# EXPERT GUIDE

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## Litigation & dispute Resolution Guide 2014

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# A recent, unreported decision of the Grand Court has provided some welcome guidance to liquidators and stakeholders alike on the question of litigation funding in liquidations. *By Guy Cowan & Ross McDonough*

In the Cayman Islands, all forms of alternative fee arrangements and commercial litigation funding were historically prohibited, as a matter of public policy, by criminal and civil laws against maintenance (the intermeddling of an uninterested party to encourage litigation) and champerty (which is essentially "maintenance" with the additional element of an agreement that there will be a division of any spoils of the litigation).

Recent decisions of the Cayman Islands Court of Appeal (Attorney General v. Barrett [2012] (1) CILR 127) and the Grand Court (Re DD Growth Premium 2X Fund (In Official Liquidation) FSD 0050 OF 2009 (ASCJ), dated 23 October 2013) have affirmed that, whilst no amount payable by a successful plaintiff to its lawyers under a conditional fee agreement[1.] could be recovered from a defendant on taxation, a conditional fee agreement could be lawfully enforced as between lawyer and client if the agreement meets certain criteria.

Following on from these recent decisions, the Grand Court has now considered (in ICP Strategic Credit Income Master Fund Ltd, where judgment was delivered on 4 April 2014) the question of when, and to what extent, court appointed liquidators may enter into (i) litigation funding agreements with litigation funders and (ii) contingency fee agreements[2.] with liquidators' own lawyers.

## Litigation Funding Agreements

Having reviewed various decisions of the English Courts on this topic and the issues of maintenance and champerty, including in particular the decision of Coulson J in London & Regional (St. George's Court) Limited v Ministry of Defence [2008] EWHC 256, the Judge in ICP summarised the present state of Cayman law on the subject of litigation funding agreements entered into by liquidators as follows:

- In considering whether a funding agreement is unlawful on grounds of maintenance or champerty, the overriding question is whether the agreement has a tendency to corrupt public justice. The Court will adopt a flexible approach and will generally decline to hold that an agreement under which a party provides assistance with litigation in return for a share of the proceeds is unenforceable. The rules against champerty, so far as they have survived, are primarily concerned with the integrity of the judicial process in the Cayman Islands.

The Judge then considered how an official liquidator might seek to deal with causes of action which vested in the liquidation estate, and found that:

- An outright sale by an official liquidator, by way of legal assignment, of a cause of action where the price is expressed to be a percentage of the proceeds of the action is a valid exercise by the official liquidator of his statutory power to sell the company's property; and

- An assignment of a percentage of the proceeds of a cause of action pursuant to a litigation funding agreement is also a valid exercise of the official liquidator's statutory power to sell the company's property, provided that the funder is given no right to control or interfere with the conduct of the litigation. The Court will carefully scrutinise the terms to ensure that no such right is conferred on the funder directly or indirectly.

At the same time, the Court emphasised that certain rights of action (and the proceeds of such rights of action), such as a preference claim, vested in an official liquidator personally and therefore are not capable of being sold or assigned, as doing so would amount to an unlawful surrender by the liquidator of his fiduciary power which is contrary to public policy.

## Contingency Fee Agreements

The Judge then considered the question of contingency fee agreements. He noted that contingency fee agreements with Cayman

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Islands attorneys or counsel are contrary to Cayman Islands public policy, void and unenforceable, and the Court therefore obviously cannot authorise an official liquidator to enter into such an agreement. However, the Judge drew a distinction between such agreements and contingency fee agreements which might be entered into with foreign attorneys or counsel. The latter, he found, are not void on public policy grounds, provided that the agreement is to be performed wholly outside the Cayman Islands in a foreign country where its performance will be lawful and permissible in accordance with applicable local law and rules of professional conduct.

In addition, he noted that any contingency fee agreement entered into with foreign attorneys or counsel must:

- comply with the relevant provisions of the Companies Winding Up Rules (including the requirement that it be governed by Cayman law and that any disputes arising under it are subject to the exclusive jurisdiction of the Cayman Courts);

- not fetter a liquidator's fiduciary power to exercise complete control over the manner in which the litigation is conducted, including preserving the liquidator's final and exclusive right, subject to Court sanction, to make settlement decisions; and

- expressly address the scope of the law firm's reporting obligations, which will typically require it to prepare or assist in the preparation of reports to creditors/shareholders, the liquidation committee and the Court. The lead lawyers may be expected to appear in person in connection with sanction applications made to the Court in connection with the conduct or settlement of the litigation.

The Judge noted that the Court will always be concerned to ensure that the termination provisions within a contingency fee agreement are appropriate and that the law firm (or the funder under a litigation funding agreement) should have no right to terminate the agreement and cease undertaking legal work (or paying legal fees) without the consent of the liquidator or sanction of the Court. Conversely, the law firm should have no right to continue to prosecute a claim which the liquidator no longer considers to be meritorious, or to insist on being paid on a time spent basis if the liquidator gives instructions for the action to be discontinued. The Court will also need to be satisfied that appropriate due diligence has been conducted by the liquidator and that both parties to the agreement have the financial resources to meet their obligations under the agreement.

The Future

The Court of Appeal in Barrett expressed its view that the issue of litigation funding involved complex areas of public policy and "that it is a subject that calls for consideration by the Law Reform Commission in advance of any legislation so that full account may be taken of all interests involved, and most importantly of the need to provide access to justice for those who cannot afford it". Following that case, the Attorney General formally requested that the Law Reform Commission undertake a review of the law relating to conditional or contingency fee agreements with a view to its reform, and this review is now underway.

The Law Reform Commission's report is something that will certainly be welcomed by practitioners and, in the meantime, the judgment in ICP provides Cayman liquidators with a valuable mechanism with which to pursue meritorious claims (particularly in certain foreign jurisdictions such as the United States).

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*He has appeared before the Grand Court and the Cayman Islands' Court of Appeal on numerous occasions and his recently reported cases include Re SPhinX Group [2012 (2) CILR 371] and Re FIA Leveraged Fund [2012 (1) CILR 248].*

*Managing Partner and Head of Litigation, Ross frequently acts in complex international insolvencies, restructurings and security enforcements and is regularly retained by local and overseas insolvency professionals, directors, fund administrators, auditors, creditors and investors in connection with all aspects of the restructuring and winding up of companies, investment funds, limited partnerships, SIV's and structured finance entities.*

*He has specific experience of coordinating cross-border appointments and obtaining recognition and assistance for insolvency professionals appointed by foreign courts. Having practiced continuously in the Cayman Islands since 1994, Ross is one of the most experienced litigators at the Cayman bar and has acted in more than 40 reported cases and was admitted in the British Virgin Islands in 2008. He is also regularly engaged to give expert evidence on issues of Cayman Islands law in proceedings before foreign courts.*

1. i.e. an agreement entered into by a lawyer and a client whereby work is done at an hourly rate, but it is agreed in advance that if the claim is successful then the client will pay the lawyer a higher fee.
2. i.e an agreement pursuant to which lawyers are permitted to recover fees from the damages awarded to their clients (in contrast to a conditional fee agreement).