

Third Party Funding in Hong Kong

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[ARTICLE](#)



Withers' Hong Kong Family team has been running a potentially ground breaking case in the High Court on the question of third party funding using the expertise of Withers' dispute resolution teams spread across the world's key dispute resolution centres. It has been seeking, on behalf of the applicant, a declaration that proposed third party funding shall not breach the laws of champerty and maintenance as the funding arrangement falls into the 'access to justice' exception, such that it can be funded by third party funders. In Hong Kong, under common law, maintenance and champerty are simultaneously criminal offences, torts and a ground of public policy for invalidating contracts. In the case which Withers has been running, it was hoped that there would be a change in practice, bringing Hong Kong into line with England and Wales and other common law jurisdictions, such as New Zealand, Canada and most of the states in Australia. It was argued that in the global context and the growing trend towards allowing third party funding that Hong Kong was behind in its development of its jurisprudence on third party funding.

Withers' client was a husband seeking to set aside a transfer of valuable shares in a company by the wife to her brother, the beneficial ownership of which was in dispute. The application was made under section 17 Matrimonial Proceedings and Property Ordinance Cap 192 (s17 MPPO) (the equivalent in England and Wales to section 37 MCA 1973). The transfer represents the lion's share of the marital pot for division and therefore the determination of the husband's application to set aside was crucial to his case for ancillary relief. Without third party funding, the husband argued that he would not be able to afford to pursue his section 17 application, thus restricting his access to justice, in breach of his rights under Article 35 of the Hong Kong Basic Law.

The husband's application was made to a Judge who was not the Judge who will hear the underlying section 17 application. It was opposed by the Secretary for Justice (the SJ) on the basis that the application was misconceived as, the SJ argued, declaratory relief was not available for the purpose of obtaining a declaration of non-criminality and was against the public interest. Highly unusual nowadays, the Judge was assisted by both a senior and junior counsel acting as *amicus curiae* (a figure introduced into English Law in the 9th century), "a friend of the court" in the plural known as the *amici curiae*. The senior *amicus curiae* in this case was Wong Yan Lung SC, who held the position of Secretary for Justice in Hong Kong from 2005 to 2012.

John Scott SC for the husband emphasized the particular need in family law cases where often one party has no means of funding the case which undermines the ethos of contemporary ancillary relief jurisprudence. The less well-off spouse, who has few or no assets in advance of the divorce settlement, cannot fund the level of expert advice and representation required in order to secure an award which meets the judicially constructed standard of 'fairness'.

The SJ argued that widening the scope of jurisdiction to grant declaratory relief in approving funding agreements was best left to the legislature which may decide to introduce some form of regulation. It was not in the public interest for the courts to be granting declarations. There was a public interest in preventing the development of an unlicensed and unregulated market in litigation as well as the undesirable development whereby litigation becomes commercialized and commoditized.

Both Withers and the potential litigation funders, Woodsford hoped that this being a "text book" case would finally allow funding to be permitted in family cases under the "access to justice" exception. There have already been recent changes to the Arbitration Ordinance to permit third party funding in arbitration in Hong Kong which came into effect in February 2019.

Unfortunately, for our client and those seeking third party funding in Hong Kong, the Judge in the Court of First Instance by her Decision that came out on 19th March 2020 has disagreed. The Honorable Marlene Ng J dismissed the applicant's originating summons in an extremely detailed judgement which examined the concepts and history of maintenance and champerty. The judgment also analyzed in detail the public policy considerations, including whether there should be a declaration of non-criminality and whether it was appropriate for counsel for the husband to request a pre-clearance declaration of non-criminality. She found that this required an assessment of the "totality of the facts" and a balancing of competing policies to determine whether very or truly "exceptional circumstances" are made out by reason of the access to justice exception such that an injustice would result. This could not be done in an *ex parte* application or on the facts of this case. The Judge was not persuaded that she was able to grant the pre-declaratory relief applied for by the husband which would have given the lenders the comfort to

proceed with the loan agreement.

In her 300 page judgment Ng J said that this is an area of the law which should be developed by the legislature, not the courts. She fully endorsed the arguments put forward by the current and the past Secretaries for Justice and said in conclusion, at paragraph 437,

“Some may say third party funding with all the concerns it entails is better than having no claim/recovery at all, but the common law is in principle hostile against profiting from someone else's litigation unless justified and effectively controlled/regulated (otherwise litigation for vindication of wrongs can easily turn into trafficking of commercially commoditised litigation). These concerns retain force and vitality, but no protective scheme exists in Hong Kong at the moment. At the very least, the continued existence of the crimes/torts of maintenance and champerty of the vitality of such legal principles to invalidate contracts show that these concepts remain important values in the law here. In my view this is an area in which Hong Kong should move forward with caution and certainty for the stakeholders (rather than on a case-by-case assessment (possibly lengthy and unpredictable) by any court confronted with the issue)”.

Unless this matter is appealed, it is difficult to envision how the husband in this case will bring the section 17 application to court. He has already been refused legal aid and has no private means with which to pursue the application to set aside the transfer. It is disappointing but it seems Hong Kong is still not ready for commercial third party funding even in 2020.

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