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The Cayman Islands Welcomes Third Party Litigation Funders

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Third party litigation funders, once seen as “strangers to litigation”, have recently been welcomed with open arms by the Grand Court. Departing from the historical common law offences of maintenance and champerty, the Grand Court has confirmed that commercial funding of litigation is not contrary to public policy. On the contrary, third party litigation funding may promote access to justice and have a role to play in the modern justice system. In *A Company -v- A Funder* (unreported, 23 November 2017) Segal J noted that:

"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".

Maintenance and Champerty

Maintenance and champerty are both crimes and torts in the Cayman Islands. Maintenance involves the procurement by direct or indirect financial assistance of another person to institute or carry on or defend civil proceedings without lawful justification. Champerty is an aggravated form of maintenance whose distinguishing feature is the support for litigation by a stranger in return for a share of the proceeds. These doctrines developed under English common law as a safeguard to prevent against frivolous litigation and the corruption of the public justice system through the meddling of unrelated parties.

In modern times, as the legal profession developed and procedural rules improved to better protect the justice system, several common law jurisdictions (including England and Wales) abolished the historical doctrines of maintenance and champerty. In the Cayman Islands, while not yet abolished by the Legislature, the Courts have recognised that the nature of common law itself needed to change to meet the needs of society. In relation to maintenance and champerty, this has meant an increasing willingness by Cayman Islands Courts to allow third party litigation funding, as long as adequate protections were built into such arrangements to prevent the corruption of public justice. The decision in *A Company -v- A Funder* confirms this approach.

A Company -v- A Funder

In *A Company -v- A Funder*, the plaintiff applied to the Court for a declaration that the third party funding agreement it had entered with the defendant was not illegal on the grounds of maintenance and champerty. While the procedure construct was somewhat artificial, the Grand Court allowed the application to proceed given the importance of the matter to the plaintiff (and particularly the issue of possible criminal liability if the funding agreement was found to breach the doctrines of maintenance and champerty).

After canvassing the recent Cayman Islands authorities and taking into account the developments in several other common law jurisdictions, Segal J found that as a matter of principle, a funding agreement will not be unlawful by reason of maintenance and champerty if it does not have a tendency to corrupt public justice. Whether or not an agreement had such a tendency would depend on a number of features, including:

- *The extent to which the funder controls the litigation*: Complete control by a non-party funder who only has a financial interest raises the risk of abuse by manipulation of the proceedings.
- *The ability of the funder to terminate the funding agreement at will or without reasonable clause:* If a funder can terminate without reasonable cause this could allow the funder to achieve indirect control by threatening to terminate the agreement (increasing the risk of abuse as mentioned above).
- *The level of communication between the funded party and the solicitor*: The funder should not be in control of the litigation, and should not give instructions to the party's solicitors (again an increase in control increases risk of abuse as mentioned above).
- *The prejudice likely to be suffered by a defendant if the claim fails*: The funder should be able to pay any costs order made against it, if the funder is unwilling or unable to fund an adverse costs order, this increases the risk of abuse.
- *The extent to which the funded party is provided with information about, and is able to make informed decisions concerning the litigation*: Again, an increase of control increases the risk of abuse by manipulation of the proceedings.
- *The amount of profit that the funder stands to make*: If the party's interest in the outcome of litigation is immaterial, as the funder stands to receive the majority of any award, it is more likely that such an arrangement would be champertous.
- *Whether or not the funder is a professional funder and is regulated*: The risk of abuse may be less where the litigation funder is regulated or has agreed to follow a code of conduct for litigation funders.

Provided the above principles are respected and the important policy goals are achieved then commercial funding of litigation, which can promote access to justice, should not be objectionable or subject to enhanced requirements or constraints.

In *A Company -v- A Funder*, even though the company was not in liquidation and not impecunious, the Court found that the funding agreement would not be illegal under the doctrines of maintenance and champerty. Segal J found that there are clearly benefits that may flow from allowing plaintiffs with genuine claims the opportunity to litigate them on terms which they consider to be commercially attractive and provide them with a better risk-reward ratio than if they were to fund the costs of litigation themselves.

The ruling of Segal J will likely result in an increase in the usage of such funding agreements, which, for all of the reasons set out by the Learned Judge, can only be a good thing.

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