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### Issue 3

*Intervention in the conduct of the proceedings.*

Drummond J in *Movitor*, said this in relation to *Groveswood*:

"Lightman J held that, because there was no sale of a cause of action belonging to the company by the liquidator which would have been within the exemption from maintenance and champerty, the fact that the purchaser from the liquidator of a share in the fruits of the litigation was to be involved in the conduct of the litigation made it champertous." (at 594).

Similarly, in *Magic Menu Systems Pty Limited v AFA Facilitation Pty Limited* (1996) 137 ALR 260 (appeal dismissed on 20 January 1997, unreported), the court held that:

"... if the purchaser of a share of the fruits of litigation between others is also entitled, under the purchase agreements to involve himself in the litigation, that will be sufficient to turn an otherwise lawful transaction into one that involves both unlawful maintenance and champerty." (at 272).

Lindgren J did not need to formally address the issue, because he concluded that under the amended agreement FAI had no more than a right to be kept informed and to invoke mediation procedures described in the Creditors Recovery Service Facility, while leaving ultimate control of the proceedings with the Insured.

Lindgren J concluded that the liquidator of *Tosich* had the power to enter into the insurance agreement with FAI.

### Summary

In order for an insurance litigation funding arrangement to be valid it must satisfy the following requirements:

- (i) it must effect a sale or disposition of the cause of action or of the fruits (or a share of the fruits);

- (ii) it must constitute a bona fide exercise of power by the liquidator. In this respect it will be important for the liquidator to obtain the consent of the creditors or a committee of inspection or of the Court to the proposed assignment; and
- (iii) where there is a sale or disposition of the recoveries, the funder should not have control over the conduct of the proceedings.

### Consequences of Invalidity

If an insurance litigation funding arrangement does not comply with above requirements the possible consequences of invalidity include the following:

- (a) the insurer will not be able to require payment of the premium notwithstanding funding having been provided;
- (b) liquidators who have paid a premium in advance of funding, may not be able to receive compensation from the company's assets;
- (c) indemnities for adverse costs orders granted by insurers are unenforceable;
- (d) liquidators who have borrowed funds mistakenly believing that the debt is underwritten by the insurer are left with personal exposure; and
- (e) parties who have been sued by liquidators in reliance upon litigation funding will seek a stay of proceedings (on the grounds that the insurance litigation funding arrangement is invalid) to frustrate the liquidator's activities and diminish his resolve in the proceedings.

Given the possible consequences of invalidity of a litigation funding arrangement and the rapid expansion in their use by liquidators in the last two years, Lindgren J's decision in *Tosich* is an important one.

## NEEDED

### Chairpersons of Disciplinary and Inability Appeal Boards

The Commissioner for Public Employment, Mr David Hawkes, is responsible for administering the *Public Sector Employment and Management Act*.

Since 1993 a Disciplinary Appeal Board and an Inability Appeal Board have been established under this legislation.

Chairpersons of these Boards have generally been local legal practitioners and the Commissioner seeks further Expressions of Interest from any practitioners nominated as a chairperson for either of these two Boards.

Anyone interested in obtaining further information can do so by contacting the Commissioner's office on 8999 5511 (ph) or 8941 1895 (fax).

### Law Librarian Exchange

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sion has created something of a demise in the mentoring system and the ability to network personally. Karen's law association is working very hard to rectify some of these problems.

Members of the profession in NTAG's department are indeed fortunate in being able to tap into the knowledge and experience Karen has brought with her from Canada, and even more fortunate that this expertise is accompanied by the enthusiastic intelligence (and possibly even a liking for lawyers) that Karen exhibits.

The Law Society wishes Karen every enjoyment of her time in Darwin and her subsequent travels in Australia.