Errata to file:

19.10.2001

GRAND COURT CAYMAN ISLANDS

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE 316 of 1999

JUL 10 2002
LEGAL DEPARTMENT
CAYMAN ISLANDS

BETWEEN:	MOHAMMED A. QUAYUM AND SIX OTHERS	PLAINTIFFS
AND:	HEXAGON TRUST COMPANY (C.I.) LTD	DEFENDANTS

Appearances:
Mr. Steven Barrie of C.S. Gill and Co. for the plaintiffs
Mr. William Helfrecht of Boxalls for the defendant.

Before: Hon. Chief Justice Anthony Smellie

REASONS

The plaintiffs brought this interlocutory application for the court's approval, prior to further steps in the action of a fee arrangement entered into with their lawyers.

On the 1st October 2001, I upheld the fee arrangement. It is in the form of agreements entered into between the plaintiffs and C.S. Gill & Co, by which that firm would represent the plaintiffs in these proceedings. Also upheld, was the fee agreement as between the firm (on behalf of the plaintiffs) and English counsel by which counsel will act on behalf of the plaintiffs in these proceedings. I then stated my decision in these terms:

"Having considered the scope of the common law offences of champerty and maintenance, I have concluded that the proposed fee arrangements between the plaintiffs (as a single group of litigants having a common interest in pursuing a lawful cause of action) on the one hand and the firm of C.S. Gill and Co. on the other, falls outside that scope.
I will therefore approve of the fee arrangement subject to conditions to ensure that it does not in its operation fall within the scope of those offences.
Full written reasons to follow".

Background

The plaintiffs were employees of the ill-fated Bank of Credit Commerce International "(BCCI)" and beneficiaries of the Staff Benefit Trust which had been established by BCCI.

It came to light in the subsequent liquidation of BCCI, that the Staff Benefit Trust had been fraudulently stripped of its assets by the former management of BCCI. The former employees of BCCI had thus, in effect, been defrauded of their pensions.

The plaintiffs formed an action committee and after a very great deal of work and expense, including the institution of legal proceedings in different jurisdictions, secured a settlement of the employees' trust claims. This settlement was secured after it also became necessary to engage the liquidators of BCCI in the different jurisdictions to ensure that, in the recovery of BCCI assets, the interests of the Staff Benefit Trust was considered.

The settlement took the form of employee benefit trusts established by the liquidators in this jurisdiction and in Jersey. Some 70-80 million dollars have been settled for those purposes.

The former employees of BCCI, including the plaintiffs, are the beneficiaries.

The defendant is the trustee of the Cayman Islands trust.

The plaintiffs have brought this action in which they seek to recover from the Cayman Islands trust, remuneration for the time expended, costs and liabilities they incurred, in their successful efforts to preserve and recover the assets of the Staff Benefit Trust. This claim, which proceeds upon a number of different equitable and legal bases, is referred to as the "salvage claim". It is fully recognised and accepted that without the efforts of the plaintiffs, the value of the Staff Benefit Trusts would have been entirely lost.

Being unemployed, and having expended all their resources in their efforts to salvage the trust assets, the plaintiffs do not have the means to fund the litigation of their salvage claim.

Although they applied, the plaintiffs, not surprisingly, have been found to be not entitled to legal aid in this jurisdiction.

The salvage claim has, however, 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, their lawful claims would not get their day in court. They would be driven from the judgment seat for lack of funds.

The objection to the fee arrangement is on grounds of public policy: That the arrangement is void for illegality on the basis that it would involve the commission of the common law offences of maintenance and champerty.

The objection proceeds on the basis that those common law offences and the tort of maintenance still exist in the Cayman Islands, even though they have been abolished as being obsolete in the United Kingdom and other Commonwealth countries. Assuming

that they are offences in the Cayman Islands, there are no statutory provisions abolishing those offences as there are in the Criminal law Act 1967 or Abolishment of Obsolete Offences Act 1967, of the United Kingdom.

The terms of the fees arrangements

The fee arrangement here is one that is nowadays described as a "conditional fee agreement".

As between the plaintiffs and the firm of C.S. Gill, it initially provided that the firm, in the event of success, will be paid its normal fees calculated at normal hourly rates with an enhancement or "uplift" in the hourly rates of approximately 28.5% to reflect the risk that the firm would not be paid at all in the event the action does not succeed. The "uplift" has, however, been overtaken by the event of an increase in the normal fee rate of the firm in the meantime and which has brought the "uplifted" fee rate within it. A similar arrangement is in place as between the firm on behalf of the plaintiffs and English counsel in respect of counsel's fees; except that in the event of success, the uplift will be 50% of the normal hourly charge out rate of counsel. The arrangement was, therefore, clearly providing for recovery of fees based upon the contingency of success and must, frankly, be acknowledged for what is - a contingency fee agreement.

Forms of written agreements were entered into with the firm and with English counsel along the lines of similar agreements which have become commonplace in England since 1993, by virtue of section 58 of the Courts and Legal Services Act 1990 (which came into force in July 1993) and the Access to Justice Act 1999 - both of which provide for conditional fee agreements of the sort contemplated here, in defined circumstances.

Prior to 1993, the position in England, was however, far more stringent and as regards legal representation by solicitors it was governed by the Solicitors Act 1974, section 31(1) of which enabled the making of rules for the regulation of practice. Rule 8(1) of the Solicitors Practice Rules 1998 prohibited a solicitor from receiving a contingency fee in respect of any action, suit or other contentious proceeding. This was irrespective of the terms for payments of such a fee.

The statutory rules of practice of the U.K. were never adopted in the Cayman Islands but the ethos of practice here, as evidenced for example by judicial pronouncement on other issues; has been heavily influenced by them.

Against that background, I regard myself as having to decide two substantive issues of law:

(i) "Do the common law offences of Champerty and Maintenance exist in the Cayman Islands?

(ii) If so, do they preclude an agreement for a conditional fee in the circumstances of this case?

As already noted, because of the legislative history and changes in England (briefly outlined above) having no direct application in the Cayman Islands, the starting point here must be to consider the common law position.

Much depends upon what is now to be considered, in the Cayman Islands, as constituting the offences of maintenance and champerty.

Halsbury's Laws of England, 4th Ed, Vol. 9 para. 400 defines maintenance as "the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any motive recognised by the law as justifying his interference."

And at para. 401 (citing dictum of Fletcher Moulton LJ in British Cash and Parcel v Lawson Store Service Co, [1908] 1. K.B. 1006, 1014) in the wider sense as "directed against wanton and officious inter-meddling with the affairs of others in which the maintainer has no interest whatever and where the assistance he renders to one or the other party is without justification or excuse".

"Champerty" is described as being "a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject-matter of the action".

Champerty is thus a species or category of maintenance: see In re Trepca Mines Ltd.(2) (1963) Ch 199 at 266 where Pearson LJ said that it was convenient to use the phrase "champertous maintenance" distinguishing it from simple maintenance, in which the element of champerty is not present".

As already noted, there is no statutory expression of the offences in the Cayman Islands. There appears to have been only one prior occasion for judicial pronouncement. See Johnson v Cook Bodden 1999 CILR 399 where Kellock J. proceeded on the assumption - correct in my view - that the offences exist here in holding that a litigant could plead the offences as a bar to challenge the enforceability of a judgment alleged to have been obtained by maintenance.

There appears, however, to have been no earlier specific consideration of this question of the existence of the offence in this jurisdiction.

Whether the offences and tort form a part of the Cayman Islands law depends upon the legal theory by which it is said that the common law of England was received within the Islands.

Section 40 of the Interpretation Law (1995 Revision) provides:

> "All such laws and statutes of England as were, prior to the commencement of I George II Cap I, esteemed, introduced, used, accepted or received as laws in the Islands shall continue to be laws in the Islands save in so far as any such laws or statutes have been, or may be, repealed or amended by any law of the Islands."

I George II Cap. I occurred in the year 1725 and this provision of the Interpretation Law, passed by the local Assembly in 1963, is in terms similar to the provisions passed by the Jamaican legislature in 1728 for the reception of English law into that Island. This was on the basis of the constitutional theory that Jamaica, having been acquired by conquest from Spain in 1565, the laws of Spain would continue to apply unless and until it was altered by or under the authority of the Sovereign: Campbell v Hall (1774) 1 Comp. 204. Hence the need for the Jamaican legislation.

The different constitutional theory by which English laws were received into the Cayman Islands is that which is applicable to a territory acquired by settlement, as was the Cayman Islands.

It is that British subjects, who settle abroad in a territory not already within the jurisdiction of another recognised power, take with them English law.

The rule applies as a consequence of the fact of settlement whether or not the establishment of the colony had been previously authorised or subsequently recognised by the Crown. The English law taken by the settlers is both the unwritten law (common law and equity) and the statute law in force at the time of settlement - not that subsequently enacted, unless it is specifically extended.

What is received at the time of settlement was not, however, the whole of the law. The colonists "carry with them only so much of the English law as is applicable to their own

situation and the condition of an infant colony". See Commonwealth and Colonial Law by Sir Kenneth Roberts Wray at pp 538.-541 citing Blackstones, Commentaries, 15th Ed. Vol.1 pp 106-107.

It is against the background of that legal history that I think the provisions of section 40 of the Interpretation Law are to be construed.

It is a curious adaptation of an enactment of the Jamaica Legislature - suitable to the objective of removal of doubts about the provenance of laws in that conquered territory - for application to a territory colonised by settlement.

There can however, be no doubt that the common law offences of maintenance and champerty existed in 1725. For this one need look no further than to the benefit of research as expressed by Lord Mustill in his speech delivered on behalf of the House of Lords in Giles v Thompson [1994] 1 A.C. 142 at 153:

> "My Lords the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influences to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, recourse was often required".

Thus, clearly, the offences existed at common law before these Islands were settled.

Accordingly, even if the time of settlement was after 1725, acceptance of the English Law, as we will see, was not dependent so much upon the provisions of the Interpretation Law; but upon the common law itself relating to the principles of settlement.

The question whether the law as it applied to maintenance and champerty was received as being "applicable to the situation of the settlors at time of settlement and as being applicable to the conditions of the infant colony" Cayman is not free from difficulty. It seems that the earliest recorded date of unauthorised settlement was 1658 when, it is reported Watler and Bowden (described as two defectors from Cromwell's conquering army in Jamaica) arrived.

By contrast, the date of letters patent which effected the first known grant of land to settlers of Grand Cayman, was September 7th 1734. This has been suggested to be the more reliable date at which settlement may be regarded as having occurred - see the Legal Systems of the Cayman Islands by Elizabeth W. Davies (L.R.I.) at pp 92-93. This Court has preferred that date in at least one previous case. See Warren v Immigration Board, Cause 327 of 2001, 10 April 2002.

The adoption of 1734 as the date of settlement would render section 40 of the Interpretation Law, in its recognition of 1 George II Cop I (1725) meaningless as a cut-off date for the reception of English law. For there could have been no laws "esteemed, introduced, used, accepted or received as laws of the Islands" not yet inhabited. Fortunately, however, that incongruous result - the function perhaps of an inappropriate legislative adaptation of the earlier pronouncements of the Jamaica Assembly - does not preclude the operation of the rules of settlement by which the settlors would carry with them appropriate English laws. See Roberts Wray (supra).

While it is certainly arguable whether the early settlors, given their circumstances at the time, were in immediate need of the common law prohibitions against maintenance and champerty, there can be little doubt that the oppressive objectives of those who would

practice such wrongs would have been most unwelcome and their preclusion by the reception of the law prohibiting them, would have been a matter about which there would have been ready acceptance.

With those considerations in mind, I am prepared to conclude that the law of England as it related to the offences of maintenance and champerty and to the tort of maintenance, was received as part of the law of these Islands.

Is the present arrangement prohibited?

The real issue before me becomes, therefore, whether the fee arrangement between the firm and clients and between the firm on behalf of their 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.

The prohibition of champertous fee arrangements as between lawyer and client on grounds of public policy is itself a species of the common law rules against maintenance and champerty and as Lord Mustill observed in Giles v Thompson (supra):

> "In the most recent decades of the present century, maintenance and champerty have become almost invisible in both their criminal and their tortious manifestations.
> In practice they have maintained a living presence in only two respects.
> First, as the source of the rule now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a "bare right of action". The former survives nowadays, so far as it survives at all, largely as a rule of professional conduct, and the latter is in my opinion best treated as having achieved an independent life of its own". (emphasis supplied)

And later at p.161.

> "My Lords -- it appears to me to make no difference how precisely one expresses what is left of the law of champerty, for the answer must inevitably be the same. It is sufficient to adopt the description of the policy underlying the former criminal and civil sanctions expressed by Fletcher Moulton LJ in British Cash and Parcel v London Store Service [1908] 1 K.B. 1006, 1014:
> It is directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse. (emphasis supplied).
> This was a description of maintenance. For champerty there must be added the notion of a division of the spoils".

The "course of attenuation" of the rule to which Lord Mustill referred, has led to the acceptance by statute in the United Kingdom of conditional fee agreements in defined circumstances already mentioned.

It is worthy of further note that the Rules of Professional Conduct promulgated as secondary legislation in England and Wales, have been altered accordingly.

They are now since 1993, in keeping with the Rules of Professional Conduct in Scotland which had earlier led the way in acceptance, in defined circumstances, of "speculative actions". See Awwad v Geraghty & Co.(a firm) [2001] Q.B. 570 at 593.

It is to be noted as well however, that in that case, the Court of Appeal also noted (per Schiemann LJ) that because speculative actions or conditional fee arrangements were not permitted in England - where to the contrary they were prohibitted not only by the common law but by the Rules of Practice - legislative action was required to make the change.

In this jurisdiction, against the background of the common law but in the absence of legislative Rules of Practice, we have had no such legislative change. It was, therefore,

argued by Mr. Helfrecht that this Court should nonetheless regard any attenuation of the common law position as being a matter for parliament.

That to my mind overlooks the mutable nature of the common law itself as it changes to meet the needs of society. It also overlooks the particular duties and responsibilities of the court in this jurisdiction.

The common law relating to maintenance and champerty has indeed evolved over the years, reflecting the changing social imperatives and thus reflecting the evolution of public policy.

As Lord Denning M.R. observed before the time of legislative change in England in Hill v Archbold [1968] 1 Q.B. 686 at 693F:

> "Maintenance is a very ancient offence. It was a crime, and also a civil wrong, officiously to intermeddle in another man's lawsuit. It was at one time carried so far that no man could help another by paying his (legal) costs. In 1797 Lord Loughborough L.C. said that "every person must bring his suit upon his own bottom and at his own expense": see Wallis v Duke of Portland (1797) 3 Ves 494, 502. There were exceptions when a person had a valuable interest in the result of the suit itself or an interest arising from the connection of the parties; eg: as master and servant: see Bradlaugh v Newdegate (1883) 11 Q.B.D. 11. , but these exceptions were never defined.
> In particular the exception of master and servant was most obscure.
> That appears in Professor Winfield's book on 'Abuse of Legal Procedure' (1921) at pp34 and 39.
> I do not think it useful today to trace the origins of maintenance. The modern law is not to be rested on those old notions.
> It is to be found in the judgment of Danckwerts J. [(as he then was)] in Martell v Consett Iron Co. Ltd. [1956] Ch. 363, 375. He asked the rhetorical question (at 382) "how can such a doctrine founded upon considerations of public policy become at some point frozen into immutable respectability, so as to be no longer capable of alteration?" A person is still guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse. But the bounds of "legitimate concern" have been widened: and " just cause or excuse" has been readily found.
> This new approach means that we must look afresh at the previous cases."

The Master of Rolls then considered the cases of Oram v Hutt [1914] 1. Ch. 98 and Baker v Jones [1954] 1 W.L.R. 1005; both of which he found to be no longer valid expositions of the law. He further observed (at 694 G to 695 A):

> "Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or the other, or by the state itself. Comparatively few litigants bring suits, or defend them, at their own expense.
> Most claims by workmen against their employers are paid by a trade union. Most defences by motorists are paid by insurance companies.
> This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side. It is the universal experience in this court that if a trade union or an insurance company supports a case and fails, it pays the costs of the other side.
> In light of this experience, I am satisfied that if Oram v Hutt (supra) were to come before us today, we should hold that the union had a legitimate interest in the suit and were quite justified in maintaining it: remembering that if the suit had failed, the union would have paid the costs"

That perspective on the evolving nature of the public policy behind the crime of maintenance, led the Master of Rolls (with whom Danckwerts LJ and Winn LJ agreed in their separate written opinions) to conclude in Hill v Archbold; that the union in that case had a legitimate interest in libel actions brought by Mr. Hill against two of its officials such that it was proper for the union to support their defence and was not guilty of maintenance or of any wrong-doing in paying their legal costs.

Before passing from this important case, I must however, make further reference to the dictum that a prerequisite to the lawfulness of an arrangement for the payment of a party's costs, must be the further undertaking to pay those of the opposite party, if the supported party loses.

That dictum was clearly obiter. In Hill v Archbold Mr. Hill who was ultimately successful in the libel claim brought against him by the union officials, did not seek his

costs against them or the union. What he objected to, being a due paying union member himself, was the union's support for the officials by the payment of their legal costs. There are, moreover, many circumstances where the suggestion would simply not be tenable. The Master of Rolls identified some when he mentioned litigation supported by the State. It is a common place that legally aided defendants are not funded as to the recovery of their opponent's costs if they are unsuccessful. For those reasons, I do not accept and do not proceed on the basis in these reasons, that a fee arrangement must provide not only for the supported party's costs but also for his opponents', in order to fall within the bounds of acceptable public policy to be ascribed to any notion of the modern evolution of the law of maintenance and champerty.

The common law and contingency fees

It is against that background of the historical judicial dicta, that I consider it is appropriate to look at the more specific issue whether the common law offences entirely prohibit fees being payable only upon the contingency of success.

The case law specifically on this issue must be considered. It must also be considered with the true public policy underlying the law of maintenance and champerty firmly in mind.

It must moreover, be considered in the context of what public policy demands in the Cayman Islands.

As Lord Denning M.R. said in Re Trepca Mines Ltd (No.2) supra at 219 -220:

> "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence or even to suborn witnesses"

Passages from another important pre-1993 English case show how the common law at that time regarded all forms of contingency fee arrangements: Wallersteiner v Moir (No (2) [1975] Q.B. 373 per Lord Denning M.R. at pp 393-394:

> "5. Contingency fee
> "English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a "contingency fee", that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. In its origin champerty was a division of the proceeds (campi patitis). An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty. Even if he was not to receive an actual share, but payment of a commission on a sum proportioned to the amount recovered only if he won it was also regarded as champerty: see In re Attorneys and Solicitors Act 1870 (1875) 1 CH. D 573, 575, per Sir George Jessel M.R. and In re A. Solicitor, Ex p Law Society [1912] 1 KB 302. Even if the sum was not a proportion of the amount recovered, but a specific sum or advantage which was to be received if he won but not if he lost, that, too, was unlawful: see Pittman v Prudential Deposit Bank Ltd. (1986) 13 TLR 110 per Lord Esher M.R. It mattered not whether the sum to be received was his sole remuneration, or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost. That state of the law has been recognised by Parliament. In a series of Solicitors Acts from 1870 to 1974 a solicitor may make any agreement he likes with his client as to his remuneration save:
> "Nothing [herein] - - shall give validity to - - - (b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding - - -:". See section 59(2)(b) of the [Solicitors Act 1974].
> Now for recent changes.
> In 1967, following proposals of the Law Commission, Parliament abolished criminal and civil liabilities for champerty and maintenance, but subject to this important reservation in section 14(2) of the Criminal Law Act 1967: "The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to cases in which a contract is to be treated as contrary to public policy or otherwise illegal". It was suggested to us that the only reason "contingency fees" were not allowed in England was because they offended against the criminal law as to champerty: and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England. That appears from the judgment of Lord Esher M.R. in Pittman v Prudential Deposit Bank Ltd. 13 TLR 110, 111: "In order to

> preserve the honour and honesty of the profession it was a rule of law which the court had laid down and would always insist upon that a Solicitor could not make an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation". Seing that the rule is one of public policy, it is preserved by section 14(2) of the 1967 Act. It is so treated in the Solicitor's Practice Rules 1936 - 1972 [made by the Council of the Law Society and approved by the Master of Rolls under the Solicitors Act 1957, section 25]. Rule 4(1) says: "Contingency fee" means any sum (whether fixed or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action, suit or other contentions proceeding". Rule 4(1) says:
> "A solicitor who is retained or employed to prosecute any action, suit or other contentious proceeding shall not enter into any agreement or arrangement to receive a contingency fee in respect of that action suit or other contentious proceeding. In my opinion, those rules accurately state the general rule as to the contingency fees".

Those statements importantly for present purposes emphasise two things: The first is that the general common law rule against contingency fees as a species of champerty acquired an existence of its own such that it survived the abolition of the common law offence in England.

Secondly, its raison d'etre is in the public policy interest in the preservation of the integrity of the legal profession and of the conduct of litigation. So much so that that public policy had received recognition in the enactment in the Solicitors Acts and Rules of Practice in England.

Before turning to consider what this should all mean in the context of the Cayman Islands in this day and age, further passages from the opinion of Buckley LJ from the same case are worthy of specific note as they so succinctly identify the reasons behind the public policy concerns as they developed in England (at pp 401 - 403):

> " A contingency fee, that is, an arrangement under which the legal advisor of a litigant shall be remunerated only in the event of the litigant succeeding in recovering money or other property in the action, has hitherto always been regarded as illegal under English law on the ground that it involves maintenance of the action by the legal advisor. Moreover,

> where, as is usual in such a case, the remuneration which the advisor is to receive is to be, or to be measured by, a proportion of the fund or of the property recovered, the arrangement may fall within that particular class of maintenance called champerty…..
> It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can I think be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and advisor to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course present and conduct with the utmost care of his client's interest, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal advisor who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations: see in this connection Neville v London "Express" Newspaper Ltd. [1919] AC 368, 382 - 387, and in re Trepca Mines Ltd. (No. 2) [1963] Ch. 199, 219, 255. This is not something which can be dealt with by judicial orders, directions or rules. We cannot constrain any solicitor to accept a retainer on a contingency fee basis, nor can we require the Law Society to alter its rules. The matter is, indeed, one which, in my opinion, would require comprehensive consideration by a body such as the Law Commission, the Lord Chancellor's Law Reform Committee, or a specially appointed committee before any change were made on these lines; and any change must be affected by an alteration in the relevant professional rules of etiquette or by legislation.
> Accordingly, the suggestion that recourse might be had in this case to contingency fees is not, in my judgment, a suggestion that we can adopt. In any case, in my opinion, public policy does not require its adoption if another solution of the problem is available".

It is to be readily acknowledged that the real concerns impelling the public policy may arise with equal force in this jurisdiction. 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.

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

Cayman Islands public policy

Having thus considered the nature of the common law principles and the public policy behind them I now turn to the second issue which arose for consideration.

From the review of the cases we have seen how time has changed the perception of the public policy interests in prohibiting the maintenance of other people's litigation. It is no longer regarded as mischievous for trade unions, insurance companies and indeed, even the state, to maintain someone else's action. The common law thus recognised exceptions to the prohibition.

The strict prohibitions which the common law placed, in the special context by the lawyer/client relationship, upon contingency fee arrangements and which came to find statutory expression in England, no longer apply there.

There, as shown above, public policy now recognises the importance of allowing such arrangements in the interest of ensuring access to justice and on the basis that in the

defined circumstances under which they are allowed, the continued high standards of legal professional integrity can be maintained.

Is the Cayman Islands public policy frozen in time by the unavoidable strictures of a doctrine of "immutable irrespectability?" In the United Kingdom, in what has been described as "a triumph of semantics", (see Awwad's case (supra) at p.576B) practice has come to identify three types of contingency fee arrangements. The first - the outright contingency arrangement - is where the lawyer's reward is set, not in terms of fees upon the contingency of success; but as a portion or percentage of the client's award. The second is where the lawyer will recover only his fees charged at the normal rates; called a "conditional normal fee". The third is where a lawyer will recover his normal fees plus an enhancement or uplift to reflect the additional risks assumed.

The third, insofar as it applied to the initial rate of charge of C.S. Gill & Co, and to counsel's retainer, is this case.

There are obvious and substantial arguments in favour both of conditional normal fee and conditional uplift fee arrangements.

Some which are helpfully identified by Scheimann LJ in Awwad's case (supra) at p. 588 as being applicable only to conditional normal fee arrangements, I cite and set out here; adapted as I regard as applicable to a conditional uplift fee arrangement as well:

(i) a conditional fee arrangement is of obvious advantage to a client who cannot afford to pay his own costs of litigation. In such situations, the arrangement merely gives legal form to what would otherwise be practical reality - the lawyer only gets paid if the client wins. Nobody would question the virtue of a lawyer who proceeds to act for a client in doubt whether he would ever be paid.

(ii) 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 the court may well allow on taxation only the normal fee rate.

(iii) It is of potential advantage to the litigation opponent of the client in that, if such opponent is awarded costs against the client, the client's assets from which those costs must be taken will be larger because they will not have been diminished by costs owed to the client's own lawyer.

(iv) A conditional normal fee arrangement does not involve any division of the spoils in the way that an outright contingent fee arrangement does. Arguably, a conditional uplift fee arrangement does since the winnings produced by the litigation will produce or swell the assets from which the uplift will have to be found. Thus there may be extra incentive for the lawyer to stir up litigation.
On the other hand, the uplift may be viewed only as reasonable commercial recognition of the risks assumed by the lawyer and as unlikely to induce misbehaviour by a professional who would otherwise behave in keeping with the best traditions.
Regarded in that light, the uplift would be no incentive for a lawyer to stir or promote litigation which would otherwise be regarded as unmeritorious.

(v) Situations can arise where initially a normal fee agreement is entered into between lawyer and client. Thereafter the client, before the conclusion of the litigation, becomes financially unable to commit to paying his lawyer if he loses. It is manifestly undesirable for the lawyer to leave the client in the lurch. A conditional fee arrangement, even one involving a reasonable uplift to reflect the risk to be assumed by the lawyer for the remainder of the trial, has much to commend it in those circumstances.
On the part of the lawyer any improper incentive is reduced even further by the fact that the course of the litigation would have already largely been set.

(vi) Finally, and over and above the benefit it will bring to a client in a particular case; the availability of lawyers upon conditional fee arrangements will generally facilitate access to the courts by members of the public.

Considering such advantages as against the disadvantages already identified, I pose the further question; whether it is open to this court to endorse the advantages and treat them as applicable in this jurisdiction, notwithstanding the absence of legislative change. I concluded that it is.

Remaining firmly within the realm of the common law as we do in this jurisdiction, this court is amenable to be persuaded by changes in the common law in other jurisdictions. Moreover; unlike the situation in England pre - 1993 where reform could only have been appropriately undertaken by the legislative process because of the governance of statute and statutory rules (per Lord Justice Buckley in Wallersteiner (supra)); the discipline and regulation of the legal profession in this jurisdiction is primarily given over by statute to this court. See section 7 of the Legal Practitioner's Law. So, unlike the sophisticated structure which is in place in England for those purposes, here the authority chosen by legislation, as being best placed to understand, assimilate and reflect public policy on the matter of the standards of professional conduct among lawyers, in this court.

The time may soon arrive when a more sophisticated structure and elaborate rules are required; but pending its arrival, litigants such as the plaintiffs will require access to justice.

In Thai Trading Co v Taylor and another [1998] Q.B. 781 the English Court of Appeal, notwithstanding the full prohibition of all contingency fee arrangements then expressed in the Rules of Practice, in a robust judgment delivered by Millett LJ; upheld the validity of a conditional normal fee arrangement.

That learned judge based his reasoning on the following premises (at pp785 - 786).

> "-- the fact that a professional rule prohibits a particular practice does not of itself make the practice contrary to law: see Picton Jones & Co v Arcadia Developments Ltd. [1989] 1 E.G.L.R. 43.
> Moreover, the Solicitors Practice Rules are based on a perception of public policy derived from judicial decisions the correctness of which is in question in this appeal".

The first of his premises has been brought into question in subsequent cases as being wrong in law. Of particular significance is the subsequent critique by the Court of

Appeal in the Awwad case (supra) where, citing the House of Lords decision Swain v The Law Society [1983] 1 AC 598; (a case not apparently considered by Millett LJ); Schiemann LJ concluded that Millett LJ had fallen into error in holding that the professional Rules of Practice did not have the force of law, because he had not considered that binding House of Lords decision to the contrary.

In this jurisdiction we do not have binding statutory Rules of Practice and to the extent that it may be appropriate to refer to the English law and practice, it must still be open to this court to consider the persuasive force of the reasoning of Millett LJ. as it proceeded upon the second of his two premises.

In this regard it is worth noting that leave to appeal to the House of Lords in the Thai Trading case was refused.

In the result, I was persuaded by his reasoning even while concluding, that, perhaps because of the defined circumstances of the facts of the case before him, Millett LJ. sought to limit the extent to which a conditional fee arrangement might be allowed. He did so in a manner which I concluded was too narrow.

In the Thai Trading case, the defendant Mrs. Taylor had paid to the plaintiff a deposit for a four-poster Thai carved bed. On delivery she rejected it as unsatisfactory and refused to pay the balance of the purchase price. The plaintiff brought an action for the balance and the defendant counter-claimed to recover the deposit. The defendant's husband, who was a solicitor, acted for her on the understanding that he would recover his ordinary profit costs only if she succeeded in the action (a conditional normal fee arrangement). The defendant won on her counter-claim and was awarded costs which went to taxation.

On the review of taxation, the judge concluded that he was bound by authority to hold that the arrangement as to payment of fees was contrary to public policy and void as an agreement for a contingency fee, that therefore the defendant was not liable to pay her solicitor's profit costs and that accordingly, by virtue of the indemnity principle, no liability attached to the plaintiffs to pay those costs.

The defendant's appeal was allowed by the Court of Appeal on the basis that it was not contrary to public policy or unlawful for a solicitor to agree to act for a client on the basis that he would forego all or part of his fee if he lost, provided that he did not seek to recover more than his ordinary profit costs and disbursements if he won.

Millett LJ reviewed many of the earlier cases on the subject of contingency fees including Wallersteiner v Moir (supra) which was distinguished on the basis that in the judgment of the majority (Buckley and Scarman LJJ); they did not have in mind the charging of normal fees contingent on success in the action. In that earlier case, the Court of Appeal considered a proposed fee arrangement involving a reward to the Solicitor over and above his ordinary profit costs if he won and disallowed it.

Buckley LJ at p 402 said:

> "Under a contingency fee arrangement the remuneration payable by the client to his lawyer in the event of 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, 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 arrangement".

This particular potential vice of a contingency fee arrangement, can of course be addressed by judicial control; as the award of costs, even full indemnity costs, is always a matter of discretion.

That was moreover, a potential vice, which even taken with the other potential disattributes, did not dissuade Denning LJ in his dissenting judgment in Wallersteiner v Moir; from concluding that the proposed contingency fee arrangement for risk reward by way of uplift, was acceptable in order to enable a plaintiff to proceed with a derivative action.

Millett LJ in Thai Trading agreed with the majority but nonetheless proceeded to distinguish the conditional normal fee arrangement then at bar, as being acceptable and in the process, overruling two earlier cases to the contrary (Aratra Potato Co. Ltd. v Taylor Joynson Garrett [1995] 4 All E.R. 695 and British Waterways Board v Norman 26 H.L.R. 232).

His reasoning is to be considered in some detail (at pp 789 - 790):

> "It is time to step back and consider the matter afresh in the light of modern conditions. I start with three propositions. First, if it is contrary to public policy for a lawyer to have a financial interest in the outcome of a suit, this is because (and only because) of the temptations to which it exposes him. At best he may lose his professional objectivity; at worst he may be persuaded to attempt to pervert the course of justice. Secondly, there is nothing improper in a lawyer acting in a case for a meritorious client who to his knowledge cannot afford to pay his costs if the case is lost; see Singh v Observer Ltd (note) [1989] 3 All E.R. 777; A. Ltd v B. Ltd. [1996] 1 WLR 665. Not only is this not improper, it is in accordance with current notions of the public interest that he should do so. Thirdly, if the temptation to win at all costs is present at all, it is present whether of not the lawyer has formally waived his fees if he loses.
> It arises from his knowledge that in practice he will not be paid unless he wins. In my judgment the reasoning in British Waterways Board v Norman, 26 H.L.R. 232 is unsound.
> Accordingly either it is improper for a solicitor to act in litigation for a meritorious client who cannot afford to pay him if he loses or it is not improper

> for a Solicitor to agree to act on the basis that he is to be paid his ordinary costs if he wins but not if he loses .
> I have no hesitation in concluding the second of these propositions represents the current state of the law.
> I reach this conclusion for several reasons. In the first place, I do not understand why it is assumed that the effect of the arrangement being unlawful is that the solicitor is unable to recover his proper costs in any circumstances.
> Where the solicitor contracts for a reward over and above his proper fees if he wins it may well be that the whole retainer is unlawful and the solicitor can recover nothing. But where he contracts for no more than his proper fees if he wins, this result does not follow. There is nothing unlawful in the retainer or in the client's obligation to pay the solicitor's proper costs if he wins the case. If there is anything unlawful, it is in the waiver or reduction of the fee if he loses. On ordinary principles the result of holding this to be unlawful is that the client is liable for the solicitor's proper costs even if he loses the case. I regard Aratra Potato Co Ltd. v Taylor Jayson Garrett [1995] 4 All. E.R. 695 as wrongly decided.
> In the second place, it is in my judgment fanciful to suppose that a solicitor will be tempted to compromise his professional integrity because he will be unable to recover his ordinary profit costs in a small case if the case is lost.
> Solicitors are accustomed to withstand far greater incentives to impropriety than this. The solicitor who acts for a multinational company in a heavy commercial action knows that if he loses the case his client may take his business elsewhere. In the present case, Mr. Taylor had more at stake than his profit costs if he lost. His client was his wife: desire for domestic harmony alone must have provided a powerful incentive to win".

In a context such as ours (and such as Millett LJ had assumed was England's) - where there is no statutory prohibition upon contingency fee arrangements - I find that reasoning in favour of conditional normal fee arrangements to be persuasive.

I do not however, accept the rationale by which conditional uplift fee arrangements would be precluded; being mindful that to that extent the reasoning was obiter.

What should be a lawyer's "proper fees if he wins" cannot be a matter to be determined entirely by reference to public policy. It must surely be a matter which reflects the circumstances of the case and so must primarily be a matter of reasonableness, not doctrine.

There seems to me to be no logical basis in principle for saying that a conditional normal fee arrangement is acceptable in the public interest but such an arrangement coupled with a provision for a reasonable uplift in fee rate dependent upon the same contingency, is not.

The added incentive to impropriety which the uplift might cause in the mind of a lawyer is different only in degrees from that which might arise from wishing to secure a normal fee.

I think it is equally fanciful to suggest that a lawyer who would not be induced to impropriety by the one, would be by the other.

Nor, I am sure, was the decision in the Thai Trade case intended to rest upon the narrow basis only that recovery of "ordinary profit costs in a small case" was acceptable. (see passage last quoted above). The fees which might accrue to a lawyer who conducts complex and lengthy litigation on "an ordinary profit costs basis" could well exceed that in many simpler cases conducted on the basis of an uplift in fees.

Simply by way of contrast a brief comment on the outright contingency fee is appropriate. It is a fundamentally different kind of creature - born peculiarly of incentive and risk and restrained by no fetter of contractual or commercial reasonableness such as govern either the normal or enhanced conditional fee.

By it, not only would the lawyer in the true and direct sense "share in the spoils", but there is also the concern that the incentive is not only to win. There is also the temptation to secure an outcome which might be most advantageous to the lawyer. An example of this could arise at time of considering an offer of settlement. The lawyer, incentivised by

his share of the settlement is even more at risk of giving advice which is less likely to be in the interest of his client than one who is not.

A conditional fee arrangement which provides for an increase in fees to reflect the exceptional nature of the risk undertaken, is not based in any true sense upon the notion of sharing in the spoils of the action. In the case before me, I regard it as based upon a recognition of the exceptional risks being undertaken by counsel in accepting a complex and difficult case without the assurance of any fees whatsoever.

I conclude that there is no reason in logic or policy why, in the absence of statute, the common law should today be taken as precluding such a fee arrangement.

As Millett LJ also observed (at p790 E - G)

> "Current attitudes to these questions are exemplified by the passage into Law of the Courts and Legal Services Act 1990. This shows that the fear that lawyers may be tempted by having a financial incentive in the outcome of litigation to act improperly is exaggerated, and that there is a countervailing public policy in making justice readily accessible to persons of modest means. Legislation was needed to authorise the increase in the lawyer's reward over and above his ordinary profit costs. It by no means follows that it was needed to legitimise the long-standing practice of solicitors to act for meritorious clients without means and it is in the public interest that they should be required to do so. I observe that the author of Cook on Costs, 2nd Ed. (1995) p. 341 expresses his doubt that it is now against public policy for a solicitor to agree with a client that he will not charge a fee unless a particular result is achieved. I agree with him and would hold that it is not."

I have already identified some advantages of a conditional uplift fee arrangement held in common with a conditional ordinary fee arrangement.

When such advantages are taken along with the safeguards which might be imposed by the court by way of further conditions to be considered below, I was entirely persuaded that a conditional uplift fee arrangement would not fall afoul of the law against

maintenance and champerty. Nor would it run contrary to the modern public policy behind the application of that law to the lawyer/client relationship.

The view taken elsewhere

The question of the appropriateness of contingency fee arrangements in the widest sense has been the subject of continued discussion for many years in many countries. Such arrangements have become an established feature of litigation in the United States (where it has reportedly given rise to wide-spread abuse) and throughout Canada where, reportedly, the fetter of judicial control and the self- restraint of the profession, have yielded more acceptable results.

It seems that at least since 1960, the law in Australia has been that an agreement to be paid proper legal fees in the event of success but not in the event that the litigation is unsuccessful is not champerty or maintenance and is not contrary to public policy. See Clyde v Bar Association of New South Wales (1960) 104 CLR 186 and Sheehan v Sheehan [1990] FLC 92.

For the purposes of the judicial development of the law in this jurisdiction, guidance can properly be taken from the Canadian practices as well.

In two recent cases in Ontario, the Superior Courts have proceeded in the wake of many years of debate but ahead of Parliament, to define circumstances under which contingency fee arrangements may be allowed:

Bergel & Edson v Wolf (2000) 50 Or (3d) 777 (SCJ) per Justice Spiegel and McIntyre Estate v Ontario (Attorney General) [2001] OJ 713 (SCJ) per Justice Wilson.

Prior to these two decisions, the Solicitors Act was widely interpreted as prohibiting contingent or conditional fee arrangements as champertous. Contingent fees were only allowed in Ontario in class proceedings pursuant to the Class Proceedings Act. But that view of the Solicitors Act was a matter of judicial interpretation of common law policy embodied in the Act.

Both of the recent cases eschew the English common law approach to the subject. That approach, as the cases show, had assumed that English law has never sanctioned such an agreement "as it was illegal on the ground that it was the offence of champerty" per Lord Denning MR in Wallersteiner v Moir (supra).

Instead, the approach taken in the Canadian cases resorted to the fundamentals. They considered what the constituents of the offences of maintenance and champerty were and then asked the question whether a contingency fee agreement came within them and so outlawed as a vestige of those offences on grounds of public policy and notwithstanding the abolition of the common law offences there.

In both cases the judges thus examined the development of the law and found that there is an increasing tolerance for contingent and conditional fee arrangements in England and in Canada. Both judges concluded that an essential element of champerty is "officious intermeddling"; ie: the stirring up of parties to litigate when they otherwise would not. This was an element which contingency fee arrangements obviously do not include.

In the McIntyre case, Justice Wilson (later upheld an appeal) adopted the two-part test enunciated by Lord Mustill in Giles v Thompson (supra) at 161. First, the agreement she held must be free of the marks of champerty (ie: officious intermeddling). Second, the

lawyer must have "a legitimate social policy interest in pursuing the claim, distinct from benefits in the form of fees".

In applying this test, Justice Wilson noted that it was Mrs. McIntyre who sought the services of the lawyer: there was no "stirring up of litigation" and so no officious intermeddling.

As to the second criterion, she held that there was a legitimate public policy interest in seeing claims such as the one at bar (ie: against the tobacco industry for injury to public health) proceed.

One must however immediately recognise the foible of the second criterion because - if literally applied - it would disqualify a legitimate private interest claim such as that of the plaintiffs in this case on the basis that there is no wider virtue of public interest to be served.

One rather is inclined rhetorically to ask: what need should there be for other public interest apart from that of seeking to ensure access to justice for meritorious litigants who may be denied access for want of means?

That apart, the approach taken in the Canadian cases raise, to my mind, a further legitimate challenge (going beyond that raised by the Thai Trading case) to the earlier entrenched assumption taken in the English cases that contingency fee arrangements, by definition, are champertous. In seeking the answer as to the legitimacy of contingency fee arrangements, those cases, in my view, properly lay emphasis upon the classical definition of the common law offences such as is expressed most authoritatively in Giles v Thompson (supra).

Conclusion

The foregoing review of the development of the common law of maintenance and champerty reveals that its branch relating to the special relationship of lawyer and client grew into an existence of its own. Heavily influenced by the public policy concerns for the preservation of the integrity of that relationship and of the administration of justice, it acquired strictures which were not truly attributable to its source. So much so, as is shown, despite the absence of the element of "officious intermeddling" which the common law had otherwise prescribed as essential for the commission of the offences. And, as the Thai Trading, Canadian and Australian cases show, the case law had developed on the assumption that all contingency fee arrangements were to be precluded as being champertous because they necessarily involved the prohibited division of the spoils of litigation.

Yet, as has been shown, that mischief was in no real sense involved in a conditional normal fee arrangement. Nor, if proper, fair enhancements are agreed, need it be involved in conditional uplift fee arrangements.

Indeed, 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. That is not what this application is about.

The strictures developed in this branch of the law were no doubt appropriate to an age gone by when, quite understandably and appropriately, great emphasis required to be placed upon the public policy interests from which they arose.

Nowadays though, we witness the ascendancy of Rights and of the equally important public policy concern to ensure equal access to justice for those of modest means.

It no longer suffices, in the face of disenfranchisement, to say that "every person must bring his suit - upon his own bottom and at his own expense": Wallis v Duke of Portland (supra)).

Nor is it invariably appropriate to look to the public purse for funding of private disputes. That is a recourse which is particularly unlikely in this jurisdiction, where that purse is necessarily limited by the defined sources of public revenue.

Here, I think the balance of public policy must certainly weigh in favour of allowing the present arrangement. This is all the more so when the conditions which can and will be imposed by the court are available:

(i) 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.

(ii) The Court is best placed to do so and will consider the reliability and reputation of the attorney.

(iii) 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.

(iv) In an appropriate case, the court as a matter of the exercise of discretion, can disallow the whole or such rate as it sees fit of any enhanced fee from the amounts to 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.

(v) 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.

(vi) The agreement must be in writing and their must be a mechanism by which the client can discharge the attorney.

(vii) 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.

With all the foregoing considerations in mind, I 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.

Anthony Smellie
Chief Justice

Dated the 5th July 2002

GRAND COURT CAYMAN ISLANDS