



## Contingency Fees Codified in the Cayman Islands

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In a groundbreaking move last month, the Cayman Islands gazetted the Private Funding of Legal Services Act 2020 (“the Act”). Although the Act has not yet come into force, when it does, it will put the legality of Litigation Funding Agreements in the Cayman Islands on a statutory footing. In addition, and more significantly, the Act introduces the availability of Contingency Fee Agreements. This legislative development is a welcome departure from the traditional prohibitions against champerty and maintenance and will provide greater opportunities for potential litigants to bring their claims in the Cayman Islands courts.

Prior to the Act, third party funding was sanctioned by the Court on a case-by-case basis where a plaintiff could demonstrate that its claim fell within the access to justice/not contrary to public policy exception to the torts of champerty and maintenance. Historically, that required them to be impecunious<sup>1</sup> however the Court subsequently widened the scope of that exception in *A Company v A Funder*<sup>2</sup> where it sanctioned third party funding agreements in relation to non-impecunious litigants, such as large and very solvent international entities.

The key provisions of the Act are discussed below.

### Repeal of champerty and maintenance

Sections 17 and 18 of the Act officially repeal these offences thereby doing away with the need for parties to seek special

permission from the Court. The Act does, however, retain the provision that agreements must not be contrary to public policy or be otherwise illegal.

### Contingency Fee Agreements

The Act aims to provide for greater flexibility in fee structures and to balance the interests of both the lawyer and the client as described below.

- A contingency fee agreement is defined as one between a lawyer and his/her client in which it is agreed that the remuneration paid to the lawyer for the legal services provided to or on behalf of the client is contingent, on whole or in part, on the successful disposition or completion of the matter<sup>3</sup>.
- The amount of the success fee which a lawyer is entitled to impose under a contingency fee agreement is capped at no more than 100% of the lawyer’s normal fees<sup>4</sup>. Notwithstanding that position, both parties may apply to seek permission from the Court to increase this cap, within 90 days of the execution of the contingency fee agreement. In exercising its discretion, the court will take into account (i) the nature and complexity of the action or proceedings, (ii) the expense or risk involved in the action or proceedings and (iii) any other factors the Court finds relevant. In the event that parties wish to apply to the Court to increase the success fee cap, the contingency fee agreement will not be enforceable until it is approved by the Court.

1 Re ICP Strategic Credit Income Fund Ltd [2014] 1 CILR 314

2 *A Company v A Funder* FSD 68 of 2017

3 Section 3(1) of the Act

4 Section 4(1) of the Act

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- In calculating the amount of costs for the purposes of making any adverse costs orders, a court shall not reduce the amount of costs only because the lawyer is being compensated in accordance with a contingency fee agreement<sup>5</sup>.
- A provision in a contingency fee agreement that a lawyer is not liable for negligence or is relieved of any responsibility to which that lawyer would otherwise be subject, is void<sup>6</sup>. This does not prohibit a lawyer who is employed by a third party from being indemnified by his employer for liabilities incurred as a consequence of professional negligence in the course of the employment.

### Litigation Funding Agreements

- The Act defines a litigation funding agreement, which shall be in writing<sup>7</sup>, as an agreement that relates to the provision of legal services under which a funder agrees to fund in whole or in part the provision of legal services to a client by his/her lawyer and under which the client agrees to pay a sum to that funder in specified circumstances<sup>8</sup>.
- The sum to be paid by a client shall consist of any costs payable to the client in respect of the proceedings to which the agreement relates, together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services. Alternatively, the sum to be paid by a client shall consist of a percentage of the amount or the value of the property recovered in the action or proceedings to which the agreement relates<sup>9</sup>.

### Concluding Remarks

The Act awaits the publication of regulations which will provide guidance on various issues such as the form and content of the funding agreements, the maximum percentages recoverable under such arrangements and the duties owed by lawyers when acting in these circumstances<sup>10</sup>.

Irrespective of the details of that guidance, the Act provides more options for parties to pursue external funding in respect of litigation in the Cayman Islands courts. This will be particularly appealing for Asia based clients where the use of third party funding in jurisdictions like Hong Kong and Singapore is currently restricted to arbitration and insolvency proceedings only, and contingency fees are not allowed at all. This makes the Cayman Islands an excellent destination for parties and funders alike in promoting access to justice.



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5 Section 6(3) of the Act  
6 Section 8(1) of the Act  
7 Section 16(2)(a) of the Act  
8 Section 16(1) of the Act  
9 Section 16(2)(c) of the Act  
10 Section 19 of the Act