ASSIGNMENT OF CLAIMS BY LIQUIDATORS

Speaker: Hugh Jory QC

The role of public policy in the ability of liquidators to assign and fund claims belonging to the company

In a recent decision of the Cayman Court of Appeal concerning conditional fee agreements[1] the Cayman Island courts once again urged on the legislature the need for it to intervene in the setting of public policy in the Cayman Islands.

Against the background of the doctrines of maintenance and champerty this paper looks at the role and changing nature of considerations of public policy in relation to both assignments of causes of action and funding arrangements in the Cayman Islands. It seeks to draw out the distinctions and similarities between the way those matters affect official liquidators in the Cayman Islands and their counterparts in England & Wales.

Champerty and Maintenance

1. A convenient starting point in understanding why the common law in England & Wales developed these doctrines to meet abuse within the justice system was given by Steyn LJ in **Giles v Thompson**[2] :

   "…it seems that one of the abuses which afflicted the administration of justice was the practice of assigning doubtful or fraudulent claims to royal officials, nobles or other persons of wealth and influence, who could in those times have expected to receive a very sympathetic hearing in the court proceedings. The agreement often was that the assignee would maintain the action at his own expense, and share the proceeds of a favourable outcome with the assignor"

2. At the root of the evil was the fact that those with the ear of the courts could invest in litigation whose outcomes they could influence as a result, indeed the word 'champerty' finds its origins in Middle English (from *champ* –field, and *part* – portion) in about the 15th century. This was a time when powerful nobles were looking for new sources of income - England had lost all but the remnants of its possessions in France with the end of the Hundred Years War, and was a land of competing royal houses, where the powerful were engaged in a ferocious civil war, namely the Wars of the Roses.

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[1] DD Growth Premium 2X Fund (in Official Liquidation) (Cause FSD 0050 of 2009)

[2] [1993] 3 All ER 321

3. Lord Denning explained the principles in **Re Trepca Mines Ltd**[3]
"*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. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful…"*

4. There are two elements to champerty which occurs when:
" *the person maintaining another stipulates for a share in the proceeds of the action or suit*"[4] , the first of which is maintenance. That concept was explained in the well known case of **British Cash**[5] by Fletcher Moulton LJ:

"*wanton and officious intermeddling in the disputes of others…where the assistance [the maintainer] renders to the one or the other party is without justification or excuse*."

5. The second element of champerty of course is the share in the proceeds. However, the principles of champerty and maintenance emerged as the answer to particular problems of abuse which the court system encountered at the time, and it is important to remember as Lord Phillips pointed out in **Factortame (No.8)** that :

"*Because the questions of whether maintenance and champerty can be justified is one of public policy, the law must be kept under review as policy changes*."

Public policy lies at the heart of the application of the doctrines - Baroness Hale said in **Massai**[6] in response to the submission that the assignment of causes of action amounted to 'trafficking':

"…'trafficking' is a pejorative term which takes the debate no further: it simply means trading in something (be it drugs or people) in which it is not permissible to trade. In order to decide whether the particular transaction is permissible, it is essential to look at the transaction as a whole and to ask whether there is anything in it which is contrary to public policy. When one looks at this transaction as a whole, it is clear that there was nothing objectionable about it at all."

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[3] [1963] Ch 199
[4] Factortame (No.8) [2003] QB 381, per Lord Phillips
[5] British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006,
[6] Massai Aviation Services v Att Gen [2007] UKPC 12

6. By the Criminal Law Act 1967, Parliament in England & Wales abolished criminal and civil penalties for champerty and maintenance, subject to an important reservation:

> "*the abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal*."

Assignments of causes of action by liquidators

7. For convenience, the situations in which assignment is prohibited under the general law of England & Wales can be classified into 4 categories:
   (i) contractual terms prohibiting assignment
   (ii) assignment prohibited by statute or public policy
   (iii) assignments of personal contracts and covenants
   (iv) assignments which adversely affect the obligor

8. For present purposes, it is helpful to focus on (ii). The general law distinguishes between so-called 'bare rights of action' which are not capable of assignment by reason of champerty and maintenance, and rights of action which are assignable because of the presence of some additional factor. Prior to **Trendtex**[7]that factor, which had evolved alongside the rolling back of the doctrines of maintenance and champerty, was whether the right of action was incidental or subsidiary to a right in property. Following **Trendtex** a right of action is assignable provided that the assignee has a genuine commercial interest in taking the assignment and enforcing it for his own benefit[8]and in those circumstances it is not fatal that the assignee may make a profit[9].

9. There is a distinction to be made between assigning a cause of action and assigning the fruits of a cause of action. The latter is not objectionable even where an assignment of the cause of action itself may to vulnerable to attack as a 'bare cause of action'. As Fletcher Moulton LJ put it:

> "…*We are all agreed that you cannot assign a cause of action for a personal wrong…[but] there is nothing wrong in this assignment. It is clearly intended to assign the fruits of action, so that whatever benefit comes from the action shall go to Mr Glegg by way of further security, but there is nothing which gives him the right to intervene in the action or which is in any way against public policy*"[10]

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[7] Trendtex Trading Corp. v Credit Suisse [1982] AC 679
[8] Trendtex (above) at p.703
[9] Brownton Ltd v Edward Moore Imbucon Ltd [1985] 3 All ER 499
[10] Glegg v Bromley [1912] 3 KB 474

10. The rationale for the doctrines of maintenance and champerty includes distaste for interference with the action itself. As set out below, this is a factor which impacts heavily on situations involving official liquidators, with their duties to the court which distinguish them from other litigants.

Champerty and Maintenance – the Insolvency exception

11. The starting point in England & Wales is that the rules of policy that militate against assignment of bare rights of action still apply (albeit in a in very much modified form in the context of insolvency) and when it comes to funding agreements:
    (i) A liquidator is entitled, as part of his statutory duties to realise the assets of the insolvent party for value even though the assets may be bare rights of action which would otherwise be unassignable at common law; and
    (ii) the common law doctrines will apply where the liquidator enters arrangements (eg with a third party funder) whereby he prosecutes an action which is funded by another in exchange for a share in the proceeds of recovery. Lightman J held sponsorship agreements entered into in exchange for a half share in the recoveries as fell outside the statutory protection and accordingly were champertous:
    "*I can see no basis in principle or authority for extending the statutory exemption applicable in the case of sales of bare causes of action to sales of the fruits of litigation which include provisions for the purchaser to finance the litigation…So far as the [Insolvency Act 1986] confers powers on liquidators and trustees other than the power to sell bare causes of action, the law of maintenance has full force and effect*"[11].

12. So far as liquidators and official liquidators are concerned, both of whom have statutory powers of sale in relation to the property of the company, there is an important distinction between their powers by reason of their office[12] on the one hand and the property of the company on the other. The powers cannot be assigned – whereas property (including rights of action vesting in the company at the commencement of the winding up) can be assigned. Lying behind that distinction is the special relationship between the liquidator and the court or as Knox J put it the "*statutory privileges and liberties conferred upon liquidators…officers of the court and act under the court's direction*"[13]

[11] Greenwood Holdings plc v James Capel [1995] Ch 80
[12] The powers of an official liquidator are set out in the Companies Law, s.110 and Parts I and II of Schedule 3.
[13] Re Ayala Holdings Ltd (No. 2) [1996] BCLC 467

13. In **Oasis Merchandising**[14]the Court of Appeal drew the distinction "*between the property of the company at the commencement of the liquidation (and property representing the same) and property which is subsequently acquired by the liquidator through the exercise of rights conferred on him alone by statute and which is to be held on the statutory trust for distribution by the liquidator*."

14. The Court of Appeal held that the fruits of the action (in that case for wrongful trading under s.214 Insolvency Act 1986) were not the company's property within the meaning of the legislation although they thought that "*as a matter of policy we see much to be said for allowing a liquidator to sell the fruits of action for the reasons given my Drummond J*[15]*, provided that it does not give the purchaser the right to influence the course of, or interfere with the liquidator's conduct of the proceedings. The liquidator is an officer of the court exercising a statutory power in pursuing the proceedings and must be free to act accordingly"*.

15. The relevant part of Drummond J's judgment in **Re Movitor** to which they were referring is:
"*The provision by strangers to the litigation of funds to insolvency administrators for the purpose of enabling them to pursue worthwhile claims on behalf of the entity under administration when, without that assistance, good claims might bot be able to be prosecuted, will often serve a good public purpose. The purpose of the legislature…will frequently by frustrated because the insolvency administrator will often not have access to the financial resources necessary to pursue, for the benefit of the administration, claims which have reasonable prospects of success*."

16. As statutory claims are not '*property of the company*'[16], an official liquidator cannot assign his power to apply to court to have transactions at undervalue avoided/preferences set aside[17] or to assign claims for fraudulent trading[18], for example.

17. There are occasions where the courts in England & Wales are asked to intervene to direct office holders to assign causes of action. The English courts have provided some guidance about the circumstances in which liquidators should assign causes of action, including to the potential

[14] Re: Oasis Marketing Ltd [1998] 170
[15] In Re Movitor Pty Ltd v Sims (1996) 19 ACSR 440
[16] Oasis Merchandising [1995] 2BCLC 493
[17] sections 145 and 146 of the Companies Law (2013 revision)
[18] section 147 of the Companies Law (2013 revision)

defendant to such action including **Re: Edennote Ltd**[19] and **Hopkins v T L Dallas Group Ltd**[20].

18. Here too, public policy has a role to play particularly where the effect of the assignment is in fact to kill off the action. Lindsay J pointed out in **Whitehouse v Wilson**[21] that "*… it is important to see an adequate consideration of the 'public interest element' and a recognition that on some facts it can oblige a liquidator to adopt a course that does not necessarily represent the best commercial interests of the creditors*".

19. In his judgment, Chadwick LJ put it this way "*The relevant question, as it seems to me, is whether the public interest in the imposition of civil sanctions – in this context, the recovery for the benefit of the company's pre-liquidation creditors of funds or commercial opportunities said to have been misappropriated or misdirected by the actions of a director – should lead to the conclusion that litigation to achieve that end should be pursued at the expense and risk of the post-liquidation creditors whose interests would be best served by a compromise with the alleged wrongdoer."*

20. Prominent amongst the considerations for a liquidator faced with a cause of action to assign is not wishing to expose himself to liability as a result. So, for example, he needs to be satisfied that there is a viable cause of action - **Re: Papaloizou**[22] and should not proceed where the only offer is derisory, **Khan v OR**[23] .

21. Non party costs orders in England & Wales apply where the third party is responsible for bringing the proceedings and they have been brought in bad faith/ulterior purpose or where there has been some other conduct on his part that makes it just and reasonable to make an order against him[24]. They are unusual. Similarly in the Cayman Islands the power to make non party costs orders appears to be one that is used only in exceptional circumstances[25].

22. In England & Wales, liquidators are at particular risk as to costs where they assign on terms that the estate will receive a share of recovery, and it is then a matter for the discretion of the trial judge whether or not they

[19] [1996] 2 BCLC 389,
[20] [2004] EWHC 1379
[21] [2005] EWCA 1688
[22] [1999] BPIR 106
[23] [1997] BPIR 109
[24] Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613
[25] Banco Economico SA v Allied Leasing and Finance Corp [1998] CILR 333.

can be liable in costs. In England & Wales the court will not sanction such an arrangement in advance, see **Hunt v (1) Harb (2) HRH Prince Aziz**[26].

Funding arrangements to enable liquidators to bring actions themselves

23. Champerty and maintenance have appeared prominently in the arguments concerning the propriety of conditional fee agreements in England & Wales as well as the Cayman Islands. In **National Trust for Cayman Islands v Planning Appeals Tribunal and Humphries**[27], Sanderson J was concerned with a case of a conditional fee agreement which did not provide for an uplift at a time when the Cayman Islands still retained an offence of champerty and maintenance under the Cayman Islands Penal Code[28]. It was a so-called 'conditional normal fee agreement' (ie no uplift), and prominent in the judge's mind was the fact that the client was a 'not-for-profit organisation'. He identified the following factors in favour of the enforceability of conditional fee agreements without uplifts:
    (i) it is of advantage to the conditional fee agreement client; and
    (ii) it does not increase the potential liability for costs of the opponent should he be ordered to pay the costs; and
    (iii) it is of potential advantage to the opponent if he is awarded costs, as the conditional fee agreement client's assets will not have been depleted by paying his own legal fees; and
    (iv) there is no division of spoils (contrast contingency fees) and potentially conditional uplift fee agreements; and
    (v) the temptation of the lawyer to act improperly is less than it would be in the case of a contingent fee or conditional uplift agreement; and
    (vi) where the client has no assets then a conditional normal fee agreement merely gives legal form to what is a practical reality – the lawyer only gets paid if the client wins; and
    (vii) there is nothing improper in a lawyer agreeing to act for the client for his normal fee whilst having it in mind, for reasons of friendship or wishing to foster future work from the client, not to exact his fee if the client should lose. It seems odd that an open contractual statement of what is unobjectionably in a solicitor's mind should render unenforceable an agreement which would have been enforceable had the solicitor not shared his thoughts with his client and promised not to change his mind; and

[26] [2012] BPIR 117
[27] [2002] CILR 59 citing from the Court of Appeal in Awwad v Geraghty & Co [2001] QB 570
[28] s.2(a), although the judge was dismissive of the possibility of any charge being brought or sustained.

(viii) Where a client runs out of money to afford representation, it is manifestly undesireable that the solicitor should leave him in the lurch; and

(ix) Conditional fee agreements facilitate access to the courts by members of the public

24. Amongst the arguments against conditional fee agreements he identified the following:

(i) the public interest in the highest quality of justice outranks the private interests of the two litigants. Lawyers should not be exposed to the avoidable temptations not to behave in accordance with their best traditions; and

(ii) the concept of normal fee is elusive – some solicitors idea of 'normal' fees are a multiple of those charged by others for the same work; and

(iii) it is undesirable to have to consider whether or not an agreement is illegal on a case by case basis depending on a detailed examination in each case of solicitors' cost structures; and

(iv) if legal practices are set up, the bulk of whose business is conducted on the basis of conditional normal fee agreements, then their normal fees would presumably have to be higher than they would have been had such arrangements not been normal in the firm.

25. In England & Wales – hitherto unlawful conditional fee agreements whereby lawyers had an interest in the outcome of the action, were made lawful subject to some limitation and conditions under the Courts and Legal Services Act 1990. However contingency Fee Agreements remained champertous and champerty had not "*withered away*" albeit its "*scope…has been shrunk greatly*"[29].

26. Lord Mustill said:
"*I believe that the law on maintenance and champerty can best be kept in forward motion by looking at its origins as a principle of public policy designed to protect the purity of justice and the interest of vulnerable litigants. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the single question whether…there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatsoever, and where the assistance he renders to one or the other party is without justification or excuse*."

[29] Giles v Thompson [1993] 1 AC 142.

27. Contemporary public policy lies at the centre of whether or not a particular agreement tends to corrupt public justice and Lord Mustill approved the approach taken by Steyn LJ in the Court of Appeal[30] in identifying the correct question for the court, namely whether "*in accordance with contemporary public policy, the agreement has in fact caused the corruption of public justice. The court must consider the tendency of the agreement*" per Steyn LJ

28. For present purposes focussing on liquidators and their legal advisors, context is everything. Public policy concerning champerty in the context of funding agreements with attorneys needs to be seen in a very different light to funding agreements with other persons. In **Factortame (No.8)** Lord Phillips said:

"*In **Giles v Thompson [1994] 1 AC 142** Lord Mustill applied the test of public policy identified by Fletcher Moulton LJ in the **British Cash** case. That test is appropriate when considering those who, in one way of another, support litigation in which they are concerned. It is not, however, really in point when considering agreements under which those who are playing a legitimate part in the process of litigation provide their services on a contingency fee basis. A solicitor who charges as contingency fee which does not satisfy the requirements of section 58 [Courts and Legal Services Act], can hardly be said to be guilty of 'wanton and officious intermeddling, in the disputes of others…where the assistance he renders to one party or another is without justification or excuse. The public policy in play in the present case is that which weights against a person who is in a position to influence the outcome of litigation having an interest in that outcome.*"

29. Lord Neuberger MR pointed out in **Regina Sibthorpe v London Borough of Southwark [2011] EWCA Civ 25**
"*There is much to be said for a properly funded legal profession which has no need to have recourse to conditional fees or contingency fees or the like. It is a matter for the legislature if such arrangements are thought to be necessary for economic or other reasons, and, if they are so necessary, then it is for the legislature to decide on their ambit.*

30. In the Cayman Islands, in **Re: ICP Strategic Credit Income Fund Ltd**[31], Andrew Jones J followed the Chief Justice in **Quayum**, in holding the position was different to that under English law in respect of contingency fees. Whereas in England & Wales the once hostile attitude to contingency fees had changed since the decision in **Wallersteiner v Moir (No.2)**[32]where Buckley LJ had explained the public policy at that time as:

[30] Giles v Thompson [1993] 3 All ER 321
[31] Cause No. FSD 82 of 2012, in July 2013
[32] [1975] QB 373

"*First, in litigation a professional lawyer's role is to advise his client with a clear eye and 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 to 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 conflicts with his obligations*"

that hostility remained in the Cayman Islands for precisely the reasons identified by Buckley LJ. However, he also referred to the Chief Justice's observation in **Quayum** that an equally important and compelling interest was that everyone has access to justice.

31. Andrew Jones J helpfully summarised the position in the Cayman Islands as follows:

"*An outright sale by an official liquidator, by way of legal assignment, of a cause of action where the price is expressed to be a percentage of the proceeds of the action is a valid exercise by the official liquidator of his statutory power to sell the company's property.*

Second, an assignment of a percentage of the proceeds or a cause of action pursuant to a litigation funding agreement is a valid exercise of the official liquidator's statutory power to sell the company's property, provided that the funder is given no right to control or interfere with the conduct of the litigation. It follows that where the court is asked to sanction a litigation funding agreement, its terms will be carefully scrutinised to ensure that it does not directly confer upon the funder any right to interfere in the conduct of the litigation or indirectly put the funder in a position in which it will be able, as a practical matter, to exert undue influence or control over the litigation.

Thirdly, a purported assignment of a right or action of the proceeds of a right of action vested in the official liquidator personally, such as the right to assert preference claims, is not authorised under the statutory power to sell the company's property. It would be an unlawful surrender by the official liquidator of his fiduciary power and would be contrary to public policy."

32. However, it is important bear in mind whose public policy is relevant to any particular piece of litigation. A very important distinction was made by Jones J in **ICP Strategic Credit Income Fund** namely, that the relevant public policy to be considered in that case was not Cayman Island public

policy but that of the United States since sanction was being sought to conduct actions by way of a contingency fee in that country. He said:

"*in my view a contract expressed to be governed by Cayman Islands law, which would be contrary to public policy if performed in this jurisdiction, is capable of being valid and enforceable if its terms require it to be performed wholly outside the Cayman Islands and in a foreign country where its performance would not be contrary to the public policy of that country*".

That approach is consistent with the judgment of Steyn LJ in the Court of Appeal in **Giles v Thompson**[33] where he said:

" *The doctrine of champerty is further limited in application to the extent that it only applies to agreements governing English litigation: see **Trepca Mines Ltd [1963] Ch 199** at 218. An agreement of a champertous nature made in England is valid if it relates to litigation in a country where champerty is lawful. This again illustrates that the Court is not dealing with an overriding public policy, which applies wherever the agreement is made or to be performed, such as an agreement to pay a bribe abroad. It is designed to protect the integrity of the English judicial system."*

The need for legislation in the Cayman Islands

33. The courts of the Cayman Islands properly consider that public policy in relation to funding agreements is a matter for the legislature. The practice of sanctioning uplifts as recoverable from the other party had been apparent at first instance from cases such as **Quayum** where the Chief Justice held that a conditional fee agreement with a 35% uplift did not fall foul of Cayman Islands law on maintenance and champerty.. In **National Trust for Cayman Islands v Planning Appeals Tribunals** [34] the court held that conditional fee agreements were not in themselves against public policy – in that case an attorney had agreed not to charge his 'not for profit organisation' client unless the action succeeded, and in any event to cap his fees at the amount of the taxed costs in that event, which the court upheld. Apart from the requirement for sanction in the Cayman Islands, things looked rather similar in this respect to the approach then taken by the courts of England and Wales, until the Court of Appeal of the Cayman Islands considered the wording of the guidance on costs in the personal injury case of **Barratt v A-G of Cayman Islands**[35]

34. It held that the previous interpretation of the relevant guidance had been interpreted too ingeniously by judges so as to allow conditional fees

[33] [1993] 3 All ER 321
[34] [2002] CILR 60
[35] CICIA 19 of 2010

where they were calculated by reference to hourly rates. Champerty and maintenance - whilst argued, did not form the basis of the Court of Appeal's decision in that case.

35. In his judgment, Chadwick P identified different strands of the public policy argument; (i) the advantages of giving access to the courts to impecunious litigants; (ii) the danger of giving the lawyer a pecuniary interest in the outcome of the litigation which might lead him to act improperly and pose a threat to the administration of justice, but also (iii) the potential unfairness to the conditional fee litigant's opponent of being exposed to the risk of paying uplifted costs. He described para.7 of the guidelines as "*a considered legislative response*" to (iii) by rendering such uplifts irrecoverable from opponents.

36. Chadwick P also said this:

"55 In National Trust v Humphries, Zacca, P. observed in this court ([2003] CILR 201, at para. 12):

> *"When it became obvious, during the later stages of argument, that the preliminary objection was likely to succeed, observations were made to us by counsel on both sides, as to the present quite unsatisfactory state of the law in the Cayman Islands in regard to conditional fee agreements. We entirely agree with their observations, which we were given to understand are also concurred in by the Cayman Law Society and the Caymanian Bar Association, the professional bodies representing legal practitioners in these Islands. We therefore urge the Attorney General, and through him the responsible executive and legislative authorities, to give the matter urgent attention. What seems to be needed is:*
> *First, a fresh consideration of whether the doctrines of champerty and maintenance, already abolished in England, now serve any useful social purpose in the Cayman Islands.*
> *Secondly, in the light of that decision and any action taken on that point, to eliminate certain apparent contradictions and anomalies in the Grand Court Rules which give rise to uncertainty and may mislead some practitioners in the preparation of bills of costs where conditional fee agreements are involved."*

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

37. The assertion that the doctrines of maintenance and champerty have been abolished in England is not correct albeit that they are no longer subject to criminal or civil penalty, as set out earlier.

38. The approach taken in England & Wales since April 2013, as part of the Jackson reforms, has been to carve out an exception for insolvency cases from a new general rule that uplifts are not recoverable from the losing party. For the time being at least, they remain so in insolvency cases, albeit that as part of those reforms the ability to recover the cost of any ATE insurance premium taken out to insure against an adverse cost in the event of failure has been removed.

Conclusion

39. Like England & Wales, in the Cayman Islands costs usually follow the event. Accordingly, whilst waiting for the legislative solution conditional fee agreements with uplifts in Cayman are likely to have limited appeal as the uplift is not recoverable from the losing party and would fall instead on the shoulders of the attorney's own winning client. Professional litigation funds and investment banks may appear more attractive.

40. However, even pending legislative reform there are still occasions where they may provide a solution to the problem of providing justice for those who cannot afford it, including joint official liquidators. A case on point is **DD Growth Premium 2 X Fund**[36] where the Chief Justice was persuaded that the **Quayum** criteria were met – the joint official liquidators' decision to enter into the amended funding arrangement and conditional fee agreement had been reached on a commercially sound basis and were in the best interest of the company whose apparently meritorious litigation would have to be abandoned due to lack of funding if sanction were withheld. In deciding how much to sanction, the judge applied the principles adopted by English courts to calculate the level of the uplift both in respect of the risk element that he was prepared (following **Spiralatem v Marks & Spencer[37] and Callery v Gray[38])** and in relation to the postponement element following the table in Cook on Costs .

41. However, one risk for clients entering conditional fee agreements with uplifts in the Cayman Islands persists – it was raised by the President of the Court of Appeal in **Barrett**, and repeated by the Chief Justice in **DD Growth Premium 2 X Fund**; whether pending legislation and on the wording of the existing guidelines on costs, the unsuccessful party can avoid liability for the other side's costs altogether where the successful party had the benefit of such an agreement. The President said: "*Indeed as it seems to me, there would be much force in a submission-not advanced on this appeal- that para.7.2 of the guidelines prohibits recovery from the unsuccessful party not only of the uplifts contained in conditional uplift fee agreements (which the agreements in the present*

[36] Cause No. 0050 of 2009
[37] [2007] EWHC 90084
[38] [2002] 1 WLR 2000

case are) but also of any normal or "basic" fees that would otherwise be payable under those agreements. It is pertinent to have in mind that that was, in effect, the outcome in ***Awwad v Geraghty***".

42. In those circumstances, when the promised Law Commission Review is undertaken in the context of public policy today, it will be interesting to see how far the Cayman Islands public can trust the legal profession today compared with over a century ago in England when Lord Esher MR said in **Pittman v Prudential Deposit Bank Ltd**[39]

"*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 which he was conducting so as to give him any advantage in respect of the result of the litigation*"

and how far impecunious clients themselves can be expected to pick up from their recoveries any additional costs resulting from such funding arrangements as may be permitted or, even the total costs of them. What Chadwick P referred to as "*a considered legislative response"* lying behind the non-recoverability of uplifts from unsuccessful opponents needs to be considered further.

[39] (1896) 13 TLR 110