



Application Granted for Sanction to Enter into a Litigation Funding Agreement

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In the recent decision of in *In the Matter of the Companies Law (2018 Revision)* and *In the Matter of Platinum Partners Value Arbitrage Fund L.P. (In Official Liquidation)* the Grand Court of the Cayman Islands granted an application seeking sanction to enter into a litigation funding agreement.

Background

The application was brought by the joint official liquidators (the “JOLs”) of Platinum Partners Arbitrage Fund L.P (the “Master Fund”) for sanction to enter a litigation funding agreement with LL Finance LLC (“LLF”). Some of the creditors of the Master Fund purport to hold non possessory security interests in the Master Fund’s assets (the “PSCs”) in respect of liabilities which are considerably greater than net realisations to date. The JOLs informed the Court that funding was required in order to carry out investigations and to pursue litigation for the benefit of the Master Fund’s stakeholders. There was a real possibility that, without litigation, no distributions would be made to the unsecured stakeholders of the Master Fund.

An unusual aspect of the application was that the JOLs sought an order that amounts due to LLF would be paid as an expense of the liquidation (thus granting those amounts due statutory priority) save for when amounts may be due to the PSCs. In such an occurrence, the JOLs said, the sums due to LLF should be paid as an expense incurred in realising the proceeds of the litigation. This was necessary as the JOLs had been unable to determine whether certain claims belonged to the secured or unsecured estate.

White Rock Properties LLC Dispute

The application was opposed by White Rock Properties LLC (“White Rock”), one of the PSCs. The submissions filed were brief and were not supported by evidence. They noted that White Rock did not oppose the principle of funding being obtained by the JOLs to enable them to pursue litigation; rather their concerns related to certain terms of the Funding Agreement and the failure, in their view, of the JOLs to provide sufficient information to allow White Rock to satisfy itself that its rights and position as a PSC were adequately protected.

The Court was advised that the other PSCs were on notice of the proceedings and did not support White Rock’s opposition or appear at the hearing, but they also did not consent to or support the JOLs’ application.

The Issues Arising on the Application

The following issues were considered by the Court;

- i) The impact and effect of the Funding Agreement on those who claim to have security interests over some or all of the Claims covered by the Funding Agreement (the PSCs) and whether the Court should sanction the Funding Agreement in the absence of the consent of the PSCs or where they object (the “PSC issue”).

- ii) Secondly, which powers the JOLs seek to exercise and whether in the circumstances the JOLs have satisfied the Court that it should exercise its discretion to sanction the exercise of these powers having regard to the applicable principles, in particular the principles set out in the Judgment of the Chief Justice in *Re DD Growth*¹ (the “Discretion to Sanction Issue”).
- iii) Thirdly, whether the Funding Agreement is unlawful by reason of champerty and maintenance (the “Champerty and Maintenance Issue”).

Grand Court Ruling

The Court found in favour of the JOLs on all of the above issues.

PSC Issue

The application relied both on the Court’s general jurisdiction and on Section 142 (2) of the *Companies Law (2018 Revision)* which provides that;

“where the liquidator sells assets on behalf of a secured creditor, he is entitled to deduct from the proceeds of sale a sum by way of remuneration equivalent to that which is or would be payable under Section 109”.

The applicant relied on various authorities in England and Australia to support the proposition that costs incurred by the liquidators in realising charged assets are payable ahead of the secured creditor’s claims such as:

- *Re Berkeley Applegate*²
- *Re Marine Mansions*³
- *In Re Universal Distributing Co Ltd (in liquidation)*⁴
- *Townsend -v- Biscoe*⁵

The Court paid significant attention to the position of the PSCs and noted the absence of their involvement in the decision making process with respect to the secured Claims. The Court held that it was important that the JOLs have regard to the interests of those PSCs and satisfy themselves that those PSCs are properly protected.

However, particularly given the lack of objection to the funding agreement *per se*, notwithstanding the fact that the PSCs had been given notice of the application, the Court determined that it did have jurisdiction to affect the purported rights of the PSCs and order that any amounts realised on behalf of the PSCs would be subject to the obligations due to LLF under the funding agreement. The Court derived its jurisdiction from common law, determining that Section 142 (2) did not give it jurisdiction to make the order sought.

The Discretion to Sanction Issue

In seeking sanction of the Court in the exercise of powers falling within Part 1 of Schedule 3 to the *Companies Law (2018 Revision)* the applicant relied on the following principles set out in the Judgment of the Chief Justice in *Re DD Growth Premium 2x Fund*.⁶

- (a) *The Court must consider all the relevant evidence.*
- (b) *The Court must consider whether the proposed transaction is in the commercial best interests of the company, reflected prima facie by the commercial judgment of the liquidator.*
- (c) *The Court should give the liquidator’s view considerable weight unless the evidence reveals substantial reasons for not doing so.*

¹ [2013] CILR (2) 361]

² [1988] 4 BCC 279

³ Co LR 4 Eq 601

⁴ [1933] 48 CLR

⁵ [2010] WL 316608

⁶ *ibid*

- (d) *The liquidator is usually in the best position to take an informed and objective view.*
- (e) *Unless the Court is satisfied that, if the company is not permitted to enter the deal in question, there will be better terms or some other deal on offer, the choice is between the proposed deal and no deal at all.*

White Rock did not challenge the JOLs position on the issue (beyond the challenge based on their own treatment dealt with in the PSC's issue). The Court accepted the submissions of the applicant on the discretion to sanction issue, particularly given the wide-ranging market testing carried out by the JOLs to determine that the LLF deal was commercially the most attractive.

Champerty and Maintenance Issue

Where the Court is asked to sanction a litigation funding agreement, its terms will be carefully scrutinised to ensure that it does not confer upon the funder any right to interfere in the conduct of the litigation or put the funder in a position in which it will be able to exert undue influence or control over the litigation (*Re ICP Strategic Credit Income*⁷).

The applicant relied on the Judgment in *In A Company -v- A Funder*.⁸ It was submitted that this case established that the crucial issue was whether the funding agreement has the tendency to corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse. Such a question requires the closest attention to the nature and surrounding circumstances of the agreement. The following seven features of a funding agreement were stated to have particular significance:

- (a) *the extent to which the funder controls the litigation.*
- (b) *the ability of the funder to terminate the agreement at will or without reasonable cause*
- (c) *the level of communication between the funded party and the solicitor.*
- (d) *the prejudice likely to be suffered by a defendant if the claim fail;*
- (e) *the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation.*
- (f) *the amount of profit that the funder stands to make and*
- (g) *whether or not the funder is a professional funder and/or is regulated.*

White Rock did not challenge the JOLs position on this issue. On balance and after careful consideration of the funding agreement and its terms, the Court granted the JOLs application and made the order to sanction to enter a liquidation funding agreement.

Conclusion

This Judgment should be welcomed by practitioners and is a timely reminder that the Grand Court of the Cayman Islands will be flexible and co-operate wherever possible in facilitating the recovery of monies for an estate by a liquidator. Nevertheless, the decision shows that liquidators, when considering a funding arrangement that will affect secured creditors, have regard to the interest of those secured creditors and satisfy themselves that on balance the interests of those secured creditors are properly protected.

Ben Hobden and Róisín Liddy-Murphy of Conyers Dill & Pearman acted on behalf of LL Finance LLC.

⁷ FSD 82 of 2010 (AJJ), unreported, 4 April 2014, at paras, 14, 18).

⁸ FSD 68 of 2017 (NSJ), unreported, 23 November 2017.

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