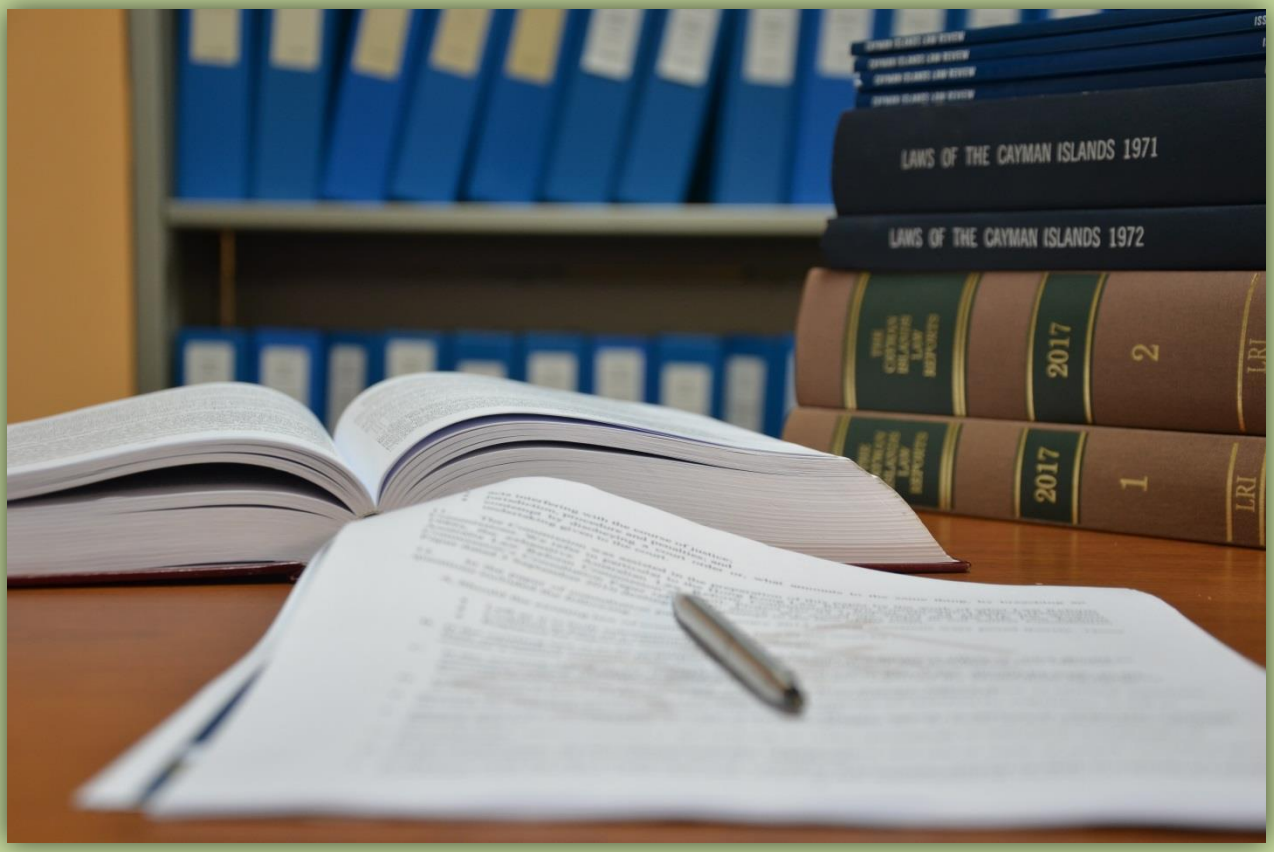
THE CAYMAN ISLANDS LAW REFORM COMMISSION



A REVIEW OF LITIGATION FUNDING IN THE CAYMAN ISLANDS-

CONDITIONAL AND CONTINGENCY FEE AGREEMENTS

FINAL REPORT
30th SEPTEMBER, 2019

The Cayman Islands Law Reform Commission

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A REVIEW OF LITIGATION FUNDING IN THE CAYMAN ISLANDS- CONDITIONAL AND CONTINGENCY FEE AGREEMENTS

INTERIM REPORT

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INTRODUCTION

1. On 27th February, 2012 the Attorney General requested that the Law Reform Commission undertake a review of the law relating to conditional or contingency fee agreements with a view to its reform. This referral was made following the case of *Latoya Barrett v the Attorney General* in which the Honourable Justices called for an examination of the law relating to conditional fee agreements in the Cayman Islands.

2. In that case the Attorney General, and the Cayman Islands Insurance Association, as intervener, appealed an order as to costs recoverable by the respondent Latoya Barrett who succeeded in the Grand Court on the issue of liability in proceedings arising out of a road traffic accident involving a police officer who was on duty. The trial judge had ordered that the Attorney General, as the representative of the Government, pay Ms. Barrett's costs. The judge also approved an uplift fee of 33.3% contained in the conditional fee agreement entered into between the Plaintiff and her attorneys-at-law dated 20 August, 2008 and the uplift of 33% contained in the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at-law and Counsel dated 4 December, 2009. The agreements were adjudged reasonable as between attorney and client and as between barrister and attorney respectively and, on that basis, they were approved.

3. The trial judge further declared that section 7.2 of Practice Direction No 1/2001 titled *"Guidelines Relating to the Taxation of Costs"* did not prohibit the recovery of the uplifts contained in the conditional fee agreement entered into between the Plaintiff and her attorneys-at-law, nor the uplift in the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at- law and Counsel if such uplifts are calculated on an hourly rate basis. The judge was of the view that the taxing officer, when assessing the costs payable under this Order, may, if in the exercise of his discretion he thinks it just to do so, assess such costs on the footing that the appropriate hourly rates are those which include uplifts.

4. In the notice of appeal the Government sought, inter alia, to set aside that part of the judge's order. The intervener questioned the application by the trial judge in the case of the decision of the Grand Court in *Quayam and others v Hexagon Trust Company (Cayman Islands) Ltd* in arriving at his judgment. In that case, although the Chief Justice had acknowledged that champerty and maintenance are still a part of the law of the Cayman Islands, he went on to consider whether agreements with a success fee were unlawful as being champertous maintenance and void on the grounds of public policy. The Chief Justice decided that the balance of public policy must certainly weigh in favour of allowing the conditional fee arrangements.

2012 Vol.1, C.I.L R 127
Justice Quin
2002 CILR 161

5. The Chief Justice at paragraphs 36 and 37 of his judgment stated-

> "If a lawyer anywhere has too much at stake in the success of litigation he may be tempted to conduct that litigation in a manner which is unethical. The ultimate concern is that the administration of justice could be impaired by improper conduct of litigation motivated by the self-interest of lawyers becoming common place. It follows that a situation should not be encouraged in which lawyers would be exposed to temptations which might lead them to behave other than in accordance with their best traditions. Improbable though such a scenario might seem in an environment where professional honour remains the norm, those who fear have only to look to the experiences in other places where contingency fees are routinely allowed, to find cause.
>
> There is, however, another equally important and competing public interest: that of ensuring that everyone has access to justice. For many, such as the plaintiffs in this case, that access would be denied for want of legal representation, were it not for the willingness of some lawyers to undertake litigation on the risky basis of a conditional fee arrangement.".

6. The Practice Direction relied upon by the trial judge was made after the *Quayam* case in 2001 and came into force in 2002. The Court of Appeal in *Barrett* did not address the wider issue of the enforceability of conditional fee agreements generally in the Islands but held that the Practice Direction did not permit a successful party to recover taxation on the standard basis at an hourly rate above the maximum figure permitted in the Practice Direction. In allowing the appeal, the court held that a conditional fee agreement with an uplift fee is unenforceable and that the conditional fee arrangements in the case were to be disregarded.

7. The Court of Appeal urged a review of the law of maintenance, champerty and conditional fees agreements before the making of any relevant legislation. The court noted that complex issues of public policy were involved and that full account must be taken of all interests involved and most importantly of "the need to provide access to justice for those who cannot afford it".

8. Pursuant to such referral the Commission conducted research and submitted a discussion paper and Bill entitled the Private Funding of Litigation Bill, 2015 ("the 2015 Bill") for public consultation in December, 2015. A copy of the paper and 2015 Bill can be found at www.lrc.gov.ky.

9. A conditional fee agreement is an agreement where the lawyer accepts the client's normal fee only if the action was successful and the lawyer accepts the client's normal fee with an agreed uplift amount in the event of success so as to compensate the lawyer for the risks of not being paid in the event of failure. A contingency fee agreement is one in which the lawyer retains an agreed percentage of the client's recovery, and is paid nothing if the action is unsuccessful, also to compensate for the risks of not being paid in the event of failure. It should be noted however that in the literature the nomenclature is not settled but these are the definitions which the Commission believes best encapsulates the two types of agreements.

Justice Campbell, para 37, 2012 Vol.1 C.I.L R. 127

10. Both types of agreements have been viewed by proponents over the years as fundamental routes to access justice by lower income persons while opponents view such fee agreements as an incentive to excessive litigation and argue that they promote a "compensation culture". The advantages and disadvantages of such fee agreements are set out in the paper.

11. It is noted nevertheless that while an examination of the law has been requested, conditional fee agreements have been in use in the Cayman Islands for more than a decade. Their validity have been acknowledged by the courts of the Cayman Islands in several cases to the extent that the court has provided guidelines which attorneys must follow in concluding such agreements with clients. This is notwithstanding the fact that the common law offences of maintenance and champerty have never been repealed and therefore still form a part of the law of the Cayman Islands. *Maintenance* is the ancient crime and tort of assisting a party in litigation without lawful justification. *Champerty* is an aggravated form of maintenance, in which the maintainer receives something of value in return for the assistance given.

12. The historical background of this area of the law was examined in the consultation paper. Also, the paper addressed not only the conditional fee agreements which are more prevalent in jurisdictions such as the UK, Australia and New Zealand but also contingency fees which are more familiar to Canada and to the USA.

13. In the paper the Commission stated that, in providing legislative intervention as requested by the courts, the questions which the Commission believed should be considered in the regulation of such agreements include the following-

(a) what are the measures which should be provided to protect the interests of clients?
(b) should the Cayman Islands follow the path of the UK and Canada and introduce the US type contingency fee agreements?
(c) should third party funding form part of this reform?
(d) should the court be given oversight of these agreements or could there be a system of review by legal associations similar to South Africa?
(e) how should success fees in conditional fee agreements be regulated?
(f) what are the types of action or proceedings to which such agreements should be applicable?
(g) should there be cooling-off periods provided during which a client can cancel the contract?

14. The paper also briefly addressed other types of litigation funding such as before-the-event insurance, after-the-event insurance and litigation funding agreements.

15. As conditional fee agreements are already in use in the Islands, the object of the review was primarily one of codification.

16. The 2015 Bill and discussion paper were published generally but were also sent to the legal associations and the judiciary. The deadline for comments was 31 March, 2016. There were only two responders to the Bill, a local law firm and an overseas firm. While two representatives

from the legal associations had indicated verbally that they would be responding to the review on behalf of the legal associations they did not do so. There was interest from overseas lawyers but no written responses were submitted. It is noted however that the two firms supported the regulation of such type of legal funding and we were advised that there could be interest in having similar legislation in Bermuda.

17. After a change in composition of the Commission in June 2016 the new members, with their expertise in this area, gave their contributions which were incorporated into the final Private Funding of Legal Services Bill ("the 2017 Bill") and the Private Funding of Legal Services Regulations. The draft legislation was appended to a Final Report which was submitted to the Attorney General on 3rd January, 2018.

18. However, prior to that, in late December 2017, the Users Committee of the Financial Services Division of the Grand Court (the "FSD Users Committee") wrote to the Commission, stating that the Committee had not been consulted on the 2017 Bill. The Discussion Paper had in fact been sent, in accordance with the practice of the Commission, to the Chief Justice and the judges of the Grand Court, as well as to the legal associations (being, at the time, the Cayman Islands law Society and the Caymanian Bar association), as part of the Commission's consultation process prior to the preparation of a final report.

19. Notwithstanding, following the request of the FSD Users Committee, in January 2018, the Commission provided copies of the interim final report, together with the draft legislation, as it stood at the time, to the judiciary and the FSD Users Committee, for further consideration and comment. In September 2018 the Committee received two submissions from the legal associations, as they then were, one from the Cayman Islands Law Society (**CILS**), and the other from the Caymanian Bar Association (**CBA**).

20. Following a meeting with representatives of the legal associations, after receiving their submissions, the Commission again, in November 2018, sent the Discussion Paper and draft legislation to the judiciary for further comment, if deemed necessary. No further comment was received.

The CILS and the CBA subsequently merged to establish the Cayman Islands Legal Practitioners Association

SUMMARY OF THE PRIVATE FUNDING OF LITIGATION BILL, 2015

21. The 2015 Bill which was submitted for public comment with the discussion paper, sought to deal with the regulation of conditional and contingency fee agreements and, in drafting the legislation, the Commission was guided by the questions posed in the discussion paper.

22. The main precedents used in the preparation of the Bill were the Ontario Solicitors Act, the UK Court and Legal Services Act and the Contingency Fee Act of South Africa. The Bill provides for contingency fee agreements which comprise the US style agreement as well as the conditional fee style agreement with the success fee. Also provided for is third party litigation funding. It was proposed under the Bill that the Grand Court will be able to review such agreements upon application by the attorney and the client.

23. The 2015 Bill provided in clause 5 for the form and content of an agreement. In accordance with that clause, all such agreements must be in writing, be signed by the client or his representative such as a guardian or trustee where that is applicable and by the relevant attorney-at-law and must state the following-

(a) the proceedings to which the agreement relates;
(b) that before the agreement was entered into, the client-
    (i) was advised of any other ways of financing the litigation and of their respective implications;
    (ii) was informed of the normal rule that in the event of the client being unsuccessful in the proceedings, the client may be liable to pay the taxed party and party costs of the client's opponent in the proceedings; and
    (iii) understood the meaning and purport of the agreement;
(c) what will be regarded by the parties to the agreement as constituting success or partial success;
(d) the circumstances in which the fees and disbursements of the attorney-at-law relating to the matter are payable;
(e) the amount which will be due, and the consequences which will follow, in the event of the partial success in the proceedings, and in the event of the premature termination for any reason of the agreement;
(f) either the amounts payable or the method to be used in calculating the amounts payable;
(g) the manner in which disbursements made or incurred by the attorney-at-law on behalf of the client shall be dealt with;
(h) subject to subsection (5), that the client will have a period of fourteen days, calculated from the date of the agreement, during which the client will have the right to withdraw from the agreement by giving notice to the attorney-at-law in writing; and
(i) the manner in which any amendment or other agreements ancillary to that agreement will be dealt with.

Ante para. 2

24. The Bill also proposed the abolition of the torts and offences of maintenance and champerty using the approach taken in several jurisdictions. While the offences and torts would be abolished the Bill provided that the abolition of criminal and civil liability under this Law for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

RESPONSES TO THE REVIEW

25. This review was started because of the calls of the judiciary for regulation of the use of conditional fee agreements by legal practitioners, so it would have been instructive to have received feedback from the judiciary and the legal associations.

26. A local law firm welcomed the legislation and agreed that the legislation would enable persons "to access effective legal representation without overburdening the legal aid system". The detailed response from that firm related to the provisions of the 2015 Bill. The main points raised were as follows-

(a) There should be no need for the legislation to mandate that an attorney needs to undertake the exercise of assessing whether there is a reasonable prospect of success before entering into a contingency fee agreement. According to the firm, this could create a loophole for a client to maneuver his way out of a contract if the attorney decided to act in relation to a client's case which the attorney thought was likely to be unsuccessful but turned out in the client's favour.
(b) Contingency fee agreements should be permitted even where proceedings have not been initiated.
(c) What are the powers of the court in assessing a contingency fee agreement?
(d) Under litigation funding agreements, the sum to be paid by the client should extend beyond an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services and should take into account the risk the funder takes on, the amount of money being borrowed, the length of the time required for the repayment of the money, among other factors.

27. The overseas firm which responded to the review dealt with litigation funding. The firm was of the view that the Islands should move completely towards full acceptance of litigation finance. They further opined that such type of funding did not require regulation and noted that "(adopting) an unduly regulatory or interventionist approach to third party funding will create a disinclination to do business in the Cayman Islands.".

28. The Commissioners were in agreement with the overseas firm regarding the regulation of litigation funding and was of the view that the UK approach of self regulation by way of a Code was all that was required.

Embracery would remain an offence
Clause 20(2)
Higgs and Johnson
Burford

Submissions by the CILS

29. The CILS paper agrees with the Commission that the offences and torts of champerty and maintenance should be abolished. The CILS also agrees, as proposed in the draft legislation, that neither contingency fee agreements (either based on a success fee or a percentage of the amount or value recovered), nor litigation funding agreements, should be permitted for the funding of the fees and costs of criminal or family proceedings.

Sophisticated clients in commercial cases

30. The paper suggests that "*sophisticated clients in commercial cases"* should be free to agree to terms of engagement and funding, subject only to restrictions necessary to protect the proper administration of justice. The restrictions proposed are-

(a) There should be an upper limit on the total of the attorney's fees and the amount payable under any funding arrangement, such that they do not exceed one third of the overall recoveries or damages;

(b) The client must always have overall control of the litigation and have final say in settlement discussions;

(c) Litigation funders (but not attorneys) should be subject to the court's jurisdiction to make costs orders against third parties in appropriate cases, possibly limited to the level of funding.

Personal injury and medical negligence claims

31. With respect to personal injury and medical negligence claims, the CILS paper raises "*serious objections"* to any form of alternative fee agreement which could have the result that the client does not receive the full amount of his or her costs of future care, and "*less fundamental objections"* to arrangements which would reduce the amount received by the client for pain and suffering and loss of amenities, past financial losses and future loss of earnings.

32. The CILS paper proposes that the already existing legal aid system should continue to be the source of funding for meritorious personal injury and medical negligence claims by impecunious litigants.

33. The paper concludes that if alternative fee arrangements and litigation funding agreements are to be permitted for personal injury and medical negligence cases, this should be on the terms that-

(a) Agreements which entitle the attorney to receive a share of the overall award recovered are not permitted;

(b) The attorney’s uplift on a conditional fee agreement is limited to 100%, and the percentage uplift must be purely risk based;

(c) The plaintiff should not be entitled to recover the cost of taking out after the event ("ATE") insurance cover or litigation funding as part of the recoverable costs of the action. The plaintiff in such cases should however have the benefit of "Qualified One-Way Costs Shifting" (QOWCS), whereby,

(i) the defendant pays the plaintiff's costs if the defendant loses;

(ii) the plaintiff does not have to pay the defendant's costs if the plaintiff loses; but

(iii) if the defendant makes a settlement offer which is less than the plaintiff recovers in a judgment, the plaintiff will have to pay the defendant's costs from the date after the settlement offer was made, but with the plaintiff's liability to pay being capped by reference to the amount of the plaintiff's damages recovered.

(d) All such agreements must be in writing, signed by the client and contain the following elements-

(i) The risk calculation and its effect on the success fee set out in plain English.

(ii) The effect of the success fee on the damages expected to be recovered by the client set out in plain English.

(iii) Confirmation that before the conditional fee agreement was concluded, the attorney gave the client a full explanation of the alternatives to proceeding in that way and that the client wishes to proceed with the conditional fee agreement nonetheless.

(iv) An explanation of the client's right to apply to the court to review the conditional fee agreement.

(v) An explanation of the adverse costs rule in plain English together with an explanation of ATE insurance and in any case where ATE is not taken out, an explanation of why not.

(vi) The agreement should be open to challenge by the client for up to one year after performance on the basis that the risk assessment is unfair or unreasonable.

Other types of legal claims

34. It is presumed that under this category the CILS paper is referring to claims other than personal injury and medical negligence claims, and claims other than those brought by

sophisticated litigants in large commercial claims. The CILS paper proposes that only conditional fees, that is, those permitting an uplift of the usual fee, but not those which are damages based, ought to be permitted but without QOWCS, and that third party litigation funding should be permitted subject to the same restrictions as those proposed for sophisticated litigants.

Submissions by the CBA

35. The CBA paper states as its "*starting point*", "*the general undesirability*" of third parties and attorneys having an economic interest in the outcome of litigation, and expresses the view that "*there must be compelling public policy reasons to override these presumptions*." By way of further general comment the paper states that the Commission's proposals are being made "*without a proper comprehensive survey, statistical or otherwise, as to the current position and how (or even if) the current system falls short.*"

36. The CBA paper also agrees that alternative fee agreements and litigation funding agreements should not be permitted to fund family proceedings. As to commercial proceedings, the paper states that there are no access to justice issues regarding these claims, save in the case of claims by companies in liquidation.

37. The CBA paper states that no case has been made for alternative fee agreements to be allowed to fund personal injury and medical negligence claims. Following is a summary of the views expressed in the paper on litigation funding, (damages based) contingency fee agreements, and (uplift/success fee based) conditional fee agreements.

Third Party Litigation Funding

38. Based on an assertion that third party litigation funding already exists, the CBA paper proposes that such agreements should only be allowed on a case by case basis, subject to an application to, and approval by a court, adopting the considerations set out at paragraph 45 of the judgment of Mr Justice Segal in *The Trustee v The Funder* (unreported, 26 July 2018). Those considerations are-

(a) the extent to which the funder controls the litigation;

(b) the ability of the funder to terminate the funding agreement at will or without reasonable cause;

(c) the level of communication between the funded party and the attorney;

(d) the prejudice likely to be suffered by a defendant if the claim fails;

(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 or is regulated.

39. The CBA paper proposes that, in any event, access to litigation funding should be limited to cases in the FSD, and that litigation funders should be subject to adverse costs orders.

Contingency fee agreements

40. With respect to damages based contingency fee agreements, the CBA paper states that there is no real demand for such agreements to be permitted, and suggests that there are public policy reasons relating to conflicts of interest which weigh against such agreements being permitted.

Conditional fee agreements

41. The CBA paper suggests that these agreements should only be permitted to fund claims by insolvent companies in liquidation, stating, "*We doubt there will be many if any cases in which a party other than an insolvent is ineligible for legal aid or unable to afford litigation*."

Discussion of the legal associations' submissions

42. Whilst starting from the position that the offences and torts of champerty and maintenance should be abolished, and expressing the view that consumers of legal services should be free to enter alternative fee agreements and litigation funding arrangements, the CILS paper proposes an approach which would result in different rules being applied based on the nature of the claimants and the types of claims.

43. The Commission does not accept as valid the proposed distinction between "*sophisticated clients*" in commercial cases and other parties maintaining other types of claims, as proposed in the CILS paper. There is, in the opinion of the Commission, no good reason for parties to litigation which quite likely have access to greater means, and who commence proceedings which, in the main, arise out of some type of commercial contractual relationship, should have access to forms of litigation funding arrangements which are not available to other litigants. No such reason was provided in the CILS paper.

44. The proposal is not supported by the comprehensive review done by Lord Justice Jackson in his Final Report in 2009, based on the experience in England for the first nine years after conditional fee agreements were first permitted. There is no reason to suggest that litigants and attorneys in the Cayman Islands would behave so differently than those in England such as to warrant making access to certain forms of litigation funding available to some litigants and not to others. The proposal is also not supported by the approach taken by the Cayman Islands courts which have approved alternative funding arrangements, both in respect of parties in large commercial disputes[11] and in respect of claims by for damages for personal injury by parties.[12]

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[11] (*Quyum v Hexagon Trust Company (Cayman Islands) Limited* 2002 CILR 161; *Re DD Growth Premium 2X Fund (in Official Liquidation)* [2013] (2) CILR 361; *ICP Strategic Credit Income Fund Ltd* [2014] 1 CILR 314; *A Company v A Funder* (unreported) 23 November 2017; *Re Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation),* (unreported), 31 October 2018) and in respect of claims by for damages for personal injury by parties (*Latoya Barrett v the Attorney General* [2012] 1 CILR 127; *Bennett v The Attorney General* [2010 (1) CILR 478]).

45. The Commission's view, as expressed in the Discussion Paper, and as evident from the draft Bill, is that all parties to litigation should have access to all permitted forms of alternative litigation funding arrangements, subject to such limitations and regulations prescribed.

Personal injury and medical negligence cases

46. The Commission, in the Discussion Paper, reviewed and considered a number of arguments put forward in favour of and against contingency fee agreements, many of which have been raised specifically in relation to personal injury and medical negligence cases. The Commission continues to be of the view that, consistent with the position reached in Lord Justice Jackson's Final Report, the arguments in favour of making alternative funding arrangements available for all civil disputes, save for family disputes, outweigh the arguments against. In the Commission's view, the safeguards proposed in the draft Bill and Regulations, based on the Ontario Model, should be sufficient to address most, if not all, of the concerns raised, mainly in relation to relatively unsophisticated claimants in personal injury and medical negligence cases, who, in the main, did not place themselves in the position which gave rise to the claim.

47. The Commission does not support the argument made in the CILS paper, and to be implied from the CBA paper, that it would be preferable that personal injury and medical negligence claims be funded by the legal aid system. First, the CILS paper acknowledges that a relatively low income threshold is used in the means test for legal aid entitlement, which means that potentially, there are a number of litigants who will not qualify for legal aid, but who would only be able to fund their personal injury claim, if not funded in some way by the attorney deferring payment of the fees, by placing their personal assets at risk. Further, the Commission can see no good reason why the burden of the costs should be shifted to the public from the party who is likely to benefit from the claim, even if the amount recovered is less as a result of the payment of the enhanced legal fees or a percentage of the damages.

48. The Commission accepts that there is some merit in introducing Qualified One Way Costs Shifting for personal injury/medical negligence claims, as well as for claims for judicial review, as a means of mitigating the impact of a potential adverse costs order, which may act as a deterrent to parties who are contemplating bring these types of claims.

49. As stated above, under a QOWCS rule, the plaintiff pays no costs to the defendant if the claim is unsuccessful; the defendant pays the plaintiff's costs if the claim is successful, save where the defendant makes a pre-trial offer of settlement which is not accepted by the plaintiff who ultimately recovers less at trial than the amount offered. This can be justified on the basis that, as is very often the case, the successful plaintiff did not place himself in the situation which ultimately resulted in the claim, unlike litigants in commercial matters. It is arguable that such a power already exists under section 24(3) of the Judicature Law, which gives the Grand Court a broad discretion with respect to costs. It may however be a matter for the Grand Court Rules

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[12] (*Latoya Barrett v the Attorney General* [2012] 1 CILR 127; *Bennett v The Attorney General* [2010 (1) CILR 478]).

Committee, exercising its rule making power under section 19 of the Grand Court Law, to create a specific exception or variation of the usual rule that costs should follow the event.

Third Party Litigation Funding

50. The Commission has not proposed any specific set of regulations governing third party litigation funding. This follows the position adopted in the England based on Lord Justice Jackson's Final Report which favours self-regulation over prescribed regulation, at least until the market for private litigation funding becomes better developed.

51. The Commission continues to be of the view that no regulations for third party litigation funding should be prescribed at this time. The market for private litigation funding in the Cayman Islands is at the moment completely undeveloped, in part due to the possibility (even if remote) of criminal or tortious liability for champerty and maintenance. In England, third party litigation funders are regulated by a voluntary code of conduct drafted by the Civil Justice Council, an agency of the UK's Ministry of Justice, and administered by the Association of Litigation Funders. There are no comparable agencies in the Cayman Islands.

52. Further, it would not be surprising, as appears to have been the case to date, that most third party litigation funders who seek to fund litigation costs in the Cayman Islands are based outside the jurisdiction. There is no reason to limit the sources of funding only to funders from the United Kingdom or to prescribe any restrictions which may have the effect of placing the Cayman Islands at a disadvantage in the eyes of potential litigants seeking a forum for the resolution of their disputes.

53. Given the nature of the litigation funding business, it is not foreseen that potential funders would likely be interested in funding any cases other than high value commercial cases. Such parties should be allowed to make their own bargains, based on appropriate legal advice. Such advice would no doubt highlight the jurisdiction of the Cayman Islands court to control its procedure and to prevent abuse of process. This power may well be exercised to prevent third parties from improperly seeking to control or influence the outcome of litigation, even in the face of the proposed abolition of champerty and maintenance.

54. As such, there is no perceived need at this time to limit the fees being charged or the measure of compensation payable to litigation funders. The Grand Court already has the power, under section 24(3) of the Judicature Law, to make adverse costs orders against non-parties, including, in time, third litigation funders: see *A Company v A Funder (supra)*, para 45(a).

55. The matters which Mr Justice Segal, in *A Company v A Funder*, considered to be relevant when a court considers whether to approve a litigation funding agreement, must be viewed in light of the absence of any statutory framework which defines the policy towards such agreements. In any event, the judge in that case, as have others before him, seemed hesitant to prescribe policy by judicial edict.

56. Hopefully the adoption of the draft Bill will create the basic framework which can then be developed over time. The framework may, in time, through regulations, make prescriptions consistent with the principles expressed by Justice Segal.

FINAL RECOMMENDATIONS

57. The 2015 Bill was substantially amended after the public review had concluded. The Commissioners took into account the responses to the review and had many discussions on the final Bill. It was also agreed to prepare regulations to accompany the Bill. The Private Funding of Legal Services Bill, 2017 and the Private Funding of Legal Services Regulations, 2017 were submitted to the Attorney General in January 2018. They are now renamed the Private Funding of Litigation Bill, 2019 and the Private Funding of Litigation Regulations, 2019 and are contained in Appendix A and B respectively to this report.

58. The Commissioners all preferred the legislation of Ontario as the main precedent and endorsed the views of Lord Justice Jackson in his review of conditional fees in the UK in 2009. Lord Justice Jackson had recommended in that review that-

> "Having weighed up the conflicting arguments, I conclude that both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients on the Ontario model. In other words, costs shifting is effected on a conventional basis and in so far as the contingency fee exceeds what would be chargeable under a normal fee agreement, that is borne by the successful litigant.".

59. Lord Justice Jackson had noted in relation to contingency fee agreements that "permitting the use of contingency fee agreements increases the types of litigation funding available to litigants, which should thereby increase access to justice". He opined in his analysis of conditional fee agreements that-

> "Although many people formerly regarded it as an anathema for lawyers to have a financial stake in the outcome of litigation which they were conducting, this is no longer the case. In the course of the Costs Review I have encountered no tenable arguments for returning to the position which existed before style 1 CFAs were permitted. In my view, there can be no objection in principle to lawyers agreeing to forego or reduce their fees if a case is lost. Nor can there be any objection to clients paying something extra in successful cases as compensation for the risks undertaken by their lawyers, provided that the extra payment is reasonable. Therefore I do not recommend that the clock should be put back, so as to prohibit "no win, no fee" agreements. Nor do I recommend any ban upon style 1 CFAs, which remain perfectly lawful.".

Changes to the 2015 Bill

60. The 2019 Bill (previously the 2017 Bill) which is contained in Appendix A is the result of substantial consideration by the Commissioners and it changed several provisions of the 2015

Review of Civil Litigation Costs, Final Report", 2009
See para 52 of discussion paper
Para. 1. 8 of report
Original conditional fee agreements
The original conditional fee agreements

Bill while retaining some fundamental ones. The changes in, and main matters of, the legislation are set out below.

Contingency fees

61. The review relates in part to the regulation of conditional fees which are similar to those first used in the UK. However, the Commission agrees with the contention that if conditional fee agreements can be used there could be no valid argument to exclude the US type contingency fee agreement. As the latter type of agreement is one with which most persons are familiar the Commission recommends the use of the term "contingency fee agreement". The 2019 Bill therefore seeks to regulate contingency fee agreements which is defined to encompass both conditional and contingency fees. The 2019 Bill provides in clause 3(1) that-

> " (1) Subject to subsection (2), an attorney-at-law may, enter into a contingency fee agreement with a client in which it is agreed that the remuneration paid to the attorney-at-law for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which services are provided.".

62. Clause 3 then goes to on to delimit the proceedings to which contingency fee agreements will relate and provides as follows-

> " (2) An attorney-at-law shall not enter into a contingency fee agreement if the attorney-at-law is retained in respect of a proceeding under the Penal Code (2013 Revision) or any other criminal or quasi-criminal proceeding.
>
> (3) An attorney-at-law shall not enter into a contingency fee agreement if the attorney-at-law is retained in respect of services relating to the care of a child or any order under the Children Law (2012 Revision) but may, with the approval of the court, enter into a contingency fee agreement for services relating to a matrimonial financial dispute which does not involve the care of a child.".

63. Under the 2015 Bill it had been provided that contingency funding would not be available in proceedings relating to family law matters. Family law matters were defined to include matters arising under the following legislation -

(a) the Adoption of Children Law (2003 Revision);
(b) the Affiliation Law (1995 Revision);
(c) the Children Law (2012 Revision);
(d) the Maintenance Law (1996 Revision); and
(e) the Matrimonial Causes Law (2005 Revision).

64. As noted earlier in this report the provision was based on the long held view and on legal provisions in other jurisdictions that the policy of excluding contingency fees is based on "the State's strong interest in promoting and preserving marriage, which is supposed to be served by prohibiting attorneys from taking divorce cases on contingencies, thus preventing counsel from

"promoting divorce" and "hindering reconciliation" because of the attorney's (contingent) financial interest in the divorce proceedings.".

65. The Commissioners agreed with the exclusion of matrimonial proceedings relating to child care, custody matters and matters with respect to parental contact or access to a child. However they were of the view that the question is whether there are matters which may arise from matrimonial proceedings that perhaps may be amenable to a contingency fee agreement. It was decided to provide as in clause 3(3) that in relation to any family law dispute which does not involve the care of a child, a contingency agreement may be entered into, subject to the prior approval of the court. The Commission could see no reason why, if there are no children, a spouse wanting a substantial lump sum should not be permitted to enter into a contingency fee agreement with his or her attorney.

66. With respect to the exclusion of criminal or quasi criminal proceedings this is in keeping with legislation in other jurisdictions such as the UK and Canada and continues that the long established public policy that third parties should not be able to profit from defending or assisting in the defence of persons charged with crimes or quasi- crimes.

"Family law and contingency fees; time to reconsider?" by Marshal S.Willick, Esq.

Provision of legal services

67. In regards to the definition of "legal services" now contained in the long title, the Commission agreed to define "legal services" as follows-

> " "legal services" means any advice or representation provided by an attorney-at-law to a client in proceedings, in anticipation or in contemplation of proceedings;".

69. This definition was inserted to ensure that the legislation was clear that the funding under the legislation was available not only for persons who are conducting proceedings but who are contemplating bringing proceedings and where deliberations or meetings culminate in an agreement prior to court action.

Form of a contingency fee agreement

70. Clause 5 of the 2019 Bill sets out in detail the form and content of a contingency fee agreement. It was agreed however that with a mind to flexibility and the need to ensure that the form and content of contingency fee agreements could easily change with the evolution of the law that regulations would set out in greater detail such form and content.

71. Clause 5 of the Bill provides inter alia that a contingency fee agreement –

(a) shall be in writing;
(b) shall state the matters prescribed by this Law and the regulations; and
(c) shall be signed by -
  (i) the client concerned;
  (ii) the client's appointed guardian, a trustee or an attorney under a power of attorney; or
  (iii) if the client is not a natural person, by its authorised representative; and
  (iv) by the attorney-at-law representing such client.

72. The Regulations provide for the content of contingency fee agreements in regulations 4 and 5. Regulation 6 further provides that an attorney-at-law shall not include in a contingency fee agreement a provision that -

(a) requires the attorney-at-law's consent before a claim may be abandoned, discontinued or settled at the instructions of the client; or
(b) prevents the client from terminating the contingency fee agreement with the attorney-at-law or changing attorney-at-laws.

73. Such regulations and the 2019 Bill also provide for the maximum fees which may be charged in contingency fee agreements. Clause 4 of the 2019 Bill provides, inter alia, as follows-

> "(1) Subject to subsection (2), if a contingency fee agreement is an agreement under which the attorney-at-law is entitled to a success fee for any legal services rendered, the

success fee shall not exceed the normal fees of the attorney-at-law by more than one hundred per cent.

(2) In the case of claims sounding in money, the total of any such success fee payable by the client to the attorney-at-law, shall not exceed the prescribed percentage of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.".

(3) If a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceedings, the amount to be paid to the attorney-at-law shall not be more than the maximum percentage, if any, prescribed by regulations, of the amount or of the value of the property recovered in the action or proceeding, however the amount or property is recovered.".

74. It should be noted that notwithstanding the proposed provisions, an attorney-at-law may enter into a contingency fee agreement where the amount paid to the attorney-at-law is more than the prescribed maximum percentage of the amount or of the value of the property recovered in the action or proceeding or where the success fee exceeds either of the percentages set out in subsections (1) or (2) if, upon joint application of the attorney-at-law and the client, which application shall be brought within ninety days after the agreement is executed, the agreement is approved by the Grand Court.

75. The regulations set out the maximum percentage which may be charged under a contingency fee agreement. Regulation 8 (1) provides that in the case of claims sounding in money, the total of any success fee payable by the client to the attorney-at-law, shall not exceed the thirty-three point three per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

76. However if a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceedings, the amount to be paid to the attorney-at-law shall not exceed thirty-three point three per cent of the amount or of the value of the property recovered in the action or proceedings.

Abolition of maintenance and champerty

77. This 2019 Bill, like the 2015 Bill, would also abolish the torts and offences of maintenance and champerty using the approach taken in several jurisdictions. While the offences and torts would be abolished, the Bill provides that the abolition of criminal and civil liability under this legislation for maintenance and champerty will not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Embracery would remain an offence
Clause 20(2)

Litigation funding

78. As indicated earlier the Commissioners agreed with the recognition of litigation funding but also agreed with self-regulation similar to the UK via a Code of Conduct. The change to the 2015 Bill in this area is found in clause 16 (2) of the 2019 Bill which sets out different conditions for the operation of a litigation funding agreement. Thus clause 16 (2) provides that the following conditions are applicable to a litigation funding agreement –

(a) the agreement shall be in writing;
(b) the agreement shall comply with prescribed requirements, if any; and
(c) the sum to be paid by the client shall consist of either-
    (i) any costs payable to the client in respect of the proceedings to which the agreement relates, together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; or,
    (ii) a percentage of the amount or the value of the property recovered in the action or proceedings to which the agreement relates.

CONCLUSION

79. As indicated earlier in this Final report and in the discussion paper, the principal aim of this review was one of codification and indeed legalisation of conditional fee agreements in the Cayman Islands. Based on our research and developments in the UK we have taken the opportunity to recommend a contingency fee agreement which can take the form of either the UK style conditional fee agreement with the success fee or the US style contingency fee agreement with its "no win no fee" approach or a percentage of sums won by a party. The party and his attorney would be given flexibility in using this type of funding.

80. Notwithstanding the dearth of contributions by others approached by the Commission such as the judiciary, the legal associations and other persons in the legal fraternity, there have been several calls from the court and questions raised in the recent sitting of the Legislative Assembly regarding, the early enactment of regulation in this area. The Commission therefore looks forward to the early consideration and implementation of the Private Funding of Litigation Bill, 2019 and the accompanying regulations.

Thursday, September 12, 2019

See clause 16; a copy of the UK Code is annexed as Appendix C

APPENDIX A
PRIVATE FUNDING OF LITIGATION BILL, 2019

CAYMAN ISLANDS

PRIVATE FUNDING OF LITIGATION BILL, 2019

A BILL FOR A LAW TO PROVIDE FOR THE REGULATION OF PRIVATE FUNDING OF LITIGATION; AND FOR INCIDENTAL AND CONNECTED PURPOSES

PUBLISHING DETAILS

Sponsoring Ministry/Portfolio: Portfolio of Legal Affairs (PLA)

Memorandum of

OBJECTS AND REASONS

This Bill seeks to regulate contingency fee agreements and litigation funding agreements which provide an alternative way of funding litigation, especially litigation in injury cases and medical malpractice. It is proposed under the Bill that the Grand Court will be able to review such agreements upon application by an attorney-at-law and a client.

PART 1 - PRELIMINARY

Clause 1 contains the short title of the Bill and the commencement provisions.

Clause 2 contains the interpretation provisions.

PART 2 - CONTINGENCY FEE AGREEMENTS

Clause 3 defines a contingency fee agreement. Clause 3 also provides that contingency fee agreements cannot be entered into in relation to -

(a) a proceeding under the Penal Code (2019 Revision) or any other criminal or quasi-criminal proceeding; or

(b) legal services relating to the care of a child or any matter under the Children Law (2012 Revision).

However, an attorney-at-law, with the approval of the court, may enter into a contingency fee agreement for services relating to a matrimonial financial dispute which does not involve the care of a child.

Clause 4 sets out the conditions which are applicable to contingency fee agreements. For example, if a contingency fee agreement is an agreement under which the attorney-at-law is entitled to a success fee for any legal services rendered, the success fee shall not exceed the normal fees of the attorney-at-law by more than one hundred per cent. However, the attorney-at-law and the client can apply to the court to seek an exemption from that limit.

Clause 5 provides, among other things, that a contingency fee agreement shall be in writing and shall be signed by the attorney-at-law and the client or by an authorised person on behalf of the client. A contingency fee agreement must also state certain prescribed matters.

Clause 6 deals with awards of costs and how such awards affect contingency fee agreements.

Clause 7 prohibits an attorney-at-law who is a party to a contingency fee agreement from claiming more fees than the contingency fee agreement provides unless such extra fees are expressly permitted by the contingency fee agreement.

Clause 8 provides that any agreement which seeks to relieve an attorney-at-law from negligence or from liability for any action for which the attorney-at-law would otherwise be liable as an attorney-at-law is void.

Clause 9 provides that no action may be brought upon any contingency fee agreement but an application can be made to the court to determine the validity or effect of the contingency fee agreement and to set aside or enforce the contingency fee agreement.

Clause 10 provides for the enforcement of a contingency fee agreement upon a successful application under clause 9.

Clause 11 provides for the reopening of a contingency fee agreement upon application by a person who has made all payments under the contingency fee agreement if it appears to the court that the special circumstances of the case require the contingency fee agreement to be reopened.

Clause 12 provides that the Clerk of the Court, before payment under a contingency fee agreement, must examine such contingency fee agreement where the client is in a fiduciary position such as a guardian, attorney or trustee under a deed or will.

Clause 13 provides that, if the client pays the whole or any part of any amount due under a contingency fee agreement without the previous allowance of the Clerk of the Court under clause 12 or the direction of the court, the client may be directed by the court to account to the person whose estate or property is charged with the amount paid or any part of it for the amount so charged; and the attorney-at-law who accepts the payment may be ordered by the court, in certain circumstances, to refund the amount received by the attorney-at-law.

Clause 14 prohibits an attorney-law from purchasing all or any part of a client's interest in an action or proceedings which the attorney-law intends to bring or maintain on behalf of the client.

Clause 15 provides that except as otherwise provided by the legislation a bill of an attorney-at-law arising under a contingency fee agreement is not liable to taxation by the court.

PART 3 - LITIGATION FUNDING AGREEMENTS

Clause 16 provides for litigation funding agreements which are defined as agreements -

(a) under which a funder agrees to fund, in whole or in part, the provision of legal services to another person ("a client") by an attorney-at-law;

(b) which relate to the provision of legal services; and

(c) under which the client agrees to pay a sum to the funder in specified circumstances.

PART 4 - GENERAL

Clause 17 repeals any distinct offence under the common law of maintenance, including champerty. The clause also makes it clear that embracery is not abolished.

Clause 18 abolishes the tort of maintenance and champerty but indicates that this clause does not affect contracts which are to be treated as contrary to public policy or otherwise illegal.

Clause 19 provides for the making of regulations relating to litigation funding agreements and contingency fee agreements by the Cabinet after consultation with the Chief Justice and the legal association. The clause also provides that the Rules Committee of the Grand Court may make rules of court to give effect to the legislation.

CAYMAN ISLANDS

PRIVATE FUNDING OF LITIGATION BILL, 2019

Arrangement of Clauses

Clause Page

PART 1 - PRELIMINARY

PART 2 – CONTINGENCY FEE AGREEMENTS

PART 3 – LITIGATING FUNDING AGREEMENTS

PART 4 - GENERAL

CAYMAN ISLANDS

PRIVATE FUNDING OF LITIGATION BILL, 2019

A BILL FOR A LAW TO PROVIDE FOR THE REGULATION OF PRIVATE FUNDING OF LITIGATION; AND FOR INCIDENTAL AND CONNECTED PURPOSES

ENACTED by the Legislature of the Cayman Islands.

PART 1 - PRELIMINARY

Short title and commencement

1. (1) This Law may be cited as the Private Funding of Litigation Law, 2019.

(2) This Law shall come into force on such date as may be appointed by Order made by the Cabinet, and different dates may be appointed for different provisions of this Law and in relation to different matters.

Interpretation

2. In this Law —

"**Clerk of the Court**" means the officer appointed as such under section 7 of the *Grand Court Law (2015 Revision)*;

"**client**" includes a person who, as a principal or on behalf of another person, retains or employs or is about to retain or employ an attorney-at-law, and a person who is or may be liable to pay the bill of an attorney-at-law for any legal services;

"**contingency fee agreement**" means an agreement specified in section 3;

"**funder**" means a person who provides funding for legal services under a litigation funding agreement;

"**legal association**" means the Cayman Islands Legal Practitioners Association;

"**legal services**" means any advice or representation provided by an attorney-at-law to a client in proceedings, or in anticipation of or in contemplation of proceedings;

"**litigation funding agreement**" means an agreement specified in section 16;

"**normal fees**" in relation to work performed by an attorney-at-law in connection with proceedings, means the reasonable fees which may be charged by the attorney-at-law for such work, if such fees were taxed on the indemnity basis, in the absence of a contingency fee agreement;

"**proceedings**" means any proceedings in or before —

(a) any court; or

(b) any tribunal or functionary having the powers of a court, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorization for the performance of any act or the carrying on of any business or other activity,

and includes arbitration proceedings;

"**quasi-criminal proceeding**" means a proceeding dealing with a non-criminal offence that carries a penalty similar to that of a criminal offence, but which is subject to less complex court procedures than criminal offences, such as traffic and workplace health and safety offences; and

"**success fee**" means any fee under a contingency fee agreement which is higher than the normal fees of an attorney-at-law but does not include a percentage of the amount or of the value of property recovered in an action or proceedings.

PART 2 – CONTINGENCY FEE AGREEMENTS

Contingency fee agreements

3. (1) Subject to subsection (2), an attorney-at-law may enter into a contingency fee agreement with a client in which it is agreed that the remuneration paid to the attorney-at-law for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which the legal services are provided.

(2) An attorney-at-law shall not enter into a contingency fee agreement if the attorney-at-law is retained in respect of a proceeding under the *Penal Code (2019 Revision)* or any other criminal or quasi-criminal proceeding.

(3) An attorney-at-law shall not enter into a contingency fee agreement under which the attorney-at-law is retained in respect of services relating to the care of a child or any order under the *Children Law (2012 Revision)* but may, with the approval of the court, enter into a contingency fee agreement for the provision of legal services relating to a matrimonial financial dispute which does not involve the care of a child.

Conditions applicable to contingency fee agreements

4. (1) Subject to subsection (2), where a contingency fee agreement provides that an attorney-at-law is entitled to a success fee, the success fee shall not exceed the normal fees of the attorney-at-law by more than one hundred per cent.

(2) In the case of claims sounding in money, the total of any success fee payable by a client to an attorney-at-law shall not exceed the prescribed percentage of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for the purposes of calculating any excess, include any costs.

(3) Where a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceedings, the amount to be paid to the attorney-at-law shall not be more than the maximum percentage, if any, prescribed by regulations, of the amount or of the value of the property recovered in the action or proceedings, however the amount or property is recovered.

(4) Notwithstanding subsections (1), (2) or (3), an attorney-at-law may enter into a contingency fee agreement where —

(a) the amount paid to the attorney-at-law is more than the prescribed maximum percentage of the amount or of the value of the property recovered in the action or proceedings; or

(b) the success fee exceeds either of the percentages set out in subsections (1) or (2),

and where a joint application by the attorney-at-law and the client is brought within ninety days of the execution of the contingency fee agreement and the contingency fee agreement is approved by the Grand Court.

(5) In determining whether to grant an application under subsection (4), the Grand Court shall consider —

(a) the nature and complexity of the action or proceedings;

(b) the expense or risk involved in the action or proceedings; and

(c) any other factors as the Grand Court considers relevant.

(6) The Grand Court in determining an application under subsection (4) shall not approve a contingency fee which exceeds forty per cent of the total amount awarded, of any amount obtained by the client or of the value of any property recovered in the action or proceeding, however the amount or property is recovered.

(7) A contingency fee agreement shall not include in the fee payable to the attorney-at-law, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement, unless —

(a) within ninety days of the execution of the agreement, the attorney-at-law and client jointly apply to a judge of the Grand Court for approval to include the costs or a proportion of the costs in the contingency fee agreement because of exceptional circumstances; and

(b) the judge is satisfied that exceptional circumstances apply and approves the inclusion of the costs or a proportion of the costs, subject to subsection (6).

(8) A contingency fee agreement that is subject to approval under subsection (4) or (7) is not enforceable unless it is so approved.

Form and content of contingency fee agreements

5. (1) A contingency fee agreement —

(a) shall be in writing; and

(b) shall be signed by —

(i) the client concerned;

(ii) the client's appointed guardian, a trustee or an attorney under a power of attorney; or

(iii) if the client is not a natural person, by the client's authorised representative, and

the attorney-at-law representing such client.

(2) Subject to subsection (3), a client shall have a period of fourteen days, calculated from the date a contingency fee agreement is executed, during which the client will have the right to withdraw from the contingency fee agreement by giving notice to the attorney-at-law in writing; and —

(a) the attorney-at-law shall advise the client in writing of this right of withdrawal prior to the execution of the contingency fee agreement; and

(b) the contingency fee agreement shall state that the client has such a right of withdrawal.

(3) In the event of withdrawal in accordance with subsection (2), the attorney-at-law shall be entitled to fees and disbursements in respect of any necessary or

essential work done to protect the interests of the client during such period, and the fees and disbursements shall be taxed on the indemnity basis if not agreed.

(4) A copy of a contingency fee agreement shall be delivered by the attorney-at-law to the client concerned upon the date on which the contingency fee agreement is signed.

(5) A contingency fee agreement which does not satisfy all of the conditions applicable to a contingency fee agreement by virtue of this section, section 3 and any regulations shall be unenforceable.

Agreement not to affect costs as between party and party

6. (1) A contingency fee agreement does not affect the amount, or any right or remedy for the recovery, of any costs recoverable from a client by any other person, or payable to a client by any other person, and any such other person may require costs payable or recoverable by the person to or from the client to be taxed in the ordinary manner, unless such person has agreed otherwise.

(2) Notwithstanding subsection (1), the client who has entered into the contingency fee agreement is not entitled to recover from any other person under any order for the payment of costs made in the proceedings to which the contingency fee agreement relates, any amount more than the amount payable by the client to the client's own attorney-at-law under the contingency fee agreement.

(3) In calculating the amount of costs for the purposes of making an award of costs, a court shall not reduce the amount of costs only because the client's attorney-at-law is being compensated in accordance with a contingency fee agreement.

Claims for additional remuneration excluded

7. A contingency fee agreement shall exclude any further claim of the attorney-at-law in respect of legal services except such further claims as are expressly permitted by the contingency fee agreement.

Agreements relieving attorney-at-law from liability for negligence void

8. (1) A provision in a contingency fee agreement that an attorney-at-law is not liable for negligence or that the attorney-at-law is relieved of any responsibility to which the attorney-at-law would otherwise be subject, is void.

(2) Subsection (1) does not prohibit an attorney-at-law who is employed in a master-servant relationship from being indemnified by the employer of the attorney-at-law for liabilities incurred as a consequence of professional negligence in the course of the employment.

Determination of disputes under the agreement

9. (1) Subject to subsection (2), no action shall be brought in respect of a contingency fee agreement.

(2) Where there is a question in respect of the validity or effect of a contingency fee agreement, the court in which the business or any part of the business was done, or if the business was not done in any court, the Grand Court, may, upon application by a person under subsection (3), enforce or set aside the contingency fee agreement.

(3) The following persons may make an application under subsection (2) —

(a) a person who is a party to the agreement;

(b) a person who is or is alleged to be liable to pay the fees or disbursements in respect of which the contingency fee agreement is made; or

(c) a person who is or claims to be entitled to be paid the fees or disbursements in respect of which the contingency fee agreement is made.

Enforcement of agreement

10. (1) Upon an application under section 9, where it appears to the court that the contingency fee agreement is fair and reasonable, the court may enforce the contingency fee agreement by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit.

(2) Where the terms of the contingency fee agreement are deemed by the court to be unfair or unreasonable, the contingency fee agreement or the part of the contingency fee agreement deemed unfair or unreasonable may be declared void, and the court may order that the contingency fee agreement or the part of the contingency fee agreement deemed unfair or unreasonable be cancelled and may direct the fees and disbursements incurred or chargeable in respect of the matters included therein to be taxed on the indemnity basis if not agreed.

Reopening of agreement

11. Where the amount agreed under a contingency fee agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay it, the Grand Court may, upon the application of the person who has paid it, where it appears to the Grand Court that special circumstances of the case require the contingency fee agreement to be reopened, the Grand Court shall reopen the contingency fee agreement and —

(a) shall order the fees, and disbursements to be taxed on the indemnity basis if not agreed; and

(b) may order the whole or any part of the amount received by the attorney-at-law to be repaid by the attorney-at-law on such terms and conditions as the Grand Court deems just.

Agreements made by client in fiduciary capacity

12. Where a contingency fee agreement is made by a client in the capacity of guardian, attorney or of trustee under a deed or will, or in the capacity of guardian of property that will be chargeable with the amount or any part of the amount payable under the contingency fee agreement, the contingency fee agreement shall, before payment, be laid by the client or the attorney-at-law before the Clerk of the Court, who shall examine the contingency fee agreement and may disallow any part of the contingency fee agreement or may require the direction of the court to be made thereon.

Client paying without approval to be liable to estate

13. (1) Where a client pays the whole or any part of the amount specified in section 12 without the previous allowance of the Clerk of the Court under section 12 or the direction of the court, the client may, where the court is of the view that the client had not exercised due care in ensuring compliance with section 12, be ordered to account to the person whose estate or property is charged with the amount paid or any part of it for the amount so charged.

(2) The attorney-at-law who accepts a payment in circumstances specified in subsection (1) may be ordered by the court to refund the amount received by the attorney-at-law where the court is of the view that the attorney-at-law has not exercised due care in ensuring compliance with section 12.

Purchase of interest prohibited

14. An attorney-at-law shall not enter into a contingency fee agreement by which the attorney-at-law purchases all or part of a client's interest in the action or other contentious proceeding that the attorney-at-law is to bring or maintain on the client's behalf.

Bills under agreement not liable to taxation

15. Except as otherwise provided in this Law, a bill of an attorney-at-law for the amount due under a contingency fee agreement is not subject to any taxation or to any provision of law respecting the signing and delivery of a bill of an attorney-at-law.

PART 3 – LITIGATION FUNDING AGREEMENTS

Litigation funding agreements

16. (1) A litigation funding agreement is an agreement —

(a) under which a funder agrees to fund in whole or in part the provision of legal services to another person ("a client") by an attorney-at-law;

(b) which relates to the provision of legal services; and

(c) under which the client agrees to pay a sum to the funder in specified circumstances.

(2) The following conditions are applicable to a litigation funding agreement —

(a) the agreement shall be in writing;

(b) the agreement shall comply with prescribed requirements, if any; and

(c) the sum to be paid by a client shall consist of —

(i) any costs payable to the client in respect of the proceedings to which the agreement relates, together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; or

(ii) a percentage of the amount or the value of the property recovered in the action or proceedings to which the agreement relates.

(3) The requirements which may be prescribed under subsection (2)(b) —

(a) include requirements for the funder to have provided prescribed information to the client before the litigation funding agreement is made; and

(b) may be different for different descriptions of litigation funding agreements.

PART 4 - GENERAL

Repeal of maintenance and champerty

17. (1) Any distinct offence under the common law of maintenance, including champerty, is repealed.

(2) For the avoidance of doubt, embracery is not repealed.

Civil rights in respect of maintenance and champerty

18. (1) A person shall not be liable in tort for the offence under the common law of maintenance or champerty, unless the cause of action accrued before the coming into force of this section.

(2) The abolition of criminal and civil liability under this Law for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Regulations

19. (1) The Cabinet, after consultation with the Chief Justice and the legal association, may make regulations providing for contingency fee agreements and litigation funding agreements.

(2) Regulations under subsection (1) may, among other things —

(a) provide for the form and content of a contingency fee agreement;

(b) provide for the maximum percentage of the amount or of the value of the property recovered that may be a contingency fee and may —

(i) set a scale for the maximum percentage that may be charged for a contingency fee based on factors such as the value of the recovery and the amount of time spent by the attorney-at-law; and

(ii) differentiate the maximum percentage that may be charged for a contingency fee based on factors such as the type of cause of action and the court in which the action is to be heard and distinguishing between causes of actions of the same type;

(c) impose duties on attorneys-at-law who enter into contingency fee agreements; and

(d) exempt persons, actions or proceedings or classes of persons, actions or proceedings from this Law, a regulation made under this section or any provision in a regulation.

(3) The Rules Committee of the Grand Court may also make such rules as are necessary in order to give effect to court procedure relating to this Law.

Passed by the Legislative Assembly the day of , 2019.

Speaker

Clerk of the Legislative Assembly

APPENDIX B
PRIVATE FUNDING OF LITIGATION REGULATIONS, 2019

CAYMAN ISLANDS

Private Funding of Litigation Law, 2019

PRIVATE FUNDING OF LITIGATION REGULATIONS, 2019

PUBLISHING DETAILS

CAYMAN ISLANDS

Private Funding of Litigation Law, 2019

PRIVATE FUNDING OF LITIGATION REGULATIONS, 2019

Arrangement of Regulations

CAYMAN ISLANDS

Private Funding of Litigation Law, 2019

PRIVATE FUNDING OF LITIGATION REGULATIONS, 2019

In exercise of the powers conferred by sections 16 and 19 of the Private Funding of Litigation Law, 2019 the Cabinet makes the following Regulations —

Citation

1. These Regulations may be cited as the Private Funding of Litigation Regulations, 2019.

Definitions

2. In these Regulations —

"**person under disability**" has the meaning assigned under Order 80, rule 1 of the *Rules of Court*; and

"**Rules of Court**" means the Rules of Court made under section 19 of the *Grand Court Law (2015 Revision)*.

Signing and dating contingency fee agreement

3. For the purposes of section 5 of the Law, a contingency fee agreement shall be entitled "Contingency Fee Retainer Agreement".

Contents of contingency fee agreements - general

4. An attorney-at-law who is a party to a contingency fee agreement shall ensure that the contingency fee agreement includes the following —

(a) the name, address and telephone number of the attorney-at-law and the client;

(b) a statement that indicates that before the contingency fee agreement was entered into, the client —

(i) was informed of the normal rule that, in the event of the client being unsuccessful in the proceedings, the client may be liable to pay the taxed or agreed costs of the client's opponent in the proceedings; and

(ii) understood the meaning and purport of the contingency fee agreement;

(c) a statement of the basic type and nature of the matter in respect of which the attorney-at-law is providing services to the client;

(d) a statement that indicates that —

(i) the client and the attorney-at-law discussed options for retaining the attorney-at-law other than by way of a contingency fee agreement, including retaining the attorney-at-law by way of an hourly-rate retainer;

(ii) the client was advised that hourly rates may vary among attorneys-at-law and that the client may consult with other attorneys-at-law to compare rates;

(iii) the client has chosen to retain the attorney-at-law by way of a contingency fee agreement; and

(iv) the client understands that all usual protections and controls on retainers between an attorney-at-law and client, as defined by the common law, apply to the contingency fee agreement;

(e) a statement that explains the contingency upon which the fee is to be paid to the attorney-at-law;

(f) a statement that explains what is to be be regarded by the parties to the contingency fee agreement as constituting success or partial success;

(g) a statement that sets out the method by which the fee is to be determined where the method of determination is as a percentage of the amount recovered;

(h) a statement that explains that for the purpose of calculating the fee, the amount to be recovered excludes any amount awarded or agreed to that is separately specified as an amount in respect of costs and disbursements;

(i) a simple example that shows how the contingency fee is calculated;

(j) a statement that outlines how the contingency fee is calculated, where recovery is by way of a structured settlement;

(k) a statement that informs the client of the client's right to ask the Grand Court to review and approve of the attorney-at-law's bill and that includes the applicable timelines for asking for the review;

(l) a statement that outlines when and how the client or the attorney-at-law may terminate the contingency fee agreement, the consequences of the termination for each of them and the manner in which the attorney-at-law's fee is to be determined in the event that the contingency fee agreement is terminated; and

(m) a statement that informs the client that the client retains the right to make all critical decisions regarding the conduct of the matter.

Contents of contingency fee agreements - litigious matters

5. In addition to the requirements set out in regulation 4, where an attorney-at-law is a party to a contingency fee agreement made in respect of a litigious matter, the attorney-at-law shall ensure that the agreement includes the following —

(a) a statement in respect of disbursements, payable on the attorney-at-law's fees, that indicates —

(i) whether the client is responsible for the payment of disbursements and, if the client is responsible for the payment of disbursements, a general description of disbursements likely to be incurred, other than relatively minor disbursements; and

(ii) that if the client is responsible for the payment of disbursements and the attorney-at-law pays the disbursements during the course of the matter, the attorney-at-law is entitled to be reimbursed for those payments, as a first charge on any funds received as a result of a judgment or settlement of the matter;

(b) a statement that explains costs and the awarding of costs;

(c) where the client is a plaintiff, a statement that indicates that the client agrees and directs that all funds claimed by the attorney-at-law for legal fees, costs, taxes and disbursements shall be paid to the attorney-at-law in trust from any judgment or settlement money; and

(d) where the client is a person under disability represented by a litigation guardian —

(i) a statement that the contingency fee agreement must be reviewed by a judge before the agreement is finalized or must be reviewed as part of the motion or application for approval of a settlement under Order 80, rule 11 of the *Rules of Court*;

(ii) a statement that the amount of the legal fees, costs and disbursements are subject to the approval of a judge when the judge reviews a settlement agreement under Order 80, rule 11 of the *Rules of Court*; and

(iii) a statement that any money payable to a person under disability under an order or settlement shall be paid into court unless a judge orders otherwise under Order 80, rule 11 of the *Rules of Court*.

Matters not to be included in contingency fee agreements

6. An attorney-at-law shall not include in a contingency fee agreement a provision that —

(a) requires the consent of the attorney-at-law before a claim may be abandoned, discontinued or settled at the instructions of the client; or

(b) prevents the client from terminating the contingency fee agreement with the attorney-at-law or changing attorneys-at-law.

Contingency fee agreement - person under disability

7. Where a person under disability who is represented by a litigation guardian seeks to enter into a contingency fee agreement with an attorney-at-law, the attorney-at-law shall —

(a) apply to a judge for approval of the contingency fee agreement before the contingency fee agreement is finalized; or

(b) include the contingency fee agreement as part of the motion or application for approval of a settlement under Order 80, rule 11 of the *Rules of Court*.

Maximum fees

8. (1) For the purposes of section 4(2) of the Law, in the case of claims sounding in money, the total of any success fee payable by the client to the attorney-at-law shall not exceed thirty-three point three per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs.

(2) For the purposes of section 4(3) of the Law, where a contingency fee agreement involves a percentage of the amount or of the value of the property recovered in an action or proceedings, the amount to be paid to the attorney-at-law shall not exceed thirty-three point three per cent of the amount or of the value of the property recovered in the action or proceedings.

Disbursements

9. (1) Where the client is responsible for the payment of disbursements under a contingency fee agreement, an attorney-at-law who pays disbursements during the course of the matter in respect of which legal services were provided shall be reimbursed for the disbursements from any funds received as a result of a judgment or settlement of the matter.

(2) Except as provided under section 30 of the *Legal Aid Law, 2015*, the amount to be reimbursed to the attorney-at-law under paragraph (1) is a first charge on the funds received as a result of the judgment or settlement.

Made in Cabinet the day of , 2019.

Clerk of the Cabinet