

Article

Private Funding of Legal Services Act 2020: Codification and Clarity in Cayman

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As foreshadowed in previous Conyers briefings¹, the Private Funding of Legal Services Act 2020 (the "Act") is on the horizon² in the Cayman Islands. The Act seeks to provide welcome clarity and new opportunities for both potential litigants and litigation funders analysing their respective positions in this jurisdiction.

As matters currently stand, the law in this jurisdiction is governed by the common law and is seen to be unclear, making it desirable for a party to obtain sanction of the Grand Court to enter into funding arrangements to avoid falling foul of the "antique laws" of champerty and maintenance³. The Act seeks to modernise and codify the litigation funding process to reflect changes already enacted in the United Kingdom, United States and other onshore jurisdictions.

By reference to the Act and approaches in other jurisdictions, it is useful to divide litigation funding agreements into three sub-categories:

- i. **Conditional Fee Agreements:** the client agrees to pay a success fee by way of an uplift on standard legal fees in the event that the client is successful. If the client is unsuccessful, the lawyer may be paid nothing or a lesser amount. Success or failure may be defined in different ways, depending on the case;
- ii. **Contingency Fee Agreements:** the lawyer receives a fixed percentage of the overall sum recovered in the litigation in the event that the client is successful, but nothing if the case is lost. Again, success or failure may be defined in different ways, depending on the case; and
- iii. **Third Party Funding Agreements:** a third party agrees to fund all or part of the litigation in exchange for some form of payment or a portion of the proceeds. There is a wide range of commercial terms which may be negotiated between the litigant(s), funder(s) and lawyer(s).

For many years, it has been possible to obtain litigation funding in the Cayman Islands in certain circumstances (for example, in a liquidation scenario in which limited resources are available in the estate). However, it has been left to the Cayman courts to regulate the funding environment and there are lingering risks and additional costs associated with the absence of a statutory framework. Accordingly, the Act is designed to remove barriers and facilitate access to justice on prescribed terms.

In broad terms, important features of the Act include:

- i. abolition of causes of action related to champerty and maintenance from the date at which the Act comes into force;

¹ <https://www.conyers.com/publications/view/application-granted-for-sanction-to-enter-into-a-litigation-funding-agreement/>
<https://www.conyers.com/publications/view/the-cayman-islands-welcomes-third-party-litigation-funders/>
<https://www.conyers.com/publications/view/the-changing-landscape-of-litigation-funding-in-the-cayman-islands/>
<https://www.conyers.com/publications/view/non-party-cost-orders-an-inevitable-consequence-of-funding-litigation/>

² The Act was gazetted on 7 January 2021 but is not yet in force.

³ This practice has however been criticized by the Grand Court.

- ii. permission to use a Contingency Fee Agreement (save for in specific criminal and family proceedings), provided that the success fee does not exceed the “maximum percentage” to be defined in the regulations which will sit behind the Act. Based on the current draft regulations, the maximum percentage is likely to be 33.3% of the total value recovered by the client. Court approval is required to agree a figure beyond the prescribed maximum percentage, but there is a prohibition on success fees which exceed 40% of the total value;
- iii. permission to use a Conditional Fee Agreement, provided that the success fee does not exceed the attorney's normal fees by more than 100% or the “prescribed percentage” of the total amount awarded. Based on the current draft regulations, the prescribed percentage is likely to be 33.3% of the total value recovered by the client. Court approval is required to agree figures outside the scope of the prescribed terms;
- iv. the calculation of the success fee does not include any amount due to the litigant on the back of a costs award or settlement regarding legal costs; and
- v. wide discretion and scope to agree Third Party Funding Agreements, which must be in writing. The Act leaves open the possibility for future regulation in this space (if necessary), but for now the legislature appears to have formed the view that competition in the commercial market should dictate the standard terms of this type of arrangement.

This is a helpful and much anticipated development. It is critically-important that the Cayman Islands keeps pace with onshore jurisdictions and that there is certainty for litigants seeking to bring proceedings in this highly sophisticated legal environment.

Coupled with the Legal Services Act 2020⁴, which is set to introduce a mandatory code of conduct and disciplinary tribunal for attorneys, the legal industry in the Cayman Islands continues to modernise and adapt in parallel with other similar common law jurisdictions.

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⁴ Also gazetted on 7 January 2021