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# Valid case

LISA SPRINGATE AND ROBERT GARDNER DISCUSS THE LANDMARK DECISION REACHED ON THE VALIDITY OF LITIGATION FUNDING IN JERSEY

**Trust disputes, like any litigation, can be expensive, complex and uncertain. While trustees may own significant assets, such assets may be illiquid, hard to realise or trading at a loss – particularly in the current market. Cash-rich trustees, for their part, may (rightly or wrongly) lack the appetite to embark on complex litigation, however good the case, especially when they know the litigation is likely to be heavily defended by one or more well-funded opponents, some of whom may be insured. As for impecunious plaintiffs, it may be particularly galling, for example, for a beneficiary to be unable to fund a claim to recover a loss from a trustee who has acted in breach of trust as a result, in whole or in part, of the very breaches that form the subject matter of the claim.**

In many matters, whoever the plaintiff and whatever the circumstances, the

risk of adverse costs may be too much of a potential burden to bear. 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 your own disposal. Third-party funding involves an agreement, not between a litigant and a lawyer, but between a litigant and a professional

funder. It involves sharing (or entirely passing on) the burden of legal fees, as well as the risk of paying an opponent's costs if the claim is lost, with a third party, in return for forgoing a slice of the proceeds if the claim is won.

While the case is progressing, the funder will not meddle in the litigation by getting involved in decision-making, although it will no doubt take an active interest in the case. Funding agreements can take various forms depending on both the circumstances of the case and the identity of the funder concerned.

In the UK (and indeed elsewhere), litigation funding is mainstream. It has developed significantly in the past ten years or so and is a sophisticated business. If properly structured, funding agreements have long been regarded as a beneficial concept in the interests of justice. But no one knew whether litigation funding agreements were enforceable in Jersey until recently. It is perhaps surprising, given the number of substantial commercial disputes litigated in the Courts of Jersey, particularly valuable trust disputes, that funders have not tested the Jersey market before now.

Surprising or not, the recent removal of the uncertainty

**'REMOVING LITIGATION FUNDING UNCERTAINTY IN JERSEY HAS CONSEQUENCES FOR ACCESS TO JUSTICE'**



in Jersey has consequences, not just for access to justice, but also for opening up a range of options for potential plaintiffs in trust and other litigation generally.

### JUDGMENT DAY

On 25 November 2011, a landmark judgment was handed down in *In the Matter of the Valetta Trust*, in which the Royal Court concluded that public policy

### 'THE JUDGMENT ONLY APPLIED TO THIRD-PARTY FUNDING AGREEMENTS, NOT CONDITIONAL FEE ARRANGEMENTS'

strongly pointed towards the third-party funding agreement in question being regarded as valid and enforceable. The case involves litigation commenced in 2011 by beneficiaries of a trust and its replacement trustee, against the former Jersey trustee, together with two individuals. The only material asset of the trust was a minority shareholding in an underlying company, which in turn owned certain rights to a product. 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 plaintiffs contend that the sale of the shares was done at a gross undervalue, although the former trustee and other defendants strongly deny the allegations.

When considering their litigation options, the prospective plaintiffs turned to litigation funding. They entered into a funding agreement with third-party funder Harbour Litigation Investment Fund LP (Harbour). Under the agreement, Harbour would fund the litigation in return for a share of the proceeds if the plaintiffs were successful. The defendants, for their part, were protected, in respect of their costs if the plaintiffs were unsuccessful, by virtue of an after-the-event insurance policy.

The Royal Court requested detailed submissions on whether such an agreement

is permissible and enforceable under Jersey law, particularly as the Court was being asked to authorise the replacement trustee to enter the agreement and because this was the first time the enforceability of funding agreements had been considered in Jersey litigation. The Court framed its consideration of the funding agreement in terms of whether there was a reasonable prospect of the agreement being lawful.

In reaching its decision that public policy considerations strongly pointed towards the agreement in question being held 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 its damages than to forgo the chance of litigation altogether.

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, depends on the circumstances of each case and the terms of each agreement. A close analysis of the particular terms of any funding agreement is required to see whether it falls on the right side from a public policy viewpoint.

The Court noted that, while 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 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. Furthermore, the agreement facilitates access to justice by the particular plaintiffs

in question, who would not otherwise be able to afford to bring the litigation. For these reasons, the Court approved of the funding agreement and authorised the trustee to become party to it.

The Royal Court did emphasise that its judgment only applied to third-party funding agreements. Conditional fee arrangements, which allow solicitors to charge no fee if a claim fails, but to apply an uplift if a claim succeeds, have been valid as a result of statute in England since 1995. However, such agreements remain outside the Jersey statute book and are prohibited in Jersey. The Court took the opportunity to state that Jersey public policy prevents officers of the Court allowing their own interests to conflict with their duties to the Court.

### PROFOUND EFFECT

This decision could have a profound effect in the Jersey litigation market. Trustees, for their part, ought to familiarise themselves with the existence of funding as an option and may well need to investigate the array of different funding models the market now offers. Funding may be something trustees should seriously consider deploying as a plaintiff (or counter-claimant) in proposed litigation. On the other hand, litigation funding may be a weapon (as in *In the Matter of the Valetta Trust*) that trustees find is used to fund claims against them by disgruntled beneficiaries or replacement trustees investigating prior conduct.

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 that are litigated in Jersey.

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