## Article Information

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Service: Class Actions, Dispute Resolution & Litigation, Litigation Funding
Sector: Financial Services, Private Clients

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# LCM | High Court refuses to hear GPC's challenge to enforceability of funder's class action agreements

**The High Court of Australia has refused to hear an appeal from last year's decision of the Queensland Court of Appeal, unanimously upholding the enforceability of third party funding arrangements in the Gladstone Fisheries class action. The court held that the proposed appeal would not enjoy sufficient prospects of success to warrant the grant of special leave to appeal, and in doing so, preserved the Court of Appeal's finding that the funding agreements could not be challenged on public policy grounds. That challenge, argued by the defendant, Gladstone Ports Corporation Limited (GPC) had also been unsuccessful at first instance.**

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Piper Alderman acted for the funder of the proceedings, LCM Operations Pty Ltd (**LCM**) in the application at first instance, on appeal and in the application for special leave to appeal.

A background to the class action and the decision at first instance can be found here.

**The appeal**

GPC argued that the litigation funding agreements were void for public policy, being the policy informed by the ancient torts of maintenance and champerty. Maintenance is the financing of another person's law suits. Champerty is a form of maintenance in which the funder receives a share of the proceeds of the action. Maintenance and champerty have an ancient providence, dating back to an English statute of 1275, but as has been pointed out judicially and academically since as long ago as 1890, the vices that the law against maintenance and champerty were designed to address passed away long ago, and the modern rule is no longer dependent upon any considerations of "justice and policy". The torts have been abolished by statute in England, the Australian Capital Territory, New South Wales, Victoria and South Australia, but have a vestigial life in Queensland, Western Australia and Tasmania.

A tort gives rise to a cause of action, but GPC was not seeking to bring a claim against LCM for champerty. Nor did it seek to stay the class action that GPC alleged was being unlawfully maintained. That is understandable as both of those courses had little prospect of success. Instead, GPC directed its attack at the legitimacy of the funding arrangements, seeking to stymie the litigation by a peripheral attack on its funding. It argued that the funding agreements between the class and LCM were invalid, in circumstances where all the parties to those agreements agreed they were valid and enforceable.

The Court of Appeal had a preliminary concern that in those circumstances, it was being asked to provide an advisory opinion or rule on a hypothetical, but concluded that given GPC had agitated the issue, it would be unfair to the class and LCM to continue to conduct this "onerous, complicated, expensive and important litigation with this tactical threat remaining alive."

The Court of Appeal found that LCM's provision of financial aid to the class pursuant to the funding agreements did not infringe any public policy. LCM did not unlawfully "maintain" the class action and it was not "trafficking" in the claims of the class. Neither did its funding agreements constitute an assignment of a bare cause of action.

Like the judge at first instance, the Court of Appeal accepted that a provision in Queensland's statutory class action regime was a statutory recognition of the necessity of champertous funding agreements to class actions.

While strictly unnecessary to decide, the Court of Appeal found that an examination of the principles that once informed the torts of maintenance and champerty reveals that there are no principles of coherent application anymore. Notably, the court found: "Unless there is some distinct aspect of public policy that would prohibit a third party's maintenance of an action and renders that conduct, (in) the terms of the modern definition, "improper", then the law of maintaining has been subsumed in the modern law of abuse of process."

**Class action funding**

The Court of Appeal gave express recognition to the sound policy justifications for class action funding. Class actions are often matters that involve complex issues of fact and law; that take several years to bear fruit, of which there is no guarantee; that require the outlay of enormous costs to fund; and that require the class to marshal technical evidence to bring their claims up to proof. All of these factors necessitate the provision of financial aid from funders, in return for a portion of the fruits of the claim, in order for the claim to be brought at all.

On 25 June 2021, the High Court dismissed GPC's application for special leave to appeal from the Court of Appeal's decision, finding that the proposed appeal would not enjoy sufficient prospects of success to warrant a grant of special leave. Its decision to do so therefore confirms not only the lawfulness of LCM's class action funding agreements, but also the legitimacy of the class action funding model generally.

The judgment of the Court of Appeal can be located here.