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THE ACCENT ON EXCELLENCE

12 July 2021

Briefing Note

Litigation Funding in Guernsey

What is litigation Funding

Litigation funding is where a third party with no prior connection to the litigation agrees to finance all or part of the legal costs in return for an agreed share of the proceeds recovered by the funded litigant if successful.

The litigation funding market has grown and evolved considerably in offshore jurisdictions in recent times, and considering the significant pressures that the current global climate has placed on businesses as a result of the COVID-19 pandemic, litigation funding provides an attractive means to access justice for those who might otherwise be deprived due to a lack of financial resources. Litigation funding is also an attractive option to those, who may have sufficient funds, however, wish to apportion or share the risk of the litigation.

Public Policy considerations

The primary obstacles that litigation funding is required to negotiate are the doctrines of champerty and maintenance. Maintenance is the improper support of litigation in which the supporter has no legitimate concern without just cause or excuse. Champerty is an aggravated form of maintenance, which occurs when the maintaining (supporting) party pays some or all of the costs of a party in return for a share of the proceeds of the action or suit. The rationale underpinning these doctrines is based on the public interest in protecting the purity of justice.

Champerty and maintenance were criminal offences at common law, and continue to be in some jurisdictions. Most jurisdictions, have abolished them as offences, but have retained the rules based on public policy grounds. The rules against champerty and maintenance are facets of Guernsey Law and have not been abolished by statue or common law. The effect of a funding agreement being found to offend these principles is that it will be deemed void and unenforceable. This would be a particularly undesirable result for a litigation funder, as it would mean that the funder would be unable to enforce the funding agreement against the funded party. It would also mean that the funded party would be unable to recover their costs from its opponent if successful in the litigation as there would be no liability on the part of the funded party to pay the funder. This is known as the indemnity principle; see *Hughes v Kingston Upon Hull City Council* [1999] QB 1193.

In recent years the courts in several offshore jurisdictions, including Cayman, BVI, Jersey and Guernsey have established principles (most of which have been adopted from the English and Australian developments in this space) which allow for third party funding, without contravening the public policy considerations that underpin the rules of champerty and maintenance.

The Position in England

Next to Australia, the position in England is arguably the high water mark of litigation funding. Litigation funding is an accepted market and is available in nearly all forms of civil litigation. In England, a third party funding agreement will not, of itself, breach the rules against champerty and maintenance. Whether a third party funding agreement offends the rules will depend on the circumstances, and when considering this a court will have regard to the following factors:

- The extent to which the funder controls the litigation.
- The level of communication between the funded party and solicitor.
- The extent to which the funded party is provided with information about the litigation, and is able to make informed decisions.

- The amount of profit that the funder stands to make.
- Whether there is a risk of inflaming damages or distorting evidence.

The Position in Guernsey

The seminal case in Guernsey is the decision of the Royal Court in *Providence Investment Funds PCC Limited & Providence Investment Management International Limited* (Guernsey Judgment 44/2017). Administration Managers appointed to two related companies identified a possible cause of action against the company's auditors, and lacking the funds to prosecute the claim, entered into a litigation funding agreement. The Administration Managers subsequently made an application to the Royal Court seeking sanction to enter into the funding agreement, as was required by the agreement. The Lieutenant Bailiff considered there to be two questions for determination, firstly, whether the court should authorise the Administration Managers to enter into the agreement, and secondly, whether the terms of the agreement offended the rules against champerty and maintenance.

After considering English and Cayman authority, with reference to the longstanding exception for litigation funding in insolvency proceedings in English Law, the Lieutenant Bailiff held that, in principle, Guernsey Law will permit the assignment of a cause of action for value by a liquidator, and will also permit a litigation funding agreement to be entered into, notwithstanding that maintenance and champerty are prohibited under Guernsey Law. The Lieutenant Bailiff held that these principles would apply by analogy to the Administration Managers.

The Lieutenant Bailiff then considered whether, in the circumstances, it was reasonable for the Administration Managers to enter into the funding agreement. Following the English decision in *In re Longmeade Limited* (in liq) 2016 Bus LR 506, the Lieutenant Bailiff considered that the following factors should be taken into account;

- The merits and prospects of success of the prospective litigation.
- The adequacy of funds available to the administrator.
- The likely costs to be incurred if the proceedings should fail.
- The proportion of damages that the funder would recover if successful.

The Lieutenant Bailiff considered that the Administration Managers had given sufficient consideration to the above factors and the decision to enter into the funding agreement was a decision that a reasonable administration manager would make in the circumstances. The Lieutenant Bailiff then considered whether the agreement was champertous, which would involve looking at the amount of control that the litigation funder has over the proceedings. In this regard, the Lieutenant Bailiff took into account, amongst other things, the following matters;

- The Advocates to act on behalf of the companies were to be agreed by the funder, however, the Administration Managers noted that there had been no improper influence or restriction in their freedom of choice.
- The proposed plaintiffs would agree to consult with the funder in regard to steps in the litigation, however, it expressly stated that this was to be without ceding control to the funder.
- The proposed plaintiffs agreed to follow the advice of the Advocates and not to discharge them without consultation of the funder.
- The funder had the right to terminate the agreement but remained liable to pay amounts due to that date.

The Lieutenant Bailiff held that none of the above amounted to control of operational decisions by the funder and that the agreement therefore was not champertous.

It is relevant to note the Lieutenant Bailiff's comments, at [20], of the Judgment, where after considering English authorities, she noted that as the English law regarding champerty and maintenance had developed significantly over the past 25 years on a liberal and flexible basis, it may not necessarily be relied on to reflect the position in Guernsey, which may adopt a more incremental approach.

The Position in Jersey

Jersey, however, has adopted a more liberal approach in line with that of England and Australia. *In the Matter of Valetta Trust* [2011] JRC, involved beneficiaries of a discretionary trust who entered into a funding agreement to prosecute a claim against a former trustee for breach of trust. In finding the funding agreement to be valid, the Bailiff held that there was no material difference between the law of Jersey and English Law in regard to champerty and maintenance and that the sea change in the approach in those jurisdictions as to the requirements of public policy are equally applicable to Jersey. The Royal Court of Jersey's view in this regard, at [32], was explained in the following terms:

"*For the reasons set out in the English cases referred to above, public policy must be kept under review and we have no doubt that today, the importance of access to justice is extremely important and the concerns about powerful people corrupting the process of justice by acquiring an interest in litigation have faded away because of the independence of the judiciary. We therefore find that the public policy reasons which have led England and Australia to allow third party funding subject to certain safeguards are equally applicable in Jersey*."

So where does this place Guernsey?

In light of the findings of the Royal Court in *Providence*, Litigation funding agreements will be allowed in insolvency proceedings in Guernsey, subject of course, to the terms of the agreement.

As there were no findings regarding whether this approach will also be applied to funding agreements entered into in the context of other types of proceedings, coupled with the Lieutenant Bailiff's comments regarding Guernsey adopting an incrimental approach set out above, it can not be said with certainty that the Royal Court will adopt the same approach with other types of proceedings. However, considering the emphasis placed on the English and Australian authorities, it is considered likely that the Royal Court would adopt an approach similar to that in Jersey if and when it is required to consider whether litigation funding should be allowed in Guernsey in proceedings that are not insolvency based. In this regard, it is prudent for a litigant who intends to enter into a litigation funding agreement for non insolvency proceedings (and insolvency proceedings) in Guernsey to ensure that the agreement itself has regard to the considerations that the court had regard to in *Providence*, to ensure that it does not offend the rules against champerty and mainteance.

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