

Third Party Litigation Funding and Private Funding of Legal Services Act – Cayman Islands

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On Monday 14 December 2020, the Cayman Islands Parliament passed the landmark Private Funding of Legal Services Act 2020 (the **Act**). The Act was Gazetted on 7 January 2021, but is subject to a commencement order and is therefore not yet in force.

| Background

In the Cayman Islands, the doctrines of maintenance and champerty were both crimes and torts, which sometimes created obstacles for litigants seeking to enter into funding agreements with third parties to obtain financing for the litigation in return for a share of the proceeds.

Following the growing global prevalence of litigation funding (including in jurisdictions such as England and Wales and the British Virgin Islands, where maintenance and champerty have already been abolished) a flurry of applications seeking the approval of third party funding agreements have come before the Grand Court in recent years. In recognising the growing limitations on the application of the maintenance and champerty doctrines, the Grand Court sought to confine the question of whether a funding agreement was unlawful to whether the agreement had "a tendency to corrupt public justice" and set out and applied various factors in deciding whether to approve such agreements.

Funding agreements generally fall into one of the following categories:

Contingency fee agreements, whereby an attorney agrees that their fees will be a percentage of a monetary award or the value of assets recovered. Until now such agreements have been considered contrary to Cayman Islands public policy and therefore void and unenforceable in relation to Cayman Islands litigation.

Conditional fee agreements, pursuant to which an attorney agrees to defer payment in return

for a percentage uplift in their fees in the event of success. Until now such agreements were subject to approval by the Grand Court in each case and have remained relatively rare in the Cayman Islands. The Cayman Islands Court of Appeal had also cast doubt on whether they would be held to be enforceable as between the attorney and the client.

Third party funding agreements, pursuant to which a third party agrees to provide funding for litigation on commercial terms, typically in return for the payment of a percentage of the recoveries made in the litigation. Such agreements had until recently been restricted to the use of funding for the benefit of impecunious liquidation estates in the Cayman Islands.^[1]

The Act

The Act is the culmination of several years of review and consultation by the Cayman Islands Law Reform Commission, which commenced in 2015. The key sections are as follows.

Maintenance and Champerty

- Section 17 of the Act repeals the common law offences of maintenance and champerty and abolishes both civil and criminal liability, unless the cause of action accrued before the Act comes into force.

Litigation Funding Agreements

Section 16 of the Act permits the use of litigation funding agreements, subject to the following requirements:

1. The agreement must be in writing;
2. The agreement must comply with prescribed requirements, if any. The requirements which may be prescribed by the Cayman Islands Cabinet after consultation with the Chief Justice and local professional associations (a) may include requirements for the funder to have provided prescribed information to the client before the funding agreement is entered into, and (b) may be different for different descriptions of litigation funding agreements; and
3. The sum to be paid by the client shall consist of any costs, together with an amount calculated by reference to the funder's anticipated funding expenditure in funding the provision of the services or a percentage of the amount or the value of the property recovered in the action or proceedings to which the agreement relates.

Contingency Fee Agreements

- Section 3 of the Act permits the use of contingency fee agreements, subject to a percentage cap of a monetary award or value of assets recovered to be prescribed in forthcoming regulations.

- It is, however, possible for the attorney and client to bring a joint application pursuant to section 4 of the Act, within 90 days of execution of the agreement, for approval by the Court of an agreement providing for an amount payable which is greater than the cap prescribed by regulations, but the Court cannot approve a contingency fee of more than 40%. Regulation 8 of the draft Private Funding of Litigation Regulations (the **Regulations**), which are appended to the Cayman Islands Law Reform Commission's report on litigation funding dated 30 September 2019 but have not yet been finalised or Gazetted, provides that the prescribed percentage cap will be 33.3%.

Conditional Fee Agreements

- Section 4 of the Act provides that the success fee payable under a conditional fee agreement cannot exceed an attorney's normal fees by more than 100%, unless a joint application made by the attorney and client is approved by the Court. However, the total amount payable to the attorney under the agreement cannot exceed a percentage cap of the client's money judgment to be prescribed by regulations. Again, Regulation 8 of the draft Regulations suggests that this percentage cap will be 33.3%.
- In determining a joint application, the Court will consider the complexity of the case, the expense or risk to the attorney and any other factors the Court considers relevant.
- Section 5 of the Act states that both conditional and contingency fee agreements must be in writing and signed by the client and attorney.

Conclusion

The Cayman Islands legislature has recognised the changing nature of the litigation landscape, and that outdated public policy concerns have circumscribed the role of litigation funders and alternative fee arrangements which are commonplace and utilised to good effect in other jurisdictions.

The Act has been several years in the making, and builds on case law endorsing the use of regulated litigation funding in the Cayman Islands. It will give litigants greater access to justice and a wider range of funding options enabling parties to enter into agreements with funders and attorneys on negotiated terms they consider to be attractive without the need for Court approval (other than in cases involving the statutorily prescribed exceptions).

The Act may also be of wider significance given the importance of the Cayman Islands as a financial and business hub, and reinforces its position as one of the premier jurisdictions for the resolution of complex commercial disputes.

Oliver Green recently joined the Cayman Dispute Resolution team as an Associate.

Oliver, who relocated from Ogier's British Virgin Islands office where he worked for two years, has broad experience in contentious and non-contentious cross-border restructuring and insolvency matters and high value and complex international commercial and trust disputes.

He regularly acts for high net worth individuals based in the CIS, Asia, Europe and the US, banks, private and listed companies, hedge funds and the major accountancy and insolvency/restructuring firms and practitioners.

[1] <https://www.ogier.com/publications/third-party-litigation-funding-in-the-cayman-islands-a-shift-in-policy>

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Meet the Author



Marc Kish

Partner

Cayman Islands

E: marc.kish@ogier.com

T: +1 345 815 1790

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