CITATION: 2770095 Ontario Inc. v. Morgan, 2023 ONSC 1924
COURT FILE NO.: CV-21-00663862-0000
DATE: 20230324

ONTARIO SUPERIOR COURT OF JUSTICE

RE: 2770095 Ontario Inc., Plaintiff

-and-

Maxwell Dean Morgan, Tricia Edwards, 1587803 Ontario Ltd. doing business as Aramor Payments, 2513086 Ontario Inc., 2416336 Ontario Inc., Kyla Vanessa Morgan, 4th And Long Inc., Humbleberry Inc., Dopebuilder Commerce, John Doe, Jane Doe and Doe Corporations, Defendants

BEFORE: Robert Centa J.

COUNSEL: Ashley Ferguson and Norman Groot, for the plaintiff (responding party)

Alan Cofman and Abby McGivney, for the defendant (moving party), Tricia Edwards

Howard Juriansz, for the defendant (moving party) Maxwell Dean Morgan

HEARD: February 6, 2023

ENDORSEMENT

[1] Affinitas Medios de Pago S.A.P.I de C.V. is a corporation based in Mexico City, with international operations and a global reach. Affinitas is a payment facilitator helping its clients, on-line gaming merchants, integrate and manage their online sales. Affinitas signed a contract with ZedPayments, a company from the Philippines, to provide payment processing services. Affinitas concluded that ZedPayments had not transferred funds to Affinitas' merchants as required. Moreover, Affinitas concluded that ZedPayments may itself have been fictitious and that Affinitas may have been the subject of a fraud carried out by a number of people, including several that lived in Ontario.

[2] Affinitas could have commenced an action in the Superior Court of Justice. It might have been required to post security for costs, but there is no evidence that it was incapable of advancing its claims in its own name. The defendants, or some of them, may well have harmed Affinitas. Indeed, interlocutory decisions of this court have concluded that there is a strong *prima facie case* that Affinitas has been defrauded by the defendants to this action.

[3] Instead of commencing an action in its own name, however, Affinitas assigned its claims to an Ontario numbered company that was incorporated the day before the assignment. The numbered company, the plaintiff in this action, was created for the sole purpose of purchasing Affinitas' claims in exchange for a contingent 3% interest in any net proceeds recovered by the plaintiff. The plaintiff had no pre-existing property interest or legitimate commercial interest in the enforcement of the claim. Indeed, the plaintiff had no pre-existing existence.

[4] The plaintiff then set about advancing the purchased claims with notable vigour. The plaintiff:

a. obtained *Norwich* orders that required banks to produce documents from the accounts of the defendants;

b. obtained and executed *Anton Piller* orders at the homes of the defendants;

c. obtained world-wide *Mareva* orders freezing the bank accounts of the defendants;

d. compelled some of the individual defendants to attend out of court examinations;

e. placed certificates of pending litigation on property owned by the defendants;

f. brought contempt proceedings against two individual defendants and asked the court to incarcerate them for four months; and

g. issued a statement of claim seeking over $1 million in damages and $1.5 million in punitive and aggravated damages.

[5] Affinitas could have taken these steps, if so advised, in its own name. What Affinitas could not do is assign its tort claims to a "special purpose vehicle". The courts do not tolerate this sort of trafficking in litigation. It is champertous. It does nothing to advance the cause of justice and is an abuse of the court's process. For the reasons that follow, I dismiss the action.

The identity of the parties and key persons and the relationships among them

The defendants

[6] The defendant Maxwell Morgan is an Ontario resident. He is married to the defendant, Kyla Morgan. He is the sole director and officer of the defendant corporations 1587803 Ontario Ltd. doing business as Aramor Payments, and 2416336 Ontario Inc.

[7] The defendant Tricia Edwards is an Ontario resident. She is the director and officer of the defendant 2513086 Ontario Inc. and held positions with Aramor Payments. She is a business associate of Mr. Morgan, at least through Aramor Payments.

Affinitas (non-party)

[8] Affinitas is not a party to this litigation. Affinitas is a corporation based in Mexico City, with international operations and a global reach. It does not have a subsidiary in Ontario. It is described as a payment facilitator, helping internet merchants integrate and manage online sales, primarily in the online gaming industry. Affinitas' merchant clients sell products and services online to their own customers who pay for those items via credit and debit cards. The acquiring bank then deducts its fees and remits the payment to the merchants.

[9] Affinitas contracts with third-party businesses who act as intermediaries to process payments between the acquiring banks and the merchants. These payment processors will have contracts in place with the acquiring banks and will perform this role for many merchants. In this scenario, the bank will process a transaction between a merchant and its client, settle and clear the amount of the transaction, and transfer the funds to the payment processor. The payment processor typically segregates the funds received into separate accounts for each merchant. The payment processor then deducts its own fees and transfers the funds to the merchants. Sometimes, the payment processor is referred to as the paymaster because of its role in ensuring the merchants receive what they are owed.

[10] Affinitas seeks out payment processors to provide services to its merchant clients. In Spring 2020, Affinitas was hired by some merchant clients. Michael Bugto, "a trusted industry colleague," referred Affinitas to New Line Processing LLC, a payment processing brokerage house based in New York, and its affiliate, Zed Payments. It is also asserted that Mr. Bugto referred Affinitas to Michael A. Harris and the defendant, Mr. Morgan, who advised Affinitas that they represented ZedPayments.

Zed Payments (non-party)

[11] Affinitas understood ZedPayments to be a payment processor with offices located in the Philippines. In June 2020, Affinitas worked with ZedPayments to integrate the payment processing software that would be used to process the payments to the merchant clients of Affinitas. Mr. Morgan appears to have been heavily involved in this work. During this period, Affinitas did not have a written contract in place with ZedPayments.

[12] On June 16, 2020, ZedPayments' online payment processing for the Affinitas merchants started to operate.

[13] On July 17, 2020, Affinitas signed a contract with ZedPayments. The contract is on the letterhead of ZedPayments and was signed by a representative of Affinitas (referred to as the client in the contract) and Michael Harris of ZedPayments. The entire contract provides:

> ZedPayments shall provide Credit Card processing capabilities to the Client as well as other agreed to services such as gateway services, chargeback management and any other services deemed necessary for the successful processing and operation of its online business. The Client

acknowledges that it is obligated to operate in accordance with all processing regulations.

Rates- Outlined in Exhibit “A”
[MDR: 7.00%
Rolling Reserve: 10% (180 days)
Payout period: 7 days in arrears - (paid twice a week)
Transaction Submitted: US$ 0.25 per transaction
Chargeback Fee: US$45.00 (under 1%)
Chargeback Fee: US$75.00 (over 1%)
Per Refund: US$5.00]

Reserve - A reserve shall be held against the sum total of all processed sales. The reserve shall be a six- month "rolling" reserve unless otherwise specified. The reserve shall be held in a non-interest- bearing account. The Client will be entitled to begin receiving reserve funds less credits, chargebacks, fines or fees, at the end of the six-month period provided only that the account has been maintained in good standing and chargeback rates have remained within the guidelines set forth. ZedPayments retains the right to increase the reserve fees at any time if it is deemed necessary based on Clients [*sic*] chargeback levels.

Refusal of Service - ZedPayments reserves the right to refuse or revoke service at any time at ZedPayments's sole discretion.

Representations- Client must not misrepresent its products or services with exaggerated ad copy. All advertisements online or otherwise must be free of false or misleading statements. Client must inform its customers of the billing descriptor that will appear on their monthly statement.

Chargebacks- Client will be charged for each chargeback as outlined in exhibit "A" in addition to having the total amount of the sale deducted from pending settlement. ZedPayments reserves the right to increase chargeback fees if Clients [*sic*] chargeback percentages are deemed unacceptable.

Fees/Fines - Client accepts responsibility for all fees and fines that may be enforced by the card associations or processing banks in connection with the transactions they have submitted. Documentation of all fees shall be available upon request from ZedPayments.

> **Indemnity** Under no circumstances shall ZedPayments, its staff, its affiliates or its contractors be liable for any direct, or consequential damage that results from Clients [*sic*] use of this service. Client agrees and acknowledges that all sales processed through ZedPayments are generated from its own efforts. Client agrees to defend, indemnify and hold ZedPayments, its staff and its affiliates harmless from any and all liabilities, costs, expenses (including legal fees) arising from any violation of this agreement by Client or any employee or party that may have accessed the processing service through Clients [*sic*] account.
>
> **Guarantee** Both parties agree that Client and the signer of this agreement are responsible for any and all fees, fines and unpaid chargebacks that may exceed any amount held in reserve or on deposit and that said amounts will be paid promptly at the request of ZedPayments. Client furthermore agrees that this guarantee shall remain in effect for one year from the date of the last transaction submitted by Client.

[14] By the end of July, Affinitas concluded that ZedPayments did not pay over $1 million that was owing to the Affinitas merchants. The merchant clients did not receive some of the payments that were purportedly sent to them and, in other cases, the amounts owing to the merchant clients was simply never sent.

[15] Affinitas was in frequent contact with New Line Processing and Mr. Morgan throughout July in an attempt to locate and recover the missing and outstanding funds. Affinitas received answers that it felt were unsatisfactory. The plaintiff claims that on August 4, 2020, Mr. Morgan indicated that the missing and outstanding funds would be paid. Affinitas remained unsatisfied by the lack of transparency and documentation provided by ZedPayments, New Line Processing, and Mr. Morgan.

[16] Affinitas wished to compel ZedPayments to make the timely payments required by its contract.

The plaintiff and its principal, Jack Tadman

[17] Jack Tadman is an Ontario lawyer. On August 5, 2020, he incorporated the plaintiff 2770095 Ontario Inc. Mr. Tadman is the sole officer, director, and shareholder of the plaintiff. Mr. Tadman states that he also provides legal services to the plaintiff.

[18] Mr. Tadman swore an affidavit in which he explained that he created the plaintiff as a "special purpose vehicle" that was a "convenient and appropriate vehicle to pursue payment" from the defendants:

> [the plaintiff] was created as a Special Purpose Vehicle ('SPV') for the purpose of pursuing funds for Affinitas of approximately US$1,110,000.00 owing from the payment processing transactions through [the defendants] and the corporate entities they control. At the time that [the plaintiff] was created, me [*sic*] and attorney Lee, as well as Affinitas, were dealing with Ontario residents and Ontario registered corporations, therefore the SPV was also a jurisdiction-specific entity. [The plaintiff] is a convenient and appropriate vehicle to pursue payment as against the Ontario-based individual and corporate defendants…

[19] To fulfill its "special purpose," the plaintiff entered into an "Assignment of Claim Agreement" with Affinitas on the day after it was incorporated.

The Assignment of Claim Agreement between Affinitas and the plaintiff

[20] On August 6, 2020, the plaintiff entered into an agreement titled "Assignment of Claim Agreement" with Affinitas. The title of the document provides significant insight into the substance of the transaction. The recitals to the Assignment of Claim Agreement provide as follows:

> WHEREAS [Affinitas] is owed a debt by ZedPayments, a company with its offices at 524 Aragon Str Cittadella Exec Village, 1742 as Pinas, Philippines ("ZedPayments" or the "Debtor");
>
> AND WHEREAS [Affinitas] wishes to assign the Claim (defined below) to the [plaintiff];

[21] The Assignment of Claim Agreement then assigns Affinitas' claim against ZedPayments and any of its agents or representatives, and any other individual or entity directly or indirectly responsible for the monies owed, to the plaintiff. It also assigns any actions and lawsuits of any nature whatsoever arising out of the claim. Affinitas also assigned its rights to all penalties and fees to the plaintiff. The Assignment of Claim Agreement provides as follows:

> [Affinitas], for good and valuable consideration does hereby irrevocably sell, convey, transfer and assign to [the plaintiff], all of [Affinitas's] right, title and interest in and to its claim against ZedPayments and any of its agents or representatives, including but in no way limited to Maxwell Morgan and Jaspreet Mathur; New Line Processing, LLC, including but in no way limited to Daniel Abadir, Christopher O'Hagan and George Saab; and any other individual or entity directly or indirectly responsible for the

> monies owed that are described herein (the "Claim"), in the currently outstanding principal amount of not less than $1,063,298.52 (the "Claim Amount"), and all rights and benefits of the [Affinitas] relating to the Claim (the "Transferred Rights"). The Transferred Rights shall include, without limitation, (i) [Affinitas's] right to receive interest, penalties and fees, if any, which may be paid with respect to the Claim, (ii) any actions, claims, rights or lawsuits of any nature whatsoever arising out of or in connection with the Claim, (iii) all cash, securities, instruments and other property which may be paid or issued by [ZedPayments] in satisfaction of the Claim; (iv) all proceeds of the foregoing: (v) any rights, title, and interest arising from the agreement between [Affinitas] and [ZedPayments] dated July 17, 2020. For the avoidance of doubt, the Transferred Rights shall not include any obligations or liabilities of [Affinitas] or any other party, The assignment of the Claim shall be for the purpose of collection and satisfaction, and shall not be deemed to create a security interest.

[22] Among the rights transferred by the Assignment of Claim Agreement are "any rights, title, and interest arising from the agreement…dated July 17, 2020." This appears to be a reference to the contract between ZedPayments and Affinitas described above.

[23] The Assignment of Claim Agreement then describes the consideration to be paid by the plaintiff to Affinitas in exchange for the claim – a 3% share of the funds recovered by the plaintiff (net of expenses) payable if, and only if, the plaintiff is successful:

> In exchange for the assignment of the Claim by the [Affinitas] to the [plaintiff], the [plaintiff] shall pay to the [Affinitas], net of all litigation-related attorneys' fees and costs incurred by [plaintiff] in pursuing the Claim Amount, three percent (3%) of the funds recovered by [plaintiff] that are specific to [Affinitas's] assigned Claim. [Affinitas's] full, ongoing and timely cooperation with [plaintiff's] efforts to collect on the Claim Amount is a material and otherwise integral component of [plaintiff's] willingness to give [Affinitas] 3% of the net recovery. [Affinitas] and [plaintiff] each understand and confirm that [Affinitas] is expected to and will only provide truthful and accurate assistance and cooperation, without regard to whether the assistance and cooperation helps or does not help efforts to collect on the Claim Amount. [Affinitas] and [plaintiff] are both committed to the Claim Amount being pursued in an upstanding and otherwise lawful manner.

[24] In the Assignment of Claim Agreement, Affinitas authorizes the plaintiff to sue and settle the assigned claim without further input from Affinitas:

> [Affinitas] hereby irrevocably appoints [plaintiff] as its true and lawful attorney-in-fact solely with respect to the Transferred Rights, and authorizes [plaintiff] to act in [Affinitas's] name, place and stead, to demand, sue for, compromise and recover all such amounts which are, or may hereafter become due and payable for, or on account of the Transferred Rights herein assigned. [Affinitas] hereby grants unto [plaintiff] full authority to do all things necessary to enforce the Transferred Rights and [Affinitas's] rights thereunder. In the event an objection to the Claim is received, [Affinitas] shall immediately notify [plaintiff] in writing and shall take such further action as may be necessary or desirable to effect the Assignment of Claim and any payments or distributions on account of the Transferred Rights to [plaintiff] including, without limitation, the execution of appropriate transfer powers, corporate resolutions and consents.

[25] The Assignment of Claim Agreement also contained an entire agreement clause and specified that nothing in the agreement created "the relationship of partnership or of principal and agent or of joint venture" between Affinitas and the plaintiff.

Negotiations and this action

[26] After it signed the assignment agreement, the plaintiff, through its California counsel Mr. Lee, contacted Mr. Morgan and the counsel for Aramor in an attempt to obtain payments in respect of the missing funds. The plaintiff had limited success.

[27] For example, on August 21, 2020, Mr. Morgan paid $110,000 USD via wire transfer. The payment was made to Jack Tadman PC in trust from a TD bank account held by the defendant 2416336 Ontario Inc. The evidence does not establish that Mr. Morgan knew that a payment to "Jack Tadman PC, in trust" was a payment to the plaintiff pursuant to an assignment agreement between Affinitas and the plaintiff.

[28] The plaintiff continued its investigation but remained unsatisfied with the answers it obtained from counsel for Aramor.

[29] On February 18, 2021, the plaintiff moved *ex parte* for a *Norwich* order directing the Toronto-Dominion Bank to produce the banking records of the defendants 2416336 Ontario Inc. and 2513086 Ontario Inc. to the plaintiff. Justice Myers granted the *Norwich* order.

[30] U.S. counsel for the plaintiff continued to correspond with counsel for Aramor. For example, on February 24, 2021, Mr. Lee wrote to counsel for Aramor and stated "I don't

represent Affinitas. My client is [the plaintiff]. That said, Affinitas has formally assigned its claims to my client" (emphasis added).

[31] On February 25, 2021, counsel for Aramor sent a settlement proposal to the plaintiff's U.S. counsel. In this communication, Aramor denied being a party to any contract with Affinitas, and denied all responsibility for any money owing to the plaintiff or Affinitas.[1]

[32] On May 18, 2021, the plaintiff returned before Myers J. to seek additional orders requiring RBC and ScotiaBank to produce the personal banking records of Ms. Edwards and Mr. Morgan. Justice Myers granted the additional *Norwich* order.

[33] On June 11, 2021, with the benefit of the documents provided by the banks, the plaintiff issued a notice of action.

[34] On June 14, 2021, the plaintiff brought an *ex parte* motion seeking *Mareva* and *Anton Piller* orders. Justice Myers granted the orders. While the fact of the assignment was disclosed, the plaintiff did not include a copy of the assignment agreement as part of its motion materials.

[35] On June 15, 2021, the plaintiff executed the *Anton Piller* order at the residences of Mr. Morgan and Ms. Edwards. Subsequently, the plaintiff alleged that Mr. Morgan and Ms. Edwards violated the terms of the *Anton Piller* and *Mareva* orders and brought motions to have them found in contempt. In its factum on the motion, the plaintiff stated that would be asking the court to "impose a sentence of 4 months incarceration of both [Mr.] Morgan and [Ms.] Edwards."

[36] On July 21, 2021, the plaintiff issued its statement of claim, which spans 171 paragraphs. The prayer for relief spans six pages. The primary relief sought is as follows:

> 1. The Plaintiff claims as against the defendants Maxwell Dean Morgan, Tricia Edwards, 1587803 Ontario Ltd. doing business as Aramor Payments, 2513086 Ontario Inc. and 2416336 Ontario Inc. (collectively the "Primary Defendants") for:
>
> > a) a Declaration and Judgment for fraud (common law and equity), breach of trust, conversion, conspiracy, and unjust enrichment;
> >
> > b) liquidated damages in the amount equal to the Canadian dollar exchange rate of US$1,110,000 (the "Defrauded Funds"); …

[1] This communication, although marked without prejudice, was included in the plaintiff's motion record.

> 2. The Plaintiff claims against the defendants Kyla Vanessa Morgan, 4th and Long Inc., Humbleberry Inc., Dopebuilder Commerce, John Doe, Jane Doe and Doe Corporations (collectively the "Secondary Defendants") for:
>
> > a) a Declaration and Judgment for conversion, conspiracy, unjust enrichment, knowing assistance and knowing receipt;

[37] The plaintiff does not plead that Affinitas had a direct contractual relationship with Mr. Morgan, Ms. Edwards, or any of the defendants to this action. The plaintiff does not plead that any of the defendants breached a contract with Affinitas. In its factum on this motion, the plaintiff describes its claim as follows:

> The Claims against Morgan, Edwards, 251 Ontario and 241 Ontario are based in fraud, breach of trust, conversion, conspiracy and unjust enrichment. Morgan and Edwards are alleged to have utilized their corporate alter egos and fictitious entities and personas in order to execute the fraudulent scheme. Edwards is a director, officer and signatory to bank accounts of the Ontario corporations that were used in the commission of the fraudulent scheme. Edwards admitted to having dealt with the Plaintiff's funds and altering bank documents used by Morgan in the fraudulent scheme.

[38] Although the claim repeatedly refers to seeking "liquidated damages" of $1.1 million, neither the statement of claim nor the evidence before me suggests that there is a proper liquidated damages claim against any of the defendants. Recall that the Assignment of Claim Agreement states that it is ZedPayments, not any of the Ontario defendants, that owes Affinitas $1.1 million.

[39] In addition to the claim for liquidated damages, the plaintiff seeks relief including but not limited to:

a. special damages, consequential losses, and borrowing costs;

b. punitive and exemplary damages of $1 million against the primary defendants and an additional $500,000 against the secondary defendants;

c. an accounting;

d. a declaration that all monies obtained by the defendants in breach of their duties, including fiduciary and trust duties, or in furtherance of the unlawful conduct, are subject to in a constructive trust in favour of the plaintiff;

e. an order for disgorgement of the defrauded funds;

f. a constructive trust over property owned by Mr. Morgan, Ms. Morgan, and Ms. Edwards;

g. certificates of pending litigation over property owned by Mr. Morgan, Ms. Morgan, and Ms. Edwards;

h. a world-wide *Mareva* injunction;

i. an order requiring the defendants to deliver sworn statements of assets;

j. an order that the defendants attend before an official examiner to disclose the location of their assets;

k. an *Anton Piller* order; and

l. a declaration that "any judgment granted in fraud and/or breach of trust against the defendants, in addition to any judgment in the named torts, constitutes a debt or liability that shall not be released by an order of discharge of bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended or any similar statue or regulation"

[40] Mr. Morgan and Ms. Edwards filed their statements of defence on September 13, 2021. The plaintiff points out that the defendants did not raise the issue of the propriety of the assignment at that time. In my view, in these circumstances, that is immaterial to the relief sought on this motion.

Position of the parties

[41] Mr. Morgan and Ms. Edwards take similar positions on this motion:

a. the assignment of the causes of action in this proceeding is invalid and the plaintiff may not prosecute this action;

b. the plaintiff has violated the registration and other provisions of the *Collection and Debt Settlement Services Act*;[2]

[42] Despite some variation in how they frame their request for relief, they seek:

a. A declaration that the Assignment of Claim Agreement did not validly assign any claims against them;

b. An order dismissing the action as an abuse of process;

[2] R.S.O. 1990, c. S.15 (CDSSA).

c. Orders vacating the *Mareva* orders put in place against them;

d. Orders vacating the certificates of pending litigation that have been registered against each of their properties;

e. A declaration that the plaintiff has violated the registration obligations of the *CDSSA*; and

f. Costs of this motion and proceeding to be paid jointly and severally by the plaintiff and Mr. Tadman on a scale considered appropriate.

[43] The plaintiff submits that the assignment was valid, the motion should be dismissed, and the contempt hearings should be rescheduled.

The assignment of the claim is invalid and this action amounts to maintenance and champerty

[44] The defendants submit that the Assignment of Claim Agreement and this action are prohibited because they amount to maintenance and champerty. For the reasons that follow, I agree.

[45] In Ontario, all champertous agreements are forbidden and invalid.[3] In *McIntyre Estate*, the Court of Appeal for Ontario defined maintenance and champerty as follows:

> Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty.[4]

[46] Justice Perell described the current state of the law of champerty as follows:

> The elements of a claim of champerty are: (1) the defendant for an improper motive (officious intermeddling) provides assistance to a litigant in a lawsuit against the plaintiff; (2)

[3] *An Act Respecting Champerty*, R.S.O. 1897, c. 327.
[4] *McIntyre Estate v. Ontario (Attorney General)*, (2002), 61 O.R. (3d) 257 (C.A.), at para. 26.

> the defendant has no personal interest in the lawsuit; (3) the defendant's assistance to one of the litigants is without justification or excuse; and, (4) the defendant shares in the spoils of the litigation.[5]

[47] In some cases, the assignment of a cause of action will be permitted. Assignments of certain contracts, for example, an action on a debt, are permitted. In limited circumstances, a cause of action in tort can be assigned. I find, however, that this assignment is not valid. As I will explain below, the Assignment of Claim Agreement:

a. Did not validly assign a cause of action in tort. The agreement does not merely assign the fruits of the action, it assigns the action itself, which is prosecuted in the name of the plaintiff and not Affinitas. In addition, the plaintiff did not have a pre-existing financial interest in the cause of action and did not acquire it as something ancillary to property rights that it acquired through a legitimate commercial transaction.

b. Did not assign a true debt or validly assign a cause of action for breach of contract.

c. Was not prompted by a desire to advance the cause of justice. The plaintiff was, rather, intermeddling for a collateral reason, namely profits arising from trafficking in litigation.

The Assignment of Claim Agreement does not validly assign the cause of action in tort

[48] The leading Canadian case on the validity of assignments of causes of action in tort and contract is *Fredrickson v. Insurance Corp. of British Columbia*.[6] In that case, Ms. Neilson was seriously injured while she was driving Mr. Fredrickson's car with his consent. Ms. Neilson successfully sued Mr. Fredrickson, who was defended by ICBC. The jury fixed damages at $1.2 million and found him to be 80% liable for her damages. Mr. Fredrickson only had insurance coverage for $500,000 of the $960,000 damage award. He did not have the resources to pay personally the balance of the judgment owing to Ms. Neilson.

[49] Mr. Fredrickson asserted that ICBC was negligent in the conduct of his defence and that it breached its contract with him. He assigned his right of action to the Public Trustee to assist Ms. Neilson to recover the balance of the judgment against him. ICBC asserted that the assignments were prohibited by the law against maintenance and champerty.

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[5] Citing *Smythers v. Armstrong* (1989), 1989 CanLII 4301 (ON SC), 67 O.R. (2d) 753 (H.C.J.); *Trendex Trading v. Credit Suisse*, [1982] A.C. 679 (H.L.); *Oseco Inc. v. Jansen* (1989), 71 O.R. (2d) 151 (H.C.J.); *George Biro Real Estate Ltd. v. Sheldon*, [1965] 1 O.R. 49 (H.C.J.).

[6] (1986), 28 D.L.R. (4th) 414 (B.C.C.A.) affirmed, [1988] 1 S.C.R. 1089; See also *Ma v. Ma*, 2012 ONCA 408, 111 O.R. (3d) 195, at para. 8; and *Gentra Canada Investments Inc. v. Lipson*, 2011 ONCA 331, 106 O.R. (3d) 261 (Ont. C.A.), leave to appeal refused, (2012), [2011] S.C.C.A. No. 327 (S.C.C.).

[50] The British Columbia Court of Appeal observed that a bare cause of action is not assignable because of the common law rule against maintenance and champerty.[7] The court noted that there are several exceptions to the rule and that the categories of exceptions are not closed. In each case, the court must ask itself "whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason."[8]

[51] The first exception is that the fruits of an action are assignable. This case does not fall within the first exception. The Assignment of Claim Agreement, as its name reveals, assigns the cause of action to the plaintiff along with the proceeds. If Affinitas prosecuted the action in its own name, it could permissibly assign the proceeds of that action to anyone. It is the plaintiff, however, not Affinitas, that seeks to prosecute this action. The plaintiff has not merely assigned the proceeds, it has purported to assign the entire claim, the right to prosecute it, and the right compromise the claim. The plaintiff cannot, therefore, rely on the fruits of an action exception to the rule in these circumstances.[9]

[52] The second exception is where the assignee of a non-personal tort has either a property interest to which the cause of action is ancillary, or a legitimate pre-existing commercial interest in the enforcement of the claim. For example, assignments to insurers who have a subrogated claim are permissible. The court in *Fredrickson* explained that it was the assignee's genuine and pre-existing financial interest in the litigation that negated the taint of champerty and maintenance. For example, if the assignor conveys a property interest that carries with it an ancillary cause of action, that will be sufficient. However, the assignment of a cause of action to a stranger is not permitted:

> An assignment of a cause of action for non-personal tort is generally valid if the assignee has a sufficient pre-existing interest in the litigation to negate any taint of champerty or maintenance. In determining if this test is met, the court should look at the totality of the transaction: *Trendtex*, supra, per Lord Roskill, at p. 531. A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice. The term "commercial interest" is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense. Assignment of a cause of action to a stranger will not be permitted, nor will the court uphold an assignment made for the purpose of obtaining more than what the assignee is legally entitled to. The conditions necessary to support the assignment of a cause of action in tort will be held to have

[7] *Fredrickson*, at p. 420.
[8] *Fredrickson*, at para. 23.
[9] *Fredrickson*, at paras. 24 and 25; *Glegg v. Bromley*, [1912] 3 K.B. 474 (C.A.).

> been met where one party to litigation assigns to the other a cause of action arising out of the conduct of that litigation, with a view to enabling the assignee to recover the judgment which the court has previously pronounced in his favour.[10]

[53] In summary, McLachlan J.A. (as she then was), held that the court must focus on whether the assignee had a pre-existing financial interest at the time of the assignment or if the interest in the cause of action is only created by the assignment. For this reason, the assignment in *Fredrickson* came within the exception:

> While the entire transaction must be looked to, the essential question to be considered in determining whether the assignment smacks of maintenance or champerty is whether the assignee possessed the requisite financial interest at the time of the assignment….when the assignment here in question was made, Miss Nielsen had a very real financial interest in obtaining it. She had a judgment. The cause of action of which she took an assignment represented her only means of obtaining satisfaction of that judgment. Her interest in the cause of action assigned is not created by the assignment, in which case it might well be champertous, but antedated and existed independently of the assignment. The assignee, in pursuing the assigned cause of action, does not seek to make a profit but only to recover the amount of her judgment. Moreover, she is not a stranger to the action assigned. She was involved in the proceedings which give rise to it. She has a direct relationship under our legislation with I.C.B.C., as Mr. Fredrickson's insurer, in her own right. In these circumstances I cannot conclude that assignment of Mr. Fredrickson's cause of action against I.C.B.C. to Miss Nielsen renders her an officious intermeddler guilty of the improper maintenance of the litigation. (emphasis added)

[54] The principles from *Frederickson* have consistently been applied in the province of Ontario.

[55] For example, the Court of Appeal for Ontario applied the rule from *Frederickson* that it is permissible for the assignor to convey a cause of action ancillary to a property in *Gentra*, a case relied on by the plaintiff.

[56] In that case, Gentra had been assigned the assets of a restructured corporation, including two large mortgages that were in default. Gentra sought to pursue a cause of action related

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[10] *Fredrickson*, at para. 37.

to legal work done for the restructured corporation in connection with the mortgages. The Court of Appeal held that Gentra had obtained an assignment of the property rights under the mortgages and the cause of action was ancillary to those mortgages. In these circumstances, this amounted to a legitimate pre-existing financial interest and assignment did not "savour of maintenance."[11] I do not find this case to be of assistance to the plaintiff as it did not obtain any freestanding property rights through the Assignment of Claim Agreement. It acquired only the claims it seeks to pursue in this action.

[57] A similar result was reached by the Court of Appeal in *Ma*, which involved an elderly ill shareholder in a private corporation who transferred his shares and the entire bundle of rights attached to those shares to an old friend for $1. The Court of Appeal held that the assignee could pursue an oppression proceeding because the assignment document assigned the shares, the entire bundle of rights that accompanied the shares, and the oppression claim ancillary to those property rights.[12]

[58] The plaintiffs rely on the case of *Oseco Inc. v. Jansen* in support of its position that the assignment of the agreement is permissible.[13] However, the facts of that case are extremely different from the facts of this case. In my view, *Oseco* is a good illustration of the type of genuine pre-existing financial interest that is totally absent in this case.

[59] In October 1986, Oseco Inc. sold its retail arm, Oseco Farm Seed Centre, to Annelies Jansen and to other employees. The employees incorporated Heritage Seeds Inc. and conveyed to it title to the seed centre. Oseco was a secured creditor of Heritage Seeds Inc. pursuant to a promissory note. Subsequently, the Bank of Montreal lent money to Heritage and took security, including a general security agreement over Heritage's inventory, accounts receivable, equipment and intangibles. Oseco agreed to postpone its security interest over Heritage's accounts receivable to the bank's security interest. Heritage then defaulted on both debts. Oseco obtained an assignment of the bank's indebtedness, which ranked in priority to its own.

[60] The debtors moved for summary judgment to dismiss the claim on the basis that the assignment was champertous. Justice Lane dismissed the motion for summary judgment:

> [looking] at "the totality of the transaction" and assessing the relationship between the Bank, Oseco and Heritage, I hold there is at least a triable issue as to whether this assignment is excused from being champertous on one or more of the grounds: that it arose from a *bona fide* pre-existing business relationship; that it was a *bona fide* business arrangement made for legitimate business reasons; or that the assignee had a genuine commercial interest in taking the assignment

[11] *Gentra*, at para. 37.
[12] *Ma*, at para. 30.
[13] 71 O.R. (2d) 151 (H.C.J.).

> and enforcing it for its own benefit. As these are questions of fact, there must be a trial.[14]

[61] There is no doubt that Oseco clearly had a pre-existing commercial interest in the cause of action as a result of Heritage's default on its promissory note and, prior to the transaction, it was not a stranger to the bank or to Heritage.[15] None of those features are present in this case. Prior to the transaction, the plaintiff had existed for one day, it had no pre-existing relationship with the defendants or Affinitas. There are no facts in dispute requiring a trial in this case. On the plaintiff's own evidence and best case, it had no pre-existing commercial or financial interest in any cause of action held by Affinitas.

[62] The plaintiffs also rely on the case of *Canadian Imperial Bank of Commerce v. Deloitte & Touche* in support of its argument that it purchased the claims as part of a legitimate commercial transaction.[16] I disagree. In my view, this case does not assist the plaintiffs.

[63] The *CIBC* case was a certification motion in an intended class proceeding against Deloitte arising from alleged auditing errors in connection with Phillip Services Co. By August 1997, the lenders had loan positions with Philip in excess of $1 billion USD when Philip was required to restate its financial statements and acknowledge that it had overstated its income and revenue for several years. Philip then defaulted under the credit agreement. In 1998, High River Limited Partnership and others purchased the loan positions and other rights from many of the original lenders.

[64] Deloitte took the position that the class action should not be certified because High River's claim was champertous. High River submitted that that at the time they purchased the loan positions of the predecessor financial institutions, they took an assignment of any causes of action that were ancillary to those loan positions.

[65] The court declined to strike the claim as champertous at the certification stage because the judge was not persuaded that an assignment of a cause of action as part and parcel of a genuine commercial action necessarily offends the law of champerty:

> It is clear from the case law that when considering the validity of an assignment of a cause of action, the totality of the transaction must be looked at. If the assignment is of a property right or interest and the cause of action is truly ancillary to that right or interest or if the assignee possessed a commercial interest in taking the assignment, then the assignment will not be struck down. …Respectfully, I am not persuaded that an assignment of a cause of action as part

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[14] *Oseco*, at p. 155.
[15] *Silverado Oilfield Ventures Ltd. v. Davidson*, 2014 ABQB 218, at para. 60.
[16] (2002), 25 C.P.C. (5th) 188, appeal allowed in part (but not on this issue) (2003) 33 C.P.C. (5th) 127 (Ont. Div. Ct.).

> and parcel of a legitimate commercial transaction necessarily offends the law of champerty and maintenance.

[66] This case does not assist the plaintiff. Unlike the situation where High River bought an entire loan portfolio, the assignment of the claim in this case was not part of a legitimate commercial transaction. The plaintiff did not receive the cause of action ancillary to other rights or interests that were assigned. The claim was the entire bundle of rights that Affinitas assigned to the plaintiff.

[67] Finally, the plaintiff relies on *Burns v. Sohi*.[17] In my view, the assignment agreement and circumstances of the plaintiff in that are quite different than the case before me.

[68] Dennis Burns and Stephen Burns were brothers. Dennis was the sole shareholder of 1164280 Ontario Inc. Stephen was the President of the corporation and managed its business. On March 15, 2000, Dennis assigned to Stephen all his rights as a common shareholder, including his rights to shareholder capital and all outstanding dividends. On the same day, the corporation assigned to Stephen:

> …all rights, title, interest and obligation in, to and under the following to the assignee:
>
> Any rights, title, interest or obligation to the lease, equipment, leasehold interest, franchise rights. copyrights, trademarks, patents, or other chattels associated with the Simplee Chinese franchise or the Simplee Chinese restaurant, unit #21 at the Intercity Shopping Centre, 1000 Fort William Road in Thunder Bay, Ontario, including any claim in any legal action versus Sharan Sohi, Sohi Holdings Inc, Simplee Chinese Cuisine Inc, Robert Favuzzi, 1191013 Ontario Inc, Cheryl Favuzzi, 1333405 Ontario Inc, or any other party to which a claim may have been made on behalf of 1164280 Ontario Inc.[18]

[69] Stephen sued Haran Sohi and Sohi Holdings Inc. and claimed damages personally and on behalf of the corporation for business losses incurred when they invested in fast food restaurants in which the defendants were involved. The defendants resisted on several grounds, including that the plaintiff had no standing to sue on behalf of the corporation.

[70] The trial judge rejected the defendants' submission that this amounts to the assignment of a bare cause of action as the assignment included any "rights, title, interest or obligation to the lease, equipment, leasehold interest, franchise rights, copyrights, trademarks, patents, or other chattels associated with the Simplee Chinese franchise or the Simplee Chinese

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[17] 2012 ONSC 2414.
[18] *Burns*, at para. 140.

restaurant." The assignment was, in my view, very different than the Assignment of Claim Agreement. Moreover, the judge held:

> Stephen Burns is not a stranger to the litigation. He had a sufficient pre-existing interest in the litigation to justify the assignment of the cause of action in tort. He was the president of the affected corporation. He managed the corporation's business with the agreement of his brother, Dennis Burns, the sole shareholder. The plaintiff's relationship with Mr. Sohi was both commercial and personal. The litigation arose from a dispute between the plaintiff and Mr. Sohi. I find that the evil of trafficking in litigation does not arise here. Therefore the assignment of the claims is valid.[19]

[71] In my view, the relationship of Stephen Burns to the litigation and the nature of his assignment agreement are also very different than the facts presented by the plaintiff in this case.

[72] The plaintiff cannot come within the second exception to the prohibition on assigning bare causes of action:

a. The cause of action assigned is not ancillary to any property right held by the plaintiff. The Assignment of Claim Agreement is clear that the only right being transferred from Affinitas to the plaintiff is the right to pursue the claim.

b. The plaintiff has no legitimate pre-existing commercial or financial interest in the enforcement of the claim. The plaintiff's only interest in the cause of action was created by the assignment. Any of the steps taken by the plaintiff after it received the assignment are irrelevant to the assessment of whether or not it had a pre-existing commercial interest, which is essential. It is neither surprising nor relevant that a party takes steps to realize upon tort claims after they have purchased them.

c. The plaintiff seeks to make a profit by purchasing the claims against the defendants and seeks awards of punitive and exemplary damages of $1.5 million to further enrich itself.

d. The plaintiff is a stranger to the action assigned. Indeed, the plaintiff is a special purpose vehicle created solely to purchase the claim from Affinitas and to prosecute the action.

[73] Looking at the transaction in its entirety, in the words of *Fredrickson*, the assignment of the tort claims smacks of maintenance and champerty.

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[19] *Burns*, at para. 146.

The Assignment of Claim Agreement does not validly assign a cause of action in contract or debt

[74] Courts may permit parties to assign contracts. As *Fredrickson* explains, today there are six categories of contracts that are considered to be unassignable:

a. Contracts which expressly by their terms exclude assignment;

b. Mere rights of action (assignments savouring of maintenance and champerty);

c. Contracts which by their assignment throw uncontemplated burdens on the debtor;

d. Personal contracts;

e. Assignments void by public policy (for example, public officers' salary); and

f. Assignments prohibited by statutory provisions.

[75] The assignment of a debt is not a champertous agreement.[20] A debt is assignable pursuant to s. 53 of the *Conveyancing and Law of Property Act*.[21] A debt is a sum due by certain and express agreement. It is a specified sum of money owing to one person from another, including not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment.[22] A cause of action in debt can be assigned even where the debtor denies liability.[23]

[76] This principle is demonstrated in the Court of Appeal for Ontario's decision in *Clark v. Werden*.[24] That case involved three business associates and former friends. In 2001, John Muller loaned James Werden $120,000 and Mr. Werden defaulted on the debt. In 2004, Mr. Muller assigned the loan to Peter Clark for him to collect. Mr. Clark sued Mr. Werden, who unsuccessfully defended the action on the basis that the assignment of the loan and its enforcement by Mr. Clark were prohibited because they amounted to champerty and maintenance. The trial judge disagreed, and the Court of Appeal upheld the decision on the basis that the assignment of a debt is not champertous.[25]

[77] The plaintiff, however, is not suing on a debt. The statement of claim pleads a contract between Affinitas and ZedPayments, a company in the Philippines. The assignment agreement specifies that the alleged debt was owed by ZedPayments to Affinitas. In this

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[20] 2011 ONCA 619.
[21] R.S.O. 1990, c C.34.
[22] *Central Capital Corp. (Re)* (1996), 27 O.R. (3d) 494 (C.A.), at paras. 34 and 100; *Interclaim Holdings Ltd. v. Down*, 2001 BCCA 65, 196 D.L.R. (4th) 114, at para. 31.
[23] *Fredrickson*, at para. 50.
[24] 2011 ONCA 619.
[25] *Clark*, at para. 16; The purpose of s. 53 of the *Conveyancing and Law of Property Act*, *supra*, is to overcome the common law rule that an assignee had to join the assignor as a party. *967305 Ontario Ltd. v. North American Trust Co.*, 1996 CanLII 11102.

action, the plaintiff is not suing ZedPayments and is not suing any of the named defendants based on a cause of action in debt.

[78] I find that the Assignment of Claim Agreement did not assign a debt owing to Affinitas to the plaintiff. I reach this conclusion for three reasons.

[79] First, the contract between ZedPayments and Affinitas does not create a debt obligation. Nothing in that agreement specifies the specific amount owed by ZedPayments to Affinitas. The agreement does not contain the type of certain and express agreement necessary to create an assignable debt agreement. The obligations of ZedPayments to Affinitas under that contract looks nothing like a promissory note, loan document, mortgage, or typical debt instrument.

[80] Second, the contract does not specify that, whatever amount is owed, is owed to Affinitas. Although the Assignment of Claim Agreement states that ZedPayments owes Affinitas over $1 million, nothing in the contract between the parties confirms that liability. Moreover, the contract does not provide that it is to Affinitas that ZedPayments owes a debt of over $1 million. Recall that in the statement of claim, the plaintiff pleads that the missing money was owed to Affinitas' clients:

> Over the following 60 days, that is between June and August 2020, Affinitas did not receive timely payments from ZedPayments. The net total amount that should have been paid to Affinitas' merchants was US$1,520,587.51, the actual amount paid was $483,190….as of August 2020, the total outstanding due to Affinitas's merchants had grown to over US$1,037,397.40. The US$1,037,397.40 missing and outstanding balance due to Affinitas's merchants was made up of two categories or payments:
>
> > 1. "Missing" Wire Transfers: the missing (or lost) wire transfers represented wire transfer payments that had purportedly been sent to Affinitas' merchants, for which Affinitas was provided "wire transfer confirmation" documents from [Mr.] Morgan, but which funds were never received. To date, the total amount of "missing" wire transfers is US$290,343.27; and
> >
> > 2. "Outstanding" Transfers: the outstanding transfers represented the funds due to Affinitas' merchants which have not been remitted (and have not been alleged to have been remitted). To date, the total amount of "outstanding" wire transfers due to Affinitas' merchants is US$747,054.13."

[81] If the missing funds should have been paid to Affinitas' merchant clients, and some of the missing money had purportedly been sent to Affinitas' merchant clients. I do not accept that these amounts can fairly be described as a debt owing by ZedPayments to Affinitas or that Affinitas has "liquidated damages" of over $1 million.

[82] Recall that pursuant to the Assignment of Claim Agreement, Affinitas retains only 3% of the plaintiff's net potential recovery. The only explanation of this amount in the material before me is found in one of the affidavits filed by the plaintiff, which explains that the "3% remittance is a similar amount as to what Affinitas would have received as a service fee on behalf of its merchants if the US$1,110,000 had been paid."

[83] Finally, the statement of claim demonstrates that Affinitas did not assign a debt and this action is not about a debt. The only contract that is pleaded in the statement of claim is between Affinitas and ZedPayments, which is not a named defendant in this action. The plaintiff does not sue for a cause of action in debt or breach of contract against any of the defendants. Instead, the plaintiff claims against the defendants for:

a. fraud, both at common law and equity (paragraphs 146 to 150);

b. breach of trust and that the defendants as result of the "fraudulent conduct alleged herein" were constructive trustees and/or trustees *de son tort* to the plaintiff, and are liable to the plaintiff just as express trustees would be in the circumstances (paragraphs 151 to 153);

c. conversion (paragraph 154);

d. conspiracy (paragraphs 155 to 157);

e. unjust enrichment (paragraphs 158 to 160);

f. knowing assistance (paragraphs 161 to 163); and

g. knowing receipt (paragraphs 164 to 166).

[84] The plaintiff also submits that the corporate veil should be lifted to affix personal liability against the individual defendants because the corporations were being used to shield fraudulent conduct and the individual defendants caused the misappropriation of the defrauded funds through material misrepresentations, omissions, and the execution of a "fraudulent scheme against the plaintiff."

[85] For these reasons, I do not accept that the Assignment of Claim Agreement assigned a debt. The plaintiff cannot rely on the provisions of the *Conveyancing and Law of Property Act* or the common law to save this assignment.

[86] The rule against assigning mere causes of action in contract is also based on the rule against maintenance and champerty. As in the case of causes of action in tort, where the assignee has a sufficient pre-existing interest in the cause of action assigned, the suggestion of

maintenance is negated and the assignment is valid.[26] For the same reasons set out above, I conclude that the plaintiff did not have a genuine pre-existing financial interest in the cause of action assigned. The assignment savours of maintenance and champerty.

Conclusion on champerty

[87] In assessing whether or not the assignment was champertous, the court is to look at the whole of the transaction.[27]

[88] There is no evidence before me that Affinitas could not prosecute their own claims in Ontario. There is no evidence that assigning the claim to the plaintiff was necessary to advance the cause of justice. Mr. Tadman's affidavit only states that creating the plaintiff as a "special purpose vehicle" was a "convenient and appropriate vehicle to pursue payment." However, litigation efficiency or the desire to maximize a claim or to minimize risk is not a legitimate commercial interest sufficient to convert a champertous assignment into one that is valid.[28]

[89] Recently, the courts have carefully recognized exceptions to the rule against champerty and maintenance. For example, contingency fee agreements are not champertous where they are not motivated by an improper purpose.[29] Similarly, third-party litigation agreements, which generally involve a third party otherwise unconnected to the litigation agreeing to pay some or all of a party's litigation costs in exchange for a portion of that party's recovery in damages, are not *per se* illegal.[30] However, even as the courts have charted a path to permit contingency fee agreements and third-party funding arrangements, they have identified how the features of some of these agreements cross the line into champertous litigation arrangements that raise the potential for abuse to parties and to the administration of justice.[31]

[90] For example, in *Houle* the Divisional Court explained that third party funding agreements would need to be carefully monitored to protect vulnerable parties and the administration of justice from arrangements that allow third parties to profit unduly from or unreasonably control litigation:

> The law of champerty has evolved. It no longer treats third-party litigation funding agreements as automatically unlawful. The class action industry and the court have started down the road toward defining aspects of the funding relationship that can enhance access to justice in appropriate

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[26] *Fredrickson*, at para. 46; *Trendtex Trading Co. v. Credit Suisse*, [1981] 3 All E.R. 520 at 530 (H.L.).
[27] *Trendtex* at p. 531.
[28] *Sherman v. Drabinsky*, 1990 74 O.R. (2d) 596 (H.C.J.), at para. 31, aff'd 20 O.R. (3d) 228; *Ellis-Don Ltd. v. Norton* (1982), 5 C.L.R. 281 (Ont. H.C.).
[29] *McIntyre Estate* at para. 37.
[30] *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10, 444 D.L.R. (4th) 373, at paras. 93 to 96.
[31] *Houle v. St. Jude Medical Inc*., 2018 ONSC 6352, at para. 4 (Div. Ct.).

> cases. It is too early to say that every class action automatically needs a third-party funding agreement or that any particular form of agreement is always good or always bad. As the industry grows and new forms of transactions emerge, they will be considered on their merits with due input from the affected parties. The law will continue to be concerned to protect vulnerable parties whose recovery is the subject of the proposed bargain. It will continue to be concerned with the potential for harm to the administration of justice that could accrue if the court is seen to allow third parties who are not parties to the litigation to profit unduly from or unreasonably control that litigation. The common law will continue to evolve incrementally as each case comes forward.[32]

[91] It is difficult to imagine the court approving a third party funding arrangement where the client would receive only 3% of the recovery and, in exchange, ceded complete control over all litigation decisions to the funder.

[92] Similarly, Affinitas could have could have retained Ontario litigation counsel to prosecute this case on its behalf on a contingency fee arrangement. Had Affinitas taken this step, the arrangement would have been subject to the provisions of the *Solicitors Act*, R.S.O. 1990, c. S.15 and its regulation *Contingency Fee Agreements*, O. Reg. 563/20. Subsection 28.1(5) of the regulation provides that a lawyer shall not recover more in fees under a contingency fee agreement than the amount recovered under an award or settlement. Section 8 of the regulation prohibits lawyers from obtaining a veto on the abandonment or settlement of an action.

[93] I with to emphasize that the plaintiff does not attempt to defend the Assignment of Claim Agreement as a contingency fee agreement or a third party funding agreement. Nevertheless, it is instructive to note the features of this agreement that would not be acceptable, even if this was a contingency fee agreement or a third-party funding agreement.

[94] I have no doubt that the plaintiff did not have a pre-existing or legitimate commercial interest in this litigation. It is the motive of the maintainer – here the plaintiff – that is determinative of the question of maintenance or champerty.[33] It is clear from the evidence that the plaintiff's motivation for the transaction was profit and nothing else.

[95] I find that the Assignment of Claim Agreement is champertous. It is the type of agreement that is forbidden and invalid pursuant to *An Act in Respect of Champerty*.

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[32] *Houle* at para. 51.
[33] *McIntyre Estate* at para. 27; *Operation 1 Inc. v. Philips*, 2004 CanLII 488689, at para. 40.

Collection and Debt Settlement Services Act

[96] The defendants submit that the plaintiff has violated the provisions of the *Collection and Debt Settlement Services Act*.[34] The defendants submit that the plaintiff is not a registered collections agency as required by s. 4 of the *CDSSA*. They also submit that the regulations prohibit a collection agency (whether registered or not) from commencing a legal proceeding as a plaintiff in circumstances where the original creditor retains an interest in the debt.[35]

[97] The plaintiff denies that the *CDSSA* applies to it in these circumstances.

[98] Given my determination above, I do not think it is necessary or appropriate to consider the applicability of the *CDSSA* to these circumstances. That issue is best addressed only when it is necessary to do so.

Conclusion

[99] The plaintiff submitted that I should leave the issue of whether or not this action is champertous to be decided at trial. I disagree. I do not see any facts in dispute that require a trial.

[100] Champerty is a type of conduct that has been recognized as abuse to the administration of justice.[36] The court should always be reluctant to allow its processes to be abused.

[101] Here, the case cries out for immediate intervention. Mr. Morgan and Ms. Edwards have had all their bank accounts frozen. They have been forced to live on small monthly allowances. The orders in place require them to account for the source of all their funds and how they spend those funds. Their properties are encumbered by certificates of pending litigation. They face a litigation adversary seeking to have them incarcerated for four months.

[102] In these circumstances, I am not prepared to allow this situation or the interlocutory orders to remain in place pending a trial. I order that this action be dismissed against all defendants pursuant to rule 21.01(3)(d). I also set aside any and all interim and interlocutory orders of the Superior Court of Justice in this proceeding that remain in effect. For greater certainty, this does not relieve the plaintiff of its undertaking as to damages.

[103] Finally, I stay this decision for seven days to permit the plaintiff, if so advised, to seek a stay pending appeal.

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[34] R.S.O. 1990, c. S.15 (*CDSSA*).
[35] R.R.O. 1990, Reg. 74: General, s. 23(3)(b)(i).
[36] *Operation 1* at para. 30.

Costs

[104] If the parties are not able to resolve the costs of this action, the defendants may each email its costs submission of no more than 10 double-spaced pages to my judicial assistant on or before April 7, 2023. These submissions should address the scale and quantum of the costs sought and who should be liable to pay those costs. If the defendants are seeking costs against any person other than the plaintiff, they should serve their costs submissions on that person. If the defendants seek a reference on any damages arising from the interlocutory orders, they should make a request for a reference to an associate justice.

[105] The plaintiff may deliver its responding submission of no more than 10 double-spaced pages on or before April 21, 2023. Any other person against whom the defendants seek a costs order shall have 14 days after being served with the costs submissions to serve and file submissions on costs

[106] The defendants may file reply submissions of no more than five pages total in response to all costs submissions on or before April 28, 2023.

Robert Centa J.

Date: March 24, 2023