Considerations: *Third Party Litigation and Arbitration Funding in Nigeria*

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Introduction

Third Party Funding (TPF) refers to an agreement or arrangement between a funding company/individual and a client (the claimant) whereby the funder agrees to finance some or all of the client's legal fees in exchange for a share of the proceeds in the event of success. Under this model, outside investors — typically a hedge fund or special purpose litigation fund — seek out commercial litigants who have meritorious and substantial claims, but who may be unable or unwilling to make the financial investment required to litigate those claims.

In Nigeria, TPF is frowned at by the courts based on the common law principles of champerty and maintenance which: (i) prohibit a third party from funding litigation between disputants (in which the funder has no legitimate interest); and (ii) render an agreement to provide such funds illegal and void, on the ground of public policy[1]. The latin maxim, *"interest reipublicase ut sit finis litium"* (it is in the interest of the State that there be an end to litigation) underpins public policy and permitting litigation funders could result in significant spikes in litigation, and potentially more of the otherwise unmeritorious claims. Presumptively most litigation funders could view the suits as an investment, thereby incentivizing a more than passing interest in the outcomes of claims they funded, and all attendant implications flowing therefrom. Being common law principles, until contrary statutory provisions are enacted, the principles of champerty and maintenance are applicable in Nigeria.

In ***Oloko v. Ube***[2], *Edozie JCA* held thus: *"at common law, champerty is a form of maintenance that occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute. An agreement by a solicitor to provide funds for litigation in consideration of a share of the proceeds is champertous."*

More recently, in ***Kessington Egbor v. Ogbebor,***[3] the Court held that where a person elects to maintain and bear the costs of action for another in order to share the proceeds of the action of the suit, such an action is champertous.

In ***R (Factortame Limited & Ors) v. Secretary of State for Transport, Local Government and the Regions***[4], *Lord Phillips of Worth Maltravers MR* approved the following two definitions of champerty and maintenance respectively: *"a person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. Champerty occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit."*

REGULATORY OVERVIEW

Rules of Professional Conduct (RPC) 2007

The RPC, which regulates the conduct of legal practitioners, only provides for contingency fee and not TPF. The term "contingency fee" is defined by the RPC as: *"the fee paid or agreed to be paid for the lawyer's legal services under an arrangement whereby compensation, contingent in whole or in part upon the successful accomplishment or deposition of the subject matter of the agreement, is to be of an amount which is either fixed or is to be determined under a formula."*

Rule 50(1) & (2) RPC provides as follows: *"(1) A lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken or to be undertaken for a client whether contentious or non-contentious: provided that: -a. The contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation; b. The contract is not i. Vitiated by fraud, mistake or undue influence, or ii. Contrary to public policy; and c. If the employment involved litigation, it is reasonably obvious that there is a bona fide cause of action. (2) A lawyer shall not enter into an arrangement to charge or collect a contingent fee for representing a defendant to a criminal case."*

[1] See ***Mackson Ikeni v. Chief William Akuma Efamo & Ors [1997] 4 NWLR (Pt. 499), 318*** where the Court held that it is a matter predicated on public policy that there must be an end to litigation.
[2] ***[2001] 13 NWLR (Pt.729), 161 at 181.***
[3] ***(2015) LPELR-24902***
[4] ***(No.8) [2002] 3 WLR 1104 at para 32.***

It is instructive to note that under ***Rule 50(4) RPC***, a lawyer shall not enter into a contingent fee arrangement without first informing the client of the potential effects.

From the foregoing provisions, a contingency fee arrangement is only permissible in the following circumstances, where: (i) it is a civil matter, whether contentious or non-contentious; (ii) the contract is reasonable in the circumstances of the case including risk and uncertainty of compensation; (iii) the contract is not vitiated by either fraud, mistake, or undue influence; (iv) the contract is not contrary to public policy; and (v) the employment involves litigation, there is a reasonable and bona fide cause of action.

It is expressly stated in ***Rule 50(2)*** that a lawyer cannot collect contingent fees in criminal matters. It is clear from the above that the ***RPC*** does not expressly prohibit TPF in light of its approval of contingent fee arrangement (for civil matters).

Legal Aid Council (LAC)

The Legal Aid Council (the Council) was established by the ***Legal Aid Act No. 17 2011 (LAA)*** to ensure the grant of legal aid, advice and access to justice to otherwise disadvantaged citizenry. By ***section 8 LAA*** the foregoing shall be provided by the Council in three broad areas: (a) Criminal Defence Service, (b) Advice and Assistance in Civil Matters, including legal representation in court and (c) Community Legal Services subject to merits and indigence tests for the parties. The ***LAA*** seeks to make provision for the establishment and operation of a scheme for the granting in proper cases, legal aid and legal advice, to people with low income, who could not otherwise afford to procure them for the enforcement or vindication of a legitimate right or for obtaining a just relief. As laudable as the actions of the LAC are, we must understand that not every category of litigant can be covered by the legal aid scheme (LAS).

Section 10 LAA provides: *"(1) Legal aid shall only be granted to a person whose income does not exceed the national minimum wage; (2) Notwithstanding the provision of subsection (1), the Board may, in exceptional circumstance, grant legal aid service to a person whose earning exceeds the national minimum wage; (3) Notwithstanding the provisions of subsection (1) of this section, the Governing Board may approve the giving of legal aid on a contributory basis to a person whose income exceeds ten times of the national minimum wage."*

It is clear from the foregoing that *some prospective litigants with rightful claims are still outside the coverage of the legal aid scheme.* ***Section 8(3) LAA*** provides that *"the Council shall establish and maintain a service to be known as the Civil Litigation Service for the purpose of assisting indigent persons to access such advice, assistance, and representation in court where the interest of justice demands, to secure, defend, enforce, protect or otherwise exercise any right, obligation, duty, privilege interest or service to which that person is ordinarily entitled under the Nigerian legal system."*

The purpose of the LAS is to address fundamental rights cases for persons at the lower end of the economic pyramid whose fundamental human rights have been allegedly violated. ***Section 11(1) LAA*** provides that in ascertaining the means of any person for the purposes of ***LAA***, that person's income and his personal and real property shall be taken into account.

Arbitration and Conciliation Act, CAP A18 LFN 2004 (ACA)

It is a fact that arbitration is increasingly becoming the preferred mode for the resolution of commercial disputes. However, the costs of arbitration have been a major concern to users and proponents of arbitration. One way of reducing the cost of arbitration, thereby making it even more attractive, is through TPF.

In the UK case of ***Essar Oilfields Services Limited v. Norscot Rig Management PVT Limited,***[5] an application was made under ***section 68, Arbitration Act 1996*** to set aside a partial award. The Award was concerned only with the question of interest and costs. The costs included litigation funding. The litigation funder, *Woodsford Litigation Funding*, had made an agreement with Norscot in 2011, whereby it advanced to it about £647,000 for the arbitration. That agreement entitled it, in the event of Norscot's success, to a fee of 300% of the funding or 35% of the recovery. In that regard, Norscot sought from Essar a sum just over £1.94 million, being the sum Norscot owed to Woodsford for the funding. The arbitrator held that he was entitled to make order at his discretion, because such litigation funding costs were "other costs" for the purpose of ***section 59(1)(c) Arbitration Act***, which refers to *"legal or other costs of the parties"*. The Court held that as a matter of language, context and logic, it seemed that *"other costs"* could include the costs of obtaining litigation funding.

In Nigeria's ***ACA, section 49*** defines "costs of arbitration" but does not include "other costs" as in the UK. Furthermore, ***section 49*** is restrictive in its definition of what costs entail and does not give much room for arbitrators' discretion.

In light of the above, we must critically consider whether the time is ripe to revisit applicability of the doctrine of champerty and maintenance. A significant proportion of litigation has always been funded by third parties in the form of insurers, trade unions or other interested bodies. However, the funding of litigation by commercial funders who seek to make a profit from their funding of litigation is a more recent development. TPF would potentially facilitate filing of meritorious claims that would have been otherwise not litigated. It may help the economically weaker party to get closer to a level playing field against a well-funded opponent. For instance, where a person has a claim for medical negligence against a well-established hospital, TPF can grant such a prospective litigant access to resources to successfully proceed with his action.

[5] *[2016] EWHC 2361*

COMPARATIVE ANALYSIS - OTHER JURISDICTIONS

Legislative Approach: Hong Kong and Singapore

In June 2017, the Hong Kong legislature passed the ***Arbitration and Mediation (Third Party Funding) (Amendment) Bill*** into law. This new legislation expressly permits TPF agreements and authorizes a body to issue a code of practice for TPFers. The legislation requires parties to disclose to the arbitration body (which includes the arbitral tribunal) and opposing parties if a TPF agreement is in effect, along with the name of the TPFer, either before arbitration commences or within fifteen days of the TPF agreement's adoption, whichever is earlier.

Like Hong Kong, Singapore passed a ***Civil Law (Amendment) Bill*** in January 2017 to permit TPF agreements for arbitration. Singapore considered that opening up TPF to arbitration was necessary in order to remain a competitive international arbitration hub. The Singaporean government also introduced the ***Civil Law (Third Party Funding) Regulations*** to set out eligibility requirements for TPFers, including a requirement that TPFers must have *"paid up share capital of not less than US$5 million."*[6] The Singapore International Arbitration Centre (SIAC) also issued its revised ***Investment Arbitration Rules*** in January 2017, which permit arbitral tribunals to order disclosure of the existence of TPF agreements and names of TPFers.

Under the Singapore model, a typical funding agreement will include provisions for calculating the maximum amount of money the funder will contribute to the legal representation, the portion of the return that the funder will expect to receive upon success, and the maximum adverse costs award that the funder would pay, if any, in the event that the client loses the case.

Ad Hoc/Juridical Approach: England and Wales

In England and Wales, statutory amendments in the late 1960s abolished the torts and crimes of champerty and maintenance. Common law prohibitions on champerty and maintenance do still remain and such arrangements would be contrary to public policy and unenforceable as a result. The courts have, however, played a significant role in relaxing (and thereby developing) the rules on champerty and maintenance, particularly in respect of TPF.

In England and Wales, a TPF arrangement will generally only amount to maintenance or champerty *where there is an element of impropriety such as disproportionate profit or excessive control of the proceedings* by the TPFer. The English courts have gone further by highlighting the important role TPF can play in providing access to justice and downplaying historic concerns over such funding. Historic concerns included the risk of justice being corrupted and/or inappropriate third party meddling in proceedings.

South Africa

South Africa (SA) does not prohibit TPF. SA courts first tackled the topic as far back as 1894, when in ***Hugo & Moller N.O v. Transvaal Loan, Finance and Mortgage Co,***[7] it was ruled that agreements to share proceeds of lawsuits – or *pactum de quota litis* – are not necessarily illegal, and could be upheld or otherwise at the discretion of the courts, based on the structure of the agreement and the peculiarity of the situation. In 1997, the enactment of the ***Contingency Fees Act***, "no win, no fee" agreements became legally enforceable. Accordingly, there are companies such as Litigation Funding SA, South African Litigation Funding Company Limited engaged in litigation funding as their primary business.

Conclusion

It is instructive to note some of the factors that are the main driving forces in the demand for TPF – the *maxim ubi jus ubi remedium* is a cardinal principle underlying our jurisprudence and by extension the very justification of the legal profession. What happens if there is a wrong and the victim has no resources to sue? Should citizens be denied access to justice because of the source of their funds for litigating the suit?

In a country like ours with endemic poverty and where many parties simply cannot afford the disproportional cost of access to justice and consequent inability to ventilate the grievances, should we continue wholesale application of champerty and maintenance? Truly, "*there should be an end to litigation*", but not at the cost of injustice that would result from lack of financial capacity to prosecute meritorious claims.

In the absence of any legislation, it is my opinion that Nigerian courts should consider every matter on a case by case basis. The claim that TPF would lead to a hoard of unwarranted litigation has no merit as no investor would readily invest in a suit which does not have the likelihood of success especially considering the expensive nature of arbitration/litigation. It is time for TPF to be embraced in Nigeria's judicial system firstly for the purpose of expanding access to justice as well as opening an untapped business avenue.

[6] ***Section 4***
[7] ***[1894] 1 OR 339 at 340***