Maintenance & Champerty

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May/June 2005
**Maintenance & Champerty**

1 Champerty is a variety of maintenance:

(i) ‘A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse’ Chitty 28 Ed Vol 1 17 – 050

(ii) Champerty ‘occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit’ Chitty 28 Ed Vol 1 17 – 054.

2 The law in relation to maintenance depends upon public policy and so must be continually kept under review – see *Hill v Archbold* [1968] 1 QB 686 at 697. The introduction of CFA’s is an example of public policy changing. In the case of *Factortame* the CA held that:

> Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain, to inflame the damages, to suppress the evidence, to suborn witnesses or otherwise undermine the ends of justice. (paragraph 36).

3 Thus in any individual case it is necessary to look at the agreement under attack in order to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant – *Factortame* paragraph 44.

4 The authorities have treated the various different types of funders slightly differently. They are:

(i) Lawyers

(ii) Others providing ancillary services – Litigation Support

(iii) Experts

5 The courts have been called on to decide two different types of application:

(i) Applications by paying parties that certain agreements are champertous and so unenforceable (to minimise their costs outlay).
(ii) Applications by successful parties that an agreement between the unsuccessful party and a non-party funder should give rise to a costs order against the non-party funder.

The public policy considerations in relation to the two different types of applications are slightly different.

**Lawyers**

6 It remains unlawful to enter into a contingency fee agreement – ie an agreement that allows a lawyer to receive a share of the proceeds of the litigation (see rule 8 of the Solicitors Practice Rules 1990). However between 1995 and April 2000 when the current conditional fee agreement scheme came into force, it was lawful for a lawyer to enter into a CFA in which the success fee was recovered from the client, inevitably out of his/her damages – contingency fees by the back door?

7 The position since section 58 of the Courts and Legal Services Act 1990 was amended in April 2000 has seen a radical shift in public policy towards the practice of conducting litigation on terms that the obligation to pay fees will be contingent upon success. Conditional fees are now permitted to give access to justice. The agreements are no longer considered champertous. In such agreements success fees are recoverable from the paying party, and regulation 3 of the Conditional Fee Agreement Regulations 2000 protects the client against paying any part of the success fee that is not recovered from the other side (unless the court is satisfied that it should continue to be payable by the client).

**Litigation Support**

8 Section 58 CLSA 1990 only embraces agreements for the provision of litigation or advocacy services concluded by those with rights to conduct litigation or those with rights of audience – see Factorlane paragraph 54. It does not therefore apply to the provision of services ancillary to the conduct of litigation by different categories of person who assist with the conduct of litigation. For those providing such services (here called non-lawyers), different considerations apply.
The issues as to whether a contingency agreement with a non lawyer was champingrous and so unenforceable was the issue that fell to be considered in the case of R (on the application of Factortame) v Secretary of State for Transport [2002] EWCA Civ 932. The issue in that case was whether an agreement with a company (GT) who had carried out services that were ancillary to the conduct of the litigation (i.e. back up to experts, and services that could have been carried out by the solicitor such as collating evidence) under a contingency fee agreement (their fees were to be 8% of the settlement monies received by the claimant) was enforceable.

The Court of Appeal asked themselves 3 questions before coming to a view as to the nature of the agreement:

(i) Does GT have an interest in the litigation?
(ii) Did the fact that under the agreement GT had an interest in the litigation, offend against public policy?
(iii) Did the fact that GT had a right to a share of the damages provide a temptation to GT to deviate from performing their duties in an honest manner to maximise recovery?

The court took a number of factors into consideration in answering these questions including:

(i) The fact that GT had no role at all in the part of the case dealing with liability.
(ii) GT did not play any expert role in the proceedings.
(iii) GT were only entitled to 8% of the damages, this was not extravagant and although it would have been a motive to in flame damages, not to the extent that an agreement for a larger proportion would have done.
(iv) GT are reputable members of a respectable profession whose members are subject to regulation.
(v) There was not much scope for GT to influence the outcome of the assessment of damages hearing as a result of the work that they carried out in any event. The litigation was being conducted by a large group of counsel and a well known commercial solicitors firm. Thus any suggestion that GT could have attempted
to procure a settlement on terms which were at odds with their appreciation of the merits was regarded as unrealistic.

Accordingly the Court of Appeal came to the view that the agreement GT had with the claimant lacked the characteristics that would have rendered it contrary to public policy and so champertous.

See also *Papera Traders Co Ltd v Hyundai Merchant & another* [2002] EWHC 2130 (Comm).

It is worth noting that the successful party will only succeed in recovering from the paying party the reasonable costs incurred by them. Thus the quantum of an agreement with a non-lawyer under a contingency agreement is not in any way binding on the paying party. The non-lawyer’s fees will usually be assessed on the basis of an hourly rate for the reasonable work done. The quantum of the contingency agreement will only be relevant in so far as it provides an upper cap on the costs recoverable.

**Experts**

The issues in relation to experts are slightly different. They are:

(i) Is the expert evidence admissible if the expert is instructed under a contingency fee agreement?

(ii) If so, what is the weight that should be attached to the evidence.

The first issue falls to be considered at the case management stage of proceedings. If an expert had an interest in the litigation the court should be told as early as possible. The court must then make the decision as to whether the evidence is admissible.

In *Factortame* it was said to be ‘always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence’ (paragraph 70). The reason why such an interest is undesirable is obvious. If an expert has a substantial interest in the outcome of the litigation then this may affect the quality of the evidence given.
It is perhaps worth noting that in *Factortame* the Court of Appeal had never come across an expert being instructed on a contingency fee agreement, and thought that it would be a very rare case in which the court would be prepared to consent to such a step. The Academy of Experts has amended its Code of Practice to prohibit conditional fee agreements.

**Making a claim against a funder**

*Professional and Pure Funders*

19 The courts have differentiated what they call pure funders and professional funders:

(i) A pure funder (as seen in *Hamilton v Al Fayed* (No 2) [2003] 3 ALLER 641) is someone who contributes towards the costs of bringing an action on the basis that if the claim is successful their contribution only will be returned. Such funders exercise no control over the management of the litigation, have no control over how their donations are spent, and stand to make no profit.

(ii) A professional funder (as seen in *Arkin*) is someone who funds the litigation as a result of a contractual arrangement (ie a trade union or an insurance company) or someone who may expect to make a profit out of the litigation, sometimes by means of a contingency agreement. Such a party will usually have some control over the litigation.

20 Both pure and professional funders have found themselves on the ends of applications made by a successful party that they should pay their costs pursuant to section 51(3) of the Supreme Court Act 1981. This provides that the court has full power to determine by whom and to what extend the costs are to be paid.

21 Where the professional funder is an insurance company or a trade union there is an agreement to indemnify the funded party against any costs order made against them (in the case of an insurance company subrogation plays its part). Further, these agreements are not champertous as the funding party does not have a share in the proceeds of the litigation. However, where the professional funder is a company who has entered into a contingency fee agreement with the funded party the considerations are rather different.
There is no liability on the professional funder in these circumstances to cover any adverse costs order made against the funded client whether by means of an indemnity or by way of subrogation. It is unlikely that the professional funder will have taken out an insurance policy to cover the other side’s costs, and of course they are not a party to the proceedings in their own right.

22 The case of *Arkin v Borchard* [2003] EWHC 2844 (Comm) (which has been heard by the Court of Appeal although judgment has not yet been handed down) sets out the public policy objectives that must be considered when considering an application by a successful party for a costs order against a funder of an unsuccessful party (see paragraph 18):

(i) The purpose of discouraging ill-founded claims or defences and of compensating those who have been obliged successfully to protect their rights in the course of litigation underlies the rule that in general a successful party is entitled to recover his costs.

(ii) The purpose of facilitating access to justice, including the achievement of equality of arms, for impecunious claimants in the absence of public funding or insurance or trade union membership needs to be supported. Costs orders against funders of unsuccessful claimants will tend to discourage the availability of such funding.

(iii) The purpose of protecting the due administration of justice requires that the courts should discourage the interference by funders in the proper and responsible management and conduct of litigation in any manner adverse to that purpose. In order to achieve this purpose the courts will taken into account in the exercise of their discretion as to the making of costs orders against funders who are parties to conditional fee agreements whether the terms of such an agreement give rise to a material risk of conduct adverse to that purpose and whether the actual conduct of the funder in the course of the litigation has been consistent with that purpose.

23 In *Hamilton* the court concluded that the public policy of access to justice superseded the public policy reflected in the principle that costs should follow the event. It was said in
that case that a pure funder should not be in any different position than a lawyer offering services under a CFA. In general then, it is difficult to get a section 51(3) costs order against a pure funder.

24 The court in *Arkin* found that in determining whether a section 51(3) order should be made as against a professional funder, the court needs to balance the competing public policy considerations set out at paragraph 3(ii) and (iii) above. Colman J stated at paragraph 21:

> It is in my judgment …seriously inconsistent with the relevant principles to suggest that a third party costs order will necessarily be appropriate against a professional funder given that he is by definition not a pure funder. Whether such an order is appropriate in any given case must depend primarily on whether on the evidence before it on the application the court is satisfied that such an order is appropriate to reflect (i) the defendant’s success and (ii) the risk of prejudice to the objective of protection of the due administration of justice. Specifically, I am unable to accept that the mere fact of a contract for the share in the proceeds in the litigation necessarily involves such material prejudice. Whether it does will depend on the legal and practical relationship between the professional funder and the claimant. If that relationship by reason of the terms of the funding agreement is such as not to give rise to any material opportunity to the funder to influence the conduct of the litigation to serve his own interest as distinct from the proper running of the trial and the funder does not in the event intervene or attempt to do so, there will be strong grounds for declining to make an order for costs against him where, but for such funding, access to the court would have been impossible.

25 The court must therefore enquire into the terms of the agreement between the party to the litigation and the funder and look at who in reality was controlling the litigation before weighing up the competing public policy issues.

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