Jersey opens its doors to litigation funding

by Lisa Springate and Robert Gardner, Bedell Cristin

Introduction

1. In the United Kingdom and elsewhere, litigation funding is mainstream and has developed significantly over the past few years. Litigation funding involves an agreement between a litigant and a professional funder rather than between a litigant and a lawyer. In broad terms, the funder will pay the ongoing legal costs of taking a case to trial which usually includes coverage for any adverse costs liability. This liability is typically covered by the funder purchasing ATE ("after the event") insurance in the litigant's name.

2. The funder will take an active interest in the case but cannot meddle in the litigation by getting involved in decision making. In return, the litigant will agree to share a percentage of the proceeds with the funder if the action succeeds and nothing, if it fails. Whether litigation funding agreements are valid and enforceable, as opposed to an abuse of process, is dependent on the circumstances in each case. However, as a concept and if properly structured, they are regarded as being in the interests of justice and to be encouraged for more significant (typically commercial) claims where the prospects of success and recovery look good. Indeed, in England and Wales there is both a Code of Conduct for Litigation Funders (published in November 2011) and a newly formed Association of Litigation Funders.

3. Whilst it has long been recognised by 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 notwithstanding some of the significant cases which have come before the Royal Court in Jersey to-date. This is because until the recent landmark decision of the Royal Court "In the Matter of the Valetta Trust"[1], the legality and enforceability of funding agreements in Jersey remained untested, unlike in the United Kingdom and elsewhere.

4. The Plaintiffs in the case were represented by Advocate Springate of Bedell Cristin who persuaded the Royal Court that public policy strongly pointed towards the agreement in question being regarded as valid and enforceable.

[1] Unreported Judgement [2011] JRC 227

In the Matter of the Valetta Trust

5. The case involves litigation 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 other trust was for the benefit of the family of one of the co-investors involved in developing the product. The sale proceeds received by the Trust were subsequently distributed to the beneficiaries since when the Trust fell dormant.

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

7. When considering their litigation options, the Plaintiffs turned to litigation funding and entered into an Agreement (the "Funding Agreement") with an entity known as Harbour Litigation Investment Fund LP ("Harbour") based in England. Under the Funding Agreement, Harbour will fund the litigation in return for a share of the proceeds if the Plaintiffs are successful. The Defendants are protected in respect of their costs if the Plaintiffs are unsuccessful.

Whether funding agreements are permissible under Jersey Law

8. At the outset, the Royal Court requested that it be addressed by Counsel on whether such an agreement is permissible and enforceable under Jersey law particularly since the Court was being asked to authorise the replacement trustee to enter into the Funding Agreement and since this was the first time that the enforceability of funding agreements under Jersey law had been considered by the Royal Court. This article sets out the submissions which were advanced on behalf of the Plaintiffs which entailed a detailed review of the authorities concerning maintenance and champerty to be found in a number of jurisdictions.

Maintenance and Champerty in England

> '[A] person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse'.
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> Per 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]*
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> "Champerty is an aggravated form of maintenance[2]. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds".
>
> per Steyn LJ in the Court of Appeal in *Giles v Thompson [1993] 3 All ER 321*

9. 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. The mischief at which it was aimed was the practice of assigning doubtful cases to wealthy and influential persons who could secure a favourable decision from the court. That mischief has long since disappeared. Lord Mustill summarised the history of maintenance and champerty at the start of his speech to the House of Lords in *Giles v Thompson [1994] 1 AC 142:*

> "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

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[2] 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) [2011] EWCA Civ 25* 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 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.'

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."

10. The medieval understanding of champerty was that it condemned all assignments of choses in action as leading to maintenance[3].

11. 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".

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

12. Public policy changes over time which explains why such agreements (which would have been struck down as champertous at some point in the past) are now acceptable.

'because the question of whether maintenance and champerty can be justified is one of public policy, the law must be kept under review as public policy changes.'

Per Lord Philips in *Factortame*

"the law of maintenance depends on the question of public policy, and public policy ... is not a fixed and immutable matter. It is a conception which, if it has any sense at all, must be alterable by the passage of time."

Danckwerts LJ in *Hill v Archbold [1968] 1 QB 686 at 697.*

[3] 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*

13. The public interest which is protected by maintenance and champerty is the integrity of the litigation process.

> "The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses"
> Per Lord Denning in *Re Trepca Mines (No. 2) [1963] Ch 199.*

14. 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 basis"
>
> see *Morris v Southwark London Borough Council (Law Society intervening); Sibthorpe v Southwark London Borough Council (Law Society intervening) [2011] 2 All E.R.* per Lord Neuberger.

Maintenance and Champerty in Jersey

15. There is under Jersey customary law, the Norman law concept of 'Champart' which is related to, but to be distinguished from, the English law concept of Champerty.

16. The word Champerty is derived from the Norman word 'Champart'. The 2002 edition of the Shorter Oxford English Dictionary gives the origin of the word as:

> "[Anglo-Norman *champartie*, from Old & mod. French *champart* the feudal lord's share of the produce, from Latin *campus* (see CAMP noun) *pars* PART noun.]"

17. The Norman word was used in the limited context of an obligation to surrender part of the produce of a field to a third party. Hoüard, in his *Dictionnaire de Droit Normant* of 1780 says this of the word Champart:

> "Ce droit ... consiste en une part des productions d'un fonds, *campipars*; il étoit défendu par les anciennes loix de cette Province de prendre une terre à prolonger les Procès mus à l'occasion de cette terre ...".

18. There does not appear to be any reference to Champart in Terrien.

19. In Blackstone's *Commentaries on the Laws of England*, after a description of Maintenance as an offence he says this of Champerty (1st Edtn, 1769, Book IV, ch.10 at p134):

> "... 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."

20. Thus, Blackstone drew a distinction between the English law term and the more limited French law meaning from which it appears to have been derived.

21. The complete works of Pothier include his *Traité des Champarts* at Part 20, Article Préliminare, articles I-II published in 1821 (i.e. post dating the Code Civil) where he commences:

> "Le champart est une redevance foncière qui consiste dans une certaine quotité des fruits qui se recueillent sur l'héritage qui en est chargé".

22. In summary, 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.

23. 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.

24. It appears from an extract from Le Geyt's *Manuscrits sur la Constitution*, which was written in the late sixteenth/early seventeenth 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 fit that no man should buy or contract for any debt or other thinge in action."

(As mentioned in paragraph 10 above, the simplistic approach in that era was that champerty prohibited the assignment of *any* chose in action).

25. 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".

26. This evolved into a provision of the Jersey Code of 1771:

"Personne ne poura contracter pour les chose ou matières en litige."

27. 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".

28. So far as a more general prohibition on contracts contrary to public policy is concerned, Pothier states in his *Traité des Obligations* at Part 1, Chapter 1, 1st section, article 3, §VI (para 43) 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 renferme."

29. 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.

30. 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.

31. 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.

32. 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.

    (a) In the case of *Planning and Environmental Minister v. Yates, Yates & Reg's Skips Limited [2008] JCA 203*, 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 [1986] 2 All E.R. 409* and a decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Limited v. Todd [2005] 4 All E.R. 195*. At paragraph 77 of the Judgment, the Court stated that this jurisdiction should continue to accept the views expressed in those cases.

    (b) In a case heard in the same year, *SGI v. Wijsmuller [2008] JRC078, JRC079, JLR Note 22*, 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 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; *(Café De Lecq Limited v R A Rossborough (Insurance Brokers) Limited [2011] JRC 011)* and/or (b) following English principles, by making a third party costs order against the 'real' interested party.

33. 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.

Litigation funding agreements in England – public policy

34. In this article, "litigation funding" and "third party funding" refers to the provision of financial support for litigation by a commercial funder with no other connection with the litigation where the funder receives a share of the sums received if the action succeeds and nothing if it fails.

35. In its 2007 Report to the Lord Chancellor recommending regulated litigation funding as a means of improving access to justice, the Civil Justice Council[4] described the forms of litigation funding as follows:

> "122. Third party funding is the provision of funds by individuals or companies who have no other connection with the litigation. A funder may provide the full legal costs of the proceedings, part fund, or fund only disbursements outlayed. Protection for adverse costs is often (but not exclusively) provided, and in some circumstances the funder may provide no direct funding at all, but agree to cover a party's potential exposure to adverse costs. In return, the funder would expect to make a financial profit for their outlay and attendant risk to investment.
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> 123. The third party funder may calculate profit in a number of ways. It may be assessed by a percentage contingency fee, perhaps in addition to any costs recovered from the other party. Other third party funding agreements may stipulate a return based on a multiplier of the investment provided (e.g. if the funder puts in £x he may require £x multiplied by y as a return on his investment)".

36. There is no statutory authorisation for litigation funding in England and Wales. Section 28 of the Access to Justice Act 1999 introduced a new section 58B in the Courts and Legal Services Act 1990 which is intended to pave the way for new authorised funders along the lines of a Contingency Legal Aid Fund whereby success fees recovered will be used to fund fees in unsuccessful actions; see Cook on Costs at paragraph 41.21 for further details. In the Valetta case, it was contended that this is not litigation funding as described above or as the Royal Court was concerned with on this application, and that in any event, section 58B has not been brought into force and there is no indication whether or when it will be.

37. It was further contended that the validity of litigation funding agreements falls to be tested under the common law principles of maintenance and champerty. Traditionally, litigation funding would have

[4] The Civil Justice Council is an Advisory Public Body established under the Civil Procedure Act 1997 and funded by the Ministry of Justice with responsibility for overseeing and co-ordinating the modernisation of the English civil justice system.

been classified as champertous. In recent years, however, there has been what has been described as "a sea change"[5] in the approach of the English courts.

> "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"
>
> Chapter 15, para 1.1 of Lord Justice Jackson's Preliminary Report on the "Review of Civil Litigation Costs".

38. In his Final Report in December 2009, Lord Justice Jackson concluded that, in principle, litigation 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 foregoes 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."

[5] Chapter 15, para 1.1 of Lord Justice Jackson's Preliminary Report on the "Review of Civil Litigation Costs"

Litigation funding agreements in England – case law

39. 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 law. For a review of the cases see (a) Cook on Costs paragraphs 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.

40. 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 [2008] EWHC 526 TCC at 103* 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:
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> 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.*".

41. The decision in *Morris v Southwark* is an important gloss to the summary by Coulson J. It is clear that there is 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. This was made clear by Lord Neuberger:-

> "[35] ...Relying on statements and principles laid down in the *Factortame* case *[2002] 4 All ER 97, [2003] QB 381*, applying *Giles v Thompson [1993] 3 All ER 321, [1994] 1 AC 142*, it is said

on behalf of Ms Morris that there is no longer a strict principle such as Lord Esher laid down in *Pittman v Prudential Deposit Bank Ltd (1896) 13 TLR 110* and the Court of Appeal affirmed in *Wallersteiner v Moir (No 2) [1975] 1 All ER 849, [1975] QB 373*; it is further said that the correct approach is now to look at the CFA 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 basis.

[36] There is, at least at first sight, much to be said for this argument. Indeed, I consider that it represents 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. That seems to me to be the effect of the views expressed by Steyn LJ and Lord Mustill in *Giles v Thompson [1993] 3 All ER 321, [1994] 1 AC 142* respectively, and by what was said by Lord Phillips in the *Factortame* case. Indeed, I think that such an approach was foreshadowed by Oliver LJ in *Trendtex Trading Corpn v Credit Suisse [1980] 3 All ER 721, [1980] QB 629* and by Danckwerts LJ in *Hill v Archbold [1967] 3 All ER 110, [1968] 1 QB 686.*

[37] However, with the sole exception of *Thai Trading Co (a firm) v Taylor [1998] 3 All ER 65, [1998] QB 781*, there seems to be no support for the application of such an approach where the allegedly champertous agreement is entered into with a person who is conducting the litigation in question (or providing advocacy services in connection therewith). Such agreements have, as I see it, always been treated as a special category or species of champertous agreements, and are subject to stricter rules. That is clear from what Oliver LJ said in *Trendtex Trading Corpn v Credit Suisse [1980] 3 All ER 721 at 747, [1980] QB 629 at 663*, and from what Steyn LJ and Lord Mustill said in *Giles v Thompson [1993] 3 All ER 321 at 332, and [1993] 3 All ER 321 at 360, [1994] 1 AC 142 at 163* respectively. It was also the effect of the reasoning of Schiemann and May LJJ in *Awwad v Geraghty & Co (a firm) [2000] 1 All ER 608 at 628 and 634–635, [2001] QB 570* at *593* and *600*, respectively.

[38] Despite Mr James's submission to the contrary, I believe that this view also accords with that of this court in the *Factortame* case: see per Lord Phillips MR at [23] and [33]–[35]. Further, Lord Phillips's citation of Buckley LJ's observations in *Wallersteiner v Moir (No 2) [1975] 1 All ER 849 at 866, [1975] QB 373 at 401*, and his reference to *Awwad v Geraghty & Co (a firm) [2000] 1 All ER 608, [2001] QB 570, at [60] and [61]* respectively, undermine the notion that he was intending to depart from the principles in those cases. Indeed, one would have expected a very full discussion and analysis of the law if he was intending to differ from a decision of the Court of Appeal less than two years earlier. Further, the only reason that Lord Phillips considered whether Grant Thornton had been conducting the litigation was because the approach in *Giles v Thompson* would have been inappropriate if they had been doing so.

[39] I accept that *Thai Trading Co (a firm) v Taylor [1998] 3 All ER 65, [1998] QB 781* gives some real support to the notion that it is now appropriate to consider a fresh approach to the law of champerty, even in relation to arrangements with those who conduct litigation. However, although the trenchant judgment of Millett LJ is powerful and deserves respect, it was clearly per incuriam, and, in relation to the point I am currently considering, as mentioned at [24], above, inconsistent with the subsequent decisions of this court in *Awwad v Geraghty & Co (a firm)* and the *Factortame* case.

[40] In my judgment, when it comes to agreements involving those who conduct litigation or provide advocacy services, the common law of champerty remains substantially as it was described and discussed in *Wallersteiner v Moir (No 2)* and *Awwad v Geraghty & Co (a firm).* This is for two main reasons. The first is to be found in the passages in the judgments of Buckley LJ in the former case ([1975] 1 All ER 849 at 866, [1975] QB 373 at 401), and of Oliver LJ in *Trendtex Trading Corpn v Credit Suisse [1980] 3 All ER 721 at 747, [1980] QB 629 at 663*. The second reason, articulated in *Awwad v Geraghty & Co (a firm) [2000] 1 All ER 608 at 628, 634–635, [2001] QB 570 at 593, 600,* by Schiemann and May LJJ, is that, in s 58 of the 1990 Act (as amended) the legislature has laid down the rules as to which previously champertous agreements may be entered into by those conducting litigation and those providing advocacy services, and which may not.

[41] There is a third reason, at least in my judgment, for this conclusion. As already indicated, there is obvious attraction in the notion that there should be no general rule as to whether an agreement with a person conducting the relevant litigation which involves him benefiting from the success of the litigation, is unlawful, and that each case should be assessed on its merits. However, there is also much to be said for clear rules so that all parties, solicitor and claimant client as well as the defendant, know where they stand rather than waiting for a determination as to the validity of a potentially champertous agreement on the overall merits. There is also much to be said for a properly funded legal profession, which has no need to have recourse to conditional fees or contingency fees or the like. It is a matter for the legislature if such arrangements are thought to be necessary for economic or other reasons, and, if they are so necessary, then it is for the legislature to decide on their ambit."(emphasis added)

42. In summary, as a matter of English law, therefore, the judge deciding whether a litigation funding agreement is champertous should consider it *"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 basis".*

The approach in Australia

43. In Australia, litigation funding has been a feature of civil litigation for over a decade. During that period, the courts in Australia have tested litigation funding against the key issues of access to justice, consumer protection, and the relationship between the funder, the lawyer and the consumer. The Australian courts have demonstrated in their decisions and in obiter commentary that public policy is changing, and that it is no longer taboo for a party who provides funding for a case, to have a legitimate commercial interest in the outcome[6].

44. The landmark decision of the High Court of Australia is *Campbells Carry Pty Ltd v Fostiff Pty Ltd [2006] HCA 41* which has since been followed and applied. In that case, a litigation funder sought to encourage tobacco retailers to claim a refund of tobacco licence fees from wholesalers by persuading them to join in litigation controlled by the funder, and the funder instituted proceedings purportedly brought as a representative action. One of the issues raised by the appellants was whether, assuming that the proceedings had been properly constituted as a representative action, they were nevertheless contrary to public policy and an abuse of process because they were champertous and constituted maintenance. Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ found that the proceedings did not constitute an abuse of process by reason of the involvement of the litigation funder, and they were not contrary to public policy. Callinan and Heydon JJ dissented on that issue.

45. The minority disapproved of a case being run by a "shadowy" litigation funder:-

> "In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control". (para 266)

46. The majority judgment, however, decided that:

(a) The justification for litigation funding is that it offers access to justice to those who could not otherwise afford to vindicate their legal rights;

(b) The fact that a litigation funder has sought out proceedings in which to invest for profit is not objectionable as a matter of public policy;

(c) The terms upon which litigation is funded may be so onerous and unreasonable as between the litigant and the funder as to be unenforceable between them, but that is no

[6] This paragraph is a summary of paragraphs 125 and 126 of the Civil Justice Council's June 2007 report "Improved Access to Justice – Funding Options & Proportionate Costs".

concern of other parties to litigation and does not of itself make the prosecution of the proceeding by the funder an abuse of process;

(d) If the funder, driven by the profit motive, attempts to interfere with or manipulate due process in the litigation, or if the funder's lawyers commit breaches of professional duties, the court has sufficient power to deal with those matters without staying the litigation.

The terms of the Funding Agreement in the Valetta case

47. The key terms of the Funding Agreement in the Valetta case are as follows:

(a) Harbour will invest an amount equal to the Plaintiffs' legal costs;

(b) Harbour will pay any adverse costs order made against the Plaintiffs;

(c) 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;

(d) The Plaintiffs will conduct the litigation reasonably and commercially and in accordance with the procedural rules and the reasonable advice of its legal advisers;

(e) From any proceeds recovered in the proceedings, Harbour will be paid:

(i) An amount equal to the costs it has funded;

(ii) 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.

(f) Harbour has the right to terminate the agreement for fault;

(g) Harbour has the right to terminate the agreement at its discretion if there has been a material adverse decline in the prospects of success;

(h) There are detailed provisions as to the consequences of termination, but Harbour will meet its obligations to fund the Plaintiffs' legal costs to the date of termination and will be liable for any adverse costs for the period up to the date of termination.

Whether the Funding Agreement is champertous under Jersey law?

48. It was contended by the Plaintiffs that the reasons identified by Lord Justice Jackson as making litigation funding desirable (see paragraph 38 above) applied to the Funding Agreement in the present case. In particular, the fact that without this agreement, the proposed Plaintiffs would not be able to bring the proceedings and that it is better for them to have the prospect of some recovery rather than no recovery at all.

49. In addition, it was contended that there is nothing in the Funding Agreement which would "undermine the purity of justice, or would corrupt public justice" for the following reasons:-

(a) The Plaintiffs retain full control of the litigation and whether to settle. Harbour is not entitled to interfere in the litigation and has no say as to whether the case is settled or what it is settled for. The concern expressed by the minority in the Australian decision of *Fostiff* of a "shadowy" litigation funder controlling the litigation in the background, out of the direct supervision of the court, did not arise in the present case.

(b) It has been said that the greater the share of the spoils, the greater the temptation to stray from the path of rectitude. Here, the share of the spoils could be as large as 50% or three times the Plaintiffs' costs whichever is the greater. However, as Harbour is a pure litigation funder with no other role in the proposed litigation, the opportunity for Harbour to improperly influence the outcome of the litigation is non-existent. The common law fear of the temptation "to inflame the damages, to suppress evidence, or even to suborn witnesses" as explained by Lord Denning in *Re Trepca* does not arise.

(c) Harbour has agreed to pay any adverse costs order which is a benefit to the opposing party. In *Arkin v Borchard Lines Ltd [2005] EWCA Civ 655*, the Court of Appeal decided that in principle, litigation funders should be liable for adverse costs orders but that their liability should be capped at the value of the costs they had funded. Lord Justice Jackson came to the view in his Final Report that this cap was unjust and should be removed; (Chapter 11 paragraphs 4.1 to 4.7.) The Funding Agreement is "Jackson compliant". The

exposure of Harbour to adverse costs is also relevant to the share of the spoils which it requires as a return on its investment.

50. In the premises, it was contended by the Plaintiffs that litigation funding of the proceedings by Harbour on the terms of the Funding Agreement would encourage access to justice and is not a threat to the integrity of the Jersey litigation process and it is not therefore champertous.

The decision of the Royal Court in the Valetta case

51. In reaching its decision that public policy considerations strongly pointed towards the Funding 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. Furthermore, that 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 to forego the chance of litigation altogether.

52. 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 dependant upon the circumstances of each case and the terms of each agreement.

53. In the present case, the Royal Court had regard to the fact that, whilst the Funding Agreement provides Harbour with a share of the proceeds, it is 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 is 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 authorised the trustee to become party to it.

54. The Royal Court emphasised that its judgment is only applicable to third party funding agreements. It noted that whilst there has been a minor relaxation in England as a result of a statute which permits conditional fee arrangements, the requirement of public policy that officers of the court should be inhibited from putting themselves in a position where their own interests could conflict with their duties to the court remains otherwise in force, that is to say conditional fee agreements

between client and lawyer remain prohibited in this jurisdiction. In Jersey, no statutory relaxation of this principle has been introduced and in the Royal Court's judgment, it remains in full vigour.

55. The importance of this decision to litigation funders and those contemplating litigation in Jersey is that it is now officially recognised 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 such agreements may facilitate access to justice by those 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.

56. 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.

The authors act on behalf of the Plaintiffs in the Valetta case.