IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-001620
[2022] NZHC 1798

BETWEEN	PREMIER LEGAL FINANCE LIMITED PARTNERSHIP Plaintiff
AND	MORRISON KENT Defendant

Hearing:	20 May 2022 Further submissions received: 27 May, 3, 21 and 30 June 2022
Appearances:	D W Grove for Plaintiff A L Holloway and M A Karlsen for Defendant
Judgment:	26 July 2022

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by Associate Judge Andrew
on 26 July 2022 at 12 noon
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date ……..

Introduction

[1] Premier Legal Finance Limited Partnership,[1] sues the defendant Morrison Kent, solicitors, in negligence. Premier claims to have acquired the cause of action from a Mr Ensom pursuant to a general security agreement.[2] Mr Ensom was Morrison Kent's client and the party to whom the alleged duties of care were owed.

[2] Mr Ensom is bankrupt. He was adjudicated bankrupt prior to the assignment of the GSA on which Premier relies. The original parties to the GSA were Bridgewest Finance (New Zealand) Ltd[3] and Mr Ensom. Premier took assignment of the GSA from Bridgewest.

[3] Premier says that Morrison Kent owed and breached duties of care to Mr Ensom in relation to a failed property development on Great North Road, Grey Lynn, Auckland, involving Mr Ensom's company, MR8 Construction Ltd. Downtown House (No 2) Ltd[4] financed the development and Mr Ensom guaranteed the lending. The alleged losses are said to be 40 per cent of the judgment award in *Downtown House (No 2) Ltd v Ensom*,[5] and Mr Ensom's costs associated with various proceedings, including the *Downtown House* litigation. It was that litigation that led to Mr Ensom's bankruptcy.

[4] Morrison Kent seeks orders striking out Premier's claim and/or for defendant summary judgment. Morrison Kent says that Premier has no standing and submits that Premier's rights can be no better than Mr Ensom's, and Mr Ensom has no cause of action against Morrison Kent because any such right vested in the Official Assignee upon his bankruptcy. Although this right was then disclaimed (rendering it bona vacantia), it has not yet been re-vested in Mr Ensom. Morrison Kent therefore submitted that it is an abuse of process for Premier to bring these proceedings. The correct process is for Premier, in Mr Ensom's name, to seek vesting orders (as it appears to have done or has required Mr Ensom to do pursuant to its powers under the

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1 Premier.
2 GSA.
3 Bridgewest.
4 Downtown House.
5 *Downtown House (No 2) Ltd v Ensom* [2019] NZHC 724.

GSA) because the assignment of a bare cause of action is an abuse of process and cannot succeed.

[5] The critical issue I must determine is whether it is reasonably arguable that Premier has standing to sue. That is to be answered by addressing the following questions:

(a) Was Mr Ensom's cause of action against Morrison Kent vested in the Official Assignee upon his bankruptcy?

(b) Are the proceedings an abuse of process because there has been an assignment of a bare cause of action that is prohibited by law?

(c) Under the terms of the GSA must the proceedings be brought in the name of Mr Ensom?

[6] A further issue arises (not a standing issue); is there an arguable case of a breach of a duty of care, and was loss caused by that breach?

Factual background

[7] Premier is a financier and carries on business as an investment company.

[8] Mr Ensom was previously a company director and investor.

[9] Morrison Kent acted as solicitors for Mr Ensom and associated entities in various property investments undertaken with Mr Samuel MacDonald.

[10] On 23 February 2016, Mr Ensom emailed Morrison Kent a signed sale and purchase agreement for the Grey Lynn property between the trustees of the Stanley Trust as vendor and MR8 Construction Ltd as purchaser.

[11] On 13 January 2017, Mr Ensom signed a waiver of independent legal advice, addressed to Morrison Kent and Downtown House. A second waiver of independent legal advice was signed by Mr Ensom on the same day. Mr Ensom also executed a loan agreement, a general security deed between Pomegranate Recording Ltd (as

guarantor) and Downtown House (as secured party), and an all obligations guarantee and indemnity between Mr Ensom (as guarantor) and Downtown House.

[12] On 4 April 2019, Downtown House obtained summary judgment against Mr Ensom for monies owed up until May 2018 (being $1,842,651.74) under the guarantee.

[13] On 27 February 2020, Mr Ensom was adjudicated bankrupt.

[14] In March 2022, the Official Assignee disclaimed any litigation rights Mr Ensom may have to sue Morrison Kent.

[15] The Crown subsequently advised it would not oppose but would abide by the Court's decision on any application by Mr Ensom to revest litigation rights against Morrison Kent in him.

[16] Mr Ensom has issued proceedings in this Court seeking an order vesting the litigation rights in him. Morrison Kent opposes that application.[6]

Draft amended statement of claim of May 2022[7]

[17] The subject of the strike out/summary judgment application is the draft amended statement of claim of May 2022. The key allegations in the draft amended statement of claim include:

(a) Between 2011 and 2019, Mr Ensom provided instructions to Morrison Kent in relation to various property investments he was undertaking in partnership with Mr MacDonald.

(b) It was specifically explained to Morrison Kent that all of the previous investments proceeded on the basis that in relation to each of the investments, Mr Ensom and Mr MacDonald would be 60/40 per cent equity shareholders.

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6 See CIV-2022-404-000472.

7 I directed that the plaintiff was to file an amended draft statement of claim in response to issues raised in the hearing.

(c) This meant that after payment of costs and expenses, Mr Ensom was entitled to 60 per cent of the net profits and Mr MacDonald was entitled to 40 per cent of the net profits. If the investment led to a loss, the losses and costs would be shared as to liability of 60 per cent for Mr Ensom and 40 per cent for Mr MacDonald.

(d) Morrison Kent owed Mr Ensom and entities associated with him a duty to exercise reasonable care and skill, which it breached in the following respects:

(i) Morrison Kent did not provide advice to Pomegranate Recording Ltd and Mr Ensom in relation to the risks associated with the arrangements entered into with Mr MacDonald.

(ii) Failed to recommend and prepare a formal "joint venture" agreement or "partnership" agreement between Mr Ensom and Mr MacDonald so as to record the fact that Mr MacDonald was personally liable to Mr Ensom for 40 per cent of all costs, expenses and losses.

(iii) Failed to discuss and highlight that the lender was related to Mr MacDonald and that the transaction was inherently risky to him without it being properly recorded in writing.

(e) Had Mr Ensom received competent legal advice, a binding written contract would have been entered into with Mr MacDonald so that he was contractually obliged to pay 40 per cent of all costs, expenses and losses of the development.

(f) As a result of the negligence of Morrison Kent, Mr Ensom has suffered as a loss the amount of the judgment obtained by Downtown House for damages, being the amount Mr MacDonald should have paid to Mr Ensom for the costs and losses of the development.

The GSA and its assignment

[18] On 22 May 2018, Mr Ensom, the trustees of the Fishbowl Trust, the trustees of the Rawene Trust and MR8 Construction Ltd, granted and executed a GSA in favour of Bridgewest in relation to a (partially executed) loan agreement between those entities, with Bridgewest as lender.

[19] Clause 12.1 of the GSA reads:

> 12.1 **Powers on enforcement**: Pursuant to cl 11(c) if an Event of Default occurs and is continuing the Secured Party may, in the relevant Debtor's name or in its own name, do anything and exercise any right which any Debtor or its directors could do or exercise in relation to the Secured Property including the power to:
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> …
>
> (j) **Actions**: Bring, take, defend, compromise, arrange, submit to arbitration, mediation or conciliation and discontinue or settle any accounts, claims, proceedings, questions or disputes which may arise in connection with the Secured Property, the business of any Debtor or its premises or in any way relating to this Deed or the Secured Obligations and for any such purpose, use the name of any Debtor.

[20] Clause 12.2 of the GSA reads:

> 12.2 **Powers generally**: In exercising any of the rights conferred upon the Secured Party under clause 12.1, the Secured Party may generally do or cause to be done such acts and things in relation to the business and property of any Debtor or the Secured Property as the Secured Party might do or cause to be done if the Secured Party had absolute ownership thereof and carried on the business for the Secured Party's own benefit without being answerable for any loss or damage which may happen thereby.

[21] Under cl 17.1 of the GSA, any security interests created are not affected by a debtor's insolvency and the secured party continues to have the same rights against the debtor or such other person who holds the debtor's rights.

[22] Clause 19 entitled Power of Attorney reads:

> 19.1 **Appointment of Secured Party**: Each Debtor irrevocably appoints (by way of security) the Secured Party, any Receiver and every Officer of the Secured Party severally to be its attorney (with full power to appoint substitutes and to sub-delegate) to, on its behalf and in its

name or otherwise, and at such time and in such manner as the attorney may think fit:

a. **Take Action**: do anything which that Debtor may be obliged to do or ought to do under this Deed and which that Debtor fails to do; and

b. **Exercise Powers**: generally carry into effect, complete or facilitate the exercise or purported exercise of all or any of the rights, powers or discretions conferred on the Secured Party (or any Officer of the Secured Party) under this Deed.

[23] By way of deed of assignment, the 2018 GSA was assigned from Bridgewest to Premier on 25 November 2020. Premier says that in consideration for taking the assignment of the GSA, it paid Bridgewest the full sum outstanding to the assignor, including principal interest, penalty interest and costs totalling $3,253,454.54.

Relevant legal principles

Strike out

[24] Rule 15.1 of the High Court Rules 2016 provides that the Court may strike out all or part of a pleading if it:

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

[25] The relevant principles are well established.[8] Pleaded facts, whether or not admitted, are assumed to be true. This does not, however, extend to pleaded allegations which are entirely speculative and without foundation. The cause of action or defence must be clearly untenable.

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[8] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[26] Abuse of process is a broad category and captures all other instances of misuse of the court's process that are not otherwise specified in r 15.1(1). It includes proceedings that have been brought with an improper motive or are an attempt to obtain a collateral benefit.[9]

[27] Policy considerations relevant to determining whether to strike out a claim as an abuse of process include:[10]

(a) The courts should generally exercise their jurisdiction on matters properly brought before them;

(b) It is important to preserve freedom of access to the courts;

(c) The courts need to be vigilant that abuse of process claims are not advanced other than in clear and appropriate cases, and are not brought for tactical reasons;

(d) The courts should be alert to the misuse of its processes and be prepared to exercise the strike-out jurisdiction where the interests of justice demand it.

[28] The improper purpose need not be the sole purpose, as long as it is the predominant purpose. The onus is on the party alleging abuse of process to show that the proceeding was brought for an improper purpose. It is a heavy onus.[11]

Summary judgment

[29] Rule 12.2(2) of the High Court Rules provides that the court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

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9 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53 at [89].

10 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR15.1.05(3)] citing *Williams v Spautz* (1992) 174 CLR 509 (HCA) at 519.

11 *McGechan on Procedure,* above n 10, at [HR15.1.05(4)].

Assignment of a cause of action

[30] In *Waterhouse v Contractors Bonding Ltd*,[12] Glazebrook J held:

> Assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand. The rule had its origins in the torts of maintenance and champerty but now seems to have an independent existence of its own.

[31] *Todd on Torts*[13] states that the assignment of a right to sue for breach of contract may validly be made where the assignee has a genuine commercial interest in the subject matter of the proceedings. The same principle has been recognised as applying in the case of a right of action in tort.

Analysis and decision

[32] Premier initially contended that it had taken assignment of Mr Ensom's cause of action, that it had a genuine commercial interest in the subject matter of the proceedings and that there was therefore no prohibited assignment of a bare cause of action. The focus of the submissions and arguments at the hearing were on the issue of whether Premier had a genuine and sufficient commercial interest rendering the assignment a valid one.

[33] In written submissions filed subsequent to the hearing, Premier has taken a different position. Premier now says that it is not taking an assignment of Mr Ensom's right to litigate; it is merely exercising its rights to litigate as provided for in the GSA. It contends that clauses 12.1 and 12.2 of the GSA do not vest Mr Ensom's rights of action to the secured party. Rather, those clauses give the secured party, here Premier, a right to bring an action in Mr Ensom's name "or in its own name".

[34] Premier further contends that the central issue remains whether it has a "genuine commercial interest" in the subject matter of the proceedings which it seeks to pursue on the debtor's behalf.

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12 *Waterhouse v Contractors Bonding* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].
13 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [23.12].

[35] Morrison Kent agrees that any right of action of Mr Ensom has not been assigned to or vested in Premier. It also agrees that there has been no assignment of Mr Ensom's rights to litigate.

[36] Morrison Kent relies on s 101 of the Insolvency Act 2006. It says that on adjudication all of Mr Ensom's property, including rights of litigation/causes in action, vested in the Official Assignee and any rights in the property of Mr Ensom were extinguished. Morrison Kent further argues:

(a) Clause 2 of the GSA creates a security interest, defined by s 17 of the Personal Property Securities Act 1999, and includes a charge over "Other Property". Clause 2 does not refer to an assignment and does not purport to effect an assignment of a cause of action;

(b) In turn, cl 12 which deals with "enforcement" provides for a range of circumstances. In relation to some secured property, the secured party would be able to act in its own name. In other cases, it will not. Clause 12 simply provides the machinery and is subordinate to cl 2, which does not effect an assignment of a cause in action;

(c) It is accepted that pursuant to the powers under cl 12 and the associated powers of attorney (cl 19 of the GSA), Premier may be able to require Mr Ensom to take certain actions or have an enforceable interest against Mr Ensom in the proceeds of any claim that Mr Ensom may have (but that is a fundamentally different matter to this claim);

(d) The named plaintiff does make a difference. It is of fundamental importance, consistent with the rules of natural justice, that the defendant only faces claims from parties who have legal standing.

[37] I now turn to address each of the three issues. Those issues and the central issue of standing fall to be determined in the context of a strike out/defendant summary judgment application. The threshold is whether there is a reasonably arguable case.

Issue (a) – Was Mr Ensom's cause of action vested in the Official Assignee?

[38] It is not in dispute that there has been a default under the GSA. In that event, Premier is entitled as the secured party to take action in either Mr Ensom's name or in its own name and to exercise any right which Mr Ensom could do or exercise in relation to the secured property (cl 12.1 of the GSA). That includes, as cl 12.1(j) expressly provides, the bringing of legal proceedings.

[39] As Premier submits, bankruptcy law operates to preserve the favoured position of secured creditors. The position is described in *Heath & Whale on Insolvency* as follows:[14]

> Bankruptcy law operates to preserve the favoured position of secured creditors. Property that is subject to a security does not pass to the Official Assignee unencumbered, although of course, the Official Assignee takes over the rights and equities in respect of such property … The Official Assignee therefore takes over such property subject to the security.

[40] "Secured property" is described extremely broadly under the GSA. That supports Premier's submission that the right to bring an action in Mr Ensom's name is protected by their position as a secured party. "Secured property" is defined to include "personal property" and "other property" where "other property" means:

> … all of the debtor's present and future interests in, and all of the debtor's present and future rights in relation to, any real property and any other property to which the PPSA does not apply.[15]

[41] Section 243 of the Insolvency Act 2006 provides clear support for Premier's position. It reads:

> **Secured creditor's options in relation to property subject to charge**
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> (1) A secured creditor may –
>
> (a) realise property subject to a charge, if entitled to do so (*Option 1*); or
>
> (b) value the property subject to the charge and prove in the bankruptcy as an unsecured creditor for the balance due (if any) after deducting the amount of the valuation (*Option 2*); or

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[14] Paul Heath and Michael Whale (eds) *Heath & Whale on Insolvency* (looseleaf ed, LexisNexis, Wellington) at [4.35].

[15] The Personal Property Securities Act 1999 does not apply to a "transfer of a right to damages in tort" (s 23(e)(vii)).

> (c) surrender the charge to the Assignee for the general benefit of the creditors and prove in the bankruptcy as an unsecured creditor for the whole debt (*Option 3*).
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> (2) Despite subsection (1), a secured creditor may exercise Option 1 whether or not the creditor has exercised *Option 2*.

[42] I also note that cl 17.1 of the GSA provides that the security interest granted is not affected by a debtor's insolvency and that the secured party continues to have the same rights against the debtor or such other person who holds the debtor's rights.

[43] I find that it is reasonably arguable that the security interests at issue, namely Mr Ensom's cause of action, did not vest in the Official Assignee. It is reasonably arguable that, consistent with the statutory bankruptcy regime, Premier as the secured creditor can exercise its rights over Mr Ensom's (the bankrupt's) property independently of and in priority to the Official Assignee's rights over the property. It is reasonably arguable that Premier is exercising option 1 under s 243. Option 1 is described by *Heath & Whale* as follows:[16]

> First, the secured creditor may realise the security, in the sense of taking whatever steps are appropriate to enforce the security, and thereby staying outside of the bankruptcy, or they may prove in the bankruptcy for any shortfall.

[44] The position is the same in England. In *Lazari Properties 2 Ltd v New Look Retailers Ltd*, it was held:[17]

> Secured creditors are entitled to rely on their security outside of bankruptcy or liquidation (and the assets of the debtor subject to security have been treated as excluded from the bankruptcy estate).

Issue (b) – Are the proceedings an abuse of process?

[45] Having concluded that the cause of action did not vest in the Official Assignee, I reject the Morrison Kent submission that the proceedings are an abuse of process because they subvert the statutory insolvency regime. They arguably do not.

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16 Heath and Whale, above n **Error! Bookmark not defined.**, at [4.68].

17 *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 1209 (Ch) at [113]. See also *Cotterell v Price* [1960] 3 All ER 315.

[46] I now turn to address whether the proceedings are an abuse of process because they involve the assignment of a bare cause of action.

[47] Many of the recent New Zealand cases involving assignments of bare causes of action have involved litigation funding arrangements. This is not strictly a litigation funding case, although it does have some similarities with the Supreme Court decision *PricewaterhouseCoopers v Walker*.[18] That case involved both a litigation funding arrangement and an assignment under a general security agreement.

[48] The parties here are agreed there has been no assignment of the cause of action. However, regardless, it is necessary to address whether the arrangements entered into are an abuse of process because they are contrary to public policy and the still extant torts of maintenance and champerty. Here, proceedings are brought by a third party to the legal relationship at issue (i.e. the relationship between Morrison Kent and Mr Ensom) and where that third party's interests are purely financial ones. In substance and in the broader sense, there is an assignment of a cause of action because Premier has acquired the cause of action from somebody else and it cannot be disputed that there is an assignment from Bridgewest to Premier. The issue thus arises as to whether there has been a prohibited trafficking in litigation.

[49] The test to be applied is not in dispute: does Premier have a genuine commercial interest in the subject matter of the proceedings which it seeks to pursue on Mr Ensom's behalf?

[50] The starting point is that a GSA that allows a secured creditor to pursue the debtor's claims against third parties to recover money owing to the secured party is recognised as a genuine commercial transaction. In *PricewaterhouseCoopers v Walker*, it was held:[19]

> The assignment of debt secured by a GSA can be an uncontroversial commercial transaction, even where the GSA provides, as the Allied GSA did in the present case, for the secured party to be able to pursue claims of the debtor in order to recover money owing to the secured party in the event that enforcement of the security becomes necessary. The assignment of the Allied GSA from Hanover to Allied was a commercial transaction of this kind.

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18 *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735.
19 *PricewaterhouseCoopers v Walker*, above n 18, at [78].

[51] In *PricewaterhouseCoopers v Walker*, the Supreme Court referred to the following summary of the law by Lord Roskill in *Trendtex Trading Corporation v Credit Suisse*:[20]

> 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 in enforcing it for its own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.

[52] The Court also noted that *Camdex International Ltd v Bank of Zambia*[21] (which followed *Trendtex*) is authority for the proposition that:[22]

> … assignment of a debt even in circumstances where it is foreseen that litigation will be necessary in order to recover the debt is not problematic.

[53] The Court further noted that the factoring of debts is a common form of commercial financing and that the assignment of distressed debt is also not unusual.

[54] In adopting those principles, I find that it is reasonably arguable that Premier does have a genuine commercial interest in the subject matter of these proceedings. Premier has expressly pleaded that in consideration for taking assignment of the GSA from Bridgewest, it paid the assignor (Bridgewest) the full sum outstanding under the GSA, including principal interest, penalty interest and costs totalling $3,253,457.54. In a strike out context, factual allegations in a statement of claim are, of course, presumed to be correct. It is reasonably arguable that Premier, having paid the full sum due to Bridgewest, is now simply enforcing their security interest in the chose of action as expressly provided for in the GSA and with a view to recovering the secured debt. It is reasonably arguable that there is no breach of the public policy reasons behind the torts of champerty and maintenance. It is reasonably arguable that there is no prohibited assignment of a bare cause of action.

[55] In *First City Corporation Ltd v Downsview Nominees Ltd*,[23] the second debenture holder of the company, FCC Ltd, assigned the company's indebtedness to

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20 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (HL) at 703.
21 *Camdex International Ltd v Bank of Zambia*, [1998] QB 22 (CA) at 39.
22 *PricewaterhouseCoopers v Walker*, above n 18, at [78].
23 *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710 (HC).

FCF Ltd after the company went into receivership and where FCF Ltd were looking to seek damages in negligence from the receiver for their conduct of the receivership. Gault J held that in considering whether there was a sufficient commercial interest that the actions in tort were ancillary to the assignment of the debenture itself, and the assignee was not buying merely in order to get a cause of action. Rather, it was buying property and a cause of action as incidental thereto. His Honour further held that the actions in tort were subsidiary matters, assigned with the debenture so that the assignee could protect the property it had received. There was thus a genuine commercial interest by the debenture holder in protecting the value of the security.

[56] On the facts here, it is reasonably arguable that Premier did not pay Bridgewest the entire amount outstanding under the GSA merely to get a cause of action but was rather buying all of the security interests with the cause of action being incidental thereto. That is clearly arguable from the price paid.

[57] Morrison Kent placed some reliance on the Queensland decision *WorkCover Queensland v Amaca Pty Ltd*,[24] and in particular the following dicta:[25]

> Plainly, a commercial interest in exploiting an assigned right, even if to recoup an amount paid in exchange for the assignment, would not, of itself, suffice. A commercial interest merely of that kind would tend to taint the assignment as savouring of maintenance or as champertous.

[58] *WorkCover Queensland* was an insurance case, concerning an individual who assigned his causes of action for damages for personal injuries allegedly caused by Amaca Pty Ltd's negligence to WorkCover, a third party, five days before his death.

[59] However, I find that that case provides no real support of Morrison Kent's position. Here, Premier is arguably trying to recover debt, rather than money that they had spent on acquiring the right to litigate. Furthermore, in *WorkCover Queensland*, the Court ultimately found that WorkCover did have a genuine commercial interest in the assignment at the time it occurred. The interest it had was in recoupment, fully or partially, of the amount it had paid out to its former client, Mr Rourke, by way of statutory compensation.

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24 *WorkCover Queensland v Amaca Pty Ltd* [2012] QCA 240.
25 *WorkCover Queensland v Amaca Pty Ltd*, above 24, at [65].

[60] In my minute of 10 June 2022, I invited submissions from the parties on the issue of whether it was relevant that the GSA was entered into by Mr Ensom after summary judgment had been entered against him on 4 April 2019. It was those summary judgment proceedings which led to his bankruptcy.

[61] In response to that question, Morrison Kent submitted that the timing of the GSA is relevant insofar as it conclusively demonstrates that Premier has no genuine commercial interest in the subject matter of the proceeding.

[62] There may be some merit to that submission, but I am in no position to resolve it at this summary stage. I cannot conclude that the timing of the GSA conclusively demonstrates a lack of genuine commercial interest. This is a trial issue. I also note that there are no proceedings by the Official Assignee to set aside the GSA.

[63] I note Morrison Kent's submission that Bridgewest and Downtown House are unrelated. It may be that Bridgewest had no interest (commercial or otherwise) in the loan arrangements with Downtown House when the lending arrangements were entered into in 2019. Again however, that does not mean that at this summary stage I could properly conclude that there is no genuine commercial interest by Premier in the subject matter of the proceedings. I reject Morrison Kent's submission that the assignee must "have skin in the game that was played at the time the cause of action arose". *Trendtex* makes clear that the Court must look at the totality of the transaction.[26]

[64] Morrison Kent further submitted that there are clear policy reasons why Morrison Kent should face Mr Ensom directly. These are said to include issues regarding discovery and security for costs; essentially fair trial issues. However, while the issue of a fair trial must undoubtedly be part of any abuse of process determination, there is no basis for concluding at this summary stage that those factors meet the high threshold of an abuse of process. There are procedures available under the High Court Rules to address the concerns Morrison Kent might have about discovery and security for costs.

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26 *Trendtex Trading Corporation v Credit Suisse*, above n 20.

[65] I find that the proceedings are not an abuse of process.

Issue (c) – Under the GSA must the proceedings be brought in the name of Mr Ensom?

[66] Morrison Kent submitted that cl 12.1(j) provides a power of "action" to "bring … any … proceedings … which may arise in connection with the Secured Property [or] the business of the Debtor … and for any such purpose use the name of any Debtor". It contends that cl 12.1(j) of the GSA expressly contemplates that a secured party will need to use a debtor's name to bring proceedings in relation to secured property (as is necessary without a valid assignment).

[67] However, that submission overlooks the very clear and broad wording of cl 12.1 and 12.2 (Powers Generally). Clause 12.1 expressly states that the secured party may either in the debtor's name "or in its own name" do anything and exercise any right including the right to bring proceedings under subclause (j). Read together with the very broad powers conferred by cl 12.2, I find that it is reasonably arguable under the terms of the GSA (i.e. the source of Premier's rights to sue) that it can bring proceedings in its own name and is not required to use the name of Mr Ensom.

[68] I reject Morrison Kent's submission that the power of attorney provision in the GSA, namely cl 19, is the only way for Premier to assert its rights and confirms the position that the claim always has and still does sit with Mr Ensom. In reading the GSA as a whole, there is arguably no basis for reaching that conclusion.

[69] As noted above, Morrison Kent also submitted that cl 12 provides for a range of circumstances and that in relation to some secured property the secured party is able to act in its own name. They say that in other cases it will not. It is further argued that cl 12 simply provides the machinery and is subordinate to cl 2, which does not effect an assignment of a cause in action.

[70] I agree that cl 12 provides for a range of circumstances. I also accept that in principle there are differences between real property, a mortgage interest and a chose in action. However, as already noted, the terms of the relevant clauses are very broad. Insofar as enforcement action is taken in the name of the security holder, the wording

of the relevant GSA terms does not distinguish between different types of secured property.

[71] I conclude that it is reasonably arguable that under the terms of the GSA, Premier can bring the proceedings in its own name. Morrison Kent has not established that the only tenable interpretation of the GSA is that Premier must bring the proceedings in the name of Mr Ensom.

Principal issue – Standing

[72] I conclude that Premier has standing to bring the proceedings. The cause of action has not vested in the Official Assignee, the proceedings are not an abuse of process and under the terms of the GSA, Premier may bring the proceedings in its own name.

Final issue – Is it reasonably arguable that there was a breach of the duty of care alleged and that loss was caused by that breach?

[73] Morrison Kent submits that Premier's cause of action against it cannot succeed because it discharged its general duty to advise Mr Ensom to seek independent legal advice. Morrison Kent relies upon the two undisputed waivers of independent legal advice that Mr Ensom signed on 13 January 2017 in respect of the guarantee. Those waivers record that Morrison Kent: acted for Pomegranate Recording Ltd; explained broadly the nature of the loan documents; advised Mr Ensom to obtain independent legal advice; and that Mr Ensom understood the nature of the documents and declined to seek independent advice.

[74] Morrison Kent relies upon the well-settled case law that a solicitor may act in circumstances where interests may conflict so long as informed consent is obtained. In determining whether a solicitor has obtained informed consent, the precise nature of the services required by the parties is essential. Morrison Kent relies on the decision *Clark Boyce v Mouat*[27] for the following proposition: where there is no contractual duty on a solicitor to advise the claimant on the wisdom of entering into a transaction,

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[27] *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC).

s/he cannot claim that the solicitor nevertheless owed a fiduciary duty to give the advice.

[75] In response, Premier contends that the standard waivers of independent advice relate solely to the finance documentation and guarantee provided by Mr Ensom. It says that these waivers have no bearing upon the negligence asserted in the proceedings and could not do so. Premier further contends that it will be a matter of expert evidence at trial whether, given the "inherent unusual features and high risks Mr Ensom was undertaking without a contract with Mr MacDonald", a waiver of independent advice would be sufficient.

[76] There may well be merit to Morrison Kent's submission. Again, however, this is a trial issue. I note also that Morrison Kent contends that it did not act for Mr Ensom but, rather, for the company, Pomegranate Recording Ltd. There are a range of disputed factual issues relating to the critical matter of whether there has been a breach of the alleged duty of care. I am not in a position to resolve them.

[77] Morrison Kent further contends that there is no probative evidence that Mr Ensom has suffered any loss beyond his undisputed liability arising from the Downtown House litigation. It says that it has squarely put loss at issue. It says that this Court has already found that Mr Ensom would have had liability to Downtown House over and above the value of any third-party claim against Mr MacDonald. Therefore, even if there was a joint venture arrangement Mr Ensom, it is argued, still had 60 per cent liability for the judgment debt.

[78] Morrison Kent further say that there is no evidence that Mr Ensom was bankrupted because of an inability to pay 40 per cent of the outstanding debt owed to Downtown House (as opposed to an inability to pay the 60 per cent Morrison Kent understands that Mr Ensom did not dispute liability for).

[79] In response, Premier contends that Morrison Kent misunderstands the basis of its claim. Premier asserts that should competent advice have been provided to Mr Ensom, there would have been a contractual obligation upon Mr MacDonald to

pay 40 per cent of the actual losses. That obligation is said to be not contingent upon any specific payment by Mr Ensom or his associated entities.

[80] Premier further alleges that if an appropriate contract was not entered into between Mr Ensom and Mr MacDonald, the investment would not have proceeded and Mr Ensom would not have suffered any losses at all.

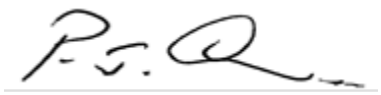
[81] Again, this issue, namely whether there was any loss flowing from the alleged breach, may well present a formidable hurdle for Premier. However, these are all trial issues. There are significant disputed matters of fact, where causation and loss in these solicitor negligence cases are often highly fact specific.

[82] For these reasons, I conclude that Morrison Kent has not established that there is no tenable claim of breach of duty of care and/or loss caused by that breach.

Result

[83] The application by Morrison Kent for summary judgment and/or strike out is dismissed. It is reasonably arguable that Premier has standing to bring the proceedings. It is also reasonably arguable that there was a breach of Morrison Kent's duty of care and loss caused by that breach.

[84] As to costs, having succeeded, I am of the view that Premier is entitled to costs and on a 2B basis. If the parties cannot agree on costs, then memoranda (no more than three pages) are to be filed and served **within 14 days**.



Associate Judge P J Andrew