IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: 98 of 2018 (NSJ)

IN THE MATTER OF THE LITIGATION FUNDING

BETWEEN: **THE TRUSTEE** **PLAINTIFF**

AND: **THE FUNDER** **DEFENDANT**

RULING

Introduction

1. This is a note of my analysis of the issues arising on and the order I would make on the originating summons (the ***Originating Summons***) issued by the Trustee seeking a declaration in relation to a proposed litigation funding agreement to be entered into with a third-party funder who is made defendant to the Originating Summons (the ***Funder***).

2. The Originating Summons, in circumstances I describe below, was listed to be and was heard on Friday 1 June (while I was in London). I concluded and confirmed to Leading Counsel for the Trustee, that while I was satisfied that it was appropriate to grant the declaration sought by the Trustee (subject to certain amendments to the wording of the draft order submitted to me), since it was at least arguable that the Originating Summons did not involve an interlocutory application which could be disposed of by a Judge who was located outside the Cayman Islands it was preferable to make arrangements for the order to be made by a Judge who was physically present in the Islands. I explained that I would need to consider further what arrangements could and should be made to enable this to be done (and whether it was necessary for there to be a further hearing before another FSD Judge or before me when I next returned to the Islands). At the end of the hearing I indicated

that I would inform the parties (through the attorneys for the Trustee) as soon as I could of my conclusions. I also requested that a note of the hearing be prepared and that the note together with a revised draft of the order be filed for my review as soon as was convenient.

The Main Proceedings and the reasons for litigation funding

3. The Trustee is a trustee of a foreign trust (the ***Trust***) and a defendant to proceedings in this Court brought by parties claiming rights in respect of assets of the Trust (the ***Substantive Plaintiffs***).

4. The Trustee has concluded that it has no alternative to obtaining third-party litigation funding. Mr B (a member of the board of the Trust) in his affidavit in support of the Originating Summons explained that the Trustees' need for external litigation funding and why the Trustee has concluded that there is no better alternative in the present case. After having approached a number of litigation funding providers the Trustee decided that it should enter into a litigation funding agreement with the Funder. The litigation funding agreement would provide the Trustee with funding for the defence of the Main Proceedings as well as for other related proceedings in other jurisdictions. The Trustee is concerned that the litigation funding agreement could be treated as a matter of Cayman law as maintenance or champerty. Maintenance and champerty are both crimes and torts in the Cayman Islands. The Trustees therefore seek a declaration from the Court to the effect that the litigation funding agreement is not unlawful and that they are not:

> "*disentitled, including on the grounds of maintenance or champerty, from making use of funding provided pursuant to [the litigation funding agreement] ... As a source of funding in their capacity as defendants in [the Main Proceedings] (and/or any related litigation in the Cayman Islands).*"

The listing of the Originating Summons and the rules regulating hearings where the Judge is outside the Cayman Islands

5. The Originating Summons came to be listed in rather unusual circumstances. It was said to be urgent and it was initially assigned to me since it related to the Main Proceedings. I indicated before being aware of the nature of the application that I was in principle available to hear the application on 1 June. However, the listing was delayed due to a discussion between the attorneys for the Trustee and the FSD Registrar as to whether the Originating Summons was a financial services proceeding within GCR O.72 and whether it was to be commenced in the FSD or in the Civil Division.

6. That issue was referred to the Chief Justice who concluded on 30 May that:

"This is in reality an administrative action brought by the Trustee to seek the approval of the Court for entering into a Litigation Funding Agreement. Even if it is not brought under the Trust Law (and I think it should be) does not change the nature of what it is. It is covered by GCR O72 r. 1(2) (e) as an FSD Matter"

7. Accordingly, the Originating Summons proceeded as an FSD matter and was listed before me for a hearing on 1 June. I received the hearing bundle (including the skeleton argument filed on behalf of the Trustees) on 31 May. It was only after I had been able to read the Originating Summons and the evidence filed in support of the Originating Summons, together with Leading Counsel for the Trustee's skeleton argument, that the nature of the application became apparent and I became concerned that the application could not properly be characterised as an interlocutory application so that it was not properly one that I could dispose of while I was physically present in London. I concluded that rather than adjourn the hearing, which was said to be urgent and already set to take place the following day, I should raise the issue at the beginning of the hearing and hear Leading Counsel for the Trustee's submissions on it and then conclude how best to proceed.

8. This issue arises because of the terms of the applicable rules in the Grand Court Rules and the Practice Direction issued in connection therewith. As I explained in my Note of Ruling dated 26 September 2016 in *Palladyne v Upper Brook and others* (unreported) the effect of the applicable rules can be summarised as follows:

(a). the place of a *trial* of a cause or matter, or of any question or issue arising therein, must generally be the Law Courts in Cayman (see GCR O.33, r.1(1)).

(b). however, where there is a special reason for doing so the Court may order that the trial take place in another jurisdiction provided that the Secretary of State for Foreign and Commonwealth Affairs has issued a certificate (see GCR O.33 r.1(2)).

(c). but in an appropriate case a Judge may hear any *interlocutory application* where he is present by telephone or video-link (and whether he is physically in the Islands or outside the Cayman Islands) or at any place outside the Cayman Islands (see GCR O.32, r.28 as amended by the Grand Court (Amendment No. 2) Rules 2011 and Practice Direction No. 2/2012).

The basis and nature of the Originating Application

9. The Originating Summons has been issued as a separate proceeding independently of the Main Proceedings. The Funder is the defendant to the Originating Summons. The Originating Summons is described as an *ex-parte* summons.

10. During the hearing Leading Counsel for the Trustee confirmed that the Originating Summons was not in the nature of an application by the Trustee for directions qua trustee. The Trustee had applied to and obtained an order from the court which the Trustee regards as having the jurisdiction to supervise its conduct as trustees in relation to the Trust and the other related trusts (I refer to these other trusts as the ***Other Trusts***).

11. Leading Counsel for the Trustee, in response to a question from me, confirmed that the Originating Summons did not involve any consideration by this Court of whether the Trustee was properly exercising its powers or otherwise acting in accordance with applicable law and in the best interests of the potential beneficiaries of the Trust in entering into litigation funding in general and the litigation funding agreement with the Funder in particular (this was not an application to which GCR O.85 applied). These issues are of no concern and do not arise on this application. The only issue which arises on the Originating Application is whether the Trustee and the Funder in entering the litigation funding agreement would be committing the criminal offence or the tort of maintenance or champerty as a matter of Cayman law (this might be said to raise an issue as to whether the Originating Summons should in fact properly be treated as a financial services proceeding – however, the Chief Justice has decided that it can be and has allocated the matter to the FSD - even if there were a question as to whether the Originating Summons was a financial services proceeding requiring it to be commenced in the FSD it could be issued in the Civil Division and transferred to the FSD).

12. It seems to me that the Originating Summons constitutes a separate action and that the hearing is the trial of the action at which the Court is being asked to adjudicate on the final relief sought in the Originating Summons. The Originating Summons involves *inter-partes* proceedings between the Trustee and the Funder. It is a mis-description to label the Originating Summons an *ex parte* summons which entails an application for interim rather than final relief. The Originating Summons seeks a declaration in the terms I have described. At the hearing the Trustee seeks the making of the declaration. If the Court makes the declaration sought that is the end of the proceeding.

13. In these circumstances I do not consider that the Originating Summons can be properly characterised as an interlocutory application. Leading Counsel for the Trustee noted that the Originating Summons was closely connected with and could be said to be an application related to the Main Proceedings.

That is correct but not relevant. I think that for the purposes of interpreting the Grand Court Rules and Practice Direction No. 2/2012 the critical issue is whether the application to be heard will involve the final disposal of the relevant proceedings. In the present case a judgment on the Originating Summons will do so. I accept, as I said in my judgment in *Palladyne*, that there is room for debate over the treatment of applications which are closely related to other proceedings. That issue was relevant to applications for limited admissions for counsel in proceedings before the Grand Court and discussed in my ruling in *Palladyne*. I was not then satisfied, and remain unsatisfied, that a wide construction of the reference to interlocutory applications would be appropriate (and I would note that the connection and therefore the argument that they should be treated in substance as part of the main proceedings is stronger in the case of applications for limited admission than applications relating to the funding of one of the parties to the proceedings).

14. So it seems to me that this is an application that can and should only be disposed of by a Judge who is located in the Cayman Islands so that it will at least be necessary for the order to be made on the Originating Summons to be made by a Judge who is in the Islands.

The wider question – should the Court adjudicate on this type of application?

15. There is also a wider question as to whether it is appropriate for the Court to adjudicate on an application structured in this way, where it is in substance an uncontested *inter partes* application in which the defendant submits to and supports the order being sought by the plaintiffs and where the order sought is for the benefit and protection of both the plaintiffs and defendant. In *A Company v A Funder* (an unreported judgment of mine in FSD 68 of 2017, handed down on 23 November 2017) (***Re A Funder***) a similar application was made by a party who intended to issue proceedings in the Cayman Islands to enforce a foreign arbitration award and to apply for a freezing injunction, funded by litigation funding from a commercial funder. While, in the circumstances of that case, I made the order sought I referred to a number of concerns including the concern over what I labelled the "*artificiality of the procedural construct [that had been] used.*" (see *Re A Funder* at [3], [47] and [52]). I remain concerned that the Court is, as a matter of substance, being asked to provide an advisory opinion that will have little or only limited effect since the order made by the Court will not determine the issue of criminal liability or preclude a prosecution and will not bind the Substantive Plaintiffs, who will remain at liberty at any time in the Main Proceedings to assert, to the extent the point is relevant on any application relating to costs or the conduct of the Main Proceedings, that the litigation funding agreement constitutes unlawful maintenance or champerty. My own view is that, while the Court wishes to be of assistance to litigants or prospective litigants with a proper interest in

seeking relief and a real legal issue to raise, it would not be appropriate for the practice to develop whereby parties who are considering entering into a litigation funding arrangement regularly apply for a declaration in proceedings constituted in the manner adopted in *Re A Funder* and this case. I would hope that the views (subject to the substantial caveats) that I expressed in *Re A Funder* will allow parties to consider and obtain advice on their position and the risks they face and be sufficient until the issue arises in a contested *inter partes* at which point the Court can hear full argument and address the issues raised (and in which, if appropriate and as noted below, the Attorney General can participate).

16. I also said in *Re A Funder* (see [47]) that it seemed to me to be important, in view of the wider public policy issues involved, that the Attorney General should be notified of applications relating to third-party litigation funding which raised the issue of whether such funding was unlawful as maintenance or champerty under Cayman Islands law. The concern I have mentioned above is made more acute in the absence of any representations from the Attorney General (although I completely understand that the Attorney General is only likely to consider participating in contested *inter partes* proceedings in which the issues are raised). In the present case the Trustee followed my suggestion and notice of the application was given to the Attorney General originally on 24 May and subsequently in follow-up emails. The Attorney General's office confirmed to the attorneys for the Trustee shortly before the hearing, in an email dated 31 May, that:

> *"Having reviewed the papers for the funding application the attorney general does not propose to intervene or make submissions at [the] hearing. If however the court requires any specific assistance [the Attorney General] will of course endeavour to assist."*

17. Despite these reservations and my comments regarding the approach which in my view should be adopted for the future, I consider that, since the Originating Summons had been listed before the issue regarding whether it could be adjudicated upon by a Judge outside the Cayman Islands could have been aired and since Leading Counsel (and the attorneys involved) had prepared for and attended the hearing and made submissions, the right course is for me to set out my views on the Originating Summons and the order that I consider should be made (subject to a decision on whether a further hearing is required before the order I propose or another other is made).

A point on the need for and manner of service of the Originating Summons

18. It is true that the Funder has not actively participated in these proceedings and indeed supports the Originating Summons and is prepared to submit to and accept an order in the terms sought by the

Trustee. It appears that the Funder has been given notice of the Originating Application. The Second Affidavit of Ms B states that the attorneys for the Trustee on behalf of the Trustee had written to the Funder asking it "*to confirm for the record whether [it] supports the application and (ii) whether [it] wishes to be heard upon the application and/or make any other representations*." That affidavit exhibited an email from the attorneys for the Trustee to the Funder dated 31 May 2018 in which the attorneys for the Trustee referred to the Funder having "*been on informal notice of [the application and attached] by way of formal notice links to the application and supporting evidence*" together with an email response from the Funder of the same date in which an unidentified individual on behalf of the Funder confirmed that it had received "*formal notification of the application .. [was] aware that the application [was to be heard by me and confirmed] that [the] application [was] fully supported by [it although it did not] consider that there [was] any need for it to attend the hearing*." However, as I pointed out during the hearing, it was not clear that such notice was sufficient to constitute service where the Funder appeared to be out of the jurisdiction. It seemed to me that either permission to serve out (following and based on an application for service out) was required or an alternative method of service not requiring permission was needed (for example if the Funder had entered into a suitable contract submitting to the jurisdiction of the Court and providing for service within the jurisdiction in accordance with GCR O.10, r.3(1)).

Does the litigation funding agreement in this case constitute or involve unlawful maintenance or champerty?

19. A draft of the litigation funding agreement with the Funder which was under discussion in the present case was exhibited to the affidavit of Mr B. At the beginning of the hearing Leading Counsel for the Trustee handed up the latest draft of the agreement (the ***Funding Agreement***) which had been agreed in principle with the Funder (but which had yet to become binding) subject to a further review of the proposed funding arrangement and the terms of Funding Agreement by the Funder's investment committee in light of the outcome of the present application.

20. In paragraph 45 of my judgment in *Re A Funder* I identified seven features of a funding agreement that were likely to have particular significance for the Court when considering whether the agreement constituted or involved unlawful maintenance or champerty. The seven features are as follows:

    (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 solicitor.*

(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.*

(g). *whether or not the funder is a professional funder and/or is regulated.*

21. Leading Counsel for the Trustee in his written and oral submissions adopted the analysis and approach taken in *Re A Funder* and sought to apply the analysis, and the features or factors identified above, to the Funding Agreement in this case. He submitted that the Funding Agreement was consistent with each and did not involve a failure to satisfy any of the seven factors. He reviewed each of the factors in turn. He submitted that, having regard to each relevant factor and the terms of the Funding Agreement as a whole, the Funding Agreement should and could not be treated as being contrary to public policy or as amounting to a breach of the laws of champerty or maintenance.

22. I do not propose, and do not think it appropriate, on this application, to revisit the analysis I set out in *Re A Funder*. On this application I shall apply the analysis and approach set out therein.

23. The following points can be made with respect to the main factors I identified in *Re A Funder* and Leading Counsel for the Trustee's submissions thereon:

(a). *the extent to which the funder controls the litigation*. Leading Counsel for the Trustee referred to clause 10 of the Funding Agreement (which contained the heading "*[The Trustee] to have sole conduct of the Proceedings*"). The Trustee is given sole control and the right to conduct the Proceedings including the right to compromise or discontinue, file an appeal in, and enforce orders and judgments obtained in, the Proceedings. This is subject to various obligations including an obligation to consult with the Funder in advance about any material step and an obligation to act in good faith and to follow the reasonable advice of External Counsel and the Funder's asset

tracing and enforcement services firm on such matters. The reference to External Counsel is to a defined term that includes the attorneys to the Trustee and various other law firms in other jurisdictions (and such other firms and lawyers appointed subsequently by the Trustee with the consent of the Funder). The Trustee also agrees to do nothing to prejudice any benefits, rights or causes of action sought or advanced in connection with, or the general pursuit of the Proceedings. But, Leading Counsel for the Trustee submitted, the obligations assumed by the Trustee did not qualify in any material respect its right and ability to control the conduct of the litigation.

(b). *the ability of the funder to terminate the funding agreement at will or without reasonable cause*. Leading Counsel for the Trustee referred to clause 17 of the Funding Agreement. He noted that the right to terminate was limited (and was not a right to terminate at will) and followed the approach set out in paragraph 11 of the UK Code of Conduct for Litigation Funders established by the Association of Litigation Funders in the UK (a self-regulatory but unofficial body set up by litigation funders) of which the Funder is a founding member (save that the Funder was also given a right to terminate the Funding Agreement if a new trustee was appointed without the Funder's prior written consent). During the hearing I noted that the right to terminate referred to a material breach of the Funding Agreement by "*a Claimant*" and that the definition of "*Claimants*" included not only the Trustee but also trustees of the Other Trusts. This meant that the funding available to the Trustee could be terminated even if the Trustee was not itself in breach. Leading Counsel for the Trustee accepted that this was the correct construction of the Funding Agreement but submitted that this was not a concern where the trustees of the Other Trusts and the Trustee were closely connected and conducting litigation relating to connected trusts so that there was a common interest between them in protecting the integrity of trust structure The real mischief which the principle limiting the extent of a funder's right to terminate funding was seeking to address was a situation where a the funder could threaten to withdraw funding unilaterally and thereby use the threat of termination as a means of exerting improper control of the litigation. Here there had to be some breach by the funded parties and the funded parties were sufficiently closely connected and had aligned interests to ensure that there was no real risk that the other trustees ould take action to prejudice the position of the Trustee or act so as to give the Funder control of the litigation to the detriment of the Trustee.

(c). *the level of communication between the funded party and the solicitor*. Leading Counsel for the Trustee referred to the Preamble to and clauses 7.3 and 7.3.7 and Schedule 1 of the Funding Agreement. He submitted that while the Trustee was under an obligation to take such action as the Funder or External Counsel may reasonably request to enable the Funder to have knowledge about the conduct of the Proceedings and to give access to give the Funder to relevant documents, the rights given to the Funder were reasonable in order to enable it to protect and consider its position as funder and were not oppressive (so that they did not give the Funder leverage to assert improper control over the litigation). Furthermore, as I have already discussed, the Funder did not have a unilateral right to change the Trustee's legal advisers.

(d). *the prejudice likely to be suffered by a defendant if the claim fails*. Leading Counsel for the Trustee referred to clause 16 of the Funding Agreement and noted that if the claim did not succeed the sum payable under the agreement by the Trustee to the Funder (defined as the Resolution Amount) was not payable. While the Funder did not undertake a contractual liability to the Trustees to pay the Trustees' or the Substantive Plaintiffs' costs in the event that the claim fails and an adverse costs order is made (see clause 12 of the Funding Agreement) nonetheless Leading Counsel for the Trustee submitted there were various protections in the Funding Agreement that should be considered by the Court in particular the Funder's right to require the Trustees to obtain ATE insurance (see clause 6.1 of the Funding Agreement). Leading Counsel for the Trustee submitted that the Funding Agreement would not prevent the Substantive Plaintiffs from applying for and in appropriate circumstances obtaining costs orders against the Funder and so there was no reason to conclude that the Substantive Plaintiffs would be materially prejudiced by the Trustee entering into the Funding Agreement.

(e). *the amount of profit that the funder stands to make*. Leading Counsel for the Trustee submitted that the amount of the profit to be earned by the Funder was reasonable and proportionate and was not at a level which jeopardised the integrity of the litigation process. There was no question of the Trustee ceasing to be able to benefit substantially from a successful outcome to the proceedings. Furthermore, Leading Counsel for the Trustee noted that the value of the assets which the Trustee was seeking by the relevant proceedings to protect and regain control of were worth considerably more than the maximum possible return payable to the Funder. The following points arise:

(i). Leading Counsel for the Trustee noted that this was not a case where profits of 40% of the proceeds was contemplated. He explained the way the sums payable to the Funder (defined as the Resolution Amount) were calculated under the Funding Agreement, including the profit element payable above the sums invested and advanced by the Funder. The calculation of the Resolution Amount was set out in Schedule 2 to the Funding Agreement and involved a complex formula. The key elements of it were as follows. The Funder would receive from the date of the Funding Agreement interest on the total amount of its financial commitment, being the maximum amount that it had agreed to invest for the purpose of paying relevant costs relating to the *Proceedings* (which was a defined term). Interest ceased to be payable once the funds were disbursed and used to pay costs. In addition the Funder was entitled to recover the sums it had invested plus a profit element.

(ii). the Resolution Amount was only payable to the Funder in the event of *Success* and only payable to the extent that the Trustee would, after payment of the Resolution Amount, retain a substantial sum (being an amount sufficient to allow the Trustee to fund its activities as trustee). Success was defined to cover achieving, obtaining or regaining *Control over Assets meeting the Asset Threshold*. This meant that there had to be a recovery of trust assets (in the sense of regaining control of trust assets as identified and defined in the Funding Agreement pursuant to the proceedings) worth more than a substantial sum and that a significant part of those recoveries had to include certain key assets which the Trustee was seeking to recover..

(iii). Leading Counsel for the Trustee referred me to and briefly explained each of the key elements of these defined terms. He also noted that *Proceedings* was defined by reference a list of proceedings in Schedule 1 which was currently blank. He confirmed that Schedule 1 would include the Main Proceedings along with other actions relating to the Trust and the Other Trusts.

(iv). I asked Leading Counsel for the Trustee during the hearing to explain how the profit element was calculated and the maximum amount that the Funder would be entitled to in the event of complete success, as defined in the Funding Agreement. He confirmed that the maximum aggregate amount of the profit

element was in the tens of millions of dollars (which would be in addition both to the interest paid and the repayment of the sums originally invested and advanced by the Funder to pay litigation costs and the costs of the Fund's asset tracing and enforcement services firm pursuant to a consultancy agreement). He submitted that this amount, although large, should be assessed by reference and having regard to the sums at stake for the Trustee which in the case of the Trust was the value of assets valued at more than three times the total amount that coyuld become payable to the Funder under the Funding Agreement.

(v). I asked Leading Counsel for the Trustee about the extent to which the Funding Agreement provided for what I labelled cross-collateralisation. The Funding Agreement provides for the funding not only of the Main Proceedings and not only of proceedings to which the Trustee was a party, either in their capacity as trustees of the Trust or of the Other Trusts. As a result it appeared that recoveries by the Trustee of assets of the Trust might need to be used to pay sums owing to the Funder in respect of the costs of other proceedings relating to the recovery of assets of the Other Trusts. As I understand the operation of the Funding Agreement if there is a Success in relation to the Main Proceedings such that assets of the Trust are recovered the Funded Amount for the purpose of the calculation of the Resolution Amount is the total amount of the Claimant Costs advanced by the Funder in respect of all the proceedings including those relating to the Other Trusts. Leading Counsel for the Trustee submitted that these were commercially reasonable terms required in the circumstances by the nature of the litigation financing agreed by the Trustee and the connected trust structure of which the Trust and the Other Trusts were a part and which meant that the action being taken by the Trustees in the Main Proceedings and in relation to assets of the Trust and the action being taken to protect and recover the assets of the Other Trusts in the proceedings covered by the Funding Agreement should be seen as closely related.

(g). *whether or not the funder is a professional funder and/or is regulated*: I have already noted that the Funder is a professional funder and one of the founding members of the Association of Litigation Funders in the UK.

24. I would also mention that Leading Counsel for the Trustee pointed out that the Funding Agreement was to be governed by English law. He accepted that, as I had said in *Re A Funder*, the Funding Agreement must not only be valid under the proper law of the contract but also it must not be contrary

to law of the country where it is to be performed (I would add that in so far as there is a risk of liability in tort the choice of law rule for tort claims also needs to be considered).

25. I have carefully reviewed the Funding Agreement, the factors that I identified as of particular significance in *Re A Funder* and considered whether, in the round, the Funding Agreement gives rise to a tendency to corrupt public justice, undermine the integrity of the litigation process or give rise to a risk of abuse (as those terms are understood in the cases I referred to in *Re A Funder*). I have concluded (accepting the submissions made by Leading Counsel for the Trustee) that in the circumstances of, and based on the evidence filed in, this case the Funding Agreement does not constitute or involve unlawful maintenance or champerty. I am therefore prepared to grant the declaration sought in the Originating Summons but consider that the wording used in order I made in *Re A Funder* should also be used in the present case.

26. Two aspects of the Funding Agreement did however cause me some concern. First, the amount payable to the Funder in the event of complete success and secondly the cross-collateralisation feature. But:

(a). while the amounts payable to the Funder are at least in absolute amounts (rather than as a percentage of total recoveries or the value of assets at risk) very substantial (particularly having regard to the combination of the obligation to pay interest, to repay the sums originally advanced and pay the profit element), it does not seem to me, based on the evidence before me, that the sums payable are such that they prevent the Trustee from being able to benefit substantially from a successful outcome to the Main Proceedings. Furthermore, based on Leading Counsel for the Trustee's explanation of the way the sums payable to the Funder are to be calculated, there appear to circumstances in which the amounts payable to the Funder will not represent a substantial part of total recoveries. Nor can I – or would it be right for me - on this application to conclude that such sums are so unrelated to the risks involved for the Funder or so large that they should be treated as giving rise to an abuse of or a material risk to the integrity of the litigation process.

(b). while the cross-collateralisation feature could result in assets of the Trust being used to fund the litigation costs of proceedings relating to the Other Trusts, the reverse proposition is also true and the assets of the Other Trusts may end up being used to pay the costs of the Trust in the Main Proceedings. Furthermore, as I have explained, on this application I am not considering whether the Trustee is properly exercising its powers as trustee of the Trust. It

will remain accountable for its conduct to the potential beneficiaries and subject to orders of the court (or courts) with the jurisdiction over them in relation to the exercise of such powers. In the present context the issue is whether the cross-collateralisation terms either of themselves or together with other terms (or effects) of the Funding Agreement create a material risk that the integrity of the litigation process will be jeopardised, corrupt public justice or give rise to a risk of abuse. It seems to me that this is not the case where it appears, as the evidence in this case demonstrates, that (i) the Trustee qua trustee of the Trust has concluded that the funding arrangement is necessary to protect the assets of and those with an interest in that trust and that the funding arrangement is for the benefit of the Trust and (ii) such views are not unreasonable in the circumstances (having regard to the potential benefit and risks to the Trust and the effect and extent of potential cross-collateralisation). If the Court concluded that by entering into a litigation funding agreement trustees were in breach of trust then the question would arise as to whether, in addition to the trustees being exposed to a breach of trust claim, the funding agreement should be treated as an abuse of the litigation process for the purposes of the law of maintenance and champerty. In the present case there is no basis on which I could conclude that the cross-collateralisation feature gives rise to a breach of trust under the applicable law or is an improper exercise of the Trustee's powers. Mr B in his evidence in support of the Originating Summons has confirmed the reasons and justifications for resort to third party funding in this case and the Trustee's approach and conclusions justifying entering to the Funding Agreement with the Funder on the terms proposed, which include the cross-collateralisation (although the reason and justification for cross-collateralisation was not directly addressed in Mr B's evidence) and Leading Counsel for the Trustee reiterated and expanded on these in his written and oral submissions.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 14/17

The Hon Mr Justice Segal
Judge of the Grand Court
26 July 2018