IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 19 of 2010

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Ian Forte, Justice of Appeal
The Rt Hon Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
Cause No 368 of 2010

BETWEEN

LATOYA BARRETT
Plaintiff/Respondent

-and-

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
Defendant/Appellant

-and-

CAYMAN ISLANDS INSURANCE ASSOCIATION
Intervener

Mr Paul Reed QC and **Mr Peter Kirby** instructed by Nelson & Company appeared for the Appellant and the Intervener
Mr Thomas Lowe QC with **Mr Christopher McDuff** of Thorp Alberga appeared for the Respondent

Hearing dates: 4 and 5 April 2011
Judgment delivered 14 February 2012

JUDGMENT

Sir Anthony Campbell, Justice of Appeal:

1. This is an appeal from an order as to the costs recoverable by the Respondent, Latoya Barrett, who succeeded in the Grand Court on the issue of liability in proceedings arising out of a road traffic accident. As the driver of the other vehicle involved in the accident was a police officer on duty the proceedings were defended in the name of the Attorney General.

2. Shortly after the issue of proceedings Ms. Barrett entered into a conditional fee agreement with her attorneys (Myers Alberga now Thorp Alberga). They agreed that were her claim to succeed Ms Barrett would pay her attorneys their basic charges, disbursements and a success fee. The success fee was set, subject to the approval of the court, at 33.3% of all of the attorneys' professional costs.

3. There was also an agreement between Ms.Barrett, her attorneys and leading counsel, Mr Lynagh QC, that he would receive an 'uplift' of 33% if Ms. Barrett were successful in the proceedings.

4. Prior to the commencement of the trial and in accordance with guidance given by Smellie CJ in *Quayam and others v Hexagon Trust Company (Cayman Islands) Limited* [2002] CILR 161, the approval of the court was sought and received to both agreements.

5. At the conclusion of the hearing on liability Justice Quin, the trial judge, ordered that the defendant pay the plaintiff's costs of and occasioned by the determination of the trial on liability and that such costs be taxed on the standard basis if not agreed. On the application of the plaintiff the judge went on to make the following declaration:

> "2.1 The uplift of 33.3% contained in the Conditional Fee Agreement entered into between the Plaintiff and her attorneys-at-law dated 20 August 2008 and the uplift of 33% contained in the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at-law and Counsel dated 4 December 2009 are reasonable as between attorney and client and as between barrister and attorney respectively and on that basis are hereby approved.

2.2 Section 7.2 of Practice Direction No 1/2001 titled Guidelines Relating to the Taxation of Costs (the 'Guidelines') does not prohibit the recovery of the uplifts contained in the Conditional Fee Agreement entered into between the Plaintiff and her attorneys-at-law, nor the uplift in the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at- law and Counsel if such uplifts are calculated on an hourly rate basis, and the taxing officer, when assessing the costs payable under this Order, may, if in the exercise of his discretion he thinks it just to do so, assess such costs on the footing that the appropriate hourly rates are those which include uplifts.

2.3 It was reasonable for the Plaintiff and her attorneys to engage leading counsel (Mr Lynagh Q.C.) to act on the Plaintiff's behalf.

3.The Defendant shall pay to the Plaintiff an interim award of costs in the sum of CI$50,000.00

4. The Defendant shall pay the Claimant's costs of the present application in any event, such costs to be taxed on the standard basis if not agreed.

5. By consent, pursuant to GCR Order 59 rule 12(6) (cc) the Defendant is granted leave to appeal against paragraphs 2 to 4 of this Order."

6. The Attorney General appealed against the judge's order but chose not play any part at the hearing of the appeal before referring the matter to the Law Reform Commission.

7. The Cayman Islands Insurance Association, representing the insurance industry in the Cayman Islands, applied for and was granted leave by the Court to intervene in the appeal.

8. Mr Reed QC (who appeared for the interveners with Mr Kirby) accepted that there could be no objection to a litigant entering into a conditional fee agreement without a success fee. In the notice of appeal, as amended with the leave of this Court, the application is to set aside paragraphs 2.1, 2.2, 2.3, 3 and 4 of the judge's order. If a success fee is found to be payable the interveners did not contest the figures of 33.3% and 33% for uplift.

9. The issue raised by the interveners in this appeal is the application by the trial judge of the decision of the Grand Court in *Quayam and others v Hexagon Trust Company (Cayman Islands) Ltd* following the introduction of Practice Direction No 1 of 2001

10. In *Quayum* employees of Bank of Credit and Commerce International (BCCI) brought proceedings to recover assets that had been taken unlawfully by the former management of BCCI from the Staff Benefit Trust. They brought a claim against the trustees of the Cayman Trust to recover the costs they had incurred and sought the approval of the Grand Court to a conditional fee agreement that they had entered into with a firm of Cayman attorneys. The agreement was that they would pay nothing if their claim failed and a fee increased by 28% if it succeeded. The attorneys in turn had an agreement with counsel that provided for a fee to be increased by 50% on success.

11. In a reserved judgment giving reasons the Chief Justice concluded that the law of England as it related to the offences of maintenance and champerty and as to the tort of maintenance was received as part of the law of the Cayman Islands. Further, that in the absence of legislation similar in effect to the Criminal Law Act 1967 maintenance and champerty continued to be part of the law in these Islands.

12. The Chief Justice went on to consider whether agreements with a success fee were unlawful as being champertous maintenance and void on grounds of public policy. He rejected the argument that the court should regard any attenuation of the common law position as being a matter for the legislature. In his view this overlooked the mutable nature of the common law itself as it changes to meet the needs of society. It also overlooked the particular duties and responsibilities of the Court in Cayman. The Chief Justice put the issue of public policy at paragraphs 36 and 37 of his judgment in this way:

> "36. …If a lawyer anywhere has too much at stake in the success of litigation he may be tempted to conduct that litigation in a manner which is unethical. The ultimate concern is that the administration of justice could be impaired by improper conduct of litigation motivated by the self–interest of lawyers becoming common place. It follows that a situation should not be encouraged in which lawyers would be exposed to temptations which might lead them to behave other than in accordance with their best traditions. Improbable though such a scenario might seem in an environment where professional honour remains the norm, those who fear have only to look to the experiences in other places where contingency fees are routinely allowed, to find cause.
>
> 37. There is, however, another equally important and competing public interest: that of ensuring that everyone has access to justice. For many, such as the plaintiffs in this case, that access would be denied for want of legal

representation, were it not for the willingness of some lawyers to undertake litigation on the risky basis of a conditional fee arrangement."

13. The Chief Justice decided that the balance of public policy must certainly weigh in favour of allowing the arrangement. He went on to say that this was all the more so when the conditions that can and would be imposed by the court were available. The conditions (at para. 62.) were:

    (a) All such proposed arrangements must first receive the sanction of the court to be considered in the context of all the circumstances of the client and of the case.
    (b) The court is best placed to consider the reliability and reputation of the attorney, and will do so.
    (c) In the present matter – and in others, as a matter of discretion, where there is to be an enhanced fee – a requirement for submission to taxation on the solicitor and own client basis will be imposed and, if appropriate, a cap may be placed upon the quantum of fees recoverable.
    (d) In an appropriate case the court, as a matter of the exercise of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation, the unsuccessful opponent may be required to pay. That is, the fee will be limited to what is reasonable in the circumstances. In this way the potential risk of unfairness to such an opponent can be avoided.
    (e) In appropriate cases, depending, among other things, upon the potential value and size of the litigation, the circumstances of the client and the proposed terms of the conditional fee agreement, the client should be encouraged to take independent legal advice about it. The court may so require before granting its approval.
    (f) The agreement must be in writing and there must be a mechanism by which the client can discharge the attorney.
    (g) The overriding objective is that the conditional fee arrangement must, from beginning to end, be governed in principle and in practice by what is fair and reasonable. To this end, notwithstanding the prior approval of the court, the court must always be able to oversee its execution, by reference, in particular, to the manner of the conduct of the proceedings by the attorney."

14. He concluded "that it is not against public policy in the Cayman Islands to allow attorneys to enter into conditional normal or uplift fee arrangements with clients who need their services on that basis".

15. Shortly after the decision in *Quayum* was given, on 1 October 2001, and before the written reasons became available in July 2002, the rules committee modified the Grand Court Rules and issued Practice Direction No 1/2001. Both came into force on 1 January 2002.

16. Costs in civil proceedings are in the discretion of the relevant court (s.24 (1) of the Judicature Law) and provision is made for rules to be made relating to the costs of those proceedings and in particular, the entitlement to costs, the taxation of costs, the powers of taxing officers and the powers of judges to review decisions of taxing officers (s.24(2)).

17. The Rules Committee is constituted under the Grand Court Law (s.19) and empowered to make rules for the purpose of prescribing the fees and costs of legal practitioners in contentious matters, and regulating their taxation (s.19 (3)).

18. The Rules provide in Order 62 rule 4:

> " (2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.
>
> (6) The amount of the costs which a successful party shall be entitled to recover from any other party is –
>
> (c) the amount allowed after taxation on the standard basis;"

19. Practice Direction 1 of 2001 states:

"7.1 The amount of attorney's fees allowable on taxation on the standard basis shall be determined on the basis of time spent.

7.2 Amounts claimed on the basis of brief fees, refreshers, lump sums, percentages, conditional fee agreements, contingency agreements or any basis other than hourly rates will be disallowed.

7.3 In the case of taxations on the standard basis, the hourly rates to be applied will be determined on the basis of the post qualification experience of the persons engaged as follows:

More than 15 years	Up to CI$300 or US$365
Between 10 and 15 years	Up to CI$275 or US$335
Between 10 and 5 years	Up to CI$250 or US$305
Less than 5 years	Up to CI$150 or US$185
Articled Clerks and Paralegals	Up to CI$90 or US$110

> These are maximum rates. The taxing officer may, in the exercise of his discretion, determine that lower rates are appropriate in any particular case… Queen's Counsel shall be treated as having more than 15 years post-qualification experience."

20. After the introduction of sections 7.2 and 7.3 of the Practice Direction Justice Henderson in *Bennett v Attorney General of the Cayman Islands* said of *Quayam* :

> "Although the passages quoted are obiter dicta, they appear in a judgment in which all aspects of conditional fee agreements were examined thoroughly. In light of these passages section 7.2 of the 'Guidelines' cannot be taken to prohibit the recovery and costs of an uplift. The purpose of section 7.2 is to forbid the assessment at taxation of costs on any basis other than by a consideration of hourly rates and the number of hours spent doing the work. Its focus is the method of assessment. The older approach to taxation – that is, assessment of a fee which is fair and reasonable in all of the circumstances – often paid little, if any, attention to hourly rates or hours worked. Indeed, it is a relatively recent development for attorneys, and particularly for barristers, to even have hourly rates and to keep a record of their hours worked on behalf of a client. Section 7.2 makes the hourly rate approach the only permissible manner of taxation. It does not prohibit uplifts which are themselves calculated on an hourly–rate basis."

The judge was satisfied that the taxing officer could assess costs on the basis that:

> "the appropriate hourly rates are those which include the uplifts. He does not have to do so because the decision in Quayam provides clearly that it is a matter for his discretion."

21. In the decision that is the subject of the present appeal Justice Quin agreed with Justice Henderson and confirmed that section 7.2 of the Practice Direction did not prevent the taxing officer ordering payment of an uplift.

22. The authority for making practice directions is derived from the inherent jurisdiction of every court " to regulate its own procedures, save in so far as any such direction is inconsistent with statute law or statutory rules of court" - Lord Donaldson M.R. *Langley v North West Water Authority* [1991] 1W.L.R. 697 at 702. Practice Direction No 1 of 2001 contains no such inconsistency and is therefore to be followed.

23. Paragraph 7.2 of the Direction provides in clear terms that amounts claimed on the basis of conditional fee agreements or on any basis other than hourly rates,

will be disallowed. It is significant that conditional fee agreements are mentioned specifically in this context and I do not understand this to mean that provided 'uplifts' under a conditional fee arrangement are charged on an hourly basis they may be allowed.

24. In my view the costs regime introduced in January 2002 does not permit a successful party to recover on taxation on the standard basis an hourly rate above the maximum figure in paragraph 7.3 of the practice direction. Any increase in the hourly rate charged under a conditional fee arrangement for a success fee must be disallowed.

25. In his ruling on costs the trial judge allowed for leading counsel and the intervener appealed on the ground that this was a matter for the taxing officer and that it was not appropriate for leading counsel to have been retained in a case of this nature. Mr Lowe Q.C. (who did not appear in the court below and appeared, with Mr McDuff, pro bono, on the hearing of the appeal) submitted that in allowing for leading counsel the judge was exercising his discretion and that this court should be slow to come to any different conclusion. The judge conducted the trial and was best placed to decide if it was reasonable for the respondent to retain the services of leading counsel. I would not alter this part of his order.

26. Subject to this I would allow the appeal on the basis that under the practice direction hourly rates are payable only within the prescribed limits and that conditional fee arrangements are to be disregarded. Further that a conditional fee agreement with an uplift for success is unenforceable.

27. I would therefore set aside the declarations in paragraphs 2.1 and 2.2 of the Order of 24 September 2010 and affirm the declaration in paragraph 2.3. It would then remain for the Court to hear the parties on the outstanding issues of an interim award of costs and the costs of this appeal.

28. Although this is sufficient to dispose of the appeal as we heard detailed and helpful arguments on maintenance and champerty from counsel on both sides

and were referred to the *obiter dicta* of the Chief Justice in *Quayam* I wish to add some further observations.

29. The Law Commission for England and Wales in its Proposals for Reform of the Law Relating to Maintenance and Champerty in 1966 said:

> "Champertous agreements (including "contingency fee" arrangements between solicitor and client) should for the present continue to remain unlawful as contrary to public policy. Meanwhile, further study, in consultation with the Law Society, should be given to the question of "contingency fee" arrangements."

30. The recommendations of the Law Commission resulted in the enactment of the Criminal Law Act 1967 by which maintenance and champerty ceased to be crimes or torts in England and Wales but the abolition of civil and criminal liability did not affect cases in which a contract is to be treated as contrary to public policy or otherwise illegal (section 14(2)).

31. In *Thai Trading Co. v Taylor* [1998] Q.B. 781 the Court of Appeal held that there was nothing unlawful in a solicitor acting for a party to litigation to agree to forgo all or part of his fee if he loses, provided he does not seek to recover more than his ordinary profit costs and disbursements if he wins. Millett LJ at 788 observed:

> "It is understandable that a contingency fee which entitles the solicitor to a reward over and above his ordinary profit costs if he wins should be condemned as tending to corrupt the administration of justice."

32. *Thai Trading* was not followed in *Awwad v Geraghty & Co*. [2001] QB 570 where a solicitor had agreed to charge the client in libel proceedings her normal fee if he won and a reduced fee if he lost. Schiemann LJ held (at p 593) that "…acting for a client in pursuance of a conditional normal fee agreement in circumstances not sanctioned by statute, is against public policy." May LJ. (at p 599) did not consider it was lawful in 1990 for a lawyer to enter into an arrangement to receive a contingency, apart from the Solicitors' Practice Rules. These rules, which had the force of a statute and prohibited a solicitor from entering into any arrangement to receive a contingency fee, had been overlooked in *Thai Trading*.

33. While there has been wide acceptance that the law of maintenance, depending as it does on public policy, has to adapt to changing times (see *Hill v Archbold* [1968] 1Q.B. 686 at 697 Danckwerts LJ and *Giles v Thompson* [1994] 1 A.C. 142 at 164 Lord Mustill) legislative action has been said in a number of cases to be necessary before speculative actions could be permitted. (*Wallersteiner v Moir* (No 2) [1975] QB 373 at 403; 408 and *Awwad* at 593).

34. It is instructive to refer to another passage in the judgment of May L.J. in *Awwad* at p 600 where he said:

> "I accept the general thesis in the judgment of Milllett L.J. in the *Thai Trading* case [1998] QB 781 that modern perception of what kinds of lawyers' fee arrangements are acceptable is changing. But it is a subject upon which there are sharply divergent opinions and where I would hesitate to suppose that my opinion, or that of any individual judge, could readily or convincingly be regarded as representing a consensus sufficient to sustain a public policy."

35. When *Awwad* was before the Court of Appeal section 58 of the Courts and Legal Services Act 1990 had been enacted. It made conditional fee agreements enforceable in certain limited circumstances and was later modified by the Access to Justice Act 1999. As a result success fees under a conditional fee agreement became payable by the opposing party rather than by the lawyer's own client from April 2000.

36. Lord Justice Jackson in his Review of Civil Litigation Costs Final Report (December 2009) noted that the statutory changes that were introduced set England and Wales apart from all other jurisdictions. He refers to research carried out in 2009 into costs rules in 33 overseas jurisdictions in which no jurisdiction was found where success fees were recoverable from opposing parties. (*Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, "Costs and Funding of Civil Litigation: A Comparative Study", December 02, 2009), Oxford Legal Studies Research Paper No. 55- 2009*). Lord Justice Jackson recommended that success fees should cease to be recoverable from unsuccessful opponents in litigation and the United Kingdom Government proposes to amend the current legislation to accept his recommendation and to make them made payable by claimants to their own lawyers.

37. The experience in England and Wales illustrates that complex issues of public policy are involved and that it is a subject that calls for consideration by the Law Reform Commission in advance of any legislation so that full account may be taken of all interests involved, and most importantly of the need to provide access to justice for those who cannot afford it.

Campbell JA

Sir John Chadwick, President:

38. I agree that this appeal should be allowed to the extent indicated by Sir Anthony Campbell, Justice of Appeal. But I have thought it appropriate to add a judgment of my own in the circumstances (i) that, in relation to the effect of paragraph 7.2 of the Guidelines, we are differing not only from Justice Quin in the present case but also from Justice Henderson in *Bennett v Attorney General of the Cayman Islands* (Cause No 512/2006; unreported, 10 May 2010) and (ii) that the Court was informed that it was Attorney General's view that the issues raised by this appeal "encompass serious questions of public policy which would best be dealt with via legislative reform" and that it was his intention, following the judgments in this appeal, to refer those issues to the Law Reform Commission for review.

The issue raised by the appeal

39. Following a trial on liability, in which the plaintiff was successful, Justice Quin directed, by an order dated 24 September 2010, that the defendant should pay the plaintiff's costs, such costs to be taxed on the standard basis if not agreed. He went on to make a declaration in these terms:

> "2.2 Section 7.2 of Practice Direction No 1/2001 titled Guidelines relating to the Taxation of Costs (the 'Guidelines') does not prohibit recovery of the uplifts contained in the Conditional Fee Agreement entered into between the Plaintiff and her attorneys-at-law, nor the uplift in the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at-law and Counsel if such uplifts are calculated on an hourly rate basis, and the taxing officer, when assessing the costs payable under this Order, may, if in the exercise of his discretion he

thinks it just to do so, assess such costs on the footing that the appropriate hourly rates are those which include the uplifts."

The principal issue raised by this appeal is whether the judge was correct to hold that paragraph 7.2 of the Guidelines does not prohibit recovery of the uplifts contained in the conditional fee agreements under which the plaintiff obtained legal advice and representation in the proceedings which she brought against the Attorney General.

Practice Direction No 1/2001

40. Practice Direction No 1/2001 was issued by the Rules Committee on 22 October 2001. It purports to have been issued pursuant to Order 62 rule 17 of the Grand Court Rules; but, as it seems to me, the relevant power was contained in GCR Order 1 rule 12(3) read with Order 62 rule 16(3). Order 62 rule 16 is in these terms, so far as material:

> "16(1) The amount of costs to be allowed on taxation shall (subject to rule 17 and to any order of the Court fixing the costs to be allowed) be in the discretion of the taxing officer.
>
> (2) In exercising his discretion the taxing officer shall have regard to the Guidelines issued by the Rules Committee pursuant to paragraph (3), . . .
>
> (3) The Rules Committee may issue guidelines relating to –
>
> . . .
>
> (c) the nature and amount of fees, charges, disbursements, expenses or remuneration which may be allowed on taxation;"

Order 1 rule 12(3) provides for those guidelines to be issued in the form of practice directions.

41. Paragraph 1.1 of the Guidelines set out in Practice Direction No 1/2001 contains the statement that they are intended to be a comprehensive code in relation to (*inter alia*) "the nature and amount of fees, charges, disbursements, expenses or remuneration which may be allowed on taxation". Section 7 ("Attorney's fees") is in these terms, so far as material:

> "7.1 The amount of attorney's fees allowable on taxation on the standard basis shall be determined on the basis of time spent. The unit of time used in a bill of costs may be 1/10 hour or 1/4 hour.
>
> 7.2 Amounts claimed on the basis of brief fees, refreshers, lump sums, percentages, conditional fee agreements, contingency

> agreements or any basis other than hourly rates will be disallowed.
>
> . . ."

Paragraph 7.3 sets out the maximum hourly rates (based on the post qualification experience of the fee earner concerned) that will be allowed on taxation on the standard basis.

42. Paragraph 7.2 refers to both "conditional fee agreements" and "contingency agreements". Those concepts are not defined; but it is, I think, not in doubt that the Rules Committee would have had in mind the following passage in the judgment of Lord Justice Scheimann in *Awwad v Geraghty & Co* [2001] 1 QB 570. Speaking of the "historically widespread perception" that, if a lawyer has too much at stake in the success of litigation, he may yield to the temptation to act improperly in order to ensure success, he said this (*ibid,* 576*B-C*):

> " . . . There are three categories of reward for success: (1) where the lawyer will recover some of the client's winnings; (2) where the lawyer will recover his normal fees plus a success uplift; (3) where the lawyer will only recover his normal fees. They used all to be described as contingent fees but, in what Judge Cook in his book on *Costs*, 3rd ed (1998), refers to as a triumph of semantics, situations (2) and (3) have in recent years been given the name of conditional fees whereas situation (1) is still described as a contingent fee. I shall keep that nomenclature for situation (1). The present case is concerned with situation (3) which I shall call a conditional normal fee case to distinguish it from situation (2) which I shall call the conditional uplift case."

Awwad v Geraghty had been cited to the Chief Justice in *Quayum and others v Hexagon Trust Company (Cayman Islands) Limited* [2002] CILR 161. *Quayum* was heard shortly before the Rules Committee, of which the Chief Justice was a member, issued Practice Direction No 1/2001. The Chief Justice had, himself referred to the passage just cited – and adopted the threefold categorisation and the descriptions – at paragraph 39 of his judgment in *Quayum.* In my view it is impossible to avoid the conclusion that the concepts "conditional fee agreements" and "contingency agreements" are to be understood, in the context of paragraph 7.2 of the Guidelines, in the sense explained in that passage.

43. Leaving aside, for the moment, the question whether the fee agreements in the present case fall within the meanings to be given to the concepts "conditional

fee agreements" or "contingency agreements" in the context of paragraph 7.2 of the Guidelines, it might, perhaps, be said that that paragraph does not, in terms, prohibit "the recovery" of amounts claimed under agreements which do fall within those concepts. Strictly, the requirement imposed by Order 62 rule 16(2) is that, in exercising his discretion as to "the amount of costs to be allowed on taxation", the taxing officer "shall have regard to" the Guidelines; and so shall have regard to the direction, in paragraph 7.2 of the Guidelines, that amounts claimed under conditional fee agreements or contingency agreements "will be disallowed". But, as it seems to me, it is impossible to argue – and it was not argued on this appeal – that a taxing officer who did allow on taxation amounts claimed under conditional fee agreements or contingency agreements could be said to have had regard to the clear direction that such amounts will be disallowed. A decision to allow such amounts would, I think, have to be set aside on the ground that the taxing officer had exercised his discretion on a basis which was not open to him; and so flawed. Given that – save where costs are fixed pursuant to Order 62 rule 7 or assessed by the judge in accordance with Order 62 rule 8 – the amount of the costs which a successful party is entitled to recover from his opponent is limited to the amount allowed after taxation (order 62 Rule 4(6)(c)and (d)), paragraph 7.2 of the Guidelines does, in effect if not in terms, prohibit "the recovery" of amounts claimed under conditional fee agreements or contingency agreements.

The fee agreements in the present case

44. I return, therefore, to the question whether the fee agreements in the present case do fall within the meanings to be given to the concepts "conditional fee agreements" or "contingency agreements" in the context of paragraph 7.2 of the Guidelines.

45. The fee agreement entered into between the plaintiff and her then attorneys (Myers & Alberga) is dated 20 August 2008. Clause 6 ("Paying us") is in these terms:

> "Only if you win your claim will you pay our basic charges, our disbursements and a success fee. You are entitled to seek recovery from your opponent of part or all of our basic charges, our

> disbursements and a success fee. This Conditional Fee Agreement is known as a 'no win – no fee' agreement.
> . . ."

Paragraph 8 ("The Success Fee") provides:

> "The success fee is set at 33.3% of all our professional costs, subject to Court approval. This means that a further 33.3% will be payable in addition to all our professional costs."

There is nothing in that agreement – or in the correspondence passing between the plaintiff and her then attorneys which has been put before the Court – to indicate what hourly rates would be charged by way of "basic charges".

46. The fee agreement between the plaintiff's attorneys and counsel who appeared on her behalf at the trial is not in evidence; but we were taken to a "Conditional Fee Agreement between Solicitors and Counsel", dated 17 January 2011, which was made, in respect of this litigation, between the claimant's present attorneys (Thorp Alberga) and counsel practising from the same London Chambers. That agreement is in the standard form agreed between the Association of Personal Injury Lawyers and the Personal Injury Bar Association in 2005. We were invited to assume that "the Conditional Fee Agreement entered into between the Plaintiff's attorneys-at-law and Counsel" to which the order of 24 September 2010 is referred was in the same form. I note that the agreement contains the statement that it is not a contract enforceable at law. That agreement does set out, in a table, "Counsel's Normal Fees" for both "Advisory work and drafting" (at an hourly rate) and "Brief fees for a trial" in the Grand Court of the Cayman Islands (a single composite figure) based on a trial estimate of two to four days and twenty hours of preparation. The agreement makes provision for a "success fee" or "Counsel's uplift" of 33%, based on counsel's estimate of "the overall prospects of success, taking all risk factors into account . . .".

47. In my view there can be no doubt that both the fee agreements in the present case fall within the meaning to be given to the concept "conditional fee agreements" in the context of paragraph 7.2 of the Guidelines. No submission to the contrary was advanced on this appeal.

48. It follows that my preliminary view, which is of course subject to examination of the judge's reasons for reaching the conclusion that he did, is that the answer to the principal issue raised by this appeal - whether the judge was correct to hold that paragraph 7.2 of the Guidelines does not prohibit recovery of the uplifts contained in the conditional fee agreements – would be "No". Indeed, as it seems to me, there would be much force in a submission – not advanced on this appeal - that paragraph 7.2 of the Guidelines prohibits recovery from the unsuccessful party not only of the uplifts contained in conditional uplift fee agreements (which the agreements in the present case are) but also of any normal, or "basic" fees that would otherwise be payable under those agreements. It is pertinent to have in mind that that was, in effect, the outcome in *Awwad v Geraghty.*

The judge's reasons

49. The judge explained, in his written Ruling dated 7 September 2010, that he was content to hold that paragraph 7.2 did not prohibit the recovery of the uplifts for which provision was made in the present case "if such uplifts are calculated on an hourly rate basis" on the basis that the point had been decided by Justice Henderson in *Bennett v Attorney General of the Cayman Islands* (*supra).* He followed that decision, without adding reasons of his own.

50. In the course of his judgment in *Bennett* Justice Henderson had referred to the ruling of the Chief Justice in *Quayum and others v Hexagon Trust Company (Cayman Islands) Limited* (*supra*). At paragraph 16 of his judgment he pointed out that the ruling in *Quayum* was released after Practice Direction No 1/ 2001 had been made, "so naturally, the Practice Direction takes no account of the extensive analysis contained in that decision." But he observed that there were passages in that ruling in which the Chief Justice had used language "which presupposes that uplifts may, in appropriate circumstances, be a component of an award of costs and paid by the losing party". After citing those passages (to which I refer later in this judgment) Justice Henderson had said this:

> "Although the passages quoted [from *Quayum*] are *obiter dicta*, they appear in a judgment in which all aspects of conditional fee agreements were examined thoroughly. In the light of these passages section 7.2 of the 'Guidelines' cannot be taken to prohibit the recovery and costs of an uplift. The purpose of section 7.2 is to

> forbid the assessment at taxation of costs on any basis other than by a consideration of hourly rates and the number of hours spent doing the work. . . . Section 7.2 makes the hourly rate approach the only permissible manner of taxation. It does not prohibit uplifts which are themselves calculated on an hourly-rate basis."

Justice Henderson went on, at paragraph 19 of his judgment, to say that he was satisfied that "the taxing officer may assess the costs here on the footing that the appropriate hourly rates are those which include the uplifts".

Quayum

51. It is important to have in mind that paragraph 1.2 of Practice Direction No.1/2001 provides, in terms, that the Guidelines have no application to bills of costs relating to work done before 1 January 2002: such costs were to be taxed in accordance with the schedule to the Grand Court (Taxation of Costs) Rules 1995. It can be seen from paragraph 2 of his judgment in *Quayum*, delivered on 5 July 2002, that the Chief Justice reached his decision in that case – upholding the conditional fee arrangements described in paragraphs 7 and 8 of that judgment – on 1 October 2001: that is to say, before the Practice Direction had been issued (on 22 October 2001). The Guidelines had no application to the costs that were the subject of the application in *Quayum*. The Chief Justice was plainly entitled to take the view that he did not need to refer to the Guidelines in his judgment.

52. Nevertheless, in the circumstances (i) that the judgment was delivered some months after the Practice Direction had been issued and had come into force, and (ii) that the Practice Direction was issued by the Rules Committee of which the Chief Justice was a member, the fact that, in his judgment in *Quayum*, the Chief Justice made no reference to the Guidelines does give rise to the question which was before Justice Henderson in *Bennett.* Can paragraph 7.2 of the Guidelines be reconciled with the continuation, after 1 January 2002, of what the Chief Justice described, at paragraph 62 of his judgment in *Quayum*, as "the present arrangement" under which a successful party who has entered into a conditional fee agreement with his lawyers can expect to recover from his opponent on a taxation some or all of the "success fee" payable under that agreement?

53. *Quayum* was not a case in which there had been an order for costs following litigation against an unsuccessful opponent. As the Chief Justice explained in paragraphs 2 to 4 of his judgment, the application before him was for the approval of fee arrangements made between the applicants (former employees of BCCI and members of an action group) and their Cayman Island attorneys in connection with a "salvage claim" made in proceedings which they had brought against a new employee benefit trust established in the Cayman Islands. The new trust had been established, for the benefit of the applicants and others, for the purpose receiving assets recovered in settlement of an earlier claim by the applicants against former managers of BCCI for the restoration of funds formerly held in the BCCI Staff Benefit Trust. As the Chief Justice put it, at paragraph 5:

> ". . . The salvage claim has . . . been found by this court to be arguable and sustainable on a number of its grounds. The sum of these circumstances is that without the benefit of the conditional fee agreement, [the applicants'] lawful claims would not get their day in court. They would be driven from the judgment seat for lack of funds."

Put shortly, the issue for decision, raised by the trustee of the new employee benefit trust on the application for approval of the fee arrangements made between the applicants and their lawyers in connection with the salvage claim, was whether those arrangements were open to objection on grounds of public policy. The issue was identified, more fully, by the Chief Justice at paragraph 23 of his ruling as:

> ". . . whether the fee arrangement between the firm and its clients and between the firm, on behalf of its clients, and counsel – by which the firm and counsel will be paid the agreed rates of professional fees if the action is successful but nothing if the action is unsuccessful – is unlawful under the laws of the Cayman Islands for being champertous maintenance. If it is, the arrangement would be void on grounds of public policy for being illegal".

54. The Chief Justice addressed that question at length and in depth. As I have said, at paragraph 39 of his ruling he adopted Lord Justice Scheimann's categorisation, in *Awwad v Geraghty* (*supra*), of the three types of contingency fee arrangements. He pointed out the fee arrangements which were before him for consideration fell into the category described as "conditional uplift fee arrangements". At paragraph 60 he concluded that the mischief which the

common law of maintenance and champerty (in its application to the special relationship of lawyer and client) had developed to meet "was in no real sense involved in a conditional normal fee arrangement". Nor, he said, "if proper, fair enhancements are agreed, need it be involved in conditional uplift fee arrangements". In his view "the only truly unarguable context in which the element of champerty is involved is that of the outright contingency fee arrangement where the reward of the lawyer is expressed as a percentage of the spoils of the litigation". At paragraph 62 he held that the balance of public policy "must certainly weigh in favour of allowing the present arrangement". He then set out a number of conditions for approval: "which can and will be imposed by the court". The first of those conditions was that all such proposed arrangements "must first receive the sanction of the court to be considered in the context of all the circumstances of the client and of the case". It was that condition which led to the conditional fee agreements in the present case coming before Justice Quin (on 12 November 2008) and Justice Henderson (on 7 December 2009) for approval.

55. It is, of course, plain that a fee arrangement which was contrary to public policy could not give rise to an award on taxation or to the recovery of fees from the client's unsuccessful opponent. The reason is that the recovery of costs is founded upon the principle of indemnity: a successful party cannot recover from his opponent by way of costs more than the amount for which he is indebted to his lawyers. If the fee arrangement between the client and his lawyers is unenforceable, because contrary to public policy, there is no basis on which the fees for which it provides can be recoverable from the other party to the litigation. But, save in that context, the decision in *Quayum* had little or nothing to do with the question what costs would be allowed against an opponent on a taxation. That was not what that case was about. The issue in the case was whether the fees payable under a conditional uplift fee agreement could be recovered in the context of a salvage claim against trust assets. The relevant question was whether the client was liable to pay his lawyer; not whether the client could recover from an unsuccessful opponent.

56. Nevertheless, as Justice Henderson observed in *Bennett*, there are passages in *Quayum* which suggest that the Chief Justice assumed that fees payable under a conditional uplift fee agreement (if not struck down by public policy) could be recovered from an unsuccessful opponent: At paragraph 40(b) of his ruling - when summarising the "obvious and substantial arguments in favour of both conditional normal fee and conditional uplift fee arrangements" – the Chief Justice said this:

> "If subject to taxation by the court, it will not necessarily (in the case even of an uplift arrangement) increase the potential liability for costs of the client's litigation opponent, should the opponent in due course be ordered to pay the costs of the litigation. This is because, on taxation, the court may well allow only the normal fee rate."

And, at paragraph 62(d) – as one of the conditions which the court "can and will impose" – he said this:

> "In an appropriate case the court, as a matter of the exercise of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation, the unsuccessful opponent may be required to pay. . . .".

Bennett

57. Given that Justice Quin reached his conclusion in the present case on the basis of Justice Henderson's view, in *Bennett*, that, in the light of the two passages in the judgment of the Chief Justice in *Quayum* which I have just set out, paragraph 7.2 of the Guidelines "cannot be taken to prohibit the recovery and costs of an uplift", it is necessary to ask whether that view was correct. In my judgment it was not correct. I reach that conclusion for three reasons.

58. First, it is impossible to be confident that, in making the observations that he did in the two passages of his judgment in *Quayum* which Justice Henderson cited in *Bennett*, the Chief Justice had in his mind the terms of paragraph 7.2 of the Guidelines. That is not to suggest that, when he handed down his written judgment in *Quayum* (in July 2002), the Chief Justice had overlooked the fact that a new costs regime had been introduced, with effect from 1 January 2002, pursuant to rules that had been made by the Rules Committee, of which he was a member, on 22 October 2001. But he did not refer to the new costs regime in his judgment. The fact that he did not do is, I think, a strong indication that he took the view that it was of no relevance to the issue

which he had to decide. In the circumstances that the issue before him in *Quayum* did not turn on the right of a party to recover costs from an unsuccessful opponent in litigation, it is easy to see why he should have taken that view. And, if he did take that view, then it is (at the least) likely that he did not think it necessary to remind himself of the specific terms of the Guidelines which formed a part of that new costs regime. Justice Henderson recognised, correctly, that the observations in *Quayum* on which he relied were *obiter dicta*: it seems to me likely that they were made *per incuriam*. It is pertinent to have in mind that the terms of paragraph 7.2 of the Guidelines would not have been the subject of any argument or discussion at the time when the application in *Quayum* was heard by the Chief Justice: at the time of that hearing the Guidelines had not been issued.

59. Second, it is impossible to identify, in the judgment in *Quayum*, the reasons which led the Chief Justice to take the view (if he did) that the terms of paragraph 7.2 of the Guidelines did not prohibit the recovery, from an unsuccessful opponent, of costs which were payable by the successful party to his lawyers on the basis of a conditional fee agreement. That is, of course, a further indication that the Chief Justice did not have the terms of paragraph 7.2 in his mind when he made the observations on which Justice Henderson relied. But, if he did have the terms of that paragraph in mind, then – as it seems to me - he did need to explain why, notwithstanding the clear direction in paragraph 7.2 of the Guidelines that costs claimed on the basis of a conditional fee agreement were to be disallowed on taxation, he took the view that such costs would be recoverable from an unsuccessful opponent. In the absence of reasons to support that view, it can have little weight.

60. Third, it is impossible to accept the view that the facts that, as Justice Henderson observed, (i) the purpose of paragraph 7.2 of the Guidelines "is to forbid the assessment at taxation of costs on any basis other than by a consideration of hourly rates and the number of hours spent doing the work" and (ii) paragraph 7.2 "makes the hourly rate approach the only permissible manner of taxation" support a conclusion that the paragraph "does not prohibit uplifts which are themselves calculated on an hourly-rate basis". One reading

of his remarks in *Bennett* (in the passage of his judgment which I have cited), suggests that Justice Henderson took that view. If so, I am satisfied that he was wrong to do so. So far as material (in the present context) paragraph 7.2 directs that "Amounts claimed on the basis of . . . conditional fee agreements . . . or any basis other than hourly rates will be disallowed". It cannot be read in the sense "Amounts claimed on the basis of conditional fee agreements . . . other than hourly rates will be disallowed". Properly understood, the direction is that "Amounts claimed on the basis of . . . conditional fee agreements . . . or *amounts claimed on* any basis other than hourly rates will be disallowed". The fact that amounts claimed on the basis of a conditional fee agreement may be calculated on the basis of an uplifted hourly rate does not take those amounts out of the prohibition in paragraph 7.2 of the Guidelines.

Conclusion

61. It follows that I can find nothing in the judge's reasons, in the observations of Justice Henderson in *Bennett* or in the passages in *Quayum* on which Justice Henderson relied to displace my preliminary view that the answer to the principal issue raised by this appeal - whether the judge was correct to hold that paragraph 7.2 of the Guidelines does not prohibit recovery of the uplifts contained in the conditional fee agreements – must be "No". Accordingly, I would set aside the declaration in paragraph 2.2 of the order of 24 September 2010. If that declaration is set aside, the declaration in paragraph 2.1 of that order serves no purpose. It should be set aside also.

Public policy

62. In the course of his judgment in *Quayum* the Chief Justice referred (at paragraph 47) to observations in the judgment of Lord Justice Buckley in W*allersteiner v Moir (No.2)* [1975] 1 QB 373, 402B-D:

> "Under a contingency fee agreement the remuneration payable by the client to his lawyer in the event of his success must be higher than it would be if the lawyer were entitled to be remunerated, win or lose; the contingency fee must contain an element of compensation for the risk of having done the work for nothing. It would, as it seems to me, be unfair to the opponent of a contingency fee litigant if he were at risk of being ordered to pay higher costs to his opponent in the event

> of the latter's success in the action than would be the case if there were no contingency fee agreement. . . ."

The passage draws attention to the need, in any consideration of the arguments for and against striking down contingency fee arrangements (which, in this context, include conditional fee agreements as well as contingency fee agreements, strictly so called) on grounds of public policy, to have regard not only to the advantage (in giving access to the courts) which such agreements may have for the impecunious litigant and to the danger (in giving the lawyer a pecuniary interest in the outcome of the litigation which may lead him to act improperly) that such agreements may pose a threat to the administration of justice but also to the potential unfairness to the other party to the litigation, who is exposed to the risk of paying uplifted costs if the contingency fee litigant is successful.

63. Paragraph 7.2 of the Guidelines – which have the force of delegated legislation. - may be seen as a considered legislative response to the third of those factors: the potential unfairness to the contingency fee litigant's opponent. For the reasons which this Court has set out in its judgments on this appeal, the effect of that paragraph is that the other party to the litigation is not exposed to the risk of paying uplifted costs if the contingency fee litigant is successful.

64. The Guidelines do not address the question whether conditional fee agreements and contingency agreements are enforceable as between the lawyer and his client. It may be said, however, that the implicit premise underlying paragraph 7.2 is that they are: for, if they were not, the direction in paragraph 7.2 that amounts claimed (against the unsuccessful opponent on taxation) on the basis of such agreements will be disallowed would be otiose. If conditional fee agreements and contingency agreements had been thought by the Rules Committee to be unenforceable as between the lawyer and his client on the grounds of public policy, it would have been unnecessary to include reference to them in paragraph 7.2: no amounts for which the client was not liable under the fee agreement with his lawyer could be claimed against his opponent in any event.

65. That question was, of course, the subject of decision in *Quayum*. The Chief Justice held that (subject to the conditions which he set out at paragraph 62 of his judgment) conditional fee agreements (including conditional uplift fee agreements), but not contingency agreements strictly so called, were enforceable as between lawyer and client. That must be seen as a considered judicial response to the first and second of the factors to which I have referred.

66. Given the conclusion which we have reached as to the effect of paragraph 7.2 of the Guidelines, the question which was the subject of decision in *Quayum* does not arise in the present appeal. Whether or not conditional fee agreements are enforceable as between the lawyer and his client, the amounts (if any) to be paid by the conditional fee client to his lawyer under such an agreement are not recoverable from the client's opponent in the litigation. In those circumstances, as it seems to me, anything we may say as to the decision of the Chief Justice on that question must be considered *obiter dicta*.

67. For that reason, and for the other reason which I shall mention, while recognising that there is much force in the view that the Chief Justice should have resisted the temptation to treat the question which was before him as one which could and should be answered by judicial development of the common law in this jurisdiction (see paragraph 41 of his judgment) rather than by legislative intervention, I am not persuaded that it is appropriate to decide whether or not he was entitled to take the course that he did. I prefer to leave open both the question whether he was entitled to take that course and the question whether (if so) the conclusion that he reached on the substantive issue (whether or not public policy requires that conditional fee agreements be struck down) should be upheld.

68. In *National Trust for the Cayman Islands v Humphreys (Cayman) Limited* [2003] CILR 201 Justice Zacca, President, observed in this Court:

> "When it became obvious, during the later stages of argument, that the preliminary objection was likely to succeed, observations were made to us by counsel on both sides, as to the present quite unsatisfactory state of the law in the Cayman Islands in regard to conditional fee agreements. We entirely agree with their observations, which we were given to understand are also concurred in by the Cayman Law Society and the Caymanian

> Bar Association, the professional bodies representing legal practitioners in these Islands. We therefore urge the Attorney General, and through him the responsible executive and legislative authorities, to give the matter urgent attention. What seems to be needed is:
>
> First, a fresh consideration of whether doctrines of champerty and maintenance, already abolished in England, now serve any useful social purpose in the Cayman Islands.
>
> Secondly, in the light of that decision and any action taken on that point, to eliminate certain apparent contradictions and anomalies in the Grand Court Rules which give rise to uncertainty and may mislead some practitioners in the preparation of bills of costs where conditional fee agreements are involved."

Those observations seem to have fallen on deaf ears. But, as I have said, we were informed that it was now the intention of the Attorney General to refer the matter to the Law Reform Commission for review.

69. A review of the question whether or not public policy requires that conditional fee agreements be struck down – and of the related question whether or not (if such agreements are enforceable) the amount payable by the client to his lawyer under such an agreement (including, in particular, any uplift over basic or normal fees to reward success) can be recovered from the client's opponent – is to be welcomed. The effect of our decision on this appeal is that the position in the Cayman Islands is – and has been for the past ten years or so since the introduction of the new costs regime and the decision in *Quayum* - that, whether or not conditional fee agreements which meet the conditions set out by the Chief Justice in *Quayum* are enforceable by the lawyer against the client, the amount payable by the client to his lawyer under such an agreement has not been recoverable by the client from the unsuccessful party to the litigation. That position may or may not be thought satisfactory: in particular, it may be thought unsatisfactory that paragraph 7.2 of the Guidelines has the effect (as it seems to me) that even the amount representing basic or normal fees, if payable under a conditional fee agreement, must be disallowed on taxation. What is plainly unsatisfactory is that the position has not yet received from the Law Reform Commission - and (subject to the recommendations of that Commission) from the legislature – the consideration which it requires.

70. The Attorney General's assurance that the matter will be referred to the Law Reform Commission and may, thereafter, be addressed in legislation is a further reason for taking the view, in this Court, that it would not be appropriate to decide either the question whether the Chief Justice was entitled to take the course that he did in *Quayum* or the question whether (if so) the conclusion that he reached on the substantive issue (whether or not public policy requires that conditional fee agreements be struck down) should be upheld. It is more sensible, as it seems to me, to leave the position as it now is until the Law Reform Commission has considered what, in its view, the public interest requires and the legislature (or, perhaps, the Rules Committee) have had the opportunity to respond to its recommendations.

Chadwick P

Ian Forte, Justice of Appeal

71. I also agree that this appeal should be allowed to the extent indicated by Sir Anthony Campbell, Justice of Appeal. I have nothing to add to the judgments which have been delivered by the other two members of the Court.

Forte JA