Cayman Court approves litigation funding agreement

Summary

In *A Company v A Funder*,[1] the Grand Court of the Cayman Islands has approved third party funding of commercial litigation in a case that falls outside of the typical insolvency context. The Plaintiff was a prospective litigant seeking Cayman Islands recognition and enforcement of a New York arbitration award and judgments, together with a freezing injunction in support. The Plaintiff was concerned that its funding agreement would contravene the law of champerty and therefore be illegal and unenforceable. To assuage this concern, it sought declaratory relief from the Court in artificial proceedings against the Funder constructed and issued for this specific purpose.

In a detailed judgment by Mr Justice Segal, the Court, not without some hesitation as to the exercise upon which it was embarking, declared that the funding agreement was not unenforceable in Cayman as a matter of public policy. This decision represents an incremental expansion of the availability of third party litigation funding in the Cayman Islands. Although the judgment does not constitute a binding precedent (including because it was in substance an *ex parte* application for declaratory relief), we anticipate that further similar proceedings will be brought in the future.

The Court's Reasoning

The Court's starting point was that champerty, which Segal J described as "*an aggravated form of maintenance, whose distinguishing feature is the support of litigation by a stranger in return for a share of the proceeds,*" remains a crime in the Cayman Islands. While a previous decision of the Chief Justice[2] had indicated that the Court would develop the common law so as to permit exceptions to the general prohibition, where that was necessary in the interests of justice, the Cayman Islands Court of Appeal had cast doubt upon that approach by suggesting that any development of the law ought to be via statutory reform.[3]

Segal J considered the Cayman Islands' authorities, along with English and commonwealth decisions, and reached the view that in the absence of any contrary decision of (or clear guidance from) the Court of Appeal, it was right for him to follow the Chief Justice's approach toward developing the common law.

When assessing the permissibility of the funding agreement, Segal J underscored that the key issue is whether a particular funding agreement has the tendency to corrupt public justice, undermine the integrity of the litigation process and give rise to the risk of abuse. Segal J considered it appropriate to have regard to the following significant factors in particular:

The extent to which the funder controls the litigation. Complete control of the litigation by the funder raises the risks of abuse by manipulation of the proceedings. A balance needs to be struck.

The ability of the funder to terminate the funding agreement at will without reasonable cause. Any such unfettered rights would be problematic.

The level of communication between the funded party and the litigant's attorneys. The funder should not be able to control the litigation by virtue of controlling communications with the litigant's attorneys.

The prejudice likely to be suffered by a defendant if the claim fails. There would be a risk of abuse if the funder was not liable to meet any adverse costs order and also if the defendant would otherwise be left without a remedy.

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

The amount of profit that the funder stands to make. The funded party must still be in a position to benefit from a successful outcome and where a funder stands to receive a substantial portion of the benefits this may of itself be problematic.

Whether or not the funder is a professional funder and/or is regulated. The risk of abuse is likely to be more carefully scrutinised where the funder has not participated in a self-regulatory regime and has not agreed to follow an industry code of best practice.

On the facts of this case, Segal J held that the funding agreement did not fall foul of these public policy considerations, subject to one concern (regarding termination rights) which was rectified to the Judge's satisfaction. The Court therefore granted the declaratory relief sought.

The Future

This case represents an incremental step towards the increasing availability of litigation funding in the Cayman Islands.

It may well be that further similar applications for declaratory relief are made in the future (albeit probably on notice to the Attorney General as suggested by Segal J) and each will fall to be considered on its own merits. However, a note of caution is appropriate. Whilst such declarations may provide some comfort, their scope is necessarily limited, not least because they are liable to be reopened in contested proceedings and they do not prevent actions from constituting a criminal offence.

To discuss the significance of these decisions further or any queries arising, please do not hesitate to contact the authors detailed below. The foregoing is provided by way of general commentary and should not be relied upon in any specific situation.

[1] FSD 68 of 2017; unreported judgment of Mr Justice Segal dated 23 November 2017.

[2] Judgment of Chief Justice Smellie QC in *Quayum v Hexagon Trust Company (Cayman Islands) Limited* [2002] CILR 161.

[3] *Per* Chadwick LJ (*obiter)* in *Latoya Barrett v the Attorney General* [2012] 1 CILR 127.

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