SUPREME COURT OF QUEENSLAND

CITATION:	*Murphy & Ors v Gladstone Ports Corporation Ltd* [2019] QSC 12
PARTIES:	**MURPHY OPERATOR PTY LTD (ACN 088 269 596)** (first plaintiff) **TOBARI PTY LTD (ACN 010 172 237)** (second plaintiff) **SPW VENTURES PTY LTD (ACN 135 830 036)** (third plaintiff) **v** **GLADSTONE PORTS CORPORATION LIMITED (ACN 131 965 896)** (defendant)
FILE NO/S:	SC No 7495 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 February 2019
DELIVERED AT:	Rockhampton
HEARING DATE:	30 November 2018 and 13 December 2018
JUDGE:	Crow J
ORDER:	**The parties are to provide written submissions within two weeks hereof as to the appropriate form of orders.**
CATCHWORDS:	COSTS - SECURITY FOR COSTS – FORM OF SECURITY – CHAMPERTOUS FUNDING ARRANGMENT – where plaintiffs proposed a security in the form of a deed of indemnity from an English insurance company – where plaintiff also offered to pay $30,000 as actual security for costs incurred in enforcing the deed in England - where defendant seeks security by payment into court or bank guarantee – where parties disagree as to the form of security to be provided – whether deed of indemnity and actual security adequate to protect the defendant – whether deed of indemnity provided is at risk of forming part of a champertous funding arrangement - whether form of security proposed imposes on the defendant an unacceptable disadvantage PROCEDURE – DISCLOSURE – PRODUCTION AND INSPECTION OF DOCUMENTS – PRIVILEGE – LEGAL

PROFESSIONAL PRIVILEGE - where defendant seeks disclosure of draft expert reports – where plaintiff argues that there is no requirement to disclose draft expert reports until it is deployed - whether draft expert reports must be disclosed under sub-rule 212(2) of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the abrogation of privilege provided under sub-rule 212(2) ought to be confined to its ordinary meaning - whether communications passing between experts and lawyers are privileged

Civil Proceedings Act 2011 (Qld) s 13A, s 103K(2)(b), s 103ZA, s 103ZB
Foreign Judgments (Reciprocal Enforcements) Act 1933 UK, s 2
Uniform Civil Procedure Rules 1999 (Qld) r 5, r 211, r 212, r 423, r 425, r 426, r 427, r 428, r 429, r 429A, r 670(1), r 671E, r 673(1)

Bodycorp Repairers Pty Ltd v GDG Legal Pty Ltd & Anor [2017] VSC 200
Campbells Cash and Carry v Fostif Pty Ltd (2006) 229 CLR 386
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588
DIF III Global Co-Investment Fund, L.P. & Anor v BBLP LLC & Ors [2016] VSC 401
Elfic v Macks [2003] 2 Qd R 125
Energy Drilling Inc v Petroz NL (1989) §ATPR 40-954
Fisher v Bridges (1854) 3 E&B 642; 118 E.R. 1283
Fox v Percy (2003) 214 CLR 118
Global Access Ltd v Educationdynamics LLC [2010] 1 Qd R 525
Hickman v Turn and Wave Ltd [2013] 1 NZLR 741
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1) [1999] 1 Qd R 141
Knights Capital Group Ltd v Bajada & Associates Pty Ltd (No 2) [2017] WASC 245
Redenbach and Another v Legal Practice Management Group Pty Ltd and Others [2018] 125 ACSR 513
Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board [2005] 1 Qd R 373
Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (2007) 164 FCR 275
Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited [2017] FCA 699
Roo Roofing Pty Ltd & Anor v Commonwealth of Australia [2017] VSC 694
Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd [2009] QSC 233
Tiaro Coal Limited (in liq) [2018] NSWSC 746
Treacy & Ors v Ryleston Pty Ltd & Ors [2002] WASC 178
Re Trepca Mines Ltd (No 2) [1963] 1 Ch 199

	Williamson v Diab [1988] 1 Qd R 210 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 *Watkins v State of Queensland* [2008] 1 Qd R 564
COUNSEL:	LWL Armstrong QC and M May for the plaintiffs JD McKenna QC, JB Sweeney and SB Hooper for the defendant
SOLICITORS:	Clyde & Co for the plaintiffs King & Wood Mallesons for the defendant

Introduction

[1] By claim and statement of claim filed 21 July 2017, the three plaintiffs bring an action against the defendant as the representative claimants and with the authority of group members defined in the statement of claim. The action alleges negligence in the design and construction of the bund wall for the Fisherman's Landing Port Expansion and Western Basin Dredging and Disposal Project which occurred in Gladstone Harbour during 2010 and 2011.

[2] The plaintiffs allege due to negligence in design and construction, the bund wall failed and allowed contaminants which materially decreased the quality of the water in affected waters, causing the members to suffer economic loss.

[3] The action, which is brought pursuant to Part 13A of the *Civil Proceedings Act* 2011 (Qld) ('*Civil Proceedings Act'*) is known as the Gladstone Port Fisheries Class Action. By application filed 16 November 2018, the defendant seeks security for costs and further discovery of documents.

Security for Costs

[4] Security for costs is sought pursuant to r 670(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') and s 103ZA of the *Civil Proceedings Act* or in the inherent jurisdiction of the court. The defendant seeks the security be provided in the "conventional" way, that is, by way of payment into court, a bank guarantee or such other form as is satisfactory to the registrar.

[5] The plaintiffs agree to provide security for the defendant's costs up to completion of disclosure in the amount of $400,000 however, the plaintiffs disagree as to the form in which the security should be provided.

[6] The plaintiffs propose a package which comprises a deed of indemnity to be provided by a foreign corporation, AmTrust Europe Limited ("AmTrust"), which has no assets in Australia and payment into the court of $30,000 as security for the costs of enforcing the deed of indemnity in London.

[7] In the event that the plaintiffs' litigation fails, then pursuant to s 103ZB, the court may order the representative parties to pay the costs of the successful defendant. The three plaintiffs have entered into representative proceeding funding agreements with a litigation funder, LCM Operations Pty Ltd ("LCM"). LCM has its offices in Sydney. The terms of

the representative proceeding funding agreements are subject to redaction provided in the exhibits to the affidavit of Mr McConnell.

[8] Pursuant to cl 40 of the representative proceeding funding agreements, the funder, LCM, agrees to make payment of action costs as defined and adverse costs, and pursuant to cl 40.3 "payment of security for adverse costs which may include procuring ATE insurance[1], or providing a deed of indemnity."

[9] Clause 41 provides that "[t]he scheme may use funding from the funder only towards defraying action costs and adverse costs incurred or to be incurred, or, where applicable, in providing security for adverse costs".

[10] In return for providing funding, the funder is entitled to a "funder's interest" defined in Item 5 with complete redaction of the method or manner in which LCM is to be remunerated for providing the funding and taking the risks. LCM as funder, being contractually bound to provide, if required, security for costs, has procured a deed of indemnity from AmTrust directly in favour of the defendant, Gladstone Ports Corporation Limited ("GPC"), however, the contract or arrangement between LCM and AmTrust, which caused AmTrust to offer the deed of indemnity in favour of GPC has not been disclosed.

[11] It is accepted that AmTrust (the body responsible for providing the deed of indemnity and paying the $400,000) has no assets within the jurisdiction of Queensland. Ordinarily where a plaintiff that has no assets within the jurisdiction, the courts have required the security of the costs to be given on the basis of a readily accessible and low risk security such as payment to the court or a bank guarantee.[2] Class action litigation is, however, far from ordinary, and a body of case law in other states has developed in relation to the provision of security for costs where typically, overseas corporations have engaged in the business of funding such litigation.

[12] In *DIF III Global Co-Investment Fund, L.P. & Anor v BBLP LLC & Ors*[3] Hargrave J summarises the law:

> [35] The effect of the authorities concerning the exercise of the Court's discretion as to the form in which security for costs may be provided by a foreign plaintiff with no assets in the jurisdiction (the 'relevant security circumstances') may be summarised as follows.
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> [36] First, the first principle stated by Priest JA in *Yara v Oswal* does not require that, in every case involving the relevant security circumstances, the form of the security must comprise a fund or asset in Victoria. There may be countervailing circumstances which point to the justice of the case not requiring security in the form of a fund or asset in Victoria.
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> [37] Second, countervailing circumstances may include that the plaintiff has substantial assets in a foreign jurisdiction, judgments of this Court can readily be registered in that jurisdiction at a cost which is secured by an

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1 ATE insurance is defined as After The Event insurance.

2 *Uniform Civil Procedure Rules* 1999 (Qld) r 671E; *Global Access Ltd v Educationdynamics LLC* [2010] 1 Qd R 525 at [12]; *Energy Drilling Inc v Petroz NL* (1989) §ATPR 40-954 at 50-422.

3 *DIF III Global Co-Investment Fund, L.P. & Anor v BBLP LLC & Ors* [2016] VSC 401 at [35] – [40] (footnotes omitted).

> asset or fund in Victoria, and execution of the judgment in the foreign jurisdiction does not pose undue difficulties or obstacles. An undertaking by the plaintiff not to seek security for costs in the event that proceedings to enforce a costs judgment are brought in the foreign jurisdiction may also be relevant.
>
> [38] Third, a plaintiff is entitled to put forward security in a form least disadvantageous to it. Where a plaintiff puts forward security in a form other than payment into court or a bank guarantee from an Australian bank, the central inquiry is whether the proposed form of security is adequate to achieve its object as security; namely, to provide a fund or asset against which a successful defendant can readily enforce an order for costs against the plaintiff. The fact that some delay may be involved in accessing that security is, while relevant, not decisive.
>
> [39] Fourth, a plaintiff proposing security bears a 'practical onus' of satisfying the Court that the proposed security will not impose an 'unacceptable disadvantage' on the defendant. Where that onus is satisfied, the Court should ordinarily order security in that form.
>
> [40] Drawing these threads together, in exercising its broad discretion as to the form of security for costs in the relevant security circumstances, the Court will usually apply the following principles:
>
> (1) the plaintiff is entitled to propose security in a form least disadvantageous to it;
>
> (2) the plaintiff bears a 'practical onus' of establishing that the proposed security is adequate and does not impose an 'unacceptable disadvantage' on the defendant;
>
> (3) in order to be adequate, the proposed security must satisfy the protective object of a security for costs order, namely, to provide a fund or asset against which a successful defendant can readily enforce an order for costs against the plaintiff; and
>
> (4) based on these and any other relevant considerations, the Court will determine how justice is best served in the particular circumstances of the case.

[13] The reasoning of Hargrave J in *DIF III* has been accepted in numerous subsequent authorities[4] which frequently recite the test in the third principle above of asking whether "a successful defendant can readily enforce an order for costs against the plaintiff".

[14] In the matter of *Tiaro Coal Limited (in liq)*[5] Gleeson JA said:

> [22] The starting point is that the relevant enquiry is whether the form of security to be ordered is adequate to protect the party seeking it:

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4 *Knights Capital Group Ltd v Bajada & Associates Pty Ltd (No 2)* [2017] WASC 245; *Bodycorp Repairers Pty Ltd v GDG Legal Pty Ltd & Anor* [2017] VSC 200; *Tiaro Coal Limited (in liq)* [2018] NSWSC 746; *Redenbach and Another v Legal Practice Management Group Pty Ltd and Others* [2018] 125 ACSR 513; *Roo Roofing Pty Ltd & Anor v Commonwealth of Australia* [2017] VSC 694; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* [2017] FCA 699.

5 [2018] NSWSC 746 at [22] – [23].

> *Blue Oil Energy* at [22]. It would be an error to approach the issue of the form of security by undertaking a comparison exercise of the relative attributes of the security offered by the plaintiff and the "conventional" or "familiar" forms of security by cash deposit or bank guarantee, with a view to determining which form of security was superior and which was inferior: *DIF III Global* at [65].
>
> [23] Insofar as Mr Meers seemed to suggest in argument that the "normal" forms of security by cash deposit or bank guarantee should be viewed as preferable to that offered by the plaintiff, I reject that submission. As Yates J remarked in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699 at [92], "… although courts are accustomed to ordering security in the form of payment into court or by provision of a bank guarantee, on present authority it would be wrong to see those forms as the only ones that could satisfy the requirement for sufficient security".

[15] Although deeds of indemnity of the type offered by AmTrust are the subject of numerous decisions concluding that the form of the security is adequate, whether a deed of indemnity will "provide a fund or asset against which a successful defendant can readily enforce an order for costs against" unsuccessful plaintiffs is a question of fact to be determined by reference to the deed provided and the evidence in the application (and not by reference to any seemingly acceptable practice in AmTrust offering a deed of indemnity in other cases).

[16] In the present case, the deed of indemnity which is offered[6] provides for an unconditional and irrevocable undertaking on behalf of AmTrust to pay to GPC any sum or sums (up to $400,000) which the plaintiffs are legally liable to pay the respondent. Various terms of the deed of indemnity have been the subject of correspondence with the deed being materially altered in favour of the defendant, that is, many of the issues between the plaintiffs and the defendant have been resolved, however, two issues of significance were unable to be resolved.

[17] The first issue is the ability, if the deed of indemnity is a valid and enforceable indemnity, of the defendant to realise the proceeds of the indemnity. In this regard it is to be noted that, cl 17 of the deed of indemnity requires AmTrust, if it fails to immediately pay in accordance with the terms of the deed, to:

(a) enter into consent judgments in the favour of the defendant both in the Supreme Court of Queensland and in the High Court of Justice in England and Wales (under the *Foreign Judgments (Reciprocal Enforcements) Act* 1933 UK s 2);

(b) undertake not to seek to set aside the registration of the Australian judgment in the High Court; and

(c) not to seek security for costs against the respondent for proceedings of the registration and enforcement for the Australian judgment in the United Kingdom.

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6 Exhibit 1.

[18] In terms of the practical receipt of any monies payable under the deed of indemnity, the plaintiffs point to the audited financial statements of AmTrust showing that it is a company of substance, i.e. having total assets (as at 31 December 2017) of almost £2 billion, having total equity of over £382 million, and reporting annual profits of almost £69 million.

[19] The financial statements of AmTrust have been audited with a clear audit certificate from KPM Auditors. There is no reason to think, therefore, on the evidence thus far advanced, that (if the deed of indemnity is enforceable) with the provision of $30,000 in actual security to enable the judgment to be enforced, there is much, if any, risk in the defendant being unable to access the $400,000 security for costs.

Maintenance and Champerty

[20] The second issue between the parties is far more complicated. The defendant argues that it:

> "has concerns that the deed may not be enforceable if AmTrust receives, as consideration providing it, a share of the proceeds of any successful settlement or judgment. In that event, the deed may form part of a champertous funding arrangement in circumstances where the maintenance and champerty are torts in Queensland."

[21] Mr McConnell, solicitor for the defendant, has expressly requested that the plaintiffs disclose all of the documents relating to the consideration sought by AmTrust for the entering into the deed of indemnity including information to enable the defendant to consider whether there are "any side agreements, arrangements or expectations" with respect to the consideration sought by AmTrust for the entering of the deed of indemnity. The request has been denied.

[22] The aforementioned cases, where similar deeds of indemnity have been approved, are cases in which litigation has commenced in New South Wales and Victoria. In those states, for a considerable period of time, the torts of champerty and maintenance have been abolished by statute, however, the torts have not been abolished in Queensland.

[23] The defendant argues that if the funding agreement between LCM and the plaintiffs is void and unenforceable, then as AmTrust must be in receipt of some form of consideration which is sourced from the unenforceable agreement, the agreement between AmTrust and LCM may also be void and unenforceable, and if void and unenforceable, then the deed of indemnity itself is also void and unenforceable.

[24] In order to determine whether the security by way of the offer of deed of indemnity is at risk, each of the steps in the above process needs to be considered.

[25] In *Campbells Cash and Carry v Fostif Pty Ltd*[7], Gummow, Hayne and Crennan JJ said:

> [68] The law of maintenance and champerty has been traced to the Statute of Westminster the First (3 Edw I c 25) of 1275. Some trace it back to Greek law and Roman law. Be this as it may, Coke identified maintenance as an offence at common law and champerty was a particular species of

[7] (2006) 229 CLR 386 at 426 – 428 (my emphasis) (footnotes omitted).

maintenance. Although traditionally identified as a common law offence, several early statutes are understood as affirming or declaring that common law.

[69] By the nineteenth century, the law of maintenance was understood by Lord Abinger CB as:

> "confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make … [By contrast], if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance."

Yet in *Bradlaugh v Newdegate*, Lord Coleridge CJ held that an action for maintenance at common law existed, but made no reference, in an extensive review of the authorities, to any requirement that the claim maintained be an unjust claim. Rather, the exceptions recognised to the general prohibition on maintaining the claim of another were seen as turning on whether the maintainer acted from charitable motives or because the person maintained was near kin, a servant, or in some like relationship to the maintainer.

[70] Champerty included every kind of maintenance for reward, whether by sharing of the "thing in plea" or otherwise. This understanding of champerty was originally seen as precluding the assignment of choses in action. The reason given in Coke's report of Lampet's Case was:

> "the great wisdom and policy of the sages and founders of our law, who have provided, that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice."

[71] As Winfield pointed out, Coke's theory was "perilously close to an anachronism". In *Norman v Federal Commissioner of Taxation*, Windeyer J said of Lampet's Case that "[i]t was a somewhat unsophisticated view of legal rights that led the common lawyers to classify choses in action and debts with mere possibilities, and to condemn all assignments of them as leading to maintenance".

[72] Maintenance and champerty, though well known in early English law, "were known almost exclusively as modes of corruption and oppression in the hands of the King's officers and other great men". And as Buller J noted, in *Master v Miller*: "Courts of Equity from the earliest times thought the doctrine [of maintenance as applied to preclude assignment of choses in action] too absurd for them to adopt; and therefore they always acted in direct contradiction to it". But the law of maintenance and champerty was not wholly expelled from this realm of discourse, either by the course of decisions in equity permitting and giving effect to

the assignment of choses in action, or by the provisions of s 25 of the *Supreme Court of Judicature Act* permitting such assignments.

[73] Assignment of a chose in action "made with the improper purpose of stirring up litigation" would raise questions of maintenance and champerty. ***But the mere*** assignment of the proceeds of litigation would not. If the assignment stipulated that ***the assignee should participate in the litigation***, the assignment was lawful only "if he have some legal interest (independent of that acquired by the assignment itself) in the property in dispute; but that where his interest is generated only by the assignment itself, such a stipulation would be improper".

[74] The distinction between the assignment of an item of property and the assignment of a bare right to litigate was regarded as fundamental to the application of the law of maintenance and champerty. But drawing that distinction was not always easy. And it was a distinction whose policy roots were not readily discernible, the undesirability of maintenance and champerty being treated as self-evident. Typical of the way in which the courts expressed this condemnation was the reference by Knight Bruce LJ to the "traffic of merchandising in quarrels, of huckstering in litigious discord". That the practices were criminal, and also gave rise to civil liability, was treated as sufficient reason to condemn them.

[75] Yet practices no different in substance, from some of those condemned so roundly, became commonplace in the law of insolvency. Bankruptcy legislation was held to permit a trustee in bankruptcy who had commenced an action to sell and assign the subject matter of the action to a purchaser for value. And, of course, the development of the doctrine of subrogation as applied to contracts of insurance qualified the apparent generality of rules against maintenance and champerty.

[…]

[92] It is necessary to bear steadily in mind that questions of illegality and public policy may arise when considering whether a funding agreement is enforceable. So much follows from s 6 of the Abolition Act. Further, to ask whether the bargain struck between a funder and intended litigant is "fair" assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity. Neither assumption is well founded.

[93] As for fears that "the funder's intervention will be inimical to the due administration of justice", whether because "[t]he greater the share of the spoils … the greater the temptation to stray from the path of rectitude" or for some other reason, it is necessary first to identify what exactly is feared. In particular, what exactly is the corruption of the processes of the Court that is feared? It was said, in *re Trepca Mines Ltd (No 2)*, that "[t]he common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses". Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no

> reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.
>
> [94] The appellants submitted that special considerations intrude in "class actions" because, so it was submitted, there is the risk that such proceedings may be used to achieve what, in the United States, are sometimes referred to as "blackmail settlements". However, as remarked earlier in these reasons, the rules governing representative or group proceedings vary greatly between courts and it is not useful to speak of "class actions" as identifying a single, distinct kind of proceedings. Even when regulated by similar rules of procedure, each proceeding in which one or more named plaintiffs represent the interests of others will present different issues and different kinds of difficulty.
>
> [95] The difficulties thought to inhere in the prosecution of an action which, if successful, would produce a large award of damages but which, to defend, would take a very long time and very large resources, is a problem that the courts confront in many different circumstances, not just when the named plaintiffs represent others and not just when named plaintiffs receive financial support from third party funders. The solution to that problem (if there is one) does not lie in treating actions financially supported by third parties differently from other actions. And if there is a particular aspect of the problem that is to be observed principally in actions where a plaintiff represents others, that is a problem to be solved, in the first instance, through the procedures that are employed in that kind of action. It is not to be solved by identifying some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against that defendant."

[26] Whilst it must be appreciated that the reasons of Gummow, Hayne and Crennan JJ were specifically directed towards the application for a stay of proceedings and that application was rejected, their Honours also observed:[8]

> "[b]ut that does not detract from the validity of the observation that there was no case where maintenance or champerty was held to be a defence to, or reason enough to stay, the action that was maintained."

[27] In *Elfic Ltd v Macks*[9] , Davies JA said:

> "There is no doubt that the arrangements were champertous. GIO provided funds in return for a percentage interest in the proceeds of the main action and it was entitled to become involved in the conduct of that litigation."

[28] Whilst it must be appreciated that *Elfic* preceded *Fostif's* case, in order for there to be a consideration of a finding of champerty then it must be not only a provision of funds in return for a percentage interest in the proceeds of the main litigation, but also an entitlement to become "involved" in the conduct of the litigation in the sense of having a degree of control in the litigation.

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8 *Campbells Cash and Carry v Fostif Pty Ltd* (supra) at [82].

9 [2003] 2 Qd R 125 at [171].

[29] The representative proceeding funding agreements have been redacted in respect of the share of any interest. Insofar as they are redacted, it is a reasonable assumption that the agreements do provide for a percentage interest or share in the agreement.

[30] The greater difficulty lies in the construction of the agreements as to the degree of involvement or control of the litigation funder, LCM, in the litigation. Clause 3 of the representative proceeding funding agreements relevantly states:

> "3. Role of the representative
>
> As Representatives in the Action and in consideration of being in receipt of the litigation financing from the Funder in accordance with the Member Agreement to prosecute the Action, the Representatives, as such:
>
> 3.1 generally, has those rights and obligations of a Member, including those stated in parts 8 and 9 of the Rules;
>
> 3.2 generally, has those rights and obligations of a Representative stated in Parts 4 and 11 of the Rules;
>
> 3.3 if and when requested by the Funder and at the Funder's absolute discretion, will enter into the Retainer Agreement on behalf of the Members;
>
> 3.4 for the purpose of Rule 59, irrevocably directs the Lawyers to apply the Recovery of the Action as set out in Rule 60;
>
> 3.5 will diligently prosecute the Action;
>
> 3.6 will diligently enforce any Judgment and recover any Recovery;
>
> 3.7 will promptly provide information, documents and full, frank and honest instructions to the Lawyers to assist with diligently prosecuting the Action;
>
> 3.8 will instruct the Lawyers to issue to the Funder, on a monthly basis, invoices for Action Costs incurred within the Action Budget in the previous month;
>
> 3.9 will comply with any direction given by the Funder pursuant to clause 8.3;
>
> 3.10 will immediately inform the Funder and the Lawyers of any offer of settlement or compromise made in relation to the Claim and/or the Action;
>
> 3.11 will do all things necessary to assist the Funder to obtain, keep in force and comply in all material respects with the terms of any ATE Insurance policy;
>
> 3.12 will instruct the Lawyers to:
>
> 3.12.1 act promptly, with due expedience and carry out their instructions in the Action;

> 3.12.2 provide the Funder with:
>
> (a) the notices, information and documents described in clauses 3.7 and 3.10;
>
> (b) copies of all advices provided by the Lawyers or barristers to the Representative in relation to the Action; and
>
> (c) assistance in relation to opposing, taxing, assessing or resolving any application for orders as to Adverse Costs and/or security for Adverse Costs."

[31] Relevantly, pursuant to cl 3, the representatives in a class action are to retain control over the litigation, principally to provide the funder with information (cl 3.10 and 3.12.2). The exception may be seen in cl 3.9 which requires the representatives to comply with any direction given by the funder pursuant to cl 8.3. Further difficulty arises because cl 8.3 has been redacted.

[32] With the redaction of cl 8.3 and the retention in the litigation funder of an ability to control or direct the representatives in a manner in which they refuse to disclose can only reasonably lead to a conclusion that there is sufficient control such as to enable the agreement to be considered, as Davies JA said in *Elfic*, as champertous.

Maintenance and Champerty in Queensland Class Actions

[33] Another difficult issue that arises from the failure of the Queensland Parliament to abolish the torts of maintenance and champerty is the meaning and effect of s 103K(2)(b) of the *Civil Proceedings Act* which provides:

> **103K Discontinuance of proceeding in particular circumstances**
>
> […]
>
> (2) For subsection (1)(e), it is not inappropriate for claims to be pursued by way of a proceeding under this part merely because the persons identified as group members for the proceeding—
>
> […]
>
> (b) are aggregated together for a particular purpose including, for example, a litigation funding arrangement.

[34] It is argued on behalf of the plaintiffs that s 103K(2)(b) was specifically introduced with reference to litigation funding arrangements in class actions, and can only support the proposition that the torts of maintenance and champerty can have no application to representative class actions within Part 13A of the *Civil Proceedings Act*.

[35] The plaintiffs argue that s 103K(2) was based on its New South Wales equivalent which, in the explanatory note to the New South Wales legislation, s 166(2) provides:[10]

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[10] *Courts and Crimes Legislation Further Amendment Bill* 2010 (NSW) – Explanatory Note.

> "Proposed s 166(2) makes it clear that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the view taken by the Full Court of the Federal Court in relation to the operation of Part IVA of the *Federal Court of Australia Act* 1976 of the Commonwealth in *Multiplex Funds Management Limited v Dawson Nominees Pty Ltd* [2007] FCAFC 200."

[36] *Dawson's* case is important; however, it is a case decided under legislation by which the torts of maintenance and champerty had been abolished. It is curious that the same section as s 103K(2)(b) in Queensland was included in the New South Wales equivalent of the *Civil Proceedings Act*, when New South Wales had, in 1993, abolished the torts of maintenance and champerty. It cannot be presumed that the Queensland parliament has overlooked these legislative provisions in adopting the New South Wales equivalent and enacting s 103K(2)(b), yet there is no obvious logical reason to simply follow the New South Wales provisions in circumstances where New South Wales has expressly abolished maintenance and champerty.

[37] Nonetheless, it is difficult to conclude that the inclusion of s 103K(2)(b) impliedly abolishes the torts of maintenance and champerty as they are common law rights and cannot be abolished, other than by the clear words of a statute. A distinction may be seen by reference to *Fostif's* case, namely the torts of maintenance and champerty are third party proceedings, i.e. creating an independent right in a disappointed defendant to directly sue a champertous litigation funder even if the primary litigation may be void for uncertainty, or as a matter of public policy.

[38] Thus in the case that the plaintiffs do fail, and currently because of the lack of evidence from the plaintiffs concerning cl 8.3 and Item 5 of the funding agreement, it may be concluded that the defendant may have a cause of action in the torts of maintenance and champerty against LCM, however, it cannot be concluded that a stay would be issued to prevent the primary litigation (as discussed in Paragraph [26] above).

Is the deed of indemnity "tainted" or "infected" by champerty?

[39] Assuming, that the representative proceeding funding agreements entered into between LCM and the plaintiffs are champertous, an assessment needs to be made of the risk that the deed of indemnity proposed is rendered unenforceable.

[40] In this regard, as stated by Hargrave J in *DIF III* (see paragraph [12] above), the plaintiffs bear a practical onus of establishing that the deed of indemnity is adequate and does not impose unacceptable disadvantage on the defendant. Further, for the deed of indemnity to be adequate, it must satisfy the protective object of a security for costs order. That is, to provide a fund or asset which a successful defendant can readily enforce an order for costs against the plaintiff.

[41] AmTrust has been shown to be a financially robust corporation. Therefore, whether the deed is adequate and can be readily enforced depends, in the present case, upon the prospects that the deed of indemnity would be found to be unenforceable as being affected by the separate champertous representative proceeding funding agreements.

[42] The defendant's argument in this regard is based upon a matter of general principle. As a matter of general principle, it can be accepted that if a contract is illegal, a subsequent or collateral contract which is "founded on and springs from" it is also illegal.

[43] In *Fisher v Bridges*[11] the claimant agreed to sell land to the defendant to be used for an illegal purpose. The parties later entered into a separate deed which contained a covenant by the defendant to pay the remaining purchase price. That covenant was held to be unenforceable. Jervis CJ stated at 649:

> "It is clear that the covenant was given for the payment of the purchase price. It springs from, and is the creature of, the illegal agreement; and, as the law would not enforce the original contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality."

[44] *Fisher v Bridges* was referred to with approval by Connolly J in *Williamson v Diab*[12] as follows:

> "I take the general law to be correctly stated in Cheshire and Fifoot, Law of Contract (4th Australian Edition) at para. 1219:
>
> "If a contract is illegal in its formation, it follows that a contract which is founded on and springs from the illegal transaction, is also illegal and void, unless it is clear from the statute in question that it was not intended to prohibit the particular collateral or ancillary transaction concerned: see *Dalgety and New Zealand Loan Ltd v. C Imeson Pty Ltd* [1964] N.S.W.R. 638 at 645–6. Cf. *R v. Licensing Court of Brisbane* (1920), 28 C.L.R. 23. It would be singular if the law were otherwise: *Redmond v. Smith* (1844) 7 Man & G 457; 135 E.R. 183 at 190 per Tindal C.J. It is irrelevant that the new contract is in itself innocuous or that it formed no part of the original bargain or that it is executed under seal or that the illegal transaction out of which it springs has been completed. If money is due from A to B under an illegal transaction and A gives B a bond (*Fisher v. Bridges* (1854) 3 E & B 642; 118 E.R. 1283) or a promissory note (*Jennings v. Hammond* (1882) 9 Q.B.D. 225) for the amount owing, neither of these instruments is enforceable by B."

[45] The defendant submits that the width of the principle in *Fisher v Bridges* does not appear to have been settled in Australian law. However, the English decision of *Re Trepca Mines Ltd (No 2)*[13] concludes that a third party whose contract is founded on or springs from an original champertous agreement is unenforceable.

[46] *Re Trepca Mines Ltd (No 2)* is a case where the collateral contract involved a third party. It also happens to be a case where the principal contract was unlawful because of champerty. A solicitor was retained to act for a client in relation to a court matter. The client entered into separate agreements with another person to provide financial assistance in relation to the court matter. Those agreements were champertous. The issue was their effect on the solicitor's entitlement to be paid for his work under the retainer.

[47] Lord Denning M.R. stated at 220-221:

> "When a solicitor is retained to conduct litigation on the ordinary and accustomed terms, he is not debarred from acting in that litigation simply because he knows, or gets to know, that his client has made a champertous agreement to share the proceeds with another. He is entitled to conduct the

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11 (1854) 3 E&B 642; 118 E.R. 1283.
12 [1988] 1 Qd R 210 at 212.
13 [1963] 1 Ch 199.

> litigation to the end, and to recover his proper costs for so doing, unless he has himself in some way or other participated in the champertous agreement. Pennycuick J. held that knowledge by itself was enough to debar him form recovering; but I think this is erroneous. There must be active participation by the solicitor in the illegal transaction before he is disentitled to his costs. If he is himself a party to the champertous agreement by stipulating for a percentage for himself, the answer is clear. He cannot recover anything: see *Wild v. Simpson*. But even though he is not himself a party, nevertheless, if he is an active participator in this sense, that he voluntarily does a positive act to assist to implement the unlawful agreement, then he cannot recover; for, by rendering positive assistance, he becomes guilty of aiding and abetting the offence and is himself guilty of it."

[48] The solicitor was found to have participated in the champertous agreements, going beyond mere knowledge of them. Pearson LJ stated at 226 that the solicitor was "substantially involved in the performance of the champertous contract", and that:

> "[t]he solicitor was requested and agreed to assist, and did assist, in the performance of [the champertous contract]. His retainer to act as solicitor on behalf of [the client] in the litigation was connected with and affected by the champertous contract. He was to participate, and did participate, in the implementation of it."

[49] Pearson LJ at 227-228 inferred that the solicitor agreed to play the part assigned to him by the champertous agreement so that he would participate in its implementation. Further, the solicitor was involved in seeking to make the champertous contract more certain and effective, and he sought to have it carried out. Pearson LJ concluded at 228 that the solicitor by positive acts assisted the performance of the champertous agreement. At 230:

> "In the present case the solicitor is the person invoking the aid of the court, and he is himself extensively implicated in the illegality, because, though not a party to the champertous contract, he was participating extensively in the implementation of it in the course of his work as solicitor under the retainer. Therefore, the court ought not to assist him, and his claim to have his costs taxed and ordered to be paid to him fails."

[50] Donovan LJ also held that the solicitor had aided and abetted the champerty, with the result that the court "ought not lend its aid to him when he seeks to recover his costs" (at 223-224). Donovan LJ added at 224:

> "for those costs are not remuneration earned pursuant to a completely innocent retainer. They are remuneration from a retainer involving the conscious and voluntary assistance in champerty."

[51] The defendant points out that *Re Trepca Mines* has been referred to with approval in Western Australia[14] and New Zealand[15]. The decision in *Re Trepca Mines* was discussed by Tipping J, sitting in the Supreme Court of New Zealand, in *Hickman v Turn and Wave Ltd*[16], in relation to the common law doctrine of 'tainting', Tipping J stated:

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14 *Treacy & Ors v Ryleston Pty Ltd & Ors* [2002] WASC 178.
15 *Hickman v Turn and Wave Ltd* [2013] 1 NZLR 741.
16 [2013] 1 NZLR 741

"[128] … The doctrine of tainting applies when one contract (the collateral contract) is rendered unenforceable by reason of its being tainted by the illegality and unenforceability of another contract (the primary contract). …

[129] The issue arises when the collateral contract, viewed in isolation of the primary contract, is not itself unenforceable for illegality. But in some cases the collateral contract is so tainted by its association with the illegality of the primary contract that the courts will decline to enforce it. …

Leading contract law textbooks recognise that a collateral contract may be so tainted by the illegality of the primary contract as to become unenforceable. Anson says that a transaction which is collateral to an illegal agreement may be affected by taint of illegality.

Cheshire Fifoot & Furmston say that a subsequent or collateral contract which is "founded on or springs from" an illegal transaction is itself illegal and void. Treitel states that collateral transactions may be "infected" with the illegality of a principal contract if they help a person to perform an illegal contract.

[130] Burrows, Finn and Todd say that a contract may be tainted by illegality if it is designed to assist or promote a different contract which is in breach of a statute. In Australia, Willmott states that where a contract is illegal it is possible for that illegality to taint a wider scheme or enterprise of which it forms part. If that is so, the same consequence, that is unenforceability, applies to each part of the scheme. The authors add that the question is whether the illegal dealing was an integral part of the whole arrangement entered into, which could not have been performed without the illegal dealing. It is apparent therefore that the existence of a common law doctrine of unenforceability by tainting cannot be doubted. As Megarry J said in *Spector v Ageda*, illegality may be contagious." (footnotes omitted)

[52] Tipping J observed at 143 that the collateral contract in question involved a third party, i.e. someone who was not a party to the primary contract which, in that case, was illegal by reason of statute. His Honour concluded at 156 that the doctrine of tainting applies if the collateral contract is sufficiently related to the primary contract, and the party to the collateral contract knew or ought to have known of the essential facts giving rise to the illegality. As regards the first of those matters, Tipping J stated:

"[143] … It is necessary as a first step to consider whether the collateral contract is sufficiently related to the primary contract so that it can fairly be said that the unenforceability of the primary contract should lead to the unenforceability of the collateral contract. That will be so if, for example, the collateral contract is a necessary part of a composite arrangement of which the primary contract is also a part. In such circumstances the collateral contract assists the implementation of the primary contract.

[144] There can be no doubt that this criterion is satisfied in the present case. Here the collateral and primary contracts were interdependent. If an analogy were made with the concept of severance there could be no question of the collateral contract being severed from the primary contract. The primary contract represented, in substance, the means by

> which the investors were to finance, and thereby implement, the collateral sale and purchase contract. The linkage between the two is immediate and self-evident. The second question that arises is what, if any, knowledge the third party must have to render the collateral contract unenforceable by reason of its being tainted by the illegality of the primary contract."

[53] It would come as no surprise and represent a victory of form over substance if the same two parties, as occurred in *Fisher v Bridges*, knowing they entered into a contract that was unenforceable, attempted to secure some obligations of the contract by a separate instrument and expect any court to uphold the separate instrument after having struck down the primary instrument. *Williamson v Diab* also relates to separate agreements between the same parties and the extract from Cheshire and Fifoot's Law of Contract extracted by Connolly J expressly refers to only two parties, A and B.

[54] In the present case, if the plaintiffs are considered A and the funder, LCM, is considered B and AmTrust is considered C, then a court, is considering the validity of the deed of indemnity that exists between C (AmTrust) and D (the defendant).

[55] What is being considered is a potential circumstance where a court strikes down an agreement between A and B, then must consider striking down an agreement between B and C in order to gauge the likelihood of the striking down of the deed of indemnity between C and D. In this regard it is important to consider the Court of Appeal's decision in *Re Trepca Mines* (supra) and bear in mind that the issue to be decided was whether costs ought to be ordered to include a solicitor's costs where a solicitor, whilst not a party to a champertous or unlawful agreement was, as Lord Denning MR said, an active participator in that he positively acted to assist to implement the unlawful arrangement, and concluded that the solicitor cannot recover as a result of his rendering of positive assistance, he became an aider and abetter of the offence of maintenance and champerty.

[56] AmTrust however are not a solicitor acting for a party in litigation and there is no evidence of and nor can there be an inference that AmTrust, as a major English public corporation, has been involved in "conscious and voluntary assistance in champerty". According to its annual report, AmTrust's business is in the provision of financial services and insurance including ATE insurance.

[57] With reference to the judgment of Tipping J in *Hickman v Turn and Wave Ltd* (supra) at paragraph 129 and in relation to the doctrine of tainting, consideration can be given to collateral contracts which are so tainted by association with the illegality of a primary contract that a court will decline to enforce the collateral contract.

[58] Putting this argument in the context of maintenance and champerty, it may be seen that the torts of maintenance and champerty have been brought into existence for the express purpose of allowing a disgruntled defendant to directly sue a third party who provides the maintenance and champerty.

[59] The effect of the deed is to give the defendant direct recourse against a substantial fund (AmTrust) in a cost efficient and expeditious manner thus achieving readily what the defendant could possibly achieve with a difficult maintenance and champerty action brought in courts of the United Kingdom.

[60] Whilst one may see the logic in a court potentially striking down the contracts between A & B and perhaps B & C, it is difficult to see that there is any logic in a court declining to enforce the deed of indemnity (the agreement between C and D) when a court would, if the agreement were tainted by maintenance or champerty, readily allow D to sue C under the tort of maintenance and champerty.

[61] As such an outcome is illogical and against the policy reasons for the development of the torts of maintenance and champerty, the risk of such an outcome must be seen to be extremely low, such that it cannot be concluded that the security offered by the deed of indemnity (together with $30,000 payment into court for the enforcement of the security) is not a readily enforceable security.

[62] Consequently, the risks of the deed of indemnity, which provides a direct right of access on an unconditional and irrevocable basis, is judged as having low risk of being unenforceable. In effect, the deed of indemnity attempts to shortcut and provide a direct means of recourse against a large overseas corporation without the necessity of the "satellite proceedings" contemplated by a suit upon the tort of maintenance and champerty.

Conclusion

[63] In summary, I consider that the risk of the deed of indemnity which is proposed being rendered unenforceable by the defendant is negligible, such that the deed of indemnity proposed, together with the additional payment into court for the practical enforcement of the deed of indemnity satisfies me that the proposed security is adequate and does not impose an unacceptable disadvantage on the defendant.

Discovery of Documents

[64] All but two of the several issues between the parties relating to discovery of documents were determined ex tempore on 13 December 2018. The two remaining matters of dispute with respect to discovery are the Category 9 documents which are the subject of the claim by GPC, that it is entitled to disclosure of "any expert reports, including drafts, directly relevant to the issue of dispute on the pleadings" and the category 10 documents and opinions provided to litigation funders or insurers.

Category 9 – Existing expert reports and UCPR 212(2)

[65] Rule 212 of the UCPR provides:

> **212 Documents to which disclosure does not apply**
>
> (1) The duty of disclosure does not apply to the following documents—
>
> (a) a document in relation to which there is a valid claim to privilege from disclosure;
>
> (b) a document relevant only to credit;
>
> (c) an additional copy of a document already disclosed, if it is reasonable to suppose the additional copy contains no change,

> obliteration or other mark or feature likely to affect the outcome of the proceeding.
>
> (2) A document consisting of a statement or report of an expert is not privileged from disclosure.

[66] GPC argues that pursuant to r 212(2) it is entitled to disclosure of any expert reports in existence including any expert report prepared for possible use in litigation. The plaintiffs resist such an order, contending that r 212 does not go so far, but rather applies only to the expert evidence "deployed" by a party, in this case, the plaintiffs.

[67] The suggestion of materials being disclosed following deployment in court was referred to by P Lyons J in *Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd.*[17]

[68] The defendant argues that the words in r 212(2) are plain and unambiguous and ought to be given their full effect; that is, abrogating litigation privilege at common law, whereas the plaintiffs argue that litigation privilege at common law is a substantive right, and in accordance with conventional principle, those substantive rights cannot be affected other than by clear legislative intent, which is absent.

[69] The plaintiffs' argument starts with a recitation of the following well-accepted principles that operate at common law, that is, in the absence of r 212:

> (a) communications between a lawyer and any third party for the dominant purpose of anticipated or actual litigation are subject to legal professional privilege (since this is the only privilege present in issue, we will refer to it simply as "**privilege**");[18]
>
> (b) the reason for the privilege is that it is in the interests of justice that each party be free to prepare its case as fully as possible, without the risk that its opponent will be able to recover the material generated in the course of those preparations;[19]
>
> (c) it follows that, ordinarily, the confidential briefings to a potential expert witness are privileged;[20]
>
> (d) while the privilege is attached to communications and not to documents per se, *copies* of non-privileged documents will be privileged if made for the purposes of communications between lawyers and clients or third parties (including relevantly potentially expert witnesses) for the purposes of giving or obtaining legal advice or use in preparation for actual or anticipation litigation;[21]

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17 *Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd* [2009] QSC 233 at page 4.

18 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; *Watkins v State of Queensland* [2008] 1 Qd R 564.

19 *Grant v Downs* (1976) 135 CLR 674 at 685; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Watkins* (supra) at [74] to [78] per Keane JA, citing *Baker v Campbell* (1983) 153 CLR per Gibbs CJ at 60, 66; Mason J at 74-75; Murphy J at 86-87, and Deane J at 93-94.

20 *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438; [2003] FCA 804 at [21].

21 *Southcorp* (supra) [21] item 2; see also *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

(e) documents generated unilaterally by the expert, including his working notes and own drafts, do not attract privilege because generally they are not communications[22] (although where draft reports *do* comprise or evidence communications, they are privileged – see "h" below);

(f) ordinarily reliance on the expert's report will result in implied waiver of the documents in (c) and (d) above, at least where the inference arises that the documents were used in a way that influenced the content of the report. This is because it would be unfair to compromise the examination and cross-examination of the expert by refusing access to all assumptions and facts on which the opinion was based, and the process by which it was arrived at;[23]

(g) because of the considerations in either (e) or (f), privilege cannot be maintained in respect of documents actually used by the expert to form the opinion, regardless of how the expert came by the documents;[24]

(h) the consideration in (f) requires further qualification, namely that the "influencing" must have been such as to make it *unfair* that the influencing material not be disclosed.[25] This additional requirement of *unfairness* explains why proper communications with the lawyers, directed at ensuring a draft report is in admissible form, will retain privilege, while communications directed at influencing the substance of the expert's opinions would forfeit privilege upon disclosure of the report;[26] and

(i) any implied waiver in (g) occurs at the time the expert's report is first deployed to the advantage of the party who commissioned it. Where there are directions for *pre-trial exchange* of expert reports, that waiver occurs at the time of exchange.[27]

[70] In the present case, the further amended statement of claim runs to some 58 pages and relates to numerous technical issues regarding bund wall construction, water pressure, base discharge and water quality issues, including the effect of water in a certain area as a result of turbidity, increased contaminants including heavy metals and the presence of algae blooms. The further amended statement of claim refers to several scientific studies.

[71] There is a fair inference that expert evidence exists and it is held by the plaintiffs or their advisers, because it is difficult to conceive that such a detailed statement of claim could be drafted without the aid of expertise. It is also plain that at common law, such expert

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22 *Southcorp* (supra) [21] item 3; *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141 per Thomas J at 160.

23 *Southcorp* (supra) [21] item 4; *Interchase* (supra) per Thomas J at 160; *Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd* [2009] QSC 233 at p.4 lines 20-30, p.5 lines 50-60 (Peter Lyons J).

24 *Southcorp* (supra) [21] item 5; *Interchase* (supra) at 148.10 (Pincus JA).

25 *Watkins* (supra) at [14]-[15] per Jerrard JA, also Keane JA at [55] (Qd R line 40).

26 *New Cap Reinsurance Corp Ltd (in liq) v. Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [53]; applied *Matthews v. SPI Electricity Pty Ltd (Ruling No.8)* [2013] VSC 628 at [55]ff (Matthews). See also *Brookfield v Yevad Productions Pty Ltd* [2006] FCA 1180 at [14] - [18]; *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at [9].

27 *Thomas v New South Wales* [2006] NSWSC 380; applied *Matthews v. SPI Electricity Pty Ltd (Ruling No.1)* [2013] VSC 33 at [47]ff, [97]ff.

advice is the proper subject of a claim for legal professional privilege and thus not disclosable.

[72] Whilst those matters were not in dispute, it is important to bear in mind the aforesaid principles when analysing the arguments brought by the plaintiffs in support of their position that it does not need to disclose existing expert reports until they are "deployed".

[73] The plaintiffs argue that once the potential expert is deployed, then r 212(2) operates to moderate the general law, but only to the extent of requiring all statements or reports of that particular expert to be disclosed, whether or not any other reports appear to have influenced that expert's final report.

[74] In support of its submission that r 212(2) has limited effect as described, that is, requiring disclosure only after the statement of the expert has been deployed, the plaintiffs raise six factors in support of their argument.

[75] The first is that legal professional privilege is a rule of substantive law and a fundamental right or immunity not lightly abrogated by statute or other legislative instrument. That, as set out above, may be accepted.[28] Accordingly it is accepted that what is required to abrogate legal professional privilege is "clear and unambiguous words" or "irresistible clearness".[29]

[76] The plaintiffs accept that r 212 effects some abrogation of privilege. That is, the plaintiffs accept there is a limited abrogation of the privilege requiring that all statements and reports of the expert deployed be disclosed whether or not other reports appear to have influenced the final report.

[77] The plaintiffs argue that r 212(2) does not affect a complete abrogation of legal professional privilege with respect to expert reports. The plaintiffs argue it is consistent with reading the UCPR as a whole to read r 212, and particularly Chapter 11 Part 5, that r 212 affects a partial abrogation of common law legal professional privilege, not a total abrogation.

[78] The second argument brought by the plaintiff is there is nothing in r 425, containing the definitions of 'expert' and 'report', which compels the conclusion that the legislature intended to completely abrogate the well-established principles of legal professional privilege in "non-deployed expert reports".

[79] Although the plaintiffs concede the r 425 definitions apply to Chapter 11 Part 5, it is difficult to accept the combination of the first or second arguments brought by the plaintiffs.

[80] In r 425, 'expert' is defined as:

> a person who would, ***if called as a witness*** at the trial of a proceeding, be qualified to give opinion evidence as an expert witness in relation to an issue arising in the proceeding.[30]

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28 *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543.

29 Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2013) at [25.1.1960].

30 My emphasis.

[81] Rule 427 provides:

> **427 Expert evidence**
>
> (1) Subject to subrule (4), an expert may give evidence-in-chief in a proceeding only by a report.
>
> (2) The report may be tendered as evidence only if—
>
> (a) the report has been disclosed as required under rule 429; or
>
> (b) the court gives leave.
>
> (3) Any party to the proceeding may tender as evidence at the trial any expert's report disclosed by any party, subject to producing the expert for cross-examination if required.
>
> (4) Oral evidence-in-chief may be given by an expert only—
>
> (a) in response to the report of another expert; or
>
> (b) if directed to issues that first emerged in the course of the trial; or
>
> (c) if the court gives leave.

[82] Rule 429 provides:

> **429 Disclosure of report**
>
> A party intending to rely on a report must, unless the court otherwise orders, disclose the report—
>
> (a) if the party is a plaintiff—within 90 days after the close of pleading; or
>
> (b) if the party is a defendant—within 120 days after the close of pleading; or
>
> (c) if the party is not a plaintiff or defendant—within 90 days after the close of pleading for the party.

[83] The difficulty in accepting the plaintiffs' first two arguments is that r 212(2) was included in the original form of the UCPR and indeed is in precisely the same terms as its predecessor, order 35 rule 5(2) of the rules for the Supreme Court which was introduced on 1 May 1994. Chapter 11 Part 5 Expert Evidence, however, came into operation on 2 July 2004. The purposes of the new Chapter 11 Part 5 are set out in r 423 as follows:

> **423 Purposes of pt 5**
>
> The main purposes of this part are to—
>
> (a) declare the duty of an expert witness in relation to the court and the parties; and
>
> (b) ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and
>
> (c) avoid unnecessary costs associated with the parties retaining different experts; and
>
> (d) allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding.

[84] Chapter 11 Part 5 of the UCPR gives effect to the preference for a single expert where possible, and if not, requires a limitation in the number of experts and most importantly,

early disclosure of expert evidence. In particular, as subject to limited exceptions, all expert evidence must be given by a report. The report is required to be disclosed, and the plaintiffs' case, pursuant to r 429(a) within 90 days after the close of pleadings. That is, it is the intent of the rules to have a relatively early disclosure ***of the final report*** that a party wishes to rely upon as its primary expert evidence in court. That is why r 429 is explicit in its reference to the words "the report" and makes provision to r 429A for supplementary reports.

[85] Accordingly, the scheme set forth by Chapter 11 Part 5 is clear. That is, the actual report which any party wishes to rely upon must be disclosed early. The words in r 429 "intending to rely on a report" do not appear in r 212, nor do the words "a party intending to deploy a report" appear in r 212(2).

[86] These observations dispose of the first, second and third arguments brought by the plaintiffs. The third argument is that GPC's construction of r 212 would render r 429 otiose. GPC's construction of r 212 is that, according to its ordinary, plain meaning, all expert reports must be disclosed, whether relied upon or not, whether deployed or not, and that the purpose of r 429 is to ensure that the parties obtain their final expert report at an early stage. This submission is correct and accords with r 5 which provides:

> **5 Philosophy—overriding obligations of parties and court**
>
> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

[87] The fourth argument brought by the plaintiffs is that their interpretation of limited extent disclosure required by r 212 facilitates a harmonious interpretation of rules 212, 214 and 429. The plaintiffs argue the primary obligation to disclose a report arises under r 429, that is, once a party deploys the expert, typically by service of the report. I reject that submission. The party's primary obligation to disclose a report arises under r 212, the obligation to disclose the final report under r 429 is intended to meet the aim of the UCPR set out in r 5, that is for efficient and, as far as possible, inexpensive litigation.

[88] The fifth argument raised by the plaintiffs is that, to the extent that the rationale for r 212 is that expert witnesses have an overriding duty to the court, the rationale is not always applicable to every person who has expertise and gives a statement or report to a lawyer for the purpose of litigation. In support of the submission, the plaintiffs point to the duty of an expert under r 426 which provides as follows:

> **426 Duty of expert**
>
> (1) A witness giving evidence in a proceeding as an expert has a duty to assist the court.

> (2) The duty overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses.

[89] A difficulty in accepting that argument is the long-held view that "partisan" expert reports are of no value to the court nor the parties to litigation. In *Fox v Percy*[31] Callinan J said:

> [151] The third matter to which reference should be made is that touched upon by Beazley JA in the Court of Appeal, the adversarial stance taken by Mr Tindall. This is very much to be regretted. It also might have been basis enough for the rejection of his evidence. What was said in the tenth edition of Phipson on Evidence and earlier editions before enactment of the *Civil Evidence Act* 1972 (UK), and notwithstanding the enactment of the *Evidence Act* 1995 (NSW) remains relevant:
>
> > "*Value of Expert Evidence.* The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of pre-conceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will."

[90] In *Dasreef Pty Ltd v Hawchar*[32], Heydon J expressed similar views. It may be seen by r 423(a), a main purpose of Chapter 11 Part 5 is to declare the duty of an expert witness in relation to the court and the parties. Indeed, as can be seen by r 428(3)(e), any expert report tendered must expressly contain confirmation at the end of the report that the expert understands the expert's duty to the court and has complied with the duty.

[91] Furthermore, r 426 with its express limitation to a witness "giving evidence in the proceeding" does not assist the plaintiffs because, as stated above, if it was the intention to limit r 212(2) to expert reports that had been deployed, then that ought to have been clearly stated. In effect, the plaintiffs' submission requires the additional words "deployed" to be inserted into r 212(2).

[92] The plaintiffs argue that their submission on the interpretation of r 212 is consistent with the Court of Appeal's decision in *Interchase.*[33] In *Interchase,* a valuation report had been disclosed and the dispute was to whether all ancillary documents likewise lost their privilege.

[93] Pincus JA held that the communications passing between the expert and the lawyers (category A) were privileged, while the expert's own working papers and draft reports (categories B to E) were not. Pincus JA did state that the statutory abrogation of r 212 ought not to be read too broadly.[34]

[94] In those circumstances, category A, that is, correspondence between an expert and lawyers, would not be properly characterised as a statement or report of the expert. Pincus JA and Thomas J held that the category B to E documents (the expert's own

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31 (2003) 214 CLR 118 at page 167 at [151]. Footnotes omitted.
32 (2011) 243 CLR 588.
33 *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141.
34 *Interchase* (supra) at page 156.

working papers and draft reports) were never privileged and accordingly were required to be disclosed.

[95] In *Interchase,* Pincus JA said:[35]

> "Commonsense may be thought to favour the appellant's suggestion that the requirement that the valuation report be disclosed necessarily opens the way to disclosure of such documents as the letter of instruction in response to which it was given. On the other hand it would have been simple enough for those who made the rule to draw O. 35 r. 5(2) more broadly so as to require disclosure of categories of documents other than those expressly mentioned — "a statement or report of an expert". It does not appear to me that the implication put forward by the appellant can be said to be necessary and I therefore reject that argument.

[96] Pincus JA pointed out[36] the category B, C, D and E documents were not privileged as "witness document privilege does not exist". As stated by Pincus JA in *Interchase* (supra) the words "a statement or report of an expert" as they then appeared in Order 25 Rule 5(2) and as currently appears in r 212(2) ought to be given their ordinary and natural meaning, and limited to their ordinary and natural meaning. *Interchase* does not assist the plaintiffs' argument, but rather assists in GPC's plain interpretation of r 212(2).

[97] The plaintiffs also rely upon *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board*[37] in which the defendant disclosed the final reports of two experts but refused to disclose the draft reports of two experts.

[98] In that case, Douglas J rightly distinguished such drafts from internal drafts and working papers in categories B to E in *Interchase*. The applicant argues that the *Mitchell Contractors* decision is incorrect because the primary judge failed to recognise that the Court of Appeal in *Interchase* emphasised the narrow reading to be applied to r 212, and also failed to realise that the whole of the *Interchase* court concluded that draft reports did not fall within the expression "a statement or report of an expert".

[99] I would reject this criticism. Douglas J did expressly[38] consider these issues. I respectfully adopt the approach of Douglas J in *Mitchell Contractors*, namely that the abrogation of privilege provided in r 212(2) ought to be confined to its ordinary meaning, namely, whether any particular document can be said to be a statement or report of an expert.

[100] I expressly adopt the view set out by Douglas J[39], that is:

> "…a draft statement or report by an expert is nonetheless his statement or report even though it might not be his final view. If an expert has prepared a draft report it is still his report or statement, no doubt normally reflecting his state of mind at the time he wrote it. The fact that, after consultation with lawyers in an action, he may prepare a further report or amend the draft does not prevent the draft from meeting the description in the rules."

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35 *Interchase* (supra) at page 156, ls 11 – 20.
36 *Interchase* (supra) at page 156
37 [2005] 1 Qd R 373.
38 *Mitchell Contractors* (supra) page 376, line 25-53.
39 *Mitchell Contractors* (supra) at [13].

[101] An expert is entitled to change his or her mind and is entitled to construct a draft or as many drafts of reports prior to coming to a final view, however a draft report is disclosable if it reflects the expert's state of mind at the time it was written.

[102] The critical part of any expert report is the reasoning in the expert report (*Dasreef v Hawchar* (supra) at [90]) and disclosure of a draft report setting out the expert's reasons and state of mind at a particular point in time may assist a trier of fact in considering the reasoning of an expert. Indeed, Chapter 11, Part 5 of the UCPR itself, in requiring early disclosure of the report intended to be relied upon by the parties, expressly by r 429A, acknowledges the necessity for a supplementary report if there is any material alteration in the expert's opinion.

[103] I would conclude that r 212(2) ought to be confined to require disclosure of "all reports and statements of an expert" regardless of whether those reports are said to be final reports or statements or not.

[104] I consider that the test utilised by Douglas J in *Mitchell Contractors* is correct, namely, in respect of each document whether entitled "report" "draft report" "statement" "draft statement" or by any other title, if the document prepared reflects the state of mind of the expert, it is properly disclosable under r 212(2). I reject the plaintiffs' argument that there is no requirement to disclose such a document unless it is "deployed".

[105] In those circumstances, I rule that Annexure C Item 9 "any expert report including drafts directly relevant to the issues in dispute on the pleadings" ought to be disclosed and included in the document plan.

Item 10 – Briefs, including legal opinions to litigation funders or insurers

[106] GPC seeks inclusion in the discoverable documents the following category of documents being "any documents or briefs including legal opinions, provided to Litigation Capital Management Ltd or LCM Operations Pty Ltd or to AmTrust Europe Ltd, which are directly relevant to the issue in dispute on the pleadings."

[107] The plaintiffs resist the disclosure of information being provided to litigation funders on the basis that they are privileged documents. GPC has refined its submission to require the plaintiffs to swear an affidavit of privilege in respect of the relevant documents so that GPC can, if necessary, contest the claims for privilege at an appropriate time.

[108] There are a number of difficulties with GPC's position. The first is that GPC is unable to point to any part of the extremely complex pleadings by which it could be said that legal opinions provided to litigation funders or insurers could be directly relevant. That is, there is nothing directly relevant in the pleadings.

[109] GPC sought to avoid this by framing the request in respect of legal opinions provided to litigation funders or insurers, however, such documents, by definition, are privileged documents.

[110] Fundamentally, it is r 211(1)(b) of the UCPR which requires a party to disclose only those documents which are "directly relevant to an allegation in issue in the pleadings".

[111] Legal advice provided to third parties is not directly relevant to an allegation in issue in the pleadings (even on the expansive pleadings in the present case) and if it were, it would

be clearly privileged. I conclude that the documents the subject of Annexure C Item 10 are not the subject of proper discovery of documents, and accordingly Annexure C Item 10 ought to be deleted from the disclosure plan.

Orders

[112] I will hear from the parties by way of written submissions within two weeks hereof as to the appropriate form of orders, which, subject to further written submissions, are to the effect of:

1. The plaintiffs provide security for costs by way of payment of $30,000 into court and the entry into the deed of indemnity as otherwise agreed by the parties.

2. Category 9 documents be discoverable and included in the document plan.

3. Category 10 documents ought not to be disclosed nor included in the document plan.

4. Costs reserved.