IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS

ACTION NO.: CL-86/2019

IN THE MATTER OF REGENT GRAND MANAGEMENT LTD. (in Liquidation)

AND

IN THE MATTER OF THE INSOLVENCY ORDINANCE 2017

IN THE MATTER OF APPLICATION BY TIM PRUDHOE ("the Applicant") AS LIQUIDATOR OF REGENT GRAND MANAGEMENT LTD.

BETWEEN:

ACTION NO.: CL-08/2021

KAJEEPAN, PAINTAMILKAVALAV

RASARATNAM, VARATHARAJ

SIVALAPN, JESEEPAN SWAPALAN

Plaintiffs/Applicants

AND

DIRECTOR OF IMMIGRATION, DEREK BEEN

First Defendant/Respondent

AND

MINISTER OF BORDER CONTROL, VADEN DELROY WILLIAMS

Second Defendant/Respondent

AND

THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

Third Defendant/Respondent

CONSOLIDATED JUDGMENTS

Before:	**Mr. Justice Carlos W. Simons QC**
Appearances:	
CL-86/2019	**Mr. Yuri Saunders, Prudhoe Caribbean Attorneys for the Liquidator; Ms. Monique Allan, Saunders & Co. Attorneys for Freedom Group Management Ltd., Mr. Peter McKnight, McKnights Attorneys for James Nappo and Mr. David Cadman, Griffiths & Partners Attorneys for the Bar Council, *Amicus Curiae*.**
CL-08/2021	**Mr. Yuri Saunders of Prudhoe Caribbean Attorneys for the Plaintiffs/Applicants, and Ms. Clemar Hippolyte of the Attorney General's Chambers Attorney for the Defendants/Respondents.**
Hearing Dates:	
CL-86/2019	**Thursday, 6 May 2021**
CL-8/2021	**Wednesday, 12 May 2021**
Venue:	**Court No. 5, Graceway Plaza, Providenciales**
Date Delivered:	**23 July 2021**

The Two Cases

1. For want of a better description, this is a consolidated judgment of the above two cases that, though rooted in different facts, raise an identical issue for consideration and decision. The consolidated judgment approach therefore seems sensible in the circumstances and counsel have raised no concerns with it. For convenience, the cases will be referred to by the abbreviated names that I have assigned to them, *Regent Grand* and *Kajeepan* throughout the rest of this judgment.

2. The principal issue in each case is the place of contingent or conditional fee arrangements (CFAs) in the law of the TCI. This is an important issue of legal principle in which logic and the need for certainty in the law dictate that my decisions should be consistent, one with the other. Before we get to that point however, it will be necessary to narrate separately, though briefly the facts of each case and to decide and dispose of any issue that is peculiar to either.

CL-86/2019: *Regent Grand,* The Facts

3. Mr. Tim Prudhoe is the Liquidator of Regent Grand Management Ltd. (formerly H.A.B. Management Ltd., and hereinafter referred to as RGML). Mr. Prudhoe was appointed on 16 May 2019 by a qualifying resolution of the sole member of RGML to commence a voluntary insolvent liquidation. Until 9 March 2019 the business of RGML was to provide and manage all guest related services for rental bookings at the condominium resort known as the Regent Grand on Grace Bay Beach, and subsequently, i.e. after that date, the provision of bookings for room rentals only. In return for these services RGML retained a commission from the booking payments it received.

4. Mr. Prudhoe is also the principal of Prudhoe Caribbean, a firm of attorneys. Prudhoe Caribbean are the legal advisors to Mr. Prudhoe in his role as Liquidator of RGML.

5. On 9 July 2019 Mr. Prudhoe brought an originating summons seeking the Court's approval of an interim payment from the liquidation estate of his fees and expenses incurred to that point in the liquidation. He also sought the sanction of the Court for the issuance of proceedings against an alleged creditor, Freedom Group Management Ltd. (hereinafter referred to as FGML). FGML is the sole member of RGML and therefore the instrument by which RGML was put into liquidation. The Liquidator's originating summons was heard and disposed of by then Chief Justice Margaret Ramsay-Hale in a Judgement dated 12 May 2020.

6. We are not concerned in this Judgment with the disposition of the fees and expenses application, and nothing further needs to be said about that. The disposition of the application for Court sanction of the proposed debt collection proceedings against FGML however, is critical to the first issue in this case. The Chief Justice declined to sanction those proceedings.

The Judgment Ramsay-Hale CJ

7. It is instructive to set out the Learned Chief Justice's reasoning in full. In the closing paragraphs of her judgment, she said this:

"49. Having already incurred some $82,000.00 in purported legal fees without the sanction of the Court – a sum which is greater than the monies held by Mr. Prudhoe

qua liquidator and the value of the $46,507.16 debt due to the Company by FMGL – Mr. Prudhoe now seeks the Court's sanction to pursue that debt though [sic] the Courts. Prudhoe Caribbean's estimate of the costs of recovering that debt through action is between $20,000 or $30,000, less if they succeed in a Summary Judgment application.

"50. Under the **Insolvency Ordinance,** a Liquidator no longer requires the sanction of the Court to commence proceedings, the Legislature perhaps considering that the question of whether or not to bring an action includes both commercial and risk considerations which are best weighed by the Liquidator and not the Court. In principle, then, I think the Court should defer to the Liquidator's commercial judgment as to what is in the best interest of the insolvent estate. Asked why the proceedings were being contemplated, given that there would be no benefit to the creditors, Mr. Belliard responded that the Liquidator was obliged by law to get in all the Company's assets. I do not agree; whether to institute proceedings is a matter for his discretion.

"51. The evidence before me suggests that there is a good chance of the Company succeeding in its claim. That said, there is no evidence that FMGL will be able to satisfy the judgment or whether any recovery of the debt is likely to exceed the costs. In the circumstances, it seems to me that the risk of commencing such proceedings would be greater than the reward to the liquidation estate. Absent any evidence that the body of creditors, for whose benefit such litigation would be undertaken, support the commencement of such proceedings, I decline to sanction the proposed proceedings against FGML."

The Conditional Fee Agreement Summons

8. In the matter before me, Mr. Prudhoe as Liquidator by an interlocutory summons entitled "Summons To Enter Into Conditional Fee Agreement" filed on 3rd September 2020, seeks "an order that such sanction by the Court as may be necessary be given to enter into a conditional fee agreement with the law firm of Prudhoe Caribbean to support the issue of proceedings against Freedom Group Management Ltd. for recovery of a debt in the amount of $46,507.16 owed to the Company". It is important to bear in mind that this all plays out against a backdrop of an insolvent liquidation estate. As Mr. Prudhoe says at paragraph 14 of his 5th Affidavit, "there are no funds in the insolvent estate."

9. The summons is supported by Mr. Prudhoe's 5th Affidavit, also filed on 3rd September 2020. There, and in Mr. Saunders' skeleton arguments, and in his oral submissions, the reasons for approaching the matter in this way are addressed. As I understand the case, these may be summarized as follows: Mr. Prudhoe, as Liquidator has a duty to take possession of, protect and realize the assets of RGML; these assets include the

right to commence and prosecute legal proceedings; there is a debt owed to RGML by FGML in the amount of $46,507.16; this debt is an "asset" of RGML that Mr. Prudhoe, as Liquidator has a duty to realize; he has previously been denied court sanction of ***conventionally*** funded litigation to recover this debt; and he now seeks court sanction of a conditional fee agreement that would insulate the liquidation estate from costs except in the event of a recovery.

10. Ms. Allan represents FGML. She takes a preliminary point by which, simply put, she contends that Mr. Prudhoe has already been refused Court sanction to commence legal proceedings against FGML and the matter is at an end unless he successfully appeals that decision. He has not done so. Ms. Allan submits that having opted not to rely on the express power in schedule 2 of the Insolvency Ordinance to commence proceedings, and having sought instead the sanction of the Court, his 9 July 2019 Originating Summons must be construed as an application under s. 187 (5) "for directions in relation to a particular matter arising in the liquidation", and viewed in that light, the direction he sought as regards issuing proceedings against FGML was refused. She says it is not now open to him to rely on the power in schedule 2, having been refused the sanction he requested of the Court pursuant to s. 187 (5).

11. Numbered paragraph 1 of the originating summons dated 9 July 2019 sought:
"1. Such sanction as may be necessary to issue proceedings against Freedom Group Management Ltd. for recovery of a debt in the amount of $46,000 owed to the Company."
The affidavit in support of that originating summons also referred at paragraph 3 (a) to: "sanction to issue proceedings against Freedom Group Management Ltd for the recovery of a debt in the amount of $46,000 owed to the Company."
The Learned Chief Justice in her Judgment dated 12 May2020 "declined to sanction the proposed proceedings against FGML."
On 27th May 2020, the Learned Chief Justice signed an Order, paragraph 5 of which was in terms that: "The Liquidator is refused the sanction voluntarily sought to issue proceedings against Freedom Group Management Ltd. for the recovery of a debt in the amount of $46,000 owed to the Company."

12. The "sanction" requested by the Liquidator is nowhere described as an application for directions under s. 187 (5). However, having regard to the fact that a liquidator does not need Court sanction to commence proceedings, it seems to me that the only jurisdiction that could have been exercised by the Learned Chief Justice in declining the sanction would have been the directions jurisdiction under s. 187 (5).

13. I therefore accept Ms. Allan's submissions on the point, but only to this extent: the Liquidator may not now commence the contemplated proceedings against FGML

(having not appealed the Judgment of the Learned Chief Justice) on a ***conventionally*** funded hourly rate basis. ***Conditional*** fee funding was not argued before the Chief Justice, and her concerns were expressed purely in terms of costs/benefit to the liquidation estate arising from conventional hourly rate funding. I consider therefore that the matter of conditional fee funding of the litigation must still be open for decision.

14. Having arrived at this point it appears to me that there are two grounds on which I may still refuse Court sanction namely: (a) there be would no benefit to creditors i.e., the same ground on which Chief Justice Ramsay-Hale declined to sanction conventionally funded litigation; or (b) the proposed conditional fee agreement is champertous and/or would tend to corrupt TCI public policy.

Cost/Benefit of Conditional Fee Funding

15. On the papers before me, I am not persuaded by the cost/benefit argument in the context of conditional fee funding, notwithstanding the Affidavit of Mr. James Nappo, sworn in this matter on 10 December 2020 and of the submissions made by Mr. McKnight on his behalf. Mr. Nappo is one of the two largest creditors of RGML. The debt owed to him is $$310,544.49, approximately one third of the total debt of $967,878.35 owed to fifteen creditors in all. Mr. Nappo attended the hearing on 6 May remotely via the MST link.

16. I am also mindful of the submissions made by Ms. Allan on the point. She promised that FGML will defend robustly, and she worried about the liquidation estate being able to satisfy a costs order in the event the proceedings are unsuccessful. At paragraph 51 of her Judgment however, Chief Justice Ramsay-Hale said the evidence suggests there is a good chance of the Company succeeding in its claim though she observed there was no evidence that "the body of creditors" support the commencement of the proceedings. However, it seems clear to me that her refusal to sanction the proceedings could only have been on a cost/benefit basis in the context of conventional fee funding.

17. I am reluctant to refuse sanction of ***conditional*** fee funding on the cost/benefit argument as it seems that on this approach creditors will receive ***some*** recovery if the claim succeeds. On both the Affidavits of Erica Seidler (filed 1/12/20) at paragraph 6 and of Affidavit of James Nappo at paragraph 17, that potential recovery is put at 50% of the alleged debt. In his submissions Mr. Saunders pitched the potential percentage recovery somewhat higher when the "uplift" element of the proposal is correctly applied.

18. I also do not believe it is right for the Court to micro-manage the liquidation and I am content to rely on the Liquidator's discretion and Chief Justice Ramsay-Hale's assessment of the evidence as regards the Company's chances of success in the litigation. If it succeeds the recovery might be small, but the now statutory principle that the institution of proceedings is a matter for the discretion of the Liquidator, not the Court is preserved inviolate. The matter then comes down to maintenance and champerty and the corruption of public justice.

Maintenance, Champerty and the Corruption of Public Justice

19. At the hearing on 6 May 2021 Ms. Allan expressly reserved on the matter of conditional fee funding. At paragraph 3 of her skeleton argument, she said:

    "FGML makes no comment now as to the proposed conditional fee agreement but in due course may wish to file a supplementary skeleton argument."

20. Exhibited to the Liquidator's Fifth Affidavit is a draft of the Engagement Letter he proposes to utilize if the sanction he seeks is granted. The question is, would this arrangement be champertous or otherwise corruptive of TCI public policy? Although the matter was before the Court on the papers, Ms. Allan was not pressed either by counsel or by the Court to argue the point and as her client would be the target of the contemplated proceedings it seems right that she should have the opportunity to do so. The opportunity is also extended to Mr. McKnight whose submissions at the hearing were focused on the cost/benefit of conventionally funded litigation.

21. The Court as well could only benefit from a focused debate of the proposed Engagement Letter in the context of the common law rule against champerty and the integrity of TCI public policy. In his Judgment in *Exential Investments Inc. (in liquidation)* BVIHC 81/2020, referred to me by Mr. Saunders, Adrian Jack J. [Ag] observed "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." For the judgment to come I wish, if possible, to avoid that lamentation.

22. I had initially contemplated handing down this consolidated judgment with this section incomplete whilst I awaited Ms. Allan's supplementary skeleton argument. However, on reflection that course seemed undesirable, so I held a conference with all counsel (Mr. Cadman was traveling and unavailable at very short notice) on 12 July 2021 at which Ms. Allan confirmed that she had indeed reserved on the merits of the conditional fee funding proposal. She promised to let me have her supplemental submissions by Monday 19 July. Mr. Saunders was content to rely on his material as already submitted, and the matter did not directly involve Mr. McKnight.

23. Ms. Allan was better than her word – her Supplemental Skeleton came in on Sunday 18 July at 5:56 am! I consider I am therefore not blighted by Justice Adrian Jack's lamentation concerning the absence of adversarial argument weakening the authority of his judgment. I am satisfied this matter has now been heard "contentiously".

24. Having now reviewed Ms. Allan's supplementary skeleton, I must say with respect, and regret, there is nothing in it that dissuades me from the course I felt a faithful application of the law compelled me to. This is an insolvency case. Mr. Prudhoe is the liquidator and as such an officer of the court. But he is not conducting litigation or offering advocacy services in that capacity. His law firm is. Incestuous as that might appear, no rule of law against it has been shown to me, and Ms. Allan does not point to any in her supplementary material.

25. 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. In the context of insolvency cases, Mr. Saunders who led the application for the Liquidator has shown me a number of cases where such funding has been approved by the courts and contain enumeration of the factors to be considered by courts in weighing approval. In the Grand Court of the Cayman Islands, in *DD Growth Premium 2X Fund (in official liquidation)* FSD 0050/2009 Chief Justice Smellie in approving a conditional fee agreement said:
"The real question for the Court in respect of sanction…is whether the interests of the creditors of the company in liquidation are likely to be best served…or not:…"

26. In this case, the Court was shown the affidavit of just one of 15 creditors, Mr. James Nappo for whom Mr. Mcknight appeared. The Court takes note of Mr. Nappo's opposition to the Liquidator's proposal on the ground that the liquidation to date has been of no financial benefit to the creditors (paragraph 15). He says that if it was brought to an end now, i.e., starved of funding, he would be able to offset his losses against his capital gains liability for US tax purposes (paragraphs 13 and 14).

27. Mr. McKnight also dwelled on the point in submissions on his client's behalf. However, the Court also notes that, substantial as his debt might be in the scheme of things, Mr. Nappo is just one of 15 creditors and what he says about Mr. Michael, the other substantial creditor is technically hearsay. The Court further does not consider that Mr. Nappo's personal tax arrangements is a sufficient reason to interfere with the exercise of the Liquidator's commercial judgment in commencing proceedings.

28. Again, the Cayman Islands case of *A Company v. A Funder* FSD 68/2017 contains a very detailed review of the authorities across a range of commonwealth jurisdictions (paragraphs 21 to 40) in addition to a very useful summary of what the court should look for in a third-party funding situation. In approving such a third-party funding agreement, albeit in a modified form to what the plaintiffs had applied for, Segal J in the Grand Court said at paragraph 44:
"Recognising that the critical issue is whether a particular funding agreement between a litigant and a commercial funder has the tendency to corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse, it becomes necessary to consider particular features of the relationship between them that could have such an effect."

29. He then went on at paragraph 45 to list several of such features as might tend towards those mischiefs. I agree with Mr. Saunders at paragraph 20 of his submissions that none of the features mentioned by the learned Judge needs be of any concern to the Court in this case.

30. Finally, I am taken by the reasoning of Justice Adrian Jack in the *Exential* case in Eastern Caribbean Supreme Court referred to at paragraph 21 above. The case may be distinguished on two grounds. First the +USD$200 million fraud scheme at its core is vastly different both in scope and in conduct from the present case; and secondly, as has been noted at paragraph 47 below, the BVI did not import the English law public policy reservation upon the abolition of criminal and tortious liability for maintenance and champerty. However, the learned Judge, after making a careful review of recent English cases in particular, closes with these words at paragraph 11 of his Judgment:
"In my judgment the funding arrangement is not contrary to BVI public policy. Indeed, the contrary is the case. Without the funding, the liquidators would be unable to obtain recoveries for the benefit of the creditors of the company. Approving the funding arrangement is in the current case essential to ensure access to justice. Accordingly, I sanction the entering of the funding agreement."

31. In this case, the engagement letter that is proposed to be used (exhibited at pages TP5/35 to TP5/39 of the Liquidator's fifth affidavit) quotes hourly rates imposed by Chief Justice Ramsay-Hale at the previous hearing. Besides, there appears to be common ground that success in the litigation on a conditional fee funded basis would result in at least a 50% recovery to creditors. And, as has already been noted, it is the Liquidator, not the Court upon whom the statute confers discretion in these matters. On those grounds, I approve the arrangement.

CL-08/2021, *Kajeepan*, the Facts

32. Over the first twelve paragraphs of her written submissions, Ms. Hippolyte relates an overview of the facts giving rise to this application. I can do no better than to summarize her narrative. The three Plaintiffs are Tamil speaking Sri Lankan nationals. They arrived in the TCI on 10th October 2020 via sea from Haiti. They formed part of a smuggled human cargo of 27 Sri Lankans and one Indian national. Their boat was intercepted by police and immigration authorities, and they were detained at the Immigration Detention Center at South Dock Road, Providenciales.

33. Mr. Prudhoe has acted for the Plaintiffs (and their fellow travelers) on a *pro bono* basis since their apprehension and detention. On 20 April 2020 he brought *habeas corpus* proceedings for their (and twelve others') immediate release. The matter was heard by the Learned Chief Justice on 24 April 2020 and by a judgment, delivered on 1 May 2020 she refused to release them and held that their detention up to that point was lawful.

34. On appeal (CLAP02/2020) a three judge Court of Appeal held by a majority on 31 December 2020 that the Plaintiffs had been unlawfully detained up to 24 August 2020 when they were voluntarily released from the Detention Center and housed at the Airport Inn, Providenciales. I am given to understand that the restrictions imposed upon their release from detention at the Detention Center will be the focus of future proceedings. I should also mention that it was the then President of the Court of Appeal, Sir Elliot Motley who gave the very powerful dissenting Judgment.

35. The Plaintiffs subsequently launched substantive proceedings for damages for unlawful detention and false imprisonment. In this litigation they continue to be represented by Mr. Prudhoe and his law firm, Prudhoe Caribbean. Judgment has been entered by consent for the Plaintiffs and remain to be assessed. Meanwhile Mr. Prudhoe asks the Court to approve a conditional fee funding arrangement between his law firm and the Plaintiffs with respect to his firm's legal fees and disbursements.

The Application

36. To see precisely what Mr. Prudhoe asks of the Court one must refer to his summons filed on 12 February 2021. He prays "an order in respect of the engagement letter with the law firm Prudhoe Caribbean dated 31st January 2021 as exhibited to the affidavit of Andwena Lockhart herein." The grounds upon which the relief is sought are also to be found in the Ms. Lockhart's affidavit noted to have been "sworn on 4 February 2021". The affidavit seems to have been actually sworn on 3 February 2021 however we know it is the affidavit referred to because it exhibits at pages AL1/5 to AL1/10, the engagement letter for which approval is sought.

37. Paragraphs 5 to 7 of the affidavit foreshadow the consolidated judgment approach that I have adopted in these two matters, identifying as they do conditional fee funding as a common issue, though in different contexts – the one *Regent* Grand, insolvency and the other, *Kajeepan,* indigent litigant proceedings. I should add that the Bar Council did not appear *amicus curiae* on this occasion but having already heard from Mr. Cadman in *Regent Grand* the previous week I had always understood his submissions on behalf of the Bar to be of general application and therefore applicable to *Kajeepan* as well.

38. At paragraph 14 of her affidavit Ms. Lockhart notes that the plaintiffs are indigent and at paragraphs 16 and 17 she says that without a fee proposal such as is contemplated in the engagement letter it is likely their claim for damages for false imprisonment, currently measured to span at least the period 24 April to 24 August 2020 will not be viable, there being no availability of civil legal aid resources in the jurisdiction.

The Engagement Letter

39. In their skeleton argument, Mr. Prudhoe and Mr. Saunders emphasize at paragraph 2 that the application "relates to a claim based on a proven misuse of Executive power. It raises fundamentals [sic] issue of access to justice in a jurisdiction which currently lacks a system of civil legal aid." And at paragraphs 10 and 11 they repeat the indigence of the plaintiffs and the unavailability of civil legal aid.

40. As to the issue of the possibility of future appeals from my decision in this matter, in the context raised at paragraphs 4 to 6 of the plaintiffs' skeleton, I say the following:

    (a) I believe paragraph 4 to be a correct statement of the law enacted by s. 21 (4) of the Constitution (Cap. 1.01) and s. 5 (f) of the Court of Appeal Ordinance (Cap. 2.01);

    (b) it is not for the Court to advise counsel on the conduct of litigation under his management and the Court therefore expresses no view as to whether or not the issues raised by the engagement letter might be better suited to, or should be include in a "constitutional challenge" (paragraph 5); and

    (c) given the significance of the issues involved in the application, both to the parties themselves and to the general development of the law of the jurisdiction in a critical area, leave to appeal by either party is granted as they consider the need to be (paragraph 6).

41. In a nutshell, the plaintiffs' case is this:

(a) under s. 6 of the Constitution, the plaintiffs have a right to protection of the law and to a right to a fair hearing,

(b) in order for those rights to be meaningful they must be exercisable (relying on *Attorney General v. Whiteman* (1990) 39 WIR 397 at p. 40),

(c) those rights have been contravened by the executive – as evidenced by the plaintiffs' successful appeal and the consequent concession of false imprisonment,

(d) access to the courts is critical in securing the enforcement of those rights in the face of continued executive branch resistance,

(e) as they are indigent, the plaintiffs are unable to have access to the courts in the absence of a conditional fee agreement such as is proposed in the engagement letter;

(f) the engagement letter is not champertous or otherwise contrary to public policy and should be approved (relying on *Thai Trading Co. v. Taylor* [1998] QB 781 at pp. 786F to 787G); and

(g) alternatively, if it is champertous and contrary to public policy it is time for "judicial boldness in the face…of apparent and continuing legislative delay."

(h) If this last limb of the case would involve the exercise of the "judicial fiat" that then Chief Justice Sir Richard Ground rejected in *Williams v. Carib West Ltd.*, TC 2001 SC 16, then the changing face public policy dictates that the time has come to do so.

42. Ms. Hippolyte in reply, submits that the common law has always regarded an agreement between a lawyer and his client by which the lawyer arranges to accept a contingent fee for the conduct of litigation as champertous, and therefore contrary to public policy. She relies on a line of authorities beginning with the judgment of Buckley LJ in *Wallersteiner v. Moir* (No. 2) [1975] QB 373 at p. 401 to 403 through to Lord Mustill's speech in *Giles v. Thompson* [1994] 1 AC 142 at p. 153 and including *Sibthorpe v. Southwark LBC* [2011] EWCA Civ 25 [2011] 1WLR 211 at paragraph [40] and *Factortame v. Secretary of State* (No. 8) [2002 EWCA Civ 932 [2003] QB 381 at paragraphs [59] to [60]. She then offers as the leading authority *Awwad v. Geraghty and Co.* [2001] QB 570 and concludes at paragraph 28 of her submissions by asserting that: "The effect of the judgment in *Awwad* was to preclude the common law from having any role to play in the development of Conditional Fee Agreements. Henceforth, they were to be solely creatures of statute."

43. Ms. Hippolyte then goes on to present a very useful discussion of the state of contingency fee arrangements within the region and the legislative framework in the TCI. She cautions that, absent legislative intervention, the law of champerty and maintenance has not altered in the TCI in a way that would permit the arrangement for which approval is sought by the Plaintiffs. It would, she says, be contrary to public and therefore invalid and unenforceable.

Maintenance and Champerty Defined

44. Useful definitions of maintenance and champerty are to be found in Stroud's Judicial Dictionary of Words and Phrases, Ninth Edition 2016. These are as follows:
"Maintenance of an action: In the judgment in *Bradlaugh v. Newdegate* (11 Q.B.D. 1), Coleridge C.J., said that perhaps the fullest and completest definition of "maintenance" was to be found in Termes de la Ley, which is as follows: " 'Maintenance' is where any man giveth or delivereth to another, that is plaintiff or defendant in any action, any sum of money or other thing for to maintain his plee, or else maketh extreame labour for him, when he hath nothing therewith to doe; then the party grieved shall have against him a writ, called a writ of maintenance"." [p.1488].
And:
"Champerty is maintenance in which the motive of the maintainor is an agreement that if the proceedings in which the maintenance takes place succeeds, the subject matter of the suit shall be divided between the plaintiff and the maintainor" (Steph. Cr. (9th edn), 149; Co. Litt. 368B; Termes de la Ley; Cowel, *Champerty*;…" [p. 373].

45. There are much more recent definitions in the case law reports that I have been shown, however I have chosen these deliberately and have set them out verbatim from their original sources to underline the antiquity of the concepts and therefore of the mischief they were fashioned to remedy. This comports with the overall thesis of Mr. Prudhoe's and Mr. Saunders' case that it is time we free ourselves from being bound at the wrists by the zip ties of a remedy for a mischief that no longer exists. However, I am restrained by the caution this is quite properly urged upon me by Ms. Hippolyte and Mr. Cadman – for general rule making and defining the boundaries of public policy in this area of the law, the legislature is far better placed that the courts.

46. Under the laws of England, maintenance and champerty had been both crimes and torts until liability was abolished by the Criminal Law Act 1967. However, s. 14 (2) of that Act provided:
"The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."
In 1969 the TCI legislature followed suit with the Criminal Law Ordinance (Cap. 3.01). It is noteworthy that s. 10 (2) of that Ordinance is in identical terms to s. 14 (2) of the

English Act, save for the deletion of the reference to "the law of England and Wales". It follows that the position in the TCI, subsequent to the abolition must have been, and remains the same as the position in England, absent legislative intervention.

47. I digress to observe that this apparently contrasts with the position in our sister Territory, the BVI. There, as noted by Mr. Justice Adrian Jack in the *Exential Investments* case at paragraphs [6] to [8], s. 328 of that Territory's Criminal Code 1997 that abolished maintenance and champerty and repealed the relevant English Acts, did not retain the English legislation's rule of public policy against maintenance and champerty. I must therefore look primarily to English case law principles for guidance, but against the backdrop of a TCI case that was ultimately decided by the Privy Council, and of which I am bound take particular note.

    Williams v. Carib West Limited., TC 2001 SC 16, *Kellar v. Williams*, CA 3 2002 and *Kellar and Another v.* Williams [2005] 1 LRC 582

48. This trilogy of decisions, respectively of the TCI Supreme Court, the TCI Court of Appeal, and the Privy Council are, so far as is known the only recorded sources of judicial pronouncements on the subject of contingency or conditional fee agreements in the context of TCI law. The Privy Council decision also provides a unique opportunity to discuss the leading English authorities in the context of local law and conditions, as will become apparent.

49. The case revolved around a disputed taxation that required consideration of what counsel for Carib West contended was a conditional fee agreement and therefore offended against public policy. It was decided however, due to the uncertainty of the evidence as to the true nature of the agreement that Williams was entitled to tax his costs on a *quantum* meruit basis and the issue of the lawfulness of such arrangements in the TCI was thereby rendered academic.

50. However, in his judgment under the sub-heading "Are Conditional Fee Agreements Allowable in the TCI?", then Chief Justice Sir Richard Ground offered the following:
    "This question does not now arise. The Registrar dealt with it at the invitation of the parties, and in case the matter went further, but I think it would be wrong for me to give a firm ruling on what is now a hypothetical point.
    "However, because the matter is of some importance and interest to the legal profession generally, I will indicate that ***on the material as argued before me*** I doubt very much whether conditional fee agreements are lawful…the common law considers any such arrangement contrary to public policy…if it is to be altered it will have to be by legislation…" [emphasis added; deletions for brevity only].
    And he concluded:

"Thus, while I can personally see strong arguments in favour of some change – not least the absence of legal aid in this jurisdiction – I do not think that it can be effected by judicial fiat."

51. In the Court of Appeal, Mottley, JA (subsequently, President Sir Elliot Mottley) writing for the Court and considering the *Wallersteiner* case, noted Lord Denning's point that the effect of s. 14 (2) of the Criminal Law Act (and therefore of s. 10 (2) of the TCI Criminal Law Ordinance) was to preserve the rule of public policy that an attorney should not have a pecuniary interest in the outcome of litigation that he was conducting on behalf of his client. The Learned Justice of Appeal then went on to confirm the position in TCI law as being that articulated in the line of authorities ending with *Awwad* that held conditional fee arrangements to be against public policy unless sanctioned by statute. He concluded:
"The court has not been referred to any statute which sanctions such an agreement in Turks and Caicos."

52. The Judgement of the Privy Council was delivered by Lord Carswell. The Board expressly declined, for "reasons appearing later in this judgment" to opine on the correctness of the contention that conditional fee agreements were not permissible and hence unenforceable in the TCI. Later in the judgment the reasons were given. At paragraph [21] Lord Carswell said this (it is best to quote the paragraph in full):

"It then has to be considered whether the fee arrangement, whether in its original form or as varied in 2000, constituted a conditional fee agreement. 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 practicing conditions.*** They would point only to the views expressed by Millett LJ…in *Thai Trading*…and by May LJ in *Awwad*…For the purposes of the present appeal, however, their Lordships propose, ***without deciding that issue***, to consider the question argued before them whether the respondent and his attorneys had entered into a conditional fee agreement." [emphasis added].

53. It seems to me that the Board deliberately left open the question of the enforceability of conditional fee agreements in the TCI on public policy grounds, and pointedly identified the views expressed by two judges in two cases – Millett LJ in *Thai Trading* and May LJ in *Awwad*, with apparent approval. Those views included the following by Millett LJ in *Thai Trading*:

"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…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…I question whether this should be regarded as contrary to public policy today, if indeed it ever was." (p. 788 D).

And:

"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…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 if present at all, it is present whether or 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…

"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 that the second of these propositions represents the current state of the law." (p. 789 G to 790 A).

With the agreement of Hutchison and Kennedy LJJ, Millett LJ concluded:

"In my judgment there is nothing unlawful in a solicitor acting for a party to litigation to agree to forego all or part of his fee if he loses, provided that he does not seek to recover more than his ordinary profit costs and disbursements if he wins."

54. Among the comments made by May LJ in *Awwad* were the following:

"***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, or that of any individual judge, could readily or convincingly be regarded as representing a consensus sufficient to sustain a public policy…***In my judgment, where Parliament has, by what are now…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."*** [emphasis added].

Mr. Prudhoe finds support in the first sentence of this passage; Ms. Hippolyte in the last. It is interesting to note that Ground CJ in his first instance judgment, also quoted with apparent approval the first two sentences of this passage from the judgment of May LJ in *Awwad.*

55. In a passage from the judgment of Schiemann LJ which seems to underpin the comments of Ground CJ, and in which Ms. Hippolyte also finds support, the learned judge following Lord Scarman in the *Wallersteiner* case expressed "reluctance to develop the common law at a time when Parliament was in the process of addressing those very problems." He went on:
"I would therefore hold that acting for a client in pursuance of a conditional normal fee agreement, in circumstances not sanctioned by statute, is against public policy. In those circumstances I would also reject the submission that the Rules were ultra vires, a submission which was premised on the assumption that the Rules sought to forbid what was permitted under common law."

The Position in England Since *Awwad*

56. Finally, I have been shown the case of *Sibthorpe v. Southwark London Borough Council* [2011] EWCA Civ 25, a decision of the English Court of Appeal where Lord Neuberger MR gave the principal judgment with which Lloyd and Gross LJJ agreed. The case is noteworthy and helpful because it raised the issue of champerty and public policy in a way that was required to be decided outside the context of the English legislative framework, and I remind myself that the TCI has no legislative framework.

57. In their skeleton argument, approaching the matter from a different angle Mr. Prudhoe and Mr. Saunders referred me to paragraph 40 of Lord Neuberger's judgment, and I accept the relevance of the views expressed there for the point they wished to make. However, for the purposes of this judgment I find the headnote summary of the decision and the underlying discussion in the text of the judgment more attractive. The second, and balancing limb of the headnote reads in part as follows:
"…however, it had never been held to be champertous for a person to agree to run the risk of a loss if the action in question failed, without enjoying any gain if the action succeeded, and to hold otherwise would involve extending the law of champerty at a time when its scope was to be curtailed rather than expanded…"

58. The underlying reasoning to support this summary is to be found at paragraphs 43 to 46 of the judgment. At the beginning of paragraph 43 Lord Neuberger says:
"No case has been cited in which it has been held to be champertous for a person to agree to run the risk of a loss if the action in question fails, without enjoying any gain

if the action succeeds. Further, if one considers the various judicial definitions of champerty, they all envisage gain if the action succeeds."

He then goes on to identify, with approval a line of cases that support this view of the matter, and at the beginning of paragraph 44 he says this:

"The intellectual attraction of this argument is that to hold the indemnity in the present case champertous would involve extending the law of champerty, at a time when, as apparent from the judicial observations I have quoted, its scope is to be curtailed rather than expanded."

And he then proceeds to quote specific judicial observations on the point – Oliver LJ in *Trendtex* and Lord Phillips MR in *Factortame (No. 8)* [2003] QB 381, 414, para 91.

59. At paragraph 45 the Learned Judge quotes again, with approval the passage from the judgment of Millett LJ in *Thai Trading*, referenced at paragraph 43 above and at paragraph 46 he rounds out with the following quote (referenced at paragraph 42 above) from Lord Carswell giving the judgment of the Privy Council in *Kellar v. Williams*: "it may now be time to reconsider the accepted prohibition in the light of modern practicing conditions", citing as he notes, Millett LJ in the *Thai Trading* case and May LJ in *Awwad.*

60. And so, we end where we began – with the words of Lord Carswell in the *Kellar v. Williams* case, delivered sixteen years ago in the Privy Council in a case that is now twenty years old. Perhaps essential justice in this case lies in those words, especially given that the Privy Council is a superior court of binding authority, though I acknowledge that Lord's Carswell's comments were *obiter*. I mention the timespan only to provide context for some of the comments to come.

The Decision

61. The engagement letter for which approval is sought on the summons is exhibited to the First Affidavit of Andwena Lockhart at page [AL1/5]. When one looks at it closely one sees the following:

    a) Hourly rates reflect those approved by the Court in Practice Direction No. 1 of 2020 (engagement letter p. 3, [AL1/7]).

    b) There is to be no remuneration if the litigation is lost – "If, and only if, EITHER" a costs order is made against TCIG "OR…the claim…is settled (paid)…we will enforce the debt owed by you in respect of the legal costs." (engagement letter p. 3, [AL1/7].

c) What stands to be recovered are damages for false imprisonment. Those will be assessed by the Court, and any costs ordered will be taxed by the Registrar. The engagement letter references both.

The 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.

62. For these reasons and following the authority of *Thai Trading* and *Sibthorpe* in particular, I find that the engagement letter is not champertous. I further find that the arrangement is not against, but rather conducive to public policy in that indigent plaintiffs who would otherwise be shut out from the seat of judgment are afforded access to justice; and this in a jurisdiction where the executive is bound by its Constitution to afford just such access.

63. I accept that in many instances, there might well be a public policy concern as to an indigent plaintiff's ability to meet a costs order in the event the case is lost, and both Ms. Allan and Mr. Cadman made this point forcefully in the *Regent Grand* case. However, that consideration does not arise in this case as the plaintiffs have a Court of Appeal judgment for unlawful detention in their favor and a consent order for false imprisonment with damages to be assessed.

64. 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. These sentiments were also urged upon me most eloquently by Ms. Hippolyte on behalf of the Respondents in this case and in the *Regent Grand* case by Mr. Cadman on behalf of the Bar Council. I feel compelled to say the in each instance they both clearly came prepared for the contest. 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.

65. However, it is equally important not to lose sight of the fact that two decades have passed since the *Kellar v. Williams* case, and the jurisdiction remains bereft of the availability of the legal aid system that Ground CJ lamented (at least on the civil side). This is not offered as a criticism – the jurisdiction is small, resources are scarce and legal aid is expensive. But in the circumstances, and within the constraints of the common law, and in the absence of statute law, it is for the Court to ensure so far as

possible, that the indigent, like the well-to-do, have that access to justice which Lord Neuberger has remarked, and with which I agree, "is an essential ingredient of a modern civilized society" *Sibthorpe*, para [49].

66. Finally, these findings seem to me to be consistent with the exhortation of Lord Carswell in *Kellar v. Williams* in 2005, that was echoed by Lord Neuberger in *Sibthorpe* six years later, after having been raised by Chief Justice Ground two decades ago.

Safeguards

67. Now that I have approved the engagement letter, Ms. Hippolyte has asked me to ensure that appropriate safeguards are attached to ensure that the concepts of fairness and reasonableness are preserved. In this regard 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. At any rate these are the tools available to the Court and I am satisfied the Registrar will know how to use them.

Costs

68. Given that the respondents/defendants/interested parties in both cases were in a way compelled to present fully argued cases on the merits and given that in each case they met that mark admirably and given the significance of the principal issues in dispute to the development of the law in the jurisdiction, I make no order as to costs.

Leave to Appeal

69. I do not think the leave of this Court is needed for any appeal that FGML might wish to pursue in the *Regent Grand* matter, the decision there being a final judgment and therefore outside the restrictions enumerated in s. 5 of the Court of Appeal Ordinance (Cap. 2.01) but if so, then such leave is granted. As indicated at paragraph 30 above, I also grant leave to appeal to the respondents in the *Kajeepan* matter, in the event they wish to take the champerty/public policy issue further.

70. It remains only for me to acknowledge a huge debt of gratitude to all counsel involved for their careful preparation, their skillfully submitted arguments, and their assistance and deference to the Court.

Simons J.

23 July 2021