



Summary of Judicial Decision

Re A (SJ as intervener) HCMP 2728/2017; [2020] HKCFI 493

Decision : **Application refused**
Date of Hearing : **25-26 June 2019**
Date of Judgment/Decision : **19 March 2020**

Background

1. This case concerns the law of maintenance¹ and champerty² as applicable in Hong Kong to third party litigation funding. Maintenance and champerty are both crimes and torts. Third party litigation funding involves the provision of capital by an unrelated funder, usually on non-recourse basis, to finance all or part of the fundee's litigation costs in return for a portion of any financial recovery. In Hong Kong, the Court of Final Appeal recognised three categories of exceptions to the laws of maintenance and champerty, one of which is cases involving "access to justice"³, a fundamental right guaranteed by Article 35 of the Basic Law ("BL 35"), whereby a party would be unable to pursue a claim without support of third party funding arrangement.
2. The Applicant claims that he is unable to pursue his matrimonial litigation without third party funding since he has explored all avenues of funding (e.g. bank loans and legal aid) without success. Thus, in these proceedings, he seeks declarations that the proposed third party funding of his matrimonial litigation and these proceedings by a professional litigation funder ("**Proposed Funding Arrangement**") shall not breach the laws of maintenance and champerty as it falls under the "access to justice" exception ("**the Declarations**").
3. The Secretary for Justice ("**SJ**") was granted leave to intervene in the present proceedings. To avoid any potential prejudice to SJ's prosecutorial function under Article 63 of the Basic Law ("**BL 63**"), SJ's involvement was limited to submissions on questions of broad public policy, which did not necessitate examination into specific details of the Proposed Funding Arrangement. In the circumstances, the Court appointed *amicus curiae* to assist on all relevant issues.

¹ Maintenance is directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatsoever, and where the assistance he renders to the one or the other party is without justification or excuse: *Unruh v Seeberger* (2007) 10 HKCFAR 31, §84.

² Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute: *Unruh v Seeberger* (2007) 10 HKCFAR 31, §85.

³ *Unruh v Seeberger* (2007) 10 HKCFAR 31, §§95-97.



Issues in dispute

4. The main issues in dispute are:
 - (1) Whether the Court has jurisdiction to grant a declaration of non-criminality and if so, the circumstances in which it would be granted (“**Jurisdiction and Public Policy Issues**”); and
 - (2) Whether the Proposed Funding Arrangement falls within the “access to justice” exception (“**Access to Justice Issue**”).

Department of Justice’s Summary of the Court’s rulings

(full text of the CFI’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=127378&QS=%2B&TP=JU)

5. The hearing was partly open for submissions on legal principles, and partly closed for discussions on the terms of the Proposed Funding Arrangement in which SJ did not take part. The Court’s judgment is therefore divided into two parts, one part for publication which is Judgment (1) and the other part not for publication which is Judgment (2). The judgment at the link above is Judgment (1). (paragraph 41)
6. On the Jurisdiction and Public Policy Issues, the Court held that a civil court has jurisdiction to grant an advisory declaration of non-criminality. However, such declaration will not bind the prosecuting authority in bringing or stopping any criminal prosecution given the independence of the SJ’s prosecutorial function under BL 63, and that such declaration would be granted only in very or truly “exceptional circumstances”. (paragraphs 113, 117-119)
7. The criteria for “exceptional circumstances” include whether the case is fact sensitive or not. In the present case, the Court held that the subject matter of the Declarations was not a matter of pure law but was fact sensitive involving inquiries into the Applicant’s financial circumstances, whether the Applicant had exhausted all possible sources of funding, terms of the Proposed Funding Arrangement and the court’s weighing exercise between competing public policies. This is an important factor against any “exceptional circumstances” since the court will not know the full facts and will be hesitant to grant a *pre-clearance* declaration to an applicant. (paragraphs 144 -160)
8. The Court rejected the Applicant’s submissions that the Declarations were analogous to a trustee’s *Beddoe* application, funding approval in insolvency cases and/or class actions which are recognised exceptions to the laws of maintenance and champerty. (paragraphs 161, 173, 178, 199-200)
9. The Court further explained that maintenance and champerty are unlawful in Hong Kong and some other jurisdictions for policy reasons, i.e. to protect the vulnerable litigant from being exploited, to protect the party facing the maintained litigation, and to protect the integrity of the court’s process from



excessive litigiousness and unrighteous suits. Whilst cases in other jurisdictions should be studied to understand the international evolution, Hong Kong must search for her own balance between competing public policies in the local moral, legal, economic and social context. (paragraphs 60, 247 to 249)

10. On the Access to Justice Issue, the Applicant relied on the “access to justice” exception to demonstrate “exceptional circumstances” justifying the grant of the Declarations. The Court recognised that the issue involves a balancing exercise between competing public policies of fostering the right of access to justice and preventing the abuses that may result from maintenance and champerty. While the fundamental right of access to the courts is guaranteed by BL 35 and Article 10 of the Hong Kong Bill of Rights, such right is not absolute. Further, there is a public interest to safeguard against the mischiefs that inevitably arise in an unlicensed and unregulated litigation funding market, and to protect the integrity of the Court’s process. (paragraphs 380, 386, 390-391, 394)
11. Having considered the development in other common law jurisdictions and Hong Kong’s own experience of third party funding in arbitration cases, the learned Judge found that the Hong Kong courts are not well-placed to prevent abuses without a statutory/regulatory framework. Liberalisation of the laws of champerty and maintenance should be left to the legislature to develop a comprehensive form of procedural safeguards against abuses. (paragraphs 374-379, 392-394, 436-437)
12. The Court concluded that the Applicant’s case does not make out very or truly “exceptional circumstances” as the Applicant had not put forth a satisfactory case that he is deterred from entering the Proposed Funding Arrangement because of the chilling effect of his own fear of prosecution or fear of incurring other liability. Rather, the Declarations are sought for the comfort of the Funder. In the circumstances, it cannot be said that the Court’s refusal to grant the Declarations can be a disproportionate infringement of the right of access to justice. (paragraphs 431-435)
13. On the procedural side, the Court remarked that an application for *pre-clearance* sanction of third party funding arrangement should not be made *ex parte*, and the SJ should be joined as a party or at least be given notice so that she can properly consider whether to intervene or join the proceedings. (paragraphs 440-441)
14. For the reasons in Judgment (1) and the analysis in Judgment (2), the Court refused to grant the Declarations. (paragraph 446)

Civil Division

Department of Justice

8 May 2020