

# Litigation funding, champerty and the Code of 1771

Last reviewed: February 2017

---

In *Barclays Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* 2013 (2) JLR 22 (respectively, **Barclays Wealth** and **Equity Trust**) the Royal Court confirmed that third party litigation funding, properly constituted, will not infringe the laws against champerty and maintenance and will not be contrary to Jersey's Code of 1771.

The judgment was the first challenge to a funding arrangement and the first time that the court heard full argument on whether funding arrangements are contrary to the Jersey law of champerty (the earlier judgment in *Re The Valetta Trust* 2012 (1) JLR 1 being a Beddoe application). It was also the first time that the court heard any argument at all on the ambit of the provision of the Code of 1771 that says '*Personne ne pourra contracter pour choses ou matières en litige*' ['no one may contract for things or matters in litigation'].

In December 2011, after the commencement of proceedings, Barclays Wealth had entered into a litigation funding arrangement with leading funder, Harbour Litigation Investment Funding LP. Equity Trust claimed that the funding arrangement was unlawful in that it was contrary to the provision of the Code of 1771. It claimed that the Code operated as a blanket prohibition on contracting 'in relation to things or matters in litigation' and that this included litigation funding arrangements. The funding arrangement was therefore contrary to Jersey law and the proceedings amounted to an abuse of process. Equity Trust also argued that the Royal Court's findings in *Re The Valetta Trust* on the nature of the Jersey law of champerty were wrong and that the Code, as a complete prohibition on litigation funding, represented the Jersey law of champerty.

The court rejected these arguments. On the question of the meaning of the Code, it said that the provision of the Code only prevented contracting 'for things or matters in litigation'. It prevented the purchasing or assigning of claims that had been issued. In other words it was a provision designed to prevent the trafficking of litigation. However, it went no wider than that. Not only did the court think that this was the only tenable construction of the provision but it also found that the provision was essentially a re-enactment of an earlier anti-champerty provision contained in the 1635 Ordinance of the Star Chamber. The esteemed Jersey law commentator of that era, Philippe Le Geyt, had said that this provision related to the sale or assignment of litigation.

That was, essentially, the end of the matter. However, the court went on to consider what the effect would be of a breach of the Code. The court said that it was not entirely clear whether an arrangement that was in breach of the Code would simply be unenforceable or whether it would be void. It did not decide the point. However, the mere fact that a funding agreement was contrary to the Code would not automatically cause the proceedings to be struck out or stayed. This would only happen if the proceedings amounted to an abuse of process. Whether a funding arrangement was an abuse of process would be a matter of fact and degree but the fact that an agreement was champertous or contrary to the Code would not, on its own, be enough. Importantly, the court said the opposing party would not be prejudiced if a funding arrangement was unenforceable because one could envisage the court making a costs order directly against the funder.

The Royal Court then considered whether the comments on the Jersey law of champerty in *Re The Valetta Trust* were correct. It concluded that they were, that Jersey had a long-standing common law doctrine of champerty and, most critically, that the Jersey law of champerty had evolved in the same way that English and Australian law had done to allow third party funding arrangements that did not threaten the purity of justice.

The position on third party funding is now established. The Jersey court is firmly behind the public policy objective of broadening access to justice and third party funding arrangements are key to that. Properly constituted funding arrangements where there is no assignment of the claim to the funder, where it is the party and not the funder who has control of the litigation and where there is proper provision made for the payment of adverse costs orders will not be champertous and will not be contrary to the Code. However, it is important that these arrangements are properly put together and comply with these requirements.

That the 1771 prohibition should be given a narrow, purposive construction is also apparent from the decision of the Jersey Court of Appeal in *Booth v The Viscount* [2016] JCA 218.

The Mourant Ozannes team representing Barclays Wealth was led by partner Justin Harvey-Hills and comprises associate Katie Hooper and English counsel, Giles Richardson, of Serle Court Chambers in London.

## Contacts

---

**Justin Harvey-Hills**  
Partner, Jersey  
+44 1534 676 105  
justin.harveyhills@mourant.com

---

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED