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LITIGATION FUNDING

Litigation Funding in the Cayman Islands

Woodsford Litigation Funding Insight

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The litigation funding industry is well-known and well-established in multiple jurisdictions. However, some jurisdictions continue to be restrained by the outdated doctrines known as maintenance and champerty. This short whitepaper will look at the current litigation funding landscape in the Cayman Islands and how the market for funding could develop, with specific reference to the views of local practitioners.

Litigation funding is typically where a third party provides the financial resources, usually on a non-recourse basis, to enable litigation or arbitration cases to proceed in exchange for a share of the proceeds. This type of third-party litigation funding is common and permitted (and has been judicially endorsed on many occasions) in the Cayman Islands only where the plaintiff (or counter-claimant) is a company in official liquidation. Outside the context of an official liquidation, it is void for illegality on the grounds of maintenance and champerty (although, as far as Woodsford is aware, there have been no prosecutions in the jurisdiction for either offence).

Maintenance is the improper support of litigation in which the maintainer has no legitimate interest, without just cause or excuse. Champerty, is described as a sub-species of maintenance or an aggravated form of maintenance where the maintainer receives a portion of the proceeds in the relevant action. They both remain offences under the common law of the Cayman I slands despite the current global trend of encouraging access to justice and many other jurisdictions considering the doctrines to be out of date. For example, England and Wales abolished the doctrines by statute in 1967.

A helpful review of the law in the Cayman Islands on litigation funding was undertaken by Mr Justice Jones in In the Matter of ICP Strategic Credit Income Fund Limited and ICP Strategic Credit Income Master Fund Limited (unreported, 4 April 2014). In this case, the Court recognised the growing limitations on the applications of the common law doctrines.

In this sanction application, the Joint Official Liquidators of two Cayman funds sought the authority of the Grand Court of the Cayman Islands to commence litigation in the United States on the basis that its prosecution would be funded pursuant to the terms of a contingency fee agreement made with a New York law firm. While the points of law raised by the application concerning litigation funding were not novel in connection with liquidation proceedings, the Judge was asked to put his reasons in writing on the basis that it would be helpful to insolvency practitioners in the Cayman Islands.

Justice Jones first began by making the distinction between three different types of funding arrangements: (1) litigation funding agreements (as defined above but in the context of a contract between an official liquidator and a third-party funder); (2) contingency fee agreement (as narrowly defined in the judgment to mean, an agreement between an official liquidator and (foreign) law firm by which it agrees to conduct the litigation on terms that the firm's right to remuneration arises only upon the success of the proceedings and is limited to a share of the proceeds from the litigation); and (3) conditional fee agreements (an agreement where the law firm agrees to conduct the proceedings on terms whereby its hourly rates are reduced, or not payable, and uplifted if the claim succeeds).

The Judge then summarised the legal position in the Cayman Islands in relation to litigation funding agreements in the context of liquidation proceedings, as follows:

- "in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice". The courts have demonstrated a flexible approach and "have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable; the rules against champerty, so far as they have survived, are primarily concerned with the integrity of the process in [the Cayman Islands]".

- "an outright sale by the official liquidator, by way of legal assignment, of a cause of action where the price is expressed to be a percentage of the proceeds of the action is a valid exercise by the official liquidator of his statutory power to sell the company's property".

- "…an assignment of a percentage of the proceeds of a cause of action pursuant to a litigation funding agreement is a valid exercise of the official liquidator's statutory power to sell the company's property, provided that the funder is given no right to control or interfere with the conduct of the litigation".

- "…a purported assignment of a right of action or the proceeds of a right of action vested in the official liquidator personally, such as the right to assert preference claims, is not authorised under the statutory power to sell the company's property. It would be an unlawful surrender by the official liquidator of his fiduciary power and would be contrary to public policy".

Liquidators must disclose litigation funding agreements to the courts for the purpose of obtaining the court's sanction to enter into the agreements. Justice Jones made clear that the funding terms will be carefully scrutinised to ensure that they do not directly grant the funder any right to interfere in the conduct of the litigation or indirectly put the funder in a position in which it will be able to exert undue influence or control over the litigation. Justice Jones then went onto examine contingency fee arrangements and held he should follow a previous decision, Quayum v Haxagon Trust Company (Cayman Islands) Limited [2002] CILR 161, and concluded that contingency fee arrangements with Cayman lawyers are contrary to public policy, void and unenforceable (despite noting the change of position in England). As a result, Cayman lawyers are not permitted to enter into these arrangements and they will not be sanctioned by the Cayman courts. However, a contingency fee agreement that is performed wholly outside the Cayman Islands where its performance will be lawful and permissible in accordance with applicable foreign countries' law (amongst other things) will be valid and enforceable. Therefore, it followed that in this case the Judge sanctioned the contingency fee agreement as the agreement is with New York lawyers and is to be performed wholly outside the Cayman Islands where its performance will be lawful and permissible in accordance with applicable New York law.

In relation to conditional fee agreements, Justice Jones observed Smellie CJ's decision in Quayum which was that conditional fee agreements would be valid and enforceable if first approved by the court. Justice Jones also noted the Court of Appeal's decision in Latoya v Attorney General (unreported, 14 February 2012), which made "no observation about the broader public policy issues and the correctness of the decision in Quayum, because it was not necessary to do so and (per Chadwick P.) because it would also be inappropriate to do so bearing in mind that the matter [had] been referred to the [Cayman I slands] Law Reform Commission", thereby potentially casting some doubt on the Quayum decision.

There is currently no specific legislative or regulatory provisions applicable to, or independent body (such as, the Association of Litigation Funders in England and Wales) charged with regulating third-party funding in the Cayman Islands.

As mentioned above, in February 2012 the Attorney General requested that the Cayman Islands Law Reform Commission undertake a review of the law relating to conditional or contingency fee agreements with a view to its reform. From this review, a discussion paper entitled "A review of litigation funding in the Cayman Islands- Conditional and contingency fee agreements" dated 29 December 2015 was circulated for public comment closing 31 March 2016. The discussion paper examined the current law in the Cayman Islands, including the history, advantages, disadvantages, and social impact of such types of agreements in jurisdictions such as the United Kingdom, Australia, Canada and the United States. A draft bill called the Private Funding of Legal Services Bill 2015 (the "Bill") was attached as an Appendix to the discussion paper, which was also circulated for public comment. The Bill provides for regulation of private funding of litigation. If the Bill is enacted, it will repeal any offences under the common law doctrines, maintenance and champerty, and authorise by statute litigation funding agreements (save in respect of criminal, quasi-criminal and family proceedings), and contingency and conditional fee agreements. Court approval of these agreements would no longer be required, subject to some exceptions. The Bill also allows for costs orders made in any proceeding to include provision requiring the payment of any amount payable under a litigation funding agreement which is a topical issues in many jurisdictions, including the United Kingdom and Hong Kong.

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Conclusion

As established in In the Matter of ICP Strategic Credit Income Fund Limited, third-party litigation funding in official liquidation is a well-trodden path and has been judicially endorsed on many occasions. Further, conditional fee agreements, as noted in the discussion paper, have been used in the Cayman Islands for more than a decade. However, the Cayman Islands are frozen in time in relation to third-party litigation funding outside of an official liquidation, notwithstanding that litigation funding has grown and become a fixture in commercial litigation in many other jurisdictions.

Despite the Bill being circulated in late 2015, it hasn't progressed. While the new Cayman Islands Government are getting their feet under the table, it seems unlikely that this Bill will be at the top of their agenda. However, in a survey recently carried out by Woodsford, legal practitioners in the Cayman Islands expressed a positive attitude towards funding, feel funding could have a positive impact on their practice, and that the Cayman Islands are at a disadvantage compared to other jurisdictions that allow funding in all commercial disputes. Therefore, we would encourage Cayman legal practitioners to get behind this Bill and encourage the Government to take the next steps in the legislative process so the jurisdiction can remain competitive in the global legal market.

As access to justice is growing in importance and most jurisdictions are adapting to modern society, litigation funding will hopefully form an increasing part of commercial litigation in the Cayman Islands.

About Woodsford Litigation Funding

Founded in 2010, with offices in London, Philadelphia and Singapore Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford Litigation Funding is a founder member of the Association of Litigation Funders of England and Wales.

Woodsford's role in supporting claimants in David versus Goliath litigation was highlighted in a landmark ruling of the English High Court: Essar Oilfields Services Limited v Norscott Rig Management PVT Limited [2016] EWHC 2361 (Comm)

For further information, visit **www.woodsfordlitigationfunding.com** or email **Steven Savage** at **ssavage@woodsfordlf.com**