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UPDATE

Private Funding of Legal Services Act, 2020: the codification and expansion of litigation funding in the Cayman Islands

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The Private Funding of Legal Services Act, 2020 (the **Act**), which came into force on 1 May 2021,[1] codifies the rules that apply to litigation funding in the Cayman Islands, which had previously been determined on a case-by-case basis by the court including by reference to the anachronistic principles of champerty and maintenance. The widened access to litigation funding introduced by the Act brings the Cayman Islands into line with onshore jurisdictions such as the United Kingdom and the United States which have well-developed litigation funding markets and providers. The Act provides welcome certainty for litigants looking to manage the expense of litigating in the Cayman Islands.

There are three types of litigation funding agreements: i) **Conditional Fee Agreements**, in which the client pays an uplift on the attorney's standard fees if the claim succeeds but nothing if the case is lost; (ii) **Contingency Fee Agreements**, in which the attorney receives a percentage of the sum(s) recovered by the client if the claim succeeds, and nothing if the case is lost; and (iii) **Third Party Funding Agreements**, where a third party agrees to fund all or part of the costs of a client's case in exchange for payment on agreed terms.

History of litigation funding in the Cayman Islands

Historically, the main obstacles to the use of litigation funding in the Cayman Islands were the archaic English doctrines of champerty and maintenance, which remained both crimes and torts in Cayman until they were repealed with the introduction of the Act.

In recent years, the Cayman Islands courts have taken a pragmatic approach, having established useful guidelines for litigants looking to use Third Party Funding Agreements.[2] The Cayman courts were also sympathetic to the use of Conditional Fee Agreements by liquidators to pursue meritorious claims that could not otherwise be pursued for want of funding. While helpful, these guidelines still required each case to be considered individually on its merits. The introduction of the Act specifies the circumstances in which litigation funding, including on a contingency fee basis (which was previously unavailable), is available to litigants, generally without court approval.

The key elements of the Act

Champerty and maintenance

Section 17 of the Act repeals the offences of champerty and maintenance under the common law, save where the cause of action accrued before the Act comes into force, so this provision does not have retrospective effect.

[1] Pursuant to the Private Funding of Legal Services Act, 2020 (Commencement) Order, 2021.

[2] See, for instance, the judgments in *A Company v A Funder* (unreported, 23 November 2017) and *Re Platinum Partners Value Arbitrage Fund L.P. (In Official Liquidation)* (unreported, 31 October 2018), both summarised in our article found here.

'Contingency fee agreements'

The Act permits the use of 'contingency fee agreements', save in respect of criminal (or quasi-criminal) proceedings, or proceedings in respect of the care of a child or any order under the Children Act.

Section 3 of the Act essentially defines a contingency fee agreement as an agreement in which the remuneration paid to the attorney for their legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful outcome of the matter at hand. This definition therefore encompasses both Conditional Fee Agreements and Contingency Fee Agreements (as described above).

The Act and the Private Funding of Legal Services Regulations, 2021 (the **Regulations**) together specify certain limits on the success fee payable and what portion of a successful client's recovery can be paid to the attorney pursuant to a Conditional Fee Agreement and a Contingency Fee Agreement, as follows:

- *Conditional Fee Agreements:* under section 4(2) of the Act, the success fee payable to an attorney under a Conditional Fee Agreement shall not be greater than an additional 100 per cent of the attorney's normal fees. The success fee is further limited where the client's claim is for a money judgment, in which case the total payable by a client to an attorney shall not exceed the 'prescribed percentage' of the total amount awarded or obtained in the proceedings excluding any costs recovered. The 'prescribed percentage' is defined in the Regulations as 33.3 per cent. Consequently, pursuant to a Conditional Fee Agreement, an attorney may agree an uplift of up to 100 per cent of their normal fees with their client but the total amount payable to the attorney under the agreement cannot exceed one third of the client's money judgment.

- *Contingency Fee Agreements:* section 4(3) of the Act and the Regulations provide that the "maximum percentage" that can be payable in a contingency fee agreement is again 33.3 per cent of the amount recovered. The same limitations noted above in section 4(2) of the Act also apply to Contingency Fee Agreements in respect of claims for money judgments.

The above said, an attorney may enter into a either a Conditional Fee Agreement or a Contingency Fee Agreement which provides for the payment to the attorney of a larger amount than the specified percentages if the agreement to do so is approved by the court. Such an application must be brought jointly by the attorney and the client within 90 days of the execution of the agreement. The Act specifies the considerations the court will have regard to when determining such an application, which include the nature and complexity of the value of the proceedings. Notably, in determining such an application, the court cannot approve a contingency fee which exceeds 40 per cent of the total amount awarded, of any amount obtained by the client or of the value of any property recovered in the proceedings.

The Act further stipulates that any award of costs or costs recovered must be excluded when calculating the fee payable to an attorney under a Conditional Fee Agreement or Contingency Fee Agreement unless prior court approval to the contrary has been obtained.

The Act also includes a number of procedural requirements in relation to Conditional Fee Agreements and Contingency Fee Agreements, including as to their form and content, client cooling-off periods and the impact on costs. Notably, section 12 of the Act requires that a Conditional Fee Agreement or Contingency Fee Agreement must be first approved by the court (before payment to the attorney) where it is made by a client in a fiduciary capacity, including in their capacity of guardian, attorney or trustee under a deed or will.

Litigation funding agreements

The Act makes separate, albeit relatively brief, provision for litigation funding agreements (i.e. Third-Party Funding Agreements).

The only conditions prescribed by the Act regarding the entry of Third Party Funding Agreements are that: the agreement shall be in writing; the agreement shall comply with prescribed requirements, '*if any*', and that the sum to be paid by the client to the funder shall consist of either any costs payable to the client in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated 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. There are as yet no prescribed requirements under the Act, and none have been proposed by the

Cayman Law Reform Commission but the Act makes allowance for such requirements in the future, which may cover matters such as information to be provided by a litigation funder to a client before the agreement is made or impose different requirements for different types of Third Party Funding Agreements.

Comment

Certain forms of litigation funding agreements have been available to litigants in the Cayman Islands for over a decade, albeit often subject to the approval of the Judges in the Financial Services Division of the Grand Court of the Cayman Islands. The codification of the guidelines applicable to these types of fee agreements provides greater certainty for litigants wishing to rely on them without having to obtain the prior approval of the court (in most cases). The new availability of Contingency Fee Agreements (ie an agreement allowing the attorney to retain an agreed percentage of the client's recovery) marks a leap forward for the jurisdiction, and one that brings the Cayman Islands into line with competing common law jurisdictions.

Interestingly, and consistent with the position in England, the Law Reform Commission has not proposed any specific set of regulations governing the provision of third party litigation funding, for now favouring self-regulation over a more prescriptive approach. Consequently, we expect to see the market for these services in the Cayman Islands develop at pace.

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