IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2013 03929

IN THE MATTER OF ASCOT VALE SELF STORAGE CENTRE PTY LTD (IN LIQUIDATION) (ACN 092 643 939)

ASCOT VALE SELF STORAGE CENTRE PTY LTD (IN LIQUIDATION) (ACN 092 643 939) AND ANOTHER — Appellants

v

NOM DE PLUME NOMINEES PTY LTD (ACN 006 750 090) AND ANOTHER — Respondents

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JUDGE:	RIORDAN J
WHERE HELD:	Melbourne
DATE OF HEARING:	28 and 29 August 2019
DATE OF JUDGMENT:	4 December 2019
CASE MAY BE CITED AS:	Ascot Vale Self Storage Pty Ltd (in Liq) v Nom de Plume Pty Ltd
MEDIUM NEUTRAL CITATION:	[2019] VSC 794

ABUSE OF PROCESS – Principles to be applied – Relevance of *Civil Procedure Act 2010* (Vic) principles – Reasonableness of degree of control by litigation funder considered.

LIQUIDATORS – Policy of encouraging creditors to fund litigation by liquidator discussed – Whether liquidator required to obtain court approval for litigation funding agreement under s 477(2B) of the *Corporations Act 2001* (Cth).

PRACTICE AND PROCEDURE – Appeal from Associate Judge – Whether appellants established errors in approach – Orders set aside.

APPEARANCES:	Counsel	Solicitors
For the Appellants	P Cawthorn QC with R Zambelli	Piper Alderman
For the Respondents	P Bick QC with B Gibson	SBA Law

HIS HONOUR:

1 By notice of appeal filed 23 May 2019, the appellants appeal from the following orders made by the Associate Judge on 9 May 2019:

(a) Pursuant to r 23.01(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('the Rules') the proceeding be permanently stayed.

(b) The plaintiffs (appellants) are to pay the defendants' (respondents) costs of the proceeding including reserved costs on a standard basis in an amount to be agreed, in default of agreement to be taxed.

2 The appeal is brought pursuant to s 17(3) of the *Supreme Court Act 1986* (Vic) and r 77.06 of the Rules.

Background

3 In or about 2000, the second respondent (Leggo), John Crozier, Tony Melville and Geoffrey Turner agreed to undertake a joint venture to acquire and develop a property in Ascot Vale.

4 Ascot Vale Self Storage Centre Pty Ltd ('AVSS') was incorporated as a special purpose vehicle to act as trustee of the Ascot Vale Self Storage Centre unit trust ('AVSS trust') for the purpose of owning and developing a self-storage facility at 8-11 Burrowes Street, Ascot Vale ('the property'). The property was initially used as a self-storage facility, but in 2003 it was decided to construct a residential apartment complex on it ('the development project').

5 From 2001 to 30 April 2008, Crozier was the sole director of AVSS. On 30 April 2008, Leggo was appointed as a second director. After Crozier resigned as a director on 1 June 2009, Leggo remained the sole director.

6 The units in the AVSS trust were initially held by companies controlled by the following persons:

(a) Crozier as to 60 per cent;
(b) Turner as to 20 per cent; and
(c) Melville as to 20 per cent.

7 Crozier's unit holding was redistributed, such that by December 2001, the units in the AVSS trust were held by companies controlled by the following persons:

(a) Crozier as to 35 per cent;

(b) Turner as to 20 per cent;

(c) Melville as to 20 per cent;

(d) Leggo (personally) as to 15 per cent; and

(e) Robert McNab as to 10 per cent.

8 Funding for the development project came from the following sources:

(a) Suncorp–Metway Limited Bank ('Suncorp') facility of $14,031,091 secured by a first ranking mortgage over the property and a first ranking charge over AVSS.

(b) DBR Corporation Pty Ltd ('DBR') facility of $1,620,000 secured by a second ranking mortgage over the property and a second ranking charge over AVSS.

(c) Unit holders or associated entities made the following loans (the 'Unitholder Loans') totalling $1,896,538 during the period 1 November 2000 to 1 September 2007:

(i) Crozier $500,000;

(ii) Turner $312,788;

(iii) Melville $228,000;

(iv) Leggo $212,750;

(v) McNab $143,000; and

(vi) a group known as the Albury investors $500,000.

9 A loan agreement and a debenture charge between AVSS and Fingal Developments Pty Ltd ('Fingal') was executed on 5 October 2007 by Crozier as the sole director of both companies. The loan agreement recorded the amount of the Unitholder Loans as $1,896,538 as at 5 October 2007, and the loans were secured by a third ranking charge ('the Fingal Charge'). At the time of the transaction, Crozier, Turner and Melville were aware of AVSS's entry into the debenture charge whereas Leggo, McNab and the Albury investors were not.[1]

10 In July 2008, the first respondent, Nom De Plume Nominees Pty Ltd ('NDP'), a company (then) controlled by Leggo, took a novation of the DBR facility and assignment of its second ranking mortgage and charge.[2]

11 By Settlement Deed dated 23 March 2009 between AVSS, NDP, Fingal and persons or entities representing the five unit holders, the parties recited that they were desirous of settling a dispute regarding the terms upon which loans and facilities had been made available by Leggo and NDP, and that Leggo and NDP had agreed to provide further financial accommodation to AVSS.

12 The terms of the Settlement Deed included an acknowledgement that NDP or Leggo had advanced $2,546,889.71 as at 28 February 2009 to AVSS; and, with respect to further financial accommodation, provided as follows:

> 3.1 As [sic] the request of the parties to this deed Nom de Plume Nominees Pty Ltd and Richard Leggo have agreed to advance further funds to or for the benefit of Ascot Vale Self Storage Centre Pty Ltd as and when required to meet the costs of building the apartments in the Burrowes Street Development Project (including but not limited to construction costs, consultants fees, advertising & marketing costs, legal costs, interest costs & charges to mortgagee, rates, land tax, lodgement fees, council fees, permits, agents commission and insurance premiums).
>
> 3.2 It is agreed by all parties to this deed that the Advanced Funds shall, for the purpose of this deed, be deemed to have been made on and subject to the terms and condition[s] contained in the [DBR] Facility Agreement so far as such terms and conditions can apply and are still subsisting.
>
> ...
>
> 3.5 It is agreed that all monies advanced to Ascot Vale Self Storage Centre [Pty Ltd] by Nom de Plume whether before or after the date of this deed shall be secured money within the meaning of that expression as contained in the second mortgage and shall be secured by the second mortgage.

13 Clause 5.1 of the Settlement Deed made the following provision with respect to the Fingal Charge:

> Until the first and second mortgagee have been paid in full on or before settlement of the sale of each apartment in the Burrowes Street Development project, Fingal Developments Pty Ltd shall provide Ascot Vale Self Storage Centre Pty Ltd with a duly executed ASIC Form 312 [Notification of discharge or release of property from

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1 *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* (2016) 337 ALR 303, 308 [17] ('*NDP v Fingal*'); *Fingal Developments Pty Ltd v Nom De Plume Nominees Pty Ltd* [2015] VSC 44, [73]-[75] ('*Fingal v NDP*').

2 *NDP v Fingal* (2016) 337 ALR 303, 309 [21]-[22].

> a charge] or alternatively a letter acknowledging that its third debenture mortgage charge (No: 1536072) does not continue to affect the land the subject of the contract for the sale of that apartment and shall not do anything which might obstruct the settlement of the sale of that apartment.

14 On 16 June 2010, AVSS satisfied its debt to Suncorp and its security was discharged.

15 On 21 June 2010, Fingal appointed receivers and managers to AVSS pursuant to its charge.

16 On 22 June 2010, NDP appointed a receiver and manager to AVSS pursuant to its mortgage and charge.

17 Between October and December 2010, the receiver appointed by NDP repaid NDP all but approximately $16,000 of the amount which NDP claimed it was owed under its loan and, on 14 December 2010, Fingal redeemed the NDP mortgage and charge on the payment of $16,000.74.

18 On 26 November 2010, Galvin Constructions Pty Ltd ('Galvin') (the developer of the property) applied to wind up AVSS.

19 On 2 February 2011, AVSS was wound up in insolvency and Simon Wallace-Smith was appointed as liquidator. In the Report to Creditors dated 18 September 2014, the liquidator included the following table relating to AVSS's assets and liabilities as at 2 February 2011, based on Leggo's Report as to Affairs (Director's ERV) and his own assessment (Liquidator's ERV).

	Director's ERV	**Liquidator's ERV**
Assets	**$**	**$**
Interest in Land	Nil	Nil
Debtors	Nil	Nil
Cash on Hand or cash at bank	Nil	Nil
Stock on Hand	Nil	Nil
Plant & Equipment	Nil	Nil
Work in Progress	Nil	Nil
Other Assets	587,388	Nil
Assets subject to specific charge	1,570,000	Nil
Total Assets	**2,157,388**	
Liabilities		
Employee entitlements	Nil	Nil
Secured creditor subject to Debenture	Unknown	(3,535,731)
Partly secured creditors	Nil	Nil
Preferential creditors	(279,156)	(261,737)
Total Claims	(279,156)	(3,797,468)

Total Surplus (Shortfall) before unsecured creditors	1,878,232	(3,797,468)
Unsecured creditors	(1,975,220)	(2,711,090)
Surplus (Shortfall)	**(96,987)**	**(6,508,558)**

20 On 8 March 2012, Fingal filed Supreme Court proceeding S CI 2012 01299 ('the Fingal Proceeding') against NDP and Leggo which raised the following issues:

(a) The validity of the Fingal Charge.

(b) The amount secured by the NDP charge.

(c) Whether and to what extent there had been over-recovery by NDP and whether Fingal had standing to recover such amount.[3]

21 On 15 April 2013, the liquidator publicly examined Leggo as part of what he described as 'an extensive investigation into the examinable affairs of the Company in accordance with [his] statutory obligations'.

22 As a result of the investigations, the liquidator deposed that he had identified a series of claims against Leggo and NDP.

23 By the first funding agreement executed on 30 July 2013 between the liquidator, AVSS, Fingal and the funder, Ryeland Nominees Pty Ltd ('Ryeland'), the funder agreed to fund the Fingal Proceeding on terms including the following:

(a) The Introduction recited:

> D. The Liquidator wishes to prosecute the Actions [i.e. any proceedings issued by the Liquidator at any time with the consent of the Funder] for and on behalf of the Company [i.e. AVSS].
>
> E. The Company is unable to fund the legal costs of, and incidental to, the Actions. The Liquidator is also, from the resources of the Company, unable to fund the legal costs of, and incidental to, the Actions.
>
> F. The Funder agrees to fund the Liquidator and/or the Company to undertake the Actions, and to pay all future legal costs and expenses of the Actions and to procure an indemnity for adverse costs orders, in consideration of the Liquidator and the Company agreeing to the terms of this Deed.

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3 *Fingal v NDP* [2015] VSC 44, [121]-[124].

(b) The funder indemnified the liquidator and AVSS for the costs and expenses incurred in conducting the proceeding (cl 3.1); and for any adverse costs orders (cl 3.8).

(c) The funder could 'at any time terminate the obligations and rights of the parties pursuant to the terms of this Deed by providing not less than 28 days' notice in writing to the Liquidator of such termination'; but it would remain liable up to the date of termination (cl 4).

(d) With respect to the conduct of the proceeding, the agreement provided:

> 5.1 The Liquidator will retain the Lawyers to act on his behalf and that of the Company in the prosecution of the Actions.
>
> 5.2 The parties acknowledge and agree that:
>
> (a) the Liquidator may, in his absolute discretion, confer with the Funder in relation to any aspect of the Actions, and must confer with the Funder in relation to any significant issues arising in, or in relation to, the conduct of the Actions, and must have due regard to Funder's advice or wishes but will not be bound to follow their advice or wishes;
>
> (b) the Liquidator will be solely responsible for providing all instructions to the Lawyers in relation to the Actions;
>
> (c) the Liquidator will provide to the Funder, or instruct the Lawyers to provide, such reports and updates on the conduct of the Actions as may be reasonably required or that the Funder reasonably requests; and
>
> (d) to the extent needed to maintain the Liquidator's claim of legal professional privilege it is hereby agreed that the Liquidator, the Company and the Funder have a shared common interest in the outcome of the Actions and the provision of any information by the Liquidator and/or the Lawyers to the Funder in relation to or concerning the Actions, and whether before or after the date of this Deed, will not constitute any waiver of privilege with respect to the content of such communications.

(e) With respect to settlement of the proceeding, the agreement provided:

> 6.1 The Liquidator and Company will not make, accept or reject any offer of settlement in the Actions without first providing prior written notice to the Funder of their intention to do so. Such notification must:
>
> (a) contain the substance of the offer received or intended to be made; and
>
> (b) subject to clause 6.2, specify a date not less than 10 business days from the date of the notice in which the Funder is to respond to the notice if it wishes to do so.

6.2 If the circumstances require, whether due to the terms of the offer received or some other time limitation, the Liquidator may specify such circumstances and a shorter period of time in which the Funder may respond to the notice if it wishes to do so.

6.3 The Funder may, prior to the expiration of the notice period contained within the notice referred to in clause 6.1, either approve or oppose the Liquidator and/or the Company making, accepting or rejecting such offer. Such approval or opposition must be by notice in writing given to the Liquidator prior to the expiration of the notice period contained within the notice referred to in clause 6.1.

6.4 If the Liquidator receives notice from the Funder in accordance with clause 6.3 that it opposes the Liquidator making, accepting or rejecting the offer then, subject to clause 6.5, the Liquidator will refrain from making, accepting or rejecting such offer.

6.5 If the Funder provides a written response in accordance with clause 6.4 stating that it does not agree to the course of action proposed by the Liquidator or Company then the Liquidator will engage senior counsel nominated by the Lawyers to provide a written advice to the Liquidator and the Funder regarding the prospects of success, quantum and reasonableness of the relevant proposed course of action. If within 14 days following receipt of such advice the Liquidator and the Funder cannot agree mutually acceptable terms on which to proceed forward in the prosecution of the Actions the Liquidator will be free to determine whether to make, accept or reject any such offer as he may in his absolute discretion determine.

(f) The funder was entitled to a funding fee of 40 per cent of the amount recovered by AVSS and/or the liquidator pursuant to any settlement or judgment less the costs of the proceeding (cls 1, 9.4).

(g) The liquidator undertook in favour of Fingal not to make, bring or support any application or proceeding to set aside, avoid or otherwise challenge the enforceability of the Fingal Charge (cl 12.1). It was further provided that if the Fingal Charge was determined to be void, the liquidator would not oppose any application by Fingal for an order in its favour under s 564 of the *Corporations Act 2001* (Cth) ('the Act') (cl 12.2).

24 By an insolvency report of Deloitte dated 31 July 2013, the liquidator opined that, on the assumption that NDP and Leggo had not provided an indemnity to meet the costs of the development project, AVSS was insolvent from at least March 2009. The liquidator identified the following claims totalling $6,246,821 in the liquidation of AVSS:

Galvin Constructions Pty Ltd	$1,365,414
Australian Taxation Office	$1,193,328
Melbourne Business & Investment Commission	$ 127,690

AGL	$ 17,962
Hellier McFarland	$ 5,449
EGA Partners	$ 1,155
Telstra	$ 92
Fingal Developments Pty Ltd (formerly known as AVSS Nominees Pty Ltd)	$3,535,731

25 On 1 August 2013, AVSS and the liquidator filed the writ in this proceeding. In the statement of claim:

(a) AVSS claimed an amount not exceeding $6,246,821 from Leggo and NDP as a debt due under cl 3.1 of the Settlement Deed or as damages for breach of the Settlement Deed; and

(b) the liquidator claimed an amount not exceeding $2,711,090 from Leggo, being the debts incurred after March 2009, on the basis of insolvent trading in breach of s 588G(2) of the Act.

26 On 19 August 2013, the liquidator sought approval from this Court for AVSS to enter into the first funding agreement pursuant to s 477(2B) of the Act.[4] Section 477(2B) of the Act prohibits a liquidator from entering into an agreement on behalf of the company without the approval of either the court, the committee of inspection or a resolution of creditors, if:

(a) without limiting paragraph (b), the term of the agreement may end; or

(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than three months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those three months.

27 On 30 September 2013, Randall AsJ approved the first funding agreement.

28 On 11 March 2014, Robson J allowed the appeal against the decision approving the first funding agreement and set aside the orders of the Associate Judge. The principal basis for upholding the appeal was that the first funding agreement provided that the liquidator 'will not challenge the Fingal charge despite the possibility that AVSS was insolvent when the charge was created, and the possibility that the charge was created to defeat the interests of the unsecured creditors'.[5] In particular, Robson J noted:

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4 *Re Ascot Vale Self-Storage Centre Pty Ltd (in liq)* (2014) 98 ACSR 243, 254 [51].

5 Ibid 270 [156].

> [The liquidator] has frankly admitted that he has not investigated in any detail the allegation of Mr Leggo that the Fingal charge is voidable … [and] the court has not had the benefit of the liquidator's considered opinion on a possible claim that the Fingal charge and Fingal loan agreement are voidable transactions'.[6]

29 On 2 May 2014, at a directions hearing before Sifris J in both this proceeding and the Fingal Proceeding, counsel for the liquidator and AVSS informed the Court that following Robson J's decision, the liquidator was without funds but was seeking further funding. Sifris J fixed the Fingal Proceeding for trial on 1 September 2014 and adjourned both matters by consent to 25 July 2014.

30 On 19 June 2014, Gardiner AsJ ordered that AVSS give security for the respondents' costs of this proceeding 'the quantum of such costs to be agreed between the parties on or before 25 July 2014 or, failing agreement, to be fixed by … the Court on 25 July 2014'. This proceeding was stayed pending the provision of security.

31 On 25 July 2014, at a directions hearing before Sifris J, the Fingal Proceeding's trial date on 1 September 2014 was confirmed, and in accordance with the submission of counsel for the respondents, no directions were made in this proceeding. Sifris J said that '[i]f there is to be an application for approval of any funding agreement, it should be made obviously as soon as possible'.

32 On 8 August 2014, the liquidator filed the second funding application supported by an affidavit of the liquidator. The liquidator deposed that unless the claims were funded there was no prospect for any return to creditors out of the liquidation and stated with respect to the distribution of proceeds of any successful action:

> In negotiating the terms of the Ryeland Funding Deed, I have intentionally not sought to address how any fund recovered on a successful prosecution of the action by me is to be distributed to creditors after payment of costs. *The proceeds of an insolvent trading claim fall to the benefit of the unsecured creditors.* Equally the benefit of the Settlement Deed the subject of the statement of claim may be regarded as falling within the compass of the Fingal Charge. However, equally, unsecured creditors might contend that the benefit of the Settlement Deed was intended for them and falls outside such security. These matters are not required to be addressed by me now and to the extent required I will seek further direction of this Honourable Court should that become necessary following a successful prosecution of the claims.[7]

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6 Ibid 268 [147].

7 Emphasis added.

33 The liquidator brought on the second funding application as a matter of urgency. At the first directions hearing on 27 August 2014 before Judd J, counsel for the respondents stated that the trial of the Fingal Proceeding would proceed on 1 September 2014, and disputed the purported urgency of the second funding application. It was adjourned on the application of the respondents for hearing on 5 November 2014.

34 The trial of the Fingal Proceeding before Sifris J proceeded on 1 to 9 September and 13 October 2014.

35 On 2 October 2014, a meeting of creditors resolved that the liquidator be permitted to enter into the second funding agreement.[8]

36 By letter dated 29 October 2014 to the solicitors for the appellants (Piper Alderman), the solicitors for the respondents (SBA Law) noted that the decision in the Fingal Proceeding was now reserved before Sifris J and suggested that the first hearing of the second funding application should be adjourned until after judgment in the Fingal Proceeding. SBA Law stated:

> In our view it is illogical for your client to seek a funding approval to commence a proceeding, the outcome of which will depend in part on the validity of the Fingal charge when his Honour Justice Sifris may declare that charge to be invalid, or make findings which would be led to a successful challenge to its validity by your client (sic).

37 On 31 October 2014, at a directions hearing before Judd J, the second funding application and the directions in this proceeding were adjourned by consent to 6 February 2015. It was noted in 'Other Matters' that:

> The parties are awaiting the outcome of a decision reserved by the Honourable Justice Sifris. The parties may approach the Court for a date before 6 February 2015 for a hearing of the application. It is not proposed that the application will be heard on 6 February 2015.

38 By email of 30 January 2015 to Judd J's associate, Piper Alderman stated that '[t]he parties wish to adjourn the proceeding on the basis that the judgment is being [handed] down in [the Fingal Proceeding] on 20 February 2015'.

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8 *Ascot Vale Self Storage Centre Pty Ltd (recs and mgrs apptd) (in liq) v Nom De Plume Nominees Pty Ltd* [2015] VSC 751, [33] ('*AVSS v NDP*').

39 On 2 February 2015, Judd J made orders on the papers by consent adjourning the second funding application and directions in this proceeding to 20 March 2015.

40 On 20 February 2015, Sifris J delivered his reasons in the Fingal Proceeding.[9]

41 On 23 April 2015, Sifris J made final orders in the Fingal Proceeding. In summary he declared that the Fingal Charge was enforceable and NDP was ordered to pay Fingal the sum of $886,309.50 plus costs.[10]

42 On 18 March 2015, Judd J made orders on the papers by consent adjourning the second funding application and directions in this proceeding to 15 May 2015. The email to the Court from Piper Alderman on 18 March 2015 stated:

> [T]he parties wish to adjourn the proceeding on the basis that the costs hearing in [the Fingal Proceeding] is set to be heard on a date after 23 March 2015.

43 On 14 May 2015, Judd J again made orders on the papers by consent adjourning the second funding application and directions in this proceeding to 10 July 2015. The email to the Court from Piper Alderman on 12 May 2015 stated:

> [T]he parties wish to adjourn the proceeding on the basis that judgment was recently handed down in the [Fingal Proceeding] and the Defendants in that proceeding have indicated their intention to appeal.

44 By application for leave to appeal filed 21 May 2015, the defendants in the Fingal Proceeding (respondents in this proceeding) appealed against the judgment of Sifris J.

45 By email of 7 July 2015 to Piper Alderman, SBA Law suggested that the directions hearing on 10 July 2015 should be adjourned to mid-November 'by which time the leave for appeal application and the appeal itself will hopefully have been dealt with'.

46 On 10 July 2015, the hearing of the second funding application was set down for 29 October 2015 on the application of both parties. Counsel for both parties said that no party was to be criticised for the adjournments. The solicitor for the respondents said: 'There seems to be no prejudice to the Liquidator in waiting for a further period of time. Having waited this long …'.

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9 *Fingal v NDP* [2015] VSC 44.

10 *Fingal Developments Pty Ltd v Nom De Plume Nominees Pty Ltd (No 2)* [2015] VSC 146.

47 During the course of the hearing, Judd J said:

> Do you understand – I think I made it clear on the last occasion that we spent any time with this, that I had a great deal of inner resistance to the Court dealing with the application for approval at all. If I'm going to deal with it then everything is going to be exposed because I have got a very very uncomfortable feeling about participating in approving litigation funding contracts. It is not a role for the Court but you want to persuade me that I ought to do it and I am not [g]oing to shut you out of that if that is what you want to do. Why can't the liquidator make his own call? He has got the power to do it.

48 The appeal against the judgment of Sifris J was heard by the Court of Appeal on 8 and 9 October 2015.

49 On 29 October 2015, Judd J heard the second funding application.

50 The second funding agreement was similar to the first funding agreement, but excluded the provision preventing the liquidator from challenging the Fingal Charge.

51 On 22 December 2015, Judd J delivered judgment on the second funding application.[11] Judd J rejected the application substantially on the following grounds:

(a) Any application for litigation funding should await the outcome of the appeal with respect to the validity of the Fingal Charge.[12]

(b) The funder's fee was not acceptable for litigation funders such as Fingal and Ryeland who were not at arm's length.[13]

(c) The liquidator had not adequately explained the potential return to creditors.[14]

(d) The liquidator's independence was compromised by the ability of the funder to approve any proceeding and terminate the agreement.[15]

Accordingly, he was not persuaded that the second funding agreement was for the benefit of unsecured creditors.[16]

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11 *AVSS v NDP* [2015] VSC 751.
12 Ibid [36].
13 Ibid [37].
14 Ibid [38]–[39].
15 Ibid [40].
16 Ibid [41].

52 On 14 July 2016, the Court of Appeal allowed the appeal against the decision of Sifris J in part. The Court found that the Fingal Charge was enforceable but reduced the amount payable by NDP to Fingal to $57,901.50 together with such amount as was overpaid in respect of the undrawn fees.[17]

53 On 6 October 2016, the Court of Appeal made final orders.[18]

54 By a report to creditors dated 2 December 2016, the liquidator:

(a) advised of a meeting of creditors on 19 December 2016;

(b) reported on the conduct of the litigation;

(c) reported on the rejection of the second funding agreement by Judd J;

(d) stated that '[f]ollowing the Court's decision to reject my application to enter into a funding deed I have continued to seek out alternate funders. I have made inquiries of a number of arm's length entities that conduct business of funding litigation. I have not secured an offer of funding from such parties';

(e) reported that he was amendable to considering a further offer from parties associated with Fingal on the basis that there would be no provision for payment of any premium or funders' fee and that the liquidator would support any application the funder might make as a creditor under s 564 of the Act;

(f) reported that the appellants' solicitors, Piper Alderman, had been acting primarily on a speculative basis and in the event of a successful outcome would be entitled to a 25 per cent uplift in fees; and

(g) stated that '[a]t this stage … any distribution to unsecured creditors is dependent upon the successful resolution of claims presently on foot against Leggo and [NDP]'.

55 The minutes of the meeting of creditors of 19 December 2016 relevantly records the following:

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17 *NDP v Fingal* (2016) 337 ALR 303.

18 *Nom De Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* [2016] VSCA 233.

(a) The liquidator had been provided with special proxies by:

(i) the Australian Taxation Office, who had lodged a proof of debt for $1,271,429.43;

(ii) Galvin, who had lodged a proof of debt for $1,138,278.35; and

(iii) Fingal, who had taken an assignment of the debt owed by Melbourne Business and Investment Corporation in the sum of $127,689.93.

(b) It was resolved by the above creditors that the liquidator was 'permitted to enter into a funding agreement on behalf of [AVSS] with such creditors or other parties in relation to the Proceedings and such other claims as the Liquidator may determine on such terms as the Liquidator may determine are in the interests of [AVSS] including:

(i) The provision of an indemnity for the Liquidator's remuneration and costs of conducting such Proceedings;

(ii) The provision of an indemnity for any adverse costs order that may arise in the Proceedings; and

(iii) The provision of security for such remuneration, costs and adverse costs including the provision of guarantees and security from non-creditor third parties'.

56 On 8 May 2017, the liquidator entered into a third funding agreement, this time with Fingal as the funder. The terms of the third funding agreement were similar to the second funding agreement except relevantly:

(a) there was no provision for payment of a funding fee;

(b) the liquidator's remuneration was only fixed up to the conclusion of a mediation and then subject to a process of determination by an independent costs assessor in default of agreement; and

(c) the liquidator would consent to an application by the funder under s 564 of the Act.

57 Following the execution of the third funding agreement, the liquidator instructed Piper Alderman to engage a costs consultant to prepare a report as to the likely quantum of security the appellants would be required to pay in this proceeding up to and including the trial. On 18 July 2017 and 9 August 2017 respectively, two costs consultants advised Piper Alderman that they did not have the capacity to produce the necessary report. On 16 August 2017, Piper Alderman instructed Ethical Costing and Legal Services.

58 By letter dated 24 August 2017 to Piper Alderman, Ethical Costing and Legal Services attached a report opining that the estimated costs of the respondents up to and including the trial would be $411,485.14.

59 On 14 September 2017, the liquidator was informed by the funder that it would provide the funds to secure the respondents' costs.

60 By letter dated 3 November 2017 to SBA Law, Piper Alderman requested that the respondents consent to orders for the provision of a bank guarantee to secure the respondents' costs for the conduct of the trial in the sum of $411,500.

61 On 13 November 2017, the funder paid $411,485 into the trust account of Piper Alderman.

62 By letter dated 17 November 2017 to SBA Law, Piper Alderman provided certain information about the third funding agreement and asked whether the respondents would consent to an order for security for costs in the sum of $411,485.

63 By letter dated 17 November 2017 to Piper Alderman, SBA Law replied requesting a copy of the report to creditors dated 2 December 2016 and the basis upon which the liquidator maintains that he is not required to seek approval to enter into the proposed funding arrangement as required pursuant to s 477(2B) of the Act.

64 By letter dated 22 November 2017 to SBA Law, Piper Alderman stated that court approval is not required because the third funding agreement was approved by resolution of AVSS's creditors and enclosed a copy of the report to creditors dated 2 December 2016.

65 By letter dated 19 December 2017 to Piper Alderman, SBA Law advised that they were instructed not to consent to the stay of this proceeding being lifted on the provision of security for costs and were instructed to apply for a permanent stay.

66 By email of 23 January 2018 to the Associate Judge's associate, Piper Alderman sought a directions hearing for the lifting of the stay and the fixing of security. At a directions hearing on 23 February 2018, the Associate Judge gave directions for applications with respect to the appellants' application for the lifting of a stay and the respondents' application for a permanent stay; and listed the matter for hearing on 10 May 2018.

67 On 10 and 11 May 2018, the Associate Judge heard the competing applications.

68 On 3 May 2019, the Associate Judge delivered his reasons and on 9 May 2019 he ordered this proceeding be permanently stayed on the ground that it was an abuse of process.

69 By notice of appeal from the Associate Judge filed 23 May 2019, the appellants appealed from the orders of 9 May 2019.

70 On 28 and 29 August 2019, I heard the appeal from the decision of the Associate Judge.

Reasons of the Associate Judge

71 The Associate Judge's conclusion that this proceeding should be permanently stayed as an abuse of process was based on the following considerations:

(a) This proceeding was being undertaken solely for the benefit of the 'Melville interests' (identified as Melville, Crozier and Turner); and not the general body of creditors.[19]

(b) This proceeding was fashioned by the Melville interests in a quest to recover the claims that they were unsuccessful in recovering in the Fingal Proceeding.[20]

(c) The terms of the third funding agreement contained, in substance, features by reason of which Robson J and Judd J dismissed the previous funding applications. The position had not changed since the first two applications for funding approval were made to the Court. Further, he regarded the liquidator's explanation as to why he did not seek the Court's approval for the third funding agreement 'as being disingenuous and most unconvincing'.[21]

(d) The Melville interests had gained effective control over the creditors' meetings of AVSS and in large part enabled the passing of the third funding agreement by obtaining an assignment of two significant unsecured creditors' interests.[22]

(e) The terms of the third funding agreement gave the Melville interests de facto control of this proceeding because they could withdraw funding support at short notice. As a result 'it is fanciful to suggest that [the liquidator] would of his own volition conduct an unfunded enquiry into the efficacy of the Fingal charge and the amount secured by it' because, if he did, it is highly likely that the Melville interests would terminate the third funding agreement.[23]

(f) Extraordinary sums had been incurred for legal costs and the liquidator's remuneration. These costs and remuneration are afforded priority if the appellants are

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19 *Ascot Vale Self Storage Centre Pty Ltd v Nom De Plume Nominees Pty Ltd (No 2)* [2019] VSC 285, [221] ('*Reasons*').
20 Ibid [222].
21 Ibid [223].
22 Ibid [224].
23 Ibid [225]-[226].

successful in the proceedings. As a result, the legal costs and remuneration incurred with respect to the two unsuccessful applications for funding would be visited upon the creditors.[24] The appellants have little or nothing to show for the extraordinary fees or remuneration incurred.[25]

(g) The length of time allowed to elapse since the commencement of this proceeding is the result of the liquidator not being in a position to obtain funding on terms that were acceptable to Robson J and Judd J.[26] The respondents will suffer the prejudice associated with the fact that '[i]nvolvement in litigation is stressful and, even for those with sufficient resources able to fund it, a huge drain on financial resources'.[27] This proceeding is still in its infancy.[28]

The appeal

72 This appeal was brought under r 77.06 of the Rules. The nature of such an appeal is now by way of rehearing (rather than rehearing de novo) which, in the absence of further evidence or a change in the law, ordinarily requires the appellant to show error (factual, legal or discretionary) on the part of the Associate Judge before appellate power may be exercised.[29]

73 The appellant identified the following 17 grounds of appeal:

> 1. The learned Associate Justice erred in finding that there were grounds to permanently stay the proceeding under Order 23.01(1)(b) of the Rules: Reasons dated 3 May 2019 at [238]. His Honour could only have done so if he found (which he did not, and could not) that it was not possible for the Defendants to receive a fair trial. His Honour should have found that this case did not fall into any of the categories of abuse of process identified by him at [77]-[81] of the Reasons.
>
> 2. The learned Associate Justice erred in finding that there was any or any relevant or appropriate evidence that the Defendants would suffer prejudice if the Court determined not to grant a permanent stay: Reasons at [235]. His Honour should have found that prejudice to the Defendants if a stay was not granted was not established.
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> 3. Given that his Honour found there had not been inordinate delay (Reasons at [230]) the learned Associate Justice erred in granting a permanent stay.

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24 Ibid [227].
25 Ibid [229].
26 Ibid [230].
27 Ibid [235].
28 Ibid.
29 *Oswal v Carson* [2013] VSC 355, [11] (Ferguson J).

4. The learned Associate Justice erred in finding that the Plaintiffs' explanation for the length of time that had elapsed was inadequate: Reasons at [230].

5. The learned Associate Justice erred in finding that the litigation was not undertaken for the general body of creditors of the First Defendant but solely for the 'Melville interests' (Reasons at [221]) which would control the proceeding or that this was relevant and decisive.

6. The learned Associate Justice erred in finding that the 'Melville interests' will, through the medium of a funding agreement, have de facto control of the liquidation: Reasons at [225] and that such control was relevant or decisive in establishing the existence of an abuse of process.

7. The learned Associate Justice erred in finding that the obtaining by assignment of debts of two significant unsecured creditors for derisory sums was relevant or decisive. There was no evidence (and no finding) that the assignment of those debts was improper or unlawful: Reasons at [224].

8. The learned Associate Justice erred in finding that the 'Melville interests' had 'effective control over creditors' meetings' of the First Plaintiff and in large part enabled the passing of the Third Funding Agreement (Reasons at [224]) in that:

    (a) the third party liquidator of the creditor, Galvin Constructions Pty Ltd (in liq) voted in favour of the resolution that the Second Plaintiff (**the Liquidator**) enter a funding agreement at a meeting of creditors convened on 19 December 2016 for that purpose (**the Creditors' Meeting**) on account of a debt due to it in the sum of $1,138,278.35;

    (b) the Australian Taxation Office voted in favour of the resolution that the Liquidator enter a funding agreement at the Creditors' Meeting on account of a debt due to it in the sum of $1,271,429.43;

    (c) Fingal Developments Pty Ltd abstained from voting on such resolution at the Creditors' Meeting on account of the debts claimed to be due to it in its own right and only voted in favour of such resolution on account of the debt assigned to it by Melbourne Business and Investment Corporation in the sum of $127,689.93; and

    (d) his Honour had earlier found that the debt due from Galvin Constructions Pty Ltd (in liq) was assigned after the Creditors' Meeting: Reasons at [64].

9. The learned Associate Justice erred in finding that the litigation was a quest by the 'Melville interests' to recover claims that were unsuccessful in the 'Fingal proceeding' or that this was relevant and decisive: Reasons at [222].

10. The learned Associate Justice erred in stating or finding that Justice Judd had observed in the second funding approval decision (*Ascot Vale Self-Storage Centre Pty Ltd v Nom de Plume Pty Ltd* [2015] VSC 751) that it was at least arguable that prosecuting the proceeding with funding from the 'Melville interests' was an abuse of process: Reasons at [85]. No such conclusions were reached by Justice Judd ([2015] VSC 751 at [23]).

11. The learned Associate Justice erred in finding that failure to seek court approval of the 'Third Funding Agreement' (which, in any event, was not required) was a relevant or decisive consideration on the stay application: Reasons at [223].

12. The learned Associate Justice erred in finding that the explanation as to why the Liquidator did not seek the approval of the Court to his entering into the Third Funding Agreement was '*quite disingenuous and most unconvincing*' and that '*The position has not changed since the making of the first two applications*' (Reasons at [223]) in that:

    (a) the Third Funding Agreement was fundamentally different to the First and Second Funding Agreements in that it did not provide for any fee or premium to be paid to the funder;

    (b) the Liquidator had addressed the concern of Justice Robson (*Re Ascot Vale Self-Storage Pty Ltd (in liq)* (2014) 98 ACSR 243) in setting aside the First Funding Agreement, including that he had considered the efficacy of the Fingal Charge and Fingal Loan Agreement, which in turn Justice Sifris (*Fingal Developments Pty Ltd v Nom de Plume Nominees Pty Ltd* [2015] VSC 44) and subsequently the Court of Appeal (*Nom de Plume Nominees Pty Ltd v Fingal Developments Pty Ltd* (2016) 337 ALR 303) had found to be valid and effectual; and

    (c) the Liquidator had addressed the concerns of Justice Judd in setting aside the Second Funding Agreement including, importantly, awaiting the determination of the Fingal Appeal in which the validity of the Fingal Charge and the Fingal Loan Agreement had been upheld, and that the Liquidator was satisfied such agreement was in the interests of creditors generally having regard to its terms.

13. The learned Associate Justice erred in finding that the 'Third Funding Agreement' ought to have been rejected insofar as it contains features which led previous judges to reject previously proposed agreements: Reasons at [223].

14. The learned Associate Justice erred in concluding that the Liquidator would not conduct a proper enquiry into the efficacy of the 'Fingal charge' and the amount secured by it: Reasons at [226]. In fact, the Liquidator did not need to assess the efficacy of the 'Fingal charge' which had been assessed by the Court of Appeal and by Justice Sifris and the quantum was readily proven.

15. The learned Associate Justice erred in stating or finding that the Court of Appeal refused to declare the 'Fingal charge' secured loans made by unitholders but rather declared that the 'Fingal charge' only secured amounts that had been advanced by Fingal in its capacity as lender: Reasons at [41]. His Honour's criticism of the Liquidator's second report to creditors (Reasons at [56]) is similarly flawed. In fact, the Court of Appeal simply concluded that since the Albury investors and the unitholders were not parties to the proceeding the declaration should not state that their loans were secured by it.

16. The learned Associate Justice erred in finding that 'extraordinary' sums were incurred for costs by the Plaintiffs and that there was little or nothing to show for them and that that was relevant or decisive on the stay application given that the sums his Honour referred to were incurred by the Plaintiffs, and not by the Defendants: Reasons at [227, 228, 229]. In any event, there was no evidence that the fees were 'extraordinarily' high or as to their precise composition or makeup.

17. The learned Associate Justice erred in agreeing with a submission that '*it is not open on the evidence to find that the plaintiff's claims are strong or that there is no defence*' noting that it conflicts with his later determination that '*It*

is just not possible or appropriate in an application of this type to express a view in that regard'; Reasons at [236]. Since the application for a permanent stay was brought under Order 23 of the Rules, his Honour ought to have considered the strength of the Plaintiffs' case, and found that it was at least an arguable one, the merits of which would be finally determined at a later stage.

74 By Amended Notice of Contention filed 7 August 2019, the respondents contend as follows:

1. Having found that the proceeding was commenced on 1 August 2013 J[9], [28] and that the liquidator was not in a position to prosecute the proceeding until November 2017 J[168], and that the conduct of the proceeding was 'seriously wanting' having regard to the overarching purpose of the *Civil Procedure Act 2010* (Vic) (CPA) J[237], his Honour did not consider it necessary to find J[3], but ought to have found, that by commencing a proceeding, and maintaining it from August 2013 until November 2017, with no means of prosecuting the proceeding in the manner required by ss 7 and 25 of the CPA, or at all, the liquidator had breached ss 7 and 25 of the CPA. On this, alternative, basis the proceeding ought to have been stayed under s 29(1) of the CPA.

2. Having found that the winding up of AVSS had begun on 2 February 2011 J[24] and that the liquidator now seeks to prosecute an insolvent trading claim under s 588M(2) of the *Corporations Act 2001* (the Act) J[28], his Honour did not consider it necessary to find J[3], but ought to have found that had this claim been brought in November 2017, when the liquidator was first in a position to prosecute the claim J[168] in the manner required by ss 7 and 25 of the CPA, or at all, the claim would have been statute barred by reason of s 588M(4) of the Act. On this, alternative, basis the claim ought to have been stayed or dismissed under s 29(1) of the CPA.

3. Having found that the liquidator had taken no substantive steps in the proceeding from 1 August 2013, when the proceeding was commenced, until 1 March 2018 J[9], and that 'aside from two unsuccessful funding applications, no progress had occurred in the proceeding since 2013' J[227] and having rejected the liquidator's explanations for the delay and submissions as to prejudice J[230]-[236], his Honour did not consider it necessary to find J[3], but ought to have found that there had been an inordinate and inexcusable delay by the liquidator in prosecuting the proceeding. On this alternative basis, the proceeding ought to have been stayed, for want of prosecution, in exercise of the Court's inherent jurisdiction.

4. Having found that orders had been made on 19 June 2014 that AVSS give security for the defendants' costs of the proceeding J[6] and that no amount of security had been fixed or given and that no approach had been made to the Court by AVSS or the Liquidator to fix or give such security until 1 March 2018 J[7], his Honour did not consider it necessary to find J[3], but ought to have found that AVSS had failed to give security for costs. On this, alternative, basis the proceeding ought to have been dismissed pursuant to r 62.04 of the *Supreme Court (General Civil Procedure) Rules 2015*.

5. Having found that there was a history of litigation between the funder and the defendant and that the Court had twice rejected funding agreements between AVSS and the funder in which Robson J and Judd J had 'sharply criticised' the liquidator and funder J[222] such that there were compelling reasons why the liquidator ought to have obtained the Court's approval before entering into a funding agreement with the funder J[223]; and having found that the liquidator had, instead, entered into a funding agreement with the funder, without the Court's approval, on terms that allowed the funder to retain '*de facto* control' of the liquidation and the proceeding J[225]-[226] and to conduct the proceeding as litigation 'by proxy', for the benefit of the funder, rather than for the benefit of the general body of creditors of AVSS

J[221], in circumstances where the liquidator and his solicitors had incurred 'extraordinary' sums of unpaid legal costs and remuneration J[227] which gave them a 'very strong incentive' to obtain payment of those fees J[228], and where the liquidator's explanation for not seeking Court approval was found to be 'disingenuous and most unconvincing' J[223], his Honour did not consider it necessary to find J[3], J[87], but ought to have found that in accepting funding from the funder, without the Court's approval, in order to prosecute the proceeding, the liquidator was not faithfully performing his duties. On this, alternative, basis the proceeding ought to have been stayed either permanently or until security is provided by a person or persons on terms and in an amount approved by the Court on the application of the Second Respondent or alternatively on the Court's own initiative pursuant to ss 45-1(1) or ss 90-15(1) of Schedule 2 or alternatively s 536(1) of the Act.

Appellants' submissions

75 On behalf of the appellants, it was submitted that there were the following errors in the reasoning of the Associate Judge.

76 The finding that the litigation was not being undertaken for the benefit of the general body of creditors but solely for the benefit of the Melville interests was an error because:

(a) the uncontradicted evidence of the liquidator was that the unsecured creditors would receive nothing unless this proceeding succeeded;

(b) to the extent that the Melville interests as a creditor would be advantaged by s 564 of the Act, the advantage was permissible; and

(c) any recovery with respect to the insolvent trading claim would be for the benefit of the unsecured creditors.

77 The finding that this proceeding has been fashioned in a quest to recover the claims that failed in the Fingal Proceeding was an error because the claims in the Fingal Proceeding were 'totally different' to the claims in this proceeding. The claims in this proceeding are brought by the company and the liquidator, and are respectively based on a breach of the Settlement Deed and insolvent trading, neither of which claim was brought in the Fingal Proceeding.

78 The finding that Robson J and Judd J 'sharply criticise[d] [the liquidator] and implicitly the Melville interests'[30] was an error. The criticism of Robson J was about the premium, which did not involve the liquidator, and the observation of Judd J was that the application for approval was premature.

79 The finding that the third funding agreement in substance contains the same features by reason of which Robson J and Judd J dismissed the previous funding agreements was an error because the third funding agreement contains no premium and the timing of the application could no longer be said to be premature.

80 The finding that the liquidator's explanation (for why he did not seek the Court's approval for the third funding agreement) was disingenuous and most unconvincing was an error. The

30 *Reasons* [2019] VSC 285, [222].

finding in paragraph 223 referred to the explanation noted by the Associate Judge in paragraph 172 being '[the liquidator] had only recently been made aware that he could obtain approval from the creditors'. Such an explanation was not given by the liquidator nor submitted by his counsel.

81 The finding that the assignment of debts owed by two significant unsecured creditors gave the Melville interests effective control over the creditors' meeting was an error. The assignment of the Galvin debt occurred after the creditors' meeting.

82 The finding that the Melville interests would have de facto control of the liquidation and this proceeding was an error. The Melville interests can terminate funding but their pre-existing liabilities will remain and such a provision is usual in a funding agreement.

83 The finding that 'it is fanciful to suggest that [the liquidator] would of his own volition conduct an unfunded inquiry into the efficacy of the Fingal charge and the amount secured by it' was an error.[31] The validity of the Fingal Charge was upheld by the Court of Appeal.

84 The finding that the costs incurred in this proceeding are 'extraordinary' was an error because:

(a) there was no evidence from a costs consultant that the costs incurred were extraordinary; and

(b) the amount of the costs has no bearing on whether this proceeding is oppressive to the respondents.

Further:

(i) it is entirely unclear how the Associate Judge came to the conclusion that the costs incurred would bring the Court's procedures into disrepute;

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31 Ibid [226].

(ii) the 25 per cent uplift on the solicitors' fees is entirely proper given that the firm had been engaged on a 'no win no fee' basis; and

(iii) whether or not the costs will be determined based on cl 9 of the third funding agreement will be the subject of consideration of the Court in an application under s 564 of the Act.

85 The finding that the delay in the proceeding was 'a simple one [namely] that [the liquidator] was not in a position to obtain funding on terms that were acceptable to Robson J and Judd J' was an error.[32] The cause of the delay was principally awaiting the outcome of the Fingal Proceeding.

86 The finding that the respondents would suffer prejudice because of the stress of litigation was an error.

Respondents' submissions

87 On behalf of the respondents, it was submitted that the Associate Judge did not make any errors.

88 The finding that if the liquidator decided to investigate the sum secured by the Fingal Charge, that funding could, and likely would, be terminated was an available inference.

89 There was no error in the finding by the Associate Judge that this proceeding was being pursued for the benefit of the Melville interests. This inference was available on the basis that the liquidator was chasing a maximum recovery of $6 million and after payment of the liquidator's and the solicitors' costs incurred to date and the costs of the funder for conducting the rest of the action, it is likely that any further amount will be taken by Fingal under its charge.

90 The finding that the position under the third funding agreement had not changed since the refusal of the applications for approval of the first and second funding agreements was not in error. Judd J considered that cl 4.1 of the second funding agreement reposed in the funder an

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32 Ibid [230].

unacceptable degree of control over the future conduct of this proceeding. The same clause now appears in the third funding agreement.

91 To the extent that the Associate Judge may have been in error in finding at paragraph 172 that the explanation given by the liquidator for not seeking Court approval was that '[the liquidator] had only recently been made aware that he could obtain approval from the creditors', that error did not affect:

(a) his Honour's conclusion at paragraph 223 that the relationship between the Melville interests and Leggo/NDP had not changed; nor

(b) his Honour's conclusion at paragraph 172 that no convincing explanation had been given as to why Court approval was no longer appropriate.

92 The finding that the delay in the conduct of this proceeding was a result of the liquidator not being in a position to obtain funding on terms that were acceptable to Robson J and Judd J was not an error because:

(a) the liquidator did not have funding to prosecute this proceeding prior to 13 November 2017; and

(b) the liquidator's inability to provide security for costs resulted in this proceeding being stayed in June 2014.

93 On behalf of the respondent, it was further submitted that if the Associate Judge did make an error, the Court should nonetheless find that this proceeding should be permanently stayed as an abuse of process, or under s 29 of the *Civil Procedure Act 2010* (Vic) ('CPA'), for the following reasons:

> 1. First, in contravention of ss 7 and 25 of the *Civil Procedure Act 2010*, the Liquidator commenced the proceeding without any means of prosecuting it, either in the efficient, timely and prompt manner required by CPA or at all.
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> 2. Second, in contravention of ss 7 and 25 of the CPA, the Liquidator maintained that proceeding, without any means to prosecuting it, either in the efficient, timely and prompt manner required by CPA or at all, for more than four years.
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> 3. Third, had the Liquidator brought the proceeding in November 2017, when he first had funding to prosecute it in the efficient, timely and prompt manner

required by the CPA, or at all, the proposed claim of insolvent trading against Mr Leggo would have been statute barred.

4. Fourth, even now, more than six years after the proceeding was commenced, the Liquidator does not have funding to prosecute the proceeding to its conclusion, either in the efficient, timely or prompt manner required by the CPA or at all. Rather, the Melville interests must agree funding at each stage of the action and can terminate the funding agreement at any time.

5. Fifth, more than six years have passed since the proceeding was commenced and no substantive step has been taken in the proceeding save for filing the Originating Process. The proceeding remains in its infancy, will take years to complete, and relates to events that are now well over 10 years old. In the circumstances, the proceeding should be stayed as this is necessary to safeguard the administration of justice.

6. Sixth, the relationship and litigious history between the Melville interests and the defendants, along with the Court's rejection of past funding agreements as having compromised the liquidator's independence, were compelling reasons for the Liquidator to have sought the Court's approval of the third funding agreement. To exercise the Court's discretion to lift the stay of the proceeding, on the provision of security from the Melville interests on similar terms, without the Court's approval, would bring the interests of justice into disrepute.

7 Seventh, the Court should not exercise its discretion to lift the stay of proceedings on the provision of security, where that security has been obtained from the Melville interests on terms which contain features that are contrary to the interests of creditors and compromise the liquidator's independence and have twice been rejected by this Court for that reason. To do so would be to now give the *imprimatur* of this Court to those funding arrangements, which the Court has twice refused to do.

Principles with respect to abuse of process

94 Every court has the power to prevent its processes and procedures, 'which exist to administer justice with fairness and impartiality, [from being] converted into instruments of injustice or unfairness'.[33] The policy considerations which inform the law relating to abuse of process are:

(a) to ensure the processes of the Court are used fairly; and

(b) to maintain public confidence in the ability of the Court to function fairly.[34]

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33 *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ); *Rogers v The Queen* (1994) 181 CLR 251, 286-7 (McHugh J).

34 *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585, 590 [22] ('*Treasury Wine*') (Maxwell P and Nettle JA).

95 In determining whether a proceeding should be permanently stayed as an abuse of process, the Court undertakes a 'weighing process involving a subjective balancing of a variety of factors and considerations'.[35] The factors and considerations to be so weighed include:

(a) the requirements of fairness to the parties;

(b) the public interest; and

(c) the need to maintain public confidence in the administration of justice.[36]

96 In *Johnson v Gore Wood & Co,* Lord Bingham stated that the Court is required to make:

> a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.[37]

97 The onus of proving an abuse of process is heavy and rests on the party alleging it.[38]

98 The Court will only grant a permanent stay of proceeding on the basis of an abuse of process in exceptional circumstances. In *Williams v Spautz*, a majority of the High Court said:

> It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction [to conduct litigation] … It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an application for a stay, unless once again the interests of justice demand it.[39]

99 A permanent stay should only be imposed if the concerns about the conduct constituting the abuse cannot be remedied by less drastic relief.[40]

100 The abuse of process can arise from any procedural step in the proceeding; but it will usually arise by the institution of proceedings.[41]

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35 *Walton v Gardiner* (1993) 177 CLR 378, 396. See also *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31; quoted with approval in *UBS AG v Tyne* (2018) 360 ALR 184, 188-9 [7].

36 *Project 28 Pty Ltd v Barr* [2005] NSWCA 240, [62].

37 [2002] 2 AC 1, 31; quoted with approval in *UBS AG v Tyne* (2018) 360 ALR 184, 188-9 [7] (Kiefel CJ, Bell and Keane JJ).

38 *Treasury Wines* (2014) 45 VR 585, 599 [62] (Kyrou JA).

39 (1992) 174 CLR 509, 519 (Mason CJ, Dawson, Toohey and McHugh JJ).

40 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 232 [122] (Mason P).

41 *Rogers v The Queen* (1994) 181 CLR 251, 286 (McHugh J).

101 Abuse of process 'is not restricted to defined and closed categories';[42] but it will usually exhibit at least one of the following three characteristics:

(a) The Court's procedures are being invoked for an illegitimate collateral purpose.

(b) The use of the Court's procedures is unjustifiably oppressive to a party.

(c) The use of the Court's procedures will bring the administration of justice into disrepute.[43]

Illegitimate collateral purpose

102 The legitimate purpose for bringing a proceeding is to 'vindicate legal rights or immunities by judgment or settlement'.[44] If the party's predominant purpose is to use the *existence* of the proceeding for a purpose other than the legitimate purpose, it is liable to be stayed as an abuse of process. However, if the predominant purpose of the proceeding is to obtain a collateral advantage flowing from any judgment or settlement in the proceeding, it will not be an abuse of process.[45]

Unjustifiably oppressive to a party

103 In this context, 'oppressive' has been held to mean proceedings that are 'seriously and unfairly burdensome, prejudicial or damaging' or 'productive of serious and unjustified trouble and harassment'.[46] Examples of proceedings that may fall within this category include:

(a) the making of a claim which has, or ought to have been, raised and determined in an earlier proceeding;[47] and

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42 *Project 28 Pty Ltd v Barr* [2005] NSWCA 240, [58] (Ipp JA, with whom Hodgson JA and Campbell AJA agreed).

43 *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ); *Rogers v The Queen* (1994) 181 CLR 251, 286-7 (McHugh J); *PNJ v The Queen* (2009) 252 ALR 612, 613 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

44 *Treasury Wine* (2014) 45 VR 585, 588 [9] (Maxwell P and Nettle JA).

45 Ibid 588 [11].

46 *Ridgeway v The Queen* (1995) 184 CLR 19, 75 (Gaudron J).

47 *Walton v Gardiner* (1993) 177 CLR 378, 393; *UBS AG v Tyne* (2018) 360 ALR 184, 188-9 [7], 195-6 [39].

(b) a proceeding in which a party fails to sufficiently identify an intelligible basis for the claim, or fails to demonstrate any arguable basis justifying use of the Court's processes,[48] especially if the claim is supported by documents or affidavits containing scandalous, vexatious and oppressive material.[49]

Bringing the administration of justice into disrepute

104 The circumstances in which the use of court processes, although in compliance with the rules of the court, will amount to an abuse have been said not to 'lend themselves to exhaustive statement'.[50] It is informed by considerations of finality and fairness, which are even broader than those applicable to the doctrine of estoppel.[51] In considering whether the bringing or continuation of a proceeding is an abuse of process, the Courts have identified the relevance of various factors including:

(a) compliance with the CPA; and

(b) litigation funding.

105 On the issue of compliance with the CPA, the increasing importance of the timely and efficient administration of justice is reflected in the fact that the Court should consider procedural law, including the overarching obligations under the CPA, in identifying an abuse of process. In *UBS AG v Tyne,* Kiefel CJ, Bell and Keane JJ said:

> The timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute. These wider interests are reflected in s 37M(2) of the FCA [which provides the "overarching purpose" similar to s 7 of the CPA]. As the joint reasons in *Aon* explain, the "just resolution" of a dispute is to be understood in light of the purposes and objectives of provisions such as s 37M of the FCA. Integral to a "just resolution" is the minimisation of delay and expense.[52]

106 On the issue of litigation funding, in *Clairs Keeley (a firm) v Treacy*, the Full Court of the Supreme Court of Western Australia said that a funding agreement would constitute an abuse of process if it caused the interests of the plaintiffs to be subservient to those of the funder:

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48 *Re Seidler* [2017] FCA 113.
49 *Manolakis v Carter* [2008] FCAFC 183.
50 *UBS AG v Tyne* (2018) 360 ALR 184, 187 [1] (Kiefel CJ, Bell and Keane JJ).
51 Ibid 200-1 [62] (Gageler J).
52 Ibid 187 [1], 195 [38] (Kiefel CJ, Bell and Keane JJ); see also 203 [70]-[72] (Gageler J).

> It is acceptable for the litigation to be pursued by plaintiffs who, although funded by a third party, are acting in their own interests in the pursuit of justice in their respective causes, and are so acting on the advice of independent solicitors. It is not acceptable for the litigation to be pursued in such a way that the interests of the plaintiffs are subservient to those of the funder. That would be an abuse of process.[53]

107 In *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*, Mason P disagreed, concluding that:

(a) 'a conclusion about abuse of process must stem from a finding directed at the actual or likely conduct of the party in whose name the litigation is brought (or its agents)'; and

(b) '[the Court] is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation'.[54]

108 After emphasising that the proper inquiry to be undertaken by the Court was 'whether the role of [a] particular funder has corrupted or is likely to corrupt the processes of the court to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process', Mason P noted the reluctance of the Court to impose a permanent stay of a genuine and viable cause of action, stating:

> The standard of proof is high where (as here) the plaintiff has a genuine and viable cause of action. The court will lean in favour of moulding its remedy so as to eliminate the abuse, resorting to dismissal only as a last resort where this is impossible.[55]

109 In *Project 28 Pty Ltd v Barr*,[56] Ipp JA agreed with Mason P in *Fostif* and considered the amount of control exercised by a funder did not, of itself, constitute an abuse of process. He said:

> In appropriate circumstances, therefore, the law countenances complete or absolute control of litigation by a person who prosecutes litigation in the name of another party. In my view, without intending any disrespect to the opinions of others who have held to the contrary, the mere existence of such control in the hands of a person not formally a party to the litigation does not, on its own, constitute an abuse of the process of the Court. It is, however, a relevant factor when regard is had to the whole picture, which is required when considering whether or not to grant a stay on the grounds of abuse of process.[57]

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53 (2004) 29 WAR 479, 493 [71] ('*Clairs Keeley*').
54 (2005) 63 NSWLR 203, 229 [114] (with whom Sheller and Hodgson JJA agreed) ('*Fostif*').
55 Ibid 234 [132] (citations omitted).
56 [2005] NSWCA 240 (with whom Hodgson JA and Campbell AJA agreed).
57 Ibid [77].

110 In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,[58] the majority upheld the decision of the Court of Appeal in *Fostif* on the issue of abuse of process, and were generally supportive of the reasoning of Mason P.[59] It was held that the fact a proceeding is supported by litigation funding arrangements does not of itself constitute the proceeding an abuse of process; or make it liable to be permanently stayed.[60] The plurality found that difficulties which arise out of litigation funding should be 'addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes'.[61]

111 The approach adopted by the plurality in *Campbells Cash* has been summarised as follows:

> There is no overarching rule of public policy that bars the prosecution of funded litigation by reference to the share of the proceeds or the degree of control over the litigation extended to the funder.
>
> The relevant question to ask is not whether the agreement, of itself, discloses champerty or maintenance; rather, it is necessary to identify what exactly is feared; in particular, what exactly is the corruption of the Court processes that is feared. By way of example, their Honours referred to such matters as inflaming damages, suppressing evidence or suborning witnesses.
>
> The question of whether there is an abuse of process is not solved by identifying a general rule of public policy that may be invoked by a defendant; each case must be determined on its own facts.[62]

112 Considered in their respective relevant circumstances, the courts have held that agreements in which:

(a) the funder provides no indemnity for the plaintiff's liability for costs;[63] and

(b) the funder is entitled to the entire benefit of and controls the litigation;[64]

do not constitute an abuse of process.

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58 (2006) 229 CLR 386 (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ) ('*Campbells Cash*'). Callinan and Heydon JJ in the minority found that the litigation funding arrangements brought the administration of justice into disrepute at 486-8 [266] n 431.

59 Ibid 470 [1] (Gleeson CJ), 434 [89] (Gummow, Hayne and Crennan JJ), 447 [129] (Kirby J).

60 Ibid 470 [1] (Gleeson CJ), 432-6 [83]-[95] (Gummow, Hayne and Crennan JJ), 444 [126], 447 [129], 451 [147] (Kirby J).

61 Ibid 435 [93] (Gummow, Hayne and Crennan JJ).

62 *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Limited* (2007) 158 FCR 417, 424 [39] (Tamberlin and Jacobson JJ; Rares J dissenting) ('*Deloitte*').

63 *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75 (French CJ, Gummow and Hayne JJ; Crennan and Heydon JJ dissenting).

64 *Deloitte* (2007) 158 FCR 417.

Consideration

113 The Associate Judge did not state whether the considerations on which he relied fell within one or more of the established categories of abuse of process. However, he alluded to matters suggesting that they may have fallen into established categories. For example:

(a) the finding that the litigation was being conducted for the Melville interests, who had de facto control of this proceeding, may indicate that his Honour considered that the continuance of this proceeding would bring the administration of justice into disrepute because the interests of the appellants were subservient to those of the funder;

(b) the finding that this proceeding 'has been fashioned by the Melville Interests in a quest to recover for their interests the claims that they were unsuccessful in recovering in the Fingal Proceeding'[65] may indicate that his Honour considered that this proceeding was oppressive to the respondents either because it ought to have been raised and determined in the Fingal Proceeding, or because it was an attempt to relitigate an issue;

(c) the finding of delay in litigation may indicate that his Honour considered it oppressive to the respondents; and

(d) the finding with respect to the quantum of costs may indicate that his Honour considered that this proceeding was being conducted for a collateral purpose.

114 Although his Honour did not articulate whether and to what extent he intended his findings to relate to the established categories, this does not indicate error because an abuse of process is evaluated in all the circumstances and the categories are not closed. Senior counsel for the respondents did not contend that any of the considerations referred to by his Honour alone would have been sufficient to constitute this proceeding an abuse of process. Rather, he submitted that the Associate Judge's decision was the result of all the factors to which his Honour referred. It was submitted that:

> The point in this case is that by reason of the combination of circumstances pertaining to this liquidator and these funding arrangements, including delay, including the terms of the funding agreement, including the circumstances in which the proceeding was commenced and the stage the proceeding had reached, including the quantum of

65 *Reasons* [2019] VSC 285, [222].

> unpaid fees already incurred over a million dollars which will be visited on the unsecured creditors if there's a recovery.

115 In my opinion, in concluding that the institution and/or continuance of this proceeding was an abuse of process, the Associate Judge erred in the following respects:

(a) The litigation was not solely for the benefit of the Melville interests.

(b) This proceeding was not fashioned by the Melville interests as a result of the failure of the Fingal Proceeding.

(c) The Melville interests had not gained effective control over the creditors' meeting.

(d) The terms of the third funding agreement were not in substance the same as the earlier funding agreements and it was appropriate for the liquidator not to seek court approval.

(e) The terms of the third funding agreement did not give the Melville interests de facto control of this proceeding.

(f) The quantum of costs and expenses is not supportive of an allegation of abuse of process.

(g) The delay has not been not solely the responsibility of the liquidator.

Error 1: The litigation was not solely for the benefit of the Melville interests

116 In my opinion, the finding that the litigation was not being undertaken for the benefit of the general body of creditors of AVSS but solely for the benefit of the Melville interests was not open on the evidence before the Associate Judge for the following reasons:

(a) AVSS's principal claim under cl 3.1 of the Settlement Deed is for an amount not exceeding $6,246,821. It was not submitted that this claim has no reasonable prospects of success. If AVSS was to succeed and recover interest under the *Supreme Court Act 1986* (Vic) from the date of issue, the total potential recovery could exceed $9 million plus costs.

(b) There is no evidence that such a recovery would not return a substantial benefit to the general body of creditors, after payment of the costs of this proceeding together with the liquidator's fees even assuming that Fingal is able to justify the full amount of its claim of $3,535,731 as being covered by its charge.

(c) The liquidator's claim for insolvent trading for a sum not exceeding $2,711,090 could result in a recovery, assuming the Court awards penalty interest under the *Supreme Court Act 1986* (Vic), of in excess of $4 million plus costs. Under s 588Y of the Act, the proceeds of this recovery are not available to pay Fingal's secured debt unless all of the unsecured debts are paid in full. I reject the respondents' submission that the Court cannot have regard to this section because the appellants did not rely on it before the Associate Judge, for the following reasons:

(i) In his affidavit of 8 July 2014, the liquidator deposed that '[t]he proceeds of an insolvent trading claim fall to the benefit of the unsecured creditors'.

(ii) Senior counsel for the respondents conceded in argument that '[s]o far as the insolvent trading claims are concerned they belong to the unsecured creditors'.

(iii) It is a matter of law and could not be contradicted by evidence.

(d) The liquidator's uncontested evidence was that there would be no recovery for the unsecured creditors unless this proceeding succeeded.

(e) The entry of the liquidator into the third funding agreement for the purpose of pursuing this proceeding was approved by the creditors present by proxy being:

(i)	Australian Taxation Office	$1,271,429.43
(ii)	Galvin Constructions	$1,138,278.35
(iii)	Fingal (as assignee of the debt owed to Melbourne Business and Investment Corporation)	$127,689.93

117 In circumstances where all the voting creditors present (and virtually all the creditors of the company) vote in favour of a resolution to enter into a funding agreement to prosecute a proceeding, it can be inferred that creditors consider that prosecuting the proceeding is in

their commercial interest. In these circumstances, without strong evidence to the contrary, a court should be most reluctant to draw a contrary inference.

118 In my opinion, a finding that the principal beneficiary of this proceeding was likely to be Fingal would be unimpeachable. However, it is to be expected that the party prepared to fund a liquidator to bring a proceeding is, applying normal commercial principles, likely to do so because it is a substantial creditor of the company and is therefore likely to be the substantial or possibly the sole beneficiary of the proceeds of the proceeding. In my opinion, it is consistent with the policy underlying s 564 of the Act that creditors should be encouraged to fund liquidators in bringing proceedings for the expectation of commercial benefit.

119 In *State Bank of New South Wales v Brown*,[66] Hodgson JA (with whom Handley JA agreed) identified the object of the equivalent provision (then contained in s 450 of the *Companies (NSW) Code 1981)* as being:

(a) the encouragement of pursuit of claims by liquidators, namely to benefit creditors and shareholders generally; and

(b) to recover property from wrong-doers and thus discourage misconduct in relation to corporations.[67]

In that case, the majority held that these purposes can even justify the payment of 100 per cent of the proceeds of litigation to the funding creditor in appropriate cases. Hodgson JA explained:

> In my opinion, both purposes may be advanced by the grant of an advantage of 100% of the recovered funds to supporting creditors in appropriate cases. Plainly, such a benefit can support the objective of recovering property from wrong-doers. In my opinion also, the grant of a 100% advantage in cases where recovery turns out to be relatively small can also support the objective of benefiting creditors generally, by encouraging the support of litigation in cases where there is a prospect of a large recovery which would inure for the benefit of all creditors, but which may in certain eventualities result only in a small recovery. Of course, if a 100% advantage is too readily granted in such cases, this could unduly encourage the settling of claims for less than their reasonable value; but this risk can be taken into account when settlements are approved, as well as in applications by supporting creditors to be given an advantage.[68]

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66 (2001) 38 ACSR 715 (Spigelman CJ, Handley and Hodgson JJA) ('*Brown*').

67 Ibid 728 [91] (Hodgson JA, with whom Handley JA agreed). See also *Re Ken Godfrey Pty Ltd (in liq)* (1994) 14 ACSR 610, 612 (Hayne J) ('*Re Ken Godfrey*').

Error 2: This proceeding was not fashioned by the Melville interests as a result of the failure of the Fingal Proceeding

120 The Associate Judge found that this proceeding was 'fashioned by the Melville interests in a quest to recover for their interests the claims they were unsuccessful in recovering in the Fingal proceeding'.[69]

121 His Honour relies upon this finding in support of his conclusion that this proceeding is an abuse of process. However, it is not clear whether his finding is that the claims in this proceeding:

(a) are oppressive as an attempt to relitigate the Fingal Proceeding; or

(b) should have been brought as part of the Fingal Proceeding such as might give rise to an Anshun estoppel.

122 His Honour's reasons do not disclose the basis upon which he arrived at either conclusion.

123 In my opinion, neither conclusion was open on the evidence for the following reasons:

(a) The claims in this proceeding are brought by the Company and the liquidator; and are based on a breach of the Settlement Deed and insolvent trading respectively. Neither claim was brought in the Fingal Proceeding.

(b) There is no issue that each claim is genuine and viable.

(c) The claim by the liquidator is for the benefit of the unsecured creditors and the Associate Judge did not explain how this claim could be said to be so 'fashioned' by the Melville interests.

(d) This proceeding was filed well prior to the substantial failure of the claims in the Fingal Proceeding in the Court of Appeal.

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68 *Brown* (2001) 38 ACSR 715, 728 [92].
69 *Reasons* [2019] VSC 285, [222].

Error 3: The Melville interests had not gained effective control over the creditors' meeting

124 The Associate Judge found that the assignment of debts by two significant unsecured creditors being Galvin ($1,365,414) and Melbourne Business and Investment Corporation ($127,690) 'gave the Melville interests effective control over the creditors' meetings of AVSS and in large part enabled the passing of the Third Funding Agreement'.[70] This was an error by the Associate Judge because, as his own reasons disclose,[71] the assignment of the substantial debt owed to Galvin was made after the meeting of 19 December 2016, which approved the entry into the third funding agreement. Further, the minutes of that meeting record that Fingal only voted as the assignee of the debt owed to Melbourne Business and Investment Corporation.

125 As was noted in the minutes of 19 December 2016, even if Fingal had abstained from voting as an assignee of the Melbourne Business and Investment Corporation debt, 94.97 per cent of the value of creditors present voted in favour of the resolution.

Error 4: The terms of the third funding agreement were not in substance the same as the earlier funding agreements and it was appropriate for the liquidator not to seek court approval

126 The Associate Judge found that the rejection of the two earlier funding agreements made it 'compelling' for the liquidator to seek the Court's approval of the third funding agreement.[72] This stemmed from the findings that:

(a) the liquidator's explanation for not seeking the Court's approval was 'quite disingenuous and most unconvincing'; and

(b) the third funding agreement, in substance, contained the same features by reason of which Robson J and Judd J dismissed the previous agreements.

127 In my opinion, the Associate Judge erred in both of these findings.

128 First, the explanation, which the Associate Judge found to be disingenuous and most unconvincing was 'that [the liquidator] had only recently been made aware that he could

70 Ibid [224].
71 Ibid [64].
72 Ibid [223].

obtain approval from the creditors'.[73] It is accepted that there was no evidence or submission on behalf of the liquidator of such an explanation.

129 In fact, prior to the second funding application, Judd J expressed strong doubts about the appropriateness of the Court being called upon to approve funding agreements, saying:

(a) 'I have got a very very uncomfortable feeling about participating in approving litigation funding contracts. It is not a role for the Court …'; and

(b) 'Why can't the liquidator make his own call? He has got the power to do it.'[74]

130 In those circumstances, I consider that the liquidator could have been subject to criticism if he had made a further application to the Court after the express approval by the creditors under s 477(2B) of the Act made it unnecessary for him to do so.

131 Second, the third funding agreement was significantly different to the first and second funding agreements in the following respects:

(a) The third funding agreement did not include a provision which prevented the liquidator from challenging the validity of the Fingal Charge. This is appropriate given that this was the principal basis on which Robson J refused to approve the first funding agreement; and unremarkable given that the validity of the Fingal Charge has been since upheld by the Court of Appeal.

(b) The third funding agreement did not include a funder's fee, which Judd J found was not acceptable for litigation funders who were not at arm's length.[75]

132 In my opinion, the above matters are sufficient to conclude that it was not open to the Associate Judge to say that the third funding agreement was substantially similar to the first and second funding agreements.

133 For completeness, with respect to the other reasons identified by Judd J in refusing to approve the second funding agreement, I say as follows:

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73 Ibid [172].
74 See paragraph 47 above.
75 See paragraphs 51(b) and 56(a) above.

(a) The statement that the application was premature is no longer applicable because the appeal in the Fingal Proceeding has been determined.

(b) The failure by the liquidator to adequately explain the potential return to creditors is, in my opinion, not relevant in the determination of the current application for a permanent stay of proceedings.

(c) The effect on the liquidator's independence arising from the funder's ability to approve any proceeding and terminate the funding agreement focuses attention on the fact that the application for a permanent stay is a very different application to that before Judd J to approve the second funding agreement.

Error 5: The terms of the third funding agreement did not give the Melville interests de facto control of this proceeding

134 The Associate Judge found that, because the funder could terminate further funding on 30 days' notice:

(a) the Melville interests had de facto control of this proceeding; and

(b) it was 'fanciful to suggest that [the liquidator] would … [enquire] into the efficacy of the Fingal charge and the amount secured by it'.[76]

135 In my opinion, the Associate Judge erred in both findings.

136 Under the third funding agreement, the funder does retain a measure of control, which 'is essential if the funder is to manage group litigation and also protect its own legitimate interests'.[77] I do not consider an appropriate measure of control, in the circumstances, can be described as 'de facto control' in a sense that would support an allegation of an abuse of process.

137 I consider that the funder's reservation of the right to terminate funding under the third funding agreement on 30 days' notice is a commercially reasonable and appropriate term, for the following reasons:

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76 *Reasons* [2019] VSC 285, [225]-[226].

77 *Fostif* (2005) 63 NSWLR 203, 235 [137] (Mason P).

(a) Litigation can be notoriously expensive and the assessment of prospects can change during the course of the litigation. It is not commercially realistic to expect that a funder accept liability for all the costs associated with litigation, on a blank cheque basis, without a measure of control.[78]

(b) After termination, the funder would continue to be liable for all obligations accrued to the date of termination.

(c) After termination, the liquidator would be at liberty to seek alternative funding arrangements.

138 The propriety of similar provisions has been accepted in a number of decisions.

139 In *Clairs Keeley*, the Western Australian Court of Appeal rejected an application to remove the stay on a proceeding which was proposed to be funded by a litigation funder, on the basis that the plaintiffs had not been fully and properly advised and the solicitors did not understand the consequences of their breach of fiduciary duties.[79]

140 However, the Court accepted that it was reasonable for a litigation funder to 'have some say and control in relation to settlement',[80] noting that the Legal Aid Commission was entitled under the relevant legislation to exercise some control over litigation by terminating funding if a legally aided plaintiff refused to accept a reasonable offer.[81] The Court recognised the commercial necessity of funders being able to control the risk inherent in their investment, observing:

> Although the conduct of the litigation is in the hands of [the solicitors for the plaintiff], there is no doubt that [the litigation funder] continues to exercise a degree of control. However, that will be inevitable in the case of any litigation funding of this kind. Without some degree of control the risk would be too great for the funder to undertake the funding, especially when the litigation is protracted, complex and expensive. If litigation funders were to be discouraged, by denying them some measure of control sufficient to protect their investment, the number of oppressive or unmeritorious claims and defences might be reduced, but at the risk of preventing access to justice, or equal access to justice, by many others with genuine claims or defences and no other means of advancing, or effectively advancing, them.[82]

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78 *Campbell's Cash* (2006) 229 CLR 386, 434 [89] (Gummow, Hayne and Crennan JJ).
79 (2004) 29 WAR 479, 503 [134] (Steytler, Templeman and McKechnie JJ).
80 Ibid 489 [55], quoting *Buiscex Ltd v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357, 363 (Hodgson CJ in Eq).
81 Ibid.
82 Ibid 502 [124].

141 In *Spatialinfo Pty Ltd v Telstra Corporation Ltd*,[83] Sundberg J considered an objection by the applicant to notices to produce and a subpoena by which the respondent sought documents relating to the applicant's funding agreement. Sundberg J ultimately set aside the subpoena and some aspects of the notices to produce. In arriving at this conclusion, he analysed the funding agreement itself because it was 'necessary to consider whether the funding of the proceeding could constitute maintenance and champerty, and thus perhaps constitute an abuse of process, in order to put the challenge to the subpoenas and notices to produce in their proper context'.[84] Under the funding agreement, the funder was entitled to terminate at its absolute discretion at any time but remained liable for accrued obligations. With respect to this right, Sundberg J said:

> The funders' right to terminate the agreement in their absolute discretion was said by Telstra to be a means of controlling the proceeding. The funders' right to terminate, expressed in the same terms, was not seen as obnoxious in *Clairs Keeley*. It is to be remembered that if the funders terminate the agreement, they remain liable for any obligations accrued to the date of termination, and have no right to recover what they have already paid Spatialinfo or its solicitors. They lose their right to a proportion of the fruits of the proceeding. Mr Bowman's evidence was that a right of termination provides the capacity to limit the funders' exposure to further adverse costs, and ensures that they are not required to fund unviable cases. He said that because of the significant cost consequences for the funders consequent upon termination, that was a serious event. There had been a termination in only three cases in the approximately 210 that had been funded. In those circumstances I do not accept that the existence of the termination clause is an indirect control mechanism because of the funders' ability to use it as a threat. For the reasons given by Mr Bowman, *the right to terminate is an almost unavoidable feature of a litigation funding agreement. As he said, the funders would be very unlikely to fund a case without a right to terminate*.[85]

142 In *Re Australian Institute of Professional Education Pty Limited (in liq)*,[86] Gleeson J considered an application for approval of a funding agreement under s 477(2B) of the Act. The primary risk to the liquidators was identified as being that:

> [the funder was] entitled to terminate the agreement without cause on 30 days' notice. If that were to occur the liquidators would be liable for any costs incurred after the date of termination. In such an event, the liquidators could discontinue the IEM proceeding or seek alternative funding arrangements.[87]

Nevertheless, the liquidators submitted that the agreement did 'not impose any unusual control or influence over the liquidators in the pursuit of the … proceeding'.[88]

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83 [2005] FCA 455.
84 Ibid [22].
85 Ibid [33] (emphasis added).
86 [2018] FCA 642.
87 Ibid [26](8).

143 His Honour accepted the liquidators' submission, and approved the funding agreement, in part because he was satisfied that:

> [T]here was no reason to conclude that the liquidators' entry into the funding agreement would be other than a proper exercise of their power, or that it would be an ill-advised or improper act on the part of the liquidators.[89]

144 In my opinion, it was not open to the Associate Judge to conclude on the basis of the funder's right to terminate, in the context of the other provisions in the agreement, that '[t]he Melville interests, through the medium of funding [the liquidator], will have de facto control of the liquidation and, in particular, the Proceeding'.[90]

145 The Associate Judge also made the following finding with respect to the liquidator conducting a proper inquiry into the efficacy of the Fingal Charge and the amount secured by it:

> In my view, it is fanciful to suggest that [the liquidator] would of his own volition conduct an unfunded inquiry into the efficacy of the Fingal charge and the amount secured by it. He is without funding to do so and it is highly likely in my view that if he did, the Melville interests would terminate the Third Funding Agreement.[91]

146 There was no explanation as to why, in view of the decision of the Court of Appeal in the Fingal Proceeding, it would be necessary for the liquidator to inquire into 'the efficacy' of the Fingal Charge.

147 However, if the company's claim under the Settlement Deed results in the recovery of funds, it may be necessary for the liquidator to make an assessment of 'the amount secured' by the Fingal Charge. His Honour based his conclusion about the unlikelihood of a proper enquiry on the fact that the liquidator would be 'without funding to do so and it is highly likely … that if he did, the Melville Interests would terminate the Third Funding Agreement'.

148 However, the Associate Judge did not explain, and counsel for the respondent was unable to explain, why an inference that the liquidator would not do his duty was open in circumstances where:

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88 Ibid [26](6).
89 Ibid [30].
90 *Reasons* [2019] VSC 285, [225].
91 Ibid [226].

(a) there was no necessity for the amount secured by the Fingal Charge to be determined prior to the completion of this proceeding and the recovery of funds; and

(b) after the recovery of funds, the liquidator would be in a position to conduct the appropriate inquiry; and would be unaffected by any purported termination of the third funding agreement.

149 In particular, the Associate Judge did not explain why the liquidator would not fulfil his obligations in circumstances where any decision to allow the amount claimed by Fingal under the charge without proper inquiry could be subject to an application by the Australian Taxation Office under s 90-10 of the Insolvency Practice Schedule (Corporations) being Schedule 2 of the Act.

Error 6: The quantum of costs and expenses is not supportive of an allegation of abuse of process

150 The accrued fees and costs to the date of the third funding agreement totalled approximately $1.7 million consisting of the following amounts:

(a) $552,445.28 being funding costs incurred by the Melville interests;

(b) $411,746.61 being the liquidator's remuneration including $374,315.10 that had not been paid; and

(c) $766,412.55 being uncharged fees of Piper Alderman (including the 25 per cent uplift component pursuant to s 182 of the *Legal Profession Uniform Law Application Act 2014* (Vic) of $153,282.52 (incl. of GST)).

151 The Associate Judge described these sums as 'extraordinary' and 'quite breathtaking particularly in view of the fact that, aside from the two unsuccessful funding applications, no progress has occurred in the Proceeding since 2013'.[92] He considered the quantum such as to 'bring the court's procedures into disrepute' and provided a strong incentive for the liquidator and his solicitors to prosecute this proceeding to obtain payment of the fees.[93]

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92 Ibid [227].
93 Ibid [228].

152 With respect to legal costs, there is no evidence of an assessment of the reasonableness of the fees, although it can be inferred that the substantial costs were incurred in the following hearings:

(a) the examination of Leggo on 15 April 2013;

(b) the application for security for costs on 19 June 2014;

(c) the application for approval of the first funding agreement before Randall AsJ on 30 September 2013;

(d) the appeal against the decision of Randall AsJ before Robson J on 11 March 2014; and

(e) the application for approval of the second funding agreement on 22 December 2015.

153 With respect to his own fees, the liquidator reported to creditors that his fees had been incurred in calling and conducting creditors' meetings, negotiating with litigation funders and the 'extensive investigation into the examinable affairs of the company', the substance of which were reported to the creditors in the report dated 18 September 2014. In the report he listed the following investigations undertaken in the preparation of his report and the formulation of his opinions:

- ASIC and real property searches;
- Personal Property Securities Register searches;
- Review of books and records of the Company;
- Review of electronic records and email correspondence issued on the companies behalf;
- Discussions and questionnaires completed by the directors;
- Discussions with creditors;
- Review of the financial accounts of the Company and restatement of same;
- Discussions with Unit Holders;
- Review of books and records in the possession of Messer Vrsecky and Horne;
- Obtained legal advice with respect to various actions;
- Conduct a public examination of Leggo;

- Conduct informal examinations of Unit Holders of the Company (Melville, Crozier, Turner);
- Preparation of insolvency report including restatement of accounts;
- Assessed the solvency of the Company at various points in time;
- Review of witness statements prepared by Unit Holders of the Company;
- Liaison with litigation funders;
- Review of material filed in relation to proceedings issued by Fingal and [NDP];
- Review of information provided by Tom Fernandez in relation to his receivership;
- Reviewed material in relation to secured party loans;
- Preparation of investigation memorandum; and
- Assessed the commercial merits of various claims and formed a view as to which actions would be in the best interest of creditors.

154 With respect to the quantum of costs and fees incurred by or on behalf of the appellants as at the date of the third funding application, his Honour did not disclose how he arrived at his strong conclusions about the quantum of costs or how this consideration supported the finding of an abuse of process and a permanent stay of this proceeding.

155 First, if he found that the costs and fees incurred on behalf of the Company are oppressive to the respondents, he did not explain how.

156 Second, his Honour did not disclose the basis on which he concluded that the fees and costs were 'extraordinary'. As there was no evidence as to the value of the work performed by the lawyers over the 5 year period, his assessment was presumably based on his experience. However, he did not disclose how he estimated the amount of work performed by the lawyers or identify other parameters by which he made his assessment. Similarly, he did not disclose the basis on which he found the liquidator's fees to be extraordinary.

157 Third, accepting that the costs and fees incurred are substantial, there was no evidence about, and the Associate Judge made no finding about, whether this was the result of:

(a) excessive charging;

(b) the inefficient conduct of the liquidation; or

(c) the conduct of litigation otherwise in breach of the CPA.

158 It is apparent that substantial costs have been incurred on the two applications and the appeal relating to the approval of funding agreements. The respondents resisted those applications and were ultimately successful. This does not mean that the liquidator was unreasonable in seeking approval by the Court of the funding agreements. The issue of the approval of funding agreements is a developing area of the law and an area where minds may fairly differ as demonstrated, for example, by:

(a) the decision of Randall AsJ, a judicial officer whose extensive experience in corporations law commands respect, and the decision of Gleeson J referred to above; and

(b) the views expressed by Judd J at the directions hearing referred to in 47 above.

159 Fourth, the finding that the high amount of unpaid costs and fees provides 'a very strong incentive'[94] for the liquidator and the lawyers to prosecute this proceeding does not constitute an abuse of process. It was not submitted or found that this proceeding was commenced or continued for the predominant purpose of generating costs or fees; and such costs and fees will be recoverable only on vindication of the claims through settlement or judgment.[95]

160 There is a strong public policy in encouraging liquidators to prosecute claims, which they consider to be meritorious, for the purposes of:

(a) benefitting creditors and shareholders; and

(b) discouraging misconduct in relation to corporations and recovering property from wrongdoers.[96]

161 In particular, it is consistent with this policy that liquidators and solicitors who identify meritorious claims should not be discouraged from:

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94 Ibid [228].

95 Cf *Treasury Wine* (2014) 45 VR 585.

96 See paragraph 119 above for *Brown* (2001) 38 ACSR 715, 728 [91] (Hodgson JA); and paragraphs 139 to 140 above for *Clairs Keeley* (2004) 29 WAR 479, 502 [124].

(a) filing proceedings promptly; and

(b) incurring costs and fees;

assuming the risk that the fees may not be recovered unless the proceeding is successful or a funder is found. If the Court was too ready to infer that the maintenance of the proceeding is an abuse of process on the basis that it is for the purpose of recovering outstanding costs and fees rather than for the creditors and shareholders of the company, it would substantially undermine this policy.

162 Fifth, if it is proved that the liquidator or his lawyers have charged excessive costs and fees, the Court can remedy the issue by exercising its powers with respect to the taxation of costs and the disallowance of liquidator's fees. Issues arising from excessive costs and fees can be resolved without resort to the drastic remedy of a permanent stay.[97]

163 Sixth, in my opinion, it would likely bring the Court's procedures into disrepute for the Court to permanently stay a proceeding and render the costs and fees incurred inutile without any determination of the merits of the claim. In this case, the liquidator has given unchallenged evidence that he is satisfied as to the merits of this proceeding and the prospects of its success; and the determination by the Court of Appeal of the validity of the Fingal Charge and the insolvency report of Deloitte dated 31 July 2013 mean that the substantive issues in this proceeding can be determined in a relatively short period of time. With proper management, I consider that this matter can be brought on for trial of the substantive issues within nine months. This is a result which much better accords with the interests of justice than a permanent stay of proceedings.

164 In conclusion, as stated in *UBS AG v Tyne,*[98] breaches of the overarching obligations under the CPA are relevant in determining whether the bringing or continuation of a proceeding is an abuse of process. However, in my opinion, it was not sufficient for the Associate Judge to find that the appellants had incurred substantial, or even excessive costs, and conclude that this was supportive of the contention that the continuation of this proceeding was an abuse of

97 *Fostif* (2005) 63 NSWLR 203, 232 [122].

98 (2018) 360 ALR 184, 195 [38] (Kiefel CJ, Bell and Keane JJ); see also 203 [70]-[72] (Gageler J).

process. Unless the costs and fees between client and lawyer 'have corrupted or have a tendency to corrupt the processes of the court in the particular litigation',[99] on an abuse of process application:

(a) such costs and fees are irrelevant; and

(b) a defendant has no standing to complain about them.

165 As Mason P explained in *Fostif*, with respect to the relevant arrangements between a funder and its client on an abuse of process application:

> The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation. It is only when they have that quality that the defendant has standing to complain about them.[100]

166 As I attempt to demonstrate by reference to the six considerations above, more than a finding of excessive costs is required to be weighed in the public interest of 'the timely and efficient administration of justice'[101] to justify the drastic remedy of a permanent stay of the proceeding.

167 Further, it is not in the interests of the administration of justice to encourage defendants to apply for permanent stays of proceedings on the basis that the plaintiffs have incurred substantial, or even excessive costs. Incurring substantial costs on numerous interlocutory applications, as has happened in this case, is anathema to the adoption of procedures intended 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.[102]

Error 7: The delay has not been not solely the responsibility of the liquidator

168 Although the Associate Judge did not find that there had been inordinate delay, he concluded that the reason for the length of time that had elapsed since the commencement of this

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99 *Fostif* (2005) 63 NSWLR 203, 229 [114].
100 Ibid.
101 *UBS AG v Tyne* (2018) 360 ALR 184, 203 [72] (Gageler J).
102 CPA s 7(1).

proceeding was 'a simple one [being] that [the liquidator] was not in a position to obtain funding on terms that were acceptable to Robson J and Judd J'.[103]

169 The progress of this proceeding can be summarised as follows:

(a) Between August 2013 and August 2014, this proceeding was filed, the first funding agreement was approved by Randall AsJ, the decision was overturned by Robson J, the parties consented to an order for security for costs and the liquidator filed the second funding application.

(b) From August 2014 to October 2015, the parties jointly delayed taking any step in this proceeding until the determination of the Fingal Proceeding by Sifris J.

(c) In December 2015, Judd J refused to approve the second funding application for reasons including that any application for litigation funding should await the outcome of the Court of Appeal's decision with respect to the validity of the Fingal Charge.

(d) In July 2016, the Court of Appeal found, among other things, that the Fingal Charge was enforceable and made final orders on 6 October 2016.

(e) Between December 2016 and May 2017, the liquidator reported to creditors, who resolved that the liquidator enter into a third funding agreement, which the liquidator negotiated and entered into, in May 2017.

(f) Between May 2017 and September 2017, the liquidator obtained a report from a costs consultant as to the appropriate quantum of security that should be provided in accordance with the unquantified orders for security for costs of 19 June 2014.

(g) Between November 2017 and May 2018, the solicitors for the liquidator proposed that security for costs be provided and the amount assessed. The respondents' solicitors refused the offer and stated that the respondents proposed to apply for a permanent stay. The applications were heard before the Associate Judge on 10 and 11 May 2018.

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103 *Reasons* [2019] VSC 285, [230].

(h) From May 2018, delays were associated with Court processes and could not be attributed to conduct by the parties.

170 In my opinion, it was not open to the Associate Judge to attribute responsibility for the delay simply on the liquidator. A substantial cause of the delay was the parties' joint decision to await the determination of the question of the validity of the Fingal Charge prior to incurring further costs in this proceeding.[104]

171 As the Associate Judge observed, litigation is stressful and the respondents have been subjected to the stress consequent to the litigation being on foot since 2013. However, in my opinion, the liquidator acted properly in bringing on this proceeding at an early time after he formed the opinion that the claims were meritorious and that he had reasonable grounds to believe that he would be able to fund the litigation. I consider that greater prejudice would have been caused to the respondents if the liquidator had delayed this proceeding until close to the limitation period. A respondent can be significantly deprived of a proper opportunity to prepare a defence if he or she is unaware of the intention to file a claim until many years after the relevant events.[105]

Respondents' 'Key Points' as to why the appeal should be dismissed

172 In support of the Notice of Contention, counsel for the respondents identified several 'key points' as to why the appeal should be dismissed. In respect of these, I say as follows.

Key Point 1: In contravention of ss 7 and 25 of the CPA, the Liquidator commenced the proceeding without any means of prosecuting it, either in the efficient, timely and prompt manner required by CPA or at all.

173 I reject this submission for the following reasons:

(a) At the time the liquidator filed the writ in this proceeding, on 1 August 2013, he had in place the first funding agreement executed on 30 July 2013. For reasons set out above, the fact that the approval of the funding agreement was ultimately set aside on

104 For example, see paragraphs 33, 36, 38, 42, 43, 45 and 46 above.

105 Delay in filing proceedings may constitute an abuse of process: *Batistatos v Roads and Traffic Authority of NSW* (2006) 226 CLR 256 (Gleeson CJ, Gummow, Hayne and Crennan JJ; Kirby, Heydon and Callinan JJ dissenting). See also *Finance & Guarantee Company Pty Ltd v Auswild* [2019] VSC 664, [577](e).

appeal does not justify a conclusion that the liquidator was in breach of his obligations under the CPA. At the time of filing this proceeding, the liquidator could reasonably have expected that:

(iv) the first funding agreement would be approved (it was by Randall AsJ) or, if it was not approved;

(v) it could be varied to accord with the Court's requirements; or

(vi) the need for Court approval of the funding agreement could be avoided by obtaining the approval of the creditors under the Act.

(b) The respondent put forward no authority for the proposition that it is an abuse of process to file or maintain a proceeding without funds certain in place to conduct the trial to its conclusion. It is not uncommon for a litigant to file and maintain proceedings through solicitors who, based on their assessment of the claim or otherwise, are prepared to undertake the necessary work without payment for a period or the entirety of the action. Neither, in my opinion, is it in the interests of justice for courts to encourage defendants to collaterally attack claims as an abuse of process on the basis that the plaintiffs are in some sense not properly funded to conduct the litigation to completion.

(c) As noted above, a substantial cause of delay in this proceeding was the joint decision not to prosecute it until determination of the question of the validity of the Fingal Charge (together with, regrettably, delays in Court processes).

(d) Liquidators of insolvent companies are inherently likely to be confronted with difficulties in identifying and funding claims that they should bring on behalf of the company in accordance with their statutory obligations. Liquidators are subject to the CPA, but the Court should be mindful of these difficulties and the public policy in such claims being brought, in determining whether liquidators have breached their obligations under the CPA.

Key Point 2: In contravention of ss 7 and 25 of the CPA, the Liquidator maintained that proceeding, without any means to prosecuting it, either in the efficient, timely and prompt manner required by CPA or at all, for more than four years.

174 I reject this submission for the same reasons I have rejected the first submission.

175 Senior counsel for the respondents submitted that the liquidator should have discontinued this proceeding during the period he was unfunded. He relied on *Idoport Pty Ltd v National Australia Bank Ltd*,[106] a case where the plaintiffs' claims were dismissed after a failure to provide security for costs for two months.

176 In *Idoport,* Einstein J refused an application for an adjournment by the plaintiffs in the following circumstances:

(a) In September 1998, the plaintiffs filed what became known as the Main proceeding.

(b) In March 1999, the plaintiffs filed what became known as the Argus proceeding.

(c) In July 2000, the trial of the Main proceeding and the Argus proceeding commenced.

(d) In September 2000, the plaintiffs filed what became known as the MLC proceedings which were heard concurrently with the other two proceedings.

(e) In December 2000, the plaintiffs foreshadowed significant amendments to the statement of claim in each proceeding.

(f) In January 2001, the defendants filed a motion seeking security for costs:

(vii) incurred against one of the plaintiffs in liquidation;

(viii) the costs of the MLC proceedings; and

(ix) costs arising from the amendments sought by the plaintiffs;

on the ground (inter alia) that there were persons standing behind the appellant who were funding the proceedings in return for a share of the proceeds, should the appellant succeed.

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106 [2002] NSWSC 18 (Einstein J) ('*Idoport*').

(g) The motions were deferred, and on 27 September 2001, Einstein J ordered the provision of security for costs as follows:

(i) The sum of $479,305 by 31 October 2001 and monthly payments of $23,179 up to a total of $942,895 in the MLC proceedings.

(ii) Monthly payments of $48,178 in the Main proceeding.

(h) On 1 November 2001, the MLC proceedings were stayed by reason of the failure to provide the security for costs as ordered. In the Main proceeding only the first monthly payment was made.

(i) On 13 November 2001, the defendants filed a motion seeking dismissal of the MLC proceedings.

(j) On 26 November 2001, Einstein J:

(i) rejected the plaintiff's application to vacate the orders for security for costs;

(ii) adjourned the application to dismiss the MLC proceedings to 29 January 2002;

(iii) gave leave to the defendants to apply for the dismissal of the other proceedings on 29 January 2002;

(x) gave directions for the filing of evidence relating to the dismissal motions; and

(xi) stated that with respect to the adjournment, 'it is necessary for the Court to make quite clear to the plaintiff that this one chance being granted to it will almost certainly not be repeated on a subsequent occasion'.[107]

(k) By the time the proceeding was stayed:

(i) the trial was on its 222nd day of hearing;

(ii) the trial was estimated to continue, if uninterrupted, until late 2003; and

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107 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 1081, [104].

(iii) the defendant bank had incurred costs of in excess of $60,000,000.[108]

(l) On 29 January 2002, the plaintiff had not complied with the orders for security for costs or the filing of evidence; and sought an adjournment.

(m) Einstein J, after a detailed analysis of the circumstances, refused the application for an adjournment and dismissed the proceedings. In particular, he noted:

(i) the case was 'unusual in the extreme';[109]

(ii) there was no assurance that additional time would lead to the plaintiffs receiving funding to comply with the order for security for costs; or the continuation of the proceeding;[110]

(iii) the substantial prejudice to the defendants,[111] included that:

> Even if the proceedings were now re-enlivened upon immediate payment of all outstanding amounts due under the security for costs orders, it would take probably months before the Court could expect the defendants to be ready to continue the final hearing.[112]

177 As is apparent from reference to the extreme circumstances in that case, *Idoport* does not support the respondents' contention that the liquidator was obliged to discontinue this proceeding. Of particular relevance, is the fact that the respondents in this proceeding refer to no prejudice other than the general stress of litigation; and the appellants stand ready to provide security for costs.

Key Point 3: Had the Liquidator brought the proceeding in November 2017, when he first had funding to prosecute it in the efficient, timely and prompt manner required by the CPA, or at all, the proposed claim of insolvent trading against Mr Leggo would have been statute barred.

178 I reject this submission as it is premised on the same propositions as the first and second submissions. It further asserts, in effect and without any authority, that the proper remedy for a claim filed, prior to the litigant having funding to prosecute in an efficient, timely and

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108 *Idoport Pty Ltd v National Australia Bank Ltd* [2002] NSWCA 271, [9]-[11] (Mason P, Stein and Giles JJA).
109 [2002] NSWSC 18, [58].
110 Ibid [42], [50].
111 Ibid [51]-[52].
112 Ibid [59].

prompt manner, is to grant a permanent stay of the proceeding if the alleged breach persists throughout the limitation period.

Key Point 4: Even now, more than six years after the proceeding was commenced, the Liquidator does not have funding to prosecute the proceeding to its conclusion, either in the efficient, timely or prompt manner required by the CPA or at all. Rather, the Melville interests must agree funding at each stage of the action and can terminate the funding agreement at any time.

179 I reject the fourth submission because the third funding agreement includes the following provisions:

(a) It is the liquidator who retains lawyers to act on behalf of himself and the Company in the prosecution of this proceeding; and is solely responsible for providing instructions to the lawyers. He is only obliged to confer with the funder in relation to 'significant issues' and is not bound to follow any advice from the funder.

(b) The liquidator is 'free to determine whether to make, accept or reject any such offer as he may in his absolute discretion determine' (cl 6.5), and his obligations to the funder in respect of settlement are limited to notifying the funder and providing the funder with an opportunity to provide an advice from a senior counsel for consideration of the liquidator (cl 6).

(c) The funder and the liquidator will confer in an attempt to agree on a maximum sum payable by the funder prior to each stage of this proceeding, and the agreement provides a mechanism for determination by an independent costs assessor in the event of disagreement (cl 3.3). There was no evidence as to why this apparently perfectly sensible process would impact on the efficient, timely and prompt conduct of this proceeding.

(d) The funder does retain the right to terminate on 30 days' notice. For the reasons set out above, I consider the term to be reasonable and should not impact on the conduct of this proceeding.

Key Point 5: More than six years have passed since the proceeding was commenced and no substantive step has been taken in the proceeding save for filing the Originating Process. The proceeding remains in its infancy, will take years to complete, and relates to events that are now well over 10 years old. In the circumstances, the proceeding should be stayed as this is necessary to safeguard the administration of justice.

180 I reject the fifth submission for the following reasons:

(a) The insolvency report has been prepared and available to the parties for a long period. In my opinion, under proper management, the parties could be expected to now complete discovery and evidence on an expedited basis and the Court would make time available for trial in about mid 2020.

(b) The trial does relate to events that are about 10 years old, but both parties have been on notice of the claims and in a position to prepare their case for many years.

(c) For the reasons provided above, there has not been inordinate delay and the respondents were party to a significant cause of the delay.

Key Point 6: The relationship and litigious history between the Melville interests and the defendants, along with the Court's rejection of past funding agreements as having compromised the liquidator's independence, were compelling reasons for the Liquidator to have sought the Court's approval of the third funding agreement. To exercise the Court's discretion to lift the stay of the proceeding, on the provision of security from the Melville interests on similar terms, without the Court's approval, would bring the interests of justice into disrepute.

181 I reject the sixth submission for the following reasons:

(a) For the reasons stated above, the liquidator is entitled under the Act to proceed with this action on the basis of the resolution of the creditors. In my opinion, it is not appropriate for the Court to impose the requirement of Court approval, which is not a requirement of the statute.

(b) For the reasons set out above, the terms of the third funding agreement are significantly different to the funding agreements which were not approved by Robson J and Judd J.

(c) The submission fails to recognise the fact that the Court's consideration of an application to stay a proceeding as an abuse of process is different to an application

for approval of a funding agreement under the Act. Fundamentally, on an application to approve a funding agreement under the Act, the Court is concerned with protecting the interests of the company, its creditors and shareholders. In considering whether there has been an abuse of process, the Court is concerned with protecting the other parties to the litigation and the public interest in the administration of justice.

Key Point 7: The Court should not exercise its discretion to lift the stay of proceedings on the provision of security, where that security has been obtained from the Melville interests on terms which contain features that are contrary to the interests of creditors and compromise the liquidator's independence and have twice been rejected by this Court for that reason. To do so would be to now give the imprimatur of this Court to those funding arrangements, which the Court has twice refused to do.

182 I reject the seventh submission for the following reasons:

(a) For the reasons stated above, I do not consider the third funding agreement is contrary to the interests of the creditors and nor do I consider it compromises the liquidator's independence.

(b) The submission fails to recognise the fact that the Court's consideration of an application to stay a proceeding as an abuse of process is fundamentally different to an application for approval of a funding agreement under the Act.

Conclusion

183 The decision of the Associate Judge was affected by error and is liable to be set aside. For the reasons already given, I consider that the order to dismiss the proceeding as an abuse of process should be set aside, and orders made for the provision of security for costs and directions given for the trial of this proceeding.

184 In summary, the reasons are:

(a) It is a drastic step to permanently stay a proceeding as an abuse of process particularly in circumstances where there is no issue that the claims have reasonable prospects of success.

(b) I do not consider that the appellants have inordinately delayed the proceeding. In particular, I consider the following steps reasonable:

(i) the decision to postpone taking further steps in this proceeding until the determination of the validity of the Fingal Charge; and

(ii) the actions of the liquidator in arranging finance for security for costs and the conduct of this proceeding up to trial.

(c) The third funding agreement and the role of the funder does not:

(i) render the interests of the appellants subservient to those of the funder;[113] or

(ii) corrupt, and is not likely to corrupt, the processes of the Court.[114]

(d) The role of the funding creditor must be considered in the context of the public policy to encourage creditors to fund liquidators to prosecute claims:

(i) to benefit creditors and shareholders generally; and

(ii) to discourage misconduct in relation to corporations.[115]

(e) The fact that costs and fees may have exceeded expectations (often due to interlocutory applications) will rarely constitute a basis for a permanent stay unless the 'proceeding [was] brought with the predominant purpose of generating legal work for a solicitor' and the defendant was brought to court for the 'predominant purpose of enriching [the plaintiff's] solicitor'.[116]

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113 *Clairs Keeley* (2004) 29 WAR 479, 493 [71].
114 *Fostif* (2005) 63 NSWLR 203, 229 [114].
115 *Brown* (2001) 38 ACSR 715, 728 [91] (Hodgson JA, with whom Handley JA agreed). See also *Re Ken Godfrey* (1994) 14 ACSR 610, 612 (Hayne J).
116 *Treasury Wine* (2014) 45 VR 585, 590 [21]-[22] (Maxwell P and Nettle JA).

(f) The unsecured creditors have statutory rights to the proceeds of the liquidator's claim for insolvent trading; and the Company is not statute barred from filing another claim under the Settlement Deed.
