Providence: Royal Court of Guernsey approves litigation funding agreement

Insights - 23/10/2017

Litigation funding in Guernsey

In the matter of The Protection of Investors (Administration and Intervention) (Bailiwick of Guernsey) Ordinance, 2008 and in the matter of (1) Providence Investment Funds PCC Limited (in administration management) and (2) Providence Investment Management International Limited (in administration management)

A recent decision of the Royal Court has considered for the first time in open court the issue of whether an agreement with a third party to fund litigation would be void as a matter of Guernsey law on the basis that it was champertous.

Advocate and head of Guernsey Dispute Resolution Mathew Newman successfully argued that a third party funding arrangement between administration managers appointed under The Protection of Investors (Administration and Intervention) (Bailiwick of Guernsey) Ordinance, 2008 (the **Ordinance**) and Manolete Partners PLC (**Manolete**) is valid under Guernsey law. Lieutenant Bailiff Hazel Marshall QC's judgment provides valuable guidance as to the contractual provisions that should be considered when third party funding takes place.

Background

The case relates to two companies registered in Guernsey, Providence Investment Funds PCC Limited (**PIF**) and Providence Investment Management International Limited (**PIMIL**), placed in administration management by Order of the Royal Court on 9 August 2016. Messrs Philip Bowers, Alexander Adam and Andrew Isham of Deloitte LLP were appointed as their joint administration managers (the **Administration Managers**). Subsequently, the Administration Managers were appointed as joint liquidators of certain other companies that form part of the Providence group. The demise of the Providence group has been widely reported in the local and national media.

The Administration Managers, believing that there is a good case that the auditor of PIF and PIMIL (the **Auditor**) had negligently failed in its duties, took the view that there will be no satisfactory solution to the matter without litigation. Unable to fund the litigation themselves, they then looked at potential sources of third party funding, which might enable them to issue proceedings against the Auditor in compliance with their duty to act in the best interests of the creditors of PIF and PIMIL (most notably investors).

An agreement was drawn up between the Administration Managers and Manolete, which is a UK based company that specialises in insolvency litigation funding. The agreement was entered into on a conditional basis, subject to the Court's approval of the terms of the agreement.

What legal issues does it involve?

The Lieutenant Bailiff's judgment considers the common law doctrines of maintenance and champerty. "Maintenance" is the perceived vice of a third party funding or lending assistance to the pursuit of a cause of action in which he himself has no interest and "champerty" is the perceived vice of funding or maintaining a cause of action belonging to another in return for a share of the proceeds. Both maintenance and champerty are prohibited as a matter of public policy at common law on the basis that should litigation be conducted for personal gain, champertous maintainers may be tempted to inflate damages, suppress evidence or influence witnesses.

In recent times, certain exceptions to maintenance and champerty have been made in the name of improving or facilitating access to justice, particularly in the field of insolvency. In particular, the Lieutenant Bailiff referred to comments of Jones J in the Cayman Islands case of *In the Matter of ICP Strategic Credit Income Fund Limited and ICP Strategic Credit Income Master Fund Limited*[1], which she described as *"well-established and unexceptionable expressions, in many modern jurisdictions, of the limits of the doctrine of champerty in a liquidation context",* namely that:

1. *an outright sale by an 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;*

*(2) 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.*However, the Lieutenant Bailiff did sound a note of caution in emphasising that Jones J's judgment cannot be taken as a general account of principles applying in Guernsey law.

To what extent is the judgment helpful in clarifying the law in this area?

The Lieutenant Bailiff's judgment clarifies the extent to which developments in English law in respect of maintenance and champerty will be followed in Guernsey. It has clarified that, in principle, Guernsey law will permit the assignment of a cause of action for value by a liquidator, and will also permit the entering into of a litigation funding agreement, notwithstanding the fact that maintenance and champerty are facets of Guernsey law.

The judgment also clarifies the key principles that the court will take into consideration when deciding whether a third party funding agreement amounts to maintenance or is champertous. The Lieutenant Bailiff held that there were two questions for the court to decide in respect of this application, namely (i) the general question whether the court should approve, in principle, to authorise the Administration Managers to enter into a litigation funding agreement at all, and (ii) whether the terms of the particular agreement are such that they do not offend the principles of champerty.

Is litigation funding appropriate?

The court followed the English case of *In re Longmeade Limited (in liquidation)* **[2]**, which held that the liquidators in that case (Lieutenant Bailiff having accepted that the court's jurisdiction can be expected to operate on similar principles as with administration managers) should take the following matters into consideration when deciding whether to seek litigation funding:

1. the merits and prospects of success of the prospective litigation;
2. the adequacy of funds available to the liquidator;
3. the likely costs to be incurred (and hence diminution in funds available for distribution) if the proceedings should fail;
4. the proportion of damages which the litigation funder would be taking under the agreement if proceedings were successful, and

added by the Lieutenant Bailiff,

1. how and why the office holders lighted on and chose the particular litigation funder as their counterparty.

On the basis that the Administration Managers appeared to have given proper consideration to such factors and that the decision to enter into a litigation funding agreement with Manolete is a decision which a reasonable administration manager properly could have made, the Lieutenant Bailiff was satisfied that the decision to enter into the litigation funding agreement was a decision which a reasonable administration manager could properly have made.

Is the agreement champertous?

In order to determine whether the litigation funding agreement is champertous, the court will

look at the amount of control that the litigation funder has over the conduct of the litigation. The relevant provisions the court took into account in this case are:

1. the advocates instructed on behalf of the company are agreed or approved by Manolete, although the Administration Managers noted that there was no "improper" influence or restriction in freedom of choice;
2. the Administration Managers must "consult" with Manolete in relation to the proposed steps in the claim, although it is expressly recorded that this is without ceding control to Manolete;
3. the Administration Managers agreed to follow the advice of the acting advocates and not to discharge them without prior consultation with Manolete;
4. the Administration Managers agreed to keep Manolete informed as to the progress of the action and take counsel's opinions as to aspects of the claim if requested by Manolete;
5. Manolete has the right to terminate the agreement in respect of all or any claims but remains obliged to pay amounts due up to the date of termination;
6. the Administration Managers agree to pay over to Manolete the "applicable part" of the proceeds of the claims, as specified in the agreement; and
7. the agreement is governed by English law.

The court held that none of the above amounts to "control" of operational decisions by Manolete. The most that could be said was that the provisions of the contract that require the Joint Administrators to follow the advice of their Advocates might constrain their decision-making, but the court held that that was perfectly reasonable and did not amount to "control" in any practical sense, but in fact would operate to prevent the Administration Managers from taking any ill-advised steps during the conduct of any litigation.

What are the practical lessons for advisers?

This case offers a precedent for future litigation funding agreements in Guernsey in an insolvency context. Notwithstanding the fact that a litigation funding agreement is in the funder's standard form (and may even be governed by English law), provided it does not give the funder what could be seen as "control" over proceedings it may be enforceable under Guernsey law.

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[1] (unreported) (Grand Cayman Islands (Financial Services Division) 4 April 2014), at [18]

[2] 2016 Bus LR 506, per Snowden J at 72.

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