

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. AXAHCV2023/0005

[1] **SCOTT SVIRSKY**
[2] **LAUREN SVIRSKY**
[3] **DYLAN SVIRSKY**
[4] **HANNAH SVIRSKY**
[5] **LILY SVIRSKY**
(by her father Scott Svirsky, on her behalf
being a minor)

Claimants/Applicants

AND

SOF 82 ANGUILLA HOLDINGS LLC
dba Four Seasons Resorts and Residences Anguilla
First Defendant/First Respondent

CALYPSO CHARTERS LTD
Second Defendant/Second Respondent

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mr. Timothy Prudhoe with Mr. Carlyle Rogers of counsel for the Claimants/Applicants
Mr. Devin Hodge of counsel for the 1st Defendant/Respondent
The Honourable Attorney General, Mr. Dwight Horsford appears with Mr. Sasha Courtney and
Mr. Theon Tross pursuant to an order of the court dated 29th March, 2023
Ms. Merline Barrett, President of the Bar Association pursuant to order of the court dated
29th March, 2023

2023: June 5.
Re-issued
June 22.

Reasons for Decision

[1] **Moise, J.:** This is an application for the court's approval of a letter of engagement dated
24th September, 2022 entered into between the claimants and the law firm on record as

their representatives in the substantive claim. Given the nature of the application, the Learned Master ordered that submissions be filed by the office of the Attorney General of Anguilla and the Bar Association of Anguilla. The submissions were duly filed, and after having initially filed affidavit evidence in support of the application and submissions in support, the claimants filed additional submissions in response to those of the Attorney General and the Bar Association.

- [2] The matter was referred by order of the learned master dated 22nd May, 2023. The matter was scheduled for determination of the court on 5th June, 2023. Having read the submissions and having heard from counsel for the claimant, I determined that the application should be dismissed with no order as to costs. I undertook to give written reasons for my decision and I do so now.
- [3] However, before addressing the facts of this case, I wish to highlight an issue which arose at the start of the hearing of this matter. The application for consideration was filed on 14th March, 2023. The claimants also filed affidavit evidence in support of the application on the same day. Again on 23rd March, 2023, the claimants filed an additional affidavit in support of the application. One of the grounds upon which the application was based was that the claimants were unable to fund the litigation and therefore entered into a letter of engagement on a contingency fee basis. None of the affidavits necessarily addressed the facts upon which it was being represented that they were unable to fund the litigation.
- [4] In addition to the affidavits filed, the claimants filed skeleton arguments in support of the application on 23rd March, 2023. Whilst these are referred to as skeleton arguments, they were in fact substantive submissions on the issues raised in the application. On the invitation of the learned master, the Attorney General put in a notice of objection to the application on 26th April, 2023. The Anguilla Bar Association filed submissions on 28th April, 2023. The Attorney General filed submissions on 8th May, 2023. Again, all the submissions filed were rather substantive, together with authorities to support the arguments made in relation to the points in question. On 15th May, 2023, the claimants filed submissions in reply to those of the Attorney General and the Bar Association.

- [5] The application came up before the master on 22nd May, 2023 and it was agreed that the issues raised were best determined by the Judge. The master stayed the proceedings and referred the matter “for the determination of the notice of application filed on 14th March, 2023.” The matter was subsequently listed for hearing on 5th June, 2023. At that point affidavits and full submissions had been filed. The matter was therefore listed for hearing and determination of the issues.
- [6] On the morning of the hearing however, counsel appeared for the claimant and requested time to file additional affidavit evidence to substantiate the assertion that the claimants were unable to fund the litigation without the engagement letter. The court was of the view that to have waited until the morning of the hearing to make such a request was not proper. In any event, the court was also of the view that it was capable of addressing the substantive issues in the application without the filing of additional evidence. If the engagement letter was deemed to be valid in law and capable of endorsement by this court, then I would have been prepared to allow for the additional affidavit to be filed and the matter reverted back to the master for the assessment of the claimant’s capacity to fund the litigation. That was not objected to by either of the other parties as a reasonable approach to take.
- [7] However, counsel for the claimants then indicated that he was not prepared to argue the application because he had somewhere else to be and was of the view that the matter was listed for a case management hearing without any such order having ever been made. Counsel also indicated that he had no documents before him and was not prepared to argue. This is despite the fact that all the documents were lodged on an e-litigation portal for at least two (2) weeks prior to the hearing of the application in circumstances where a claim for personal injury has been stayed. The court expressed the view that this was not a valid reason for an adjournment of the matter. Affidavits and substantive submissions having been filed, a claim has been stayed for the determination of what were narrow points of law, it was not acceptable for counsel to simply indicate that he was ill-prepared to deal with the application on the date for which it had been set. It was the court’s view that there was another counsel present, who had in fact filed and signed the submissions and

who, in the court's view, was competent to make the submissions if Mr. Prudhoe felt himself unable to do so. The court was not prepared to grant an adjournment.

- [8] It is the duty of counsel to assist in ensuring that the overriding objectives of the rules are met at all times. This includes the need to deal with cases expeditiously. All too often the court's discretion to grant adjournments are taken for granted. When an application of this nature is filed, affidavits and submissions are also filed, counsel cannot take it for granted that an oral application without notice for an adjournment will readily be given. That is a decision which is in the court's discretion. There is no reason to find that counsel can simply appear and state that he has another engagement and therefore request an adjournment. If counsel appears before the court he must be prepared to proceed with the application in the event that the court is not minded to grant an adjournment. In order to give regard to the overriding objective, the court must also be slow to grant such adjournments and counsel must always bare this in mind. The adjournment was therefore not granted.

The Facts

- [9] The claimants were all passengers on a charter boat on 18th June, 2022. As has been pleaded in the statement of claim, the boat was chartered for the claimant's engagement in the watersport activity known as "tubing" in the waters of Anguilla on the western side of the island for a period of 2 hours. In addition, the party of persons onboard was to travel to Sandy Island, an offshore cay of Anguilla. Unfortunately, the boat was involved in an accident in which the claimants suffered personal injury. They have therefore brought this action against the defendants to recover damages for personal injury as a result of breach of contract and for the alleged negligence of the defendants. The statement of claim was filed on 24th February, 2023.
- [10] However, on 24th September, 2022, prior to the filing of the claim, counsel, whose chambers has been engaged to represent the claimants, presented an engagement letter to the claimants which highlighted the terms upon which chambers was to be engaged. Insofar as it relates to the fees chargeable under the engagement, the letter can be

described as a Contingency Fee Agreement (CFA) for un-liquidated damages. The relevant clauses of the letter are as follows:

“If, and only if, Either, (i) such an order that one or both of the intended defendants pays your legal costs or the claim each of you intends to bring with the help of the firm is either settled (paid) by either or both of the defendants or (ii) a damages award is ordered by the court, we will enforce the debt owed by you in respect of the legal costs incurred by you.

Subject to the content of this letter, the firm, at your request, agrees to payment in the form of contingency of 33.3% of the damages award(s) (“The Contingency Payment”). It is an agreed condition of the engagement that any settlement payment(s) or court award damages shall be paid directly to the firm, such that the contingency payment can and shall be deducted from the gross amount received.”

- [11] In addition to the contingency fee of 33.3%, the engagement letter also goes on to state that for the purpose of costs recoverable from the other side, the firm would be entitled to log billable hours. The rate at which those hours are to be charged was not specified in the letter. However, the letter confirmed that the claimants would not be charged for both the contingency fee and the billable hours logged by the Firm.
- [12] The engagement letter goes on to state that the legislation regarding contingency fee agreements in Anguilla is not clear as it relates to claims for un-liquidated damages, into which category this letter would fall. As such, it was represented to the claimants that it would be necessary to seek the court’s approval of the engagement letter. It is for this reason the application of 14th March, 2023 was filed.
- [13] The grounds upon which this application is based can be summarized as follows:
- (a) That the applicants are not in a financial position to fund the litigation themselves and have thus entered into the engagement letter on a contingency fee basis;

- (b) That the area of law in Anguilla regarding the validity of Contingency Fee Agreements is unclear since the repeal of the Champerty and Maintenance and Embracery Act 1540 by the English Parliament;
- (c) That the claimants are entitled to protection of the law and a fair hearing under section 1(a) and 9(1) of the Constitution of Anguilla. Implicit in this right is a right to access to justice and a legal representative of their choice.
- (d) In the absence of any legal aid regime in Anguilla, the claimants are entitled to seek legal representation in as effective and efficient manner as possible, as long as it is not legally prohibited. A contingency fee agreement in those circumstances will enable the claimants to pursue their claim.

The Issues

- [14] As I indicated to counsel at the hearing of the application, the main issue which the court must consider is whether there is in fact any lacuna or ambiguity in the legislation which is in force in Anguilla relating to contingency fee agreements. Rule 10(3) of the Code of Ethics enshrined in the **Legal Profession Act** specifically legislates for Contingency Fee Agreements and the question is whether an agreement of the nature entered into by the claimants is enforceable in light of the provisions of the Act.
- [15] The claimants have also raised questions of constitutional rights and whether the enforcement of the agreement can be validated on the basis of those rights, in light of the specific provisions of the legislation. I state from the onset however, that reliance cannot be placed on section 1 of the Constitution as it is now trite that this section confers no rights on anyone and therefore the section has not been addressed any further in this decision.
- [16] In addition to those issues, there is the added question, to my mind, as to whether the court should embark on the exercise of approving the agreement at this stage in the proceedings, where there is no dispute between the parties to the agreement. In essence the application appears to be one in which the court is called upon to give an advisory opinion and to approve a contract between the attorney and his client.

- [17] If the court was of the view that the agreement is lawful then, as I would have indicated to counsel, the court would have been minded to refer the matter back to the master to assess the question of whether the claimants were in fact incapable of funding the litigation. I would have therefore been minded to grant leave to file additional affidavit evidence in that regard if the previous hurdles of this application had in fact been met.

The Law of Champerty

- [18] It has been a long tradition dating back many centuries that attorneys were prohibited from making arrangements with clients during the course of litigation which result in giving the attorneys a vested interest in the outcome of the proceedings which is above and beyond the normal profits. This principle was highlighted in the case of ***Wallersteiner v Moir (No 2)***¹ where the following was noted:

"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."

- [19] Counsel for the claimants in their own submissions also referred the court to the case of ***Re Trepcia Mines Ltd (No. 2)***² where Lord Denning stated that ***"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."***

- [20] I do not take Lord Denning's statement to mean that the potential abuses and the motives he highlighted are the limits to the public policy concerns which may arise. To my mind,

¹ [1975] QB 373

² [1963] Ch. 199

even if the champertous maintainer is not consciously motivated by greed, an arrangement of that nature may have a negative impact on the administration of justice in many other ways. In a claim for un-liquidated damages, even the court may not be in a position to fully appreciate the true implication of the contingency until the damages are actually assessed; or at least the issue of liability is addressed. Litigants who are unable to fund the litigation are in a position where there is an imbalance in the contractual relationship with the attorney. It is perhaps more likely that it is only at the end of the litigation when the payout is made, will they fully appreciate what they have signed. If the court is on record as having sanctioned that specific agreement, that may very well lead to an undermining of the trust and confidence of the system in general, if litigants later feel exploited by such agreements at moments of significant vulnerability in their lives. The court's approval may later be interpreted as providing cover to an attorney where the litigant later challenges the reasonableness of the fee he has to pay. I am not suggesting any unreasonableness on the part of the attorneys in this case, but merely raising those issues as part of the broad discussion on agreements of this nature.

[21] The courts have therefore been traditionally slow to embrace contingency fee agreements as a matter of public policy. Insofar as that is the case, in 1540 the Legislature in England made it a criminal offence to engage in such practices. The common law tort of Champerty also existed alongside this criminal offence. However, as counsel for the claimant has noted, attitudes towards the law have changed over a period of time to the extent that the legislation in England was repealed by the **Criminal Law Act of 1967**. That Act did not repeal the common law tort of Champerty. However, for the most part, across many common law jurisdictions, judges have not been firm one way or another in espousing a dogmatic position insofar as it relates to the common law tort on the issue. It is a matter which has largely been left to the Legislature to address.

[22] In Anguilla, the offences of Champerty and Maintenance were abolished by section 371 of the **Criminal Code**³ which states that:

371. (1) The following offences under common law are abolished—

³ R.S.A C140

(a) larceny

...

(j) any distinct offence, under the common law, of maintenance (including champerty and embracery);

(2) For the avoidance of doubt, it is hereby declared that to the extent (if any) that the following Acts of the Parliament of England apply in Anguilla, namely— (a) the Champerty Act; (b) the Maintenance and Embracery Act 1540; ...they are hereby repealed in relation to Anguilla.

[23] Counsel for the applicant submits that this section in fact abolishes both offences in tort and in crime by repealing the English statutes in broad and exhaustive language. It is argued that unlike the English provisions, the section does not specifically retain the public policy objections to such agreements. I do not agree with that submission. I accept the argument put forward by the Honourable Attorney General that the section in fact repealed the criminal “offences” of Champerty, Maintenance and Embracery. Nowhere in the section does it specifically say that the common law tort was to be disturbed. The Attorney General refers the court to section 1 of the **Common Law (Declaration of Application) Act**⁴ which states as follows:

“... it may be declared, and it is hereby declared by the Authority aforesaid, that the Common Law of England, as far as it stands unaltered by any written law of these islands, ... or by some Act or Acts of Parliament of the Kingdom of England, extending to these Islands, is in force in each of these Your Majesty’s Leeward Charibbee Islands, and is the certain Rule whereby the Rights and Properties of Your Majesty’s good subjects inhabiting these Islands, are and ought to be determined ...”

⁴ R.S.A. C60

[24] To my mind what was repealed by the **Criminal Code** was the criminal offence of Champerty. As in the case of England, the common law tort of Champerty remained applicable to Anguilla. In any event, insofar as it relates to contingency fee agreements, the Legislature in Anguilla specifically addressed the issue in the **Legal Profession Act**⁵. However, before addressing the substance of the Act itself, it is important to make some general comment on the state of the common law in England as it relates to such arrangements.

[25] Perhaps the current state of the law in England has best been articulated by Lord Neuberger in the case of **Sibthorpe v Southwark London Borough Council (Law Society intervening); Morris v Same (Same intervening)**⁶ where he states the following:

“In my judgment, when it comes to agreements involving those who conduct litigation or provide advocacy services, the common law of champerty remains substantially as it was described and discussed in Wallersteiner v Moir (No 2) and Awwad v Geraghty & Co (a firm). This is for two main reasons. The first is to be found in the passages in the judgments of Buckley LJ in the former case ([1975] 1 All ER 849 at 866, [1975] QB 373 at 401), and of Oliver LJ in Trendtex Trading Corp v Credit Suisse [1980] 3 All ER 721 at 747, [1980] QB 629 at 663. The second reason, articulated in Awwad v Geraghty & Co (a firm) [2000] 1 All ER 608 at 628, 634– 635, [2001] QB 570 at 593, 600, by Schiemann and May LJJ, is that, in s 58 of the 1990 Act (as amended) the legislature has laid down the rules as to which previously champertous agreements may be entered into by those conducting litigation and those providing advocacy services, and which may not.”

[26] Essentially, the law has remained the same, subject to certain legislative intervention. However, that has not prevented English judges and those from other parts of the common law world from commenting on its relevance to modern day litigation. Counsel for the

⁵ Act No.6 of 2016

⁶ [2011] 1 WLR 2111

applicant refers the court to the case of *Kellar and Another v Williams*⁷ where Lord Caswell noted that:

“It is then to be considered whether the fee agreement, whether in its original form or as varied in 2000, constituted a CONDITIONAL FEE AGREEMENT (my emphasis). In approaching this issue their Lordships wish to make it plain that they are not to be taken as accepting without question the traditional doctrine of the common law that all such agreements are unenforceable on grounds of public policy. The content of public policy can change over the years, and it may now be time to reconsider the accepted prohibition in the light of modern practising conditions. They would point only to the views expressed by Millett LJ giving the judgment of the Court of Appeal in Thai Trading Co v Taylor [1998] QB 781 and by May LJ in Awward v Geraghty & Co [2001] QB 570 at 600.”

[27] The views of Millett LJ to which Lord Caswell referred are that:

“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. There is no reason to suppose that Lord Denning M.R. in Trendtex Trading Corporation v. Credit Suisse [1980] Q.B. 629 or any of the members of the court in Wallersteiner v. Moir (No. 2) [1975] Q.B. 373 had in mind a contingency fee which entitles the solicitor to no more than his ordinary profit costs if he wins. These are subject to taxation and their only vice is that they are more than he will receive if he loses. Such a fee cannot sensibly be described as a ‘division of the spoils.’ The solicitor cannot obtain more than he would without the arrangement and risks obtaining less. On the principle that ‘the worker is worthy of his hire’ I would regard the solicitor who enters into such an arrangement, not as charging a fee if he wins, but rather as agreeing to forgo

⁷ [2005] 1 LRC 582

his fee if he loses. I question whether this should be regarded as contrary to public policy today, if indeed it ever was.”

[28] It is important to make just a few observations in relation to the above comments. Firstly, it must be noted that there is an actual difference in law between a contingency fee agreement and a conditional fee agreement. Whilst the general term Contingency Fee Agreement encompasses both concepts, the contingency fee agreement (small caps) is a circumstance where the attorney is merely forgoing his usual profits if the litigation is unsuccessful. If it is successful he is entitled to the usual profits. An agreement of this nature may sometimes entitle the attorney to a percentage of the award of damages; but that is not a necessary feature of such an agreement. On the other hand a Conditional Fee Agreement is a creature of statute and initially established in England by the provisions of Section 58 of the **Courts and Legal Services Act 1990**⁸. Under the provisions currently in force, the solicitor is entitled to charge an up-lift in addition to his usual fees in the event that the litigation is successful. This is not a percentage of the damages, but a percentage increase of his usual profits. For example, the client may agree to pay an additional 10% of the legal fees. If the normal profits would be \$1,000.00 the attorney will charge an additional \$100.00 representing the 10% uplift. The Act itself regulates how such an agreement is to be executed if it is to be valid in law.

[29] In the cases referred to above, both Millet LJ and Lord Caswell sought to draw a distinction between an agreement in which the attorney is securing a profit above and beyond what he would ordinarily be entitled to if the litigation is successful and one where he is not. Millet LJ notes that the latter of the two ***are subject to taxation and their only vice is that they are more than he will receive if he loses.*** I too agree that this may not necessarily be the type of arrangement which is an affront to public policy as was outlined by Lord Denning. It can hardly be said that an attorney who forgoes his fees in unsuccessful litigation should be deemed to have committed some injustice to his client or have caused any damage to the integrity of the administration of justice. However, Millet LJ continued to express the view that ***it is understandable that a contingency fee which entitles the solicitor to a***

⁸ These provisions are now contained in section 58 of the Access to Justice Act 1999

reward over and above his ordinary profit costs if he wins should be condemned as tending to corrupt the administration of justice.

- [30] When one examines the letter of engagement which is before me, I express some concern. An entitlement to 33.3% of the damages which may be agreed to or awarded in this case cannot necessarily be said to be the normal profits which may be subject to taxation; and by that I mean there are no provisions for costs or any other fee in Anguilla to be measured as a 33.3% of the outcome of litigation. The entitlement is also not an up-lift of the usual profits. If anything, it comes across to me as a potentially significant fee when balanced against a potential award. Let us use a hypothetical example to make this point.
- [31] Let us take the case of an unfortunate widow whose husband had died as a result of an accident. In an instantaneous death case, the bulk of what may be awarded in negligence is likely to be loss of earnings and years lost. Take an annual salary of \$30,000.00 as his income and a multiplier of 12. His widow without him has been forced into indigence. In such an instance she (or his estate) is awarded the sum of \$360,000.00 as compensation for the lost years. At first blush this may seem like a relatively sizable payout to some; especially those who are indigent. However, even Millet LJ's reference to a '***division of the spoils***' may be potentially misleading to this widow who may now have to raise her children without her husband and main bread winner for a number of years to come. What is awarded to her are not spoils of war but compensation, which in and of itself may not even be adequate for what she is about to endure alone.
- [32] In the instance where there is a contingency fee agreement 33.3% of this compensation belongs to the attorney; despite the fact that under the agreement the widow has paid for all of the disbursements of the litigation. This amounts to \$119,800.00. This may also occur in circumstances where the case was compromised prior to a full trial and the award of prescribed costs may be but pittance in comparison to what the attorney is entitled under this agreement. I do not wish to come across as being unnecessarily critical, but insofar as the court is being called upon to address this issue, I would find it difficult to believe that the average person on the streets of Anguilla or even wider OECS would not conclude that this ***should be condemned as tending to corrupt the administration of justice.*** I do have

difficulty in accepting, that even if one were to find that such agreements are lawful in Anguilla, the court should embark on placing its stamp of approval on it.

- [33] Such a scenario may not be uncommon in personal injury claims. One can also consider damages for future medical care as an example. Every dollar out of this which is paid out in legal fees may result in the undermining of the very purpose for which the award of damages was made. Damages are not spoils but are awarded for a purpose and it is important to consider this in any discussion regarding contingency fee agreements.
- [34] It is not that one may not envisage a case where the litigation may be naturally more costly. If one adds for example the element of medical negligence to such a hypothetical case, one can see how the complication in the litigation can drive up the costs. Even in the present case one may argue that a boating accident is not the normal run of the mill running down action. But the agreement before me is not that of a litigation funder per se. The attorney is taking no responsibility towards the disbursements. The litigant is to fund the litigation himself in every respect except the legal fee which is potentially payable at a rate above the usual profits.
- [35] On the other hand, it cannot be said that there are any provisions in Anguilla for conditional fee agreements as in England. When one examines the history of the introduction of this legislation and the issues which have arisen as a result of it, I would rather doubt that it is for the court to usurp the authority of the Legislature and introduce such a provision into the Laws of Anguilla. In any event I express my own doubts, that without any empirical research on the impact of such agreements on the distinct peculiarities of our own polity, that this will be an acceptable approach to take. It cannot simply be taken for granted that merely because lawyers and judges have softened their approach on the link between such agreements and access to justice that this is even the outcome we will likely achieve. The legislature is best suited to assess the need for such provisions by proper consultation and data collection on the impact it may have on litigation in Anguilla and the wider ambit of the jurisdictions of the Eastern Caribbean Supreme Court and the provisions which will be necessary to adequately regulate its implementation. I will assess the exact provisions

enacted by the legislature in Anguilla in due course but would be disinclined to embark on any expansion of the express provisions by virtue of this application.

- [36] Counsel then went on to refer to the following remarks of May LJ in the case of **Awward v Geraghty & Co**⁹:

“I accept the general thesis in the judgment of Millett LJ 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 should 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. The difficulties and delays surrounding the introduction of conditional fee agreements permitted by statute emphasize the divergence of view. In my judgment, where Parliament has, by what are now (with section 27 of the Access to Justice Act 1999) successive enactments, modified the law by which any arrangement to receive a contingency fee was impermissible, there is no present room for the court, by an application of what is perceived to be public policy, to go beyond that which Parliament has provided. That applied with, if anything, greater force in 1993 than it does today.”

- [37] I make the observation here, that yet again, the judge in that case was merely expressing an opinion. He acknowledges that there may be a change in modern perceptions about contingency fee arrangements. He however, also acknowledged that opinions have been sharply divided on the issue. What is nonetheless very important is that some form of deference to legislative intervention in this area is necessary. Counsel for the applicant argues that unlike England where there has been legislative intervention relating to conditional fee arrangements precisely because of the fact of indigent litigants, no such intervention has taken place in Anguilla. I do not agree that this submission is correct and I remain skeptical as to whether there is any empirical evidence to suggest that the

⁹ [2001] QB 570

endorsement of such an approach is even likely to naturally achieve greater access to justice; at least not on the basis of an agreement on the terms which has been presented for approval by the court. I say because there is no evidence to suggest that persons in a position similar to the claimants would be unable to find a reasonably competent attorney in Anguilla who would be willing to provide the relevant services without such an agreement. To my mind, that is an important issue to consider. Research ought to be done on this issue before one can simply embark on a process of doing away with the old public policy concerns. The Legislature is best suited for this.

The Legislation

- [38] The Legislature in Anguilla has passed and promulgated the **Legal Profession Act (LPA)** and made specific provision for the ethical standards applicable to attorneys. Section 39(1) of the LPA provides that the Code of Ethics set out in Schedule 5 of the Act shall regulate the professional practice, etiquette, conduct and discipline of legal practitioners. As has been noted by the President of the Bar Association, in accordance with section 39(2) a breach of the rules in Part A of the Code may constitute professional misconduct; but a breach of the rules in Part B of the Code **shall** constitute professional misconduct. In accordance with Rule 9(2) of Part B of the Code ***“A legal practitioner shall not enter into an arrangement for or charge or collect a fee in contravention of this Code or any law.”***
- [39] I make the point here that the legislation expressly notes that an attorney is prohibited from entering into an agreement which contravenes the Code. The very language used in this section is prohibitive. It is designed to ensure that agreements made between attorneys and their clients are only valid if they do not infringe the express provisions the Code. The Code goes on to state in Rule 10(3) of Part B that ***“A legal practitioner shall not charge a contingency fee except with prior agreement of the client for reasonable commission on the collection of liquidated claims.”***
- [40] To my mind, contrary to the submissions put forward by counsel for the applicants, the legislation is quite clear. The precise wording outlined in Rule 10(3) is designed to make it

unlawful for an attorney to charge a contingency fee except in the circumstances outlined in the Rule. It is only if there is prior agreement with the client and, in any event, only on the collection of liquidated damages. As even counsel for the applicant has conceded, the agreement presented to this court is for un-liquidated damages. In my view, there is no lacuna in this legislation and an attorney is prohibited from entering into a contingency fee agreement in claims for un-liquidated damages.

[41] But it is perhaps important to place this rule into context. When one examines the public policy issues which are historically accepted as driving the court's initial concerns with CFAs and balanced against the modern approach to litigation, one can appreciate the value of this rule. In a claim for liquidated damages, the client is in a better position to be properly advised on the impact such an agreement would have on him. By being in a position to know the value of his claim upfront, he is capable of being informed as to what he is likely to recover in prescribed costs at each stage of the litigation. He is therefore capable of balancing the fees he is likely to pay his attorneys with what he is likely to recover. Though potential indigence may create an imbalance in the contractual relationship, the rule is mitigated by the requirement of a reasonable commission. His indigence is therefore not to be taken to be synonymous with ignorance. He is better able here to count the costs of what he is agreeing to and to determine whether the litigation is even worth it if this is the amount of fees he is likely to pay even if he is successful.

[42] In claims for un-liquidated damages however, the opposite is true. The age old concerns are not mitigated by anything here, unless the legislature not only makes provision for such agreements, but also set the parameters within which they are to operate. That is not a matter for the judiciary to do as I am unconvinced that the uncertainties which are inherent in such cases will be adequately addressed on an adhoc basis with no research, consultation or empirical data to drive the policy. As the Honourable Attorney General points out, the Legislature, in passing the LPA cannot be taken to have been ignorant of the state of the law and specifically legislated for CFA's to be limited to certain circumstances. It is best left to the Legislature to continue to assess the issue and consider the best ways in which any changes to the legislation should take place.

[43] In addition to actually legislating for CFA's, the legislation and the Code of Ethics would have also prescribed the manner in which the reasonableness of the contingency fee is to be dealt with. There is no provision in the Act or the Code of Ethics for the court to embark on a prior approval of the agreement. I agree with the Honourable Attorney General where he argues that this is not the proper approach to take. The issue of contingency fee agreements is described in the Act and the Code as a matter of professional practice, etiquette, conduct and discipline of legal practitioners. There are provisions in the Code for the regulation of those issues; those do not involve the court's prior approval of the agreement. Further, it may be that a dispute which later arises between the attorney and the client in relation to the agreement will be the subject of litigation in the courts as a breach of contract. By embarking on a process of approving agreements beforehand, the court's independence and impartiality may be compromised at that point. It is for those reasons I believe that the legislature is best suited to address this issue and properly determine the manner in which such an approach is to be regulated.

[44] Insofar as this court is invited to join the discussion on the link between contingency fee agreements and access to justice, I think it is important to make a few general observations on another issue which may perhaps be an even greater hindrance to access to justice than the lack of contingency fee agreements; that is the issue of costs. I am of the view that a link must be made here to adequately address the question of whether the old public policy concerns are no longer relevant to modern day litigation. We may go some way in addressing the issue of access to justice if we stop paying lip service to the issue of costs.

Access to Justice and Costs

[45] Counsel for the applicants have raised the issue of a constitutional right to access to justice. Reference is made to section 9 of the Constitution and a number of authorities in which it has been stated that access to justice is a constitutional right. No one can argue with that. The court is a service provider and it is a public service that the citizen ought to have unfettered access to. However, it is important to note that access to justice is not limited to or synonymous with access to courts. If what takes place in our courts is unjust

then the litigant has no greater access to justice. One issue which has been tirelessly championed as affecting this access is the issue of costs.

[46] As I have stated before, I am unconvinced that the authorities presented to me stand for the proposition that the absence of contingency fee agreements in certain circumstances constitute a breach of that right to access to justice. To my mind, it is not necessarily the right to access the courts with an attorney of your choice. If the attorney of a litigant's choice wishes to charge a fee which is unreasonable, it would not be a breach of his constitutional rights for the court to decline to endorse such an approach. Indeed, even legal aid which seeks to provide greater access to justice is not necessarily based on providing an attorney of one's choice at whatever rate he or she chooses to charge. The question is whether there is any evidence to show that the lack of CFAs in certain circumstances is generally leading people to forgo litigation of the type which is the subject of this claim. I express my doubts. If anything it is my view that a broader discussion on costs may be what is warranted.

[47] In 2009, Sir Rupert Jackson was commissioned to conduct a review of civil litigation costs in England. Whilst I do not necessarily agree with all of the recommendations stemming from this report, there are two comments which I would like to endorse. Sir Rupert noted firstly that ***“[a]ccess to justice is only practicable if the costs of litigation are proportionate.”*** Very importantly, for the purposes of this discussion, he goes on to state that ***“[i]t is wrong to regard ‘funding’ and ‘costs’ as separate topics which must be tackled individually, in order to provide access to justice.”*** Insofar as counsel for the applicants are raising the constitutional right of access to justice as a ground upon which CFAs are to be endorsed outside of that which is catered for in the legislation, I state without any equivocation, that even if I were to have been empowered to do so, the courts should be unwilling to have a discussion about access to justice purely on the basis of litigation funding without also having a fruitful and honest discussion on the issue of costs.

[48] In a lecture delivered to the Association of Costs Lawyers in England on 11 May 2012, Lord Neuberger noted the following:

"Excess litigation cost has for too long been an endemic and unwelcome feature of our civil justice system. In his 1986 Hamlyn lectures, Sir Jack Jacob rightly described it as having long been 'the most baneful feature of English Civil Justice.', and he was by no means the first person to do so. In the quarter century that has passed since those lectures things have got worse."

- [49] I again do not wish for my comments to be taken as a criticism but if one is to consider the public policy concerns in a broad sense, one cannot do so in isolation to the views of the public and the users of the court's services in general. I doubt very much that the average citizen who has a right of access to our courts is more concerned about Contingency Fee Agreements as they are concerned with the issue of costs. Many of our citizens consistently complain that legal fees are too high. Our judges and masters have persistently complained about the nature of cost bills presented for assessment which are altogether disproportionate to the substance of litigation. But yet it persists. Like Sir Rupert Jackson, I too believe that in an attempt to discuss litigation funding, even to the poor, the discussion must include the issue of costs. I refer to the case of *Willis v Nicolson*¹⁰ where the following was noted:

"The very high costs of civil litigation in England & Wales is a matter of concern not merely to the parties in a particular case, but for the litigation system as a whole. While disputants should be given every encouragement to settle their differences without going to court, that encouragement should not include the making of litigation prohibitively costly so that litigants are deterred irrespective of the merits of their case. One element in the present high cost of litigation is undoubtedly the expectations as to annual income of the professionals who conduct it. The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of the market rates charged by the professions, rather than attempting the no doubt difficult task of placing an objective value on the work. When the Civil

¹⁰ [2007] EWCA Civ 199

Procedure Rules replaced the Rules of the Supreme Court, and encouraged active intervention by the court and the application of public values and not merely those values with which the parties were comfortable, it was hoped that that practice might change; and that hope was reinforced when this court said, in of its judgment in Lownds v Home Office [2002] 1 WLR 2450: 'Proportionality played no part in the taxation of costs under the Rules of the Supreme Court. The only test was that of reasonableness. The problem with that test, standing on its own, was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when professional services were rendered. If a rate of charges was commonly adopted it was taken to be reasonable and so allowed on taxation even though the result was far from reasonable.' However, in the event nothing seems to have changed. That is because, as explained in [29] of the same judgment, 'proportionality' is achieved by determining whether it was necessary to incur any particular item of costs. And then 'When an item of costs is necessarily incurred then a reasonable amount for the item should normally be allowed': and the reasonable amount per hour of the professional's time continues to be determined by the market."

- [50] In the case of *J v. J*¹¹ Mostyn J expressed to have been almost lost for words when the scale of legal fees in a family court matter was revealed to him. He described it as "madness". He also went on to state that ***"[a]lthough the mantra "something must be done" is repeated time and again"***, nothing is ever really done about it. Insofar as it relates to the issue of legal fees charged by the lawyers, the learned judge went on to note the following:

"Yet the Jackson reforms in the civil sphere limit merely the costs recoverable by the winner from the losing party by confining them to a pre-approved costs budget. They do not seek to limit the amount of costs that a lawyer may charge his own client, even though this had been mooted during the process of the

¹¹ [2014] EWHC 3654 (Fam)

review. I suppose that to do so was regarded as an impermissible interference with the right to form whatever commercial contracts you want and to spend your money on whatever you like. Yet that argument simply does not wash when those very costs come out of a finite pot over which the other party has a valid claim”.

[51] Although this is written in the context of family court cases, I express similar concerns based on this court’s own experience in having to assess costs in our part of the world. This court has had the experience of also being alarmed at cost bills. To have this discussion without any consideration being given to this issue may very well be counterproductive. What is before me is not merely to approve an agreement by the claimants and chambers. The court is invited to engage in a broader discussion, with general implications. Again, it is one of the reasons I believe that the Legislature is best suited to intervene on this issue. An assessment of the role which indigence and poverty plays in access to justice, when balanced against the cost of litigation, is an exercise which the courts are not best suited to undertake.

[52] Mostyn J went on to note that ***“the time has come when the law-makers in this country, whether they are legislators or judges, must stop saying something must be done and actually do something.”*** To my mind, one cannot have a fruitful discussion on access to justice on the basis of contingency fee agreements without also incorporating the issue of legal costs into the equation. By merely referring to those who are the most indigent among us, we may be ignoring the challenges which are inherent in such an approach. Without any evidence to suggest that the cases in which the litigant is likely to enter into such an agreement are such that they are unable to acquire the services of a reasonable competent attorney, the court should be slow to embrace such an approach. An agreement like the one presented to me, where the litigant is meeting the full cost of disbursements but paying as much as 33.3% of the compensation to the attorney, is not one I would be prepared to endorse, even if I were empowered to do so. It doesn’t establish that even though the litigants were to be proven to be indigent that the lack of the signing of such an agreement would deprive them of access to this court.

[53] I make one other point. Whilst it is true that we likely share a similar problem with the UK on the issues of litigation funding and costs, it also cannot be taken for granted that a resolution to those issues and access to justice in general calls for a mere endorsement of the approach taken in that and other jurisdictions. It may be that a proper assessment of the profession and the system on the whole is warranted. We may need to make some cultural changes to the way we operate to ensure a balance between access to justice on the one hand, and the ability of the attorney to be properly remunerated on the other is struck, whilst at the same time considering other factors which drive up the costs to litigation. However, as a public service, the court's approach should not be seen as a means of guaranteeing wealth for the attorney beyond the normal profits which are sufficient to make his practice worthwhile. Again, this is no criticism of counsel. Given the changing perspective of other courts to the issue of contingency fee agreements, counsel would have been right to raise the issue before this court. However, I do fear that approving a CFA as the one presented to me may not be the right approach to take.

Regional Case Law

[54] I wish finally to make a few remarks on 2 authorities presented to me by counsel for the applicants. These have emerged from cases within the region. Counsel referred firstly to the case of ***Russell Crumpler et al v Exential Investments Inc (In Liquidation)***¹² where Jack J sought to address the issue of litigation funding in a case emanating from the British Virgin Islands. Before him was an application for a direction, sanction and/or permission to draw down on a funding agreement between the Liquidators, the Company and a litigation funder on the basis that it was in the best interests of the creditors as a whole, did not offend the principles of maintenance and champerty and was a lawful and enforceable agreement as a matter of BVI law.

[55] In paragraph 2 of judgment Jack J. noted that:

¹² BVIHC (COM) 81 OF 2020

“... this Court has granted such sanction of funding agreements in other cases, but counsel for the liquidators tell me that there is no written judgment in this jurisdiction confirming the power of the Court to grant such relief. I shall state my reasons briefly, but I observe that I have heard no adversarial argument. The authority of this judgment is thus likely to be weaker than if the matter had been heard contentiously.”

- [56] It is to be noted therefore, that though there was a convention that such agreements had been sanctioned in the past, there was no judicial precedent confirming that the court even had that power. Jack J was therefore careful to point out what he thought was the weakness in his decision, given that there were no alternative perspectives placed before him. He made the following comment at paragraph 8:

“It is noticeable that the provision in the English legislation for the retention of the rule of public policy against maintenance and champerty is not reproduced in our legislation, which suggests that the legislature was not concerned with any breach of public policy from the making of litigation funding arrangements.”

- [57] Counsel for the applicants point out that the legislation in the BVI is the same as that in Anguilla and as such the legislation did not retain the rule of public policy against maintenance and champerty. I make the point however, that Jack J himself noted that he did not have an alternative view before him when coming to his conclusion. I make a few observations insofar as it relates to what has been placed before me.

- [58] I am not necessarily of the view that because the legislation was worded in that manner, did it intend to do away with the common law rule against Champerty. As the Honourable Attorney General pointed out, there are other provisions in the Anguillan legislation which expressly imports the common law of England into Anguillan Law. In any event, what Jack J had before him for consideration was a litigation funder agreement. That is not necessarily the same as what is before this court. As I indicated earlier, insofar as it relates to contingency fee agreements with attorneys, this was specifically legislated for and the

legislation seeks to prohibit the use of contingency fee agreements by attorneys except in certain circumstances. It seems to make very little sense to me, that the Legislature would have thought it necessary to incorporate Rules 9 and 10 of the Code of Ethics if there was no rule against the use of such agreements in the first place. In as much as there has been a convention that the courts have provided some measure of supervision over the actions of a liquidator or receiver in insolvency cases and have sanctioned such agreements within that context, there is an equally forceful convention against attorneys entering into contingency fee agreements except in circumstances provided for in the legislation in regular civil claims.

[59] Counsel then referred the court to the case of *Kajeepan Paintamilkavalav et al v Director of Immigration, Derek Been*¹³ emanating from the Turks and Caicos Islands. There the court was called upon to consider the issue of contingency fee agreements in the context of insolvency and a constitutional motion in two separate cases. At paragraph 25 of his judgment the learned judge noted that “***so far as conditional/contingency fee funding is concerned, the decided cases seem to draw a clear distinction between insolvency cases where litigation funding seems to be common and lawyer/client cases where the approach of the courts has been far more restrictive.***” The judge goes on to endorse the statement made by Jack J in the case of *Russell Crumpler et al v Exential Investments Inc (In Liquidation)*.

[60] I repeat my earlier observation that the legislation in force in Anguilla does not necessarily repeal the aged public policy concerns regarding champertous agreements. A more comprehensive assessment of the legislation in general is needed before one can come to such a conclusion. The law in Anguilla has imported the English tort law and it may very well be the case that the tort of Champerty still exists. In any event, I find it worth repeating, that as it relates to CFAs between lawyers and clients the law has specifically legislated for that issue. In addition to that, as the learned judge pointed out, there has been a convention of greater supervision of the court in insolvency proceedings. On the

¹³ CL-86/2019 and CL-08/2021

contrary, it was well recognized that the courts have been far more restrictive in lawyer client cases as the one currently before me.

- [61] In *Kajeepan Paintamilkavalav et al v Director of Immigration, Derek Been* the court then went on to consider a contingency fee agreement in relation to foreign nationals who had been unlawfully detained. After examining the English case law on the issue the learned judge found that the CFA in that case was not Champertous. In doing so the judge noted that ***“[t]he engagement letter therefore does not appear to me on any level to be a blueprint for a division of the spoils of litigation that is an essential feature of a champertous agreement and the mischief that the law of champerty and the underlying public policy was designed to remedy.”*** In that case, when assessing the provisions of the CFA the judge noted that hourly rates reflected those approved by the Court in Practice Direction No. 1 of 2020. I do not find anything in that judgment to suggest that the CFA contained anything akin to the 33.3% charge on the damages claimed against the claimants in this case. In his final conclusions, the judge noted the following:

“I note again that the proposed hourly rates are tied to court approved taxation tariffs, and I would expect the red-ink pen of the Hon. Registrar as Taxing Officer, with a close eye to Order 62 and PD 1/2020, will be sufficient to safeguard fairness and reasonableness by reference to long-established rules of practice.”

- [62] In my view therefore, if the fees chargeable are in line with that which is contained in the practice direction, then I can only repeat my observations at paragraph 29 of this judgment. What the rule cautions against is the charging of a fee above and beyond the usual profits. As the judge noted, if there is an award of costs for example, the Registrar in that jurisdiction will assess the bill for its reasonableness. The government, in that constitutional motion, may very well end up paying most if not all of those fees. If the litigants are unsuccessful, then in a constitutional motion they are unlikely to pay costs to the government, unless the litigation is deemed to be frivolous or vexatious. However, in the agreement before me, there is precisely a dividing of the damages. I am not convinced

that even if I were empowered to sanction such an agreement that it would have been proper for me to do so.

- [63] I also wish to note that in the cases referred to me there was no reference of a section remotely similar so that of Rule 10(3) of the Code attached to the **Legal Profession Act** in Anguilla. As I have stated I am persuaded that the section prohibits CFAs in claims for unliquidated damages. Insofar as that is the case, I must also note the comment of the learned judge in *Kajeepan Paintamilkavalav et al v Director of Immigration, Derek Been* when he states that *“I am restrained by the caution ...for general rule making and defining the boundaries of public policy in this area of the law, the legislature is far better placed than the courts.”* The judge also went on to note that:

“I also consider that in making these findings this Court is not usurping the role of the legislature in this area of the law and is not flouting the often-counseled deference that courts must show to the legislative branch. As we have seen above, such sentiments have been expressed by eminent jurists of superior courts for whom this Court reserves the greatest reverence and respect. ... Besides, sweeping statements of principle fit uncomfortably on first instance judges with limited views of the legal landscape and the bigger public policy picture. I hope to have avoided this pitfall.”

- [64] I too hope that the learned judge had avoided the pitfalls to which he refers in that case. However, as far as I am concerned, the application before me is one in which the pitfalls are far more glaring. The learned judge was careful to point out that the old public policy discussion is not over. He was also careful to point out that which I have mentioned throughout this decision. The expansion of CFAs to claims for unliquidated damages in the circumstances before me is an invitation I would wish to decline.

- [65] Finally, the Honourable Attorney General referred the court to the case of *Israel Bruce v William Black-Williams*¹⁴. This was a case emanating out of Saint Vincent and the Grenadines, where the learned master determined that a contingency fee agreement was

¹⁴ SVGHCV2014/0040

unlawful. I wish to express my agreement with the following statements made by the learned master at paragraphs 34 and 35 in that case:

“Thus even where there has been legislative enactments changing the common law position, the court has been reluctant to find that the public policy reasons underlying the prohibition against conditional fee agreements had been altered with the passage of time.”

While it may be argued that there should be a change in the law with regard to these types of agreements having regard to modern economic realities and the changing legal services landscape I agree that such a change is the task of the legislature.”

[66] In these circumstances I make the following declarations and orders:

- (a) Contingency Fee Agreements between an attorney and his or her client for a percentage of the damages to be awarded in a claim for un-liquidated damages is unlawful and therefore unenforceable, pursuant to the provisions of the **Legal Profession Act**.
- (b) In any event, even if the court were to be wrong about that issue, I am of the view that the public policy concerns about the enforcement of such agreements under the common law are still relevant and that changes to that position are matters best left to the Legislature to resolve;
- (c) I would also be wary of adopting a process whereby the court’s approval is sought prior to the enforcement of such an agreement. If it is that such agreements are to be considered lawful, a proper approach to regulating such arrangements should be considered.
- (d) Further, I would have also been disinclined to approve the Contingency Fee Agreement presented to me for all of the reasons I have already outlined in this judgment;

(e) The application is therefore dismissed with no order as to costs.

Ermin Moise
High Court Judge

By the Court

Registrar