



Liquidators and litigation funders

The recent matter of [Hall v Poolman \[2009\] NSWCA 64](#) in the New South Wales Court of Appeal is a case which will be of interest to all liquidators. It involved an appeal against a decision by Justice Palmer that a Court conduct an inquiry into the conduct of the liquidators in relation to their engagement of a litigation funder.

The background to the decision was that a Committee of Inspection approved the engagement of litigation funder, IMF, even though it was acknowledged in the course of the creditor's meeting that there was a very low prospect of a return to creditors.

In ordering an inquiry, Justice Palmer considered some of the following matters relevant:

- The extent and cost of the litigation, which he considered excessive.
- The liquidators' costs of \$2M being "quite out of proportion" given the proceedings were brought to recover a possible maximum of \$6M.
- The liquidators did not, and should have, approached the court for directions under s 511(1)(a) of the *Corporations Act* as to whether the commencement of proceedings was justified in view of the terms of the funding agreement, the likely return to creditors and the costs of the proceedings generally.
- In circumstances where the liquidators' funding arrangements provided no more than a token benefit to the creditors, Justice Palmer questioned whether they were in truth a means for the litigation funder and the liquidator to profit handsomely.

The New South Wales Court of Appeal allowed the appeal and although the decision turned on the facts, the Court made the

following findings:

- The size of anticipated return to creditors is not of itself relevant to the decision of a liquidator to commence or prosecute recovery proceedings.
- The fact that the costs of the proceedings were disproportionate to the maximum possible recovery was a factor to consider in ordering an inquiry, however Justice Palmer failed to consider that there was a public interest in bringing directors to account for allowing a company to trade while insolvent. In the absence of the litigation funder, the liquidators could not have conducted public examinations of the directors or pursued the main proceedings. The Court held that it is not, however, such an overwhelming consideration that it eclipses all other considerations
- There is no legal policy as such that objects to liquidators entering litigation funding agreements that will share the fruits of the litigation with the funder. This is provided that the arrangements have been approved by the creditors or the Court and that the arrangements themselves are consistent with the liquidators overall duties.
- There is no obligation upon liquidators to apply to the court for directions as a matter of course before entering a funding agreement. The decision whether to do so is informed by a liquidators' duties of skill, care and diligence.

Liquidators should carefully consider this judgment before entering into agreements with litigation funders.

Our lawyers are well placed to advise liquidators regarding their obligations when deciding whether to engage a litigation funder and all aspects of insolvency law. For further information please contact Catherine Ballantyne, Senior Associate on +61 3 9242 4766 or catherine.ballantyne@madgwicks.com.au or Effie Alexopoulos, Trainee Lawyer, on +61 3 9242 4730 or effie.alexopoulos@madgwicks.com.au

► For information on Madgwick's Insolvency & Reconstruction Group, please [click here](#)