IN THE SUPREME COURT OF NEW ZEALAND SC 89/2016

BETWEEN **PRICEWATERHOUSECOOPERS**
Appellant

AND **ROBERT BRUCE WALKER AND ORS**
Respondents

SPF NO 10 LIMITED
Intervener

Hearing: 16 March 2017

Coram: Elias CJ
Glazebrook J
Arnold J
O'Regan J
Ellen France J

Appearances: B D Gray QC, P M Fee and M D Atkinson for the Appellant
J B M Smith QC and R S May for the Respondents
D R Bigio QC for the Intervener

CIVIL APPEAL

MR GRAY QC:
May it please Your Honours I appear and with me Ms Fee and Mr Atkinson.

ELIAS CJ:
Thank you Mr Gray, Ms Fee, Mr Atkinson.

MR SMITH QC:

May it please Your Honours Smith for the respondents, with me Mr May.

ELIAS CJ:

Thank you Mr Smith, Mr May.

MR BIGIO QC:

May it please Your Honours Bigio for the intervener.

ELIAS CJ:

Yes Mr Bigio.

MR GRAY QC:

Your Honours there's a perhaps a preliminary matter which has got to the about the affidavits which have been filed and whether Your Honour wish to –

ELIAS CJ:

Yes, well do you want to oppose those?

MR GRAY QC:

In relation to the further evidence about the subjective intention of the parties to the assignment, entry into the assignment and the funding agreement, I say it's irrelevant and inadmissible because those issues are to be objectively assessed rather than subjectively assessed. But Your Honours

ELIAS CJ:

But that's a submission you can make.

MR GRAY QC:

I can make that submission and whether or not the evidence comes in doesn't affect that. As to the updating evidence, having given the interveners leave to be here, I'm sure Your Honours will wish to hear what it is that they wish to say and receive the evidence they wish to introduce.

ELIAS CJ:

Yes thank you, Mr Gray will admit that evidence.

MR GRAY QC:

Turning to the appeal Your Honour, the starting point of course has to be *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91, in *Waterhouse* this Court modernised the law relating to maintenance. It was respectful of history but recognised the need that some of the policies and drivers which influenced the law over time no longer applied today and the important thing was to look at modern conditions and to modernise the law of maintenance in New Zealand. And we argue that this is the case to do the same for champerty. And just as in *Waterhouse* the Court was confronted by funding arrangements which were not like funding arrangements of old but were expressed in modern terms and had to be understood and analysed in that way. So in this case we say the assignment of causes of action is not done in a way as it was of old but is dressed up in a modern way. And we do advocate that the Court as was said in both *Camdex International Ltd v Bank of Zambia* [1998] QB 22 (CA) and *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) in the United Kingdom to be appropriate, should look at the substance of the matter rather than its form.

ELIAS CJ:

It does depend on the perspective of whether this really is seen as champerty or whether it is simply seen as *Waterhouse* again, a maintenance case so you need to convince us of that.

MR GRAY QC:

Yes, the key question is whether there has been an assignment of course, in a modern sense.

ELIAS CJ:

Yes.

MR GRAY QC:

I mean the High Court and the Court of Appeal both learned far too keenly, listened far too keenly to my learned friend Mr Smith's submissions that like *Camdex* all there was here was an assignment of a debt with a security interest ancillary to it and so there wasn't truly champerty at all and our argument is with respect to the Courts below, that's wrong, that in substance what occurred here isn't an assignment of a cause and the Court needs to consider whether in modern New Zealand it's the kind of transaction that the Courts will recognise and hear.

ELIAS CJ:

Isn't there a third way of looking at it which is that there is only funding of the liquidator, in other words that the assignment of debt dimension is not really in the frame of what we're looking at here?

MR GRAY QC:

That is a way of looking at it and it's a way I need to confront.

ELIAS CJ:

Yes.

MR GRAY QC:

And I can do really quite quickly. Whether I can do it persuasively is for Your Honours. The first step we say is this. The purchaser is a funder, the purchaser is not an organisation which buys and sells and debts, it doesn't lend money to people. It is in the business of litigation funding. Second, the funding agreement was entered into before the assignment and the funding agreement was expressly conditional upon the assignment taking place. So that the two transactions on their face are linked and are dependent on each other. Third, and I need here really to engage with the argument that the acquisition was no more than a defensive move to prevent somebody else from acquiring the security for the purpose of preventing the claim from being brought. And about that I say this. First, that very position is a recognition that possession of the security is possession of the claim in substance.

The very fact that the defensive move was undertaken is itself a recognition that the purpose for which it's undertaken is to control and to own the proceeds of the claim and it was an interest in the claim itself. But we say if what was intended was truly only defensive then the appropriate course where a liquidator is involved is to fund the liquidator in the redemption of a security. Section 305 of the Companies Act 1993 contains a scheme by which the liquidator clarifies where the secured creditors wish to be unsecured or not and if so, to what extent and what it is that secured creditors should do with their security. And it requires a liquidator to say to a secured creditor, what do you value your security at, do you intend to execute, to enforce your securities, in which case you are irrelevant to me because my job is for the people defined by the Companies Act as creditors, namely unsecured creditors. But we know what Allied would have sold the security for, $100,000 plus a small percentage of the proceeds of any litigation. If all that was intended was that the claim, that the security was purchased defensively for the benefit of the people the liquidator was interested in, which is the unsecured creditors, then $100,000 of funding to procure the redemption of the security would have been enough. And then what we would have had is the liquidator pursuing a claim in interests of the unsecured creditors, which is what the liquidator ought to have been doing.

And of course that's not the only thing that could have been done. Funding could have been provided to Allied so that Allied could have pursued the claim. But Allied has never been interested in pursuing either its own claim which is we, Allied –

ELIAS CJ:

Might there have been an issue as to whether Allied could have run this claim, being a claim in tort effectively?

MR GRAY QC:

Yes, in my submission Your Honour that would have fallen squarely within *Camdex*, and it would have been an acquisition by Allied of the Hanover debt

and the securities which were ancillary to it. And so we say there's an important distinction –

ELIAS CJ:

I know, all parties seem to say that, but I must say I have a query as to whether it really is. I mean, you get there because it's a chose in action, but I wonder whether there is any authority directly on point you can refer me to to say that it goes with the debt?

MR GRAY QC:

I think the best authority, Your Honour, is *Trendtex.*

ELIAS CJ:

Yes.

MR GRAY QC:

Remember what happened in *Trendtex* was that Credit Suisse as a creditor of Trendtex was held to have a sufficient interest in the proceeds of the litigation for an assignment to Credit Suisse to be valid, but then an assignment by Credit Suisse on to an independent third party was held to be invalid and to be a trafficking. Now the point Your Honour is asking about is both that and the somewhat historical question of whether assignment of causes in tort are permissible, and that's a different question which we haven't addressed squarely in our submissions but it's a matter this Court would have to have a look at.

ELIAS CJ:

No. Well, it's almost an elephant in the room really isn't it? But if you are forced to rely on the assignment of the GSA – anyway, you develop your argument, but I have an unanswered question around that.

MR GRAY QC:

Well, we address that in this way, Your Honour. We acknowledge that in *Camdex,* but first *Trendtex* in relation to the assignment to Credit Suisse and

in *Camdex* the Court said, “Look, for a long time we have treated debts as a specie of property and we have recognised the assignment debt and we have recognised security interests ancillary to the debt as having been validly assigned with it.” But we say there’s a very important distinction in this case between what the law sees as a debt and what the law sees as a speculative claim which will be defended like this, and that's where the submission that I’m making now touches the question asked by Your Honour the Chief Justice. There’s a material distinction, debt is a specie of property. If you read the facts of *Camdex*, if you read the defence that was being raised, the debt was not disputed. What was disputed was the ability of the new owner of the debt to enforce it in Courts of England because it was said that the arrangement was champertous. There was no defence to the debt itself, it was not a disputed liability. This claim on the other hand is disputed, it is in that sense, we say, in an entirely different category from those types of debts which were at issue in *Trendtex* and *Camdex* and we say therefore this is a wholly new fact situation for the Court.

ELIAS CJ:

But that's only if you’re relying on the assignment as – if this is simply seen as funding of the liquidator then it’s irrelevant, isn’t it?

MR GRAY QC:

Yes, one the factual nuances in this case is that what was assigned from Allied to SPF was a security for repayment of a debt, and it is possible to look at that transaction as being like *Camdex* and like in *Trendtex* to Credit Suisse simply a debt, with the security interest being incidental, and we submit that really is the issue in the appeal. But we say that both *Trendtex* and *Camdex* are authority for the proposition that what’s required is to look at the substance of the transaction, not its form…

ELIAS CJ:

Well, why isn’t the substance of the transaction the funding of the liquidator to bring the claim, which is its form?

MR GRAY QC:

Yes. I had started to give the answer to that, Your Honour, and it was the submissions I had give the answer to that Your Honour and it was the submissions I had made earlier about the interdependence of the funding agreement and the assignment, but it goes further than that. On the facts of this case Allied had already enforced its security, it had appointed receivers, the receivers had sold all of the real assets, the receivers had resigned. They reported that there were no other assets available for realisation and that any further realisations would require litigation. And so this is a case where while there was a residual obligation, as it turns out, not for the amount of principal that had been advanced but for accumulated unpaid interest, although that's just an accounting issue I suppose. But while there was an amount which remained unpaid, there was no possibility of paying it other than by suing people and not suing people to recover debts, i.e., property but suing people in disputed claims in Court for negligence.

GLAZEBROOK J:

Well it's still going to be property isn't it, it's just a contingent debt isn't it?

MR GRAY QC:

It's a chose in action.

GLAZEBROOK J:

Well a chose in action but you can look at it as a contingent debt can't you?

MR GRAY QC:

Yes. The Court can.

ELIAS CJ:

Can you, I mean I'd like some authority on that. It's ultimately a debt if you're successful but –

MR GRAY QC:

Well it's not a debt Your Honour it's –

GLAZEBROOK J:

Well it becomes property which is then available to repay a debt I suppose is the better.

ELIAS CJ:

Well I'm not sure that –

MR GRAY QC:

Well the distinction we make is that if we say it is not a debt, it's not a debt until there's a judgment. It's a claim. And we say there is a material distinction between the two.

ELIAS CJ:

Well that is the distinction that's been drawn in maintenance and champerty cases.

MR GRAY QC:

Yes. And the interest that Allied has was a security interest. It was a right to sue in the company's name and it was a present assignment of the proceeds of the claim, if and when there were; whether it be by settlement or by a judgment which is satisfied. And we say in the modern world in substance, that amounts to the claim itself. And we say that the combination of the prior funding agreement expressed to be conditional upon the acquisition of the assignment, the acquisition of the security and the security itself with the bundle of rights in respect of the claim itself and the proceeds of the claim actually amounts to an assignment of what it was that the company had.

ELIAS CJ:

Well except you have the liquidator who is bringing the claim and who has responsibilities to the Court and to – so it's not an assignment even in – it – your arguing from the, from where the money would go, to say that it's in substance aren't you, but it's not in substance an assignment if the liquidator is taking responsibility for the claim?

MR GRAY QC:

The liquidator seems to have failed to do what section 305 of the Companies Act requires the liquidator to do.

ELIAS CJ:

Do we have that, sorry?

MR GRAY QC:

Section 305 of the Companies Act, yes we do, it's in the materials.

ELIAS CJ:

It's in the authorities, I did see.

MR GRAY QC:

Tab 6 Your Honour. Bear in mind that looking at section 305 that section 240 has defined creditor to mean unsecured creditor.

ELIAS CJ:

Yes.

MR GRAY QC:

And Your Honour, the Chief Justice will know many of these things better than most of us but the scheme of the legislation was to create a difference between secured creditors and unsecured creditors and to provide liquidation for unsecured creditors. So section 305 provides that a secured creditor may realise property, subject to a charge, may value the property, may surrender the charge. So they can do two things: they can sit of their security by itself, they can say, "My security is worth only part of my debt and I'm unsecured for the balance and I want to prove as an unsecured creditor for the balance, or I can give up my security and prove as an unsecured creditor for the lot," and you can realise property, whether or not you valued the security. And in my copy of these unfortunately the pages are a little bit scrambled, it goes section 289, 291, 290, so it's a matter of turning over to section 290 to find subsection (3)…

GLAZEBROOK J:

No, it's in the right order.

MR GRAY QC:

So just a trap set for me by my instructing solicitors, Your Honour.

GLAZEBROOK J:

Well, mine's in the right order.

MR GRAY QC:

So we come to subsection (3), "A secured creditor may, unless the liquidator has accepted a valuation and claim by the secured creditor under (6), claim as an unsecured creditor for a balance due and must account to the liquidator if they get too much." And then (4) is that they've got to give some particulars of their security so the liquidator can assess it, (5), "The liquidator can require them to give them documents," and then (6), "Where a claim is made by a secured creditor the liquidator must," not "may", "must", "accept the valuation of the claim or reject the valuation and the claim."

ELIAS CJ:

Sorry, can you just say which section it is?

MR GRAY QC:

It's 6, Your Honour, subsection (6).

ELIAS CJ:

What section is it, sorry?

MR GRAY QC:

305.

ELIAS CJ:

Thank you.

MR GRAY QC:

And then (7), "Where a liquidator accepts the valuation of the claim or a revised valuation the liquidator may at any time until the property is realised redeem the security on payment of the assessed value." And (8) is the enforcement power, the liquidator can at any time give 28 days' notice to a secured creditor saying, "Get on with telling me what it is that you want to do."

So the question then arises, Your Honour, what is the liquidator doing in this case? The claim is funded by SPF and by reason of its funding agreement and security the first $300 million plus of the value of the claim is already assigned to SPF.

ELIAS CJ:

I'm just trying to remember what your application to the Court was based on. Was it based on the original application?

MR GRAY QC:

It might be helpful to look at it – yes. It's in the case, Your Honour, under tab 7, and because of arguments which are made partly in Mr Wilson's affidavit about despite not being present what he recalls being said to the High Court in argument, it's perhaps important to recall precisely what the application is, and it is for a stay and for the production of documents, "But for the grounds staying," paragraph 5, "The property is funded and maintained pursuant to an arrangement which is champertous and therefore an abuse of process," language which really came out of *Waterhouse* and analysed maintenance as a modern form of abuse, and then alleges as the first ground the general security agreement with Hanover, at 7 an assignment, 8, the incorporation of SPF, 10, because it's prior in time the funding agreement, and paragraph 14 is the key one, "As a consequence of the terms of the funding agreement and the GF of the GSA, SPF has procured the effective control and prior claim to the proceeds, if any." We say the application, Your Honour, is precisely based on the arguments that we are making today.

ARNOLD J:

The order that you seek, the proceedings have been stayed until the plaintiff's satisfied that the Court, that the arrangements are not an abuse of process?

MR GRAY QC:

Yes.

ARNOLD J:

So what would they have to do to satisfy you of that?

MR GRAY QC:

Well, I don't think you could fix trafficking by further trafficking.

ARNOLD J:

Well, it's your application. I'm asking what it means.

MR GRAY QC:

Yes. Your Honour, we thought about the relief quite hard. It is true that the remedy for abuse can include a striking out. But we understand the law relating to champerty is that the assignment from Allied to SPF is regarded as being void, so the agreement goes back to Allied, and we accept, subject to the argument, the issues raised by the learned Chief Justice in her questions, that Allied is in a different position from SPF. So while we would like to have been able to apply for a strike out, we understand the cases say that the correct approach of the Court in cases like this is to grant a stay, which may become permanent.

ELIAS CJ:

So does that mean you accept that Allied could fund the liquidator or not?

MR GRAY QC:

Yes.

O'REGAN J:

Allied could sue on its own interest couldn't it?

MR GRAY QC:

Yes.

O'REGAN J:

I mean, well, wouldn't it have suffered a loss as well if a claim…

ELIAS CJ:

Subject to the question…

MR GRAY QC:

I'm sorry, Your Honour?

O'REGAN J:

It would have suffered loss in its own right wouldn't it?

MR GRAY QC:

Yes.

O'REGAN J:

If the claim was made out.

ELIAS CJ:

Well, it might have its own claim, I support, direct claim, but subject to –

MR GRAY QC:

You would have thought if anyone had a claim, Allied had a claim. If anyone wanted to say, "I was misled by an audit report," then Allied is the, by far the largest financier would have been the party, but it's elected never to do that and of course…

ELIAS CJ:

Out of time.

MR GRAY QC:

Miles out of time.

ELIAS CJ:

But, sorry, but that's its direct claim.

MR GRAY QC:

Yes.

ELIAS CJ:

You also accept that it could fund the liquidator on the basis of its debt –

MR GRAY QC:

Yes.

ELIAS CJ:

– subject to the query I still have about that. It doesn't seem a huge step to allow someone else to fund the liquidator.

MR GRAY QC:

Well, I'm not sure it could actually fund the liquidator as much as maintain the claim itself pursuant to the provisions of the general security agreement, could bring the claim in the name of the company, it could take possession of the chose in action.

ELIAS CJ:

If that was assigned legitimately without falling foul of – I don't know which one it is in that case, champerty.

MR GRAY QC:

It's champerty, Your Honour.

O'REGAN J:

But you're accepting it is, aren't you? You're accepting the deal from Hanover to Allied can't be challenged?

MR GRAY QC:

I'm accepting that it falls within *Camdex* and before a *Trendtex* in relation to the…

O'REGAN J:

So you accepting that Allied could just run the claim itself as, on the basis of the rights it has under the GSA?

MR GRAY QC:

Yes, I'm not necessarily at the moment giving up defences we might have to a claim brought by Allied, but I'm not arguing today –

ELIAS CJ:

For stay.

MR GRAY QC:

Yes.

ELIAS CJ:

Yes.

MR GRAY QC:

Where were we? We were –

ELIAS CJ:

So you accept that the, yes, the outcome on any view's a fairly limited one on this Court?

MR GRAY QC:

I will come on to make submissions about why we say this claim is oppressive and therefore vexatious. It some ways it may seem to be limited but we say it would be very material.

ELIAS CJ:

Yes.

MR GRAY QC:

Can I defer that till I get to that point? It may be more comprehensible to Your Honour if I give you the whole argument at that time.

ELIAS CJ:

Yes, I think so.

MR GRAY QC:

We've been looking at the position of the liquidator and what it is the liquidator has been doing and we've been doing that as part of understanding why it is that the appellant says that this is in substance in the modern world an assignment of a cause and therefore is champertous, and we've been looking at the agreements themselves, the fact that Allied had already enforced all its securities, what it is that Allied's receiver had said about what assets remained available to be sold, to be realised, and the proceeds paid to Allied, and asking ourselves in substance what really is happening here, and the only thing that's happening is that this claim is being maintained against a range of defendants, including the directors but importantly for financial purposes so far as the plaintiff is concerned, PwC, and I'll come to make that other submission in a moment. But we say that is in substance what is being done here, and the liquidator has said in his reports why he's doing it. First he's said he's doing it to get money for unsecured creditors, and we know that the first $300 million plus, at least originally, and I'll come to talk about the new arrangements in a moment, would not go to unsecured creditors at all but would go instead to the funder, either as its reward for funding or alternatively in repayment of the residue of the debt that was owed to Allied, a residue that's increasing almost exponentially because it is at penalty rates in excess of 20% and compounding monthly and has been for over 10 years. We've done one calculation that by the time the trial starts what the plaintiffs asking for could well exceed a billion dollars. We know that it says in its pleading that in 2010 the debt is valued at between $240 million and $320 million, and it's just growing, and that in a company which at the time had shareholders funds within the few millions and total assets of a sum that's about a third of that 2010 valuation of the claim.

So we say in any real sense the liquidator was not here bringing this claim for benefit of unsecured creditors, but he said his second motivation was to show how the commercial world had been corrupted, and he hasn't quite explained in his reports what he says that means, but we say whatever it means it's the kind of ancillary purpose for bringing litigation that the Courts have regarded as inappropriate and as an inadequate explanation to justify an assignment that would otherwise be champertous, and we say the liquidator has himself in his reports explained that his motivation for involvement in this proceeding is one which is outside what the Act mandates him to do and –

ELIAS CJ:

Well, that's not directly before us of course, and I suppose it would be open to you to – well, I don't think it is before us is it?

MR GRAY QC:

Yes, the evidence, his reports are in the evidence, Your Honour.

ELIAS CJ:

No, no, what I mean is is it part of your application for stay that it's outside his statutory functions, that's effectively what you're saying isn't it?

MR GRAY QC:

Yes, it is, and I'm partly responding to what I anticipate my learned friends may say, because they've said in their written submissions that the liquidator is bringing this for valid reasons which the Court ought to allow, even if the assignment might otherwise be champertous. And I'm saying it also as part of my argument that when the Court looks at the substance of this arrangement, the substance is that there was in fact an assignment of the cause of action. And it's true that it's been dressed up in a way that seeks to avoid that by dressing it up as an assignment of a debt and it's been dressed up as if it was something different by having the claim brought by the liquidator rather than by SPF in its own right as secured creditor taking possession of the claim and bringing it.

FRANCE J:

So the idea of the liquidator acting outside the statutory powers, where is that in the, referred to in the application?

MR GRAY QC:

It's not Your Honour because we asked in the application also for production of documents because we didn't at that time have the documents, the liquidator would not give them to us.

GLAZEBROOK J:

If the liquidator was bringing the claim for unsecured creditors, in terms of getting some money, would it matter that his other purpose might be for personal publicity or as a champion of the downtrodden or whatever it might be?

MR GRAY QC:

Yes.

GLAZEBROOK J:

Are you really acting outside your statutory purpose if the claim is otherwise properly brought and isn't an abuse of process in sum and just because you see yourself as a knight on a white charger or whatever it might be?

MR GRAY QC:

If the liquidator was bringing a claim owned by the company for the benefit of unsecured creditors so that the claim might yield funds to unsecured creditors but the liquidator had other additional motives, by itself that would not be objectionable and it is not a ground of the application that there should be a stay because the liquidator may not bring claims belonging to the company for the benefit of unsecured creditors but also for other reasons. But the reason I challenge the involvement of the liquidator, the reasons are two-fold. First, the fact that the claim is brought by the liquidator tends to conceal who actually owns the claim and I do, I am arguing to Your Honours that in

substance what has happened here is that SPF as funder has purchased the claim, owns its proceeds, controls it –

ARNOLD J:
Well just on that are you saying that SPF controls it because as a result of the term in the GSA?

MR GRAY QC:
Yes.

ARNOLD J:
And so what then about the argument that the terms of the funding agreement are explicit as to a control of the litigation, as I understand it rest with the liquidator.

MR GRAY QC:
The terms of the GSA and the terms of the GSA that the funding agreement does not provide that SPF as owner has given up its right under the general GSA to take possession of the claim and to bring it in its own, bring it in the company's name. The funding agreement says as funder we won't control the litigation. But it doesn't say the funder is also the owner and the funder agrees that as owner it won't exercise its security powers and it waives them.

ELIAS CJ:
But can it, won't it be out of time?

MR GRAY QC:
Well I wouldn't think that it could Your Honour and –

ELIAS CJ:
But in any event it hasn't.

MR GRAY QC:
It hasn't.

ELIAS CJ:

And that can be dealt with if it arises.

MR GRAY QC:

I say Your Honour the simple answer is the funding agreement came first and the assignment came later and the funding agreement cannot waive a right that hadn't yet been acquired.

ELIAS CJ:

If the rights are derived from the GSA?

MR GRAY QC:

Whatever they are. Yes.

ELIAS CJ:

I'm not sure about, I mean that maybe what happens in, yes all right.

MR GRAY QC:

Yes.

ELIAS CJ:

I still will need some help later on why we shouldn't just regard this as a funding arrangement of funding of the liquidator. I still struggle to see that the assignment of the GSA really enters into the argument for us today on the stay.

MR GRAY QC:

Well I think I've made some of the points that we make in that Your Honour by saying first look at it in substance. And second, look at the interdependence of the agreements. Look at the funding agreement explicitly providing that it is conditional upon the assignment and then look at the bundle of rights that are delivered by the assignment and then say, if it was only ever intended to be funding there were lots of other ways of ensuring that the claim could still be brought, including by funding the liquidator in the redemption of the security.

ARNOLD J:

But if the funding agreement contemplated that the assignment of the GSA, doesn't that undermine your argument that the, it would be consistent with the funding agreement as to control to rely on the term of the GSA which is different to the terms of the funding agreement?

MR GRAY QC:

We say not in this case Your Honour because the funding agreement came first and because the funding agreement simply says it's conditional upon us getting an assignment. It's a stretch to say that the funding agreement contemplates the precise terms of the assignment so that the two agreements are in that sense interdependent and the assignment becomes a waiver of the rights in the GSA. They're simply not addressed, they are inconsistent but it's entirely possible for the funder to say, as funder we're not going to control the litigation. But as owner we've got the residual right to. I know I'm treading a bit of a path because on the one hand I'm saying SPF is wearing two hats and you need to see them together and then in answer to Your Honour's question I'm saying no but they're separate and I understand the tension in the answer that I've given. But I say, nevertheless if properly thought through that tension is there and the position is as I've submitted it is. The agreements are interdependent but the rights are not necessarily merged.

ARNOLD J:

All right.

MR GRAY QC:

They remain separate rights under the separate –

GLAZEBROOK J:

The answer to that may be that it may be champertous if that's what they try and do but as long as they stick to the terms of the funding agreement it isn't, because as long as they're not controlling then you can't bring them together.

MR GRAY QC:

But I would still argue Your Honour that it is champerty because of the ownership. There's been a trafficking and a claim.

O'REGAN J:

What do you say about the intervener's submissions and the effective waiver now?

MR GRAY QC:

I say three things. The first is, we submit the fact that they're now, at this stage, moving to do something against the reality of this appeal shows that they see it as a problem. It has to be that. Second we say, the making of a voluntary payment of an indeterminate nature is not an answer. Saying we will now give up our control rights under the GSA is not an answer to what happened at the time and the Court addresses the transaction that occurred at the time and asks itself was that assignment invalid. Doing something now to give up some rights because it's now seen that those rights are a problem, isn't an answer.

GLAZEBROOK J:

Well is it because you're asking for a stay because there were those difficulties. If there aren't difficulties anymore why would you have a stay or if you did have a stay why wouldn't it be lifted?

MR GRAY QC:

Because I say –

GLAZEBROOK J:

Don't you have to say it's still a problem under those new arrangements?

MR GRAY QC:

Well I would – first I say it's not addressed in that way. If Your Honour says well no it has to be addressed in that way then I would say it is still a problem and it's still a problem because of ownership and I'll go onto talk about how

someone who was a complete stranger to a litigation, well funded and is bringing the litigation for its own sake as a business enterprise in its own right, and that's what SPF is doing, as owner, is champertous, and the transaction is void. And if, and it's not –

GLAZEBROOK J:
Well, you'd still have to deal with whether the liquidator can assign in that way.

MR GRAY QC:
Well, the liquidator didn't assign, Allied did.

GLAZEBROOK J:
Well, I understand that, but this is in the context of a liquidation, so it's obviously not seen in policy terms as a bad thing for liquidators to get somebody else to fund their litigation or, alternatively, to assign a cause of action, because they're getting money in for the unsecured creditors.

MR GRAY QC:
Yes. I'll come on to make more sustained submissions on that point in due course, Your Honour, but we say interest of access to justice are not engaged in this case. This is not a case where a liquidator has sought funding to pursue a company's claim for the benefit of unsecured creditors, that's simply not happening. And that's funding, Your Honour, and this Court dealt with that in *Waterhouse,* it said, "We're no longer going to regard it as maintenance, and therefore impermissible, for claims to be funded, in part because interests of access to justice are promoted by doing so." But we're not dealing in this case just with funding, subject to that being a live issue, as point out by the Chief Justice.

ELIAS CJ:
Well, it's not a live issue between the parties.

MR GRAY QC:
This involves also ownership.

ELIAS CJ:

Yes. Your argument based on section 305 of the Companies Act 1993, I know it's not being run here but do you go so far as to at least leave open the possibility that the litigation funder here, having taken the assignment of the GSA, can't fund, that the liquidator can't bring the claim under the funding agreement because of 305, that the GSA rights would have to be dealt with under 305? I can't remember really what the scheme of the legislation is.

MR GRAY QC:

No, Your Honour. You may recall I said in response to the argument that the acquisition of the claim by SPF was defensive and intended to prevent Mr Henderson from acquiring the claim?

ELIAS CJ:

Yes.

MR GRAY QC:

And I said, well, if all that was intended to be achieved was that then the liquidator could have been funded for the redemption of the debt and then the claim would have become an asset of the company for the benefit of unsecured creditors, and of course the liquidator could have brought that claim and have sought funding to do it. But we also know that unsecured creditors of PVL that have provided proofs of debt are about $750,000, and you don't need to bring a claim for up to a billion dollars to pay unsecured creditors of $750,000. Now I don't want – that answer's a little bit glib because there are some interlocking arrangements with subsidiaries, and there are other unsecured creditors of other subsidiaries. But the point that I will come to make is this case shows all of the evils of champerty. It's pursued as a business assets in its own right by someone who was well funded and who's not about vindicating rights or being repaid for something that has been done with the company, but is pursued for maximum profit in its own right. And the defendants live with the reality of being defendants in a claim for about a billion dollars every day, and that's troubling. But you have to ask would they be vexed in that way if the liquidator was actually looking

only for the interests of unsecured creditors, looking to realise some money to pay to unsecured creditors.

GLAZEBROOK J:

Well if you do have a billion claim then you would take the billion claim, wouldn't you, to get the $750,000. You wouldn't just say oh well I've got a claim for a billion but I think I'll just make it a million because that's all I need for unsecured creditors, would you?

MR GRAY QC:

The reality of the management of the claim like that is that the interests are smaller, they're more direct, the causation and remoteness of loss that falls to be considered is viewed very differently and the whole management of the claim including settlement discussions, looks very different.

GLAZEBROOK J:

Yes there may be – that's certainly true, but I'm not sure it's an answer.

MR GRAY QC:

Well in part we're speculating aren't we, it may be and it may not be and so –

GLAZEBROOK J:

Well if it is a justified claim then it's a justified claim. If it isn't a justified claim, it isn't so in fact we don't really have any information or certainly not sufficient do we, to make any comment on that?

MR GRAY QC:

That could be said of any claim which was regarded as champertous. In any claim that's regarded as champertous –

GLAZEBROOK J:

Well by your argument seems to more that it's, not that it's, well in this instance it's champerty but your argument seems to be that it's an unjustified claim by itself.

MR GRAY QC:

My, the argument I was making is that this claim illustrates the evils of champerty.

GLAZEBROOK J:

Well you see I don't see that it does, I mean that's my problem I suppose, because if it's a justified claim then it means the liquidator gets the 750,000 that otherwise they wouldn't get.

MR GRAY QC:

Champerty was never about the merits of the claim. The cases do not say –

GLAZEBROOK J:

Well exactly, that's where I have the difficulty because you say "the evils of champerty" and because you could have an unjustified claim that is vexatious.

MR GRAY QC:

With respect Your Honour what I was saying is not that –

GLAZEBROOK J:

All right, perhaps you better explain.

MR GRAY QC:

– it's that champerty was never about an assessment of the merits of the claim. All of the cases assume that the claim is a valid one which can be brought and will be defended. The evils of champerty are about the claim being brought for purposes other than vindication of a right or recoupment of a loss which has been suffered but being brought for ancillary purposes, including just profit from the claim itself. And I do say that in this case because on the original arrangements the first 300 million-odd or more of any recovery will go to SPF. This claim is not being pursued for vindication of a right or for recoupment of a loss that has been suffered, but as a profit making venture in its own right. And those are the evils of champerty and I say they're illustrated in this case. And this case is not about an attempt to avoid

what might otherwise be a good claim by using a procedural application. This claim was about avoiding being vexed by a terrible claim arising out of a comparatively small company in a comparatively small original transaction. And being vexed because the motive for which the proceeding is being brought, the goal to be achieved is simply the recovery of the biggest amount of money and that is it. If champerty is to have any life in the modern world it's to prevent that and there is an impression, oppressive component to the bringing of litigation in these sorts of circumstances and it is troubling to people.

GLAZEBROOK J:

I suppose my difficulty is, if you can have funding arrangement which absent assignment you would say is perfectly valid but in fact in exactly the same terms, I'm not sure why we take that step further, when it isn't, when there are aspects of it that would suggest there wasn't control of the litigation et cetera.

MR GRAY QC:

I understand the question you asked Your Honour from a policy perspective, it's too soon to tell whether the decision to allow funding of claims to provide access to justice is actually yielding results for the small people for whom it was intended to be beneficial. It's too early to tell. We don't know yet whether the decision no longer to regard as unacceptable maintenance, the funding of someone's claim has been a good move or not. And early indications are perhaps to the contrary. But we have taken that step for now, *Waterhouse* is the law and you're right, it may only seem a small additional step to say, will we allow funding, why wouldn't we also allow trading in claims. And I say there's a very important difference between the two. The purpose of funding is to enable unsecured creditors in this case to get access to justice so that their rights can be vindicated and so that they can recoup the losses they have suffered. Trading in claims changes the motive for which proceedings are brought. It makes the claim no longer a vindication of rights but a use of legal arguments in order to procure money. It maybe of course as an aside that the law is clarified and that conduct is considered and can be said to be either appropriate or inappropriate and there's a community interest in that

happening, but that's ancillary to the purpose for which the claim is now being brought when it is owned by someone whose business is making money out of claims.

Now the control point in my submission is not central. What this Court decided in *Waterhouse* was that a funding agreement by itself did not provide such control over litigation that it amounted to an assignment of the cause itself. That's what the decision was. The question was whether the terms of the funding agreement amounted to such control that what was involved was not maintenance but was champerty. And the house, the Court was very clear that champerty remained inappropriate and it remains the law in New Zealand that the sale and purchase of claims, the bare assignment of a claim is void on grounds of public policy. So when Your Honour Justice Glazebrook says well isn't it just a small step and it's a –

GLAZEBROOK J:
Sorry, I was talking about the particular case here because you have liquidators who can assign claims, that's clear they can assign claims. And it was in response to yours, it was for profit. But in fact the profit comes under the funding arrangement effectively.

MR GRAY QC:
As to the first, the liquidator can assign liquidator's assets with the consent of the Court. The liquidator has the ordinary power in the schedule to the Companies Act to sell and dispose of company assets. The liquidator could not assign this claim. This claim is secured to SPF.

GLAZEBROOK J:
Well no, I understand in terms of –

MR GRAY QC:
It is wrong to say that the liquidator could have sold this claim, it couldn't. Any proceeds from the claim –

GLAZEBROOK J:

I think we've already been through that, I accept that. It's the policy issues that we're talking about though in this particular context.

MR GRAY QC:

Well again, and it comes back to the reason for my drawing the Court's attention to section 305. If the liquidator is there for unsecured creditors then of course the Court wants to protect the ability of a liquidator to do what can be done to realise money to pay them, so that they can recoup their losses. But we say the distinction in this case is that's not what's happening. Because we say the combination of the funding agreement and the GSA mean that money just doesn't become available to unsecured creditors until many hundreds of millions of dollars have been realised.

ELIAS CJ:

Well is your, sorry to go back to section 305 but is your, and I understand you raising it part, well principally in response to the arguments here because there might be a different…

MR GRAY QC:

Yes.

ELIAS CJ:

But is it part of your argument that the funding arrangements undermine the scheme of section 305(1) because the scheme is that the secured creditor enforces directly or else has to prove as an unsecured creditor after valuing the interest, if he wants to go through the liquidator?

MR GRAY QC:

As Your Honour has asked the question, no, the funding arrangement do not. The assignment does, and the conduct by the liquidator in not requiring either Allied or SPF to value the security so that the liquidator had the power to –

ELIAS CJ:

Yes, sorry, I did mean that, in combination in this case.

MR GRAY QC:

Yes.

ELIAS CJ:

So on your approach they shot themselves in the foot by doing the assignment –

MR GRAY QC:

Yes.

ELIAS CJ:

– because if they'd simply funded it would have been all right?

MR GRAY QC:

Well, I'm asking the Court to be sceptical about whether the acquisition ever was purely defensive. Because if it was purely defensive it could have been done in a way which sat comfortably within section 305 and achieved what a liquidator ought to be achieving, which is vindicating the company's rights and realising money for payment to unsecured creditors. But that's not what was done, and to say it was done purely for defensive reasons, in my submission, is a difficult argument because it's inconsistent with what was done.

ELLEN FRANCE J:

But just to be clear, you're not then saying in a legal sense it undermines the scheme of the Act, their 305?

MR GRAY QC:

No, I'm saying it needs to be analysed.

ELLEN FRANCE J:

You're saying there was an alternative route by which the liquidator could have acted, and the fact that that hasn't been used tells you something about the motive?

MR GRAY QC:

Precisely. And I say evidence given now, six years later, about what was subjectively intended by other people at the time is of very limited value and that the approach of the Court ought to be to look at the matter objectively in the context of the contemporary documents rather than to rely now on untested affidavits given this late responding to an argument.

Another thing that is now seen is, well, "We can fix things up, we've agreed to give some money to Dominion Finance, a subordinate secured creditor, and we've now agreed to give some money to the liquidator so that he can pay unsecured creditors," and interestingly the amount of money to be given is the first 10%, to the liquidator, is the first 10% of – sorry, 10% of the first $75 million, which realises the $750,000 which we understand is the volume of the proofs of debt submitted by unsecured creditors of PVL. To that we say –

O'REGAN J:

Hang on, say that again.

GLAZEBROOK J:

That it takes off the unsecured creditors, it would pay off the unsecured creditors.

MR GRAY QC:

And the point I think Justice O'Regan's going to tell me is my mathematics is wrong, it's 7.5 million.

O'REGAN J:

Well, 10% of 75 – yes, that's 7.5 million.

MR GRAY QC:

Yes, my mathematics was wrong. So that we say a voluntary payment made now in response to these arguments, still of a reasonably indeterminate sum, is not an answer to what was intended at the time, and that the task for this Court is to determine what it was that happened at the time and what the legal significance of it should be. And so we say all of this rushing around now is interesting, because it tells us that someone sees there's a problem, but it's not an answer and it doesn't change what happened at the time.

ARNOLD J:

Well, it might be an answer in terms of the relief you see though. I mean, if in fact it removes what are the essential complaints you make about the arrangement and if it were the case that they were locked in, why wouldn't that be, meet the terms of your application for a stay?

MR GRAY QC:

It wouldn't Your Honour because it doesn't meet the central complaint.

ARNOLD J:

Okay.

MR GRAY QC:

The central complaint is that this litigation is now conducted with a view to making a profit. It is not made with a view to vindicating rights or providing recoupment to unsecured creditors of losses they have suffered. And fixing problematic provisions in the GSA or helping the liquidator look as if in fact he's doing something for the benefit of unsecured creditors by giving him some money to pay them, doesn't meet the main point.

And so to come to the policy component and to ask the question, why is champerty objectionable, why is this champerty and why is this champerty objectionable? I gather some of the points that I have already made. The size of the claim is now wholly disproportionate to losses suffered by

unsecured creditors and to any rights that could sensibly need to be vindicated. The size arises –

ELIAS CJ:

But – just pause, but not if the holder of the GSA values the property and is content to be treated as an unsecured creditor in the liquidation?

MR GRAY QC:

Not if Allied, I mean we know what Allied thought the property, thought the claim was worth. It thought the claim was worth $100,000.

ELIAS CJ:

But its assigned its interest.

MR GRAY QC:

Yes but when we ask ourselves, when Allied, because of the arrangement with Hanover and I must say as an aside, part of my answer to your questions about whether the assignment from Hanover to Allied would be regarded as valid, in the case of these companies the answer is more complicated because of the moratorium arrangement that was entered into and the effective merger of the two, two firms. And that's why I really didn't want to start walking down that path because there's not just a commercial sale and purchase of a debt such as might occur between finance companies that were ongoing and independent. If Allied, we know what Allied thought the claim was worth, it thought it was worth $100,000 plus a small percentage of anything that might be recovered.

GLAZEBROOK J:

Well I mean it's hard to know whether it thought it was worth that or it knew it wasn't going to be able to fund it itself and it was realising what it could get knowing it was not going to fund it. It might have been because it thought it was a useless claim, it might have been a thought it was a good claim but it had a 10% change of success, we don't know what that was, do we?

MR GRAY QC:

Well we know what it thought the market value, we know what it was thought, it was responsible for the depositors of Allied for the claim to be sold for. It's difficult to see why if the liquidator of PVL could acquire funding to bring the claim, Allied couldn't acquire funding to bring the claim. If funding was available to bring to this claim, in my submission it's reasonable to assume that it would have been as available to Allied as it was to the liquidator of PVL. But the real answer to Your Honour the Chief Justice's question is that in this case the loss is so, or the claim is so high because unpaid interest is compounding monthly at more than 20% and will continue to. And we say a little bit of thought needs to be given to the incentives that arise in respect those sorts of circumstances because they are not unique. For a start, what would somebody who could not repay a finance company do, they'd resolve the matter, they'd pay whatever they could and would be released from further obligations to pay compounding penalty penal interest rates. If the company was ongoing it would refinance, and it would negotiate the interest rates down by repaying and borrowing at the new market rates which, after the GFC, became much lower. The incentives in this case are to leave the claim running and to leave these very high interest rates compounding for time.

ELIAS CJ:

But that may be why you can't assign a cause of action, but that's not the matter that's before us.

MR GRAY QC:

It might be why you can't assign the cause of action but I am asking you not just to then discard the issue as relevant. We say it is relevant to why this claim might be regarded as champertous and –

ELIAS CJ:

But it may be something that you will have to address in a different application to the Court rather than use it as an aid to the argument you're now advancing about litigation funding.

MR GRAY QC:

Well, with respect I say I can do both.

ELIAS CJ:

Yes.

MR GRAY QC:

I mean, there are a range of – I mean, the Courts will recoil from finding that loss has been suffered in a million dollars, a billion dollars, and the Courts have all sorts of techniques available to properly address what foreseeable loss has been suffered as a matter of causation and what policy might say about recoverability. So there are a range of issues to be addressed, probably at trial rather than by an interlocutory application. But for our purposes, when considering whether assignments of this type ought now to be regarded as permissible because they serve some social good, we say regard needs to be had to the fact that the incentive becomes one to maximise the claim. Ordinary duties of mitigation of loss, in the interest of both parties and efficiency in the community, don't apply to the same extent when a claim is being purchased and pursued simply for profit, because in those circumstances the incentive is to make the claim as big as it can be, and so this claim was commenced late. It's actually two claims. One of them was commenced just within six years from the second of the audits and the other claim, the one for the subsidiary companies, which is consolidated, was commenced later and may, arguably, be time barred. But it was commenced late when the claim had already become very large, and it's taken a long time.

ELIAS CJ:

If the GSA covers this assignment.

MR GRAY QC:

Yes.

ELIAS CJ:

But surely it's better if that's addressed directly – anyway, you understand the point.

MR GRAY QC:

Yes, I do, Your Honour, and I do ask you nevertheless not to put it aside entirely but to see it as one of elements of what it is that the community might be interested in in deciding whether a sale and purchase of claims of this type is something that should no longer be regarded as contrary to public policy and therefore void.

And the second point I make is the one I've already made, that the reason champerty was contrary to public policy is that the power of the Courts was not being used to vindicate rights or to recoup losses actually suffered, but for other ancillary purposes, and I repeat my submission that that is illustrated in this case. And it is oppressive for people to have to live their daily lives faced with exposure to a claim of this type. Remember SPF is complete stranger to the transaction, it makes its money from funding litigation and now from buying and selling litigation.

And then if it is to be the law that the sale and purchase of securities which attach to claims possessed by debtor companies is valid then, while I know it's a floodgate argument and they are always unattractive and they're hard to make and so forth, there'll be a now business. The business will be buying the debentures of insolvent companies, audited and insolvent companies, insolvent companies that have liabilities to other people. And those claims will then be brought for profit, pursued by the new security holder for profit. Not to vindicate the rights of the company, not to enable the company to recoup its losses so that it can pay its creditors. But what conceptually would be different between a secondary market and a sale and purchase of debentures of insolvent companies with claims, the ability to make claims against other people? Even if the claim is big enough and capable of being made big enough by reason of a contractual obligation to pay interest under the debt security, just the bringing of claims in the hope that there might be a

settlement in a manner that might be said to be extortionate. And we say that remains something which the law should turn its face against, that if you like coming back to *Waterhouse* which said, well we need to address maintenance really as an example of abuse. It's a specie of abuse and we need to look at orthodox principles of abuse in deciding whether maintenance might be abuse in the modern world. So we say this application should be looked at with the question in mind, is what's happening here a specie of abuse. It's a misuse of Court procedures and we say for that reason the law should be that it remains inappropriate and that the assignment is invalid and void.

ARNOLD J:
So if we look at the categories that the Court set out in *Waterhouse* at paragraph 31 –

ELIAS CJ:
Sorry what tab are we at?

ARNOLD J:
This is under tab 28 of the authorities in volume 2.

MR GRAY QC:
Sorry Your Honour, which paragraph?

ARNOLD J:
Paragraph 31 where a reference was made to the, where the Court identifies what the High Court of Australia or the majority did. They identified four categories where there might be an abusive process. The one that you argue, I guess, is (b)?

MR GRAY QC:
Yes.

ARNOLD J:

And you say that, "It's employed for some ulterior or improper purpose or in an improper way," simply, well essentially because of the proportion of the, any award that the funder will take, either – I mean that's the heart of it, isn't it?

MR GRAY QC:

Meaning it's brought with a profit motive. And we say that's –

ARNOLD J:

Well I mean all funders all operate with a profit motive. Your argument here is not that. It is just that so much of the return is going to the funder.

MR GRAY QC:

All funders are seeking to make a profit from funding litigation. But they don't control the litigation. So the litigation is not conducted for a profit. If the funder did control the litigation the funding would no longer be maintenance but would be champerty and would therefore be subject, be vulnerable to the same complaints I am now making. What the change from maintenance to champerty does is change the purpose for which the litigation is pursued and to make it improper. And that's the distinction and that's why I argue that in the modern world that the Court should go as far as it has in *Waterhouse* for the time being, subject to re-evaluation and go no further.

GLAZEBROOK J:

Well it is dependent on your argument that it is champerty and that it's champerty that isn't in some way under the policy in respect of litigators, even if not the letter, an allowable thing for a liquidator to do?

MR GRAY QC:

Yes. Yes it is.

GLAZEBROOK J:

Because if you don't get there then all of your arguments about – because the profit arrangement could equally arise under a funding agreement as it could under an assignment, couldn't it?

MR GRAY QC:

In my submission no.

GLAZEBROOK J:

In exactly the same…

MR GRAY QC:

No, in my submission no.

ELIAS CJ:

I was going to ask you, I would find it helpful if you'd take us, with the benefit of the discussion we've had, at some stage to the funding arrangement, because there's the fees and the success fee component and there is the recovery that's attributable to the GSA.

MR GRAY QC:

Yes.

ELIAS CJ:

Is that right? I'd find it quite helpful just to see that.

MR GRAY QC:

I'm happy to do that. May I answer Justice Glazebrook's question first?

ELIAS CJ:

Yes, of course.

MR GRAY QC:

My answer comes back to the one I just gave to Justice Arnold a moment ago, Your Honour Justice Glazebrook. A funder is always trying to make profit and

the Courts decided that's fine, but it makes it profit from helping other people pursue other people's claims, but that –

GLAZEBROOK J:
No, I absolutely understand.

MR GRAY QC:
Forgive me.

GLAZEBROOK J:
I was just saying that the difference, and that was the difference that we indicated in *Waterhouse*, was there was a difference between champerty and maintenance, but the profit could be exactly the same amount was all I was saying. So when you say…

MR GRAY QC:
It could be, in this case it isn't because the profit is a combination of the funding fee and the recovery.

GLAZEBROOK J:
I understand that.

MR GRAY QC:
But in my submission the touchstone in *Waterhouse* –

GLAZEBROOK J:
But really what I'm putting to you is that the real point of your argument is to say that it is champerty, not maintenance.

MR GRAY QC:
Yes. I have to succeed in persuading you that there's effectively been an assignment of the claim. And that was the sticking point in the High Court and the Court of Appeal. I mean, I arrive having not been terribly successful so far with the arguments and I acknowledge that, but I say –

GLAZEBROOK J:

It's just that it's not particularly helped that argument by mixing it up with saying it's an abuse of process or it's an oppressive claim or there's excessive profit, just personally it doesn't help much, because if you were saying, "Well, even if it was maintenance it is improper in this circumstance," but I don't understand that to be your argument.

MR GRAY QC:

No, Your Honour –

GLAZEBROOK J:

So therefore it's not terribly helpful to be talking about the abuse of process because the only issue is whether is champerty.

MR GRAY QC:

I had not seen those points, Your Honour, as being parallel points being made at the same time or mixed up, as Your Honour put it, I had seen them as being sequential. I do need to persuade you that this is an assignment of the claim, and I say then if it is an assignment of the claim it's champerty. The Court nevertheless will need to consider as a matter of policy whether the law should change so that champerty becomes –

GLAZEBROOK J:

Oh, so those were arguments against the changing of the law. I understand that, sorry. So those were arguments that said you should go no further than, as the Court went in *Waterhouse,* so if it is champerty we should just cut it off?

MR GRAY QC:

Yes.

GLAZEBROOK J:

Okay, now I've now understood. It's just that I was slightly concerned you were trying to get us to look at the claim to see whether this was an unjustifiable claim, which I just don't think we've got enough…

MR GRAY QC:

I don't want to argue that at the moment, Your Honour, that's for another day.

GLAZEBROOK J:

Yes, that's what I would have thought, but…

MR GRAY QC:

Yes. It's for another great number of days actually.

GLAZEBROOK J:

All right, no, I understand the argument now thank you.

MR GRAY QC:

Your Honour Chief Justice, at paragraph 40 of our synopsis we touch on the point that you've been asking about, which is whether a tortious claim can be assigned…

ELIAS CJ:

No, sorry, I was asking you to take me to the…

MR GRAY QC:

No, I'll come that.

ELIAS CJ:

Oh, yes, that's right.

MR GRAY QC:

I'm making that prior point, and we're making it at this part of our argument to say this is why this case is different from *Camdex* and *Trendtex* because the debt which was assigned in those cases was a form of property, that the law does recognise debts as a form of property, whereas claims like this are not.

ELIAS CJ:

Yes.

MR GRAY QC:

And in *Trendtex* even then the assignment to a third party was found to be champertous. Now Your Honour was then asking about the funding agreement. If I may – well, that's found in tab 40 in the case, which is in volume 4.

GLAZEBROOK J:

Where are you, sorry?

MR GRAY QC:

Tab 40, Your Honour. I'm just looking for the – section 4 is the application of resolution sum, and that's redacted in that one.

ELLEN FRANCE J:

I was going to say, I thought the full version was the one at tab 48 in volume 5?

MR GRAY QC:

Indeed it is, thank you Your Honour. 4.1, payment of project costs, their defined in the definition section – and it's on page 601 of the case – and then services fee, which is at 603 of the case, "If settlement was achieved," under (i), "within six months then 25% of the net resolution sum," (ii), "If within 12 months then 33," (iii), "18 months," then 37%, "and otherwise," in (iv), "42.5%," and that's of net realisation sum, which itself is defined to mean the resolution sum less project costs, and "resolution sum" is itself defined to mean the aggregate gross amount of money. So that the fee is, or the remuneration is, first, a recovery of all amounts paid, and the 42.5% of everything else. And the way we get to our $300 million plus number is that once the fees have been paid and 42 and a half percent is paid to the funder, the remaining 57 and a half percent is available to pay the secured debt, so the question is what's the secured debt and how much is needed to be recovered before the –

ELIAS CJ:

So where's that?

MR GRAY QC:

That's not in this document, Your Honour.

GLAZEBROOK J:

That'll be because of the assignment is what you say.

MR GRAY QC:

Yes.

ELIAS CJ:

Well, where's the indication of the scope…

MR GRAY QC:

Size of the secured debt?

ELIAS CJ:

The scope of the claim.

MR GRAY QC:

Not here.

ELIAS CJ:

And the security and guarantee provision in 6, is that anything that we need to look at?

MR GRAY QC:

I'm sorry, 6, Your Honour?

ELIAS CJ:

Yes. That's just securing payment from the liquidator to the funder?

MR GRAY QC:

Yes, the liquidator has given a first ranking security.

ELIAS CJ:

So it's in the statement of claim we see what the scope…

MR GRAY QC:

Yes.

ELIAS CJ:

I'm just interested in knowing whether the debt secured by the GSA is, whether it's pleaded.

MR GRAY QC:

It is included – well…

ELIAS CJ:

It's just as part of the whole loss is it?

MR GRAY QC:

Yes, it is.

ELIAS CJ:

So where is the statement of claim?

MR GRAY QC:

The statement of claim is at tab 11, Your Honour, in volume 2. It's a very, very long…

ELIAS CJ:

Ah, yes, we won't want to read it. Volume 2, 11?

MR GRAY QC:

Yes. And, Your Honour, at paragraph 454 on page 201 is the claimed quantum. You can see that the claim is made on the basis of actual deficit of liabilities over assets achieved in the receivership of PVL and its subsidiaries.

GLAZEBROOK J:

Sorry, what paragraph are you at?

MR GRAY QC:

454, Your Honour.

MR GRAY QC:

Estimated at 302.7 million as at July 2010, less the estimated deficit, that's the date it should have been wound up. And so at 4.5.1 they say if it's the 2006 audit that's negligent, the loss is 302 million up to July 2010 with contractual interest continuing to accumulate thereafter.

ELIAS CJ:

I see, yes, thank you.

MR GRAY QC:

Now is that a convenient time, Your Honour?

ELIAS CJ:

It is.

MR GRAY QC:

And I don't expect to be much longer when we return.

ELIAS CJ:

No, thank you, Mr Gray.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.51 AM

MR GRAY QC:

Three briefs points Your Honour only. The first is the question asked by I think Justice O'Regan, what was the payment proposed to be made to the liquidator? The answer to that is found in Mr Wilson's affidavit in the intervention application documents under tab 2 and it is at paragraph 25 and the first payment is an amount of 10% of the first 75 million of the net proceeds. So the 10 times arithmetical error that I made was in the first number, not the second. The second, in response to questions about how the numbers add up; it's helpful to Your Honours, Justice Brown summarised them in a table at paragraph 16 of his judgment. That can be found in volume 1 of the case under tab 9 at page 65.

GLAZEBROOK J:

Tab, sorry tab?

MR GRAY QC:

Nine Your Honour.

GLAZEBROOK J:

Found it.

MR GRAY QC:

Sorry if you're just looking for a quick summary, that's where it is. And the final point is we were looking before the morning adjournment at paragraph 454 of the statement of claim and the calculation of the claim as at July 2010 by a particular provided by letter which is not part of the bundle. The plaintiffs have since clarified that in fact that calculation is to March 2014. So where at paragraph 254 you see 2010 the date now alleged for that amount is March 2014. And unless Your Honours have any further questions, those are my submissions.

ELIAS CJ:

No, thank you very much. Yes Mr Smith.

MR SMITH QC:

Yes, may it please Your Honours. There are two central issues as we perceive it. The first is whether as PwC contends there is an assignment of the, their cause of action in circumstances where it isn't permitted. And second, there's the general issue of the propriety of the actions of the liquidator which were mentioned in the judgment giving leave as a specific matter that you wanted attended to and which has been discussed by my friend. I'll deal first of all with the question of whether there's an assignment of a bare cause of action, so the appellant contends that there is an assignment of bare cause of action which is evident because of the co-existence of the funding agreement on the one hand, and of the assignment of debt and the GSA from Hanover to Allied and then onto SPF; and in particular the latter assignment.

We say that neither the funding agreement nor the assignment to SPF can be an assignment of a bare cause of action and so in order to examine this, it's important to adopt the framework where we, in the first instance, look at each of those agreements to see whether either of them by themselves can amount to an assignment of a bare cause of action before considering whether in combination somehow that is achieved. First of all the funding agreement; I perceive that I can be brief about that. It is a standard market funding agreement. There are clear provisions in it in relation to the control of the litigation. I don't perceive that on its own it is contended by the appellant to amount to maintenance or champerty. And so we can go –

O'REGAN J:

Just on that, the power of the funder over when a settlement happens, the funder's right to chose that, has that been changed now? Is it now proposed that that won't have that, that the liquidator will also have a say over when a settlement ends?

MR SMITH QC:

It is, I'll just have to go to the actual volume itself but the answer to it is that it is the liquidator who generally has control of proceedings including any

settlement but in the funder having a legitimate interest in the matter, having funded it, is required to be consulted about that.

O'REGAN J:
Okay, sorry.

MR SMITH QC:
And in the event that they are consulted and don't agree then they go to dispute resolution and the term which I can refer to, I don't perceive you need me to take you to it.

O'REGAN J:
Okay, that's fine. No need to take it further.

MR SMITH QC:
So the assignment is, that is to say the assignment between Allied and SPF is what I perceive the appellant to have its principal, if not sole beef with, namely the effect of it. And we say that first of all it's, I want to go to it and the framework for considering such documents with quite some care but in general, in the round, we're saying that it's patently not an assignment of a bare cause of action in and of itself. It is an assignment of debt with all ancillary rights in terms of charges over secured property and rights to take it, to take it over the secured property on default and to realise it, including expressly the bringing and settlement of claims in relation to that property, be it whatever it may be. So in itself it couldn't amount to champerty, being but an assignment of bare cause of action but in order to have a framework for thinking about that and to remind ourselves of just why that is the case, I ask that if you look with great care at any particular case, although I know of course you'll look with great care at all the relevant cases, it is –

ELIAS CJ:
If you take us to them and indicate which ones you want us to pay particular care to.

MR SMITH QC:

I intend to go through the particular –

ELIAS CJ:

Yes.

MR SMITH QC:

– in some care.

ELIAS CJ:

I just wanted for myself, I've read a couple of cases only.

MR SMITH QC:

Yes well, this is really the only case that I'm going to take you to with great care, and the reason, it is *Camdex* and it is the decision of Lord Justice Hobhouse half way through his time in the English Court of Appeal and the reason why I want to take you to that is because on the subject of assignments, profit motives and motives, et cetera, et cetera, et cetera, the issue of debt factoring, debt collection, assignments and the knowledge that you're going to have to sue to get the debt in, on all those issues it is a comprehensive account of the law, at least as it stood at the end of last century, on the subject and having appreciated fully what Lord Justice Hobhouse has to say about it, I venture to say that you won't need to look a lot further for a guide.

ELIAS CJ:

No, I would agree that it's an excellent account.

MR SMITH QC:

Well, in that case it's really only six pages. The reason why I'm hesitating, Ma'am, is because I don't want to bore you by going through it all, but I perceive it's –

ELIAS CJ:

No, no, we're never bored by law.

MR SMITH QC:

Well, in that case…

ELIAS CJ:

Maybe the way it's presented sometimes.

MR SMITH QC:

I could only take you through sections of Lord Justice Hobhouse's judgments and if – it is what it is. If we can go to tab 11 of the first volume – I just want to make sure you have every page because the appellant's first volume missed every second page of that judgment, I hope you've got them.

ELIAS CJ:

Yes, we have.

MR SMITH QC:

The relevant part begins at intrinsic page 30 of the judgment where Lord Justice Hobhouse begins his discussion with a short trot through the history of the Property Law Act 1925 in the United Kingdom, at that time the relevant provision of section 136 of the 1925 Act, and that's the equivalent of our current section 50 of our Property Law Act 2007, and he sets it out, which has the effect that there can be a legal assignment of choses in actions, including debts, whereas formerly they could only be assigned in equity, and then in the middle of the page begins to talk about the cases which had considered that, beginning with *Comfort v Betts* [1891] 1 QB 737. *Comfort v Betts* was a case where a plaintiff had sued as an assignee of a debt and the defendant had said that the assignee or the assignment of a debt for the purpose of suing to recover wasn't a valid assignment because it was done in the knowledge that you'd have to sue. So in the second to last paragraph on that page there's a reference to the judgment of Lord Esher, Master of the Rolls, where Lord Justice Hobhouse says that he was somewhat unhappy

about the practical consequences of the judgment and the growth of a new business of debt collecting, “Together with the feature that the ability to aggregate debts in this way would remove the claims from the jurisdiction of the county Court,” however held that is bound to give effect to the plain words of the Act and to hold this is a valid assignment of these debts within its terms and therefore that it pass legal property and into the plaintiff.” Other members of the Court did not feel any doubt, he refers to Lord Justice Fry, “I know of no legal or equitable objection to the owner of a legal chose in action converting someone else into the legal owner and himself into an equitable owner only.”

I then go over on the following page to *Fitzroy v Cave* [1905] 2 KB 364, an early 20th century case, and that was a case where there was a defendant had a number of trade debts which were assigned to a plaintiff all as one lot and the plaintiff sued and, as can be seen between lines (c) and (d), there was evidence that the plaintiff was motivated by a grievance that he had against the defendant and had taken the assignment with a view to procuring the bankruptcy of the defendant, and at trial Justice Lawrence thought that the assignment for that reason was invalid as savouring of maintenance or otherwise against public policy. So that appeal of that decision was successful and rationale appears in the succeeding paragraphs, but for example between (f) and (g) the then Master of the Rolls said, “The title of the assignee was absolute and could not be impeached because he acted maliciously in contemplation of the law enforcing it,” and similar comments can be said about the following decision of Lord Justice Cozens-Hardy, and it goes on in the same vein over the page to 32, the sided paragraphs in the middle of page (b) to (f) about six lines down, “by the Judicature Act 1873 any debt is made assignable at law by an absolute assignment in writing of which notice is given. Henceforth in all Courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods.” Down the bottom again on the question of motivation which looms large in my submission’s submissions, “I fail to see that we have anything to do with motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. Debts are a species of property,” continues

Lord Justice Hobhouse, "Recognised before 1873 in equity. Like other species of property they may be transferred to another and the legal rights which are incidents of that property may be exercised by the new owner of that property." And I will come in due course to what those legal rights are in the case of this particular debt.

ELIAS CJ:

So and whether it, yes whether it is analogous to property.

MR SMITH QC:

Over the page, third line down, "Similarly it does not raise a question of maintenance or public policy if the terms of the assignment include a provision that the assignee may account to the assignor for some or all of the proceeds of litigation to recover the assigned debt," so you could have an agreement as here to pay some of it back if you win. Further down at line (c), "However the fact that the debt may have to be sued for or that it is expressly contemplated that the debt will have to be sued for, does not alter the position. Suing for an assigned debt raises no question of maintenance." Then the bottom at (g), "I do not consider that in principle it is relevant whether or not the debt is disputed by the debtor. If there is a debt it is a species of property and the fact that the debtor disputes it, ex hypothesi wrongly, does not make it any the less a debt." And then consistently with that, over the page down between lines (f) and (g) a commentary on the, not by then emerging, but well established business of debt factoring; "It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The editors also point out in word which echo those of Longmore J in the present case that the practice of assigning or selling debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise." We then have –

O'REGAN J:

When you're talking about the "debt here" –

MR SMITH QC:

That was slightly different here –

O'REGAN J:

– you're talking about the debt that was owed to Hanover by Property Ventures?

MR SMITH QC:

I am, I'm talking about the debt that was owned by Hanover to Allied then, sorry PVL to Hanover, assigned to Allied, assigned onwards but with the debt, as I'll come on to say, is assigned a variety of securities over various forms of property as are described, which includes choses action and enforcement powers which entitle the assignee of the chose in action and the person holding the security over the other rights to sue, to vow to save those rights. It may well be that the right of action you have in order to recover your debt as a GSA holder, is quite different from the debt, but nevertheless it is something which you have been given security over to enforce for the purpose in turn of recovering your debt. There may be a number of such causes of action. It could, for instance, in this case have been some patent legislation, litigation completely unconnected with the actual debt itself, but nevertheless an asset and –

ELIAS CJ:

Property.

MR SMITH QC:

Pardon?

ELIAS CJ:

But if so, property. I mean the issue is whether this crosses a line.

MR SMITH QC:

That would be the issue, yes.

O'REGAN J:

A patent's a bit different isn't it, because that actually is a property interest?

ELIAS CJ:

Yes.

O'REGAN J:

This is just a claim for negligence.

MR SMITH QC:

It's a bad example. I should have just mentioned some right of action, yes. So and particularly useful perhaps in light of my friend's submissions to Your Honours is what you see from Lord Justice Hobhouse at the top of page 35 and there he has begun to discuss, just beginning on the previous page, the difficulty which the defendant bank had in *Camdex,* what happened in *Camdex* was that there was simply a case of debt factoring to Camdex who wanted to enforce the debt. And you'll see that at the top of the page, Lord Justice Hobhouse says that, "The price paid by the plaintiff to purchase the debt was heavily discounted," and he puts it at just over 4 million Kuwaiti dinar. It was indeed heavily discounted because the amount of the debt, as one can see from an earlier part of the judgment, inclusive of interest, was slightly over 36 million dinar as opposed to 4 million dinar. So it was heavily discounted. But he goes onto say, "There's no evidence that this represented anything other than a commercial valuation of the debt. The debtor was and is insolvent and unable to pay its debts in the ordinary course. It has entered into an arrangement with a number of its creditors, the value of a debt depends on a number of factors, including its maturity date, the current interest rates and the currency fluctuations but ultimately the most important factor must be the credit-worthiness of the debtor. Here the credit rating of the debt of the defendant is minimal and the payment of heavily discounted price for the debt was appropriate."

And then he goes on down the bottom of that paragraph, "If the judgment of Justice Longmore stands and assets of the defendant can be found which are

amenable to execution," and those assets for example could be claims if they were given security over, we don't know in this case, "The plaintiff may at the end of the day have made a profit on the transaction. But that does not invalidate the assignment of a debt. Why else should a commercial entity purchase a debt?" And he gives authority for that. So in that one paragraph the Court of Appeal in that case puts paid to a suggestion that one can examine the motives and if they're found to be profit-based, that an arrangement can be struck down as an abuse of process or maintenance or champertous for that reason. And it goes on elsewhere in the judgment to say that this is gist of the stuff of international debt collection and factoring. We may not like it but we know that there are vulture funds who make it their business to acquire enormous debts for relatively small amounts of money and make what some would regard as very, very high profits. But of course we can't look at that in isolation, we also have to note that in doing so they take commensurately, gigantic risks and spend very large amounts of money in order to collect the debts, not always successfully.

Then in some pages over Lord Justice Hobhouse deals with *Trendtex. Trendtex* was a different, this is on page 37, was a different type of case. Trendtex was in litigation with a Nigerian bank and Credit Suisse was a creditor of Trendtex and therefore it had a legitimate interest in helping *Trendtex* recover via its litigation with the Nigerian Bank. However what happened in that case was not that Trendtex' debt was assigned to anybody but particularly as you can see from that paragraph, that what was assigned or made available to an apparently unknown third party, was in particular the claims which Trendtex had, as distinct from the overall debt. In other words there was on the face of it in *Trendtex* what appears to have been an assignment of a bare cause of action which taken by itself plainly isn't permissible if no other statutory or other exception comes to its aid. And you can see that just below line (e), "However at this stage or at line (e) an unidentified third party came on the scene and through an intermediary offered to buy Trendtex' claims against the central Bank of Nigeria for a sum of US$800,000. Credit Suisse made an agreement dated 4 January, governed by Swiss law with Trendtex enabling Credit Suisse to sell its claims.

And shortly afterwards the intermediary came to an agreement whereby the enforced against the bank to the tune of $8 million and Trendtex took steps to strike down the arrangement as champertous," but it did so against the background and the relative benefit of having in its favour, in that argument, the fact that what had been sold was not a debt plus ancillary rights in various securities and rights of actions but a bare cause of action, thus the distinction in *Trendtex* as against *Camdex* and the distinction in this case.

ELIAS CJ:
So you emphasise the "bare"?

MR SMITH QC:
Yes.

ELIAS CJ:
Yes.

MR SMITH QC:
Well as per *Waterhouse* because it –

ELIAS CJ:
Well I guess that repeated earlier formulations –

MR SMITH QC:
Yes.

ELIAS CJ:
– but it's important for you because otherwise it is a cause of action and *Trendtex* would seem to be against you. In fact it's even, I mean at least that was contract but you say because it's linked with a debt it's consequential on a debt that's all right?

MR SMITH QC:
Yes.

ELIAS CJ:

But do you have any authority on that?

MR SMITH QC:

Yes, *Camdex.*

GLAZEBROOK J:

The next page I think you're going to tell us in.

MR SMITH QC:

Camdex specifically says, if we just go over the page – I'm sorry, there is a passage there somewhere, I may have just –

GLAZEBROOK J:

The top of page 38 were you going to refer us to?

MR SMITH QC:

Yes, that's it, "Assigned a bare cause of action and other assignments." He affirmed that, "Where the assignee has by the assignment acquired a property right and the cause of action was incidental," so that's the precise passage I was after, Ma'am.

ELIAS CJ:

Well, that's still what you have to convince us of, that it's incidental to the right.

MR SMITH QC:

Yes.

ELIAS CJ:

Not consequential but incidental, I suppose.

MR SMITH QC:

Yes.

GLAZEBROOK J:

Well, do you say incidental because it's just a general enforcement right that you're given under a security in relation to your debt?

MR SMITH QC:

Yes, it is, and then I'll come to that because I perceive it –

GLAZEBROOK J:

And is there authority specifically in relation to securities? Obviously that statement is helpful in terms of assuming there will be incidental rights.

MR SMITH QC:

Yes. It really depends – well…

ELIAS CJ:

Actually *Glegg v Bromley* [1923] 3 KB 474, I think, was that a defamation case? It might be on point. I might have that wrong.

MR SMITH QC:

I think it may have been. I perceive though the point that you're making, Ma'am, is that it's one thing to assume that why you buy a debt you're going to be able to buy or you also buy with it the right to sue to recover it. Are you buying anything else or are you having legitimately transferred to you anything else? And the answer to that, as I would submit all creditors who appoint receivers and have the receivers bring various causes of action is to be found in the terms of the debt instrument itself, which I'll come to –

GLAZEBROOK J:

But you would say that those are incidental rights to the debt itself, so if you can buy the debt itself there is nothing to stop you buying all those incidental enforcement rights that go along with it, bringing yourself with the page 38 comment?

MR SMITH QC:

Well, when you take an assignment of the debt, including the documents which evidenced the existence of the debt and the terms on which it's granted, and if that document gives you security over those types of asset as a general security agreement will do and does, and gives you enforcement powers in respect of all of those, as this does, and I'll come to it, then you get, as the assignee, provided you get the assignee of all the rights and there are no reservations, then you get in principle not merely to sue to recover the debt but in the event of a default you can appoint a receiver for instance and take any number of other enforcement actions which are set out in detail in the security agreement, and one of those will generally be that you get to take either in your own name or in the name of the company, but generally via the receiver, any action which could succeed and which the company has, because that is a specie for property that is –

ELIAS CJ:

Well, I don't doubt that security instruments commonly open their mouths wide enough to take all of those things. But I would be assisted by any determination directly on the point which indicates that the Courts have accepted that that is not an assignment of a cause of action which is champertous.

MR SMITH QC:

I think the nearest I can come to it is *Camdex*, where *Camdex* – I've got two answers to that. First of all, *Camdex* says, "Well, if you buy the debt then axiomatically you get the right also to sue for its –

ELIAS CJ:

But I wasn't talking about this sort of thing.

MR SMITH QC:

No, but the reason why, when you buy a debt it stands to reason, one would think, that you also get the right, the bare right, with it, with it, to sue for its recovery.

ELIAS CJ:

Absolutely.

MR SMITH QC:

Whether you get anything else on assignment purely depends on what the assignor of the original creditor had itself by way of its rights and which it itself assigns to you as an assignee. So you get to be able to do anything which the original creditor could have done.

ELIAS CJ:

Well, that might be right as a matter of contract, but we're not looking at that.

GLAZEBROOK J:

Although it would be slightly odd in a situation where Westpac is taking over some small finance company and buys all the debts, that they wouldn't then have exactly the same enforcement powers that the, and for a full price, because in many instances that would be a full price, not particularly, well discounted in terms of – presumably in terms of risk but it would be odd if it didn't have the enforcement powers.

MR SMITH QC:

That's not the situation. What's referred to by Lord Justice Hobhouse isn't the situation here is it, there's no property right. The cause of action here isn't incidental to a property right here, it's just a – you're just suing someone a tort. It's not suing for a patent –

GLAZEBROOK J:

Not if the property right is the debt and any incidental rights.

MR SMITH QC:

That's absolutely right. And sorry in *Camdex* that's, with respect, absolutely right, simply for the reason that all that *Camdex* proposed to do was sue for the debt, it didn't – however there's a hint that *Camdex* may have done something else because all it was doing was getting a judgment against, then

it translated to this situation that would amount to SPF getting a judgment against PVL. Having got a judgment against PVL and having found as *Camdex* may well have found, that PVL isn't worth anything or the Central Bank of Nigeria might not have been worth anything. Then it would seek to enforce it by means of the excision of whatever rights it had under the security agreement which gave charges by way of security over the bank's property and that would require a careful analysis of what the security agreement did give them rights over or conversely, didn't. If their security agreement was nothing but a debt then it may well not have conveyed to the creditor anything but the right to sue for the debt, in which case *Camdex* would have had an empty judgment. But in this case and perhaps it's as well to turn to it because you have asked about it Ma'am a number of times, the GSA and just briefly refer to what I'm talking about.

ELIAS CJ:

No I accept that it permits this as a matter of contract between the parties. I'm just still hung up on whether it's – everything is grounded here in the debt being a species of property. As soon as you're talking about a claim in negligence it's very difficult to make that connection.

MR SMITH QC:

It's a claim in contract, contractual evidence and tortious negligence and it is the company's claim. It remains the property of the company.

ELIAS CJ:

Well if you get it.

MR SMITH QC:

No, it remains – when I say "the company" I mean PVL.

ELIAS CJ:

Yes, no I understand that but it's, yes...

MR SMITH QC:

And so PVL most certainly can –

ELIAS CJ:

It's a funny thing to, it's a strange thing to describe it as property in PVL's hands, it's a claim it has.

MR SMITH QC:

Yes.

ELIAS CJ:

And what the effect of the documents you're talking about is that the claim is assigned.

MR SMITH QC:

Yes well it –

GLAZEBROOK J:

Perhaps we should go and look at the documents to see whether that is actually what happens.

ELIAS CJ:

Well I'm sure it is what happens.

GLAZEBROOK J:

No, because but I think what you're saying is that all it is, is that one way of getting your debt in, you had security over all of the assets, anyway let's look at the document maybe.

MR SMITH QC:

You'll find it in volume 5 and I think it's the last document, it is, the general security agreement and there are a number of ways. It's very comprehensive but there are a number of ways of approaching this point. The first would be to look at clause –

ELIAS CJ:

Sorry what tab are we, under 54 is it?

MR SMITH QC:

Tab, 54 yes it is. The last document in that volume. And clause 3.1 would be where you start and you'll see that it gives security, "A charge over secured property," and before going to what secured property is, it describes the nature of the charges which are given, namely a security interest which is like a mortgage, a fixed charge and a floating charge. Then over to species of property, plus under clause 3.2 you get an assignment of choses in action. Coming to the question of what is the secured property over which a charge is given and that you find in clause 2.16 I think, towards the end of the document. At 21.6(o) on the last page, page 12, intrinsic page 12. "Secured property means all the right title and interest present and future legal, equitable in the undertaking property assets and revenues et cetera, et cetera of the company wherever situated et cetera." So in other words it's, the clause is intended when it refers to undertaking property and assets to give a charge over the entire corpus and business of the company in the widest possible sense. And so when an event of default happens or first what is an event of default, is specified in the enforcement provision which is clause 6 on page 5 and first of all there is a provision relating to acceleration, "If at any time for any reason, whether or not within the control of the company an event of default occurs then," various things can be done and amongst those is 6.1(d) "Exercise powers of enforcement," which we'll come onto shortly.

Then at 6.2 there are definitions of an event of default including non-payment. Then in 6.3 we come onto the powers of enforcement, exercisable in the event of an event of default. "It shall be lawful for but not obligatory on the security holder to, without prejudice to other rights, in the name of the company or otherwise," and if we go down to (e), "Claims of proceedings, bring, defend, submit to arbitration, negotiate, compromise, abandon or settle any claim or proceeding or make an arrangement or compromise in relation to the secured property." So by that process of reasoning, secured property would include, because it's part of the undertaking, assets and property in a

general sense of the company, any claim which it has. You give security over it, there's an event of default from, by virtue of, for instance, non-payment. You are then able to bring your enforcement proceedings by any of the means which are allowed under clause 6.3 and then finally, although I haven't mentioned it yet, for the purposes –

ELIAS CJ:

Sorry, this in a general sense, it's that really that I suppose I'm querying.

MR SMITH QC:

It's that.

ELIAS CJ:

You say it is secure within the definition in a general sense?

MR SMITH QC:

I mean to say that it's a general definition. The aim of the document is to scoop up –

ELIAS CJ:

Yes, everything.

MR SMITH QC:

– everything that the company has and there are bits of property that the company has which are defined elsewhere with more specificity.

ELIAS CJ:

But debt is regarded as property the company has.

MR SMITH QC:

Yes.

ELIAS CJ:

Claims are generally, are not because until you've secured it, it's not property.

MR SMITH QC:

For the purposes, one would think of a security agreement, let's just imagine a company which is insolvent on one level, given that it's unable to pay its debts as it falls due, but on the other hand it is owed a very large debt which simply hasn't been paid and is going to have to sue for. Let's say that suing a publicly listed company with a good balance sheet –

ELIAS CJ:

Well I don't have any problem with that.

MR SMITH QC:

Well in that case, one would regard the debt which it is owed as a species of the company's property. Let's then, it's – let's then suggest that as in this case a company has lost money against a, by virtue of the actions of a third party in respect of which it has a right of claim.

ELIAS CJ:

Yes.

MR SMITH QC:

And the right of claim would ordinarily be seen as part of its assets or property or undertaking.

ELIAS CJ:

Well where's your authority?

MR SMITH QC:

I don't have any.

GLAZEBROOK J:

Well I suppose if it doesn't include the debt then there isn't actually a problem because it's not champerty.

ARNOLD J:

Yes that's what I was just thinking.

GLAZEBROOK J:

So I mean if it includes the debt then Mr Gray's argument's – if that includes the cause of action Mr Gray's argument as at champerty, if it doesn't include the cause of action then we can all go home now. But I think what you're –

MR SMITH QC:

Can I just say that was my final point that if –

ELIAS CJ:

Well –

GLAZEBROOK J:

You're really accepting though –

ELIAS CJ:

– that's further down the track isn't it, there remains an argument to be made along these lines, but we're dealing with assuming that you're right in the submission, is it champerty so that's the way it's been set up at the moment I think.

MR SMITH QC:

I am saying that first of all, although there's no authority for it but a security agreement such as this must intend to give the creditor in the event of a default, a right to –

ELIAS CJ:

It might, it may well. My point is, has the law accepted that because it's at this intersection of what is champertous or not?

MR SMITH QC:

Not that I've, I can't say that I have seen that directly in terms but the general principle for it is that a right of action such as this just as a right to recover a debt, is a right ancillary to the debt itself. So I am –

GLAZEBROOK J:

Perhaps you shouldn't say the right to recover the debt is ancillary to the debt because it isn't because the – as Mr Gray pointed out when I put it that way, it might be sort of a contingent debt on the books of the person who is being sued but it's not until there's a Court judgment seen as a asset or a debt but so perhaps if you call it something other than a debt then we –

MR SMITH QC:

The right to proceed to recover damages for instance.

GLAZEBROOK J:

Yes. I think that's probably the better way of putting it.

MR SMITH QC:

Yes. Is under a security agreement just as much an ancillary right as the right – it could be that you're fortunate enough simply to recover the debt because all you have to do is sue the debtor which is fantastic. But the security agreement envisages that the debtor might be insolvent, hence the security and hence the breadth of the security which is given and hence the expansion of the rights given to the creditor in order to exercise those rights in the name of the company in the event that the ordinary process of debt collection.

ELIAS CJ:

Look I don't have any problem with that; I understand that that's the effect. My problem is whether it's property and therefore within the principles that are discussed in those cases but I think the point is that there is no, this is taking things a step further than any of the authorities you're asking us to look at. I accept it's not directly in front of us now, the case is proceeding on the assumption that you can bring that cause of action and the question is whether it's champertous.

MR SMITH QC:

Exactly Ma'am, but two further points. The first point is that we oughtn't to forget in all this that it is PVL which is bringing the claim. The right of action is

PVL's, it has given security over it. And all that would happen in a situation where there was an insolvency and, is that PVL is not in a position because of its insolvency to bring that cause of action to fruition itself against some third party with the result that the creditor doesn't recover for that reason and that reason alone. And therefore in the ordinary course, you would as a creditor, whether on assignment or otherwise, be entitled to take all of these actions, including suing in the company's own name or suing even in your own name according to these documents. The final point is that Justice Glazebrook's point which was one that I was going to finish off with was, if in point of fact this isn't, that there is no right of action as against PwC, that matters not for two reasons, the first is that an action has already been taken by PVL itself which whether it succeeds or not certainly has a right to sue, and the second point is that it would denude the assignment of any champertous effect if in point of fact it didn't at law convey or purport to convey a right of action. So in the end it should matter not.

GLAZEBROOK J:

Can I just take you a bit more slowly through the agreement because – can we go to 3.2 of that agreement, which is the assignment of choses in action – do you, I think Mr Gray said that that this claim against PwC is a chose in action. Would you agree with that, or would you say that that clause 3.2 was something else?

MR SMITH QC:

It is also a chose in action. The right of action is of the secured property because it is part of the property, and it's also a chose –

GLAZEBROOK J:

No, I understand that, but there are specific indications as to what's within security. I know you say that it's within the secured property because it's within the definition, but that one is the one that talks about the assignment of the chose in action.

MR SMITH QC:

Yes.

O'REGAN J:

Well, does it? It just talks about accounts receivable doesn't it?

MR SMITH QC:

I'm sorry, Sir?

O'REGAN J:

It has a heading, "Choses in action," but the actual text says, "Assign for present or future accounts receivable.

ARNOLD J:

Accounts receivable, yes.

GLAZEBROOK J:

Is that just all that's related to?

MR SMITH QC:

Yes, it is.

O'REGAN J:

It's a bit odd actually, because…

GLAZEBROOK J:

It is a bit odd.

MR SMITH QC:

It is odd.

ELIAS CJ:

Well, it's certainly not accounts receivable, so you'd have to bring them under something else.

GLAZEBROOK J:

Well, that's what I was asking, whether that was more general or whether it was just looking at accounts receivable. But the point about it is that, what I was just going to refer to is the release of security, because we're assuming this is an assignment to a bare cause of action but it's actually, in itself it can't be an assignment of a bare cause of action because if you paid the debt then the security holder has absolutely no rights in the cause of action.

MR SMITH QC:

They disappear.

GLAZEBROOK J:

The only rights in the cause of the action that arise arise upon default.

MR SMITH QC:

Yes. Well, the –

GLAZEBROOK J:

So there's no purporting to assign except by way of security any…

O'REGAN J:

Well, that's to the first security holder, but this was assigned when they were in default. If the assignment from Hanover to Allied was when they were in default.

MR SMITH QC:

Of the rights inchoate prior to default.

O'REGAN J:

Yes.

MR SMITH QC:

And then after default –

GLAZEBROOK J:

But does that make a difference? Because at that stage you still don't assign the cause of action do you?

O'REGAN J:

Well, that's the $64,000 question.

GLAZEBROOK J:

It's still a security isn't it?

MR SMITH QC:

Well, it remains a security…

GLAZEBROOK J:

I mean if somebody just buys this debt as an insolvent debt with no funding agreement whatsoever, they just get all the rights of enforcement don't they? Does it matter because they're insolvent that the rights of enforcement might have already arisen or…

MR SMITH QC:

No, they simply take an assignment of all of the rights whether they have arisen yet, whether they, if they have arisen whether they're exercised or partly exercised at this stage, they simply take over and stand in the shoes of the previous owner of the debt, subject of course to the actual terms assignment, but this is a complete assignment.

GLAZEBROOK J:

Well, the argument would have to be that either you can't do that when somebody's already insolvent because you already have the rights to sue someone else and that becomes champertous, or that you couldn't actually include in the security rights in the first place or, if you did, you couldn't assign it.

MR SMITH QC:

You still have the right to the debt, it's still owed to you. It may well be that –

GLAZEBROOK J:

Sorry, so if you say this is a champertous agreement that's what you'd have to say, that either you aren't allowed to have this sort of agreement at all or you aren't allowed to assign it.

O'REGAN J:

Well, no, because here the assignment happened after the litigation had been commenced.

MR SMITH QC:

Yes.

O'REGAN J:

So it's quite a different situation from when the GSA was entered into and litigation was just a prospect in the future. But this assignment from Allied to SPF was after the litigation had commenced.

MR SMITH QC:

As will often be the –

O'REGAN J:

So there was a claim in actual existence.

MR SMITH QC:

Yes, as one would expect would ordinarily be the case with the factoring of distressed debt, which there's nothing unusual about that, in fact that's the…

GLAZEBROOK J:

Well it may not already be in existence actually, it may just be an asset that the person buying the distressed debt knows is available.

MR SMITH QC:

And that's absolutely right. And the existence of the right of action or whatever the secured property is, underpins the purchase, the arrangement whereby the debt is purchased on assignment together with all the rights. If it didn't exist, that is to say one or other of these enforcement rights, then one would assume that the assignment wouldn't take place and never would in the commercial world, simply for the reason that on an insolvency it –

GLAZEBROOK J:

There isn't anything there to get out of it.

MR SMITH QC:

There's nothing, and it runs contrary to the entire purpose of security documents that say on an insolvency you can execute against a variety of rights or property rights as described.

GLAZEBROOK J:

But it can't matter if for champerty whether the claim has already been set up or whether it's a prospective claim, can it?

MR SMITH QC:

It can't make any difference.

GLAZEBROOK J:

So either it's champertous to sell it anyway or to have it in there in the first place or it's not I would have thought.

MR SMITH QC:

The question of champerty or not doesn't, in my submission, I respectfully agree depend on the time of issue at all.

In any event so what I am saying is that where we end up is that what LPF, well if there was an insolvency and there was secured debt and you have a creditor in the shoes of Allied, Allied would, supposing it was able to, would

enforce by appointing a receiver. If it appointed a receiver it would almost inevitably need, this case would need itself to fund the recovery action, whatever form it took, simply for the reason that PVL had no other assets. So in terms of the question of funding –

ELIAS CJ:
But you know, even the use of that term "recovery" is a bit odd an application to claim for compensation.

MR SMITH QC:
It's recovery by means of pursuing the claim for compensation. In other words – I'm using a shorthand but once –

ELIAS CJ:
Yes.

ARNOLD J:
Can you – there's just something here that's slightly puzzling me, I've obviously missed something in the – but if you look at clause 6.3, "Powers of enforcement," you referred us to, "(e) Claims and Proceedings," and that claim or proceeding as I read it, has to be in relation to the secured property, is that right?

MR SMITH QC:
Yes it does, and so the secured property –

ARNOLD J:
And the secured property isn't defined?

MR SMITH QC:
No the secured property is the entire undertaking of the business as defined.

ARNOLD J:
Is there any definition of it?

MR SMITH QC:

In the agreement yes.

ELIAS CJ:

Yes at 12 –

ARNOLD J:

I missed it, sorry.

MR SMITH QC:

It's the one I first took you to on the final page, page 12, intrinsic page 12, paragraph – clause 21.60.

ARNOLD J:

Right, sorry I missed it, yes.

MR SMITH QC:

Where I submit that leaves us is that if you had Allied unable to recover its debt and proposing to put the company into receivership and exercise the various powers that are given to the receiver to seek to collect an asset, including claims or the value unrealised, then it's usual and unquestionably the case, in this case that Allied would have had to have funded or any person in Allied's position would have funded, had to have funded a receiver to do that. There were no assets within PVL's coffers to do that. That would be a perfectly de rigueur receivership and we all know that receivers frequently sue corporation trustees, auditors and the like relying on the powers which –

GLAZEBROOK J:

Are you talking about receivers, agents of the company or –

MR SMITH QC:

Well they're agents of the security holder, the creditor in this case.

GLAZEBROOK J:

You're talking about agents of the security –

O'REGAN J:

They're appointed as agent of the company.

GLAZEBROOK J:

They're usually appointed.

MR SMITH QC:

Well sorry they are, they're appointed by the security holder as agents of the company.

O'REGAN J:

Yes.

GLAZEBROOK J:

But as agents of the company usually.

O'REGAN J:

But you're saying the security holder will have to fund them in reality because there wouldn't be any money, yes.

MR SMITH QC:

My point is that the security holder is going to have to fund them otherwise it's simply not going to happen. Now nobody has ever suggested that that is champerty, it's simply exercising your powers under a GSA in order to recover the debt by means of recovery of whatever assets are able to be realised in the course of the receivership or other insolvency. My central point is that what is happening in reality here, albeit that it is a liquidator, is precisely no different. A liquidator would need to be funded, just as this one needs to be funded in order to proceed in PVL's name and his own name against PwC and the various other defendants, that wouldn't ordinarily be seen as champerty or maintenance, and it's very difficult to see why it is, it's suddenly become so merely because of the contemporary existence of a funding agreement. In particular in this case were it to be case that SPF were to take

all of the proceeds, that's to say not just the recovery of the project costs, the legal fees and experts fees, and not just the so-called services fee, which is now 42% of the net proceeds, but the balance which is secured up to the level of whatever judgment is obtained, then it takes that balance above the recovery of the project costs and the services fee not as a funder but qua security holder. It makes no difference to PwC or any defendant in its position –

O'REGAN J:
Well, yes, but the liquidator shouldn't be doing it if there's nothing in it for the…

MR SMITH QC:
I'm sorry, Sir?

O'REGAN J:
The liquidator shouldn't be doing it should it? If there isn't anything in it for the creditors for whom the liquidator's responsible they shouldn't be taking the action should they?

MR SMITH QC:
That's another issue and I'll deal with that presently.

O'REGAN J:
I mean, that's why I'm not sure your analogy with the receiver appointed by the security holder being exactly the same as the liquidator really stands up.

MR SMITH QC:
I'll come to that in due course and say that, A, a liquidator can do that and, B, even if he, and any liquidator can't but is, then that doesn't taint the proceeding as champertous and, thirdly, as a factual matter he is in it for the unsecured creditors in any event. But I'll come to those presently. All I'm saying – because that's the second point, the second overall point that I wanted to address – all I am saying for the present is that so far as a funding

exercise is concerned what is being done here by means and through the process of liquidation is in essence no different from what would be done during the course of a receivership, not only would Allied have been entitled to initiate that receivership had it not assigned the debt but SPF as a subsequent assignee would have been perfectly entitled to do the same thing itself and in fact as would any number of subsequent assignees, I say without limit, there is no limit to the number of assignments that can be made, and that is something which in my submission simply has to be faced as a commercial reality and there has to be some practical and, in substance, differentiation between those two sets of circumstances which renders this one distinctly champertous.

O'REGAN J:

So do you say as soon as the assignment document includes something in addition to the cause of action champerty's ruled out?

MR SMITH QC:

If the assignment document includes all of the rights over all of the property over which charges are given and all the rights of enforcement, and it is all ancillary to a debt and there is an insolvency and you propose to exercise one or more of those ancillary rights, it's a de rigueur receivership, just like those which we see in other contexts all the time.

O'REGAN J:

That isn't quite what I asked you though.

MR SMITH QC:

Sorry?

O'REGAN J:

That isn't quite what I asked.

GLAZEBROOK J:

But don't you start from the premise that you assigning the debt and ancillary right, so the answer to Justice O'Regan's proposition is probably no, that's not what you're asserting, what you're asserting is if you're assigning a debt you can assign ancillary rights, which is a slightly different proposition.

MR SMITH QC

Well, I am asserting that, it's just a question of what in point of fact was done, and it is possible to assign with the debt all of the ancillary rights and –

GLAZEBROOK J:

Well I think the way Justice O'Regan put it is if when you are assigning a cause of action you assign something else with it that makes it okay. I was just saying I didn't think that was your proposition, your proposition was you are entitled to assign debts –

MR SMITH QC:

Yes it is.

GLAZEBROOK J:

– and if you then assign with them ancillary rights to that debt which include these sort of rights, then that is not champertous.

MR SMITH QC:

That's not champertous, it's the exercise. It is – perhaps it's best to exaggerate to make the point, it is the exercise of the original lender's rights, it is in no sense different unless we're going to make new inroads on the law of assignment which Lord Justice Hobhouse –

O'REGAN J:

I'm just trying to get the extent to which your argument goes. So is your argument in saying if the assignment's part of a security arrangement that covers an outstanding debt that can't be champerty or are you saying any assignment – because your general proposition seems to be, this isn't just the

assignment of a cause of action, it's assignment of a whole lot of other things as well and this is just one small part of it –

MR SMITH QC:
Yes.

O'REGAN J:
– I'm just trying to get from you, is your proposition that anything in addition to a cause of action is enough to take champerty out of the play or is it only if the cause of action's a small part of what's assigned or is it something else?

MR SMITH QC:
No, anything in addition to the debt which is assigned enables you to –

O'REGAN J:
No, anything in addition to the cause of action.

MR SMITH QC:
I'm sorry any –

O'REGAN J:
Anything in addition to the cause of action is what I asked. So –

MR SMITH QC:
Yes. Well yes.

O'REGAN J:
Is your, are you saying you have to have a 30 page general security agreement with a whole lot of rights in it, only one of which on page whatever it is refers to a cause of action, that makes it, takes it outside the scope of champerty or are you saying if you assigned the cause of action plus one other thing that would be enough?

MR SMITH QC:

As long as it was that, the one other thing that you were assigning was the thing that you were suing on, yes it probably would be but I confess that I hadn't thought of it in those terms, simply for the reason that one would ordinarily assign the whole caboodle as has been done here. But I suppose that in that situation one would look very carefully at what was being assigned to ensure that it complied with the Property Law Act and complied with the general rule that the assignment of rights ancillary to a debt and its recovery.

O'REGAN J:

Property Law Act only applies to assignment of debts though doesn't it. So if you weren't assigning a debt, if you were just assigning the right to sue someone, that's not a debt?

MR SMITH QC:

No it's not. If you're just assigning the right to sue somebody, you can't, it's automatically champertous. There's no question about that. Outside I have to add, outside the circumstances in which even an assignment of a debt by a liquidator in two circumstances is permissible under the Companies Act 1993, if it's the company's property then there's ancient authority to show that a liquidator is perfectly entitled to do that. If it is instead a claim which the legislation vests in the liquidator then under section 26(a) of the Companies Act, Schedule 6, with the Court's approval it can assign that.

ELIAS CJ:

Can I just ask because it arises out of that. In the authorities you took us to, I don't think in principal they turned on whether there was an actual assignment because the enforcement of the debt necessarily included, you know the right to bring proceedings or something like that. Should it matter if there is a general rule in law that you can't assign a cause of action, does it matter that it comes within the terms of an assignment of interests; isn't the real question whether it's, whether it is properly characterised as part of the enforcement of the debt? I mean does the terms of the assignment, do the terms of the assignment matter, because we have a rule of law that you can't assign

causes of action and so the critical thing surely is, is it incidental to enforcement of the debt.

MR SMITH QC:

Yes, well, that is a critical point, and how you would resolve that is to look at the terms which the lender had seen fit to impose in the first instance, by which the lender obtains security for enforcement should that be necessary.

ELIAS CJ:

Well, I can see that that as a matter of evidence might be helpful, but I can't see that it would be determinative if you operate against a rule that you can't assign causes of action.

MR SMITH QC:

If you had, for example, an assignee taking an assignment with a debt seeking to enforce the debt but who alleged for instance that there was with the assignment of the company's property a wholly personal right, for example, in defamation or, for example, in family law of that sort, then it may well be seen that a purported assignment of that cause of action as part of a security agreement, even if it was purported to be given as security, wouldn't even with an accompanying debt, let alone by itself, be seen to be a valid assignment, it just isn't, it's not, it is a bare cause of action in any circumstances.

ELIAS CJ:

Well, for example, if you had a debt because you'd advanced money on a valuation you couldn't assign a claim against the valuer –

MR SMITH QC:

Not by itself.

ELIAS CJ:

Well, even if you assigned your debt collection against the principal debtor, I can't see that you could assign any backup claim against the valuer could you?

MR SMITH QC:

Yes, you could, in my submission.

ELIAS CJ:

Could you?

MR SMITH QC:

If you were a company which had given a security to a creditor for the advancement of funds and you had given security in the terms that we see in this GSA and amongst the assets of the company was a building which it had purchased in respect of which the valuation had been given and the valuer had been negligent, then the company has a claim against the valuer, yet to be seen whether it produces anything, and that is amongst the secured property because it is part as per this GSA's provisions, part of the property undertaking and assets of the company in the broadest sense, that is exactly the sort of claim that a receiver would seek to bring an act on in order to raise funds to apply to secured and other debt.

ELIAS CJ:

And what's the policy reason why a cause of action can be assigned in those circumstances but not as a stand-alone thing, what's the policy?

GLAZEBROOK J:

Are you actually assigning it though? Because if you are assigning it it can only be by way of security.

MR SMITH QC:

Yes.

GLAZEBROOK J:

All you're actually doing is saying, “We can make you take this action.”

MR SMITH QC:

Precisely.

GLAZEBROOK J:

So our receiver can make you take this action.

MR SMITH QC:

Precisely.

GLAZEBROOK J:

I was actually just looking at –

MR SMITH QC:

And you’ve taken the name of the company as the provision suggest. So in other words, it hands over the management, the collection of assets, it’s a realisation of the company’s affairs, et cetera, to a receiver, for instance, or for that matter a liquidator, the liquidator then acts in the company’s name to realise that property involving claims against third parties, if that be the case, to place the company in a better position to pay creditors.

O’REGAN J:

But the real problem, if there is one, comes when the secured creditor itself goes broke, as Hanover did, and then the security agreement is transferred with that right in it.

MR SMITH QC:

Well, I wonder whether that is a real problem because with Hanover – in some ways best to keep that name out of it – but whether Hanover went broke or not and whether it did so before or after, it can always assign for whatever reason a security and, as Lord Justice Hobhouse says, looking into the motivations behind the assignment’s not a relevant line of inquiry. So it can

be assigned at any time, it's not something which pertinently ought to be gone into in my submission.

O'REGAN J:
No, I'm really just dealing with the argument that there isn't an assignment at the point of the entry into the GSA, because it's only a security arrangement. The assignment, if there is one, is when the GSA itself is assigned to another secured creditor.

MR SMITH QC:
There is an assignment of some property within the GSA to the creditor, and in addition to that various rights crystallise in the happening of certain events during the currency of the arrangement. Wholly and separately those rights, in whatever state of existence or exercision are assigned in this case by Hanover to Allied, to Allied to SPF, so there are two different concepts behind the assignment.

GLAZEBROOK J:
And also it can't really matter whether the unsecured creditor is insolvent itself.

MR SMITH QC:
No.

GLAZEBROOK J:
Because if there's something wrong with assigning that then it must be wrong whether the secured creditor's solvent or not solvent, if there is something wrong with it.

MR SMITH QC:
Exactly, Ma'am, and in that case one would expect that there would be, the same insolvency regime would apply to the secured creditor who in turn would be seeking to exercise its rights under the security agreement over the debtor.

GLAZEBROOK J:

And really if you can't do that there'll be all sorts of questions, well, the right to assign a debt in the Property Law Act is almost nullified because if you have to enter into a new security agreement every time you want to assign –

MR SMITH QC:

You lose priority.

GLAZEBROOK J:

– then there's all sorts of issues with priorities and matters of that kind, and if you don't somehow get security over these causes of action by an assignment and have to do something separate then there's probably all sorts of issues about priorities then that – in any event if you can't take it by assignment I'm not quite sure why you can do it directly.

MR SMITH QC:

Well, it essentially means that on the policy, because it's linked to the policy question which Your Honour the Chief Justice mentioned. If you cannot issue proceedings as a creditor, whether you've received the debt on assignment or not in these circumstances, then it means that for example an auditor who is – and I'm not talking about this – but who is directly responsibility for the deepening insolvency and losses of the company, get off scot free simply by virtue of the fact that its negligence has rendered –

ELIAS CJ:

I think if motives are irrelevant surely –

MR SMITH QC:

It's not a motive, it's a policy consideration.

ELIAS CJ:

No, well, it is – you're putting forward a motive for…

ARNOLD J:

No, it's policy result.

GLAZEBROOK J:

A policy reason.

MR SMITH QC:

No, I'm putting forward a policy reason.

ELIAS CJ:

Oh, a policy reason, I see, sorry.

MR SMITH QC:

Which really means that the creditors, be they secured or unsecured, would not be able to recover for two reasons. Firstly that –

O'REGAN J:

Yes, they would, because the liquidator could just assign it under section 260 and get the Court's approval.

MR SMITH QC:

Well, that is one other way, and if that is done then it's a lawful assignment.

O'REGAN J:

But the Court approves it though.

MR SMITH QC:

Well, it doesn't have to do it under section 260, in this case it would simply assign it outright because it's not a cause of action which has arisen as accruing to the liquidator, it is a pre-existing company cause of action, and so the assignor of the illiquid debtor as assignor can simply do it, and the difficulty about that of course we have to assume here that the liquidator has assigned anything, we say, that he plainly hasn't. but supposing that my friend were to be right and somehow the liquidator is held to have assigned something the difficulty with the argument then becomes that in any

event the liquidator was perfectly entitled to do that as a matter of law and, if it was the liquidator's own action, he could have done it with the company's approval. But the important point behind that is that therein lies the answer to the policy consideration: it's in the interest of creditors to make these assignments, if assignments they be, for the purposes of realising money for innocent creditors in company insolvencies, and that's the reason why it's done.

ELIAS CJ:
Is that a convenient time to take the adjournment?

MR SMITH QC:
Yes, it is, whatever the time is, it is.

COURT ADJOURNS: 1.05 PM
COURT RESUMES: 2.15 PM

ELIAS CJ:
Mr Smith, I should probably indicate to Mr Bigio that we would like to hear from you later Mr Bigio, just to give you some warning.

MR BIGIO QC:
As Your Honours please.

MR SMITH QC:
Yes Ma'am, just I had intended to go and do intend to go shortly to the question of the actions of the liquidator but just to round out this morning's discussion, the question of whether or not a cause of action is property of a company which is capable of being assigned to a creditor and assigned between creditors and acted on. And in particular the question of whether the, a claim of right of action is property, the – in answer to that is best perhaps found in the legislation that I was referring to before the break, namely Schedule 6 of the Companies Act and the authorities relating to it. Schedule 6 you find under tab 7 and it said, "Powers of liquidators, a liquidator of a

company has power to (a), (b), (c), (d), (e), (f), (g), to sell or otherwise dispose of the property of the company." I don't believe that a claim or a right of action has ever been regarded as other than property of the company but as authority for that the next, under the next tab you find the Court of Appeal's decision in *ALF No. 9 Pty Ltd v Ellis* [2010] NZCA 529, and the relevant paragraphs are 49 and 55. 49 Mr Hunter argued this ground for debenture holders, he accepts that a liquidator may sell a claim vested in a company pursuant to his or her statutory power, however it draws the distinction between company claims, that is claims existing at the time of liquidation which might have been pursued by IVS itself and liquidator claims, that is claims which may only be brought by the liquidator. Whereas the former, i.e., company claims which is what we have here maybe assigned, the latter may not be because they vest personally in the liquidator and are not company property. And then over the page paragraph 55, the second sentence. "Ownership of the cause of action includes all rights of control relating to it," and it cites *Re Nautilus Developments Ltd (In Liq)* [2000] 2 NZLR 505 (HC) and *Consolidated Technologies Development (NZ) Ltd v McCullagh* HC Auckland CIV-2005-404-6454, 15 May 2006. "Once it is accepted the liquidator is entitled to assign a company claim absolutely, there's no reason in principle to require him to, or her to exercise any degree of control over the litigation." Finally to the same effect is, and there are other cases besides, there is *Re Oasis Merchandising Services Limited* [1998] CH 170 (CA) in the Court of Appeal in England which you find under tab 22 in volume 2. And the relevant passage is at page 181 and it's between lines, it's the paragraph beginning just below line (d).

GLAZEBROOK J:

I'm sorry you're going to have to just give us a moment to find it.

MR SMITH QC:

I'm very sorry. Tab 22 of volume 2 of the appellants' authorities.

GLAZEBROOK J:

Okay yes, sorry what tab?

MR SMITH QC:

It's tab 22 and it's page 181, intrinsic page 181.

ELIAS CJ:

And the paragraph?

MR SMITH QC:

And the paragraph is between D and G beginning with the word, "Considerations". And half way down the paragraph the scheme of the Act of 1986 suggests, "That only the former falls within property of the company which an administrator or administrative receiver or liquidator can sell. Thus a right of action against directors for misfeasance which the liquidator, amongst others, can enforce under section 212 of the Insolvency Act 1986 and the fruits of such an action are property of the company capable of being charged in a debenture because the right of action arose, et cetera, et cetera." So in all these authorities there's –

ELIAS CJ:

So what's the contrast there?

MR SMITH QC:

Contrast, this is –

ELIAS CJ:

"Is worth fraudulent preference or fraudulent or wrongful trading." Well, one is a statutory claim is it?

MR SMITH QC:

Yes, one is a statutory claim. Well, either could be a statutory claim but the contrast is one which vests in the liquidator by virtue of its statutory functions.

ELIAS CJ:

Of the statutory functions. But these cases are really just answered now by the form of our legislation are they?

MR SMITH QC:

They are dealing with legislation which is the same legislation or similar legislation in England. But my point is that they are examples of it ordinarily being thought that a right of action which a company has is seen as a form of property which is capable of being given security over a debenture as it's referred to in *Oasis*, and which can be assigned and, even if it's not assigned, which the debenture holder by means of appointing a receiver has a contractual right to conduct in the name of the company, and the right to do that, if it is already in the GSA or debenture deed, can be assigned as with all the other powers and rights in the deed.

Now I had next intended to go to the question of the position of the liquidator and we make three points. The first is that section 254 of the Companies Act permits a liquidator to act with respect to secured property, and you find that, 254, in volume 1 of the appellant's bundle of authorities under tab 3, and if I can ask you to have that open because I'll also be referring to 253 in due course. So that provides that a liquidator may but is not required to carry out any duty or exercise any power in relation to any property that is subject to a charge. There are two views in my submission about –

ELIAS CJ:

Sorry, which section was it?

MR SMITH QC:

254, 254(a), "Except where the charge is surrendered," et cetera, et cetera, "a liquidator may –

ELIAS CJ:

Oh, "may", that it's not – sorry, yes.

MR SMITH QC:

"Not required to." Now in my submission there seem to be two views about the correct interpretation of that section. The first is that it gives – and not the correct one, I might add – is that it gives the liquidator a form of discretion or

residual discretion as it's sometimes called, as to whether or not the liquidator will so act with respect to secured property.

GLAZEBROOK J:
Will what, sorry?

MR SMITH QC:
As to whether the liquidator will so act with…

GLAZEBROOK J:
Oh, "act", right. It was the "so act" I hadn't…

MR SMITH QC:
In other words it's –

GLAZEBROOK J:
No, no, I understand, that's right.

MR SMITH QC:
In that interpretation there is a hint that the discretion might be improperly exercised or reviewable for its improper exercise without saying whether that's right or wrong or why yet. The other view is that section 254 is not a source of the liquidator's powers, rather the default position is that the liquidator will act with respect to secured property and, indeed, all property, but if for reasons the liquidator sees fit and sufficient the liquidator thinks there's no point in doing so then the liquidator has an out and need not do so, and there is a subtle and real difference between the two interpretations.

ELIAS CJ:
Where do you find the two interpretations.

MR SMITH QC:
I was coming to them.

ELIAS CJ:

Oh, yes, you're going to take us, thank you.

MR SMITH QC:

The first interpretation has its genesis in the Companies Act 1955 and a decision of Mr Justice Wylie in *Re Your Size Fashions Ltd* [1990] 3 NZLR 727, which is under tab 6 of this bundle – except that it's not, it's under tab 6 of the respondent's bundle, I'm sorry. And that was a case where the Official Assignee had been made provisional liquidator of the company *Your Size* under the old Companies Act and there was a secured creditor, which I think was Westpac. What eventuated was that there were assets in the company but they were insufficient to do more than discharge Westpac's security and so the official assignee in the absence of Westpac appointing a receiver or taking any action itself wished to avoid having to proceed to do no more than effectively exercised Westpac's rights as a debenture holder for free, which is what the official assignee would have been doing. So it sought a declaration for relief to the effect that it wasn't required to do it. Westpac appeared to have a desire to have this liquidation or receivership anyway, conducted on its behalf for free and accordingly instructed its solicitors to opposed the application and the upshot was that Justice or Mr Justice Wiley concluded that given the provisions of the Companies Act 1955, as it then was, that the official assignee had to proceed with respect to secured assets, whether he liked it or not. That came from a review of sections 251 and 58 of the old Companies Act 1955 which you see at page 732 of the respondents, of the case under tab 6.

ELIAS CJ:

We don't have tabs I think.

MR SMITH QC:

It should have it. I'm awfully sorry if mine does but yours doesn't Ma'am, that would be –

ELIAS CJ:

Where at –

MR SMITH QC:

The respondents' bundle, tab 6.

GLAZEBROOK J:

No I've got the case, sorry I thought you were referring to something else.

MR SMITH QC:

Page 732.

GLAZEBROOK J:

Okay, so of the case, okay. Sorry I thought we were going to go to the Companies Act.

MR SMITH QC:

I'm sorry, the provisions are actually in the –

GLAZEBROOK J:

That's fine.

ELIAS CJ:

I don't have it, I've got the respondents' bundle in an entirely different case. It's all right. I've probably got it, I've got it on my iPad, I've got it electronically, it's fine. Yes carry on.

MR SMITH QC:

Yes it's under the heading "Liquidator's duty" on page 732. And so the relevant passages are those which are italicised in those sections so under 251, "Liquidator shall cause the assets of the company to be collected and applied and discharged of its liabilities." And then under section 58, "With regard to the collection of the assets to the company and the application of the assets in discharge of the company's liability, shall be discharged by the liquidator as an officer of the Court." And as I say, Justice Wiley decided and I

think you find it on page 735 in the second to last paragraph. "In my view if a secured creditor does not take any steps in relation to assets which are the subject of a security or resort to them, the liquidator is obliged to collect those assets since they remain the assets of the company, he cannot abandon those assets because he's unsure whether a secured creditor intends to take any action in relation to them. Or whether indeed he lays any particular claim to them. Situations where a secured creditor chooses to collect and realise the assets which are subject of a charge, then a receiver is appointed. If he does not do so then in my opinion the liquidator is entitled to and indeed obliged to take possession of those assets." So that was the effect of the legislation as it was and it is, the commentaries say but I don't rely on them, that it's commonly thought or understood that section 254 of the current legislation is to relieve the liquidator from that conundrum so that the liquidator can decide to act with respect to secured property or not, as the case may be.

ELIAS CJ:
But it couldn't possibly be suggested that say in this case the liquidator would be obliged to pursue –

MR SMITH QC:
I'm not suggesting that.

ELIAS CJ:
– the litigation?

MR SMITH QC:
No I'm not suggesting that.

ELIAS CJ:
No, no I know you're not suggesting it but your, there's a slight lack of symmetry if you're relying on this provision, because clearly Wiley J wasn't thinking about a claim such as this as one of the assets that the liquidator has to bring in.

MR SMITH QC:

My reference to the decision in *Your Size* is purely to illustrate I would say the providence or genesis of this section –

ELIAS CJ:

Yes.

MR SMITH QC:

– and what does it mean? Does it mean that the liquidator under section 254 has an out to do what the liquidator otherwise might do or alternatively is it a source of power which the liquidator positively exercises and maybe reviewed or challenged in the exercise of doing more readily than otherwise is the case; I say the former interpretation is the better interpretation, when you have regard to the provenance of the section. It is simply to give the liquidator an out but the fact that the liquidator doesn't exercise it is not necessarily challengeable and not as readily challengeable as if it was intended to convey the positive exercise of a discretion or a power. Now if that's wrong then I go to my next point which is to take up –

GLAZEBROOK J:

What's this in aid of? Sorry I just – so what's the proposition that you're meeting which is not, because there are two interpretations. I'm not sure it matters which one we do for whatever point you're meeting but I probably haven't understood the point.

MR SMITH QC:

What I'm saying is that under section – a question has been raised as to whether or not the liquidator can act as a liquidator if it be the case that there is no prospect of a recovery for unsecured creditors and I say under section 254 –

GLAZEBROOK J:

Okay.

MR SMITH QC:

– that the liquidator can. In more recent decisions, namely two of them, there's –

GLAZEBROOK J:

But that doesn't matter which interpretation of 254 you have, does it?

MR SMITH QC:

And I would say that it doesn't unless you effectively challenge the so-called exercise the discretion, I simply say that the liquidator is entitled under section 254.

GLAZEBROOK J:

Well I suppose if they're using, I suppose one could say if you're using funds that should have gone to unsecured creditors in order to find money for the secured creditors then I would have thought on any interpretation that it might be challengeable?

MR SMITH QC:

It may well be that you, you might be flouting, as a liquidator you might be in breach of your basic duty under section 253, that –

GLAZEBROOK J:

Exactly.

MR SMITH QC:

– might be the case. However that's challengeable in another way.

GLAZEBROOK J:

Yes, absolutely. It's just I couldn't see quite – anyway it doesn't matter, I can see the point you were making.

MR SMITH QC:

The second point is that – so I'm saying because the liquidator plainly does have power under section 254 to act with respect to secured property, then

there is no basis to say he's acting without propriety here. The second point – or that the action is champertous as currently structured. The second point is the point raised by Justice Brown in the High Court which you find in the case of volume 1 and it will be under tab 9 and the relevant passages at the volume number 75 and the relevant paragraphs are 51, 52 and 55. So this point was made in the High Court before –

ELIAS CJ:
Sorry nine?

MR SMITH QC:
Under tab 9 of volume 1.

ARNOLD J:
Volume 1 of the case on appeal.

ELIAS CJ:
Of the case, sorry you're talking about the – Brown J's decision.

MR SMITH QC:
Sorry, it may have appeared if I was talking about the authorities, I'm sorry Ma'am. So volume 1, case on appeal, where this point had been made in the High Court and His Honour in the High Court dealt with it in this way.

ELIAS CJ:
And what paragraph sorry, I'm behind?

MR SMITH QC:
"51. However the fact that it's possible that the liquidator may have erred in the exercise of residual section 254(a) discretion and that consequently issues may arise as to the identity of the appropriate beneficiaries of any proceeds of the litigation doesn't translate into a conclusion that the bringing of a litigation itself involves the Court process being employed for improper purpose. A claim may or may not be sound, but if it is sound and an award of damage

against PwC is obtained, the fact that the liquidator brought the proceedings for the intended benefit of the wrong interested party cannot taint the proceeding itself. It may have the consequence that ultimately any proceedings may required to be, proceeds may be required to be distributed in a manner somewhat differently from the way the liquidator and SPF envisaged. Or if such different distribution cannot be effected then the unsecured creditors may have other remedies." And then finally under 55, "However if there is a legitimate cause of action which is properly the subject of the Court's process, it does not follow that the proceedings should be summarily halted because complaint may be able to be made by unsecured creditors as to the ultimate distribution of the proceeds from a successful outcomes. The assumed irregular conduct of the liquidator with reference to the different interests of secured and unsecured creditors does not constitute an abuse of process on the grounds that Court's process was being employed for improper purpose," and in my submission that is a second and, in itself, sufficient answer to the complaint. It may be wrong, just supposing it was, but it doesn't render the proceedings champertous.

GLAZEBROOK J:

I'm not quite sure how you could divvy up the proceeds differently because of the liquidator's actions because I would have thought the secured creditor has whatever the rights under the security the secured creditor has. It may be that if they've improperly used funds in order to fund it you might be able to say, "Ah, well, the secured creditor has to cough those up."

MR SMITH QC:

Yes, I think if –

GLAZEBROOK J:

Or the liquidator might have to pay it to him or herself if that's been improper.

MR SMITH QC:

The point is, the essential point I think underlying your point, Ma'am, is that if you're a secured creditor, and there a number of them here, more than just

Allied, then irrespective of any wrongful action by a liquidator the funds derived from an action still have to be applied in the Companies Act cascade priorities.

GLAZEBROOK J:
Well, that's what I would have thought.

MR SMITH QC:
Yes, that almost is right, with respect, and almost certainly can't be interfered with. But if an unsecured creditor has an issue with what the liquidator has done, then it may be difficult for them to bring home any remedy whereby the priorities are disrupted, but that that is the course that they would have to follow, and simply because it's difficult doesn't –

GLAZEBROOK J:
Well, it might be a personal action against the liquidator I suppose to say that it was improper.

MR SMITH QC:
It could be.

GLAZEBROOK J:
But of course you would have to have no chance of there being funds coming through to the unsecured creditor at that stage I suppose.

MR SMITH QC:
In which case one would wonder whether there is any proper or sensible right of action available to unsecured creditors in the first place.

GLAZEBROOK J:
Yes.

MR SMITH QC:
So that is the reason why Justice Brown was, may I say, deliberately open in his paragraphs, because he wasn't purporting to set out exactly what the

remedy could be, and just because there might in practice be none doesn't destroy the point.

So that's the second point. The third point is in relation to the disposition of the funds which are derived, if any, as a result of the action, and there have been four affidavits concerning that. There was first of all – and it's probably useful just to look at those because that covers in a very brief format the evidence about what is to happen." First of all there is the affidavit of Mr Woodhams, and that can be found in the case in volume 3 and it's at tab 12, and the relevant paragraphs are 3.2 through to 6 – it's tab 17, I'm very sorry. So at paragraph 3 he says, "In that regard I note that I commenced discussions with Mr Walker August 2012 regarding," 3.2, "LPF's need to ensure that the funding subsidiary, which was to be SPF, acquired the outstanding Allied loans and associated securities," which have been the subject of Mr Gray's submissions, "so that they were not obtained by Mr Henderson or parties related to him." Obviously both Mr Walker and SPF as it was to be were concerned that a secured creditor such as Mr Henderson, if he had acquired the Allied, formerly Hanover, debt could simply step in, appoint a receiver and collapse any claims by settling them for an inadequate amount, and there'd be no question of any unsecured creditors getting anything after that or, indeed, anybody getting anything, and this is remarked on and accepted in the Court of Appeal and correctly so in my submission.

Paragraph 4, "Mr Walker raised with LPF that the creditors of PVL, including the unsecured creditors and its subsidiary, should benefit from these proceedings in the event of successful outcome. Whilst not a legal commitment, LVF has indicated to Mr Walker that it will work with him to allocate proceedings of any Allied loan recoveries to appropriate interested parties." 5, second sentence, "As such, LPF's reputation and belief is that litigation funding should play an important role, et cetera. Our expectation is that the allocation of proceeds of the Allied loans will be consistent with this. There is a clear understanding that this will be considered at a time when the judgment is received and, finally, however both the liquidators et cetera have always been conscious of the fact that until there has been a successful

outcome of these proceedings there may be nothing to allocate and accordingly whilst there is this understanding we have not seen the need to engage in the complex process of reaching agreement until such time as there is something to allocate. This is especially the case because when SPF acquired the Allied loans no particular thought was given to the precise distribution of the judgment. Some acquiring the Allied loans was a purely defensive move," et cetera. I might add that at present nor is it known what is the level of unsecured creditors. My friend has mentioned the figure of $750,000. I am unable to give you a clear figure but I can tell you with certainty that at least on one account the level of unsecured creditors is higher than that because the company had issued mandatory convertible notes to mandatory convertible note holders in the sum of 25 million at least. They rank at or below the level of unsecured creditors and so they won't be paid as unsecured creditors unless funds are derived which go to that level.

In addition, albeit that it's a preferential creditor of the Inland Revenue is in there for 7 million, so we already have 32 million of unsecured debt or debt at a similar level, and there is more besides. The reason for the uncertainty about that is because the liquidator appreciates that it is a very, very significant task to establish what's the correct level of unsecured debt, and until he know what he has to allocate he's not about to spend weeks working out that and approving claims, disapproving them, going through the exercise of dealing with those who resist the rejection of claims and so on and so forth. However, there is clearly more than $750,000 involved in the unsecured creditor level.

O'REGAN J:

Is there any evidence about that?

GLAZEBROOK J:

I was just going to ask that.

MR SMITH QC:

My only defence to your query is that there's no evidence as I understand it of the $750,000 level either.

ELLEN FRANCE J:

Well, there is some material about the $750,000.

MR SMITH QC:

Yes, I don't think it purports to be complete in any way at all, and I don't think it's a matter of dispute that there were mandatory convertible note holders who rank at that level. I mean, it's sufficient for my purposes to accurately observe that the level of unsecured debt is as yet unascertained for the reasons mentioned. Now that's Mr Woodhams –

O'REGAN J:

This arrangement does seem incredibly fuzzy, just to say, "We'll look after you," you know, "We've got our arm around your shoulder and when the chips are down we'll look after you." I mean, that's not usually the way you enter into legal agreements, is it?

MR SMITH QC:

"Don't worry, my friend…" I'll carry on with the – it becomes clearer. But not yet, I just want to take you to the next affidavit, which is but one paragraph, and that's under the next tab, 18, where Mr Walker confirms that the position is as Mr Woodhams described it. He says, "He and I can confirm those discussions were had and content of those discussions I can also confirm that I share the understandings referred, et cetera." Now that was sufficient for the Court of Appeal, namely it was clear that it was a defensive move to acquire the security of GSA and, secondly that the liquidator was proceeding in the reasonable expectation, depending on the size of the judgment, of realising funds for unsecured creditors, if he is legally obliged to do that, or legally obliged not to embark on this litigation without a prospect of doing it, and it was only a question of how much and when. However, when leave was given in this Court the subject was specifically raised, and that resulted in two

further affidavits, one from Mr Wilson, which is in the application to intervene volume, and the relevant, it's a longer affidavit, but the relevant paragraphs are at the end. Under tab 1 of this volume.

ELIAS CJ:

Sorry, which volume? I think ours have just…

MR SMITH QC:

Are they loose are they? I'm sorry. It is Mr Wilson's affidavit which has been filed as a separate document.

ELIAS CJ:

There's only one affidavit, isn't there?

MR SMITH QC:

Only one. There's his affidavit and another one of Mr Walker which – anyway. Mr Wilson's affidavit is longer but the relevant paragraphs are 21 onwards and it firstly updates the Court with the relatively recent, since the Court of Appeal decision, acquisition of a further security, that which had formerly been held by DFG, another financier of PVL. The difficulty there was it seemed to be the case that DFG were thinking of selling that, and it was understood that that might also be sold to Mr Henderson, as recorded in this paragraph, and so SPF decided to buy that security as well. But the terms of the acquisition of that security recorded in paragraph 22, which refers to what's called the DFG deed, which is annexed, and then the relevant terms for present purposes are summarised in paragraph 23 of Mr Wilson's affidavit. The terms of the DFG deed provide the net proceeds for the proceedings in addition to a return to SPF No. 10, the parties will make the following payments and that includes item C, a return of a minimum of $500,000 and potentially up to $1.65 million for the creditors of Dominion Finance Group Ltd in receivership and liquidation.

Then in relation to money coming out of a realisation of the Allied security, that's dealt with in paragraph 25, second sentence, "SPF has undertaken that

the liquidator of PVL will receive, should the proceedings be successful, and following payment to SPF for the funded project costs, the other costs, a services fee in accordance with clause 4.1, 10% of the net proceeds up to 75 million, and 50% thereafter."

So I then want to take you finally, just on the factual aspects of this part of the argument, back to the case volume 1 and under tab 9 which again is the High Court's decision. There is a table which is referred to in paragraph 16 on page 65 of the volume and that table is replicated in the Court of Appeal's decision. So the first thing I have to say about this, of course, is that all of the number's in it is for illustrative purposes only, all of the numbers in it must inevitably change, who knows what the resolution sum is going to be. Certainly project costs would be higher and liquidator fees et cetera could expect to be higher, but simply adopting this, since the High Court and the Court of Appeal thought it useful for illustrative purposes, this would tend to indicate that you, there would be a resolution sum of 334 million, less project costs which is deducted under the funding agreement, legal fees et cetera. Net resolution sum of 331. SPF services fee is 42% comes off that, and that amounts to $140 million. Liquidation costs then come out, leaving a net amount available to PVL creditors. The SPF secured creditor was then stated to be $188 million leaving but 209 for the other creditors, and of course at that rate there are some other secured creditors there as well. The effect of the undertaking which is referred to in Mr Wilson's affidavit if you adopted these figures would be to provide in rough terms the unsecured creditors with 10% of the balance between, up to 175 million of the balance available for the secured creditor, and then after that 10% when it goes above 75 million, making in round terms approximately 58 to $59 million. Now I hasten again to say that the is a purely theoretical exercise, it could be more, it could be less, just as any of these figures could be more or could be less, but one can see that for important present purposes there is a realistic expectation if the claim succeeds of money, and a significant sum of money at that, becoming available for the purpose of applying to unsecured creditors.

ELIAS CJ:

Is there any reason why the liquidator hasn't sought a direction from the Court to bring these proceedings. I mean, that could have happened couldn't it? I'm just thinking of that in connection with this evolution of what might be made available, which emerges at the second appeal stage, whereas if the matter had been dealt with by way of application to the Court presumably some of these things could have been sorted out.

MR SMITH QC:

And the application which would be made I suspect would be an application under the Companies Act or under the Insolvency Act for directions.

ELIAS CJ:

Yes.

MR SMITH QC:

And although I don't recall that it's been discussed it may have, but I think that the immediate objection to that for now is that there's nothing much, if anything, to get directions in respect of. However, if a judgment sum becomes available then one of the means of resolution, were there to be a dispute between the funder on the one hand and the liquidator would be to seek –

ELIAS CJ:

Would be to seek directions at that stage. Now I thought you'd taken or somebody had taken us earlier to the provision in the –

MR SMITH QC:

Of the funding agreement?

ELIAS CJ:

In the Companies Act by which the liquidator can bring proceedings on application to the Court.

MR SMITH QC:

Well, no, that might have been discussion about getting the leave of the Court to assign…

ELIAS CJ:

Oh, leave of the Court to assigning rights, sorry, yes.

MR SMITH QC:

Under section 26, yes, and schedule 6. But there is certainly another provision which entitles the liquidator to seek directions from the Court, I think. As I understand it, what would happen in this case, assuming that a significant judgment sum became available, is able to be enforced and came into the liquidator's hands, the money would be held be one entity or another as a stakeholder, the liquidator and the funder would then have what I suspect would be a meaningful discussion about what happens, and that if necessary would go to dispute resolution under the terms of the funding agreement, and that's expressly provided for under the funding agreement. However, even then it may be necessary for the liquidator to seek directions and the liquidator would be in a position to do so because the liquidator would then know what the resolution sum was, what the actual costs to be deducted in getting to that point were, because it's part of the resolution sum, and what was the amount of unsecured debt which he sought to have paid out. And so that is, one would think, a definite prospect but a 12-week trial thought the judgment stands between here and that happy event.

ELIAS CJ:

Only 12 weeks. It seems quite modest really.

MR SMITH QC:

Now unless there's anything else?

O'REGAN J:

In Mr Wilson's affidavit he says there's been an undertaking given. Is that in a deed, is it a legally enforceable document?

MR SMITH QC:

It's not in a deed. However one would think that the liquidator's continuance is certainly consideration for that undertaking and turns it into an enforceable contractual binding promise, otherwise the liquidator would stop.

O'REGAN J:

But it's actually in a, there's a contract of some kind between…

MR SMITH QC:

No, well, I understand that it is in a –

O'REGAN J:

I mean, this is by Mr Wilson, not by the company, so this obviously doesn't amount to an undertaking by the company. I mean, this is just the evidence in the Court isn't it?

MR SMITH QC:

This is just the evidence in the Court. I'm not sure whether it has been reduced in writing to a separate undertaking, however it is evidence of the undertaking and it would certainly be enforceable at the behest of the liquidator, would say, "On the strength of your undertaking I continued as consideration to apply services and run this liquidation," et cetera, et cetera, "which I otherwise wouldn't have done because I, as a liquidator, regard myself as obliged –

O'REGAN J:

But all Mr Wilson is saying here is that something has happened, an undertaking has been given.

MR SMITH QC:

Yes.

O'REGAN J:

What I'm asking you is what's the form of the undertaking that's been given, how did it happen?

MR SMITH QC:

I don't know whether there is a separate piece of paper, one would expect that there is, I haven't –

O'REGAN J:

Well, there would have to be, because he's reporting something that has occurred.

MR SMITH QC:

Oh, he has given evidence, and I don't understand that it's challenged, that SPF has positively undertaken to make those payments available and those percentages in the event that there is a resolution, often net proceeds. So if there wasn't a separate contractual document or deed then the terms of the undertaking in the affidavit would hardly be able to be denied, they're stopped from denying it anyway. It would be enforceable.

ELLEN FRANCE J:

Just going back to section 254, do you accept that there might be some circumstances where the liquidator had to exercise the power?

MR SMITH QC:

Yes, because it could be that there was secured property and there was a high probability on its being realised that it would produce sufficient money to pay off the secured debt and unsecured debts besides, in which at some point theoretically the liquidator, having a duty under section 253 to act for unsecured creditors, would be obliged to take that claim even if a significant part of the proceeds served only to line the pocket or repay the secured creditor, so yes.

Unless there's anything else I can help you with, those are my submissions.

ELIAS CJ:

Thank you, Mr Smith. Yes, Mr Bigio.

MR BIGIO QC:

Your Honours, there are three or four points which I'd wish to traverse with your leave and of course respond to any questions which Your Honours may have.

The first is that one of the reasons for which SPF sought leave to intervene was an understanding that the appellants were for the first time in this Court challenging the validity of the assignment of the debt and the GSA in and of themselves. In opposing the application for leave to intervene my learned friend Mr Gray said in his submissions that we had misconstrued the appeal documents and that in fact it was this argument solely related to the combination of the two documents which was being sought. I thought I understood my learned friend to say this morning in submissions that to renew a challenge to the assignment by declaring it to be void and of no effect. Now if that is…

ELIAS CJ:

If champertous.

MR BIGIO QC:

If champertous, yes. There is no declaratory relief sought in the original application in relation to the status of that assignment, and of course the parties to the assignment are Allied, who are not here and have never been before the Court, and SPF.

ELIAS CJ:

Well, we're not going to make a declaration.

MR BIGIO QC:

Thank you Your Honour.

ELIAS CJ:

I didn't understand that that was being sought at all.

MR BIGIO QC:

It wasn't clear to me whether it was incidental to the stay and I just wanted to address that for the sake of clarity. If I again understood my learned friend's submissions this morning about the funding agreement, he concedes the funders seek to make a profit and that is part of their business model and that is acceptable, provided that the funders don't control the litigation. In accepting that the funding agreement, as PwC has throughout, in and of itself is unobjectionable, it means there are no issues taken with the control provisions in the document. The potential problem appears to arise from clause 6.3 of the GSA, which was looked at earlier this morning, and that is one of the issues that I addressed in the written submissions on behalf of the intervener. What SPF says is that it has obligations of good faith, there are no suggestions it is currently controlling this litigation, and it has no intention to depart from the commitments it's made under the funding agreement. But if required we have a situation where the parties to the funding agreement are identical to the parties of the GSA, and so if the existence of clause 6.3 unqualified creates a problem or an obstacle to the proceeding then that can be dealt with by the parties through further documentation which would confirm that SPF would not seek to exercise its powers under 6.3 in relation to these proceedings during the currency of the funding agreement. Now this form of modification is what appears to me precisely what the appellants are seeking when they seek a temporary stay to have the arrangements rectified so that they don't constitute an abuse of process, and it is consistent with the Australian cases which this Court looked at in deciding *Waterhouse* where if there are concerns or had been concerns about the arrangements the parties could amend them to the satisfaction of the Court. So the primary submission is that that parties as between themselves don't consider that clause 6.3 raises any issue between them and SPF intends for the funding agreement to proceed in its own terms in terms of control of the litigation. But if there is any concern about that that can be rectified easily.

ELIAS CJ:

Well, if you say if it can be rectified are you giving an undertaking to the Court that clause 6.3 would not be relied on to control the litigation? I mean don't give that undertaking if you're not in a position to, but is that what you're saying?

MR BIGIO QC:

I don't have instructions to give a formal undertaking to the Court, but the submissions that we filed clearly indicated that if the Court determined that the appearance of the relationship of those clauses was unsatisfactory and could give rise to an abuse of process then we would take that finding and act upon it, and it is simply resolved.

The third point I wish to make was simply in relation to this notion of subjective intention –

ELIAS CJ:

Can you just give me the reference in your submissions, which paragraph?

MR BIGIO QC:

Yes, Ma'am.

ELIAS CJ:

You don't need to take us to it, I just wanted…

MR BIGIO QC:

No, it's paragraph 24 through to 30 of the submissions.

Now on the question of subjective intention with respect to champerty, my learned friend said this morning that evidence of subjective intent is inadmissible. Nevertheless in his notice of appeal, or PwC's notice of appeal, they rely on the affidavit of Mr Woodhams, which my learned friend Mr Smith took you to, as evidence of champertous intent. So the appellant simply can't have it both ways. The affidavit of Mr Wilson was provided to you to give

further clarity around what happened at the time the assignment was taken, and if the Court looks as cases such as *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] QB 640, Your Honours will see that the subjective intent of the assignee was taken into account there. It was clear that she was bringing the proceedings, essentially, to shame a hospital and not to recover a loss which she had suffered. So to the extent that it's relevant, Your Honours, we simply say that it's uncontroverted evidence of a defensive action to ensure that the purpose of a funding agreement couldn't be undermined.

And in relation to that I just wish to make points about the options which my learned friend identified that could have been undertaken by the parties instead of an assignment of the debt, of the Allied debt to SPF. The first suggestion was that SPF could have funded Allied, and Allied could have proceeded with the claim. At the time the arrangement was entered into, Mr Wilson deposes to this, Allied was facing liquidation proceedings from the IRD. One can draw the inference that Allied had no interest in taking control of a piece of litigation in the hope of recovering more monies towards the amounts that they were owed, or else that might very well have been the deal. But for there to be a proper funding agreement, Allied would have to be in control. They would have to be willing to commit themselves to ongoing litigation. Instead they chose the option to sell that for a return of a fixed amount of money, plus a share of the proceeds of the litigation, all of which *Camdex* is authority for the proposition the assignor is entitled to retain an interest in the proceeds going forward, so there's no difficulty with that.

The other matter is that the proposal is that the security could have been surrendered and the liquidator could have been funded into the proceedings. The problem with that, as Your Honours have seen, is there was another secured creditor behind Allied, and in fact one which later on in the process, being Dominion Finance Group, asserted that they had priority, so if the Allied security was surrendered, another secured creditor could have taken control of the proceedings and extinguished them. So that just addresses the two alternatives that my learned friend has addressed.

The last point I wish to raise just relates to a suggestion I think my learned friend made that perhaps this Court might regret having opened the door to litigation funding in *Waterhouse*. Well Mr Wilson deposes that LPF, which is a New Zealand based funder, has successful funded 13 cases to completion, this is in paragraph 4 of his affidavit. My learned friend can't point to any case in which the conduct of funded plaintiffs has been raised in any Court on the basis of being abusive or otherwise, nor can he point to any case, such as *Trendtex*, where the plaintiff has sued the funder, or complained of the conduct of the funder, pursuant to the funding agreement. So there's no evidence that opening that door has done any damage to the administration of justice in New Zealand and of course the funders' view would naturally be that it has enhanced it.

So Your Honours those are the only points I wish to make subject to any questions which you may have for me.

ELIAS CJ:
Thank you Mr Bigio.

MR BIGIO:
As Your Honours please.

ELIAS CJ:
Yes Mr Gray.

MR GRAY QC:
Thank you Your Honour. Just brief points. My learned friend Mr Smith asked you if you read any authority, to read *Camdex* carefully, and I would repeat that request because when my learned friend took you to passages he considered relevant he, of course, omitted almost all of the ones that we would consider relevant. And in particular, as he proceeded through Lord Justice Hobhouse's reasons for decision at page 35 –

ARNOLD J:

Just remind me again, which one is that in?

MR GRAY QC:

It's in 1, Your Honour, I think it's 11 or 12 – it's 11, Your Honour. Now my learned friend had begun his discussion of the case with you quite early in the judgment, and then beginning at page 30, just above line E, and he'd taken you through Lord Hobhouse's discussion of the Property Law Act and the provisions which permitted the recognition by statute, as has previously been the case in equity of assignments of debt. And then at 34 at the bottom of the page he came to the arguments of the defendant bank, and over the page at 35 my learned friend stopped his discussion of the case just above the letter D. But Lord Hobhouse goes on from there to talk about the cases which deal with transactions which are champertous and therefore voidable, and in a reply I don't want to read now some pages with you, but what Lord Hobhouse is doing is looking at those cases where the assignment of a cause of action is bare and draws the distinction made by the Chief Justice in one of her questions to my learned friend, "Isn't there a distinction between a debt which is regarded as property and a claim?"

GLAZEBROOK J:

What do you say about the argument that – well, I don't think you do argue that the assignment in itself is champertous, do you?

MR GRAY QC:

Yes, I do.

GLAZEBROOK J:

All right, I thought you said that wasn't the argument that was being made. But anyway, well, I thought it was the combination of the two. But anyway, all right, so the assignment itself is champertous…

MR GRAY QC:

The application says, "By itself and in combination with."

GLAZEBROOK J:

All right, well, by itself, okay. So the assignment itself is champertous, so if you have two solvent plaintiffs, two solvent financial institutions, and somebody buys a security which I think you'd have to say is in relatively ordinary terms, ie it secures Uncle Tom Cobley and everything, that that in itself is champertous, and if not when would it be? And I suppose the related question is is the security one of the incidentals of the debt which you can, I think at page 38, which said is perfectly all right to assign?

MR GRAY QC:

Yes. Your Honour may recall I began my submissions by talking about the facts of this particular case, in this case –

GLAZEBROOK J:

Well, I'm not sure that helps very much because of what the principle –

MR GRAY QC:

Well, in my submission it does, and it does, if you begin not with *Camdex* but with *Trendtex*, and you begin –

GLAZEBROOK J:

Well, that doesn't really help – well, don't you accept that in *Trendtex* there was a purported assignment of merely a right of action, not one that was associated with the debt?

MR GRAY QC:

In *Trendtex* the debt was already unpaid and so what was assigned to Credit Suisse was a right of action and it was champertous, but Lord Mustill said, "It's acceptable in this case because Credit Suisse and the principal creditor had a prior arrangement," and it was the fact of a prior arrangement which meant that the champertous transfer to Credit Suisse was not objectionable. But the further transfer from Credit Suisse to a third party previously wholly –

GLAZEBROOK J:

Well, perhaps you need to take us to the case in terms of that, because I thought Credit Suisse had taken an assignment of the debt.

MR GRAY QC:

Yes but – should I finish the argument then take you to the passages Your Honour? It is this. What happened in *Trendtex*, it arose out of the Nigerian cement crisis. A little bit like *Camdex* there was a central bank who couldn't pay and Credit Suisse had a prior arrangement relationship with the creditor. The creditor was indebted to Credit Suisse and Credit Suisse took an assignment of the debt in order to enforce it and to get payment. And Lord Mustill said that was champerty but in the modern world it's no longer void because of an acceptable prior commercial relationship between Credit Suisse and the creditor, and that is a modern development in the law of champerty. But the further transfer from Credit Suisse to an uninterested party, with no prior relationship with the creditor or with the dealing at all, is also champerty and doesn't have the advantage of the explanation. And what Lord Mustill did was –

ELIAS CJ:

Is it Lord Mustill? I thought it was Wilberforce and –

MR GRAY QC:

Wilberforce also gave judgment.

ELIAS CJ:

I see, sorry.

MR GRAY QC:

Again if I can finish the argument and then come back to the passages. Your Honours may recall in our synopsis we referred to the Indian cases and the thing that the Indian cases did was say that assignments may not necessarily be champertous, it depends upon the intention of the parties at the time, and what the Court did in *Trendtex* is take that and say it's a matter

of looking at what is assigned and what is the understanding of the intention of the parties in relation to the assignment at the time it takes place. Lord Hobhouse when he came to it later in *Camdex* in the passages that my learned friend did not take you to, said the mere fact that the cause of action that is assigned is an incident of a debt, it doesn't inevitably mean that there's no champerty. There may be and he cited with approval what had been said in *Trendtex*. So what he said is, there can be an assignment of a debt which has, as an incident providing security, a right to sue, to enforce, remember that's different from what's in this case because this has an incident not a right to sue to enforce, but a claim against another third party. But there can be as an incident a right to sue to enforce, and that may or may not be champertous. As *Trendtex* notes, whether or not it is depends on the intention of the parties at the time. Just to complete the argument Justice Glazebrook, what is aid at the beginning is, as a matter of principle, whether an assignment –

GLAZEBROOK J:

Where is the – I suppose I'm having trouble about where the assignment is in this case because all that's there under the security interest is a right to put in a receiver to realise the assets of the company which can include, under the security interest, having the receiver in the company's name sue and control that litigation through the receiver, but it's not an assignment.

MR GRAY QC:

In my submission, and what was said in *Trendtex*, is you've got to look at the substance of it, not the form, and in this case the facts are that the company had become insolvent. The GSA rights had crystallised. The effect of that involves three things. First, that the cause of action is secured to the GSA holder. Second –

GLAZEBROOK J:

Well it always was, wasn't it?

MR GRAY QC:

No, it was a floating charge until then.

GLAZEBROOK J:

I don't think we've got that concept anymore have we?

MR GRAY QC:

If you look at the GSA it say that it's partly floating, partly attached.

O'REGAN J:

I don't think that has any meaning now under the PPSA.

MR GRAY QC:

Well, the GSA provides that the claim is secured, it provides that the proceeds of the claim are assigned, not the claim itself, but the proceeds of the claim are presently assigned, and then –

GLAZEBROOK J:

Actually, where do you say it does that?

MR GRAY QC:

Clause 3.2, Your Honour.

GLAZEBROOK J:

Well, I think we decided that it didn't actually.

MR GRAY QC:

No, what it didn't do was irrevocably assign the claim, instead it assigns the proceeds of the claim, and that's the distinction –

GLAZEBROOK J:

Well, but wasn't that the one that I'd looked at earlier and we decided that it didn't do that, or is that another cause…

MR GRAY QC:

No, Your Honour, what you decided was 3.1 did not assign the claim…

GLAZEBROOK J:

Where is it, so we can just…

MR GRAY QC:

It's in volume 5, Your Honour, at page 814, under tab 54, last tab. 3.1(a), "A security interest over all the personal property of the company." So that gives a charge of security interest over the claim.

GLAZEBROOK J:

That's right.

MR GRAY QC:

3.2, "The created under this general security agreement is an absolute assignment by way of mortgage and shall take effect as a transfer and assignment of the company's present or future accounts receivable." That is not the claim, but if you look at the definition of accounts receivable in clause 21.60, which is on 825, it means, "All the right, title and interest present and future, legal and equitable, in the undertaking property assets and revenues of the company," and the proceeds of a claim will be revenues. So 3.2 operates not as an assignment of the claim but as an assignment of the fruits of the claim.

GLAZEBROOK J:

So where do you get that from?

MR GRAY QC:

O, Your Honour, secured property.

GLAZEBROOK J:

Well, it can't –

O'REGAN J:

But the defined term we're talking about here is "accounts receivable" isn't it

MR GRAY QC:

Yes.

O'REGAN J:

Is that defined?

MR GRAY QC:

I don't…

GLAZEBROOK J:

But "accounts receivable" usually means what it says.

ARNOLD J:

That's right.

GLAZEBROOK J:

It's just a normal, like any debts of the company doesn't it?

MR GRAY QC:

Yes, they're revenue.

GLAZEBROOK J:

In fact usually current debts of the company rather than anything – debts owed to the company rather than anything…

MR GRAY QC:

Yes, but it's revenues that will come in.

GLAZEBROOK J:

Well, even if that's right I'm not sure what's wrong with that, because of course you have a security over whatever comes in. Well, you'd certainly hope so if you were a lender that if there's a whole lot of money there you

would hope to have a security over it, because if you didn't somebody else is going to take it from you.

MR GRAY QC:

Your Honour, I'm not saying there's anything wrong, I'm just saying I wanted to be clear about what it was that was Allied's interest in this litigation, and its interest was a security interest over the claim itself and an assignment of the revenues received from a judgment or from a settlement of the claim, and the right to conduct the claim.

GLAZEBROOK J:

Well, I'm not sure it is actually, under 3.2.

MR GRAY QC:

Well, in my submission it can hardly mean anything else.

GLAZEBROOK J:

Well, you certainly would have a charge over the proceeds from the claim and…

MR GRAY QC:

It's an assignment of them.

GLAZEBROOK J:

Well, I'm not sure that – I mean, if it is an assignment it's an assignment by way of security, which isn't a total assignment in any event because you always have an equity of redemption.

MR GRAY QC:

An insolvent company can't redeem a sum of money by paying a sum of money because it doesn't have any money.

GLAZEBROOK J:

Well, no, obviously not, but – yes.

MR GRAY QC:

And that's why –

GLAZEBROOK J:

Well, it might do if it has enough from the claim that enables it to pay off the secured creditor, get rid of the security, and then return its debts to somebody else, and in fact it might even have some left over for the mandatory note holders and people further down the food chain. Mightn't it?

MR GRAY QC:

That's why you do what section 305 tells you to do. You work out what the debt is, secured debt is, and what the security is worth. But, Your Honour, the point that I come back to is you can't avoid the facts of this case. In this case those rights, under the GSA, had attached and the claim had been brought at the time of the assignment and in addition the security holder had already appointed a receiver and realised all of the realisable assets. So the question is, what in substance was assigned, and we say in substance what was assigned was the interest in this claim. The security interest and the assignment of the proceeds in this claim were what was in effect sold.

Then when you look at *Trendtex*, read properly, and you ask yourself is the purchaser someone who had a prior involvement in the transaction, or with the parties, or is it a complete stranger who's come along, and it's the latter, and for that reason it's champertous and not excused.

GLAZEBROOK J:

So anybody who buys a factored debt off an insolvent company where the only asset is a claim against somebody else, and what sort of claim does it have to be, because obviously if it's a debt claim against someone else I don't think you could possibly make this argument, could you?

MR GRAY QC:

Then it may be protected by the Property Law Act.

GLAZEBROOK J:

Well I don't know but you're buying the debt claim, you're buying the senior debt, and then a right to sue the company and then you effectively require the company to sue the third party to get the debt in, don't you?

MR GRAY QC:

But that becomes the point Your Honour. What is it that you are buying. And in this case the only thing that was bought –

GLAZEBROOK J:

So the proposition must be that you can't buy a debt of an insolvent company if the only means of getting money out of that insolvent company is through an already ongoing piece of litigation.

MR GRAY QC:

Or a future piece of litigation.

GLAZEBROOK J:

Or a future piece of litigation.

MR GRAY QC:

Yes.

GLAZEBROOK J:

Well, what's say that's one of the assets, there's a whole pile of other assets that are involved under this security, so you buy a debt – say you'd bought Allied's debts before the receiver had come in, and your receiver comes in and says well I've realised these five other things that I'm now going to realise the rest of the money by this piece of litigation. Is that champertous?

MR GRAY QC:

No, I think that then falls within *Camdex*.

GLAZEBROOK J:

Right, so what you have to do is to buy it before you've got down to the wire.

MR GRAY QC:

Yes, and then it can be a question of degree about what it is precisely that you are buying. Whether what you are buying is the opportunity to realise all the real property, or other items of personal property, or whether what the transaction really is about is the buying of the claim. That's why I say the facts of this case can' be avoided. This is a funder who purchased. This is not a company that's engaged in buying and selling distressed securities.

GLAZEBROOK J:

Well, no, if it was a company in the process of buying and selling distressed securities you'd say if you buy a whole pile of debts from an insolvent, just a whole pile of debts that you're buying, you've got to be really careful that the only thing left isn't some possible litigation against someone else. So you've got to make sure there's some real assets there too.

MR GRAY QC:

Yes.

GLAZEBROOK J:

Okay, right.

MR GRAY QC:

The Court has traditionally turned its face against buying and selling pieces of litigation, and the maintenance of pieces of litigation by complete strangers –

GLAZEBROOK J:

But all you're doing here is buying a debt and a security. You're not buying a cause of action.

MR GRAY QC:

Your Honour keeps coming back to the form of the transaction –

GLAZEBROOK J:

I'm not coming back to the form at all.

MR GRAY QC:

– and my response is to ask about the substance.

GLAZEBROOK J:

But your substance is always going to be that you're buying the debt and you're allowed to, aren't you?

MR GRAY QC:

No, in my submission –

GLAZEBROOK J:

And the incidentals, that's what *Camdex* says. And if a security isn't an incidental of a debt I don't know what is.

MR GRAY QC:

However, in my submission *Camdex* does not say that. *Camdex* says that the buying of a debt and a security can be champertous.

GLAZEBROOK J:

Where does it say that, do you want to take us to that?

MR GRAY QC:

In the bits that my learned friend didn't take you to. Lord Hobhouse began his – well at page 34 he says the argument –

GLAZEBROOK J:

Where are we sorry, I've lost it again.

MR GRAY QC:

34 at H.

GLAZEBROOK J:

Tab 11.

GLAZEBROOK J:

I just keep losing it sorry. It's not numbered volume 1, that's why.

MR GRAY QC:

At H what he starts talking about is the fact that there's a need for there to be litigation to recover the debt because there was a time when the need for litigation to recover a debt by itself –

GLAZEBROOK J:

Sorry, what page are you on now?

MR GRAY QC:

Page 34 Your Honour at H.

GLAZEBROOK J:

Thank you.

MR GRAY QC:

There was a time when the need to sue to recover a debt by itself precluded assignment, and between A and C Lord Hobhouse says, no, the fact that you have to sue in order to recover doesn't mean that the debt can't be assigned. Nor does the fact that it's been discounted on sale. Then at D he says, "However, the defendant argues that, nevertheless, the assignment was not, as a matter of law, enforceable. This is the first submission: I have quoted it earlier. It depends on *Laurent v Sale*… and I'll take these cases in order. *In re Trepca Mines Ltd (No. 2)* [1963] Ch 199 did not involve any question of assignment. It was a case of a litigant who was financially supported by another in return for a share of the proceeds. The agreement between the litigant and the financier was unquestionably champertous in character and the actual question in the case concerned the duties of the solicitor acting for the litigant. The litigant was asserting a right to prove in the liquidation of the company. It was argued that the law of maintenance and champerty was confined to actions or suits. The Court of Appeal rejected this argument and held that it extended to proving in a liquidation and any contentious

proceedings where property was in dispute which became the subject of an agreement in the proceeds," through Lord Denning and Lord Justice Pearson. "It is, therefore, authority for the proposition that it is possible to make a champertous agreement in relation to legal proceedings for the recovery of a debt. It however does not qualify, or purport to qualify in any way the authorities and principles to which I have refereed earlier," and those are the authorities and principles dealing with the Property Law Act and the permission to assign debts as if they are a species of property.

Lord Justice Hobhouse then at G goes on to look at *Laurent v Sale* "It supports a similar proposition. In that case it was alleged that in 1953 the defendants had agreed to pay certain commissions to two copper brokers. In 1956 each of the brokers purported to assign the sum said to be owing to them to the plaintiff in return for a promise by the plaintiff to pay to the brokers a proportion of the amount 'which shall in fact be paid to' the plaintiff by the defendants. It appears that no reference was made to these purported assignments until 1959 when, after a solicitor's letter giving the defendants notice of the assignments, the action was started by the assignee. By their defence the defendants denied the alleged debts and further alleged that the purported assignments were illegal and champertous. On the trial of a preliminary issue it was held by Megaw J that this defence succeeded. It is clear from page 831 of the report that Megaw J did not found his decision upon any question of what was an assignment of a 'bare right' of litigation. The critical issue upon which he decided the case was that raised by the third proposition of the defendants: 'an agreement between a claimant and a stranger whereby the stranger agrees to finance the prosecution of a claim in consideration of a share of the proceeds is champertous:...'. This proposition of law was accepted (clearly correctly) by Megaw J. Megaw J at p. 832 also accepted the propositions that: 'the mere fact that there is the transfer of an existing debt and the mere fact that is involves a payment in consideration of the transfer of a part of a debt are not by themselves sufficient to make the transaction champertous.' He also expressly declined the extend the doctrine of champerty beyond the limits which it already had. The question for decision therefore became the question of fact whether it should be inferred

that the agreements between the plaintiff and the brokers were in reality agreements to finance litigation in consideration of a share of the proceeds. Megaw J., without referring to any authority other than *Martell v Consett Iron Co Limited* [1955] Ch 363*,* which was not an assignment case, held that the 1956 agreements did have that character. He found at page 833 that to take an assignment in 1956, three years after the relevant right was said to have come into existence, and to do so without making any investigation as to the reasons why payment had not been made over the course of those three years, could only contemplate litigation.

He continued, 'When one finds in addition that the so-called consideration for these assignments is that the brokers are going to get one quarter of the total amount that Sale & Co pay, the imagination boggles at the suggestion that this is not an assignment in order that the plaintiff shall conduct litigation at his risk and expense, paying for the benefit that he will get if he succeeds, the sum of one quarter of the amount that he recovers. It is obvious beyond any argument that this is exactly what the transaction was. That being so, in my view both these so-called assignments were champertous agreements. There's been no explanation offered,'" and et cetera. Lord Hobhouse continued in the bottom two lines – it's Lord Justice Hobhouse, "It's clear that Justice Megaw treated the 1956 agreements as colourable, he did not treat them as bona fide assignments. He drew the inference contended for by the defendants and found they were agreements which had as their object the financing of litigation by a party without interest in return for a share of the proceeds. As will be apparent from the quotations I have already made from what Justice Megaw says that he had regard to the fact that the so-called assignments were made by the brokers with the knowledge and intention shared by the plaintiff that legal proceedings would be necessary –

GLAZEBROOK J:
Are you sharing in the proceeds if you're just getting what you're owed?

MR GRAY QC:
This was for more than that, this was –

GLAZEBROOK J:

No, no, I understand that. In this case though, if the assignment itself is champertous all that's happening is that the person, or at least the original creditor, was owed a certain amount of money. The security is just going to pay off that debt, the debt that the person, the assignee, has purchased.

MR GRAY QC:

Again, Your Honour, we submit it's important to separate the transactions between Allied and SPF and between Allied and PVL. The assignment from Allied to SPF is the buying and selling of a claim, nothing else has the form of there having been a debt owed by PVL to Allied, but in substance it's no more than a claim. All the other assets have been realised, all there is is this claim. And so what was sold by Allied to LPF? Answer: it was this claim.

GLAZEBROOK J:

But not sold for a share of the proceeds, was it?

MR GRAY QC:

No, it sold for the whole of the proceeds.

GLAZEBROOK J:

Well, not necessarily. It's the whole of the proceeds up until –

MR GRAY QC:

Well it could – the first 300 million.

GLAZEBROOK J:

– the debt that was the debt that was purchased.

MR GRAY QC:

The first 300 million.

GLAZEBROOK J:

Well, not necessarily, as whatever's owed under the – if you're just looking at the assignment itself it's whatever's owed under that instrument isn't it?

MR GRAY QC:
Yes.

Now Lord Justice Hobhouse went on to discuss *Trendtex* and agreed with it, and he did it carefully, he cited from Lord Wilberforce and from Lord Roskill, and in particular, at 38B(2)(d), the passage from the reasons for decision of Lord Roskill, "The Court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee has a genuine commercial interest in taking the assignment and enforcing it for its own benefit, I see no reason why the assignment should be struck down." But of course on the facts of *Trendtex* the second assignment was not like that. And so at H Lord Justice Hobhouse himself said, "Lord Wilberforce thus approved these two decisions. In the context Lord Wilberforce is doing no more than recognising that an agreement can be exposed as having a champertous character whether or not it is dressed up as an assignment, even an assignment of a debt. In my judgment what Lord Wilberforce is saying does not go any further than this nor does the decision in *Trendtex* itself."

Although Lord Justice Hobhouse is, of course, well regarded and has the most closely reasoned judgment, the reasons for decision of Lord Justice Peter Gibson and also of Lord Justice Neill, are also influential because they show that the Court had in mind the distinction between a debt as a species of property, and a claim which is not property, the point made by the learned Justice in a question before the luncheon adjournment. And we have summarised really those submissions that I have just made in our synopsis at paragraphs 36 to 48.

Now the next point, Your Honour, is a less contentious one and a quicker one. You had asked what was the evidence of the unsecured debt. The answer is that the Lucas affidavit, which is in tab 14 in volume 3 of the bundle, refers at paragraph 14.3, and at exhibits J and K, to the reports of the receivers appointed by Allied, and those reports are found in volume 4 at pages 517 and 527, and they show the level of unsecured creditors. Not before the

Court are the discovered proofs of debt, but the discovered proofs of debt do not contain anything which suggests that the receivers reports were unreliable.

GLAZEBROOK J:
What about the mandatory convertible notes, do you accept that or not accept that?

MR GRAY QC:
We rather thought they converted Your Honour, so they became equity, but I don't have the evidence before the Court, and I can't check that in order to say. But they were mandatory convertible notes. What I do accept, Your Honour, is that there may well be other unsecured creditors who have not filed proofs of debt, and I don't say that the receivers –

GLAZEBROOK J:
Other secured?

MR GRAY QC:
Unsecured.

ELIAS CJ:
Unsecured?

MR GRAY QC:
And there are other subordinated secured creditors, subordinated to Allied and SPF.

Finally in response to a point made by my learned friend Mr Bigio that some sort of offer has been made to modify the rights enjoyed by SPF pursuant to clause 6.3 of the general security agreement, I have two things to say. The first is the test for whether an agreement of champertous is one applied at the time of the transaction, not later, and I don't necessarily accept that giving up the right to control to bring the litigation in the company's name by itself

would be a sufficient response, because the evils of champerty are the bringing of claims for the ancillary profit motive, and that motive would not be removed by a giving up of the right to bring the claim in a particular way, and we think, if the Court is minded to grant a stay, the chances are it will be permanent, unless Allied wishes to resume its ownership of the security and to continue to bring the claim.

ELIAS CJ:
So what are the terms of an order that you would seek if successful?

MR GRAY QC:
It would be just until of the Court, order of the Court, the claim if stayed, and then the onus would fall on the plaintiff to come back if it wanted to and say, well the stay should be lifted because we've now done these things. It means there's no element of champerty.

ELIAS CJ:
And what would they be able to do to do that?

MR GRAY QC:
Well I come back to the options I addressed the Court on earlier. The security could be redeemed.

ELIAS CJ:
Yes I see.

MR GRAY QC:
So that, I mean all the liquidator really wants to do is just bring the claim again so that unsecured creditors can get money, then he can just rest on the funding agreement, but the trouble is the funding is said to be conditional upon SPF owning the claim. So it would require a modification of the funding agreement.

ELIAS CJ:

And I suppose if the taking of the assignment was defensive there's no reason why it shouldn't, the security shouldn't be surrendered under the –

GLAZEBROOK J:

Well there is because there are other secured creditors who then jump in ahead.

ELIAS CJ:

Jump in ahead, yes, that's right.

MR GRAY QC:

Well, but if the funder is only interested in providing funding for someone else's claim, for a 42.5% share of the proceeds, why wouldn't funding still be available. Why would there be a problem. If the fund is really saying –

GLAZEBROOK J:

Well I think, but I thought that the argument was that a funder is going to share the proceeds that come in, in respect of – well, so give up their secured interest I suppose in that amount and hand it over which wouldn't be the arrangement with the other secured creditors who presumably could take the lot.

MR GRAY QC:

I say these affidavits are too unclear to be reliable and to be of much assistance to the Court about anything. The affidavits which say we only purchased the security, in a defensive move, imply –

GLAZEBROOK J:

I'm probably not really – to be honest I don't know, I think you're right, it doesn't actually matter whether it's defensive or what it is, it's either champertous or it's not.

MR GRAY QC:

Yes.

GLAZEBROOK J:

That's your point isn't it?

MR GRAY QC:

Yes.

GLAZEBROOK J:

So the motives aren't really of any moment.

MR GRAY QC:

Certainly not.

ELIAS CJ:

No, but the solution –

GLAZEBROOK J:

Although they might be to your suggestion that they do something else.

ELIAS CJ:

Yes.

MR GRAY QC:

Yes.

GLAZEBROOK J:

So if they can't do something else sensibly in terms of the arrangement then –

MR GRAY QC:

Then it doesn't matter. But to imply, to say it was only defensive is to imply we're not interested in the ownership of the proceeds. We're happy to rest on the share we get as a result of the funding agreement, then just discharge the security.

GLAZEBROOK J:

But if then you don't get a share under the funding agreement it would mean that the funding will fall over presumably?

MR GRAY QC:

Presumably because that's what the funding agreement says. And so one –

GLAZEBROOK J:

So it's not a real solution, is it, because you then say well you can't fund this because you can't actually get your…

MR GRAY QC:

Yes, but if it's not a real solution then we say it's tolerably clear that what was really involved here was the sale and purchase of the claim.

GLAZEBROOK J:

Well of course you can do it from the other side, which is what the other side say is well it's tolerably clear we were actually looking for a funding agreement which meant we got what we funded and we got back a return for funding, and if we had to do it, we had to do it this way because otherwise we couldn't fund it.

MR GRAY QC:

Why couldn't they fund it. Bearing in mind what the –

GLAZEBROOK J:

Well if they weren't going to – if somebody was going to come in and gazump them and take all of the proceeds then they weren't going to be able to fund it, were they.

MR GRAY QC:

But the liquidator has given a first security interest over the first 42.5% of the net proceeds. So the liquidator has given them priority over secured creditors. Under the funding agreement. That's what he's purported to do.

GLAZEBROOK J:

I was going to say, it must be a purporting to do, mustn't it?

MR GRAY QC:

Yes otherwise –

GLAZEBROOK J:

Because I don't, I'm not aware of a liquidator being able to take funds from secured creditors.

MR GRAY QC:

No, but that's what, I mean you were taken to the provisions in the funding agreement.

GLAZEBROOK J:

I mean there's no point saying we were taken to those if there isn't way that they can take funds off secured creditors which I'm certainly not aware of any way that…

MR GRAY QC:

No, I suppose that must be right. That must be right.

O'REGAN J:

Well it was conditional on SPF becoming a secured creditor which fixed the problem.

MR GRAY QC:

It was, and that's why we say this is not like *Waterhouse*, this is something different, and the question is whether this something different is also acceptable. Whether the law has now changed so that this something different in modern times remains – has become appropriate. If it pleases the Court those are my submissions in reply.

ELIAS CJ:

Thank you Mr Gray. Thank you counsel for your submissions. We will reserve our decision.

COURT ADJOURNS: 3.51 PM