Barclays Wealth Trustees (Jersey) Ltd (in its capacity as trustee of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2i Montenegro Property Fund and their respective sub-funds); Barclays Wealth Fund Managers (Jersey) Ltd (in its capacity as manager of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2i Montenegro Property Fund and their respective sub-funds) v Equity Trust (Jersey) Ltd; Equity Trust Services Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	16 May 2013
Neutral Citation:	[2013] JRC 94
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Text

[2013] JRC 94

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **sitting alone**.

Between
Barclays Wealth Trustees (Jersey) Limited (in its capacity as trustee of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2i Montenegro Property Fund and their respective sub-funds)
First Plaintiff
Barclays Wealth Fund Managers (Jersey) Limited (in its capacity as manager of the R2R Bulgaria Property Fund, the R2R Croatia Property Fund and the R2i Montenegro Property Fund and their respective sub-funds)
Second Plaintiff
and
Equity Trust (Jersey) Limited
First Defendant
Equity Trust Services Limited
Second Defendant

Advocate J. Harvey-Hills **for the Plaintiffs**.

Advocate M. L. A. Pallot **for the Defendants**.

Authorities

Code of 1771.

1635 Ordinance.

Re the Valetta Trust [2012] (1) JLR 1 .

Macready -v- Amy [1950] JJ 11 .

Re Overseas Insurance Brokers Limited [1963] JJ 325 .

Constable of St Helier -v- Baal and Baudains [1965] JJ 503 .

Burt and Burt -v- States of Jersey [1993] JLR 376 .

Re Ostroumoff [1999] JLR 238 .

Pinner -v- Everett [1969] 1 WLR 1266 .

Bennion, Statutory Interpretation.

Halsbury Laws of England (5th Edition).

Le Geyt *La Constitution, Les Lois et les Usages de Jersey.* Tome 1.

Pothier *Traité des Obligations* (1821 Edition).

Grovewood Holdings PLC -v- James Capel and Co Limited [1995] Ch 80 .

Martell -v- Consett Iron Co Limited [1955] Ch 363 .

Abraham -v- Thompson [1997] 4 All ER 362 .

Faryab -v- Smyth (unreported) 28th August 1998.

Stocznia Gdanska SA -v- Latreefers Inc [2000] WL 447 .

Sarum Hotel Limited -v- Select Agencies (Jersey) Limited [1987–88] JLR 343 .

Morris -v- Southwark London Borough Council (Law Society intervening) [2011] 2 All ER 240 .

Trust — appeal against the refusal of the Master to strike out or stay proceedings brought by the plaintiffs.

Bailiff

THE

1 This is an appeal by the defendants against the refusal of the Master to strike out or stay the proceedings brought against them by the plaintiffs as an abuse of process. The basis of the application before the Master was that the plaintiffs have entered into a third party funding agreement in respect of this litigation and this is said to be contrary to the provisions of the Code of 1771 which provide:–

> ***"Personne ne pourra contracter pour choses ou matières en litige."***

2 The application requires me, as it did the Master, to consider the correct interpretation of this provision of the Code ("the Provision").

Factual background

3 The nature of the proceedings is not relevant to the issue which I have to decide and can therefore be briefly summarised. The first plaintiff is the current trustee and the second plaintiff is the current manager of the R2R Funds and sub-funds. The R2R funds are three unit trusts governed by Jersey law which hold minority interests in a number of underlying companies which in turn hold interests in undeveloped land in Eastern Europe. The R2R Funds were set up in 2005 to raise money from investors to purchase undeveloped sites with the aim of obtaining planning permission for and then developing the sites. The funds have approximately 900 unit holders who are retail investors.

4 The first defendant was the original trustee and the second defendant was the original manager of the R2R Funds. They ceased to be trustee and manager on 12th December, 2007, further to an Act of Court made by consent on 5th December, 2007. The plaintiffs were appointed in their respective places pursuant to that Act of Court.

5 The plaintiffs commenced proceedings against the defendants by Order of Justice issued on 10th December, 2010, for breach of trust, breach of fiduciary duty and breach of contract. The total amount of the claim is said by the plaintiffs to be in the region of €40 million plus interest.

6 Subsequent to the institution of the proceedings, the plaintiffs have entered into a third party funding agreement with a litigation funder called Harbour Litigation Investment Funding LP ("Harbour"). This is the same litigation funder as was involved in *Re the Valetta Trust* [2012] (1) JLR 1. It has not proved possible for the parties to agree terms upon which a redacted version of the funding agreement could be made available to the defendants. The funding agreement was therefore not in the papers before the Court, although Advocate Pallot accepted that I could ask the plaintiffs to see a copy should I think this necessary. He nevertheless made it clear that his submissions did not turn on the exact terms of the funding agreement.

7 The information before the Court as to the terms of the funding agreement is contained in an affidavit sworn by Susan Dunn, a director of Harbour. She has confirmed that all funding agreements entered into by Harbour are modelled on their standard terms and conditions and these include provision that control of the proceedings remains with the plaintiffs and their lawyers and that Harbour's sole right is to be kept informed. These conditions also provide that Harbour would satisfy any adverse costs order against the plaintiffs. She further pointed out that Harbour is a member of the Association of Litigation Funders of England and Wales and that the standards of practice and behaviour of members are set out in the Code of the Association of Litigation Funders of England and Wales, which was drafted by the Civil Justice Council. In order to become a member of the Association, Harbour has had its standard funding agreement approved by independent counsel as being in compliance with the Code, Article 7(c) of which states that a funder "will not seek to influence the litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder".

8 When it was drawn to the defendants' attention that the plaintiffs had entered into the funding agreement with Harbour and after some preliminary skirmishing, the defendants issued the present summons seeking to strike out or stay the proceedings on the grounds that their continuance on the basis of the funding agreement was contrary to the law of Jersey and/or an abuse of the Court's process.

9 The Master gave a reasoned decision for rejecting the summons. I have of course carefully considered that judgment. However, the summons raises a point of law and I must reach

my own conclusion on the issue. I do not propose therefore to refer further to the Master's reasons.

The legislation background

10 On 24th September, 1635, there was registered in the Royal Court an Order in Council made by the Star Chamber on 12th June, 1635, ("the 1635 Ordinance"). As set out in the headnote in the published volume of Orders in Council, the 1635 Ordinance covered a number of unrelated matters but the one that we are concerned with is listed in the headnote as ***"Défense de contracter pour choses en litige".*** The text of the 1635 Ordinance dealing with this topic was in the following terms:–

> ***"Ffor avoiding of maintenance and Champtie It is thought fitt that no man should buy or Contract for any debt or other thinge in Action."***

11 As it is well known, in 1771 an Order in Council was registered which enacted a code of laws ("the Code") which was to establish the statutory law of the Island going forward. The Code dealt with many different matters but one section dealt with and effectively re-enacted parts of previous Orders in Council. This section of the Code is headed ***"Loix établies par differens Ordres du Roi et du Conseil & Actes de Parlement".*** The text of the Code then deals with various Orders in Council or parts thereof. In each case the relevant passages are introduced by the expression ***"Conformément à certain ordre …"***

12 Thus in relation to the 1635 Ordinance the introductory words of the Code are as follows:–

> ***"Conformément à l'Ordre du Conseil de 1635 le 12e juin …"***

13 There follow three substantive matters from the 1635 Ordinance, the substance of each of which is reproduced in the Code, although the wording is in each case not identical with that of the 1635 Ordinance. The relevant matter for our purposes is the second matter and the language in which the matter is expressed in the Code is as set out in paragraph 1 above.

The defendants' application

14 In broad summary, Advocate Pallot submits, as he did before the Master, that the Provision prohibits a party to litigation entering into a funding agreement in respect of that litigation. The Court cannot allow a party to continue litigating with the benefit of an agreement which is contrary to Jersey law as to do so would amount to an abuse of the Court's process. Before me, he confined the relief sought to a stay (rather than striking out) with the proceedings only being allowed to continue should the funding agreement be cancelled, so that the plaintiffs would have to fund the claim themselves.

Statutory interpretation

15 I must deal first with a preliminary point which was dealt with at some length in the defendants' skeleton before the Master and was accordingly also addressed in the Master's judgment. Advocate Pallot's submission was that the Court must apply Jersey principles in relation to the interpretation of the statutes. He suggested that the plaintiffs would seek to rely upon English principles of statutory interpretation. He said that any attempt to persuade the Court to look to English rules of interpretation should be ignored, although he did concede that there were certain similarities in the way that the English and Jersey courts had approached the issue of statutory interpretation.

16 I have to say that I do not think this point advances the defendants' case. As a matter of strict analysis, Advocate Pallot is of course entirely correct. The Royal Court must apply Jersey law when interpreting a Jersey statute. The principles of statutory interpretation to be applied must therefore be Jersey law principles.

17 However, it is at that point that the significance of the argument breaks down. I was referred by Advocate Pallot to observations of the Royal Court in *Macready -v- Amy* [1950] JJ 11 at 15, *Re Overseas Insurance Brokers Limited* [1963] JJ 325 at 326, *Constable of St Helier -v- Baal and Baudains* [1965] JJ 503 at 504, *Burt and Burt -v- States of Jersey* [1993] JLR 376 at 379–382 and *Re Ostroumoff* [1999] JLR 238 at 246–248. However, in most of those cases, the principles which the Court referred to were drawn expressly from English cases and English text books such as *Bennion, Statutory Interpretation* (" *Bennion*") and in none of them is there any suggestion that Jersey principles differ from English principles of statutory construction.

18 In my judgment the correct position is that the Jersey law principles of statutory interpretation are at present identical to the principles applied under English law. Reference can therefore conveniently be made to English judicial statements or to texts such as *Bennion* or *Halsbury's Laws of England* (" *Halsbury*"). However, as Advocate Pallot correctly says, that is not to say that the Court is applying English law. It is not. It is applying Jersey law, which happens at present to be indistinguishable from English law on this aspect. But it need not necessarily remain so. Were the English courts to introduce some new principle of statutory interpretation with which this Court disagreed, it would be open to this Court to refuse to follow English law in adopting that new principle. But that is not the position at present.

19 In summary, Advocate Pallot was technically correct in the submission he made; but it leads him nowhere because our principles of statutory interpretation are the same as those established under English law and reference can therefore properly be made to English judicial authority and text books.

20 One starts with the well-known observation of Lord Reid in *Pinner -v- Everett*

[1969] 1 WLR 1266 at 1273:–

> ***"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute.*** It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."

21 In relation to codifying statutes, Halsbury (5th Edition) Vol 96 states as follows at para 1119:–

> ***"In construing a codifying Act, the proper course is, in the first instance, to examine its language and to ask what is its natural meaning.*** The object of a codifying Act has been said to be that on any points specifically dealt with by it the law should be ascertained by interpreting the language used, instead of roaming over a number of authorities. After the language has been examined without presumptions, resort may be had to the previous state of the law only on some special ground, for example for the construction of provisions of doubtful import, or of words which have acquired a technical meaning. …"

22 Advocate Pallot submits that the Code was in this respect a codifying statute and therefore the Court must ascertain the natural meaning of the Provision without regard to the 1635 Ordinance. I am content to accept this an appropriate starting point.

The natural meaning

23 He submits that the correct translation of the Provision is "no person may make a contract in respect of any thing or matter in litigation" (my emphasis). He moves on from that to submit that a funding contract is a contract "in respect of" a matter in litigation because it relates to litigation. It is therefore prohibited by the Code.

24 In my judgment, his argument falls at the first hurdle because he has incorrectly translated the Provision. I consider that, as the Master held (and as the plaintiffs submitted), the correct translation is:–

> ***"No person may contract for things or matters in litigation" (my emphasis).***

25 The important distinction is between ***"for"*** and ***"in respect of"***. The natural meaning of *"pour"* is *"for"* or, in some cases, *"to"* in the sense of *"in order to"* e.g. "j'ai acheté une nouvelle voiture pour aller plus vite"; *"I have bought a new car (in order) to go faster".* But the usual meaning of *"pour"* is *"for"*. I was not referred during the hearing to any dictionary definition which translates *"pour"* as *"in respect of"*. I have since checked Harrap's Standard French Dictionary and Collins French Dictionary. Neither of these suggests *"in respect of"*

or *"in relation to"* as a translation of "pour" (save that Harrap suggests that the expression *"pour ce qui est de …"* can mean *"as concerns"* or *"with regard to"*; but that is of course not the expression used in the Provision). On the contrary, I consider that the natural French equivalent of *"in respect of"* or *"in relation to"* are expressions such as *"quant à, relativement à, en ce qui concerne, concernant, par rapport à, à l'égard du, touchant or ayant rapport à".*

26 If the correct translation of the Provision is that it prohibits contracting for a matter or thing, then I agree with the Master and the plaintiffs that the natural meaning of this expression is that it is concerned with the acquisition of a matter or thing in litigation. Indeed, Advocate Pallot had to concede during the hearing that, if I were to say "I have contracted for this house" or "I have contracted for this horse" it would in each case mean that I had agreed to acquire the house or the horse. It would not be apt language to cover some other form of contract, such as repairs to the house or treatment or training for the horse. I see no difference in meaning when using the same expression with reference to a matter in litigation. I find it very hard to interpret a prohibition on contracting for a matter in litigation as extending to a contract which deals with the funding of that litigation by a third party. Much the more natural meaning is that it is concerned with acquiring title to litigation by way of assignment.

27 Furthermore, where would Advocate Pallot's interpretation end? If I instruct a lawyer or a forensic accountant to act on my behalf in litigation, I am surely entering into a contract "in respect of" or "in relation to" that litigation. On his interpretation it would therefore be a breach of the Provision. That would lead to an absurd result. Alternatively, if a contract with a lawyer or a forensic accountant in respect of litigation is not a breach of the Provision but a funding agreement is, how is that so by reference to the natural and ordinary meaning of the language?

28 Advocate Pallot's primary submission was that the Provision should be interpreted without regard to the background or the previous legislation. I hold that, for the reasons I have given, the natural and ordinary meaning of the Provision is that it is a prohibition on assignment of a matter in litigation.

29 I should add for the sake of completion that there was no dispute between the parties that the provision covers only matters where litigation has actually commenced; hence the reference to ***"choses ou matières en litige".*** To that extent, the parties accepted the correctness of the decision to that effect in *Valetta* at para 34.

The legislative background

30 Although Advocate Pallot's primary submission was that the Provision has to be interpreted without reference to any preceding legislation because it is a codifying statute, he argued as an alternative that, if one had regard to the legislative background, it supported his interpretation. He did so on the basis that the 1635 Ordinance states that no

man should *"buy or contract for"* any debt or other thing in action whereas the Code simply prohibited *"contracting for"* a thing or matter. The removal of the word *"buy"* meant, he said, that the prohibition in the Code was wider than that in the 1635 Ordinance. He pointed out that the 1635 Ordinance referred to maintenance and champerty whereas there was no such reference in the Code, so that it was not plainly a champerty provision. He submitted that the Provision in fact widened the ambit of the earlier provision so as to outlaw all bargains, deals or contracts which are struck in relation to any thing or matter which is *"en litige"*, and not merely those which are champertous or constitute maintenance.

31 I cannot agree with these contentions. I accept that the expression ***"contract for"*** in the 1635 Ordinance must be wider than ***"buy"*** because both expressions are used in the Ordinance. I therefore accept that "contract for" in the Provision must also be wider than simply buying. However the expression would cover acquisition by way of gift or exchange. The fact is that the 1635 Ordinance uses similar wording to the Provision in that it refers to contracting ***"for"*** and, for the reasons already given, that is not the same as contracting *"in respect of"* or *"in relation to"* and therefore does not cover all bargains, deals or contracts in relation to a matter in litigation, as submitted by the defendants.

32 That interpretation is supported by consideration of the background. The 1635 Ordinance was, as expressly stated on its face, introduced to prevent maintenance and champerty. That was the vice at which it was aimed. As explained in *Valetta*, the background to the introduction of these two concepts was the practice of people assigning claims to nobles and others who could expect to be more favourably treated by the courts. The Court said this at para 13:–

> ***"13. The history of these two concepts is important to an understanding of the present position. A convenient summary is to be found in the judgment of Steyn LJ in*** *Giles -v- Thompson* [1993] 3 All ER 321 ***at 328. From this it appears that one of the abuses which afflicted the mediaeval administration of justice was the practice of the assigning of doubtful or fraudulent claims to royal officials, nobles or other persons of wealth and influence who could in those times be expected to receive a very sympathetic hearing in the courts. The agreement often was that the assignee would maintain the action at his own expense and share the proceeds of a favourable outcome with the assignor. It was in those circumstances that the courts developed the doctrines of maintenance and champerty to prevent such abuses."***

33 These are the same abuses of which Le Geyt spoke in *La Constitution, Les Lois et les Usages de Jersey* Tome 1, pages 188–192 in a chapter headed ***"Des choses litigieuses".*** Thus the historical concerns which gave rise to the need for the doctrines of maintenance and champerty in England also applied in Jersey. Le Geyt referred to the 1635 Ordinance in that chapter; he was of course writing before the enactment of the Code. At page 189, when referring to the concerns mentioned above, he states:–

> ***"Il semble qu'il n'y ait que l'abus qui rend condamnable le transport des choses litigieuses, comme quand on le fait exprès pour mettre en teste un homme puissant et difficile …".***

And at 191 he writes:–

> ***"Les dépens d'un procès, et tant les meubles que les immeubles, peuvent estre des matières litigieuses, et l'on peut dire que l'ordonnance de 1635 n'excepte ni ne distingue rien du tout.*** La cession d'une chose litigieuse est réprouvée sous quelque prétexte qu'elle se fasse, soit de donation, soit de payement d'une autre dette, soit de garantie, ou de quelque autre manière que ce puisse estre". (emphasis added in each case)

In the next paragraph on page 191, he refers in the same context to ***'le vendeur'*** and ***'l'acheteur'***, which is consistent with there being an assignment of the matter in litigation.

34 In my judgment, it is clear that Le Geyt considered that the 1635 Ordinance was concerned only with prohibiting the assignment ('cession' or 'transport') of matters in litigation.

35 Furthermore, although the Code can be regarded as a codifying statute, it is in somewhat unusual terms because it expressly states that the relevant passages are:–

> ***"… conformément à l'Ordre du Conseil de 1635, le 12e juin".***

36 The translation of " ***conformément"*** is *"in conformity with" or* "in accordance with". In my judgment, this wording negates any suggestion that the provisions of the Code were intended to make any substantial alteration to the provisions of the 1635 Ordinance. On the contrary, it suggests that the Code was intended to re-enact the relevant provisions of the 1635 Ordinance. That is confirmed by looking at the three matters covered by the 1635 Ordinance which are also dealt with in the Code. The first relates to accessories to murders and felonies. The wording of the 1635 Ordinance in this respect is as follows:–

> ***"Whereas there is noe punishement by the Lawes & Customes of that Island for Accessaries in murders & feloines affter the fact donne vdz for such as fauour & receaue the principalls before theire Convictio it is thought fitt & ordered that such accessaries shalbe punished, by ffyne & Imprisonment, And for such also Who Convay ffelons out of the Island after proclamacon made for theire apprehencon & who breake prison & for the fauourors of such offendors & Compounders with them.*** That they be punished by ffyne & Imprisonment."

37 This is reflected in the Code by the following provision:–

> ***"Conformément a l'Ordre du Conseil de 1635, le 12e Juin, ceux qui seront accessoires en crimes de meurtres, ou qui en felonie apres le crime commis, recevront ou favoriseront les coupables avant leur conviction, ou***

qui emporteront ou favoriseront l'évasion des coupables hors de l'Isle, après que proclamation aura été faite de les apprehender ; seront punis par amende et imprisonnement."

38 The wording is not identical but in my judgment the effect of the Code is the same as that of the 1635 Ordinance.

39 The same applies in relation to the third matter concerning the attendance of the Governor or his Deputy. The clear intention is to re-enact the effect of the 1635 Ordinance even though the wording is not identical (albeit very similar).

40 In my judgment the intention is clearly the same in relation to the Provision concerning matters in litigation. The intention was to replicate the effect of the 1635 Ordinance, albeit that the draftsman took the opportunity to amend slightly and simplify the language.

41 It follows that an analysis of the background is consistent with the interpretation which I have reached without recourse to that background. As with the 1635 Ordinance, the Provision was intended to avoid champerty and maintenance and it dealt with the matter by prohibiting the assignment of matters in litigation.

The consequences of an infringement of the Provision

42 On my finding, there is no breach of the Provision by virtue of the plaintiffs entering into the funding agreement. That is sufficient to dismiss this appeal. But in case I am wrong, I now turn to consider what order should be made if it were to be found that the funding agreement is contrary to the Provision.

43 As Le Geyt points out on page 191 of the chapter referred to earlier, the 1635 Ordinance does not impose any penalty. Le Geyt goes on to assume that any penalty would be left to the prudence of the judges.

44 It is by no means clear that breach of the Provision would amount to a criminal offence. The Provision simply prohibits entering into contracts for matters in litigation. It seems to me more likely that entering into such a contract would therefore be contrary to public policy. The effect of entering into such a contract under Jersey Law is not entirely clear. Under English law such contracts are unenforceable. However *Pothier* suggests in the passage quoted at para 55 (ii) below that such a contract would be ***'nul'***. I have not heard any argument as to whether this reflects Jersey law and, if so, whether ***'nul'*** must be interpreted as meaning that an agreement is void or voidable or whether it would merely be unenforceable. The point is not material for my decision and I therefore do not consider it further. I shall use the expression 'unenforceable' in order to avoid unnecessary repetition, but I am expressly not deciding the point.

45 The question therefore is whether the fact that the plaintiffs in this case have entered into a contract with Harbour which would, on that hypothesis, be unenforceable should result in their claim being struck out or stayed.

46 Advocate Pallot relied on the case of *Grovewood Holdings PLC -v- James Capel and Co Limited* [1995] Ch 80 to argue that it should. In that case, the plaintiff company had started an action against the defendant alleging that he had acted negligently in the course of acting as financial adviser in the plaintiff's acquisition of a property company. After the plaintiff went into insolvent voluntary liquidation, the liquidator wished to continue the action but was unable to obtain the funds necessary to do so from the plaintiff's creditors or shareholders. He therefore entered into two agreements under which third parties would fund the action in return for one half of the recoveries of the action.

47 Lightman J held that the agreement was champertous. He then went on to consider whether a stay should be granted. He distinguished the earlier Court of Appeal case of *Martell -v- Consett Iron Co Limited* [1955] Ch 363 where the Court of Appeal had expressed the view *obiter* that a stay was inappropriate in the case of maintenance. Lightman J held that circumstances had changed since then and said as follows at 87:–

> ***"Mr Sumption submits that, when proceedings are maintained champertously, the proceedings constitute an abuse of process and should be stayed.*** This appears to me both logical and right in an ordinary case. The law of champerty is based on public policy considerations designed to protect both the administration of justice and the defendant from the prosecution of such proceedings. If the Court does not intervene, it may be taken to be countenancing this abuse of its process."

The judge therefore stayed the proceedings.

48 However, these observations have been doubted in subsequent cases before the English Court of Appeal. In *Abraham -v- Thompson* [1997] 4 All ER 362, the actual issue was whether the Court could make a disclosure order against a plaintiff seeking information as to who was funding the action. But in passing, the Court considered the observation of Lightman J and concluded that the reasoning of the Court of Appeal in *Martell* retained its force. Potter LJ stated (at 376) that the better course would normally be to let the action proceed to trial and then, if need be, consider the powers of the Court to award costs directly against the litigation funder. Millett LJ said this:–

> ***"In*** *Grovewood Holdings Limited -v- James Capel and Co Limited* ***… Lightman J expressed the view that the decision in*** *Martell -v- Consett Iron Co Limited* ***had ceased to have any force now that the crime of maintenance has been abolished and other grounds for a stay are recognised which do not constitute defences.*** I do not find this reasoning persuasive. … Moreover, I find it difficult to see how the decriminalisation of maintenance can form any rational basis for distinguishing the decision. It is, to say the least, counter-intuitive to

> reason that conduct which was not regarded as an abuse of the process of the court even when it constituted a crime and a tort should be regarded as an abuse of process when it is neither."

49 In *Faryab -v- Smyth* (unreported) 28th August 1998 the plaintiff was said to have entered into a champertous agreement in order to raise £40,000 which he had been ordered to provide by way of security for costs for an appeal. The Court of Appeal held that, even if the funding agreement were unlawful and contrary to public policy on the grounds of champerty, it would not be right for the Court to stay the appeal. Chadwick LJ said this:–

> ***"It was accepted by this Court in Abraham -v- Thompson that, although the Court retains the power to stay proceedings if satisfied that they constitute an abuse of process, the mere fact that the proceedings are being financed by a third party with no interest in the outcome — other than in relation to the prospects of repayment — is not of itself sufficient abuse to invoke the jurisdiction of the Court.*** The Court is entitled to protect its own procedures … but it should be careful not to use that power so as to deny access to justice to a party who sought to fund his proceedings in a way which may itself become contrary to public policy, unless that which has been done can be seen to an amount to abuse of the Court's own process."

50 Finally, in *Stocznia Gdanska SA -v- Latreefers Inc* [2000] WL 447 the Court was concerned with an agreement which was said to be champertous and was invited to stay the proceedings. Morritt LJ referred to *Abraham -v- Thompson* and *Faryab -v- Smyth* and said at paragraph 59:–

> ***"A person who has funded an action champertously may fail to enforce recovery of the agreed proportion of the spoils.*** A person who has secured a champertous agreement to fund his litigation may be unable to enforce payment of the agreed funds. But the fact that a funding agreement may be against public policy and therefore unenforceable as between the parties to it, is by itself no reason for regarding the proceedings to which it relates or their conduct as an abuse."

The Court went on to consider the particular agreement and held that continuation of the proceedings with the benefit of the agreement was not an abuse of process even if it were to be found eventually to be champertous. The proceedings were therefore not stayed.

51 I prefer the approach of the Court of Appeal to that of Lightman J. A person bringing an action is entitled to get his case before the Court. Access to justice is of the first importance. There is a strong public interest in persons being able to obtain funding to enable them to bring proceedings to vindicate their rights. Whether litigation brought by way of funding in breach of the Provision would amount to an abuse of the Court's process would, in my judgment, depend upon the circumstances. There is jurisdiction to strike out or stay an action which is an abuse of process but it would be a matter of fact and degree in each case as to whether an abuse of process is established. The mere fact that a funding

agreement is contrary to the Provision does not result by itself in the proceedings thereby becoming an abuse of process.

52 I turn therefore to consider whether the fact that the plaintiffs have entered into this agreement is an abuse of the Court's process.

53 In *Valetta* the Court held at paragraph 32 that Jersey law was to like effect as English law and that an agreement which provides for a share of the proceeds of litigation may be held to be unenforceable on the ground of champerty if it is contrary to public policy. However, the Court emphasised at paragraph 9 that it had not had the benefit of adversarial argument on the point.

54 I have now heard such adversarial argument. Advocate Pallot contends that the Court was wrong in *Valetta*. He says that there is no customary law concept of champerty or maintenance in Jersey law. He points out that there has not been a single case in Jersey which has held to that effect until *Valetta*. Furthermore, he says that the position is covered by statute i.e. the Provision. That is why there has been no need for the development of any customary law doctrine. It is too late, he says, for the Court now to invent such a doctrine.

55 I have carefully considered Advocate Pallot's submissions but I remain of the view expressed in *Valetta*. I would summarise these as follows, acknowledging that I am repeating to some extent what was said in *Valetta*:–

(i) Jersey law recognises the ability of the Court to hold an agreement to be unenforceable if it is contrary to public policy. See *Sarum Hotel Limited -v- Select Agencies (Jersey) Limited* [1987–88] JLR 343 at 353 per Tomes DB.

(ii) This is consistent with *Pothier*, who is often regarded as a helpful guide as to the law of Jersey in relation to matters of contract. Thus, his *Traité des Obligations (1821 Edition)* Part 1, Chapter 1, first section para 43 provides:–

> ***"Lorsque la cause pour laquelle l'engagement a été contracté est une cause qui blesse la justice, la bonne foi ou les bonnes mœurs, cet engagement est nul ainsi que le contrat qui le renferme."***

(iii) As the passage referred to at para 32 makes clear, the doctrines of champerty and maintenance were introduced in England because of the problem of powerful people taking over litigation and hoping to gain a favourable verdict which would not have been obtained by the original plaintiff. That problem was clearly also envisaged in Jersey as is shown by the discussion in Le Geyt at page 188–190 already referred to and by the fact that it was thought necessary to introduce the Provision in the 1635 Ordinance for the stated purpose of avoiding maintenance and champerty. Thus the historical concerns which gave rise to the need for the doctrines of maintenance and champerty were equally applicable in England and Jersey.

(iv) The fact that the problem was addressed in part by statute does not mean that the courts are not free to develop a doctrine of customary law. Thus in England, maintenance and champerty were for many years criminal offences, yet this did not prevent the English courts developing the common law doctrine alongside the criminal provision. Furthermore, the Provision only applies once litigation has begun. If Advocate Pallot is right in saying that there is no customary law doctrine, there would be nothing to prevent a person entering into an agreement which was clearly contrary to public policy shortly before litigation starts. For example, the lawyer acting for a plaintiff could agree to share the proceeds of the litigation. As the Court said at para 37 of *Valetta*, referring in turn to the English case of *Morris -v- Southwark London Borough Council (Law Society intervening)* [2011] 2 All ER 240, this would clearly be capable of affecting the purity of justice. The customary law is therefore needed to cover the position at that stage and I see no reason why the Jersey courts should have less power to develop a doctrine of maintenance and champerty at customary law in order to protect the purity of justice than the English courts did at common law.

(v) Importantly, the doctrines of maintenance and champerty were developed by the English courts in order to preserve the purity of justice. That is an important public policy and I can see no logical reason why the courts of this jurisdiction should not similarly be able to develop the customary law so as to preserve the purity of justice.

56 For these reasons, I consider that this Court does have power to declare unenforceable agreements which are contrary to public policy on the grounds of champerty or maintenance.

57 As discussed at paragraphs 10–31 of *Valetta*, the requirements of public policy change over the years. There is now an independent judiciary which is not influenced by the identity of a plaintiff or defendant. Conversely, there is an important public interest in facilitating access to the courts and third party funding agreements can make a material contribution in this respect. What may have been regarded as contrary to public policy in times past will no longer necessarily remain so in today's conditions.

58 The funding agreement in *Valetta* provided in outline that Harbour would pay the legal costs of the plaintiffs, it would meet any adverse cost orders against the plaintiffs and control of the litigation remained with the plaintiffs (although they had to keep Harbour informed and they agreed to conduct the litigation in accordance with the reasonable advice of their lawyers). Harbour had the right to terminate the agreement if satisfied that there had been a material adverse decline in the prospects of success but would remain liable for all costs incurred during the existence of the agreement and for adverse costs to the date of termination. In return, Harbour was entitled to share in any damages recovered either by negotiation or by award from the Court. Any such award would be applied first in reimbursing Harbour for the costs which it had incurred and thereafter the proceeds would be split between the plaintiffs and Harbour with a sliding scale of sharing reaching a maximum of 50% or three times the legal costs of the plaintiffs, whichever was the greater.

59 In *Valetta*, the Court came to the clear conclusion that, given the considerable recent changes in the law of champerty, that agreement would not be regarded as champertous under English law and should not be so regarded under Jersey law. Far from corrupting the purity of justice, it facilitated access by plaintiffs who would otherwise be unable to bring the proceedings because of a lack of resources. Importantly, the agreement provided that control of the proceedings should remain with the plaintiffs and their lawyers and it did not prejudice any potential defendants because the agreement provided that Harbour would satisfy any adverse costs order against the plaintiffs.

60 The evidence as to the funding agreement in this case is limited as discussed earlier at para 7. Nevertheless that evidence suggests that the agreement provides that control of the proceedings will remain with the plaintiffs and their lawyers and that Harbour will satisfy any adverse costs against the plaintiffs. On the basis of the information provided, I do not consider that there is anything in the funding agreement which could adversely affect the purity of justice.

61 Nevertheless, having reached that conclusion, I felt that, in fairness to the defendants, I ought to inspect the funding agreement so as to ensure that there was nothing unexpected in it which would cause me to change my mind on this issue. Accordingly, before finalising this judgment, I requested the plaintiffs to provide me with a copy of the agreement, which they did. Having read that agreement, I share the view of the Master that there is nothing in it which endangers the purity of justice.

62 Advocate Pallot also argued that the defendants would be prejudiced if the plaintiffs were permitted to fund litigation by entering a funding agreement which was ultimately held to be unenforceable, either because it breached the Provision or because it was champertous. I do not agree. If the claim is successful, justice will have been facilitated by allowing the plaintiffs to obtain a remedy for a wrong which was done to them. If the claim is unsuccessful, then whilst it is true that the plaintiffs may be unable to enforce the agreement for the payment of adverse costs against the funder if the agreement is unenforceable and may therefore be unable to meet any adverse costs order, I think it unlikely that this would prejudice the defendants, because one can readily envisage the Court using its power to order a third party to pay the costs of the successful defendant where that party has acted as third party funder to the plaintiffs on a commercial basis (as Harbour would have done in this case).

63 In summary, given my conclusion that there is nothing in the funding agreement in this case which would harm the purity of justice, and that, on the contrary, it facilitates the important objective of access to justice, I conclude that it would not be an abuse of process for this litigation to continue on the basis of this agreement. Accordingly, even if I had concluded that the agreement was a breach of the Provision, I would not have dismissed or stayed the proceedings.

64 For these reasons, I dismiss the appeal against the Master's decision.