Third party litigation funding in the Cayman Islands: A shift in policy

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In a recent landmark decision of the Grand Court in *A Company and A Funder*[1], the Court has approved a third party litigation funding agreement and in doing so given a roadmap to funders as to what conditions it will apply in such cases. While previous decisions of the Grand Court [2] have approved third party funding agreements in principle, the Court's observations have until now been restricted to the use of funding for the benefit of impecunious liquidation estates. This was a case involving a large multinational seeking to take advantage of funding for other commercial reasons.

Background

The plaintiff, a large Korean company, sought comfort from the Grand Court that it could legally avail itself of funding from a third party commercial funder in connection with proceedings that it intended to issue for the recognition and enforcement of a New York arbitration award and related judgments.

Mindful that the common law crimes and torts of maintenance and champerty have yet to be formally abolished in the Cayman Islands, it sought a declaration from the Grand Court to the effect that the funding agreement was not unlawful and that the commencement of proceedings in the Cayman Islands with funding made available pursuant to the agreement would not be contrary to Cayman Islands public policy. Broadly speaking, maintenance is the assistance in proceedings of someone who has no relevant interest in the outcome, and champerty is an aggravated form of maintenance in which the assistance is provided in exchange for a share of any proceeds. Whilst the form of the proceedings was somewhat unorthodox, the Court recognised that the plaintiff was entitled to know whether it risked committing an offence under Cayman Islands law.

Public policy factors considered

The Court's analysis centred around a number of public policy principles. It focused in particular

on the question of whether the funding agreement had the tendency to "*corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse*", the test that had been laid down many years earlier by the English Court of Appeal in *Giles v Thompson* [3].

The Court considered the particular features of the relationship between a litigant and a commercial funder and helpfully set out a number of factors which will be taken into account when deciding whether or not to approve such agreements:

1. The extent to which the funder controls the litigation: a funder who is bound to act on the reasonable advice of attorneys will generally be considered to have done enough to prevent any assertion that he maintains an improper degree of control.

2. The ability of the funder to terminate the funding agreement at will or without reasonable cause: an agreement is unlikely to be approved if a funder can terminate the agreement at will because it would give him inappropriate leverage in the making of key decisions.

3. The level of communication between the funded party and the attorney: a funder should not be able to control the litigation by being able to give instructions to the attorneys conducting the proceedings. If the attorneys are independent of the funder and alive to the possibility of abuse or conflict of interest, it will assist the prospects of the agreement being approved.

4. The prejudice likely to be suffered by a defendant if the claim fails: a funding agreement under which the funder is not liable to meet any adverse costs order raises a risk of abuse. However, this can be mitigated against by requiring the funded party to take out after the event (**ATE**) insurance.

5. The extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation.

6. The amount of profit that the funder stands to make: where the funded party is no longer in a position to derive a real benefit from a successful outcome, the funding agreement is more likely to be treated as champertous.

7. Whether or not the funder is a professional funder and/or is regulated: an important consideration is likely to be whether the funder is a member of a professional body with its own rules of conduct, such as the UK Association of Litigation Funders.

In the instant case, having regard to the above factors and the developments in the law of maintenance and champerty in other common law jurisdictions, the Court concluded that - subject to one change being implemented - the proposed funding agreement did not give rise to a tendency to corrupt public justice and was not unenforceable in the Cayman Islands as a matter of public policy.

Conclusion

The decision highlights the Grand Court's recognition of the growing limitations of the doctrines of maintenance and champerty in relation to modern practice. As Segal J. put it:

"*Cayman has an important, world-class court system and litigation culture and there is no reason why responsible, properly regulated commercial litigation funding undertaken in accordance with the principles I have set out should not have a place in this jurisdiction. As has been accepted in other leading financial centre common law jurisdictions and as the Chief Justice noted in Quayum, the law of maintenance and champerty has evolved reflecting the evolution of public policy and that evolution should be reflected in Cayman law.*"

It should be said that statutory reforms have also been proposed in this complicated area of practice which, if implemented, may go even further than the scope of the decision in *A Company and A Funder*. For now, though, this is a decision that is likely to be welcomed by litigants and commercial funders alike as expanding the options available for the use of funding in appropriate, court-approved cases.

[1] *Unreported, Segal J, 23 November 2017*

[2] *For example, Re ICP Strategic Credit Income Fund Ltd [2014] 1 CILR 314*

[3] *[1993] 3 All ER 321*

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