THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

Claim No. SVGHCV2014/0040

Between:

ISRAEL BRUCE

Claimant

And

WILMA BLACK-WILLIAMS
CLIFFORD WILLIAMS

Defendants

Before:

Master Fidela Corbin Lincoln (Ag.)

Appearances:

Mr. Roderick Jones of counsel for the Claimant
Mr. Sten Sargeant of counsel for the Defendants

2015: April 14;
July 13.

Attorneys-at-law – Remuneration - Contingency Fee Agreements – Whether Enforceable at common law - Whether Attorney-at-Law entitled to Reasonable Fees for Work done.

JUDGMENT

[1] **CORBIN LINCOLN M (Ag)**: Israel Bruce is an attorney-at –law called to the Bar in this jurisdiction in or around 2012. Mr. Bruce commenced this claim against the defendants to recover the sum of US$10,000.00 (EC$26,700.00) as damages for breach of an oral contingency fee agreement allegedly made with the defendants for the provision of legal services.

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Background

[2] The 2nd defendant became ill during the course of his employment with Royal Caribbean Cruise Lines. He engaged the services of Lipcon Marguiles, Alsina and Winkleman P.A, ("**Lipcon**") – a US law firm – to represent him in his claim against his former employer. The matter went to arbitration and the claimant was awarded a substantial sum.

[3] Lipcon provided a "Closing Statement" showing the net sum payable to the 2nd defendant after deduction of attorney's fees, costs and other expenses. The 1st defendant, the wife of the 2nd defendant, states that she had several queries about the 'Closing Statement' and therefore began to engage in discussions with Lipcon with respect to same.

[4] The claimant asserts that the **1st** defendant attended his chambers and entered into an oral contingency fee agreement for him to provide legal representation to the defendants in relation to the negotiations with Lipcon. The claimant asserts that the 1st defendant agreed that the defendants would pay him 20% of all monies he secured in excess of the net award which the 2nd defendant was informed would be paid to him.

[5] The defendants strenuously dispute almost every aspect of the claimant's version of events. The 1st defendant gave affidavit evidence on behalf of the defendants. The 1st defendant states that she is a police officer. The claimant saw her at the Magistrates Court and enquired about the 2nd defendant's case against his former employer. She does not know how he became aware of the 2nd defendant's case but she discussed the matter with him, told him about her dissatisfaction with the closing statement provided by Lipcon and informed him of her intention to write them a letter. She states that the claimant offered to let her use his letterhead for the letter so that the letter could appear more professional. She therefore returned to the police station, wrote down the details to be included in the letter on a sheet of paper and took the paper to the claimant's office. She made several attempts to contact the claimant to follow up on the letter. Each time she contacted the claimant to get a copy of the letter he could not provide her with a copy or he avoided her.

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[6] The defendants assert that they did not enter into an oral contingency fee agreement with the claimant. In any event, even if as alleged by the claimant there was an oral contingency agreement entered into among the parties, such an agreement is unenforceable.

[7] Following unsuccessful efforts to settle the matter at mediation, the learned Master, having considered the issues in dispute, ordered that the matter be dealt with summarily and directed the parties to file affidavits and submissions.

CPR 15 – Summary Judgment

[8] The Civil Procedure Rules 2000 ("**CPR**") Part 15 states:

> *"The court may give summary judgment on the claim or on a particular issue if it considers that the –*
>
> *(a) claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) defendant has no real prospect of successfully defending the claim or the issue. "*

[9] In **Swain v Hillman** [1]Lord Woolf MR, in discussing Rule 24.2 of the UK CPR rules - equivalent to the CPR 15.2 – stated: [2]

> *"Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits,*

[1] [2001] 1 All ER 91
[2] ibid page 91-92

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they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[10] He continued[3]

> *'It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible....*
>
> *"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."*

[11] **Swain v Hillman** was cited with approval in **Three Rivers District Council v. Governor and Company and Bank of England No. 3**[4], where Lord Hope explained the rule thus:

> *"The rule... is designed to deal with cases which are not fit for trial at all; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked*

[3] page 94-95
[4] [2001] UKHL 16

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at; accordingly, the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality.'"

ANALYSIS

[12] Having regard to the principles of law I must now consider whether this is an appropriate case for summary judgment.

The Claim Against the 2nd Defendant

[13] The claimant's statement of claim avers that the claimant entered into an oral contingency fee agreement with the 1st defendant. The statement of claim does not contain any averment that the claimant entered into a contract with the 2nd defendant or that the 1st defendant was acting as the servant and or agent of the 2nd defendant when she purportedly entered into the oral contract with the claimant. There are no pleaded facts which disclose the basis upon which it is asserted that a contract was made between the claimant and the 2nd defendant or how the 2nd defendant became a party to the contract which the claimant asserts was made with the 1st defendant.

[14] A claimant's statement of case must include all the facts on which the claimant relies. A claimant cannot rely on any allegation or factual argument not set out in his statement of case unless the court gives permission.[5]

[15] As the claimant's pleadings stand, there are no facts establishing the formation of a contract between the claimant and the 2nd defendant and the claim therefore discloses no grounds for bringing a claim against the 2nd defendant for breach of a contract.

[16] In the circumstance, I find that the claimant has no prospect of succeeding in his claim against the 2nd defendant for breach of contract.

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[5] CPR 8.7 and 8.7A

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The Claim Against the 1st Defendant

[17] There are substantial disputes in the evidence before the court including, but not limited to, whether the services of the claimant were engaged at all, if in fact his services were engaged, how and when this was done, what work the claimant did and whether the claimant's work produced any benefit to the defendants.

[18] It is however not necessary to address and resolve the conflicting evidence at this stage since an important point of law arises for consideration *to wit* even assuming that the claimant entered into an oral contingency fee agreement with the 1st defendant as alleged, is the agreement enforceable?

[19] Counsel for the defendants provided written submissions on this issue. Counsel submits that an oral contingency fee agreement for legal services is unenforceable at common law and there are no statutory provisions in this jurisdiction which permit such agreements. Counsel cites the case of **Geddes** v **McDonald Milligen**[6] as authority for the proposition that even in Jamaica where such agreements are permitted by statute it is a requirement that the agreement must be in writing.

[20] The claimant's written submissions have not addressed this issue at all notwithstanding that the claimant was aware that this was the point of law being raised by the defendants and notwithstanding service of the defendants' submissions.

[21] At the hearing counsel for the claimant was invited to respond to the defendants' submissions on this point but counsel was unable to provide any rebuttal. Rather, counsel for the claimant appears to have conceded the point but submitted that the claimant should nonetheless be remunerated for the work done.

[22] Notwithstanding what appears to have been a concession on this point, I must still examine the meri of the defendants' submission.

[6] 79 WIR 376

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Contingency or Conditional Fee Agreements

[23] In the context of the legal profession, contingency or conditional fee agreements are agreements where payment to an attorney-at-law depends or is contingent upon there being some recovery or award in the case. The law governing contingency fees is said to have been derived from the public policy relating to champerty and maintenance both of which attracted criminal penalties prior to 1967.[7]

[24] A review of the case law shows that historically, the common law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a contingency fee.[8] Thus in 1896 Lord Esher MR [9] stated:

> "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."

[25] Lord Denning MR in **Re Trepca Mines Ltd** [10] stated:

> "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."

[26] In **Wallersteiner** v **Moir** (N0 2) Buckley LJ said this :[11]

> "A contingency fee, that is, an arrangement under which the legal advisers of a litigant shall be remunerated only in the event of the litigant succeeding

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[7]Thai Trading Co (a firm) v Taylor [1998] 3 All ER 65.
[8] Wallersteiner v Moir (No 2) [1975] 1 All ER 849 at 860
[9] Pittman v Prudential Deposit Bank Ltd (1896) 13 TLR 110 at 111:
[10] [1962] 3 All ER 351 at 355
[11] [1975] 1 All ER 849 at 866-868,

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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 adviser. Moreover, where, as is usual in such a case, the remuneration which the adviser is to receive is to be, or to be measured by, a proportion of the fund or of the value 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 adviser 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 interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser 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."

[27] The common law position was not changed in the 1980's. Thus in **Trendtex Trading Corp v Credit Suisse** [12], Lord Denning MR described champerty as "a particularly obnoxious form' of maintenance and stated that it exists:

"when the maintainer seeks to make a profit out of another man's action by taking the proceeds of it, or a part of them, for himself. Modern public policy condemns champerty in a lawyer whenever he seeks to recover not only his proper costs but also a portion of the damages for himself, or *when he conducts a case on the basis that he is to be paid if he wins but not if he loses*."

[12] [1980] 3 All ER 721 at 741

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[28] Various efforts to reform the legal profession in the United Kingdom culminated in the passage of the Courts and Legal Services Act in 1990 ("**the Act**") which made significant changes to the delivery of legal services. Section 58 of the Act provided that a conditional fee agreement which satisfied the conditions of the Act would not be unenforceable by reason only of it being a conditional fee agreement. One of the many criteria set out in the Act is that the agreement must be in writing. [13]

[29] The common law prohibition against contingency fee agreements was therefore changed in the UK and also in some Caribbean territories by statute. In Jamaica for example, the common law position was changed by the introduction of the Legal Profession Act 1971.[14]

[30] In this jurisdiction there is no legislative enactment which changed the common law with respect to contingency fee agreements.

[31] The clear underlying policy of both the law of champerty and maintenance is the issue of public policy. It is well established that public policy is not fixed or immutable. However, even efforts to expand upon conditional fee agreements sanctioned in the UK by the Act [15] were disapproved in **Awwad** v **Geraghty & Co (a firm)** [2000] 1 All ER 608 and **Morris v Southwark London Borough Council** [2011] 2 All ER 240

[32] In **Awwad** May LJ noted:[16]

> '"I accept the general thesis in the judgment of Millett LJ in the *Thai Trading* case 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,

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[13] Section 58 was repealed and re-enacted in different terms by the Access to Justice Act 1999, Parliament repealed section 58 of the 1990 Act and re-enacted it in different terms. The new sub-s 58(1) expressly provided that conditional fee agreements which did not comply with the requirements of s 58 'shall be unenforceable.

[14] Geddes v McDonald Milligen 79 WIR 376

[15] Thai Trading Co (a firm) v Taylor [1998] 3 All ER 65

[16] [2000] 1 All ER 608 at 634-635

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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 emphasise the divergence of views. In my judgment, where Parliament has, by what are now (with s 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."

[33] In **Morris** the court held that:

> "where the allegedly champertous agreement was entered into with a person who was conducting the litigation or providing advocacy services, the common law of champerty remained substantially unchanged as it was a clear requirement of public policy that officers of the court should be inhibited from putting themselves in a position where their own interests could conflict with their duties to the court; moreover, in s 58 of the 1990 Act the legislature had laid down the rules as to which previously champertous agreements could be entered into by those conducting litigation and providing advocacy services and which could not"

[34] 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.

[35] 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.

[36] In the circumstance I find that even if the claimant entered into an oral contingency fee agreement with the 1st defendant as alleged, such an agreement is unenforceable at

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common law. Since the oral contingency agreement forms the basis of the claimant's claim and the agreement is unenforceable, I find that the claim has no prospect of succeeding.

Is the Claimant entitled to Reasonable Compensation?

[37] At the hearing counsel for the claimant submitted that the claimant carried out work for the defendants and should be compensated for the work done for the benefit of the defendants. No authorities in support of this submission were cited.

[38] The law on whether a claim for reasonable remuneration is contractual, quasi contractual or 'restitutionary' appears unsettled. Etherton L.J in **Westlaw Services Ltd. and another v Boddy**[17] noted that '*there is considerable scope for argument*'[18] whether the claim for reasonable remuneration is a contractual one rather than a 'restitutionary' claim

[39] The authors of Halsbury's Laws states :

> "Quantum meruit translates roughly as 'the value of what was done' and exemplifies numerous situations where a benefit is conferred but not necessarily asked for. Beyond this, the term 'quantum meruit' is used in different senses at common law. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote a restitutionary claim. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for goods sold or work done. Where, however, no contract is ever concluded between the parties or the contract is void or otherwise unenforceable, the claim cannot be contractual in nature and is likely to be restitutionary.[19]

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[17] [2010] EWCA Civ 929
[18] ibid para 62
[19] 88 Halsbury's Laws (5th Edn) para 408

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[40] Whether the claim for reasonable remuneration is considered contractual, quasi contractual or 'restitutionary', it seems to me that the claimant's effort to rely on this alternative ground faces several hurdles.

[41] Firstly, the claimant did not plead for reasonable remuneration for services rendered as an alternative to his contractual claim. In my view the claim for relief on this basis must be pleaded.[20] In **Westlaw** one of the appellants failed to plead in the alternative for a reasonable sum to be paid for services rendered. This was considered fatal to his ability to pursue such a claim. For various reasons the Court of Appeal refused permission to amend the claim to include a claim for reasonable remuneration.

[42] Secondly, even if the claimant's pleadings did include a claim for reasonable remuneration for work done on a quantum meruit or otherwise, I am not of the view that such a claim has any real prospect of succeeding.

[43] In **Mohammed v Alaga & Co** [21],the Court of Appeal allowed an appeal by a non-solicitor and permitted him to pursue his claim against the defendant solicitors for professional fees on a quantum meruit notwithstanding that the contract was unenforceable. While the court was of the view that public policy precluded recovery under the contract and the claimant could not recover the same relief by bringing a claim in restitution based on the same contractual provisions, the court held that the claimant would be allowed to pursue his *quantum meruit* claim against the defendants for reasonable remuneration. The court took the view that the plaintiff was not seeking to recover fees payable under the unlawful contract but was seeking a reasonable sum for professional services rendered. The court took into consideration that the non-solicitor claimant was, unlike the defendant solicitors, not aware of the rules which made such contracts void and unenforceable and was therefore less blameworthy.

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[20] Mohammed v Alaga & Co. [1999] EWCA Civ 3037; Westlaw Services Ltd. and another v Boddy [2010] EWCA Civ 929

[21] [1999] EWCA Civ 3037

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[44] The case of **Mohammed** was distinguished in **Awwad v Geraghty** [22] where Schiemann LJ stated:

> "Mr. Dutton attempted to make use of that part of the decision in the *Mohamed* case . . . which ruled that the interpreter was entitled to be paid a fair fee for his work as interpreter notwithstanding that his agreement to work as such was part of a champertous agreement which the court refused to enforce. In my judgment this attempt should fail. If the court, for reasons of public policy refuses to enforce an agreement that a solicitor should be paid, it must follow that he cannot claim on a quantum meruit. The position in the *Mohamed* case was totally different. The interpreter was blameless and no public policy was infringed by allowing him to recover a fair fee for interpreting; the public policy element in the case only affected fees for the introduction of clients. In the present case, what public policy seeks to prevent is a solicitor continuing to act for a client under a conditional normal fee arrangement. That is what Miss Geraghty did. That is what she wishes to be paid for. Public policy decrees that she should not be paid."[23]

[45] Similarly, in this case, the claimant would be seeking to recover on a quantum meruit or some restitutionary basis for work done under a champertous agreement which is unenforceable on grounds of public policy. It would not in my view be appropriate for the court to provide an avenue for such agreements to be enforced as this could encourage breaches of the common law and erode the protection which it provides to the public.

[46] In the circumstance I find that the claimant's submission that he should be awarded reasonable remuneration for his services does not form part of his claim and, even if it had been pleaded, such a claim would have no real prospect of succeeding.

[47] In conclusion, I find that the claimant has no real prospect of succeeding in his claim and accordingly summary judgment is entered for the defendants.

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[22] [2000] 1 All E.R 608

[23] ibid pages 630-631

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Costs

[48] The effect of this decision is that the proceedings have been brought to an end. Generally the successful party is entitled to costs calculated on a prescribed costs basis. However, in this case I depart from the general method of quantifying costs and order that the costs of the proceedings are to be assessed pursuant to **CPR** 65.12 if not agreed within 21 days. In reaching my decision to depart from the general rule I have taken into consideration all the circumstances including: (a) the claimant is an attorney-at-law who is presumed to be aware of the law regarding fee agreements with clients; (b) the foundation of the claimant's claim – an oral contingency fee agreement- involves a well established and uncomplicated principle of law which the claimant ought to be aware of; (c) accordingly this is not an issue which ought to have been pursued in the manner it was pursued by the claimant, or, if pursued due to ignorance of the law or for some other reason, it ought to have been resolved earlier. The parties attended mediation and thereafter were urged by the court, even at trial, to engage in settlement discussions; and (d) the defendants have been put to the cost of defending a claim which had no reasonable prospect of succeeding.

[49] Counsel for the defendants submitted that this case brings into sharp focus the need for legislation regulating legal practitioners in this jurisdiction. I agree, but would add that even in the absence of legislation, engaging in good client care practices - such as ensuring that a written agreement which complies with the law is executed - would alleviate the problems which arise in disputes regarding the terms of legal fee agreements.

Fidela Corbin Lincoln
Master (Ag.)

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