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Legal Briefings

Third-party litigation funding in the British Virgin Islands

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Background

Litigation can be costly. The potential cost of commencing a claim can often deter a prospective claimant from pursuing a meritorious claim. Third-party litigation funding can solve this dilemma for a prospective claimant by managing the risk and covering the legal costs. The prospective claimant would then be able to focus on commencing and pursuing their claim (rather than have their financial resources used on funding the litigation). This Legal Briefing will explore third-party litigation funding in the British Virgin Islands (“BVI”).

What is third-party litigation funding?

Third-party litigation funding is where a third-party which is not related to the litigation agrees to finance all (or part) of the legal costs of the litigation proceedings. In return, should the claim be successful, the third-party funder receives a financial return from the proceeds which are recovered by the funded party, usually a percentage or a multiple of the capital they have invested in the case. In the event that the claim is unsuccessful, there is normally no obligation on the funded party to repay the funder any capital they have invested (most litigation funding arrangements are provided on a ‘non-recourse’ basis – see below).

There are no specific time limits for a party to obtain third-party litigation funding. However, a party will generally seek funding prior to issuing a claim (but a funder may be prepared to fund the case at a later stage).

It should be noted that the funded party retains control over the case. The third-party funding the litigation may however require updates on the progress of the case (and may withdraw funding if the case subsequently weakens as it progresses).

Third-party litigation funding in the BVI

The historical position

The BVI is a common law jurisdiction and historically, litigation funding was barred in common law jurisdictions (applying the torts of maintenance and champerty). The absence of legislation regulating third-party litigation funding in the BVI has resulted in uncertainty as to whether the common law rules against

maintenance and champerty were still in force in the BVI (especially as other common law jurisdictions such as England and Wales began to relax its laws around professional funders in order to facilitate access to justice).

BVI case law in relation to third-party litigation funding is limited. However, two important cases are:

*Leremeieva v Estera Corporate Services (BVI) Ltd*¹ (“**Estera**”)

In *Estera*, Justice Wallbank observed that there was a difference between “*mischief*” by third-parties being permitted to encourage lawsuits and “*the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice.*”² Justice Wallbank further stated that some of the tell-tale signs of a third-party funder improperly seeking to influence the outcome of proceedings include that the funding agreement offering the funder a significant financial advantage conditional upon the proceeding’s outcome, a considerable degree of control over the proceedings and that the funder appears not to be a professional funder or regulated financial institution.

*Crumpler v Exential Investments Inc*³ (“**Exential**”)

Notwithstanding the above, in 2020, the BVI courts had the opportunity to assess and clarify the enforceability of third-party funding arrangements in *Exential*. The BVI had previously sanctioned litigation funding in other cases but there was no written judgment confirming the court’s power to grant such relief.

The liquidators in *Exential* had applied for a direction, sanction and/or permission to draw-down on a funding agreement between them, the company and a litigation funder on the grounds that it was in the best interests of the creditors as a whole, did not offend the principles of maintenance and champerty and was a lawful and enforcement agreement under BVI law.

Justice Jack in *Exential* stated that:

- 1) The difficulty the liquidators had was that with such a large number of (comparatively) small creditors, it was difficult to raise the necessary funds to pursue potential avenues of revenue and as a result, the liquidators sought to obtain litigation and liquidation funding.
- 2) The question was whether it was lawful for the liquidators to enter into a funding arrangement whereby the funder would receive a share of the recovery in the litigation. At common law, maintenance and champerty were criminal offences. The Criminal Law Act 1967 had abolished the offences in England and Wales (although the legislation retains the rule of public policy against maintenance and champerty). Section 328 of the BVI’s Criminal Code 1997 abolished the common law offences of maintenance and champerty.
- 3) The approach adopted in England and Wales which permitted third-party litigation funding at common law was adopted by other jurisdictions such as Bermuda, Australia and the Cayman Islands.
- 4) The funding arrangement proposed in *Exential* was not contrary to BVI public policy – indeed, it was the contrary. Without funding, the liquidators would be unable to recover assets for the benefit of the company’s creditors. Approving the funding arrangement was essential to ensure access to justice.

¹ BVIHCM2017/0118

² BVIHCM2017/0118 at [153]

³ BVIHC (COM) 81 of 2020

What types of costs may be funded by third-party?

A third-party litigation funder will usually fund legal fees and disbursements such as investigatory costs or expert's costs. They may insist (as a condition of any funding) that the funded party obtain after the event (ATE) insurance to cover the risks of adverse costs.

What are the key benefits of third-party litigation funding?

It is clear that third-party litigation funding offers several key benefits to the funded party. Some of these include:

- 1) promoting access to justice by enabling the funded party to pursue a meritorious claim which otherwise may not have been financially viable;
- 2) freeing up the funded party's capital and not diverting funds away from them (in the form of upfront legal costs) – which can assist the funded party with cash flow preservation;
- 3) mitigating litigation risk for the funded party; and
- 4) the funded party only repays the funder if they are successful in the litigation. There is generally no repayment by the funded party if the claim is not successful. This 'non-recourse' financing reduces the financial risks faced by the funded party.

Conclusion

There are no longer any statutory restrictions in the BVI on third-party litigation funding. The court in *Exential* approved a third-party funding agreement between the liquidators and the third-party litigation funder. Given these developments in recent years, the third-party litigation funding market in the BVI is expanding and so a variety of funding options is now likely to be available. Even though such funding arrangements are now permissible as a matter of BVI law, there would appear to still be a need to prevent a third-party from encouraging a claim where there is little or no grounds for bringing such claim. With this in mind, third-party litigation funding must be responsible and the principles set out in the case law above should be adhered to.

Further Assistance

This publication is not intended to be a substitute for specific legal advice or a legal opinion. If you require further advice relating to the matters discussed in this Legal Briefing, please contact us. We would be delighted to assist.

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