

The Cayman Islands Welcomes Third Party Litigation Funders

开曼群岛欢迎第三方诉讼资助

Third party litigation funders, once seen as “strangers to litigation”, have recently been welcomed with open arms by the Grand Court. Departing from the historical common law offences of maintenance and champerty, the Grand Court has confirmed that commercial funding of litigation is not contrary to public policy. On the contrary, third party litigation funding may promote access to justice and have a role to play in the modern justice system. In *A Company -v- A Funder* (unreported, 23 November 2017) Segal J noted that:

“Cayman has an important, world-class court system and litigation culture and there is no reason why responsible, properly regulated commercial litigation funding undertaken in accordance with the principles I have set out should not have a place in this jurisdiction”.

Maintenance and Champerty

Maintenance and champerty are both crimes and torts in the Cayman Islands. Maintenance involves the procurement by direct or indirect financial assistance of another person to institute or carry on or defend civil proceedings without lawful justification. Champerty is an aggravated form of maintenance whose distinguishing feature is the support for litigation by a stranger in return for a share of the proceeds. These doctrines developed under English common law as a safeguard to prevent against frivolous litigation and the corruption of the public justice system through the meddling of unrelated parties.

In modern times, as the legal profession developed and procedural rules improved to better protect the justice system, several common law jurisdictions (including England and Wales) abolished the historical

曾被视为“诉讼中的陌生人”的第三方诉讼资助者最近受到开曼群岛大法院的欢迎。开曼群岛大法院摒弃了过往的助讼和包揽诉讼等普通法罪行，确认商业资助的诉讼并不违反公共政策。相反，第三方诉讼资助可以促进司法公正，在现代司法体系中发挥作用。Segal法官在*A Company -v- A Funder*一案（未发布，2017年11月23日）中指出：

“开曼群岛拥有重要的世界级法院系统和诉讼文化，没有理由禁止按照本人提出的原则所进行的负责任并受到适当监管的商业诉讼资助”。

助讼和包揽诉讼

助讼和包揽诉讼在开曼群岛均属犯罪和侵权行为。助讼涉及在无合法理由的情况下直接或间接向另一人提供财务援助，以进行或提起民事诉讼或进行辩护。包揽诉讼是一种更为严重的助讼形式，其显著特征是陌生人财务上支持诉讼，以换取诉讼一部分收益。这些根据英国普通法基础上发展起来的法律原则，是为了防止在不相关当事人的干预下，展开轻率诉讼和败坏公共正义。

直至今日，随着法律专业的发展和程序规则的完善更好地保护司法制度，一些普通法司法管辖区（包括英格兰和威尔士）废除了过往的助讼和包揽诉讼原则。在开曼群岛，虽然立法机构尚未废除这些法律原则，但法院已

doctrines of maintenance and champerty. In the Cayman Islands, while not yet abolished by the Legislature, the Courts have recognised that the nature of common law itself needed to change to meet the needs of society. In relation to maintenance and champerty, this has meant an increasing willingness by Cayman Islands Courts to allow third party litigation funding, as long as adequate protections were built into such arrangements to prevent the corruption of public justice. The decision in *A Company -v- A Funder* confirms this approach.

A Company -v- A Funder

In *A Company -v- A Funder*, the plaintiff applied to the Court for a declaration that the third party funding agreement it had entered with the defendant was not illegal on the grounds of maintenance and champerty. While the procedure construct was somewhat artificial, the Grand Court allowed the application to proceed given the importance of the matter to the plaintiff (and particularly the issue of possible criminal liability if the funding agreement was found to breach the doctrines of maintenance and champerty).

After canvassing the recent Cayman Islands authorities and taking into account the developments in several other common law jurisdictions, Segal J found that as a matter of principle, a funding agreement will not be unlawful by reason of maintenance and champerty if it does not have a tendency to corrupt public justice. Whether or not an agreement had such a tendency would depend on a number of features, including:

- *The extent to which the funder controls the litigation:* Complete control by a non-party funder who only has a financial interest raises the risk of abuse by manipulation of the proceedings.
- *The ability of the funder to terminate the funding agreement at will or without reasonable clause:* If a funder can terminate without reasonable cause this could allow the funder to achieve indirect control by threatening to terminate the agreement (increasing the risk of abuse as mentioned above).
- *The level of communication between the funded party and the solicitor:* The funder should not be in control of the litigation, and should not give instructions to the party's solicitors (again an increase in control increases risk of abuse as mentioned above).

经意识到普通法本身的性质需要改变以满足社会的需要。就助讼和包揽诉讼而言，这意味着开曼群岛法院允许第三方诉讼资助的意愿日益增强，但前提是相关安排有足够的保护措施以防止败坏公共正义。*A Company -v- A Funder*一案的裁决正正确认了这种方向。

A Company -v- A Funder 案

在*A Company -v- A Funder*一案中，原告向法院申请如下声明：原告与被告签订的第三方资助协议并不违反有关助讼和包揽诉讼的法律。虽然该法律程序颇有人为因素，但考虑到该事宜对原告的重要性（特别是如果裁定资助协议违反助讼和包揽诉讼的原则，可能会产生刑事责任），开曼群岛大法院批准该申请。

Segal法官研究近期开曼群岛的案例后，考虑到数个其他普通法司法管辖区的发展动态，认为资助协议如果没有败坏公共正义的倾向，则原则上不会因助讼和包揽诉讼而不合法。一项协议是否有这种倾向将取决于多个特点，包括：

- *资助者控制诉讼的程度：*由只有经济利益的非当事人资助者完全控制，将增加操纵诉讼程序的滥用风险。
- *资助者随意或在无合理理由的情况下终止资助协议的能力：*如果资助者可在无合理理由的情况下终止资助协议，则资助者可以通过威胁终止协议以实现间接控制（增加上述滥用风险）。
- *受资助方与律师之间的沟通：*资助者不应控制诉讼，也不应向当事人的律师发出指示（同样，提高控制权会增加上述滥用风险）。

- *The prejudice likely to be suffered by a defendant if the claim fails:* The funder should be able to pay any costs order made against it, if the funder is unwilling or unable to fund an adverse costs order, this increases the risk of abuse.
- *The extent to which the funded party is provided with information about, and is able to make informed decisions concerning the litigation:* Again, an increase of control by the Funders increases the risk of abuse by manipulation of the proceedings.
- *The amount of profit that the funder stands to make:* If the party's interest in the outcome of litigation is immaterial, as the funder stands to receive the majority of any award, it is more likely that such an arrangement would be champertous.
- *Whether or not the funder is a professional funder and is regulated:* The risk of abuse may be less where the litigation funder is regulated or has agreed to follow a code of conduct for litigation funders.
- *如果败诉，被告可能会遭受的损害：* 资助者应能够支付针对其作出的任何讼费命令，如果资助者不愿或无力支付对其不利的讼费命令，这就增加滥用风险。
- *受资助方对诉讼的知情程度以及就诉讼作出知情决定的能力：* 同样，提高资助者的控制权会增加操纵诉讼的滥用风险。
- *资助者将会赚取的利润数额：* 如果资助者会获得大部分判给额而使当事人从诉讼结果中获得的利益较少，那么该安排更有可能是包揽诉讼。
- *资助者是否为专业资助者和受监管人士：* 如果诉讼资助者受到监管或同意遵循诉讼资助者的行为准则，滥用风险可能较小。

Provided the above principles are respected and the important policy goals are achieved then commercial funding of litigation, which can promote access to justice, should not be objectionable or subject to enhanced requirements or constraints.

In *A Company -v- A Funder*, even though the company was not in liquidation and not impeccunious, the Court found that the funding agreement would not be illegal under the doctrines of maintenance and champerty. Segal J found that there are clearly benefits that may flow from allowing plaintiffs with genuine claims the opportunity to litigate them on terms which they consider to be commercially attractive and provide them with a better risk-reward ratio than if they were to fund the costs of litigation themselves.

The ruling of Segal J will likely result in an increase in the usage of such funding agreements, which, for all of the reasons set out by the Learned Judge, can only be a good thing.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

若能谨守上述原则，并且实现重要的政策目标，那么商业资助的诉讼就可以促进司法公正，而不应遭到反对或被施加更高的要求或约束。

在*A Company -v- A Funder*一案中，即使公司并非破产，也并非金钱短缺，但法院裁定，根据助讼和包揽诉讼的原则，资助协议并不违法。Segal法官认为，让真正申索的原告有机会按照他们认为具有商业吸引力的条款提起诉讼，并提供比他们自己支付讼费更高的风险回报比率，这显然是有益的。

Segal法官的裁决很可能导致更多人使用该等资助协议，而基于其列出的所有理由，这将有有益无害。

本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅!

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