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In the matter of The Valetta Trust: Jersey responds positively to Third Party Litigation Funding

While not entirely new to some common law jurisdictions Third Party Litigation Funding ("TPLF") has recently been placed in the spotlight in Jersey by the decision of the Royal Court In the Matter of the Valetta Trust.

TPLF is a mechanism by which a professional funder or investor otherwise unconnected with a legal action will finance all or part of the client's legal costs as the case progresses. In exchange for providing the funding, the investor will typically take an agreed share of the recovery or settlement proceeds in the event of success ("success fee"). If the case fails, the funder typically loses its investment and is not entitled to receive any payment. The level of the success fee can vary significantly, but it will generally be an agreed percentage of the recovered monies, an agreed multiple of the invested sums or a combination of both.

In November 2011, the Royal Court in Jersey had to consider whether a TPLF agreement was permissible under Jersey Law or whether it would be unenforceable on the grounds of champerty. The rule against champerty provides that a person with no legitimate interest in a case should not provide support for a pointless case in exchange for a share of the proceeds of the case. The rule was devised as a way of protecting against dubious or fraudulent claims being sold to noblemen and other people of power and influence who could expect a favourable hearing in the courts.

The Valetta Trust ("Trust") was a conventional discretionary trust, which was established in 2000. The beneficiaries included the Representors, who were father and daughter. The new trustee was a co-plaintiff. The beneficiaries had alleged that the former trustee had sold the sole asset of the Trust at an undervalue and wished to institute proceedings against it for breach of trust, and against certain other individuals who were knowingly involved in the sale. However, the

Representors themselves could not afford to bring proceedings and the Trust had no assets other than the claim against the former trustee. As a result the Representors entered into a TPLF with Habour Litigation Investment Fund LP ("Habour"). Under the terms of the agreement Habour agreed to fund the litigation in return for a share of any settlement proceeds. The new trustee, also impecunious, sought to be a party to the agreement and brought a beddoes application before the Royal Court.

Delivering judgment, Michael Birt, Bailiff of Jersey said: "There is no judicial authority in Jersey in relation to champerty. However, we have no doubt Jersey law is to like effect as English law and an agreement which provides for a share of the proceeds of litigation may be held to be unenforceable on the grounds of champerty if it is contrary to public policy".

He went on: "It seems to us that the underlying public policy in Jersey in relation to the purity of justice was and remains identical to that in England. For the reasons set out in the English cases referred to above, public policy must be kept under review and we have no doubt that today, the importance of access to justice is extremely important and the concerns about powerful people corrupting the process of justice by acquiring an interest in litigation have faded away because of the independence of the judiciary".

"We therefore find that the public policy reasons which have led England and Australia to allow third-party funding subject to certain safeguards are equally applicable in Jersey".

In his conclusion, Birt B said: "The public policy considerations point strongly in favour of upholding the validity of the funding agreement. In our judgement, it does not have any tendency to corrupt or adversely affect the purity of justice. The control of the proceedings remains with the plaintiffs, they will still retain a substantial proportion of the damages if successful and the defendants are protected in respect of costs if the claim fails. On the other hand, the agreement facilitates access to justice by plaintiffs who would not otherwise be able to afford to bring the litigation in question."

Comment

This is the first Jersey decision on champerty and shows support for greater access to justice, particularly for those worthy Plaintiffs who would otherwise go uncompensated because their pockets are not deep enough to meet the high costs of litigation. Accordingly, the Judgment gives a clear message to third party funders and those contemplating litigation in Jersey that TPLF agreements will be recognised and will be upheld as being in the interests of justice, provided they are properly structured, and that they are to be encouraged to allow meritorious but impecunious plaintiffs to seek redress through the court.

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Meet the Author

Edward Mackereth

Global Managing Partner

Jersey

E: edward.mackereth@ogier.com

T: +44 1534 514320

Key Contacts

Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: +44 1534 514318

Oliver Passmore

Partner

Jersey

E: oliver.passmore@ogier.com

T: +44 1534 514247

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