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LITIGATION FUNDING IN OFFSHORE JURISDICTIONS > FUNDING IN THE BVI AND CAYMAN ISLANDS

In the second of two articles produced by Mourant Ozannes, we look at the availability of litigation funding in the British Virgin Islands (the **BVI**) and the Cayman Islands.

In this article we continue our look at the position of third party funding in offshore jurisdictions, looking at the Caribbean and contrasting the position in the BVI, where the position remains relatively undeveloped, with the Cayman Islands where the legislature is more actively engaged.

The Caribbean jurisdictions of BVI and the Cayman Islands are both United Kingdom overseas territories, unlike the Crown Dependencies of Bailiwicks of Guernsey and Jersey, which were considered in our last article. There is no Norman or French law influence in either the BVI or Cayman, whose legal systems are more directly founded on English common law. Although, the Courts will consider authorities from other leading common law jurisdictions.

In both jurisdictions, as with Guernsey and Jersey, traditional English rules prohibiting champerty and maintenance prevented third party funding on public policy grounds, or at least that was the perception, but things have moved on.

GIVEN THE LACK OF PUBLISHED AUTHORITY REGARDING THIRD PARTY FUNDING AGREEMENTS, IT COULD BE ARGUED THAT THE HISTORIC COMMON LAW POSITION REMAINS UNALTERED AND THIRD PARTY FUNDING AGREEMENTS ARE UNENFORCEABLE ON PUBLIC POLICY GROUNDS

BVI

The BVI Court system was, until recently, governed exclusively by the Eastern Caribbean Supreme Court Act (Cap 80) (the ECSCA). The ECSCA remains largely in force, but has recently been supplemented by the Legal Profession Act 2015 (the LPA). Section 11 of the ECSCA provides that, where there is a lacuna in the laws or procedure in the BVI, the Court will look to the current practice in the High Court in England.

Section 77 ECSCA (repealed by the LPA) stated:

> *Subject to modification by the rules of court, the law and practice relating to solicitors, and the taxation and recovery of costs in force in England, shall extend to and be in force in the Territory and shall apply to all persons lawfully practising therein as solicitors of the Court.*

In principle the BVI would follow England's lead in this area in the absence of its own settled law.

Consistent with this, it appears that the BVI Court's attitude to the use of third party funding agreements has relaxed somewhat. Given the absence of a clear rule in respect of litigation funding (the BVI Civil Procedure Rules were, and remain, silent on the matter) the BVI Court's attitude to litigation funding is influenced by changes in English practice brought about by the Jackson reforms. Concerns about the cost of litigation and access to justice are as much a factor in the BVI as they are elsewhere.

Whilst there are no reported authorities in the BVI which definitively confirm the position regarding third party funding in contentious matters (unlike other Caribbean jurisdictions such as Cayman), and it remains the case that most BVI civil litigations are privately funded, there are a handful of cases in which the use of third party funding was acknowledged by the BVI Court[1] and anecdotal evidence suggests that the BVI Court is sympathetic to liquidators and trustees who obtain third party funding in order to pursue claims for the ultimate benefit of creditors/beneficiaries which they could not otherwise afford to pursue (in the majority of these cases the Court files are sealed and so cannot be cited as authorities).

The court system set out in the ECSCA has been reformed and modernised by the LPA, the majority of which came into force on 11 November 2015. The LPA repealed Section 77[2] of the ECSCA and contains new rules in respect of the remuneration of lawyers in the BVI[3]. In particular, Section 44 provides that:

> *(1) [A] legal practitioner and his or her client may either before or after or in the course of the transaction of any non-contentious business by the legal practitioner, make an agreement as to the remuneration of the legal practitioner in respect thereof.*
>
> *(2) The agreement which shall be in writing shall provide for the remuneration of the legal practitioner by a gross sum, or by commission or by percentage, or by salary, or otherwise…*
>
> *(3) The agreement may be sued and recovered on…*

Section 44 of the LPA was drafted in wide terms. It is clear that the use of contingency fee agreements was envisaged by the BVI legislature. Indeed, further guidance on CFAs is provided in Schedule 4 of the LPA which contains the new BVI Code of Ethics (the Code). Article 6(2), Part B of the Code confirms that it is not improper for a BVI lawyer to enter into a CFA with a client provided that such fee is fair and reasonable.

However, the LPA did not go so far as to limit or abolish the principle of champerty and although lawyers in the BVI may be tempted to argue that Section 44 and the Code of Ethics indicate that the use of third party funding is now permissible in the BVI it is unclear whether the BVI judiciary would be minded to agree.

Moreover, Section 44 deals only with non-contentious work, leaving the question of remuneration in contentious matters, including third party funding agreements and CFAs, to be decided under the BVI common law.

Given the lack of published authority regarding third party funding agreements, it could be argued that the historic common law position remains unaltered and third party funding agreements are unenforceable on public policy grounds. After all, the BVI legislature did not expressly permit the use of such agreements in contentious matters when drafting the LPA.

On the other hand, the BVI legislature did not expressly prohibit third party funding agreements when drafting the LPA and, whilst Section 77 of ECSCA was repealed by the LPA, Section 11 remains in force allowing litigants to argue that the BVI Court should continue to follow the law and practice administered by the English Courts, including the modern approach to third party funding which has been adopted in England. Anecdotal evidence supports the proposition that the BVI Courts take this approach.

[1] e.g. Hugh Brown & Associates (Pty) Ltd v Kermas Limited [2011] BVIHCV (COM) 2011/13 and14, in which Bannister J. acknowledged the use of two third party funding agreement but held that it was unnecessary for him to express any opinion upon their effect; and (i) Hualon Corporation (M) Sdh Bhd (in receivership) Acting by its Receiver and Manager Dr. Duar Tuan Kiat -v- Marty Limited (BVIHC (COM) 2014/0090) [2016] ECSC J0120-1; and (ii) Chelsworth Investments Ltd. (In Liquidation) -v- Amesby Limited (No.165 of 1994) [2001] 10 JBVIC 3104 in which it was acknowledged that third party funding often features in applications for Security for Costs.

[2] Section 66 of the LPA

[3] Sections 40 – 44 of the LPA

Cayman Islands

Cayman Islands law distinguishes between:

(i) *Third party litigation funding agreements - a loan agreement whereby a third party lender advances purely financial assistance to a litigant to fund the prosecution in exchange for a portion of any award). Third party funding agreements have been judicially validated on many occasions by the Cayman courts in the context of official liquidation cases.*

(ii) *Conditional fee agreements - where a law firm pursues litigation based upon discounted rates if the action fails and uplifts if it succeeds. In DD Growth Premium 2X Fund (In Official Liquidation)[4], the Grand Court confirmed its earlier decision in Quayum-v-Hexagon Trust Company (Cayman Islands) Limited[5] in determining that conditional fee agreements could avoid being considered illegal and unenforceable between a lawyer and client if the agreement satisfied certain specified guidelines.*

(iii) *Contingency Fee Agreements: whereby a law firm contractually acts in return for a share (usually an agreed percentage) of the proceeds of the claim, if it is successful. In ICP Strategic Credit Income Fund Limited & ICP Strategic Credit Income Master Fund Limited[6] Jones J. held that the considerations which apply to litigation funding agreements generally apply equally to CFAs, save that there is an additional public policy element rendering all CFAs unlawful and unenforceable if they relate to litigation to be conducted in the Cayman Islands. However, he did not consider that position to be fatal to the different issue of sanctioning a litigation funding agreement for proceedings outside the Cayman Islands in a jurisdiction where CFAs are legal and enforceable.*

In Latoya Barrett-v-the Attorney General[7] the Cayman Islands Court of Appeal (**CICA**) determined that the loser of a case could not be made liable for any amount of agreed fees payable to the winner's lawyer's fees for success and recommended that legislative attention ought to be paid to this issue. The CICA left open the question of whether a contingency fee agreement could be enforced as between the winning client and their lawyer. This case led to the Attorney General requesting the Cayman Island's Law Reform Commission (**LRC**) to undertake a review of litigation funding in the Cayman Islands.

The LRC commenced its review of litigation funding in 2015 and published a Discussions Paper on conditional and contingency fee agreements in December 2015 which incorporated a Private Funding of Legal Services Bill (the **Bill**) which has yet to be enacted.

If passed into law, the Bill will codify the manner in which CFA's and litigation funding agreements have been operating, in practice, in the Cayman Islands for over a decade in providing for contingency fee agreements comprising the US type agreement as well as the conditional fee style agreement with success fees. The Grand Court retains the power under the terms of the Bill to review agreements upon application by the litigants or lawyers involved.

Part 3 of the Bill provides for the following conditions in respect of litigation funding agreements:

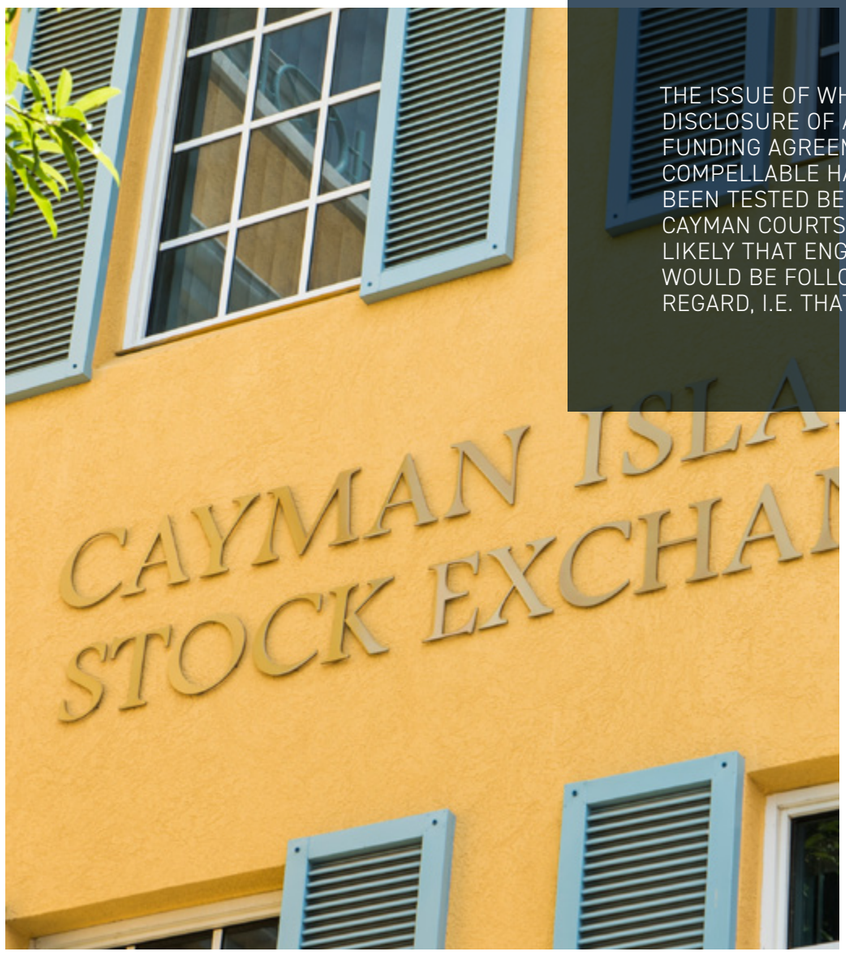
(i) *The funder must be a person/persons of description prescribed by Cabinet;*

(ii) *The agreement must be in writing and comply with prescribed requirements; if any. The requirements which Cabinet are to prescribe in this regard shall include (a) requirements for the funder to have provided prescribed information to the client before the agreement is made; and (b) may be different for different descriptions of litigation funding agreements.*

(iii) *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; and*

(iv) *The amount funded shall not exceed such percentage of that anticipated expenditure as may be prescribed by Cabinet in relation to proceedings.*

[4] [2013] (2) CILR 361
[5] [2002] CILR 161
[6] [2014] (1) CILKR 314
[7] [2012] (1) CILR 127



THE ISSUE OF WHETHER DISCLOSURE OF ANY LITIGATION FUNDING AGREEMENT IS COMPELLABLE HAS NOT YET BEEN TESTED BEFORE THE CAYMAN COURTS, BUT IT SEEMS LIKELY THAT ENGLISH CASE LAW WOULD BE FOLLOWED IN THIS REGARD, I.E. THAT IT WOULD BE

Any distinct offences arising under the common law of maintenance or champerty (but not embracery) are to be repealed under s.19 of the draft Bill (if enacted in its present form). The Bill also provides that the abolition of criminal and civil liability in respect of these doctrines shall not impact any rule of law regarding cases in which a contract is to be treated as contrary to public policy, or otherwise illegal.

The issue of whether disclosure of any litigation funding agreement is compellable has not yet been tested before the Cayman courts, but it seems likely that English case law would be followed in this regard, i.e. that it would be. The draft Bill in its present format does not address this issue. Parties can be assured however that the Cayman courts will continue to be flexible in addressing such issues on a case by case basis and will exercise its discretionary powers to make appropriate orders for disclosure of litigation funding agreements subject to specific safeguards, such as ordering partial redaction of certain details, whenever necessary.

The role of funders in litigation in the Cayman Island, which has been somewhat circumscribed to date, is likely to change once the Bill is enacted. Litigation funding agreements entered into post-enactment will have the additional layer of legislative protection (save in respect of criminal, quasi criminal or family proceedings). The Bill currently also provides that a costs order made in any proceedings may, subject to the rules of court, include provisions requiring the payment of any amount payable under a litigation agreement which will be welcomed by those considering engaging in litigation funding agreements in the Cayman Islands.