

## update

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## Friday Facts: Litigation funding gets green light

*In the recent case of Campbells Cash and Carry Pty Limited v Fostif Pty Limited (the 'Fostif Case') the High Court gave the green light to litigation funding by third parties declaring it was not an abuse of process which should result in the proceedings being stayed.*

The representative proceedings had been brought by tobacco retailers seeking to recover State license fees from licensed wholesalers which had been declared invalid by the High Court in *Ha v State of New South Wales*. The plaintiffs' proceedings were financed by a litigation funder. The defendants brought applications for the representative proceedings to be dismissed or stayed as an abuse of process. The Judge at first instance in the New South Wales Supreme Court held that the proceeding was an abuse of process and stayed the proceedings. The Court of Appeal allowed the appeal by the tobacco retailers and found that the litigation funding did not justify staying the proceedings. The licenced wholesalers appealed to the High Court who granted special leave for the appeal to be heard.

The High Court constituted by the Chief Justice, Justice Gleeson, Justices Gummow, Hayne, Crennan and Kirby (Justices Callinan and Heydon dissenting) agreed that the litigation funding did not constitute a ground to stay the proceedings.

In particular, their Honours stated that:

- the proceedings did not constitute an abuse of process and there was no reason in public policy why they should have been stayed
- the historical common law doctrine of "maintenance and champerty" – being the supporting of litigation regardless of reason and in exchange for a share of the proceeds of the litigation should it be successful – had been abolished as a crime and tort in New South Wales, and the courts had accepted as a matter of public policy that parties should be allowed to access litigation funding in order to proceed with their claims and gain access to justice
- when the crimes and torts of maintenance and champerty were abolished, the common law that had evolved around those crimes and torts had been lost
- the complaint made by the defendants that the litigation funder in seeking out complainants had been "officially intermeddling" did not constitute an

abuse of process as the crimes and torts of maintenance and champerty had been abolished

- the suggestion that the litigation funder had a degree of control over the proceedings, which resulted in the litigants' interest being said to be "subservient" to those of the "intermeddler" did not give rise to conflicts of duty for the solicitor acting, as the interests between the litigation funder and the plaintiffs could be dealt with adequately by the existing rules relating to the solicitor's duties to the Court and to their client. Similarly, any concerns regarding the administration of justice could be adequately addressed by existing doctrines of abuse of process

Interestingly, the licensed wholesalers did not contend that maintenance or champerty provided them with a defence to the claims which had been made against them by the tobacco retailers, only that it was an abuse of process for a third party to fund the litigation for the purpose of making a profit from the success of the litigation.

The Fostif Case is an important decision which was desperately needed by those relying on litigation funding in order to pursue claims. Whilst the issue of litigation funding had been considered previously by a number of Appeal Courts in various Australian jurisdictions it had not until the Fostif Case received the "green light" from the High Court of Australia.

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