

Re the Valetta Trust: Landmark decision reached on the validity of litigation funding in Jersey

Lisa Springate* and Robert Gardner**

Abstract

Whilst it has long been recognized by third party litigation funders based in the United Kingdom that the Channel Islands have a well-established litigation market, there has been no established domestic market for funding and it was not known whether litigation funding agreements were enforceable in Jersey. This is because until the recent decision of the Royal Court in Jersey *Re the Valetta Trust*, the legality and enforceability of funding agreements in Jersey remained untested, unlike in the United Kingdom and elsewhere.

Access to Justice

Commercial litigation has a reputation for being expensive and uncertain and is something which some clients may make a conscious decision to avoid. Particularly with trustees, whilst a trust may own significant assets, they may be largely illiquid or hard to realize and therefore not appropriate to meet the costs of issuing proceedings. Additionally, even if the trustees had sufficient liquid trust assets, they may not necessarily wish to embark upon proceedings which may be aggressively defended by well-funded oppon-

ents who may be insured. Litigation funding, in the right case, may provide an answer or at least provide a valuable option worth considering as an alternative to funding a case through to trial from resources at one's own disposal.

Litigation funding in the United Kingdom and elsewhere

In the United Kingdom and elsewhere, litigation funding is mainstream and has developed significantly over the past 10 years or so. Whether such agreements are viewed as valid and enforceable as opposed to an abuse of process, is dependant on the circumstances in each case. However as a concept (and if properly structured) they are now officially regarded as beneficial in the interests of justice and to be encouraged.

Litigation funding agreements

Litigation funding involves an agreement, (which may take a variety of forms) between a litigant and a professional funder rather than between a litigant and a lawyer. In broad terms, the litigant will pass to the funder some or all of the responsibility for the ongoing legal cost of taking a case to trial. The litigant may also purchase ATE (after the event) insurance to

*Lisa Springate, Partner, Bedell Cristin. Tel: +44(0)1534 814770; Email: Lisa.Springate@bedellgroup.com

**Robert Gardner, Advocate, Bedell Cristin. Tel: +44(0)1534 814690; Email: Robert.Gardner@bedellgroup.com. The authors act on behalf of the Plaintiffs.

cover any adverse costs order if the case fails. The funder will take an active interest in the case but will not meddle in the litigation by getting involved in decision making (save for agreeing that the litigant keep the funder involved of the progress of the proceedings). In return, the litigant will agree to share a percentage of the proceeds with the funder.

The funder will not be incentivized to strike too hard a bargain with the litigant for at least two reasons. First, the funder wants the litigant to retain a sufficiently keen interest in the outcome of the case to get the best result at trial or settlement for the benefit of both parties. Second, too greedy a deal on the part of the funder may lay the whole arrangement open to being set aside as abusive and contrary to underlying and longstanding rules against intermeddling in litigation.

Litigation funding agreements in England—case law

Although there is no decision specifically on a litigation funding agreement with a commercial funder, it is now clear that if properly structured such agreements are not champertous as a matter of English law¹.

In 2008, the position under English law was accurately stated by Coulson J in *London & Regional (St George's Court) Ltd v Ministry of Defence*² as follows:

Many of the relevant authorities in this area of the law have been helpfully summarised by Underhill J in *Mansell v Robinson* [2007] EWHC 101 (QB). He concluded that:

- 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: see *R (Factortame) Ltd v Secretary of State for Transport (No 8)* [2002] EWCA Civ 932, [2003] QB 381, [2002] 4 All ER 97;

- 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: see *Giles v Thompson*;
- c. the modern authorities demonstrated 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: see, for example, *Papera Traders Co Ltd v Hyundai (Merchant Marine Co Ltd (No 2))* [2002] EWHC 2130 (Comm), [2002] 2 All ER (Comm) 1083, [2002] 2 Lloyds LR 692;
- 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: see *Papera*.

It is clear that under English law there is a distinction to be made between litigation funding by a commercial funder and conditional fee or other arrangements with a solicitor or advocate conducting the case. There are different public policy considerations in relation to the latter and stricter rules apply.

It is clear that under English law there is a distinction to be made between litigation funding by a commercial funder and conditional fee or other arrangements with a solicitor or advocate conducting the case

1. For a review of the cases see (a) Cook on Costs paras 41.5 to 41.13 (b) the paper by Jeremy Morgan QC and Robert Marven presented to the London Shipping Law Centre on 18 March 2009. For comments on the appropriate structure, see Cook on Costs at para 41.17.

2. [2008] EWHC 526 TCC at 103.

The Valetta Trust

On 25 November 2011, a landmark judgment was handed down by the Royal Court of Jersey in *Re the Valetta Trust*³. The Royal Court concluded that public policy strongly pointed towards the litigation funding agreement in question being regarded as valid and enforceable.

Proceedings were commenced in 2011 by beneficiaries of a Jersey discretionary trust and its replacement trustee (the 'Plaintiffs'), against the former Jersey trustee, together with two individuals (the 'Defendants'). The only material asset of the Trust was a minority shareholding in an underlying company which in turn owned certain rights to a product. In 2003, the former trustee sold the Trust's shares in the company to itself as trustee of another trust which also held shares in the company. The sale proceeds received by the Trust were subsequently distributed to the beneficiaries since the Trust fell dormant.

The Plaintiffs contended that the sale was at a gross undervalue which was known to the former trustee, and therefore wished to institute proceedings against the former trustee for breach of trust as well as against certain other persons who were said to have been knowingly involved in the sale at an undervalue. The former trustee and other Defendants strongly deny the allegations.

When considering their litigation options, the Plaintiffs turned to litigation funding. They entered into a funding agreement with a leading third party funder, Harbour Litigation Investment Fund LP (Harbour), which is based in England. The Royal Court requested detailed submissions on whether such an agreement is permissible and enforceable under Jersey law, particularly since the Court was being asked to authorize the replacement trustee to enter into the agreement and since this was the first time the enforceability of funding agreements had been considered in Jersey litigation.

The terms of the funding agreement in the Valetta case

The key terms of the funding agreement in the Valetta case were as follows:

1. Harbour will invest an amount equal to the Plaintiffs' legal costs;
2. Harbour will pay any adverse costs order made against the Plaintiffs;
3. The Plaintiffs will consult with and keep Harbour informed of every step in the proceedings but the Plaintiffs will retain sole conduct of the litigation;
4. The Plaintiffs will conduct the litigation reasonably and commercially and in accordance with the procedural rules and the reasonable advice of its legal advisers;
5. From any proceeds recovered in the proceedings, Harbour will be paid:
 - a. an amount equal to the costs it has funded; and
 - b. thereafter, a portion of the recoveries calculated commencing with the greater of 25% of the proceeds or twice the Plaintiffs' actual legal costs, and increasing according to the length of time that the proceedings have taken, reaching a maximum of 50% or three times the legal costs of the Plaintiffs, whichever is the greater;
6. Harbour has the right to terminate the agreement for fault; and
7. Harbour has the right to terminate the agreement at its discretion if there has been a material adverse decline in the prospects of success.

There also existed detailed provisions as to the consequences of termination, however Harbour would meet its obligations to fund the Plaintiffs' legal costs to the date of termination and would be liable for any adverse costs for the period up to the date of termination.

3. Unreported Judgement [2011] JRC 227.

Maintenance and champerty in England

The law of maintenance and champerty has ancient origins. Although traditionally identified as a common law offence, several early statutes are understood as affirming or declaring that common law, aimed at the practice of assigning doubtful cases to wealthy and influential persons who could secure a favourable decision from the court. That concern has long since disappeared. Lord Mustill summarized the history of maintenance and champerty at the start of his speech to the House of Lords in *Giles v Thompson*⁴:

My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, recourse was often required. As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation. In the most recent decades of the present century maintenance and champerty have become almost invisible

in both their criminal and their tortious manifestations.

The medieval understanding of champerty was that it condemned all assignments of choses in action as leading to maintenance.⁵ In England, the Criminal Law Act 1967 abolished the crimes of tort and maintenance, but expressly preserved:

any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Therefore the common law restrictions on maintenance and champerty remain as a rule of public policy.

[A] person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse.⁶

Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds.⁷

It has recently been said that the traditional classification of champerty as a sub species of maintenance is no longer appropriate. In *Morris v Southwark London Borough Council* (Law Society intervening); *Sibthorpe v Southwark London Borough Council* (Law Society intervening)⁸ Lord Neuberger observed that a solicitor acting on a contingency fee arrangement could not be said to be maintaining litigation without justification or excuse, but nevertheless the conditional fee agreement might still be contrary to public policy and champertous:

Thus, it appears to me that the law has developed, perhaps unconsciously, so that, at least when it

4. [1994] 1 AC 142.

5. See Gleeson CJ's review of the development of maintenance and champerty in *Campbells Cash and Carry Pty Ltd v Fostiff Pty Ltd* [2006] HCA 41.

6. Lord Phillips of Worth Matravers MR in *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2002] EWCA Civ 932 at [32].

7. Steyn LJ in the Court of Appeal in *Giles v Thompson* [1993] 3 All ER 321.

8. [2011] EWCA Civ 25.

comes to agreements with those who conduct litigation (and, presumably, with those who provide advocacy services), there can be champerty without maintenance. This is consistent with the fact that, in recent times, the reach of the law of maintenance has been decreasing, while the common law has adhered to the principle that those who conduct litigation (and provide advocacy services) should not benefit financially from their clients' success in the litigation.

The public interest which is protected by maintenance and champerty is the integrity of the litigation process, due to the concern that:

the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses⁹.

The modern approach where there is an allegation of champerty in relation to an agreement to which a person conducting the litigation, or providing advocacy services, is not a party, is to look at the agreement:

in the round, and decide whether it would undermine the purity of justice, or would corrupt public justice, a question to be decided on a case by case basis¹⁰.

Maintenance and Champerty in Jersey

Under Jersey customary law, one finds the Norman law concept of 'Champart' which is related to, but to be distinguished from, the English law concept of Champerty. The word Champerty is derived from the Norman word 'Champart', used in the limited context of an obligation to surrender part of the produce of a field to a third party.

In Blackstone's Commentaries on the Laws of England, after a description of Maintenance as an

offence he says the below of Champerty¹¹, drawing a distinction between the English law term and the more limited French law meaning from which it appears to have been derived:

... a species of maintenance, and punishment in the same manner: being a bargain which a plaintiff or defendant campum partire, to divide the land or other matter sued for between them, if they prevail at law; where upon the champertor is to carry on the party's suit at his own expense. Thus champart, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right.

While the word Champart was known to customary law, it had a specific and limited meaning, namely a share of the produce of a parcel of land. Nevertheless, there was undoubtedly under Jersey customary law a similar concept to maintenance and champerty as it was understood in England and a similar concept that contracts contrary to public policy are unenforceable.

It appears from an extract from Le Geyt's Manuscripts *sur la Constitution*, which was written in the late 16th/early 17th century and published in 1846, that, as in England, champertous agreements were regarded as unlawful as a matter of public policy in Jersey to prevent wealthy and powerful people from taking advantage of their position. Le Geyt makes reference to early Roman policy and its affect on French jurisprudence. However, he also refers to an Ordinance of the English Star Chamber in 1635 which he says is applicable to Jersey 'for avoiding maintenance and champarty, it is thought

9. Lord Denning in *Re Trepca Mines (No. 2)* [1963] Ch 199.

10. *Morris v Southwark London Borough Council* (Law Society intervening); *Sibthorpe v Southwark London Borough Council* (Law Society intervening) [2011] 2 All E.R. Lord Neuberger.

11. (1st edn, 1769, Book IV, ch10 at 134).

fit that no man should buy or contract for any debt or other thing in action.’

The 1635 Ordinance is considered in Chapter 3 of Matthews and Nicolle’s Jersey Law of Real Property where it is recorded in these marginally different terms:

for avoiding of maintenance and Champ(er)tie, it is thought that no man should buy or contract for any debt or other thing in action.

This evolved into a provision of the Jersey Code of 1771: ‘Personne ne pourra contracter pour les chose ou matières en litige.’

Matthews and Nicolle conclude that under Jersey law, the prohibition on the assignment of causes of action only arises once litigation has commenced and that it is lawful to transfer a debt or other claim ‘at any moment up to the institution of legal proceedings’.

So far as a more general prohibition on contracts contrary to public policy is concerned, Pothier states that:

Lorsque la cause pour laquelle l’engagement a été contracté, est une cause qui blesse la justice, la bonne foi ou les bonnes mœurs, cet engagement est nul, ainsi que Le contract qui Le renferme¹².

This principle was taken up by the authors of the Code Civil at Article 1133, which borrows heavily from Pothier:

La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes mœurs ou à l’ordre public.

This Article has been present in the Code since 1804 and remains in the 2009 edition.

Prior to the Valetta case, it would appear that the Royal Court in Jersey had not been asked to rule on the validity of a litigation funding agreement, or indeed any other potentially champertous agreement. Article 2(1) of the Civil Proceedings (Jersey) Law 1956 allows the Court a discretion to make an order for costs against a non-party to the proceedings, and in this context, the Jersey Courts have considered litigation funding agreements. However, the Court was not in these cases directly concerned with the enforceability of funding agreements although it is interesting to note that Jersey continues to accept and apply English principles as to when a litigation funder is to be made liable for the costs of unsuccessful litigation.

In the Valetta case, the Plaintiffs contended that it would be consistent with these cases for the Court to approach the validity of the underlying third party funding agreements in the same way.

In the case of *Planning and Environmental Minister v Yates, Yates & Reg’s Skips Limited*¹³, the Court of Appeal was asked to consider a costs order against the Appellant in relation to earlier proceedings to which the Appellant had not been a party. The Court applied *Aiden Shipping Co. Limited v Interbulk Limited*¹⁴ and a decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Limited v Todd*¹⁵. At paragraph 77 of the Judgment, the Court stated that this jurisdiction should continue to accept the views expressed in those cases.

In a case heard in the same year, *SGI v Wijismuller*¹⁶, the Court followed English principles in declining to make a costs award against a non-party liquidator personally. The Court considered whether leave to discontinue should be given on terms which prohibited the Plaintiff from assigning its cause of action. The Defendant sought to prohibit ‘any unfair and potentially champertous other claims run from behind the scenes with the protection of a

12. *Traité des Obligations* at Part 1, Ch 1, 1st s, art 3, §VI (para 43).

13. [2008] JCA 203.

14. [1986] 2 All E.R. 409.

15. [2005] 4 All E.R. 195.

16. [2008] JRC078, JRC079, JLR Note 22.

limited liability vehicle'. The Judge declined to make the order sought, stating that the Court could deal with such a claim by (a) awarding security for costs against a Jersey resident;¹⁷ and/or (b) following English principles, by making a third party costs order against the 'real' interested party.

In principle, the competing considerations of promoting access to justice and avoiding corruption of the litigation process are much the same in England and Jersey. It is unlikely that Jersey public policy will differ materially from English public policy on these issues at this point in time. Accordingly, it was argued that the approach taken by the Royal Court to the question of whether a funding agreement is potentially champertous should be the same as that taken in England.

Decision

In reaching its decision that public policy considerations strongly pointed towards the agreement in question being held as valid and enforceable, the Royal Court stated that there is no material difference between the law of Jersey and the law of England in this area. English law has firmly moved away from the historical position that such agreements would fall foul of rules on champerty and maintenance. The desirability of promoting access to justice dictates that it is better, in principle, for a party to have access to funding and to forfeit a percentage of their damages than forego the chance of litigation altogether. However, the Royal Court made it clear, also following English law, that the question of whether a particular agreement is valid and enforceable, as opposed to an abuse of process and contrary to public policy will be dependent upon the circumstances of each case and the terms of each agreement.

The Court had regard to the fact that, whilst the funding agreement provided Harbour with a share of the proceeds, it was drafted to ensure compliance

with certain principles governing the validity of such agreements in England and other jurisdictions which, at their core, are all about preserving the purity of justice. It was an important feature of the funding agreement in question that control of the proceedings remains with the plaintiffs, who will still retain a substantial proportion of the damages if successful. The defendants, for their part, are protected in respect of their costs, if the claim fails. For these reasons, the Court approved the funding agreement and authorized the trustee to become party to it.

It was an important feature of the funding agreement in question that control of the proceedings remains with the plaintiffs, who will still retain a substantial proportion of the damages if successful

In concluding its judgement, the Royal Court emphasized that it is only applicable to litigation funding agreements and that conditional fee arrangements remain outside the Jersey statute book and are prohibited in Jersey.

The importance of this decision to litigation funders and those contemplating litigation in Jersey is that it is now officially recognized that a funding agreement is in the interests of justice and is to be encouraged, provided that it is properly structured. This decision may well have a profound effect on the Jersey litigation market in that litigation funding may facilitate access to justice by plaintiffs who would not otherwise be able to afford to bring the litigation in question, as well as for those who wish to share the costs of litigation with a funder.

The importance of this decision to litigation funders and those contemplating litigation in Jersey is that it is now officially recognized that a funding agreement is in the interests of justice

17. As per *Café De Lecq Limited v R A Rossborough (Insurance Brokers) Limited* [2011] JRC 011.

and is to be encouraged, provided that it is properly structured

Finally, it remains to be seen whether there are a sufficient number of funded cases in Jersey for the Code of Conduct for funders which applies in

England and Wales to be extended to disputes which are litigated in Jersey. Litigation funding is not an option for every potential litigant. However, it may well be an option worth considering for more significant claims where the prospects of success and recovery appear high.