One of the appellant companies (Lensworth Properties Pty Ltd) advanced $43 million in 1987 to Emanuel Management Pty Ltd; Emanuel (No 14) Pty Ltd and some other Emanuel companies gave Lensworth Properties Pty Ltd (later part of the EFG group), security for that advance. If that security is valid and the main action is successful against the appellants, the appellants would have first claim to the proceeds as secured creditors. The appellants contend this makes the merits of the main action and its funding questionable.

[132] The worth of that security is an issue in the main action. In bringing the main action, Macks acted on legal advice from experienced senior counsel, copies of which were shown to Mansfield J. Approval of a funding arrangement under the Law is not the place for a trial of the substantive issues in the litigation sought to be funded: *Martell v. Consett Iron Co. Ltd*.[112]

[133] The appellants raise a number of matters to suggest the claims in the main action were overstated before Mansfield J. For example, they submit that Mansfield J. was wrongly told that the DOFR involved a transfer of property valued internally by the appellants at $100 million when in fact the value may have been $53 million. Although the precise amount of the relief sought by the appellants was not clear before this Court, if the main action is fully successful, Macks will enter judgment against the appellants for many millions of dollars. A preliminary application such as this is no place to determine the strengths and weaknesses of the main action. The proof of that claim is a matter for determination at trial. It is sufficient that the potential claim is one which appears to justify the conduct of Macks in bringing the main action. The funding arrangement limits any further risk to creditors and if it has significant success, the creditors, with the possible exception of the appellants, will benefit. If the main action is completely unsuccessful, the appellants in the ordinary course will be likely to have a costs order in their favour; this will be met under the funding arrangement.

[134] It is evident that Macks has a personal interest in pursuing the main action, in that this seems to be his best prospect of recovering his past fees of over $2.5 million; the funding arrangement additionally provides for him to earn fees well into the future. Those matters alone are no reason not to approve the funding arrangement in a complex liquidation like this which will inevitably involve substantial liquidator's fees. The primary judge concluded that the material available to Macks was sufficient to induce a reasonable belief in his mind that there were good prospects of success in bringing the action which would benefit the companies in liquidation. I agree with that assessment, which was plainly open, based on the legal advice Macks received and the favourable impression the judge formed of Macks, who was cross-examined before him over two days.

[135] The appellants complain that Williams J., in justifying Macks's decision to pursue the claim in the interests of the winding up, wrongly relied upon judicial findings in *Addstead Pty Ltd (In liq.) v. Liddan Pty Ltd*,[113] namely, that a number of the transactions relating to the main action involved fraud against the unsecured creditors of the Emanuel Group by the directors of the Emanuel companies in their dealings with representatives of

112 [1955] Ch. 363, 422, cited with approval in *Faryab v. Smyth* [24] and *Sa v. Latreefers* [55].
113 (1997) 70 S.A.S.R. 21, 43–44.

the appellants. It is correct that the appellants were not parties to that action; the findings of fraud and breach of fiduciary duty were made against the directors of the Emanuel group companies, not the appellants, and related to only a small part of the claims in the main action. Nevertheless, the decision was capable of giving encouragement in a general way to the liquidator in pursuing the main action.

[136] Williams J. was entitled to conclude that Macks acted in the interests of the winding up in entering into the funding arrangement.

Application to remove the liquidator

[137] The appellants claim the liquidator has not acted impartially, fairly and independently and should be removed. This, they submit, was demonstrated by Macks's substantial personal interest in pursuing the litigation which has no realistic prospects of success; failing to seek the approval of creditors for the funding arrangement; failing to disclose to the court the true role of Mr Charles and his interest in the outcome of the proceedings; failing to give other creditors of substance the opportunity to enter into comparable funding arrangements with GIO and CBA and making the application before Mansfield J. ex parte without making full and frank disclosure.

[138] To succeed in an application for removal of the liquidator under ss 473 or 503 of the Law, the applicant is required to show that removal is for the general advantage of persons interested in the winding up.[114]

[139] Each complaint has been dealt with earlier in these reasons. It is sufficient to say the evidence before Williams J. on these matters did not support the order sought by the appellants.

[140] The appellants also complain of Macks's conduct in entering a default judgment against the appellants in circumstances where it was obviously inappropriate. Macks did so on legal advice. Williams J. concluded that whilst Macks acted robustly in entering judgment, the decision was not taken lightly and the conduct did not amount to a ground necessitating Macks's removal. His Honour's conclusion was plainly open on the evidence.

[141] The appellants also complain of Macks's conduct in attempting to trick them into releasing a security (a debenture given by Emanuel (No 14) Pty Ltd) by requesting the appellants sign releases to "update the records of the Australian Securities Commission" when this was untrue.[115] The appellants submit Macks's true purpose was to remove an obstacle to the funding arrangement he was then negotiating; GIO and CBA were concerned that any securities held by the appellants not take priority over payments to be made to CBA under the funding arrangement; Macks sent the letter to the appellant companies' directly rather than to their solicitors.

[142] Williams J. found that the liquidator had good reason for believing the appellants had surrendered the security and that the records of the Australian Securities Commission should be brought up to date to reflect that fact; the conduct of the liquidator was not unreasonable and even if "somewhat unwise" was not evidence of want of good faith.

[143] On the evidence, there was room for some confusion as to whether or not the EFG group was relying on their mortgage debenture over Emanuel (No 14) Pty Ltd. Macks accepted during cross-examination,

114 Keay, Andrew R., *McPherson: The Law of Company Liquidation*, 4th ed., LBC Information Services 1999, 314.

115 See these reasons [37].

however, that he appreciated that the EFG group still maintained their rights as a secured creditor over Emanuel (No 14) Pty Ltd. It is far from clear whether the appellants were in fact entitled to the benefit of the rights under the mortgage debenture and the validity of that security may be determined in the main action. Williams J. formed a favourable view of Macks, finding him an impressive and honest witness who as liquidator was in an extremely difficult situation.[116] There is some evidence from which it could be inferred that Macks's true purpose in writing to the appellants requesting completion of the release to update the records of the Australian Securities Commission was to remove an obstacle to the funding arrangement. The learned primary judge did not draw this inference and was not prepared on the material before him to make any finding of misconduct on the part of Macks. His Honour was entitled to reach that conclusion on the evidence.

[144] A further complaint made was that Macks breached an undertaking to the court in pursuing public examination of those connected with the appellants after commencing the main action.[117]

[145] The learned primary judge doubted whether this amounted to an undertaking to the court which could be the subject of contempt proceedings but in any case was not satisfied there was any subsequent breach of the undertaking when Macks applied for orders for the examination of the 10th appellant and former employees of the appellants. These findings were plainly open on the evidence.

[146] Williams J., who formed a favourable view of Macks after seeing him cross-examined over two days, was entitled to conclude that the appellants' complaints against Macks, alone or collectively, did not demonstrate cause for his removal under the Law.

[147] The appellants have not demonstrated in the myriad complaints raised by them, alone or collectively, that Williams J. erred in dismissing the action. I would dismiss the appeal with costs to be assessed. It is therefore unnecessary to deal with the respondents' notices of contention.

Summary

1. Section 477(2)(c) of the Law authorises a liquidator to enter into transactions which would otherwise have constituted maintenance or champerty, to sell or dispose of all or part of the property of the company.
2. Section 477(2)(c) of the Law authorises the sharing of proceeds of future litigation under this funding arrangement.
3. Proceeds from actions brought under s. 565 of the Law constitute property within s. 477(2)(c) of the Law.
4. Proceeds from claims under ss 588FF and 588M of the Law become part of the property of the company for the purposes of s. 477(2)(c) of the Law.
5. The funding arrangement does not purport to distribute proceeds of the claims under s. 565 Companies Code to persons other than creditors; the calculation of GIO's premium by reference to s. 565 does not make the funding arrangement invalid, against public policy or an abuse of process.
6. The funding arrangement in conferring significant control of the main action on GIO does not become an abuse of process.

116 *Elfic Ltd v. Macks* [2000] QSC 18, [127].
117 See these reasons [19].

7. Williams J. was entitled to refuse to set aside Mansfield J.'s order, despite non-disclosure of Mr Charles's interest in the outcome of litigation and his potential conflict of interest in an ex parte application for directions under s. 479(3) of the Law to enable the liquidator to enter into the funding arrangement.
8. Macks did not deliberately mislead Mansfield J. into concluding that Thomas J.'s order for summary judgment was a consent order.
9. Mr Charles's interest in the outcome of the litigation, his potential conflict of interest and GIO's control over the main action do not alone or collectively render the funding arrangement contrary to public policy or an abuse of process.
10. The fact that a funding arrangement may not be in the interests of creditors who will be defendants in the action the subject of the funding arrangement, is not in itself sufficient ground to limit the liquidator's power of disposition under s. 477(2)(c).
11. The omission to inform Mansfield J. that the main action would proceed without first setting aside Thomas J.'s order for summary judgment was not an abuse of process.
12. Williams J. was entitled to conclude that Macks was acting in the interests of the winding up in entering into the funding arrangement.

ORDER:

Appeal dismissed with costs to be assessed.

DAVIES J.A.:

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1. The facts

[148] Most of the relevant facts are stated in considerable detail in the reasons of the President which I have read. Her Honour's detailed statement relieves me of the need to attempt the same. I am, on the whole, content to adopt her Honour's statement. However there are some respects in which I respectfully disagree with her Honour as to the facts; these will appear in the reasons which follow. There are also some additional facts which I consider relevant to these reasons; I shall mention these in context. And finally, so that these reasons may be read without referring to her Honour's statement, I shall repeat some facts, albeit in a summary way.

2. The proceedings before Mansfield J.

[149] To explain the nature of this action and its dismissal by the learned primary judge it is necessary to say something about an earlier application to and orders made by Mansfield J. in the Federal Court in South Australia. The application before Mansfield J., which was by notice of motion filed 17 February 1998, was by the first respondent Macks as liquidator of the second to 66th respondents, called for convenience the Emanuel companies or the Emanuel group, for an order that he had "power under the Corporations Law to enter into the proposed arrangements and transactions in the terms of, or substantially in the terms of, the documents" placed before the court. That application was one for directions in the winding up of the Emanuel companies pursuant to s. 479(3) of the *Corporations Law* in which, additionally, approval of the Court was required pursuant to s. 477(2B) because the liquidator proposed to enter into agreements, obligations under which might be discharged by performance more than three months after the agreements were entered into. The agreements, which were part of the "arrangements and transactions" referred to in the application, (hereinafter "the arrangements") involved, it was said, disposal of property of the Emanuel companies: s. 477(2)(c). The application was not served on any of the creditors of the Emanuel companies.

[150] The arrangements were for the purpose of obtaining funding from the 67th respondent, GIO Insurance Limited ("GIO") and the 68th respondent, Commonwealth Bank of Australia ("CBA") to finance an action by the liquidator and the Emanuel companies ("the main action") against the appellants, conveniently called the Fosters companies or Fosters group, claiming payment of monies and damages amounting to hundreds of

millions of dollars arising out of earlier dealings between those two groups. The Fosters group were creditors in the liquidation of the Emanuel group.

[151] Those documents, in the form in which they were finally approved by Mansfield J. on 9 June 1998, may be briefly described, adapting the description thereof by the learned primary judge, as:

1. a loan and guarantee facilities agreement between CBA of the one part and the liquidator and the Emanuel companies of the other part;
2. a deed of charge by the Emanuel companies and the liquidator in favour of CBA;
3. an insurance policy issued by GIO in favour of CBA, the liquidator and the Emanuel companies;
4. a solicitor-client agreement between the liquidator and Charles, a solicitor; and
5. an agency agreement between Charles and Ward & Partners solicitors.

[152] Their effect, in summary, was as follows:

1. CBA would lend to the liquidator and the Emanuel companies a large sum of money to enable them to pay the premiums under the insurance policy issued by GIO and to prosecute the actions against the Fosters group;[118] the loan agreement provided for payment of interest at a commercial rate;
2. the loan agreement also provided that all sums recovered in the action be paid to CBA until all monies outstanding under the loan facility had been repaid; and the deed of charge charged all causes of action which the liquidator and the Emanuel companies had against the Fosters group to secure payment of those monies;
3. under its insurance policy GIO insured CBA against the risk that the liquidator and the Emanuel companies might not repay the amounts owing under the loan agreement. It also insured the liquidator and the Emanuel companies against their liabilities for legal and related expenses;
4. the policy required the liquidator and the Emanuel companies to obtain the insurer's approval before taking certain steps in the action but provided, in effect, for resolution of any dispute on any such question by an independent senior counsel to be chosen jointly. It also required the liquidator and the companies to conduct the litigation in a proper and responsible way;
5. the policy provided for an initial premium of $80,000 and a risk premium which appeared, in effect, to amount to 35 per cent of nett recoveries in the action;
6. the policy also provided that the liquidator "dispose" to GIO a share of the proceeds of the claim sufficient to pay or reimburse it for all amounts to which it was entitled under the policy;
7. by the solicitor-client agreement the liquidator appointed Charles to be his solicitor in relation to the main action against the Fosters group and by the agency agreement Charles appointed Ward & Partners to be his agents in relation to the bringing of that action.

The arrangements involved at least one (the charge in favour of CBA) and arguably another (the requirement to dispose of a share of the proceeds of

118 The precise amount to be advanced was not disclosed, Mansfield J. and the learned primary judge permitting non-disclosure of parts of the funding arrangement. But it appeared that by October 1999 over $3.3M had been advanced.

the litigation to GIO) disposition of property within the meaning of s. 477(2)(c) of the *Corporations Law*.

[153] There was evidence before Mansfield J., which he accepted, that the liquidator had received legal advice that there were good prospects of receiving substantial monies in the action, well in excess of $200M he was told, and that the liquidator had no available funds to conduct the action. We were informed by counsel that a number of opinions by counsel were received and read by his Honour and then, at the liquidator's request, sealed.

[154] Counsel for the liquidator also brought to the attention of Mansfield J. the fact that no creditors had been served with or otherwise notified of the making of the application. His Honour thought that, in a case such as this where significant creditors (the Fosters group) might be potential respondents to proceedings, it was inappropriate to consult or seek approval from creditors. The arrangements did not involve the creditors in any potential liability and, if the proceedings were successful, they could result in their receiving substantial monies which they would not otherwise receive. The creditors had earlier been informed at creditors' meetings of the intention of the liquidator to commence proceedings against the Fosters group, if funds could be obtained for that purpose, and of the general nature of those proceedings.

[155] On 20 February 1998 Mansfield J. intimated that he was prepared to make the orders sought. His order on that day was varied on 11 March 1998. The documents to which I have briefly referred were then executed and the final orders of Mansfield J., referring to those executed documents, were made on 9 June 1998. Those orders were:

> "1. The liquidator as liquidator of the Emanuel group has power under the Law to enter into the Funding Arrangement being the arrangement and transactions identified in the documents annexed to the affidavit of the liquidator sworn on 29 May 1998.
>
> 2. The annexure to that affidavit be confidential and not be available for the inspection of any person except by leave of the Court or a Judge."[119]

Thereafter a consolidated statement of claim in the main action, running to over 200 pages, was delivered.

[156] The learned primary judge correctly identified two issues which arose before Mansfield J. The first was whether the arrangements which I have described involved champerty and, if so, whether that rendered the arrangements void or at least unenforceable as being contrary to public policy. Prima facie, Mansfield J. recognised, because the insurer was entitled to a percentage of the amount recovered if the litigation were successful, and was involved in the conduct of that litigation,[120] the arrangements involved champerty. But Mansfield J. held that a disposition pursuant to s. 477(2)(c) was an exception to the champerty principle and that the arrangement with GIO, like that with CBA, was a disposition pursuant to that section. His Honour then considered whether there was any other matter which, in his discretion, justified him in refusing to give the directions and approval which he did. Here his Honour considered whether the arrangements were

119 There is no issue as to the validity of the orders, or rather of rights or liabilities conferred, imposed or affected by the orders made by Mansfield J. By s. 6 and s. 7 of the *Federal Courts (State Jurisdiction) Act* 1999 (S.A.) the orders became, in effect, orders of the Supreme Court of South Australia.

120 It was also contended in these proceedings that Charles was also similarly entitled. This question is discussed below.

made in good faith in the best interests of the creditors and the company and concluded that they were.

3. The present proceedings

(a) generally

[157] In the present proceedings, instituted by claim ("the present action"), the appellants, the Fosters group, claimed the following relief:

> "(a) a declaration that the Funding Agreement is:
> (i) void on the ground that it is contrary to public policy;
> (ii) is not authorised by s. 477(2) of the Corporations Law;
> (iii) was not entered into by Macks bona fide in the interests of the Emanuel Companies or the creditors thereof;
> (b) an injunction to restrain the Defendants from performing the Funding Agreement;
> (c) an order for the removal of Macks as liquidator of the Emanuel Companies;
> (d) an order setting aside the Order of Mansfield J of 20 February and 11 March 1998;
> (da) alternatively to (d) an order pursuant to s. 10 of the Federal Courts (State Jurisdiction) Act 1999 (Qld) and s. 10 of the Federal Courts (State Jurisdiction) Act 1999 (SA) that the rights and liabilities of the parties to this action given effect by those Acts in respect of the orders of Mansfield J of 20 February 1998 and 11 March 1998 be set aside and revoked to the same extent as if those orders had been set aside."

[158] It is convenient here to consider only the relief sought in par. (a), par. (b), par. (d) and par. (da). The application for removal of the liquidator (par. (c)) involves a separate question although some of the matters relevant to that question are common to those which arise under the other paragraphs. I propose to defer consideration of it until after discussion of the other relief sought.

(b) before the learned primary judge

[159] Before the learned primary judge the relief by way of declaration and injunction was based on the tort of champerty. Relief based on tort was not pursued in this Court. The relief in par. (d) and par. (da) was based on the contention that the appellants had a right to be heard in the proceedings before Mansfield J. and consequently had a right to set aside Mansfield J.'s orders ex debito justitiae for material non-disclosure.

[160] It is not completely clear how his Honour dealt with the argument with respect to par. (d) and par. (da) which was persisted in before this Court. He said that the application before Mansfield J. was not strictly an ex parte application "in the traditional sense" but he also said that the submission that Mansfield J.'s order was not binding on the appellants had force in it but that it was not necessary for him to rest his decision on that consideration. He also said that his approach was that findings of fact and exercises of discretion by Mansfield J. should be accepted unless the appellants established a proper basis for setting them aside. He then proceeded to consider the substantive questions which had arisen before Mansfield J. as well as the question whether the liquidator should be removed.

(c) before this Court

[161] The right to set aside the principal order of Mansfield J. ex debito justitiae on the basis of non-disclosure by the liquidator to Mansfield J. of material facts was the principal basis on which the appellants submitted before this Court that they were entitled to relief. It was accepted by them that, because s. 479(3) is concerned only with protecting the liquidator, an application thereunder need not be served on any other party.[121] However it was common ground between the parties, and it had plainly been the view of Mansfield J., that the arrangements required approval of the court pursuant to s. 477(2B) and approval under that section was made a condition of the offer of the arrangements by GIO. For that reason the appellants submitted that the application was one on which they were entitled to be heard. Further it was contended that "had the initial judicial officer appreciated the full facts and circumstances the decision would have been different".[122] Mr Keane Q.C. for the appellants submitted that Mansfield J. failed to appreciate what a minimum level of informed scrutiny of the circumstances would have revealed upon an inter partes application.

[162] Mr Keane relied strongly on authorities relating to the obligations of a party making an ex parte application and the consequences of breach of those obligations. He relied particularly upon *Thermax Limited v. Schott Industrial Glass Limited*[123] and submitted, relying upon that case,[124] that the principle is not limited to cases where there is a deliberate intention to mislead the court but extends to cases where material facts have not been disclosed even innocently. The proposition stated in that case in absolute terms, that a party seeking relief ex parte must make disclosure to the court of all matters within his knowledge, may overstate the obligations of such a party[125] though there is substantial authority for the proposition that courts require a high degree of candour and responsibility of those who seek ex parte orders[126] and it has sometimes been said that the utmost good faith is required.

[163] Much more controversial is the proposition that the requirement to obtain approval under s. 477(2B) converted the application before Mansfield J. into one to which the appellants, as creditors, were proper parties, that is, that they had the right to be heard, and consequently one the orders on which the appellants were entitled to have set aside ex debito justitiae for material non-disclosure. For that proposition Mr Keane relied on the common law rules of natural justice.[127] There are reasons to doubt the application of those rules to this case. In the first place the appellants are not punished or prejudiced by the order of Mansfield J. They are prejudiced only, and not in their capacity as creditors, by the subsequent acts of the liquidator in prosecuting the main action. And secondly they are provided, in the same section, with a right to seek relief in respect of any such act by the liquidator.[128] For those reasons I would not accept that proposition.

121 *Re G. B. Nathan & Co. Pty Ltd (In liq.)* (1991) 24 N.S.W.L.R. 674 at 679 – 681; *Re Movitor Pty Ltd (In liq.)* (1996) 64 F.C.R. 380 at 383; *Re Daniel Efrat Consulting Services Pty Ltd (rec. apptd) (In liq.); Ex parte Hawke* (1999) 162 A.L.R. 429 at 434 – 435.
122 *Bell Group NV (In liq.) v. Aspinall* (1998) 19 W.A.R. 561 at 570.
123 [1981] Fleet Street Reports 289 at 294.
124 Fn. 123 at 295.
125 See *Re South Downs Packers Pty Ltd* [1984] 2 Qd.R. 559 at 566; *Bell Group NV (In liq.) v. Aspinall* above.
126 *Garrard t/as Arthur Anderson & Co. and Others v. Email Furniture Pty Ltd* (1993) 32 N.S.W.L.R. 662 at 676.
127 He cited *Owners of the S. S. Kalibia v. Wilson* (1910) 11 C.L.R. 689 at 694; *Commissioner of Police v. Tanos* (1958) 98 C.L.R. 383 at 395 – 396; and *Re Gasbourne Pty Ltd* [1984] V.R. 801 at 809.
128 Section 477(6). See also s. 536(1)(b) and s. 1321.

[164] Of course the liquidator, as an officer of the court, owed a duty to the court to make full disclosure in an application of this kind. But the remedy of a creditor, in respect of any act or omission of a liquidator, is provided in the Law.

[165] That is not to say that, in some cases, it might not be appropriate to require service of an application of this kind upon the creditors. After all, the interests of creditors are paramount and they will often be better able than either the liquidator or the court to determine what is in their best interests.

[166] But this was not such a case. No other creditor, even at this stage, has indicated any desire to oppose the arrangements.[129] That is not surprising. The creditors, apart from the appellants in their capacity, not as creditors but as defendants in the main action, stood only to gain from the arrangements. They had no prospects of recovery of anything if they were not entered into but had some prospects of obtaining, in the opinion of counsel, a substantial sum of money with no risk of liability,[130] if they were and, in consequence, if the main action went ahead. In other words they had nothing to lose and, in the liquidator's informed opinion, something to gain from his entering into the arrangements.

[167] Before this Court Mr Keane, somewhat belatedly, sought to base the appellants' claim on s. 477(6) and plainly they had the right to come to the Court under that provision. He also, for the first time in his oral submissions to this Court, sought to base the appellants' claim for relief by way of declaration and injunction upon abuse of process. In their written submissions to this Court the appellants sought that relief on the basis of tort. However, as already mentioned, the claim for relief based on tort was abandoned in this Court.

[168] The difficulty for the appellants in seeking, for the first time on appeal, relief based on an abuse of process is that the relief is not sought in or in respect of the process said to be an abuse, the main action. Nor did the appellants seek to institute proceedings in that action, whether by way of stay or injunction although Mr Keane submitted that this Court could stay the main action in these proceedings. On the other hand, if the arrangements are contrary to public policy or the liquidator in prosecuting the main action pursuant to them is not acting in good faith in the best interests of the creditors, the appellants ought to be entitled to such relief as would effectively prevent the further prosecution of the main action pursuant to those arrangements. Whether that relief is by way of declaration or injunction and whether it is pursuant to s. 477(6) or on some other basis, need not be pursued at this stage.

[169] But in any such proceedings neither the learned primary judge nor this Court is concerned to question the correctness of the findings of fact, conclusions of law or exercises of discretion of Mansfield J. to the extent that they were based on matters before him. As the learned primary judge said, this was not an appeal from the decision of Mansfield J. The question now is whether, in the light of what has occurred since, including any newly disclosed facts, some relief should now be granted. That is no doubt what the learned primary judge had in mind when he said, in the passage criticised by Mr Keane, that the findings of fact and exercises of discretion

129 One major creditor, the Australian Taxation Office, expressly supported them.

130 Mr Keane Q.C. for the appellants suggested the theoretical possibility that if a costs order were sought to be recovered against the Emanuel companies but not the liquidator, the latter but not the former being insured against that liability, then that would reduce the amount available for distribution among unsecured creditors. However he was unable to point to any events in which this might occur or how, if it did occur, it could result in any significant loss to creditors.

by Mansfield J. must be accepted unless the appellants establish a proper basis for setting them aside.

[170] His Honour could also have added, correctly, that he would be disinclined to depart from the legal conclusions reached by Mansfield J. with respect to the application of the *Corporations Law* to those facts unless convinced that Mansfield J. had been plainly wrong.[131] In particular this would apply to the proper construction of s. 477 and its application to facts such as those in this case. The main contention of the appellants below, other than in the application to remove the liquidator, appears to have been that Mansfield J. was wrong in concluding that the arrangements, being champertous, were nevertheless permitted by s. 477(2)(c). That contention, which was rejected by the learned primary judge, was persisted in before this Court.

[171] There is no doubt that the arrangements were champertous. GIO provided funds in return for a percentage interest in the proceeds of the main action and it was entitled to become involved in the conduct of that litigation. It is possible also that Charles, or a company associated with him, also provided services, and thus also became involved, for a percentage interest in the main action. However the learned primary judge held that the arrangements constituted a disposal which, pursuant to s. 477(2)(c), was exempt from the consequence of being void or unenforceable for champerty.

[172] The appellants submitted that his Honour was wrong in so concluding. In any event it was argued that the arrangements were contrary to public policy and not entered into in good faith in the best interests of the creditors, primarily because the liquidator surrendered control over the litigation to persons with conflicting interests, GIO and Charles. It is convenient to consider those questions in that order. The first of them involves two questions: whether a disposal of property pursuant to s. 477(2)(c) is an exception to the champerty rule; and, even so, whether the arrangements, at least so far as they involved GIO and Charles, constituted disposals within s. 477(2)(c). His Honour, like Mansfield J., answered both of these questions in the affirmative. This Court, like his Honour, should not depart from Mansfield J.'s conclusions on these questions unless convinced that he was plainly wrong.

4. Whether a disposal of property pursuant to s. 477(2)(c) is an exception to the champerty rule

[173] The appellants conceded, as they had to, that there is now a substantial line of authority supporting the proposition that a disposal, pursuant to s. 477(2)(c), by a liquidator of property of the company which, upon its liquidation, comes under his control, is exempt from the consequences of champerty.[132] However Mr Keane submitted that these cases were founded on an imperfect analogy between the position of the trustee in bankruptcy and that of a liquidator of a company. That is because,

131 *Australian Securities Commission v. Marlborough Gold Mines Ltd* (1993) 177 C.L.R. 485.

132 The main English cases are *Bang & Olufsen (UK Ltd) v. Ton Systeme Ltd* (unreported, 16 July 1993, Court of Appeal (Civil Division) Transcript No. 834 of 1993); *Grovewood Holdings Plc. v. James Capel & Co. Ltd* [1995] Ch. 80; *In re Oasis Merchandising Services Ltd* [1998] Ch. 170; *Norglen Ltd (In liq.) v. Reeds Rains Prudential Ltd & Ors* [1999] 2 A.C. 1. The main Australian cases are *Re Movitor Pty Ltd (In Liquidation)* fn. 121; *UTSA Pty Ltd (In liq.) & Ors v. Ultra Tune Australia Pty Ltd & Ors* (1996) 21 A.C.S.R. 457; *Re Tosich Construction Pty Ltd* (1997) 73 F.C.R. 219; *Buiscex Ltd & Anor v. Panfida Foods Ltd (In liq.)* (1998) 28 A.C.S.R. 357; *Re William Felton & Co. Pty Ltd* (1998) 16 A.C.L.C. 1294; and *Re Daniel Efrat Consulting Services Pty Ltd (rec. apptd) (In liq.); Ex parte Hawke* fn. 121.

he submitted, in the latter case the statutory scheme does not automatically divest a company of its property.[133]

[174] Mr Keane also submitted that there is nothing in the language of s. 477 which would confer a power on a liquidator to enter into a transaction which would otherwise be unlawful. He contrasted that section with s. 564 which creates a specific exception to the rules concerning maintenance. In those circumstances he submitted that s. 477(2)(c), read in context, did no more than empower the liquidator to do what the company itself might have done. He submitted that these considerations relevant to the construction of s. 477(2)(c) were not considered in the line of authority referred to.

[175] The appellants' arguments in this respect, in my opinion, pay too little regard to the history of the section, and its equivalent in bankruptcy law, and its rationale. As long ago as 1880[134] the predecessor of each was construed so as to permit assignment by a trustee in bankruptcy and a liquidator of a bare right of action, notwithstanding that it would otherwise be unlawful, because it was thought that the evident purpose of the statute was that any right of action of the bankrupt or company should be realised for the benefit of the creditors; otherwise the trustee or liquidator would be confined to suing on the right of action himself which he may not be inclined to do either because of lack of funds or because of the risks involved.[135] The public policy of ensuring the realisation of the company's property in the best interests of creditors and contributories, and in obtaining finance for that purpose under agreements which would otherwise be champertous, has been thought to outweigh the competing public policy against an outsider, with no commercial interest in litigation apart from obtaining a share in the proceeds, from intermeddling in that litigation for that share.[136] The same rationale justifies the conferral of that power on a liquidator in a voluntary winding up, even of a solvent company; that it will ensure realisation of all assets in the best interests of contributories. In the light of that history and rationale the argument, in my opinion, lacks substance.[137]

[176] For these reasons I would conclude that a disposal of property of the company pursuant to s. 477(2)(c) is an exception to the champerty rule.

5. Even so, whether s. 477(2)(c) authorised these arrangements

(a) generally

[177] It was conceded that any causes of action vested in the company at the time of liquidation were property of the company for the purposes of s. 477(2)(c). The contention here was that the power conferred by that section did not extend to a purported disposal of a share in the future proceeds of litigation on terms which permitted the intended disponee to interfere in the conduct of the litigation.

133 In *UTSA Pty Ltd (In liq.) & Ors v. Ultra Tune Australia Pty Ltd & Ors* fn. 132 Hayne J.A. at 463 – 464 expressed the view that nothing turns on this difference.

134 See *Seear v. Lawson* (1880) 15 Ch.D. 426 and *In re Park Gate Waggon Works Company* (1881) 17 Ch.D. 234.

135 See fn. 134.

136 I have taken the definition of champerty from the speech of Lord Mustill in *Giles v. Thompson* [1994] 1 A.C. 142 at 161.

137 See also *UTSA Pty Ltd (In liq.) & Ors v. Ultra Tune Australia Pty Ltd & Ors* fn. 132 at 463 – 464; *Re Movitor Pty Ltd (In Liquidation)* fn. 121 at 390 – 391; *Re Daniel Efrat Consulting Services Pty Ltd (rec. apptd) (In liq.); Ex parte Hawke* fn. 121 at par. [27]; *In re Oasis Merchandising Services Ltd* fn. 132 at 179; *Norglen Ltd (In liq.) v. Reeds Rains Prudential Ltd & Ors* fn. 132 at 11, 12.

[178] Clause 15 of the loan agreement between the liquidator and CBA provided:

> "You must pay us an amount equivalent to everything you recover in relation to the claim, up to the combined amount of the total amount outstanding under the loan facility and the total amount of our maximum contingent liabilities under all guarantees issued under the guarantee facility. Unless prevented by law, you must do so immediately you recover anything."

By the deed of charge given in support of the loan agreement the liquidator and the Emanuel companies charged and conveyed all causes of action which they had against the appellants to secure payment of all monies owing under the loan agreement. This was plainly a disposal of existing causes of action by way of charge and so within s. 477(2)(c).

[179] However the arrangement with GIO was not a present disposal of an existing cause of action. The insurance policy with GIO provided for an initial premium of $80,000 and a risk premium calculated in accordance with a formula set out in the reasons for judgment of Mansfield J.[138] but amounting to approximately 35 per cent of nett recoveries, that is, of the amount recovered after paying the expenses of conducting the claims and amounts owing to CBA. Clause 15 of the policy then provided:

> "The liquidator disposes to us a share of the proceeds of the claim specified … sufficient to pay or reimburse us for all amounts to which we are entitled under clauses … of this policy."

[180] Clause 15 is, in terms, a purported present assignment of identifiable future property, a proportionate share in the proceeds of the claim. Subject to the champerty argument it was effective in equity to assign that future property[139] and Mr Keane did not contend to the contrary.

[181] Of course an equitable assignment of the proceeds of an action or a share in those proceeds, without more, is not champertous. Even if s. 477(2)(c) gave a liquidator no greater power to dispose of the company's property than the company would have had, it would authorise such an assignment. It is only the added rights of GIO, and possibly Charles, to become involved in the action which makes it, vis-à-vis GIO and possibly Charles, champertous.[140] But it was contended that, for two reasons, the arrangements, so far as they involved GIO and possibly Charles, did not come within s. 477(2)(c).

[182] The first contention was that, if cl. 15 of the policy was no more than a purported disposal of future property, it was not a disposal of property within the meaning of s. 477(2)(c) even if it was effective in equity. Property is defined in s. 9 to mean "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action". Mr Keane submitted[141] that the words "present or future" in this definition qualified the words "estate or interest" not "property"; and that therefore it relates only to presently existing property.

[183] But in my opinion the definition of property should not be read as narrowly as Mr Keane submitted it should. It was, in my opinion, intended to be very broad, unless the contrary intention appears, not confined to the whole estate or the whole interest in property or to the legal as opposed to

138 *Re Addstone Pty Ltd (In liq.)* (1998) 83 F.C.R. 583 at 589 – 590.
139 See *Tailby v. Official Receiver* (1888) 13 App.Cas. 523.
140 *Glegg v. Bromley* [1912] 3 K.B. 474.
141 Relying on *Bell Group Ltd (In liq.) v. Westpac Banking Corporation* (1996) 18 W.A.R. 21 at 27 – 28.

the equitable estate or interest or to a present interest or a vested interest. Nor does the decision of the Western Australian Supreme Court in *Bell Group Ltd (In liq.) v. Westpac Banking Corporation*[142] compel a contrary conclusion.

[184] The court there was concerned with the meaning of property in s. 564(a) of the *Corporations Law*. That provision, applying as it does to property which has been recovered or has been protected or preserved, should be construed as applying only to presently existing property. But that is not because of anything contained in the definition of "property" but because the context of s. 564(a) requires that construction. On the contrary, the context of s. 477(2)(c) requires a broad construction consistent with the obligation of the liquidator to realise all assets of the company in the best interests of creditors and contributories. Moreover the appellants' contention runs counter to a number of decisions in which it has been held or assumed that a disposal of a share of the future proceeds of the cause of action is within s. 477(2)(c).[143]

[185] The second contention, as I understood it, was that the exception accorded by s. 477(2)(c) to a disposal of an existing cause of action was not intended by the legislature to apply to an equitable assignment of the future proceeds of such an action on terms which permitted the intended assignee to interfere in the conduct of the litigation. Mr Keane relied for that submission on a dictum of the Court of Appeal in England in *In re Oasis Merchandising Services Ltd*[144] in which the court said:

> "Like Robert Walker J. we therefore conclude that on its true construction 'the company's property' in paragraph 6 of Schedule 4 does not include the fruits of litigation brought by a liquidator under section 214. The judge also found that his conclusion was strongly supported by the consideration that the liquidator pursuing an application under section 213 or section 214 was not conducting ordinary civil litigation but litigation with a public or penal element and any loss of control by the liquidator of that litigation was objectionable. For our part we regard that as relevant not to the question whether the fruits of such litigation are 'the company's property' within paragraph 6 of Schedule 4 but to the propriety of the liquidator's act in entering into the agreement and the correctness of the Companies Court in authorising that act. As a matter of policy we think that there is much to be said for allowing a liquidator to sell the fruits of an action for the reasons given by Drummond J., [in *Movitor*] provided that it does not give the purchaser the right to influence the course of, or to interfere with the liquidator's conduct of, the proceedings. The liquidator as an officer of the court exercising a statutory power in pursuing the proceedings must be free to behave accordingly. We are far from happy with the right of interference given to L.W.L. by the agreement, which, as it now stands, does enable L.W.L. to dictate how the liquidator is to conduct the action (see in particular clause 5). Indeed, despite Mr. Wright's argument to the contrary, it seems to us to enable L.W.L. to prevent the liquidator from exercising his statutory power

142 See fn. 141.
143 See *Re Movitor Pty Ltd (In liq.)* fn. 121 at 393; *In re Oasis Merchandising Services Ltd* fn. 132 at 186; *Magic Menu Systems Pty Ltd v. AFA Facilitation Pty Ltd* (1996) 137 A.L.R. 260 at 272; *Re Tosich Construction Pty Ltd* fn. 132 at 235, 236; *Re William Felton & Co. Pty Ltd* fn. 132 at 1299, 1301; *Buiscex Ltd & Anor v. Panfida Foods Ltd (In liq.)* fn. 132.
144 [1998] Ch. 170 at 186.

under section 168(3) of the Act of 1986 to apply to the court for directions in relation to this litigation …"

[186] There are two comments which should be made about that passage. The first is that it was obiter. The court had already held that "the company's property" in the United Kingdom legislation did not include the fruits of litigation brought by the liquidator under s. 214 because that cause of action was not property of the company at the commencement of the liquidation or property representing it.[145] Consequently, it was said, an equitable assignment by the parties of the proceeds of such a cause of action would not be protected from the consequences of champerty by the section.

[187] Secondly, having restated that conclusion in the first sentence of that passage, their Lordships went on to consider, in a case where a liquidator proposed to sell the fruits of an action which ***were*** property of the company at the commencement of the liquidation, whether, in the exercise of its discretion, the Companies Court should refuse to permit an arrangement because it involved abdication by a liquidator of his responsibility. That is a different question which requires close consideration of the terms of the arrangement so far as they permitted the involvement in the litigation of GIO and Charles and, in this case, involved the exercise of a discretion by Mansfield J. I shall return to that question later. But the dictum provides no support for the contentions advanced here.

[188] Looked at as a question of construction of s. 477(2)(c) and the definition of "property" in s. 9 there is, in my opinion, no material difference, with regard to champerty, between, on the one hand, an assignment of a cause of action and with it complete control of the conduct of that action and, on the other, assignment of the whole or part of the proceeds of a cause of action and with it some right to interfere in the conduct of that action.[146]

[189] I would therefore conclude that, at least in respect of a cause of action of the company, as opposed to one which became vested only in the liquidator by virtue of his office, s. 477(2)(c) permits its disposal or disposal of its future proceeds notwithstanding that the agreement for that disposal is champertous. But it is necessary to consider some specific causes of action which, it was submitted, were included in the arrangements but were not property of the company for the reason which I have just mentioned. It is said moreover that these are not severable and consequently, if the argument in respect of any of them succeeds, the arrangements as a whole must fail.

[190] The appellants contended that among the causes of action against them, the proceeds of which the liquidator purported to assign, were causes of action pursuant to s. 565 of the *Companies Code* and s. 565, s. 588FF and s. 588M of the *Corporations Law*.[147] And they contended that these causes of action, and consequently the proceeds of these causes of action, were not property of the company within the meaning of s. 477(2)(c). As to the first of these contentions the respondents conceded that, by the arrangements, the liquidator and the companies purported to dispose of the proceeds of causes of action pursuant to s. 565, s. 588FF and s. 588M of the *Corporations Law*. Whether the arrangements included the proceeds of a cause of action pursuant to s. 565 of the *Companies Code* was in issue.

145 Fn. 144 at 181, 182. This view must be considered when reference is made to disposal of the causes of action pursuant to s. 565, s. 588FF and s. 588M of the *Corporations Law*.
146 Cf. *Guy v. Churchill* (1884) 40 Ch.D. 481 at 488.
147 There is no doubt that claims pursuant to each of those provisions were made in the main action.

(b) whether the liquidator purported to assign the proceeds of a cause of action under s. 565 of the *Companies Code*

[191] The term "the claim" in cl. 15 of each of the loan agreement and the policy was defined as "all causes of action which the liquidator and the companies … have against [the appellants in the main action]". The learned primary judge held that a claim under s. 565 of the *Companies Code* is not a cause of action which the liquidator and the companies have in the main action because the cause of action pursuant to that section was one which the creditors alone had. That section relevantly provided:

> "Every director … who wilfully pays or permits to be paid any dividend out of what he knows is not profits … is also liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits, and the amount for which a director … is so liable may be recovered by the creditors or the liquidator suing on behalf of the creditors."

His Honour held that that provision made clear that the proceeds recovered in such an action were the property of the creditors even though the action may have been commenced by the liquidator on their behalf. It was, accordingly his Honour thought, not a cause of action "which the liquidator and the companies … have".

[192] The meaning of that quoted phrase is not entirely clear; whether it is intended to include all claims made in the main action, whether by the liquidator on behalf of the company or on behalf of the creditors; or whether it is intended only to encompass claims made by the companies or by the liquidator on their behalf. His Honour preferred the latter of these views and so do I. The use of the conjunctive "and" rather than the disjunctive "or" supports that construction, the phrase being thought to be necessary so as to include those causes of action on behalf of the companies which were not, before the liquidation, vested in the companies, such as those pursuant to s. 565, s. 588FF and s. 588M of the *Corporations Law*. Moreover it is most unlikely that the liquidator, in a carefully drawn document, would have purported to assign to a third party a cause of action, or the proceeds thereof, which he plainly had no power to assign. The construction which his Honour reached is therefore the more sensible one.

[193] It was contended by the appellants that a provision in the insurance policy dealing with calculation of premium required the contrary construction. It stated:

> "For the purpose of calculating that part of the premium in 2 and 3 above any sum recovered by the liquidator under s 565 of the *Companies Code* shall be treated (without limitation) as included in any amount the liquidator or the companies receive from the enforcement of the claim … "

On the contrary, in my opinion, this supports his Honour's conclusion for it deems, only for the purpose of calculating the premium, the sum so recovered to be included in the amount received by the liquidator or the companies; that is, the amount of the premium is to be calculated by applying the percentage rate to the amount from which the premium may be recovered plus the amount recoverable pursuant to s. 565. But it was not intended that any such amount recovered by the liquidator pursuant to s. 565 would be included in the amount from which the premium may be

recovered, the proceeds the subject of the purported assignment. The provision would be unnecessary if that were the case.[148]

[194] However as the arrangements purported to assign a share in the proceeds of amounts recovered pursuant to s. 565, s. 588FF and s. 588M of the *Corporations Law*, it will be necessary to consider whether those amounts are property of the company for the purpose of s. 477(2)(c).

(c) whether amounts recovered pursuant to s. 565, s. 588FF and s. 588M of the *Corporations Law* are property of the company within the meaning of s. 477(2)(c)

[195] The appellants submitted that none of these were property of the company within the meaning of s. 477(2)(c). However the reasons for these submissions differed between s. 565 on the one hand and s. 588FF and s. 588M on the other.

[196] Section 565 provides that, amongst other things, a settlement, conveyance or transfer of property or a payment made or obligation incurred which, if it had been made or incurred by a natural person, would have been void against that person's trustee in bankruptcy is, in the event of winding up, void against the liquidator. The appellants submitted that monies or property received by a liquidator under that section is held for the benefit of creditors and "impressed in [the liquidator's] hands with a trust for those creditors amongst whom [he] had to distribute the assets of the company".[149]

[197] The decision from which that passage comes, in *In re Yagerphone, Limited*, was accepted as correct by the High Court in *N. A. Kratzmann Pty Ltd (In liq.) v. Tucker [No. 2]*[150] but, as McPherson J.A. in *Re Starkey*[151] pointed out, their Honours did not necessarily adopt all of the reasoning in that case including the passage which I have quoted. What the court accepted in *N. A. Kratzmann Pty Ltd (In liq.)* was that money recovered from a creditor which had been paid by way of fraudulent preference was not, when recovered, subject to a secured creditor's charge. But that was because, as the High Court pointed out, although the monies paid out as a preference were at the time of payment subject to the charge, the monies recovered, not being the same monies, were not; they were monies recovered pursuant to a statutory right in and only in the liquidator.[152]

[198] Nevertheless the appellants relied on the following passage in the judgment of McPherson J.A. in *Re Starkey*[153]:

> "The result is, I think, that, while proceeds of payments recovered as preferences in winding up do not become the property of the company, nor the property of the unsecured creditors, they do form part of the general assets under the administration and control of the liquidator that are available for payment of the costs and expenses of winding up and the claims of unsecured creditors, including that of the Commissioner under s. 221P."

It is the qualification that the proceeds of payments recovered as preferences do not become property of the company upon which the appellants relied.

[199] Although I agree with his Honour's conclusion contained in the above passage I do not agree with the qualification which he makes, at least

148 The appellants submitted that this construction would mean that the creditors might recover nothing if the total amount recovered under s. 565 were more than 65 per cent of the total amount recovered in the main action. However it is plain that the s. 565 claim was but a very small part of the total claim.
149 *In re Yagerphone, Limited* [1935] Ch. 392 at 396; see also *Re Quality Camera Co. Pty Ltd* (1965) 83 W.N. (Pt 1) (N.S.W.) 226 at 229.
150 (1965) 123 C.L.R. 295.
151 [1994] 1 Qd.R. 142 at 153.
152 Fn. 150 at 301.
153 Fn. 151 at 154.

if it is intended to mean or include property of the company for the purpose of s. 477. If it did then the liquidator would have no power to sell property recovered pursuant to s. 565, the only source of his power to sell property being that contained in s. 477(2)(c); and a liquidator could not pay, as a priority debt, expenses properly incurred in getting in such property for such expenses are only properly payable as a priority if they are in respect of the getting in of property of the company.[154] And it seems that debts and claims are payable only out of the property of the company.[155]

[200] The order made by the High Court in *Octavo Investments Pty Ltd v. Knight*,[156] that payment of the amount of the preference be made to the company in question rather than to the liquidator, is, in my opinion, consistent only with the proceeds of such a cause of action, when recovered, being property of the company.[157] Accordingly I would conclude that monies recovered by a liquidator pursuant to s. 565 are property of the company for the purpose of s. 477(2)(c).

[201] Section 588FF provides that where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because it was an insolvent transaction coming within one or other of the provisions of s. 588FE, it may order a person to pay to the company an amount equal to some or all of the money paid by the company under the transaction or order the re-transfer to the company of property transferred under the transaction. Section 588M permits a company's liquidator to recover from a person, as a debt due to the company, an amount equal to the amount of loss or damage suffered by a creditor to whom a debt was incurred by the company whilst it was insolvent and the person was, at that time, a director. It is plain from these provisions that, in both cases, the money is recovered by or on behalf of the company.

[202] In *Re Movitor Pty Ltd (In liq.)*[158] the Federal Court held that "the expected fruits of an action" brought under s. 588M were a part of the property of the company for the purpose of s. 477(2)(c).[159] That conclusion is, in my view, a correct construction of s. 588M and his Honour's reasoning would be equally applicable to money recovered pursuant to s. 588FF. The matters upon which I have relied in reaching the conclusion which I have with respect to the proceeds of a cause of action under s. 565 apply also to these sections.

[203] The main argument of the appellants against this construction which, if it is correct, must apply equally to s. 565, was based on the decision of the Court of Appeal in *In re Oasis Merchandising Services Ltd*[160] referred to earlier. If that decision was correct, and if it applies to the *Corporations Law*, then none of the proceeds of the claims pursuant to s. 565, s. 588FF or s. 588M would be property of the company, because none would have been in existence before the liquidation nor would any of them be property

154 Section 556(1)(a).
155 Section 555.
156 (1979) 144 C.L.R. 360 at 372.
157 See also *Re Fresjac Pty Ltd (In liq.)* (1995) 65 S.A.S.R. 334 at 343; *Mineral & Chemical Traders Pty Ltd v. Tymczyszyn Pty Ltd (In liq.) & Anor* (1994) 15 A.C.S.R. 398 at 416 – 417; *Motor Auction Pty Ltd & Anor v. John Joyce Wholesale Cars Pty Ltd & Ors* (1997) 23 A.C.S.R. 647 at 660; *Wily (as official liquidator of Space Made Pty Ltd (In liq.)) v. St George Partnership Banking Ltd (formerly Barclays Bank Australia Ltd)* (1997) 26 A.C.S.R. 1 at 4; and *Re Captain Homemaker Pty Ltd (In liq.)* (1984) 8 A.C.L.R. 1005 at 1013. Accordingly I would not accept the reservation which McPherson J.A. had in *Re Starkey* fn. 151 at 155 as to the form of that order.
158 Fn. 121 at 392.
159 That decision was followed, in that respect in *Re Tosich Construction Pty Ltd* fn. 132 at 253 where the same conclusion was reached also with respect to s. 588FF.
160 See fn. 143.

representing property in existence at that time.[161] There is, however, reason to doubt the correctness of both of those qualifications.

[204] As to the first, the decision in *In re Oasis Merchandising Services Ltd* was based on acceptance of the general application of the reasoning of Millett J. in *Re M. C. Bacon Ltd (No. 2)*[162] that a distinction must be drawn between property of the company at the commencement of the liquidation (and property representing the same) and property which is subsequently acquired by the liquidator through the exercise of rights conferred on him alone by statute; the former is property of the company, the latter is property which is to be held on a statutory trust for distribution by the liquidator.[163] This distinction is, in turn, based on the conclusion in *In re Yagerphone, Limited* that the latter property does not become part of the company's assets but is received by the liquidator impressed with a trust in favour of those creditors amongst whom he has to distribute the assets of the company. In *Re Exchange Travel (Holdings) Ltd (In liq.) (No. 3)*[164] both Phillips L.J.[165] and Morritt L.J.[166] rejected this analysis. The decision is therefore of doubtful authority.

[205] As to the second, the legislative provisions are not the same in the United Kingdom and Australia as the Court of Appeal recognized in *In re Oasis Merchandising Services Ltd*[167] in the case of s. 588M. As indicated earlier, the provisions of s. 565 have been construed and those of s. 588FF and s. 588M specifically provide that monies recovered under them must be paid to or are at least recovered on behalf of the company and the statutory scheme of the *Corporations Law* shows that such monies are intended to be property of the company for the purpose of s. 477(2)(c). Accordingly I do not think that *In re Oasis Merchandising Services Ltd* requires a contrary conclusion.

[206] It follows from what I have said so far that I consider that s. 477(2)(c) relieved the arrangements from invalidity or unenforceability on the ground of champerty. For that reason it is unnecessary to consider the wider argument advanced by the respondents that, for all relevant purposes, champerty no longer exists.

6. Other reasons for granting relief

(a) generally

[207] It does not follow, of course, that the liquidator ought to have entered into these arrangements or that Mansfield J. ought, in the exercise of his discretion, to have approved them pursuant to s. 477(2B) or that the learned primary judge ought not to have granted relief notwithstanding the partial performance of the arrangements. The contrary of each of these was submitted because it was said that, for a number of reasons, the arrangements were not entered into in good faith in the best interests of the Emanuel companies and their creditors. And it was submitted that two of the matters which proved breach of duty in this respect by the liquidator, the abdication of control of the action by the liquidator and the financial interest of Charles in the proceeds of that action, and the fact that neither was fully disclosed to Mansfield J. were also public policy reasons, independent of champerty, for granting relief.

161 *In re Oasis Merchandising Services Ltd* fn. 132 at 181.
162 [1991] Ch 127.
163 *In re Oasis Merchandising Services Ltd* fn. 132 at 182.
164 [1997] 2 B.C.L.C. 579.
165 Fn. 164 at 587.
166 Fn. 164 at 596.
167 Fn. 132 at 185.

[208] In considering these questions it is necessary to distinguish between conclusions of fact or law by Mansfield J. which are unaffected by any subsequently discovered facts and those which may be so affected; and between questions of fact or law on the one hand and matters requiring the exercise of a discretion on the other. For the appellants have greater difficulty in seeking to overturn those findings of fact and conclusions of law[168] of Mansfield J. which are unaffected by subsequently discovered facts than those which may be. And, as already mentioned, the question before the learned primary judge was not whether Mansfield J. erred but whether, on the facts and at the time the matter came before the learned primary judge, the further performance of the arrangements should be restrained or stayed; and the question before this Court is whether his Honour erred in refusing any such relief. His Honour's decision on that question involved both factual and legal conclusions and the exercise of discretion.

[209] The main reasons why, it was submitted, Mansfield J. should have refused the application made to him, had he had the full facts before him, and why the learned primary judge should have granted relief, were the surrender of control of the main action by the liquidator to GIO and Charles, together with the financial interests of GIO and Charles which might be inconsistent with that of the creditors as a whole. Of those, only the financial interest of Charles was arguably not fully disclosed to Mansfield J. The other substantial reason advanced for the granting of relief was the poor prospects of success of the action, some elements of which, it was submitted, were misrepresented or not disclosed by the liquidator to Mansfield J. Other reasons relied on were the financial interest of the liquidator in the action, an error by Mansfield J. as to the nature of a judgment against the Emanuel companies on 27 February 1995 and the failure to serve the creditors with the application. However it is plain that if the first two of these reasons, either separately or together, do not establish a basis for relief, none of the others would do so.

(b) the alleged surrender of control of the action by the liquidator and the financial interest of Charles

[210] Clauses 6 and 8 of the insurance policy imposed restraints upon the liquidator's control of the action and conferred some rights in that respect on GIO. They were in the following terms:

> "6. The liquidator and the companies must obtain our approval before doing any of the following:
>
> - applying for a trial date (including filing a certificate of readiness for trial)
> - briefing counsel on trial
> - settling or discontinuing the claim or the legal proceedings
> - appealing against a final judgment.
> - If we do not give our written approval within a reasonable time, the liquidator and the companies may require us in writing to join them in choosing an independent senior counsel to advise whether the proposed action should be taken. The advice will be binding on all of us."

168 See fn. 131.

"8. The liquidator and the companies must conduct the claim in a proper and responsible way. In doing so, they must:

- obtain professional advice when we ask them to, as to the prospects of success of the claim and whether it should be pursued, compromised or discontinued.
- contact us immediately they receive professional advice that they should compromise or discontinue the claim, or if they become aware of anything that significantly affects the risk of not recovering the total amount outstanding under the facilities.
- pay full regard to the professional advice they receive."

In addition cl. 7 obliged the liquidator to inform the insurer of any change in any information already given, give the insurer such information as it might reasonably require as to the progress of the claim at any time, allow it to inspect documents, give it quarterly reports in writing on the progress of legal proceedings and, once the trial started, give it daily oral reports on the progress of the trial.

[211] It was submitted by the appellants that the practical effect of these clauses should be seen in the light of the solicitor-client agreement between the liquidator and Charles, of Charles's previous and continuing relationship with GIO and, it was submitted, of Charles's personal interest in the outcome of the litigation. By cl. 1 of that agreement the liquidator appointed Charles's then firm as his solicitor in relation to the bringing of the claims, cl. 4 required Charles to perform the work and by cl. 18 the appointment was said to continue for as long as the liquidator pursued the claim but that either party might terminate it earlier if the other committed a serious breach of the agreement. Clause 17 also obliged Charles to give such advice to GIO as it reasonably required on any aspect of the claim and any information which it reasonably required in exercising its rights under a policy. However cl. 6 to cl. 9 should also be noted. They provided for the basis upon which Charles would be paid fees and outlays for legal work performed. They appeared to provide for charges on an orthodox professional basis.

[212] It does not appear to have been disputed and it seems plainly to be the case that Charles had a relationship with GIO which commenced before these arrangements were entered into and continued after that date. Charles was the author of the documents the subject of the arrangements and originally claimed copyright in them. As appears from what I say later, this was the basis of the appellants' assertions that Charles had a financial interest in the outcome of the action. Charles then approached GIO with his idea and documents (referred to by some witnesses as "the product") which they subsequently developed together. Charles continued to be involved in the development and promotion of the product for their mutual benefit and GIO relied on his advice. It appears to have been for that reason that, as part of the arrangements, Charles became solicitor for the liquidator. It would be reasonable to infer that, apart from any licence fee payable for using the documents, Charles's financial interests coincided with those of GIO in that the latter was a potential major source of his future income.

[213] By the time Mansfield J. had approved these arrangements on 9 June 1998 copyright in the documents had been transferred by Charles to a company called "Liquidator's Expense Insurance Pty Ltd" of which Charles's wife was by then the sole shareholder and director. There was no evidence before the learned primary judge from which it could reasonably

be inferred that Charles thereafter retained or acquired a financial interest in that company or, in any other way, acquired or retained copyright in the documents. I would not be prepared to draw any such inference, in the light of the other evidence referred to above, from the markings which remained on the cover sheet of the documents. Nor was there any evidence from which it could reasonably be inferred that Charles was to be paid for work performed by him in relation to the conduct of the main action otherwise than in accordance with cl. 6 to cl. 9 of the solicitor-client agreement.

[214] After the date of the first hearing before Mansfield J. but before the date of final approval, and before Charles had relinquished his interest in Liquidator's Expense Insurance Pty Ltd, he advised the liquidator of his interest and that that company had entered into an agreement whereby, through the intermediary of a broker, it would receive from GIO a percentage of the premium which GIO would receive by way of licence fee for use of the documents.[169] He told the liquidator that he was about to divest himself of that interest but advised that the fact that a member of his family might retain that interest might result in a conflict and suggested that in the event of possible settlement of the main action, the liquidator might need to rely solely on the advice of Ward and Partners.

[215] Although Charles advised the liquidator of these matters, the liquidator did not so inform Mansfield J. He obtained counsel's advice on whether he should disclose them and was advised that he did not need to. The advice from Mr Meagher Q.C. was that ultimately it was not a matter of concern to the liquidator how GIO chose to distribute the premium which it made from the arrangements. However Charles's affidavit, filed in those proceedings, disclosed that a company which he controlled, Liquidator's Expense Insurance Pty Ltd, owned the intellectual property rights in the documents which constituted the arrangements.

[216] That the interest of that company, of which Charles's wife was the sole shareholder and director, was an indirect percentage interest in the proceeds of the litigation was the main fact, relevant to this aspect of the matter, which was not disclosed to Mansfield J. It was also submitted, however, that Charles's involvement with GIO, or at least the extent of it, was not fully disclosed to Mansfield J. No other facts relevant to these matters were not before Mansfield J.

[217] As already mentioned, there was an agency agreement between Charles and Ward and Partners, which was to perform the day to day work of the prosecution of the claim. Clause 4 of that agreement prevented Ward and Partners from doing any of the matters specified in cl. 6 of the insurance policy without the written instructions of Charles and cl. 19 permitted Charles to terminate the appointment, for any reason, upon 30 days written notice.

[218] Nothing in any of these documents, in my opinion, prevented or impeded the liquidator from prosecuting the proposed claims in a way which was in the best interests of the creditors as a whole. Clauses 6, 7 and 8 of the insurance policy reflect the insurer's interest in ensuring that the proposed litigation was conducted in accordance with appropriate legal advice. But there is no reason to think that the senior counsel selected to give advice on any of the matters referred to in cl. 6 of the insurance policy would give advice other than in the best interests of the creditors as a whole.

169 It appears from the evidence before the learned primary judge that, in December 1998 that broker ceased to be involved in the arrangements and, in consequence, a direct agreement was entered into between that company and GIO whereby it would receive from GIO 10 per cent of the premium which GIO was paid.

Nor is there any reason to think that, if the liquidator requested Ward and Partners or Charles to obtain advice from independent counsel on the proposed claims, they would not do so or would not be obliged to. Nor is there anything in these provisions or in any other provision of the insurance policy or solicitor-client agreement inhibiting the right of the liquidator, at any time, to seek directions of the court pursuant to s. 479(3).

[219] There is, in any event, no reason to think that the interests of the insurer and Charles are not the same as those of the creditors as a whole. All are concerned to pursue the claims so long as there are reasonable prospects of a substantial nett return. Indeed GIO, and Charles's wife, are dependent on the success of the creditors in that endeavour. And the more that the creditors recover, the greater is the amount which GIO and Charles's wife will receive. Indeed it is only the liquidator who would have any interest in, for example, compromising for a smaller sum, thereby ensuring payment for work which he had already done; and he could not do that without approval of the court or the creditors.[170]

[220] Much was sought to be made by the appellants of what was said to be impropriety in Charles's wife receiving, albeit indirectly, a share in the proceeds of successful litigation notwithstanding that it was to be paid, not by the liquidator for whom Charles was conducting the litigation, but by GIO out of its premium, that it was not to be paid to Charles but to a company in which his wife was sole shareholder and that it was not to be paid for legal work performed in the conduct of the litigation which legal work was to be paid for at hourly rates. The appellants contend that this was a matter which, if it had been fully disclosed, would have been a reason for refusing to make the order which Mansfield J. made and is now a reason for preventing the further performance of the arrangements. The reason for this is said to be the public policy against a solicitor receiving a share in the proceeds of any litigation in which he or she is involved.

[221] However, as Lord Mustill pointed out in *Giles v. Thompson*[171] the rule which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff, calculated as a proportion of the sum recovered from the defendant, is now in the course of attenuation. In the form in which it relevantly bound Charles, the current statutory provision provides:

> "A legal practitioner or firm must not enter into a costs agreement under which the amount payable to the legal practitioner or firm under the agreement, or any part of that amount, is calculated by reference to the amount of the award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates."[172]

The attenuation to which Lord Mustill referred can be seen in other sections of the same Act which permits costs to be conditional on success[173] and permit such costs to exceed by 25 per cent the costs otherwise payable.[174]

[222] The agreement between GIO and Liquidator's Expense Insurance Pty Ltd plainly does not come within the prohibition of the above section. Nor was any attempt made to prove that, in some other way, the making of

170 *Corporations Law* s. 477(2A).
171 [1994] 1 A.C. 142 at 153.
172 *Legal Practice Act* 1996 (Vic.) s. 99(1); and cf. *Queensland Law Society Act* 1952 s. 48D. Charles was a Victorian solicitor and, although it is not clear, it seems to have been assumed by the parties that the agreement between GIO and Liquidator's Expense Insurance Pty Ltd was made in Victoria.
173 Section 97.
174 Section 98.

this agreement involved Charles in professional misconduct or unprofessional conduct. Nor was any attempt made to prove that this agreement was part of the arrangements to which the liquidator was a party or that those arrangements were in any way dependent upon the making of that agreement. I do not think that this was a matter which, if it had been disclosed, would have required Mansfield J. to refuse approval or that the learned primary judge erred in refusing to grant relief upon its disclosure to him.

[223] Nor do I think that the failure by the liquidator to disclose to Mansfield J. the indirect financial interest of Charles's wife in the outcome of this action or the extent of Charles's involvement with GIO showed a lack of good faith justifying the granting of relief of the kind sought. In hindsight it would have been better to disclose both. But he acted, in respect of the first, on counsel's opinion which did not, in the circumstances, seem unreasonable, and he was apparently not fully aware of the extent of Charles's continued involvement with GIO.

[224] In the end the learned primary judge had to decide whether, on the facts disclosed to him, there was such a risk that the liquidator might not act in the best interests of the creditors as a whole that the further performance of the arrangements should be halted. In reviewing his Honour's conclusions in that respect this Court must take into account the findings of honesty, forthrightness and reasonableness made by his Honour in respect of the liquidator, the extent to which, by the time the matter came before his Honour, the liquidator had been made fully aware of that risk and the extent to which, by that time, the arrangements had been performed including by the expenditure of considerable sums of money advanced by CBA. I do not think that the arrangements vis-à-vis, either GIO or Charles require a conclusion that his Honour erred.

(c) the prospects of success in the action

[225] Mr Keane accepted that it was not for Mansfield J. to "reconsider all of the issues which have been weighed up by the liquidator" but that the court's function was

> "… simply to review the liquidator's proposal, paying due regard to his … commercial judgment and knowledge of all the circumstances of the liquidation, satisfying itself that there is no error of law or ground for suspecting bad faith or impropriety, and weighing up whether there is any good reason to intervene in terms of the 'expeditious and beneficial administration' of the winding up."[175]

Moreover he was, in this respect also, faced with the learned trial judge's findings of frankness and honesty on the part of the liquidator and the fact that Mansfield J. had had placed before him several opinions of counsel as to the prospects of success of the action. Nevertheless he submitted that a minimum level of informed scrutiny upon an inter partes application would have revealed that the litigation to be promoted by the arrangements was vexatious and improper and that that ought to have been appreciated by the learned primary judge.

[226] The learned primary judge was, of course, considering whether, a year and a half after approval had been granted by Mansfield J. and after the arrangements had been partly performed including the expenditure, in good faith, of substantial money by CBA, relief should now be granted in respect

175 *Corporate Affairs Commission v. ASC Timber Pty Ltd & Ors* (1998) 29 A.C.S.R. 109 at 118. See also *Re Spedley Securities Ltd (In liq.)* (1992) 9 A.C.S.R. 83 at 85 – 86.

of acts done pursuant to that approval. Nevertheless, if the proposed action is plainly without substance, it would be appropriate to grant such relief as would prevent its continuation.

[227] The principal attack by the appellants in this Court upon the main action was in respect of that part of it which claimed an account of profits in respect of land ("the Northern Corridor lands") transferred by companies in the Emanuel group to companies in the Fosters group in 1995 pursuant to an arrangement between those groups. There is no doubt that, before Mansfield J., this was put on the liquidator's behalf as a substantial part of the proposed claim. It was said, and subsequently alleged in the statement of claim in the main action, that the Northern Corridor lands were transferred at a substantial undervalue, they being worth substantially more than the consideration passing from the Fosters group, which was $47M. Further, it was said and alleged, in effect, in the statement of claim that the Fosters group paid a further $6M to interests associated with directors of the Emanuel group by way of bribe for this transaction.

[228] It is necessary to put these transactions in their historical context as alleged by the respondents in their statement of claim in the main action. In the first place they acknowledge that, in 1987, a company in the Fosters group, the second appellant, Lensworth Properties Pty Ltd, ("Lensworth") lent to a company in the Emanuel group, the second respondent Emanuel Management Pty Ltd ("Management") $43M secured by a bill of mortgage and a mortgage debenture by Emanuel (No 14) Pty Ltd ("No 14"). There were also guarantees by a number of other Emanuel companies one of which also granted a bill of mortgage to secure the loan. The money was advanced primarily for the purpose of the purchase of the Northern Corridor lands.

[229] The statement of claim then alleges that, by a series of agreements made between 1988 and 1994 between Lensworth, Management, No 14 and the guarantors, at a time when all of the Emanuel companies were insolvent and under the effective control of the Fosters group, the parties agreed that further loans would be made by Lensworth and that the existing securities and guarantees would secure all monies lent and obligations thereunder. And by a deed of collateralisation dated 5 March 1992 between a number of Fosters companies, including Lensworth, and a large number of the Emanuel companies, including Management, No 14, and the guarantors, it was agreed that the above securities were to be security for all debts and obligations, past, present and future, of all of those Emanuel companies. Part of the proceeds of these loans was used to pay dividends on preference shares of the Fosters group in the Emanuel group and to redeem those shares contrary to law and to the Articles of the Emanuel companies.

[230] The statement of claim further alleges that by an arrangement made between the Fosters group and the Emanuel group between 1992 and 1995, called "the 1995 Scheme", it was agreed that the Emanuel group would transfer the Northern Corridor lands to a nominee of the Fosters group at an arbitrary and improper valuation at less than market value; the Emanuel companies would release the Fosters companies from liability arising out of past dealings between them; an amount of $186.8M would be fixed as a debt due by the Emanuel group to the Fosters group, supported by a judgment, to enable the Fosters group to dominate meetings of creditors of the Emanuel group; and the Fosters group would pay amounts totalling approximately $6M to nominees of directors of the Emanuel group. The scheme was implemented by that transfer, release, judgment and payment and by the

execution by the parties of a Deed of Forbearance and Release dated 17 March 1995.

[231] If the allegations made in the last two paragraphs are correct, the Fosters group over the period from 1988 to 1995 sought to dishonestly secure a financial advantage for itself at the expense of the other creditors. Consequently it was liable to refund all monies and property received and to have the agreements and securities which gave effect to that scheme set aside; and in the alternative to setting aside the transfer of the Northern Corridor lands, an account of profits in respect of the subsequent development thereof.

[232] Mr Keane's criticism of the claim for an account of profits is that the asserted undervalue at which it was said the lands were transferred was either non-existent or substantially less than the amount which the liquidator's counsel put to Mansfield J. which was the difference between $47M and $100M. Mr Keane sought to do this by reference to estimates of value of land included in an internal document of Fosters which, he submitted, was the document relied on by the liquidator for the assertion of this undervalue. And he sought to show, by reference to that document, that the value of the Northern Corridor lands transferred was only about $54M. There are, however, it seems to me, several fallacies in his analysis.

[233] In the first place he arrived at the sum of $54M by including, as the value of one of the parcels of land transferred, $20M when the document upon which he relied included it at $35M. Mr Keane reduced that to $20M because the document valued the land at $35M on the assumption of rezoning and approvals in accordance with the concept plan within a period of two years which, he submitted, did not occur. It may be accepted that they did not occur prior to the transfer.

[234] However the land was subsequently rezoned and it may be reasonably assumed from that, that at the time of transfer it had the potential for development which it was, at the time, thought it had. Indeed the same document stated that the appellants had instructed the valuer who had arrived at the values of $20M and $35M "to analyse the project using more commercial assumptions" and that that analysis showed a land component of $40-$50M on "assumptions … not considered unrealistic or remote". Subsequent events may well have borne out such higher values for counsel for the liquidator before Mansfield J. told his Honour that that land subsequently became the subject of a development proposal by the Fosters group and another for $1 billion. Even if that $15M (the difference between $20M and $35M), or some substantial part of it, is added back in, it can be seen that the property was transferred at a substantial undervalue and, even without it, at an undervalue.

[235] Secondly Mr Keane's analysis pays no regard to the alleged bribe paid, in effect, to directors of the Emanuel companies by the Fosters group as part of the scheme which included the transfer to the Fosters group of the Northern Corridor lands. In proceedings against the Emanueles and entities associated with them $1M of this money has been recovered, the balance being irrecoverable from them. But there is reason to think that there is substance in the assertion that the money paid was a bribe.[176] This strengthens the contention that the scheme was intended to fraudulently deprive the other creditors of their rights. Consequently the prospects of

176 See the judgment of Perry J. in *Addstead Pty Ltd (In liq.) v. Liddan Pty Ltd* (1997) 70 S.A.S.R. 21 at 43 to which the learned primary judge referred at par. [119].

recovery of a very substantial amount of money in a claim for an account of profits in respect of the Northern Corridor lands is a very real one, irrespective of whether the transfer thereof was at an undervalue, on the assertion to Mansfield J., which remains undisputed, that they are the subject of a development proposal by the appellants and another for $1 billion.

[236] It is true that, as initially framed, the action by the respondents against the appellants did not seek to set aside the judgment of $186.8M obtained on 27 February 1995. However the respondents asserted in their statement of claim that this judgment was obtained pursuant to the 1995 scheme and asserted a right to go behind it for reasons already referred to but also because it was alleged that, on any view, that amount was exaggerated.[177] Before the learned primary judge an application was made and acceded to for leave to amend to claim that relief.

[237] The other basis for the submission made to this Court that the action was plainly without substance relied on the advance of $43M made in 1987 for which the mortgages and a debenture had been given as security. It was submitted that, accepting that the land the subject of the specific mortgages had since been disposed of, the debenture by No 14 remained intact and secured the advance of $43M together with interest from that date. It was submitted that, on any view, that amounted to several hundred million dollars which equalled or exceeded the amount which the action was likely to recover and that, consequently, except possibly for the payments which would have to be made to the liquidator, CBA and GIO, the balance recovered would be payable to one or more members of the Fosters group pursuant to the debenture by No 14. Consequently, it was submitted, there could be no benefit to the creditors in pursuing the action.

[238] This contention assumes that, after the performance of the 1995 scheme by, amongst other things, the execution of the Deed of Forbearance and Release, the transfer of the Northern Corridor lands to the Fosters group and the realization of other lands and payment of the proceeds of sale to the Fosters group, that debt remained unpaid and the securities given for it, including the debenture of No 14, remained in force. There is reason to think that, for a number of reasons that was not, or at least arguably was not so.

[239] In the first place the effect of the 1995 scheme may well have been to extinguish the earlier debt and with it any security therefor. Discussion at the creditors' meeting of a number of the Emanuel companies on 28 March 1996, at which the Fosters' representative was present, appeared to assume that it did so.

[240] Secondly there are a number of reasons for thinking that the total amount paid and value transferred to the appellants pursuant to the 1995 scheme may well have exceeded the amount then properly owing to them. The first is that the respondent alleged that $186.8M was an exaggerated estimate of the nett amount advanced together with interest up to 27 February 1995. There is reason to think that the directors of the Emanuel companies, if they were being paid a bribe by the Fosters group, would have had no interest in ensuring that the amount for which judgment was obtained was no more than was in fact owed by those companies. And it is unclear how much of that sum was said to be in respect of the original loan of $43M and interest thereon, for which the debenture was security, and how much in respect of subsequent loans and interest which, on the respondents' allegations, were not secured by the debenture. The second is that some part

177 Mansfield J. was told that the liquidator estimated it at about $100M.

of the monies advanced by the Fosters group to the Emanuel group had, according to the respondents' statement of claim, been advanced for the purpose of and been used to pay dividends on and to redeem preference shares of the Fosters group in the Emanuel group, contrary to law and to the Articles of the Emanuel companies and at a time when the Fosters group knew that the Emanuel group was unable to pay its debts as they fell due.

[241] According to the allegations in the respondents' statement of claim, the appellants, in consequence of the 1995 scheme, received $45M being the proceeds of lands sold pursuant to the scheme, held lands pursuant to the scheme for immediate sale which were valued at over $12M and received the Northern Corridor lands which, on its own valuation were worth between $20M and $50M. That total may well have exceeded the amount which the debenture validly secured.

[242] Mr Keane's contention also assumes that, even if the amending agreements made between 1988 and 1994 and the deed of collateralisation made in 1992, which purported to increase the amounts for which the debenture of No 14 was security, are set aside, the debenture will remain as a valid security for the original loan of $43M and interest thereon at the contractual rate. That proposition is by no means beyond argument.

[243] It was unnecessary for Mansfield J. to analyse all of these matters in great detail. He had before him a number of opinions of senior counsel upon which the liquidator relied for the purposes of bringing the main action and entering into the arrangements. The proposal for development of the Northern Corridor lands being pursued by the Fosters group at the time of the hearing before Mansfield J. showed that there was a realistic possibility that the amount which could be recovered in an action for an account of profit, whilst it could not be accurately quantified, might well be very much higher than the maximum sum which could realistically have been due to any member of the Fosters group after implementation of the 1995 scheme. Accordingly I would not accept Mr Keane's submission that a minimum level of scrutiny by Mansfield J. would have shown or that it has now been shown that the litigation to be promoted by the arrangements is vexatious or improper.

(d) the other reasons advanced

[244] Of the other reasons advanced for granting relief, the financial interest of the liquidator in pursuing the action was self-evident and all facts relevant to that were before Mansfield J.; I have already said sufficient to dispose of the contention that the creditors should have been served and even if Mansfield J. was in error in concluding that the judgment of 27 February 1995 for $186.8M was by consent, it was, on the respondents' contentions in their statement of claim, one colluded in by dishonest directors of the Emanuel companies at a time when those companies were under the effective control of the Fosters group, and, for that reason, even more likely to be set aside.[178] It follows that the appellants must fail in their appeal from the learned primary judge's refusal to grant relief other than by removing the liquidator.

[245] I turn now to the last question which arises in this appeal which is whether the learned primary judge erred in failing to order the removal of the liquidator.[179] We were informed by Mr Keane that this issue occupied by far the greater proportion of the time of hearing before the learned primary

178 The learned primary judge found that Mansfield J. was not told by the liquidator's counsel that it was by consent and this appears to be correct. That finding does not appear to be disputed by the appellants.

179 *Corporations Law* s. 473 and s. 503.

judge. That is not surprising when one has regard to the time occupied by the lengthy and rigorous cross-examination of the liquidator by the appellants' counsel and the number of grounds upon which, before the learned primary judge, it was urged that cause was shown for his removal.

7. Whether the learned primary judge erred in refusing to remove the liquidator

(a) the relevant principle and the grounds of appeal

[246] The relevant principle is not in doubt. The question is whether there is a real risk of the liquidator not being able to act impartially or objectively in the winding up.[180] In this case that question must be considered in the light of the following facts:

1. the appellants are defendants in an action instituted by the liquidator which they would very much like to stop. It would be unrealistic to think that they are pursuing any aspect of these proceedings, including the application to remove the liquidator, having in mind the interests of the creditors as a whole.
2. None of the other creditors support this application. It may therefore be assumed that they are content to retain the liquidator and with him, his conduct of this action.
3. Substantial work has already been done by the liquidator in the winding up generally and, in particular, with respect to this action.
4. As I have already mentioned, the learned primary judge, after seeing and hearing the liquidator being cross-examined rigorously and at considerable length, made findings in his favour of honesty, forthrightness and reasonableness.

[247] The principal ground relied on before the learned primary judge for an order removing the liquidator, and in this Court for the submission that the learned primary judge erred in refusing to remove the liquidator, involved the conduct of the liquidator with respect to the proof of debt by the first appellant, Elfic, in the winding up of No 14 which, it was submitted, indicated a deliberate attempt to deprive the appellants of a valuable security.

[248] Other grounds relied on, but not further expanded upon, either in written or oral argument, were:

1. the conduct of the liquidator in entering judgment by default against one of the appellants in circumstances in which, it was submitted, it was inappropriate to do so;
2. failing to seek the approval of creditors for the arrangements, particularly in circumstances where the liquidator had a conflict of duty and interest;
3. failing to disclose to the court the true role of Charles and his interest in the outcome of the proceedings;
4. failing to give creditors like Kleinwort Benson and Westpac the opportunity of entering into a similar funding arrangement;
5. failing to take into account the significance of the original $43M advance and the security given by No 14 for that advance in assessing whether the litigation and the funding arrangements were in the interests of creditors;

180 McPherson, *The Law of Company Liquidation*, (4th ed., 1999), at 311 – 314 and the authorities there referred to.

6. consenting to an arrangement which required the terms of the funding arrangements to be kept confidential from creditors; and
7. making the approval application ex parte, significantly for the reason that he expected that there would be substantial opposition to it.

The reason why grounds 2, 3, 5 and 7 were not further expanded on is that they were expanded on in argument on earlier issues. In view of what I have said there, it is unnecessary to say anything further in respect of them. Nor, in view of the appellants' failure to advance further argument on them, is it necessary to discuss grounds 1, 4 or 6. In addition to what I have said earlier, and what I say below, I rely on his Honour's reasons for rejecting all of those grounds, separately and together. There were, in addition, a number of grounds argued before the learned primary judge which were not pursued before this Court.

(b) whether the liquidator deliberately attempted to deprive Elfic of its security

[249] At the outset it is important to record the finding of the learned primary judge, after seeing and hearing the liquidator in the witness box over a lengthy period, during which he was subjected to a rigorous cross-examination. His Honour said:

> "The liquidator was subjected to a lengthy and intensive cross-examination, and allegations of improper conduct were put to him. He answered all questions in a forthright manner, and I was impressed with his honesty. He is in an extremely difficult situation. … Despite those pressures he has maintained a steadfast and reasonable view, backed by the opinion of senior counsel, that the causes of action against the Fosters Group are open and ought to be pursued."

[250] As already appears, one of the bases upon which the appellants contended that it ought to have been apparent to Mansfield J. that the proposed action by the liquidator and the respondents against the appellants was without foundation was that, subject possibly only to the claims of the liquidator, CBA and GIO, any amount recovered would go to the appellants, or at least to the second appellant, Lensworth, the original grantee, or the first appellant, Elfic, the assignee from the second appellant, of the debenture by No 14. I have already mentioned some reasons why that contention may well not be correct. But it is arguable and the possibility that it may be correct would be a sufficient basis for an argument that the liquidator, knowing of that possibility, deliberately attempted to cause the appellants to release that security, an argument which must now be considered. In order to do so it will be necessary to consider not only the conduct of the liquidator but the conduct of the appellants on which he was entitled to rely.

[251] The original loan of $43M in 1987 was made to Management on the security of, amongst others, a debenture (registered charge 9650/23) from No 14. When the lender appellant, Lensworth, and Elfic to whom it had purported to assign the debenture in 1991,[181] submitted their proofs of debt in the winding up of Management on 9 October 1995 they claimed no security for their debt which they each claimed to be $146,390,078.34 said to be "Judgment of Supreme Court of Queensland on 28.02.95. Calculation

181 We were told that Lensworth assigned or purported to assign its interest in that and other securities to Elfic on 11 April 1991.

of debt from date of judgment until 30.08.95." A proof of debt in similar form was submitted by the third appellant, then known as EFG Finance Limited ("EFG"). Moreover at a meeting of creditors of Management and some other Emanuel companies on 10 October 1995 a representative of Lensworth, Elfic and some other Fosters companies said that they were holding no security for their debt. This was reaffirmed by their representative at a further meeting of creditors of Management on 28 March 1996. Moreover, it is clear that, at that meeting, the Fosters' representative exercised voting rights as a creditor for the whole of the above amount.[182]

[252] However on 9 December 1997 Elfic and EFG, but not Lensworth, submitted further proofs of debt in the winding up of Management, No 14 and a number of other Emanuel companies for a smaller sum, $137,980,723.05, based on the same judgment and claimed as security a mortgage debenture by No 14 dated 12 June 1987 to Elfic at an estimated value of $15,348,000 based on the value of some timber agreements. There had been no debenture granted by No 14 to Elfic but the reference seems plainly to be to the debenture already referred to. No explanation for this claim, or the earlier assertion by them that no security was claimed, was advanced and the question whether the appellants, by their earlier conduct, had elected to surrender their security was not argued before the learned primary judge or in this Court. Nor was it a matter which was required to be resolved in these proceedings. However it is relevant to a consideration of the liquidator's state of mind when he wrote to those companies in respect of those proofs of debt on 2 February 1998.

[253] On 2 February 1998 the liquidator wrote to those Fosters companies in respect of the liquidation of No 14 and a number of other Emanuel companies but not, apparently, including Management, a letter in the following terms:

> "I refer to your formal proof of debt of 9 December 1997. I request that you complete the enclosed form 312 so that I may update the records of the Australian Securities Commission."

The form was a notification of discharge or release of property from a charge. In the form sent in respect of No 14, the charge was described as having original registered charge number 14777/1, ASC registered charge number 241651 and having been created on 12/6/87. That was the date on which the debenture from No 14 to Lensworth was created although neither of the registered numbers given coincides with the registered number which the respondents allege in their statement of claim the debenture created on that date bore. Then under the heading "Details of the discharge or release of property" there was stated:

> "All property other than:–
>
> - Amounts payable under timber sales agreement with Softwoods (Qld) Pty Limited;
> - Instalments yet to be received from Qld State Government on term sale of land."

[254] It was in this context, with the addition of three further facts, that the learned primary judge was asked to infer that the liquidator, by his letter of 2 February 1998, was attempting to deny the appellants and to conceal from them the existence of a valuable right, namely the right of Lensworth or Elfic, as the holder of a mortgage debenture from No 14, and of other

182 At that meeting the creditors, including the Fosters group, were informed of potential causes of action by the liquidator against the Fosters companies in respect of the preference shares and the transfer of property at an undervalue.

appellants pursuant to the deed of collateralisation, to the proceeds of any action which the liquidator might successfully bring against the Fosters group. Those further facts were that only shortly beforehand, on 6 January 1998, the liquidator had received a letter of offer from GIO which made funding conditional upon satisfactory advice from senior counsel that no charges over the Emanuel group property would take priority over the rights of CBA; that the liquidator said in an answer in the course of his very long cross-examination that he understood that the appellants still maintained their rights to security over the assets of No 14; and that he had already commenced proceedings against the Fosters group but had not served those proceedings.

[255] The liquidator denied that his purpose was as alleged and said that he relied on counsel's advice. He was, he said, attempting to clarify the position. It is plain that the learned primary judge accepted him. And the realistic likelihood of the Fosters companies being held entitled to an interest in the proceeds of a successful action against them for dishonest conduct and of their being held entitled to rely, as security therefor, on the debenture granted by No 14 in 1987 may well have been considered to be remote, in the light of the allegations made in the statement of claim and what had occurred at creditors' meetings of the Emanuel companies.

[256] Moreover, the intention of the liquidator to commence proceedings against the Fosters group in respect of the dividends on and redemption of the preference shares and in respect of the transfer of land to the Fosters companies at an undervalue, if sufficient funds could be obtained for that purpose, had been discussed as early as the creditors' meeting of 28 March 1996 which the Fosters' representative attended. And there was no secret that thereafter the liquidator was looking for a source of funding for such an action. The only question which could ever have been in doubt, in the minds of the appellants, was whether the liquidator would obtain sufficient funding to enable such a substantial action to proceed to trial. They plainly knew that the liquidator thought he and the Emanuel companies had valuable causes of action against the appellants.

[257] Notwithstanding his Honour's acceptance of the liquidator's honesty, forthrightness and reasonableness, Mr Keane submitted that his Honour erred in accepting that the liquidator, when he wrote the letter of 2 February 1998, had good reason for believing that the Fosters companies had surrendered any security for the debt founded on the loan to Management of $43M in 1987. The error arose, Mr Keane submitted, because his Honour was looking at what occurred in the winding up of Management, not of No 14, and that the liquidator must have known that security was claimed for that debt in the winding up of No 14.

[258] However if the debenture was claimed as security for that debt, it must have been security for that debt in the winding up of Management as much as in the winding up of No 14, for the original loan was made to Management on the security of that debenture. No 14's liability for that debt arose because it guaranteed Management's payment of it. His Honour was therefore correct, in my opinion, in concluding that the statements and conduct of the Fosters' representatives in the creditors' meetings of Management justified the liquidator in thinking that, in the winding up of that company, the Fosters companies could no longer credibly assert that they had security for amounts said to arise from loans made to Management. It should be added that the liquidator said, and his Honour accepted, that he

took legal advice at that stage. The appeal from his Honour's refusal to remove the liquidator should therefore be refused.

8. Orders

[259] It follows, in my opinion, that the appeal must be dismissed with costs. Each of the respondents filed a notice of contention but, in view of that opinion, I find it unnecessary to deal with any of the matters raised therein. The orders which I would make are accordingly as follows: Appeal dismissed with costs.

CULLINANE J.: [260] For the reasons given by Davies JA, I agree with both of my colleagues that the appeal should be dismissed with costs.

ORDER:

Appeal dismissed with costs to be assessed.

Appeal dismissed.

Solicitors: *Clayton Utz* (appellants); *Ward & Partners* (Adelaide) by *Bennett & Philp* (town agents) (first to sixty-sixth respondents); *Barwicks Wisewoulds* (sixty-seventh respondent); *Ryrie A. Bridges* (sixty-eighth respondent).

C. L. FRANCIS
Barrister

Editor's note: On 19 March 2002, the High Court refused special leave to appeal from this decision. Gaudron J. said:

> "The power to grant declaratory orders is ample. Nonetheless, to grant at the suit of a stranger a bare declaration about the enforceability of rights and duties undertaken by others under agreements which those others have made would, in the circumstances of this case, travel beyond the limits of the power. A declaration, if made, would not bind the parties to the impugned agreement because there is no issue between them that would be litigated in or decided by the present proceedings. That being so, it would be wrong to make the declarations that are sought. Accordingly, special leave must be refused with costs."

P.F.A.

Corrigenda
• No Corrigenda