Litigation Funding in the Context of the Family Court: Practitioner's Tips

In matrimonial litigation, the difference in wealth between the parties can translate to disparity in the quality of legal representation. Incorporating observations from Jeremy S.K. Chan, in this article Isabel Tam examines the various possible funding solutions for this inequality of arms – from *Currey* legal costs provisions, legal aid, to commercial third-party funders – and highlights pitfalls to beware of.

In the family context, the division of labour or difference in earnings or wealth between parties to a marriage, or between the parents to a child, often means that parties have very different financial positions when they enter into litigation. The "breadwinner" will likely have a much better financial position in contrast to the "homemaker"/"primary child-carer", unless the latter has somehow amassed substantial assets of his/her own. The disparity in available financial resources can result in inequality of arms when it comes to legal representation unless properly addressed.

To alleviate this, the Family Court has jurisdiction to make a litigation funding order (often referred to as *Currey* legal costs provision), such that the party with more financial resources can be compelled to finance the other side's litigation where appropriate. A divorcing spouse can apply for such order under s.3 Matrimonial Proceedings and Property Ordinance (Cap. 192) ("**MPPO**"), as a plank of Maintenance Pending Suit ("**MPS**") (but the relevant threshold test is higher than that applicable to more general MPS for living expenses). An unmarried parent can apply under s.13(3) of the Guardianship of Minors Ordinance (Cap. 13) ("**GMO**").[1]

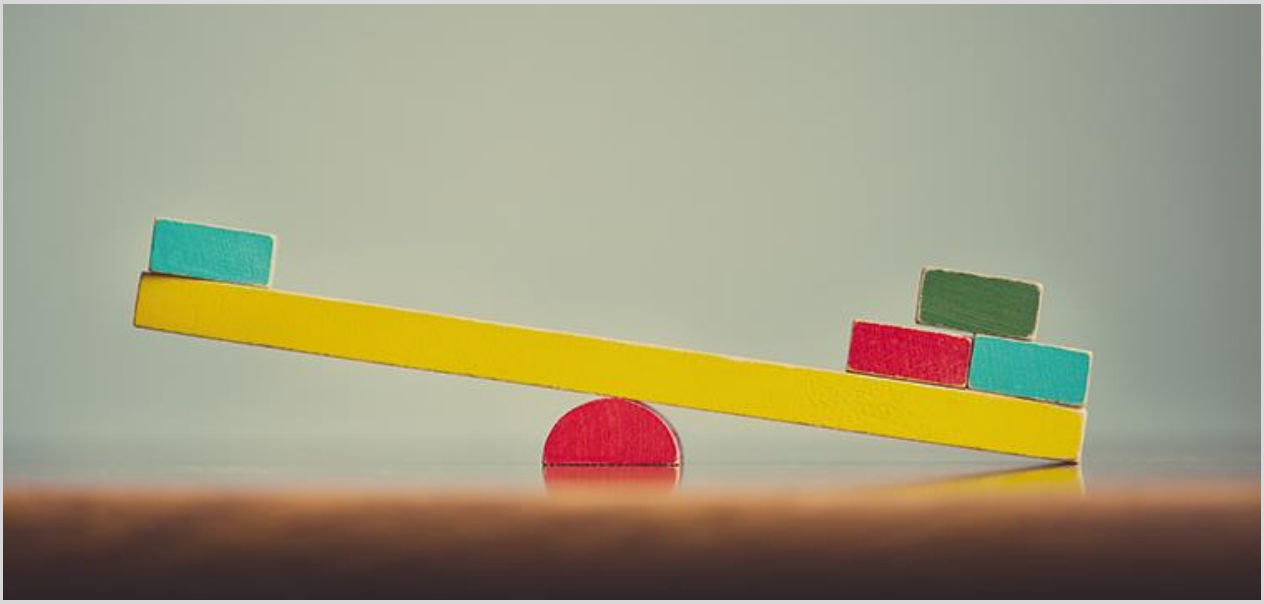
An application for funding from the other spouse/parent is not the only option for clients struggling to cover legal costs – and there are sometimes reasons for the Court's reluctance in granting such orders: MPS orders deplete the matrimonial assets available for distribution; there is also a risk of injustice arising from unjustified irrecoverable payments which were granted on a summary basis only, particularly where it is an application between an unmarried couple[2] or if there is a potential forum dispute.[3]

[1] *IDC v. SSA* [2019] HKFC 255 §17, in which the court accepted the argument that the correct statutory is s.13(3) of the GMO rather than s.10(2) .

[2] This is a heightened risk in an application between a unmarried couple as there is "no ability to offset any overpayment in an order for financial ancillary relief upon divorce": R, ER v H, IF [2018] HKFC 229 §10.

[3] With a potential forum dispute in the picture, there is a "risk of injustice arising from irrecoverable MPS" should the payer later succeed in his challenge to jurisdiction: *YS v TTWD (Maintenance Pending Suit)* [2011] HKFLR 439 §§12-13 (discussed further below).

Public funding through legal aid is another important option, if the means test is met and if the case is not the type in which the Courts would query "why public funds should be expended to fund litigation when there are ample resources within family funds".[4] Recent jurisprudence suggests that commercial third-party funders could also, in the right circumstances, be an option – although to go down this route, one would have to meet head-on numerous obstacles placed by the rules of champerty and maintenance.



Ascertaining suitability of MPS for legal costs

The Court will conduct an "overarching inquiry" into "whether the applicant could demonstrate that he or she could not reasonably procure legal advice and representation by any other means and thus that any assets could not be reasonably deployed for such purpose".[5] It is important to note the qualifying word "reasonably".

The starting point is the *Currey* test:[6] that the applicant spouse has no assets, or none that can reasonably be deployed; can provide no security for borrowing, or none which can reasonably be offered; that s/he cannot reasonably obtain legal services by offering a charge on the outcome of the litigation; and that s/he cannot secure publicly funded legal help "at a level of expertise apt to the proceedings". However, the *Currey* test is not exhaustive and is not the end of the matter.

[4] *HJFG v KCY* [2012] 1 HKLRD 95; see also *TWF v HWKR* (unreported), FCMC 16534/2015, 3 March 2016; *T v L (MPS Legal Costs)* [2013] HKFLR 373.
[5] *HJFG v KCY.*
[6] *Currey v Currey* [2006] EWCA Civ 1338.

T v L (MPS: Legal Costs) and ***HJFG v KCY*** emphasised that the test only provides "prudent guidance", and the governing principle remains that of "reasonableness" – the Court's aim is to make an order that will "achieve a reasonable and fair result".[7] The relevant steps for practitioners to satisfy the Court in its overarching inquiry are set out below.

First, estimate the legal costs, with a reasonable breakdown of anticipated items and for a reasonable duration.

- Duration: Orders for legal costs frequently provide up to the financial dispute resolution (FDR) hearing only, with the expectation that if no settlement is achieved at the FDR hearing, it would be for the new judge to determine whether a new allowance should be granted and, if so, in what amount. This is intended to "encourage the applicant to act reasonably, looking in good faith to try and reach settlement".[8]

- Breakdown of expected costs:
    - The estimate ought to take into account any interlocutory applications or preliminary issues that appear to arise from the parties' Form Es or pleadings.

    - The breakdown should be a "simple back of the envelope type bill of costs itemising out what counsel's fees are likely to be and what solicitor's expenses are likely to be".[9] This is similar to a security for costs estimate in general civil cases, but *Currey* legal costs provision will usually be viewed in the context of solicitor and own client costs, rather than being subject to a party-and-party taxation limitation as to quantum – this is because *Currey* legal costs provision is intended to provide the applicant with funds to pay his or her own lawyer.

    - Where the claim is for a modest amount and in a relatively early stage, it would be "counter-productive to require detailed breakdown for future costs". This would go against the summary nature of the exercise. On the other hand, a "big money case" would merit greater details being given.[10]

- It may be relevant to consider the parties' Form H's and how much the respondent to the application has been spending on his / her own lawyers, and also that party's Form E where legal expenses often feature in Part §4 expenses and the respondent to the application may have stated his / her own case as to how much he / she is spending on his / her own lawyers.

[7] *T v L (MPS: Legal Costs)*; *HJFG v KCY* [2012] 1 HKLRD 95.
[8] *HJFG v KCY.*
[9] *WW v LLN (No. 2).*
[10] *WW v LLN (No. 2).*

- As noted above, particular considerations will arise if the parties also have a forum dispute. The court will bear in mind "it is important to be more cautious" where a challenge to jurisdiction is preceded by a MPS order, as there is a "risk of injustice arising from irrecoverable MPS" should the payer later succeed in his challenge to jurisdiction.[11] These concerns might be addressed in formulating the duration of the order sought (with the jurisdiction challenge "swiftly listed and determined to avoid the extenuation of the pending suit period"), and adjusting the proposed amount bearing in mind "any attempt to err on the generous side should be guarded by the potential absence of adjustment powers at the final ancillary relief hearing".[12]

Second, ascertain the extent of the client's ability to generate funds to meet the estimated legal costs.

- Availability of assets: This will include assets held in the client's own name and also resources which the client is able to draw upon, albeit not held in his/her name. If there is evidence that the client has, in the past, been able to draw upon funds not held in his/her name (such as a family trust[13] or from relatives or the ability to borrow), the Court will not be convinced that there is a true "inequality of arms". The *KEWS* factors laid down by the Court of Final Appeal can be relevant but needs to be approached with caution at the interlocutory stage.[14] The overall need to be fair and reasonable may mean that the applicant does not have to resort to selling every last item before making the application.

[11] *YS v TTWD (Maintenance Pending Suit)* [2011] HKFLR 439 §§12-13
[12] *YS v TTWD* §§12-13
[13] See for example *KCMA v ABC* [2020] HKCFI 848.
[14] *KEWS v. NCHC* (2013) 16 HKCFAR 1 §§36-37 held that when taking into consideration financial assistance made by third parties, the court looks at "matters of substance and not just form" and will ask two

- Availability of loans: Letters from financial institutions refusing to provide a loan based on the client's available security will demonstrate that reasonable efforts to procure a loan have been made and exhausted. If there is evidence that the client has been borrowing money from relatives to meet legal costs, the court may well conclude that such assistance will continue to be available and refuse the application.[15]

- Availability of obtaining legal services by offering a charge on the outcome of the litigation: The Court will want to be satisfied that the client cannot obtain what is known as a Sears Tooth arrangement, ie. where the legal cost is covered by offering a charge on the outcome of the litigation.[16] The availability of such an arrangement depends on the nature of the litigation and the intended outcome of the litigation -- for example, in an application for custody care and control of the child, there may well be no money involved in the outcome of the litigation and no charge would be possible.[17] If the client has been carrying on litigation for a long period of time whilst being impecunious, the Court might draw the conclusion that he has been able to litigate on credit or on a Sears Tooth arrangement.[18] In reality, few if any solicitor firms in Hong Kong engage in Sears Tooth arrangements, and the Hong Kong Family Court has not imposed or expected solicitors to agree to such arrangements with their clients.

- Availability of legal aid: The primary concern in respect of legal aid will be whether the client can satisfy the means test in the Legal Aid Ordinance (Cap. 91).[19] The value of the matrimonial home (if occupied by the client as owner or co-owner) is excluded from the calculations under the means test.[20] Any maintenance which the client is receiving (as spouse or child-carer) will also affect eligibility for legal aid.

- The question of public funding generally ought to be addressed in the application. Exhibiting a refusal of an application for legal aid will obviously show this option is not available, although the court can also simply take judicial notice if the eligibility threshold

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"critical questions": (1) "What is the extent of the financial assistance provided by the third party to the husband or wife?"; and (2) "What is the likelihood of such assistance continuing in the foreseeable future?"

[15] See for example *YKC v LMYT* (unreported), FCMC 9062/2015, 8 February 2017 at §16, where the court refused to accept the applicant's "bare assertion" that the relative will refuse to extend further loans.

[16] *Sears Tooth (A Firm) v Payne Hicks Beach (A Firm) and others* [1997] 2 FLR 116; [16] *T v L (MPS: Legal Costs)* at §19; *LTF v SCW* [2018] HKFC 180 at §23; *YKC v LMYT* (unreported), FCMC 9062/2015, 8 February 2017 at §18 (where the court took the view that such an arrangement was an option for the MPS applicant); David Burrows, *Family Law, Costs Update – [2013] Fam Law 762(2).*

[17] See for example *T v L (MPS: Legal Costs)* at §19.

[18] *MKK v YSM* (unreported) FCMC 1194/2010, 13 September 2013 at §53.

[19] See s.5(1), ie. financial resources do not exceed $307,130.

[20] *Re A.*

is plainly exceeded.[21] The fact that a party has not been refused legal aid,[22] or has not even applied for legal aid,[23] does not bar the Court from making a litigation funding order against a party with ample financial resources. The Court of Appeal has observed that where "*there are ample resources available within family funds*", there might not be good reasons to expend public funds to fund the litigation, as an MPS order could encourage more responsible litigation by the parties. *"The court can keep better control of litigation if it's funding is at least in part within its purview. The party that controls the funds will be less willing to use them on unnecessary interlocutory procedures if he or she will have to provide funding for the other side*".[24]

Third, ascertain whether the applicant-spouse might make reasonable contribution to his/her own legal costs, and balance that against the other spouse/parent's ability to pay.

- It may be the case that the client has some sources of funding available, but that it is insufficient to cover the estimated costs.[25] The amount sought should be adjusted accordingly to satisfy the court that what is sought is reasonable and fair.

Commercial third party funding?

The last resort for the applicant to turn to if s/he fails to obtain funds from legal aid or an MPS application, could be a third party commercial funder. Relatively uncommon in Hong Kong due to the offences of champerty and maintenance, professional commercial litigation funding companies operate by agreeing to fund the litigation in return for a right to part of the "profits" of the litigation. These companies are usually based in other jurisdictions that historically have been friendly to third party funding, but have been able to make some headway in the Hong Kong market, at least in alternative dispute resolution processes, due to the enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance in June 2017.

In ***Re A***[26], the husband argued that despite his wish to proceed with an interlocutory application in the divorce proceedings, his financial resources had been depleted, his applications for MPS litigation

[21] See *LTF v SCW* [2018] HKFC 180 at §23.
[22] *TWF v HWKR.*
[23] *DX v LN* (unreported) FCMC 7870/2014, 21 September 2015 in which the parties agreed the applicant was not eligible for legal aid.
[24] *HJFG v KCY.*
[25] *R, ER v. H, IF* .
[26] [2020] HKCFI 493.

funding and for legal aid had been refused,[27] so his only viable option was to obtain third party litigation funding from an overseas commercial/professional litigation funding company. Such an arrangement would constitute the tortious and criminal offences of maintenance and champerty, unless it were found to fall within the common law exceptions. The husband therefore sought a "pre-clearance declaration of non-criminality" to sanction his proposed arrangement. The husband argued that his litigation funding arrangement would fall within the "access to justice" exception, a well-established exception to maintenance and champerty.[28]

The application in ***Re A*** was refused.

The court in deciding if the exception applies, conducts a balancing exercise between the applicant's access to justice and any countervailing policy concerns that underpin maintenance and champerty. In ***Re A***, the court took note of particular access to justice features in the matrimonial context, being the "inequality of arms" that might arise from the "family economics" or "division of labour" where the applicant spouse assumed a homemaker role and thus becomes impecunious, and the implications for gender equality. Showing the impecuniosity of the applicant is a strong factor, but is not the only factor. The court will also consider whether the policy concerns of generally prohibiting litigation funding by an unrelated party are allayed, such as protecting the vulnerable litigant from being exploited and protecting against excessive litigiousness.[29] In ***Re A***, the balance was found not to be in the husband's favour -- in particular, the court was not convinced that the husband's alleged impecuniosity arose from "family economics" or "division of labour" so no question of gender equality arose in the case.

Having said the above, the court ultimately emphasized that the continued existence of the crimes and torts of maintenance and champerty and the vitality of such legal principles to invalidate contracts show that these concepts remain important values in Hong Kong. The common law is in principle hostile against profiting from someone else's litigation unless justified and effectively controlled or regulated. The court expressed the view that "liberalisation of the laws on maintenance and champerty … should be left to the legislative deliberation/decision" and was concerned that such changes ought to be "supported by comprehensive statutory and/or regulatory framework/measures".[30]

[27] Interestingly, the wife had also made and been refused an MPS application against the husband.
[28] The starting point of these exceptions is Basic Law Art 35 and Bill of Rights Art 10, the rationale being that "an arrangement said to constitute maintenance or champerty could well result in a claim which is perfectly good in law being stifled where the plaintiff, deprived of the support of such an arrangement, is unable to pursue it." *Unruh v Seeberger* [2007] 10 HKCFAR 31 at §§95-103. *Winnie Lo v HKSAR* [2012] 15 HKCFAR 16 at §14.
[29] *Re A* §§82, 250-318.
[30] *Re A* §§433 and 437.

Realistically speaking, pursuing a "pre-clearance" application for commercial third party funding will, itself, involve potentially substantial costs, given the limited jurisprudence and the lack of successful examples allowing commercial funders to maintain family litigation.[31] This will obviously deter parties who already foresee they are unable to afford representation.

Therefore, **until the legal issues surrounding commercial third party are further reviewed or developed**, the options of MPS and legal aid are likely, for the foreseeable future, to remain the primary levellers of inequality of arms in the Family Courts.

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Disclaimer: This article does not constitute legal advice and seeks to set out the general principles of the law. Detailed advice should therefore be sought from a legal professional relating to the individual merits and facts of a particular case.

[31] The fact that such an arrangement might infringe criminal law, and all the applicant can do is to seek a "pre-clearance declaration of non-criminality" that will be of limited comfort and effect, will be another deterrent to funders. Such declarations are only given in "exceptional circumstances" as the Court will be mindful of potential prejudice to any subsequent prosecutorial decision or trial, but importantly the declaration will in any event **not** bind the criminal court or operate as a bar to criminal prosecution. *Re A* §§430-432.

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