IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO.: FSD 68 OF 2017 (NSJ)

A COMPANY

Plaintiff

and

A FUNDER

Defendant

JUDGMENT

Litigation funding agreements - maintenance and champerty – application for a declaration prior to the issue of proceedings that a funding agreement was not illegal on grounds of public policy under Cayman law?

Appearances:	**Marc Kish of Harney Westwood and Riegels for the Plaintiff**
Hearing:	**25 May, 2017**
Further submissions:	**30 May, 2017**
Note of Decision:	**5 June, 2017**
Judgment:	**23 November, 2017**

Introduction

1. This is a case concerning third party litigation funding. This is the practice whereby a stranger to litigation contracts with a party to finance all or part of a party's legal costs as the case progresses in exchange for taking an agreed share of the recovery or settlement proceeds but nothing if the action fails. In this case the funding agreement

has been entered into by and between the Plaintiff and the Defendant. The issue which falls to be considered is whether the funding agreement is unlawful on grounds of maintenance or champerty. Maintenance and champerty are both crimes and torts in Cayman. 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.

2. The Plaintiff intended to commence proceedings in Cayman (and apply for an *ex parte* freezing injunction) against parties who are subject to an arbitration award obtained by the Plaintiff. The Plaintiff intended to rely on the funding made available by the Defendant in these proceedings. But the Plaintiff is concerned that by doing so it risks committing the crime and tort of maintenance or champerty and has therefore commenced these proceedings for the purpose of obtaining a declaration from the Court to the effect that the funding agreement is not unlawful and that entering into and the commencement of proceedings with funding made available pursuant to the agreement will not be unlawful by reason of maintenance or champerty.

3. The Plaintiff acknowledged the artificiality of the procedural construct it has used. The Defendant has not taken part in the proceedings and is not adverse to the Plaintiff nor does it contest the relief which the Plaintiff seeks (indeed it must be taken to support the Plaintiff's application). In substance this is an ex parte application for a declaration. The Plaintiff also acknowledged that a declaration in these proceedings could not of itself prevent criminal liability if the steps taken by the Plaintiff otherwise involved the commission of a crime. Furthermore, the defendants to the action which the Plaintiffs intended to commence (to enforce the arbitration award and New York judgment) would not be bound by the order in these proceedings and would, to the extent that the issue of illegality on grounds of maintenance or champerty subsequently arose in those proceedings, be able to make their own submissions and argue the point afresh (although no doubt my decision would be taken into account)

4. I heard the Plaintiff's application on 25 May and subsequently handed down a Note of Decision on 5 June. The Note of Decision explained briefly my decision and that my full reasons would be set out subsequently in a judgment. This is that judgment.

5. While expressing some reluctance to grant the relief sought in these circumstances but recognising that a real issue arises because of the risk of criminal liability and that an order of the Court may be of some assistance to the Plaintiffs in the event that the issue of criminal liability was subsequently raised, I was prepared to allow the application to proceed and subject to requiring certain amendments to be made to the funding agreement I made a declaration (in a modified form to that which the Plaintiff sought). I describe further below the details of the application and the order I made.

The proceedings

6. By an ex parte originating summons (the ***Originating Summons***) issued on 5 April 2017 the Plaintiff, a large company incorporated in Korea, sought relief in connection with proceedings which it intended to issue in this Court for the recognition and enforcement of a New York arbitration award and judgments. These projected proceedings were to be funded by the Defendant, a third party commercial funder (who I shall refer to as the ***Funder***) and in the Originating Summons the Plaintiff sought declarations that the issue of such proceedings would not be champertous and that its agreement with the Funder dated 8 April 2016 (the ***Funding Agreement***) was not an illegal contract (and an order that the Court file be sealed or that certain redactions be made to the evidence filed in support of the Originating Summons before copies could be inspected or before being served on the party who was to be named as the defendant to the proceedings to enforce the arbitration award). The Funder was joined as the defendant to the Originating Summons but was not intended to and did not appear at the hearing of the Originating Summons.

7. The Originating Summons was heard on 25 May. At the conclusion of the hearing I reserved judgment and invited the Plaintiff to make further written submissions dealing with the redactions which the Plaintiff proposed be made to the Funding Agreement (and the consultancy agreement which had been entered into by the Plaintiff with an entity associated with the Funder).

8. On 5 June I issued a Note of Decision in which I explained that I had concluded that provided that certain amendments were made to the Funding Agreement I would make a declaration that the Funding Agreement was not unenforceable in Cayman as a matter of public policy (by reason of champerty). The amendments required were that the termination provisions in clause 15 of the Funding Agreement were amended so that they conformed to the terms of clauses 11.2 and 12 of the Code of Conduct for

Litigation Funders. Subsequently the Plaintiff confirmed that they had agreed with the Funder to make amendments to the Funding Agreement which amendments were put in evidence and approved by me. The order (the ***Order***) I made was in the following terms:

> "*1. The funding agreement dated 8 April 2016 between the Plaintiff and the Defendant (as amended by a Deed of Variation dated 26 June 2017) is not unenforceable in the Cayman Islands as an illegal contract by reason of being contrary to public policy and champertous.*
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> *2. Consequently the issuing of proceedings by the Plaintiff for the recognition of a final arbitration award given in favour of the Plaintiff, and any proceedings necessary for the enforcement thereof, which are funded pursuant to the said funding agreement are not an abuse of process on the ground that they are funded by a funding agreement which is champertous or otherwise unlawful by reason of being contrary to public policy.*
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> *3. The Court file be sealed until further order of the Court.*
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> *4. There shall be no order as to costs.*"

The background

9. In his affidavit in support of the Originating Summons Lee Ho-Seok explained that the Plaintiff had commenced arbitration proceedings on 4 January 2013 pursuant to the terms of certain maritime contracts (the ***Contracts***) entered into in 2012 with America Metals Trading LLP (***AMT***). The Contracts were governed by New York law and incorporated a disputes clause providing for arbitration in New York under the ICDR Rules (the ***Arbitration***).

10. In the Arbitration, AMT was named as the first respondent and four brothers who are Brazilian nationals and the members and ultimate beneficial owners of AMT (the ***Monteiro Brothers***) were named as additional respondents (collectively, the ***Award Debtors***).

11. The Plaintiff's claim in the Arbitration was that the Award Debtors conspired to defraud it of over USD 14.4 million by taking payment for but failing to deliver shipments of pig iron in accordance with the underlying Contracts.

12. Following a Partial Final Award made on 20 November 2013 the Arbitration culminated in the issuance of a final arbitration award in favour of the Plaintiff dated 27 February 2014 (the Award) in the amount of USD 15,482,751.04 plus interest and

GRAND COURT • CAYMAN ISLANDS GOVERNMENT 14/17 costs (the ***Award Debt***). The Award was made jointly and severally against each of the Award Debtors.

13. On 19 February 2014 and 14 June 2014, the Plaintiff succeeded in having the Award recognized and entered as two judgments of the Supreme Court of the State of New York, County of New York, against AMT and the Monteiro Brothers in a total amount (inclusive of cumulative interest as at that date) of USD 17,282,197.36 and USD 17,815.046.81 accordingly (the ***New York Judgments***).

14. The Award Debtors have not voluntarily complied with the terms of the Award. The Plaintiff asserts that the Award Debtors appear to have taken steps to place assets outside the reach of the Plaintiff both before and after the date of the Award and that the Award Debtors' conduct post-Award amounts to a wilful furtherance of the underlying frauds.

15. The Plaintiff had identified assets within this jurisdiction in the name of certain Award Debtors and was the intended Plaintiff in proceedings in the jurisdiction of the Cayman Islands for the recognition of the Award and subsequent enforcement against the relevant Award Debtor assets both in the jurisdiction and overseas intended Proceedings). The Plaintiff also intended to apply for a Mareva or freezing injunction over those assets (the ***Mareva Injunction***).

16. The Plaintiff alleged that the Award Debtors had engaged in a pattern of evasive and non-compliant behaviour in relation to the underlying frauds, the Arbitration and the Award, and the Plaintiff therefore had reason to believe that absent the granting of the relief sought in the Originating Summons on an ex parte without notice basis, the purpose of the Intended Proceedings and Mareva Injunction would have been frustrated by further evasive steps (including but not limited to the dissipation of assets) being taken by the Award Debtors.

The Funding Agreement

17. The main terms of the Funding Agreement were as follows:

    (a). the Funding Agreement defined the proceedings to which it related (the ***Proceedings***) as being enforcement proceedings in connection with the Award Debt and the New York Judgments. The Funder agreed to invest certain amounts being costs that may be incurred in pursuing the Proceedings.

These amounts included the expenses to be incurred by the Plaintiff in stage 1 and stage 2 as such stages were specified in a related agreement between the Plaintiff and an entity related to the Funder (the ***Related Party***) that provided asset tracing and enforcement services to the Plaintiff (the ***Consultancy Agreement***). The expenses for stage 1 and stage 2 were capped in different amounts. The Funder had a discretion to increase these caps.

(b). under the Consultancy Agreement the Related Party agreed to act for the Plaintiff in an investigation of the Award Debtors with a view to locating and assisting in the recovery of the assets of the Award Debtors. Stage 1 of the engagement continued until the fees of the Related Party reached the agreed Stage 1 cap, the Related Party decided that Stage 1 should terminate because there was little or no prospects of tracing assets or making recoveries or the Related Party decided to proceed to stage 2. Stage 2 started after the end of stage 1 if the Related Party determined that there was merit in continuing the investigation and involved a continuation of the investigation and further work up to a further agreed fees cap. Under clause 5 the Related Party had the right to terminate the Consultancy Agreement on 21 days' notice and agreed to exercise this right reasonably and in good faith.

(c). under the Funding Agreement the Funder had no obligation to pay the stage 2 expenses if the Related Party decided not to proceed with stage 2 of its work.

(d). it was agreed that the Funder would not be responsible for any adverse costs which were payable to the Award Debtors in the proceedings to be commenced by the Plaintiff. The Funder stated that it expected responsibility for such costs to be borne either by an ATE insurer or the Plaintiff (and the Funder had the right to require the Plaintiff to enter into an ATE policy during stage 2 if the Plaintiff refused to confirm that it would be responsible for the adverse cots or could not demonstrate its ability to pay such costs.

(e). the Plaintiff agreed to pursue its claims and bring about a reasonable monetisation of the Award Debt and New York Judgments through settlement or enforcement and follow the advice of its solicitors and counsel in relation to the conduct of proceedings.

(f). the Plaintiff was to have sole conduct of the proceedings and the right to settle the claims subject to an obligation to keep the Funder fully informed.

(g). if the Plaintiff decided to abandon, withdraw or discontinue the proceedings without the support of reasonable legal advice it must repay the sums advanced by the Funder plus 8% daily compound interest thereon.

(h). if the Plaintiff was successful and made recoveries in the proceedings it was required to pay the Funder a Resolution Amount calculated in accordance with a formula set out in the Funding Agreement. Essentially this provided for the Funder to be paid out of recoveries: its investment in stage 1 plus a premium (a participation payment) of four times that amount; its investment in stage 2 plus a premium (also a participation payment) of two and a half that amount; plus an amount, after deducting the Plaintiff's unbudgeted legal costs up to US$1 million, equal to forty per cent of the remaining recoveries (provided that the total payment could not exceed the sum permitted under the applicable law or the total amount recovered by the Plaintiff in the proceedings). The Funding Agreement included a statement of the reasons as to why these payments were reasonable and reflected the relevant risks.

(i). the funder had the right to terminate the Funding Agreement (in clause 15) if the Plaintiff was in material breach of its duties (under clause 5) relating to the conduct of the proceedings and the provision of information to the Funder: was in material breach of the warranties it had given; if the Related Party terminated the Consultancy Agreement or the Funder considered that the prospects of success and/or economic viability are such that it did not wish to continue to fund the proceedings. Upon termination, the Funder was obliged to meet its obligations up to the termination date; the Plaintiff would be entitled to the recoveries resulting from a continuation of the proceedings after termination; if the reason for termination was the Plaintiff's breach of its clause 5 duties or its warranties, then the Plaintiff was required to repay only the sums invested and funded in respect of expenses by the Funder out of any recoveries; but if the reason for termination was the Related Party's termination of the Consultancy Agreement or the Funder's views as to the prospects of success then the Plaintiff had no obligation to repay the Funder's investment or expenses funding or any other amount.

(j). if the Plaintiff was unsuccessful in the proceedings and made no recoveries and the funding agreement had not been terminated by the Funder then the Plaintiff would not be liable to pay the Resolution Amount.

(k). the governing law of the Funding Agreement was English law.

The Plaintiff's submissions

18. Mr Kish on behalf of the Plaintiff submitted that while criminal and civil liabilities for maintenance and champerty remained and had not been abolished in this jurisdiction and despite the absence of legislative reform of this area of the law, this Court should follow the approach to third party litigation funding taken in a number of other jurisdictions (in particular England and Wales, Australia, New Zealand, Canada and Bermuda), and the policy based approach established in a number of decisions of this Court dealing with fee agreements between attorneys and their clients.

19. Mr Kish accepted that the laws of England, as they relate to the offences of maintenance and champerty, were received as part of the law of the Cayman Islands as held to be the case by the Chief Justice in *Quayum v Hexagon Trust Company (Cayman Islands) Limited* 2002 CILR 161 at [22] (***Quayum***). He also acknowledged that the Cayman courts have responded cautiously to developments in other Commonwealth jurisdictions, which have dispensed with the principles of maintenance and champerty. The Cayman Islands Law Reform Commission published a discussion paper in December 2015 (the ***2015 Discussion Paper***) which looked in some detail at the approaches of a number of leading onshore and offshore jurisdictions to the adoption of conditional fee agreements, contingency fee arrangements and third party funding agreements. However, that helpful guidance notwithstanding, there had been no legislative reform and while the case law in this Court had considered the effect of the rules of champerty and maintenance on contingency fee and other funding agreements between litigants and their lawyers the Court had not yet dealt directly with third party funding agreements of the kind entered into by the Plaintiff in this case. Nonetheless, the approach taken by this Court in the decisions relating to attorney-client fee agreements and the relevant foreign case law supported and justified the upholding of third party commercial funding agreements provided that, having regard to the terms of the relevant agreement and the surrounding circumstances, the Court was satisfied that the agreement did not have a tendency to corrupt public justice. Mr Kish submitted that when the terms of the Funding Agreement and the surrounding circumstances in this case were considered it was clear that the Funding Agreement would not involve any corruption of public justice

20. Mr Kish submitted that the following factors should be taken into account when considering the Funding Agreement and that they established that in the present case there was permissible maintenance or champerty:

(a). whether the Funding Agreement offends current principles of maintenance and champerty in the Cayman Islands;

(b). whether the Funding Agreement is contrary to public policy; and

(c). whether the court has discretion to permit a party's arrangement where that party would not otherwise be denied access to justice.

The Cayman authorities

21. Mr Kish noted that this Court had previously approved arrangements that would otherwise have amounted to champertous maintenance on the basis that they facilitated access to justice by impecunious claimants. These instances mostly involved conditional fee agreements, by which the Cayman Islands attorneys acting for the plaintiff agreed to a reduction in their fees, in return for an agreed uplift calculated as a percentage of those fees in the event that the plaintiff was successful.

22. In *Quayum* the Chief Justice approved a conditional fee agreement between an impecunious plaintiff group (the former employees of a bank in liquidation who had been defrauded of the funds in the staff benefits trust) and their attorneys, despite the objection of the defendant that the arrangement was void for illegality because it would involve the commission of the common law offences of maintenance and champerty. The Chief Justice (in a wide ranging and scholarly judgment that considers the nature of champerty and maintenance, the reception of the offence and tort into Cayman law, Cayman public policy and the law in other jurisdictions) held that the agreement would not fall foul of the law against maintenance and champerty or run contrary to the modern public policy behind the application of that law to the lawyer/client relationship. He provided guidance on appropriate safeguards that the Court may impose and concluded at [60]:

> *"The strictures developed in this branch of the law were no doubt appropriate to an age gone by, when, quite understandably and appropriately, great emphasis was required to be placed upon the public policy interests from which they arose.*

Nowadays, though, we witness the ascendancy of rights and of the equally important public policy concern to ensure equal access to justice for those of modest means."

The Chief Justice then specified (see paragraph [62]) the conditions to be applied as safeguards to the operation of such agreements, including that (i) Court sanction be obtained, (ii) the relevant attorney be reliable and have a god reputation and that (iii) the lay client obtain independent legal advice.

23. The Chief Justice also addressed the issue of whether and the extent to which the law regulating maintenance and champerty could be updated by the Court without the need for and before legislative intervention. He said as follows in response to a submission that any attenuation of the common law position as to maintenance and champerty was a matter for the Legislature:

> *"[After noting that conditional fee agreements had been prohibited in England by the common law and rules of practice so that legislative action had been needed to make them lawful and the submission of counsel in this case that the Cayman court should regard any attenuation of the common law position as being a matter for Parliament.]*
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> *That, to my mind, overlooks the mutable nature of the common law itself as it changes to meet the needs of society. It also overlooks the particular duties and responsibilities of the court in this jurisdiction. The common law relating to maintenance and champerty has indeed evolved over the years, reflecting the changing social imperatives and thus reflecting the evolution of public policy. (paragraph [27]) ....*
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> *It is against that background of the historical judicial dicta, that I consider it appropriate to look at the more specific issue whether the common law offence entirely prohibits fees being payable upon the contingency of success. The case law specifically on this issue must be considered. It must also be considered with the true public policy underlying the law of maintenance and champerty firmly in mind. It must, moreover, be considered in the context of what public policy demands in the Cayman Islands. (paragraph [31])*
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> *From the review of the cases, we have seen how time has changed the perception of the public policy interests in prohibiting the maintenance of other people's litigation. It is no longer regarded as mischievous for trade unions, insurance companies and, indeed, even the state to maintain someone else's action. The common law thus recognizes exceptions to the prohibition...(paragraph [38]) ....*
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> *Considering such advantages as against the disadvantages already identified, I pose the further question whether it is open to this court to endorse the advantages and treat them as applicable in this jurisdiction, notwithstanding the absence of legislative change. I concluded that it is. Remaining firmly within the realm of the common law as we do in this jurisdiction, this court is amenable to be persuaded by changes in the common law in other jurisdictions..." (paragraph [41])"*

24. In *Quayum* the issue was whether the conditional fee agreement was enforceable as between the attorneys and their client. In *Latoya Barrett v the Attorney General*

[2012] 1 CILR 127, the issue was whether a successful claimant (in proceedings relating to an accident involving an on-duty police officer) who had entered into a conditional fee agreement with her attorneys and been awarded costs could recover the uplift payable to the attorneys from the unsuccessful defendant (the Attorney General). The Court of Appeal held she could not. Paragraph 7.2 of Practice Direction No 1/2001 provided that amounts claimed on the basis of conditional fee orders on any basis other than hourly rates would be disallowed on taxation and the Court of Appeal, differing from the judge below, held that paragraph 7.2, properly understood, directed that uplifts claimed on the basis of the conditional fee agreements should be disallowed, thereby rendering the agreement with the uplift fee unenforceable. The Court of Appeal noted that it was arguable, but the point was not advanced on the appeal, that paragraph 7.2 prohibited recoveries not only of uplifts but also any basic fees payable under conditional fee agreements and decided not to deal with the question of whether such agreements are enforceable as between attorney and client as it was not necessary to do so in order to dispose of the appeal. Sir John Chadwick P. said as follows:

> "*49.* *... [there is a] need, in any consideration of the arguments for and against striking down contingency fee arrangements (which, in this context, include conditional fee agreements as well as contingency fee agreements, strictly so called) on grounds of public policy, to have regard not only to the advantage (in giving access to the courts) which such agreements may have for the impecunious litigant and to the danger (in giving the lawyer a pecuniary interest in the outcome of the litigation which may lead him to act improperly) that such agreements may pose a threat to the administration of justice but also to the potential unfairness to the other party to the litigation, who is exposed to the risk of paying uplifted costs if the contingency fee litigant is successful....*
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> *53* *Given the conclusion which we have reached as to the effect of para. 7.2 of the guidelines, the question which was the subject of decision in Quayum does not arise in the present appeal. Whether or not conditional fee agreements are enforceable as between the lawyer and his client, the amounts (if any) to be paid by the conditional fee client to his lawyer under such an agreement are not recoverable from the client's opponent in the litigation. In those circumstances, as it seems to me, anything we may say as to the decision of the Chief Justice on that question must be considered obiter dicta.*
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> *54* *For that reason, and for the other reason which I shall mention, while recognizing that there is much force in the view that the Chief Justice should have resisted the temptation to treat the question which was before him as one which could and should be answered by judicial development of the common law in this jurisdiction (ibid., at para. 41) rather than by legislative intervention, I am not persuaded that it is appropriate to decide whether or not he was entitled to take the course that he did. I prefer to leave open both the question whether he was*

entitled to take that course and the question whether (if so) the conclusion that he reached on the substantive issue (whether or not public policy requires that conditional fee agreements be struck down) should be upheld....

57 *The Attorney General's assurance that the matter will be referred to the Law Reform Commission and may, thereafter, be addressed in legislation is a further reason for taking the view, in this court, that it would not be appropriate to decide either the question whether the Chief Justice was entitled to take the course that he did in Quayum or the question whether (if so) the conclusion that he reached on the substantive issue (whether or not public policy requires that conditional fee agreements be struck down) should be upheld. It is more sensible, as it seems to me, to leave the position as it now is until the Law Reform Commission has considered what, in its view, the public interest requires and the legislature (or, perhaps, the Rules Committee) have had the opportunity to respond to its recommendations*"

25. So the President identified four key points relevant to the policy analysis, at least in relation to conditional fee agreements - the enhancement of access to the courts, particularly for the impecunious litigant; the threat to the administration of justice, in this context because of the danger of conflicts of interest for attorneys and also the risk of potential unfairness to the other party to the litigation. He also noted that there was "*much force in the view that the Chief Justice should have resisted the temptation to treat the question which was before him as one which could and should be answered by judicial development of the common law*" but preferred to leave open the question of whether public policy required conditional fee agreements to be struck down, as between the client and his attorney, welcomed the Attorney General's assurance that he intended to refer the issue to the Law Reform Commission and that pending such review and the possibility of new legislation, it was best for the Court to defer a decision. Of course, the Court of Appeal's call for the law to be re-examined by the Cayman Islands Law Reform Commission led to the publication of the 2015 Discussion Paper.

26. In *DD Growth Premium 2X Fund (in Official Liquidation)* [2013] (2) CILR 361 the Chief Justice was again required to consider a conditional fee agreement. This time the conditional fee agreement was between the official liquidators of an insolvent company and a firm of Cayman Islands attorneys. The Chief Justice applied his decision in *Quayum* and sanctioned the agreement. He referred to the earlier orders made in *In the matter of AJW Master Fund Limited (in official liquidation) 18 December 2012, Cause FSD 200 of 2011* and *In the matter of SPhinX Group of Companies Cause 258 of 2006 (now FSD 16 of 2009 ASCJ), 14th January 2007*

although the Plaintiff has not been able to locate written reasons in respect of those orders.

27. In *Re ICP Strategic Credit Income Fund Ltd* [2014] 1 CILR 314 (***ICP***), Justice Jones sanctioned the joint official liquidators' entry into a contingency fee agreement with their United States attorneys in respect of litigation to be conducted in the United States. He followed the decision of the Chief Justice in *Quayum* that contingency fee agreements are void and unenforecable in Cayman but decided that since the agreement in question related to proceedings and was to be performed in New York and the public policy rule that invalidates such agreements was not of such fundamental imprtance that it must be given universal application, the contingency agreement in this case was nonetheless lawful. Such an agreement which is expressed to be governed by Cayman law will be valid provided that its terms require it to be performed wholly in a foreign country where its performance will be lawful and permissible in accordance with the applicable local law and rules of professional conduct.

28. After explaining the meaning of litigation funding agreements he noted at [14] that:

> *"Historically, the funding of litigation by third parties who have no interest in the dispute has been characterised as maintenance or champerty and such funding arrangements have been held to be unlawful. However, in the context of insolvent liquidation proceedings it has been recognised by the English courts, at least since 1888 .. that creditor-funded litigation did not contravene the common law principles of maintenance and champerty... a litigation funding agreement made between an official liquidator and a funder who has no interest in the liquidation as a creditor or shareholder will only contravene the principles of maintenance and champerty if the funder is in a position to control or exercise a significant degree of influence over the conduct of the litigation."*

29. Jones J then considered the law applicable to litigation funding agreements and quoted Coulson J's summary in *London & Regional (St George's Court) v Ministry of Defence* [2008] EWHC 526 of the state of English law on the issue of litigation funding agreements:

> *"(a) the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable; (b) in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement; (c) the modern authorities demonstrate a flexible approach where courts have generally declined to hold that an agreement under which a*

> *party provided assistance with litigation in return for a share of the proceeds was unenforceable; (d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction."*

Jones J commented that "*Whether or not point (a) reflects Cayman law in the light of Smellie C.J.'s decision in Quayum .. is not something I have to decide for the purposes of this case.*"

30. Jones J went on to note that the official liquidator must not fetter his fiduciary power to control the litigation and in this context (at [29]) to say as follows:

> *"The counterparty to a litigation funding agreement or contingency fee agreement should have no right to terminate the contract and cease paying legal fees or undertaking legal work, as the case may be, without the consent of the liquidator or the sanction of the court. Conversely, a foreign law firm should have no right to insist upon continuing to prosecute a claim which is no longer considered by the official liquidator to be meritorious. Nor should the foreign law firm be in a position to insist upon payment of a fee calculated on a time spent basis in the event that the liquidator gives instructions for the action to be discontinued."*

The foreign authorities

31. As I have already explained, Mr Kish referred me to and invited me to follow a number of other authorities in other jurisdictions dealing with third party litigation funding. At the hearing I referred Mr Kish to two Jersey decisions and asked that he provide supplemental written submissions dealing with these cases which he subsequently did. These cases are *Re The Valetta Trust* [2011] JRC 227 (***Valetta***) and *Barclays Wealth Trustees (Jersey) v Equity Trust (Jersey) Limited* [2013 (2) JLR 22] (***Barclays Wealth***).

32. I do not propose to discuss each of the cases to which Mr Kish referred me but only those that I found helpful.

England and Wales

33. As regards England and Wales, I have already referred to the judgment of Coulson J in *London & Regional (St George's Court) v Ministry of Defence* (which was quoted by Jones J in *ICP* although Coulson J was himself quoting from the judgment of Underhill J in *Mansell v Robinson* [2007] EWHC 101).

34. As Underhill J had said, the key question is whether the agreement has a tendency to corrupt public justice and such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement. Lord Phillips M.R. explained in *Factortame Ltd v Secretary of State for the Environment* [2002] All ER 97 (CA) at [36] "*one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to supress evidence, to suborn witnesses or otherwise undermine the ends of justice.*" (*Factortame* involved an agreement between claimants and a firm of accountants under which the accountants agreed to prepare the claims for a consideration of 8% of any money recovered and the Court of Appeal held that the agreement was not champertous and that the unsuccessful defendants were liable in costs to pay a reasonable hourly fee for the accountants capped at 8% of the damages). In *Giles v Thompson* [1993] 3 All ER 321, HL, at 33 of the CA decision, Steyn L.J. said that "*it is necessary to consider the questions posed in this case [concerning champerty] in the light of contemporary public policy. The correct approach is not to ask whether in accordance with contemporary public policy the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement. The question is whether the agreement has the tendency to corrupt public justice. This question requires the closest attention to be given to the nature and surrounding circumstances of the particular agreement.*" (*Giles v Thompson* involved agreements between the plaintiffs, who had sustained injuries and damage to their cars for which the defendants were to blame, and car hire companies under which the companies provided substitute vehicles and had the right to pursue the defendants in the plaintiffs' names and to select the solicitors to conduct the litigation. The defendants' claim that the agreements were champertous was rejected since the degree of control exercised by the companies over the litigation was not objectionable, there had been nothing officious or wanton in the companies' intervention and it could not be said that as between the plaintiffs and the companies the transactions had been so unbalanced or fraught with risk that they ought to be prohibited.) In *Giles v Thompson* Lord Mustill said that ".. *I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for purpose of considering the single question whether ... there is wanton and officious intermeddling with the disputes of*

others in [which] the meddler has no interest whatever and where the assistance he renders to one or the other party is without justification or excuse."

35. This approach appears to have been confirmed in the more recent case of *Morris-v-Southark London Borough Council (Law Society intervening)* [2011] 2 All ER 240 and by the remarks of Lord Justice Jackson in his reports (both preliminary and final) prepared for his Review of Civil Litigations Costs. In his preliminary report (at paragraph 1.1 of chapter 15) he said as follows:

> *"Third party funders provide financial support for litigation on the basis that they receive a percentage of the sums recovered if the action succeeds, but nothing if the action fails. The funding of litigation by third parties, who have no interest in the dispute, has traditionally been characterised as maintenance or champerty and such funding arrangements have been held to be unlawful. In recent years there has been a sea change in the approach of the courts, both in the UK and elsewhere. It is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice".*

In his final report he went on to identify the benefits of third party funding as follows (in paragraph 1.2 of chapter 11):

> *1.2 <u>Benefits of third party funding.</u> In PR paragraph 15.1.1 I expressed the view that the institution of third party funding was beneficial in that it promoted access to justice. The majority of contributors to the debate in phase 2 of the Costs Review supported that view both at meetings and in written submissions. I remain of the view that, in principle, third party funding is beneficial and should be supported, essentially for five reasons:*
>
> *(i). Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus third party funding promotes access to justice.*
> *(ii). Although a successful claimant with third party funding forgoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all.*
> *(iii). The use of third party funding (unlike the use of conditional fee agreements ("CFAs")) does not impose additional financial burdens upon opposing parties.*
> *(iv). Third party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable.*
> *(v). Third party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties."*

Furthermore, he stated (at paragraph 4.6 of chapter 11) that in his view it was wrong in principle that a litigation funder which stands to recover a share of damages in the event of success should be able to escape part of the liability for costs in the event of defeat. This is unjust not only to the opposing party (who may be left with unrecovered costs) but also to the client (who may be exposed to costs liabilities which it cannot meet).

36. Mr Kish in his skeleton argument also referred to the regulations and guidance published by the UK Association of Litigation Funders (the ***ALF***), the industry's self-imposed regulator in that jurisdiction. The ALF has developed a code of conduct (the ***ALF Code***) which members must comply with and which seeks to set out and define best practice for funders.

Bermuda

37. In *Stiftung Salle Modulable and Rutli Stiftung v Butterfield Trust (Bermuda) Limited* [2014] SC (Bda) 14 Com (21 February 2014) (Chief Justice Kawaley), the question of the legality of third party litigation funding agreements came before the Supreme Court of Bermuda. The court had to consider a funding agreement governed by English law involving a commercial funder under which the funder would receive approximately 40% of any damages recovered. The plaintiff was a Swiss charitable foundation that brought proceedings against a trustee of a Bermuda trust claiming that the trustee was obliged to fund a particular project (this was not a case involving an impecunious claimant). The trustee argued that the funding agreement was void as being contrary to public policy. Chief Justice Kawaley noted that counsel for the trustee accepted that the "*strength of the traditional prohibitions on champertous agreements had been diluted almost to vanishing point in much of the common law world*" and that "*no cogent reasons for swimming against the modern tide [had been] advanced.*" He referred to "*The constitutionally protected right of access to the Court which is implicit in the fair trial rights guaranteed by section 6(8) of the Bermuda Constitution as read with European Convention on Human Rights jurisprudence on article 6 of that Convention suggest that such funding agreements should be encouraged rather than condemned.*" and concluded that there was "*no reason why Bermuda's common law should adopt the antiquarian approach contended for by the [trustee].*" The Cayman Islands has a similar constitutional provision (see section 7. (1) of the Cayman Islands Constitution Order 2009) and our Courts have previously interpreted court rules in accordance with obligations under the European Convention on Human Rights (see *Gong v CDH China Management Company Ltd* [2011] 1 CILR

57, *Elliot v CIHSA* [2007] CILR 163, and *Dyxnet Holdings Ltd v Current Ventures II Ltd & another* [2015] (1) CILR 174).

Jersey

38. *Valetta* involved an *ex parte* Beddoe application made by a trustee appointed to pursue its predecessor for breach of trust. The trustee could not afford to bring the proceedings since the claim against the former trustee was the only trust asset. Accordingly the trustee entered into an agreement with a commercial funder under which the funder agreed to fund the litigation in return for a share of the proceeds. While no issue of champerty had been raised the court requested that counsel for the trustee address the issue. The funding agreement provided that the funder agreed to provide the legals costs and meet any adverse costs order made against the plaintiffs. Any damages recovered were to be applied first in reimbursing the funder for the costs it had incurred and thereafter the proceeds were to be split with the portion going to the funder being at least 25% of the proceeds or twice the legal costs of the plaintiffs, increasing to 50% or three times the plaintiffs' legal according to the length of time that the proceedings had taken. Control of the litigation rested with the plaintiffs although they were required to keep the funder informed and conduct the litigation in accordance with the reasonable advice of their legal advisers. The funder had the right to terminate the funding agreement if satisfied that there had been a material adverse decline in the prospects of success, in which case the funder would remain liable for all costs incurred during the existence of the agreement. The Royal Court (the Bailiff sitting with two other judges) concluded that the funding agreement did not tend to corrupt or adversely affect the purity of justice having regard to the following matters: control of the proceedings remained with the plaintiffs, they would retain a substantial proportion of the damages if successful, the defendants were protected in respect of costs if the claim failed and the funding agreement afforded access to justice by plaintiffs who would not otherwise be able to afford to bring the litigation. Given the considerable recent changes in the law of champerty the agreement would not be regarded as champertous under English law and should not be so regarded under Jersey law.

39. *Barclays Wealth* involved an application by the defendant to strike out the claim on the grounds that their continuance was an abuse of process since the plaintiffs had entered into and the proceedings were funded pursuant to a third party funding

agreement. The funding agreement involved the same commercial funder as and was taken to be in substantially similar terms to that in *Valetta* and the Royal Court (the Bailiff sitting alone) followed its decision and reasoning in *Valetta*.

Australia

40. The Australian courts have expressed the view that the dangers of maintenance and champerty are dulled in modern times, where more sophisticated court processes are sufficient to deal with a funder which might attempt due process manipulation or other breach of professional duty (see *Campbells Cash and Carry v Fostif Pty Limited* [2006] HCA 41). Whilst litigation funding agreements have repeatedly been challenged in the Australian courts, the Productivity Commission of the Australian Government's Access to Justice report in 2014 noted that *"the Standing Committee of Attorneys-General (2006) noted that in over 20 court challenges to litigation funding agreements since 1998, none had been struck down"* (page 609 of the report). The courts did, however, use their supervisory jurisdiction over such agreements to, on occasion, alter contracts, or provide information so that plaintiffs could be said to have provided informed consent.

Discussion – the law and public policy in Cayman

41. It seems to me that there are six aspects (occasionally overlapping) of the analysis in the present case:

(a). when, as a matter of principle, is a funding agreement unlawful by reason of maintenance and champerty?

(b). are there any particular elements of Cayman public policy that require or recommend a different approach and result?

(c). to what extent can the Court develop the law in this area without and before intervention by the Legislature?

(d). applying the applicable principles as filtered through and adjusted to take account of Cayman public policy and taking account of the proper role of the Court in developing the common law rules, is the Funding Agreement unlawful by reason of maintenance and champerty?

(e). what impact if any should the fact that this in an *ex parte* application have on the willingness of the Court to grant the relief sought and to make a declaration in the present case?

(f). what is the significance of the fact that the Funding Agreement is governed by English law?

42. As regards the legal principles applicable to the issue of whether funding agreements are unlawful by reason of maintenance and champerty, it seems to me that Cayman law follows the approach of English law and that the summary set out by Coulson J in *London & Regional (St George's Court) v Ministry of Defence* (above, although not a case on litigation funding by a commercial third party funder) is an accurate guide to the basic approach. This is that (a) in considering whether a funding agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement and (b) that the rules against champerty are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction. The underlying concern is a risk of abuse. The funder's prospect of and need to protect and maximise profits may tempt the funder to interfere with the litigation process in a way that might inflame (inflate) claims, suppress evidence or suborn witnesses.

43. This approach is in accordance with that taken by the Chief Justice in *Quayum* and Jones J in *ICP*. It is, of course, right (as Jones J pointed out in *ICP*) that there remains a question mark over whether Cayman and English law are the same in all respects as the Court of Appeal in *Latoya Barrett v the Attorney General* left open the issue of whether (and to some extent questioned the Chief Justice's decision in *Quayum* that) conditional fee agreements are enforceable as between lawyer and client. However, that issue does not arise in this case and while I take into account and give great weight to the judgment of Chadwick P, it seems to me that the Chief Justice was right to adopt the approach he did to the development of the common law of Cayman and that in the absence of a contrary decision of (or clear guidance from) the Court of Appeal I should follow the Chief Justice's approach. I have taken into account the developments of the law of maintenance and champerty in the other common law jurisdictions to which I have been referred, in particular Bermuda and Jersey, although of course these authorities are not binding and only of assistance for the purpose of considering how Cayman law should be developed.

44. Recognising that the critical issue is whether a particular funding agreement between a litigant and a commercial funder has the tendency to corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse, it becomes necessary to consider particular features of the relationship between them that could have such an effect.

45. It seems to me that the following features are likely to have a particular significance:

(a). *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. However, there is a balance to be struck in so far as the funding agreement includes reasonable protections of the funder's financial interest by ensuring that the proceedings will be properly conducted (for example by requiring the funded party to conduct the litigation in accordance with the reasonable advice of their attorneys). Of course the risk of abuse is reduced to the extent that the funder can be made subject to a costs as a non-party. The funder will then be responsible for and will have a clear incentive, in the same way as party to the proceedings does, to avoid abusive conduct of the proceedings for fear of adverse costs orders. Non-party costs orders can be made under section 24(3) of the Judicature Law (2107 Revision). The circumstances in which a professional funding company will be required to pay the costs of a successful defendant were considered by the English Court of Appeal in *Arkin v Borchard Lines Ltd (No.5)* [2005] 1 WLR 3055 (where reversing the judge the Court of Appeal held that the funder should be liable to the extent of the funding it had agreed to provide) and *Merchantbridge v Safron General Partner* [2011] EWHC 1524 (where the Commercial Court in London followed the steer given by Lord Justice Jackson in his final report, as I have mentioned above, held the funder – funding the defendant - liable for all the successful plaintiff's costs). See also *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144 (CA).

(b). *the ability of the funder to terminate the funding agreement at will or without reasonable cause.* If a funder can terminate its obligation to fund at will or without reasonable cause there is a risk that the funder will seek to use the threat of this right to put pressure on the funded party. In effect the right is a mechanism for achieving indirect control. The concern is that unfettered termination rights give rise to or risk an impermissible level of indirect control. I have already noted that Jones J in *ICP*, in the context of a case involving a liquidator, held that the funder should have no right to terminate the contract and cease paying legal fees without the consent of the liquidator or the sanction of the court. Mr Kish submitted that this issue only arises in a case where the funding is provided to a fiduciary acting on behalf of an estate. While I accept that there are additional reasons why the Court will require as a condition to sanctioning a funding agreement with an official liquidator that termination is only permissible with the consent of the liquidator or with the permission of the Court to ensure that there is no undue disruption to the administration of the liquidation by an officer of the Court, it seems to me that a right to terminate at will in a funding agreement raises wider concerns and the risk of indirect control which may result in the agreement being champertous.

(c). *the level of communication between the funded party and the solicitor*. The funder should not be able to control the litigation by being in control of communications with and able to give instructions to the attorneys on the record who are conducting the proceedings. It assists if the attorneys are independent of the funder and alive to the possibility of abuse or conflict of interest.

(d). *the prejudice likely to be suffered by a defendant if the claim fails*. A funding agreement under which the funder is not liable to meet any adverse costs order raises a risk of abuse. There is an increased risk of abuse and prejudice to the defendant. A funder who has a commercial stake in the outcome of the litigation and an upside on a successful outcome but no risk or exposure to the costs in the event that the claim fails has an incentive to put pressure on the funded party to adopt an unduly aggressive litigation strategy (although the funded party will need to consider the cost consequences of its actions). There is also a risk that the defendant might be prejudiced if the funded party cannot pay any costs order. If a funder is not prepared to fund the costs of an adverse costs order it is open to them to require the funded party to take out and fund the cost of ATE insurance. Once again the risk of abuse is reduced to the extent that the funder can be made subject to a costs as a non-party.

(e). *the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation.*

(f). *the amount of profit that the funder stands to make.* If the profit element or premium payable to the funder above the amount advanced by the funder to cover litigation costs is high and disproportionate to the risk involved, then the residual interest of the funded party may be so small as to make it immaterial. Where the funded party is no longer in a position to benefit from a successful outcome, it is more likely that the funding agreement will be treated as champertous. In *Factortame*, the English Court of Appeal took the view that the 8 per cent payable to the firm of accountants funding the litigation was not excessive. In *Valetta*, the Royal Court in Jersey approved an agreement under which the funder was entitled to a maximum of 50 per cent of the proceeds of the litigation or three times the plaintiff's legal costs whichever was the greater.

(g). *whether or not the funder is a professional funder and/or is regulated.* In *Factortame*, the accountants providing the funding were of a reputable and regulated profession. A voluntary Code of Conduct for Litigation Funders, as I have noted above, has been introduced in England and Wales and in both the *Valetta* and *Barclays Wealth* cases in Jersey the funder was a member of the ALF and a signatory to the ALF Code. The risk of abuse is likely to be more carefully scrutinised in a case in which the funder has not participated in the self-regulatory regime and agreed to follow a code which sets out industry best practice.

46. It does not seem to me that, having regard in particular to the discussion of the public policy analysis in the Chief Justice's judgment in *Quayum*, and subject to the caveats mentioned below, that there is any reason why this jurisdiction should treat with greater circumspection or impose additional constraints on commercial funding of litigation in this jurisdiction. The principles outlined above apply to ensure that any such funding must not have a tendency to corrupt public justice and to protect the integrity of the litigation process in this jurisdiction. Provided that these principles are respected and these 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 (I note and have regard to the four key points in the policy analysis identified by Chadwick P in *Latoya Barrett*, see paragraph 25 above). I take into account that this is not a case involving an impecunious plaintiff who would be unable to bring the proceedings without the benefit of third party funding. That is a relevant factor but should not in my view be determinative. There are clearly benefits that may flow from allowing plaintiffs will genuine claims the

opportunity to litigate them on terms which they consider to be commercially attractive and provide them with a better risk-reward ration than if they were to fund the costs of the litigation themselves (there are I accept also concerns about promoting the proliferation of speculative or unjustifiable claims but at least in principle and for the purpose of the present application these do not seem to me to be so great as to require me to treat commercial litigation as being inconsistent with Cayman public policy). Nor is there anything in the 2015 Discussion Paper which requires a different approach. 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. As has been accepted in other leading financial centre common law jurisdictions and as the Chief Justice noted in *Quayum* the law of maintenance and champerty has evolved reflecting the evolution of public policy and that evolution should be reflected in Cayman law (those interested in the origins and development of the rules on maintenance should consult the recently published monograph by Jonathan Rose *Maintenance in Medieval England*, Cambridge University Press, 2017).

47. The caveats I have mentioned are these. First, I am conscious that this is an *ex parte* application and that I have not had the benefit of full argument – accordingly my views are necessarily preliminary. Second, while I had considered directing the Plaintiff to give notice of the application to the Attorney General, this was impracticable where there was real urgency because the Plaintiff wished to proceed with an application for injunctive relief. As a result my views are preliminary for another reason. On any subsequent application it is likely to be appropriate to notify the Attorney General so that he has the opportunity to intervene if he considers that to be appropriate.

Discussion – the law applied to the Funding Agreement

48. I carefully reviewed the terms of the Funding Agreement, which I have already summarised above, and concluded that with one exception, they did not give rise to a tendency to corrupt public justice, undermine the integrity of the litigation process or give rise to a risk of abuse

49. The exception related to the right of termination in clause 15 of the Funding Agreement (summarised in paragraph 17(i) above). This included what was

effectively a right to terminate at will. The Funder had a right to terminate if the Related Party terminated the Consultancy Agreement. Under the Consultancy Agreement the Related Party had a wide discretion as to whether to continue with the investigations at stage 1 and stage 2 and the right to terminate for any reason and without default on 21 days' notice – although the Related Party had agreed to exercise this right reasonably and in good faith. While this qualification on the exercise of the right to terminate was of some comfort and the Funder itself did not directly have the right but only indirectly through the Related Party, it seemed to me that in reality the Funder was given a right to wide and almost unfettered right to terminate the funding and that there was a serious risk of the Funder having an unacceptable level of indirect control. I was fortified in this view by the fact that this right to terminate was inconsistent with the requirements of clauses 11.2 and 12 of the Code of Conduct for Litigation Funders. (November 2016 version). These clauses state the following:

> "*11. The LFA shall state whether (and if so how) the Funder or Funder's Subsidiary or Associated Entity may:*
>
> *11.1 provide input to the Funder Party's decisions in relation to settlements;*
>
> *11.2 terminate the LFA in the event that the Funder or Funder's Subsidiary or Associated Entity:*
>
> *11.2.1 reasonably ceases to be satisfied about the merits of the dispute;*
> *11.2.2 reasonably believes that the dispute is no longer commercially viable; or*
> *11.2.3 reasonably believes that there has been a material breach of the LFA by the Funded Party.*
>
> *12. The LFA shall not establish a discretionary right for a Funder or Funder's Subsidiary or Associated Party to terminate a LFA in the absence of the circumstances described in clause 11.2.*"

50. Accordingly in my Note of Decision I required that clause 15 of the Funding Agreement be amended to conform with clause 11.2 of the Code, which it subsequently was. I said that it seemed to me that, at least in the context of an *ex parte* application such as this one and in view of the relatively undeveloped state of the applicable law in Cayman, it would be inappropriate to treat as acceptable a form of litigation funding agreement involving a professional funder that fails to satisfy the requirements of the Code (in an important respect).

51. It appeared to me that subject to the exceptions I shall discuss shortly the other terms of the Funding Agreement were consistent with the Code and did not give rise to any material concerns having regard to the principles and points made above. I did note that the Funder was a member of the ALF (and a long established professional finance provider of repute in the legal profession and listed on the London Stock Exchange). The other points of concern were first, the provisions in the Funding Agreement pursuant to which the Funder was not required to fund an adverse costs order and which did not require the Plaintiff to take out ATE insurance to cover this and secondly the fact that the profit element (the Resolution Amount and the participation payments) payable to the Funder in the event that the proceedings were successful was high (see paragraph 17(h) above). As regards the first concern, the evidence adduced demonstrated that the Plaintiff was a very substantial international company which appeared to have more than sufficient resources to cover any costs order. Furthermore there was provision in the Funding Agreement for ATE insurance to be obtained by the Plaintiff if the Funder so required. Therefore the appeared to be no material risk to the Award Debtors in the present case. As regards the second concern, I concluded that, while a success fee of 40% of remaining recoveries after repayment of expenses funded by the Funder together with the right to participation payments which in stage 1 were four times the funded expenses and in stage 2 were two and half times the funded expenses was high, it was probably not so high as to deprive the Plaintiff of all material benefits under and a real interest in the successful outcome of the litigation (and I noted that the Royal Court in Jersey had approved a funding agreement providing for payment of 50% of the recoveries although the agreement in that case appeared to contain an upper limit by reference to multiples of the expenses funded). Ultimately it did not seem to me be right to regard the Funding Agreement as champertous on this ground alone although I can see that in a subsequent case, particularly on a fully argued application, the issue is likely to merit further consideration.

Discussion - the impact of the nature of the Plaintiff's application

52. I have already explained that the form and nature of the Plaintiff's application in this case gave rise to some concerns and has caused me to make my analysis subject to certain important caveats. I did consider whether it was appropriate to grant any relief to the Plaintiff in circumstances where it might be said that the Plaintiff was in effect seeking an advisory opinion from the Court on a point of general commercial

importance to the Defendant and the commercial funding industry. However, I was satisfied that I should allow the application to proceed and grant the relief sought since the evidence demonstrated that the Plaintiff had genuine claims which it intended to prosecute, that the Plaintiff intended to proceed immediately with litigation in this jurisdiction and that since maintenance and champerty remain criminal offences in this jurisdiction the Plaintiff had a legitimate interest to protect and there was real issue to be decided (in connection with the prospective proceedings against the Award Debtors).

Discussion – does the fact that the Funding Agreement is subject to English law affect the analysis?

53. Mr Kish argued his case on the basis that Cayman law applied to the issue of whether the Funding Agreement was illegal on grounds of public policy and I was prepared to proceed on that basis. I would just note that the proper law of the Funding Agreement is English law and that no submissions were made on the conflicts of law analysis to be applied in these circumstances.

54. It appears to me to be right that in order for a funding agreement in respect of Cayman litigation to be enforceable here it must satisfy the requirements of Cayman law and not be illegal on grounds of Cayman public policy. This must be the case whatever the position under the proper law of the relevant agreement. It is probably also the case (in the absence of submissions on the point I say this tentatively) that the agreement must also be valid and enforceable under the proper law of the agreement. Based on the authorities cited to me by Mr Kish it appears that the law in England is broadly similar (and certainly no more restrictive) than the law in Cayman so that I can be satisfied that the Funding Agreement is likely to be valid as a matter of English law.

55. I also note that while a funding agreement probably needs to be valid and enforceable under its proper law, the proper law may regard as valid an agreement which while unenforceable if it had to be performed in that country nonetheless was by its terms to be performed in another jurisdiction in which it would be treated as enforceable. In *ICP* Jones J considered a funding agreement governed by New York law relating to proceedings in New York which therefore fell to be wholly performed in New York. Jones J concluded that he could authorise a liquidator to enter into an agreement to

conduct litigation in a foreign country if such an agreement would be binding under Cayman law as well as the law of the country in which it will be performed. He also held that a contract governed by Cayman law which would be contrary to public policy if performed in this jurisdiction is nonetheless capable of being valid and enforceable in Cayman if its terms require that it be performed wholly outside the Cayman Islands and in a foreign country where performance would not be contrary to the public policy of that country.

The Hon. Justice Segal
Justice of the Grand Court
23 November 2017