IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

The Hon. Mr Justice Andrew J. Jones QC
In Chambers, 28 May and 18 July 2013

CAUSE NO. FSD 82 OF 2010(AJJ)
CAUSE NO. FSD 269 OF 2010(AJJ)

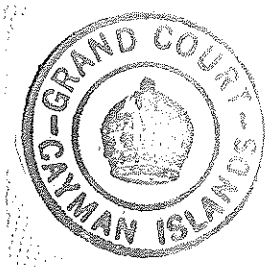
IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF ICP STRATEGIC CREDIT INCOME FUND LTD.

AND IN THE MATTER OF ICP STRATEGIC CREDIT INCOME MASTER FUND LTD.

Appearances:
Mr D. Fraser Hughes of Conyers Dill & Pearman for the Joint Official Liquidators

The Liquidation Committee was not represented



REASONS

Introduction

1. This is a sanction application by which the Joint Official Liquidators ("the JOLs") of the ICP Strategic Credit Income Fund Ltd ("the Offshore Feeder Fund") and the ICP Strategic Credit Income Master Fund Ltd ("the Master Fund") seek the Court's authority to commence litigation in the United States against Barclays Bank Plc ("Barclays") and DLA Piper LLP ("DLA") on the basis that its prosecution will be funded pursuant to the terms of a contingency fee agreement made with the New York law firm Reid Collins & Tsai LLP ("RCT"). On 28 May 2013, I made an order by which the JOLs were authorised to commence the proceedings and adjourned the rest of the application so that counsel could prepare further written submissions about the legal issues which arise in connection with litigation funding agreements in general and contingency fee agreements in particular. Having considered two further written submissions, I made an order on 18 July 2013 by which the JOLs were authorised, inter alia, to enter into a contingency fee agreement with

RCT on behalf of the Offshore Feeder Fund and the Master Fund, by which RCT will conduct the proceedings against both Barclays and DLA.

2. The points of law addressed by counsel for the JOLs concerning litigation funding agreements and contingency fee agreements are not novel and have been considered by this Court in connection with other liquidation proceedings, both before and after the decision in this case. Nevertheless, I was subsequently asked to put my reasons into writing, which I now do, on the basis that a written judgment addressing this subject would be helpful to insolvency practitioners generally.

Factual Background

3. Together with the ICP Strategic Credit Income Fund LP ("the Onshore Feeder Fund"), these funds comprise a typical master feeder structure which was launched in September 2005. The investment objectives of the Master Fund, as described in its offering documents, was to invest in a variety of mortgage backed securities and similar debt instruments, the performance of which was highly dependent upon the United States residential property market. The Offshore Feeder Fund was incorporated under the Companies Law as the vehicle through which non-US investors and US tax-exempt investors would make their investments. The Onshore Feeder Fund was established as a limited partnership under Delaware law as the vehicle through which US taxable investors would make their investments. The two feeder funds invested substantially all of their capital (either directly or indirectly via an exempted limited partnership established under Cayman Islands law) in the Master Fund. Their respective shareholdings in the Master Fund are recorded as 78.77% for the Offshore Feeder Fund and 21.12% for the Onshore Feeder Fund. [1] The circumstances in which the Offshore Feeder Fund was put into compulsory liquidation are described in my judgment of 10 August 2010. The Master Fund was put into voluntary liquidation by a unanimous written resolution of its shareholders and a supervision order was made on 23 December 2010. The current position is that Messrs Hugh Dickson of Grant Thornton Specialist Services (Cayman) limited and Stephen Akers of Grant Thornton UK LLP serve as joint official liquidators of both the Master Fund and the Offshore Feeder Fund. For the purposes of this application I shall use the expression "the Funds" to mean the Offshore Feeder Fund and the Mater Fund, being the two companies subject to liquidation proceedings in this Court. I shall use the expression "the ICP Funds" to refer to all three entities comprised in the master/feeder structure.

4. The ICP Funds were promoted by ICP Asset Management LLC ("ICP Management"), an asset management business based in New York and ultimately owned and controlled by Mr Thomas C. Priore ("Mr Priore"). It acted as investment manager of the Funds pursuant to an investment management agreement dated 25 October 2006 and an affiliated

[1] The balance of 0.11% is recorded in the name of ICP Credit Partners LLC GP.

company was the general partner of the Onshore Feeder Fund. The key person in this management structure was Mr Priore. He was instrumental in founding the ICP group of companies and acted as chief executive officer of all the constituent entities. By an order made on 19 October 2011 this Court authorised the JOLs to commence an action in the name of the Funds against ICP Management, Mr Priore and Triaxx Funding High Grade I, Ltd ("Triaxx") in connection with the misuse of US$36.5 million of the Master Fund's money for the purpose of meeting margin payments required to be paid by Triaxx to Barclays. The action was duly commenced in the Supreme Court of the State of New York on 10 February 2012. By their summons dated 17 May 2013, the JOLs now seek the sanction of the Court to commence further proceedings arising out of the same transaction against Barclays and DLA, which is a large well known law firm. Instead of instructing their existing US lawyers, Pachulski Stang Zeihl & Jones LLP ("Pachulski") to conduct this litigation on a time spent basis, the JOLs seek the Court's sanction to engage a second law firm, RCT, on the terms of a contingency fee agreement. In order to put these applications in their proper context, it is necessary to understand the causes of action which arise out of a series of margin payment transactions.

The misuse of $36.5 million of the Master Fund's money

5. Triaxx was managed by ICP Management and Mr Priore. In 2006 it issued four multi-billion dollar collateralized debt obligations ("the CDO's") secured by residential mortgage backed securities. The issue of the CDO's was financed by Barclays pursuant to a master repurchase agreement. During 2007 the residential mortgage market in the United States began to collapse. As a result of the falling value of the underlying collateral, Barclays became entitled to issue margin calls against Triaxx which was unable to meet its obligations. Between 29 October 2008 and 31 August 2009, ICP Management (acting on the instructions of Mr Priore) used US$36.5 million of the Master Fund's money for the purpose of meeting Triaxx's obligations to make margin payments to Barclays. The documentary evidence available to the JOLs reflected that these payments were made without the authority of the Master Fund's board of directors; at a time when the residential mortgage market was collapsing; even though neither of the Funds had any contractual obligation to meet Triaxx'a margin calls; without any consideration to the Master Fund; and without any security or promise of repayment. The only connection between the Master Fund and Triaxx is that they had the same manager and a large part of the Master Fund's assets were invested in the Triaxx CDOs. The complaint claims damages of US$36.5 million against Mr Priore for breach of fiduciary duty in his capacity as a director of the Funds; against ICP Management for breach of its obligations under the investment management agreement; and against Triaxx for unjust enrichment.

6. The Master Fund made 10 separate payments directly to Barclays between 29 October 2008 and 31 August 2009. In respect of each payment, Mr Priore signed a "Direction Letter" addressed to LaSalle Bank NA (in its capacity as trustee of the CDOs) by which it was stated that the Master Fund had made a payment to Barclays and that Barclays had

waived Triaxx's obligation to provide collateral for that amount. Barclays issued "Waiver Letters" by which it waived Triaxx's obligation on the basis of having received payment from the Master Fund. It follows that Barclays knew that it was receiving the Master Fund's money. It is now proposed that the Master Fund should commence an action, in the United States District Court for the Southern District of New York, against Barclays for, *inter alia*, aiding and abetting the breach of fiduciary duty committed by ICP Management and/or Mr Priore. In order to establish this cause of action as a matter of New York law, it will be necessary to prove that Barclays had actual knowledge of the breach of fiduciary duty; that Barclays knowingly participated in or induced the breach; and that the Master Fund suffered damage as a result. It is not suggested that the mere fact of knowing that the money was paid by the Master Fund is, by itself, sufficient to establish liability against Barclays. However, the Waiver Letters state that –

> "Barclays reserves all rights under the Repurchase Agreement other than to declare a default based on this Funding Obligation so long as none of the Funds Provider [ie the Master Fund] or any person or entity requests or makes any claim or demand for repayment, reimbursement or claw-back of the Margin Payment (other than any payment that would have been payable to the Issuer [ie Triaxx] under the Repurchase Agreement had the Issuer made the Margin Payment to Barclays in accordance with the Repurchase Agreement)."

To my mind, this statement is evidence tending to suggest that Barclays knew that it was not entitled to receive the Master Fund's money and might have to repay it.

7. DLA's New York office provided legal advice to ICP Management in connection with these transactions. It is said to have been involved in drafting the Directions Letters to the Trustee and the Waiver Letters issued by Barclays. DLA has denied having any attorney client relationship with the Funds, a proposition which is somewhat surprising bearing mind that they must have known that the Master Fund and Triaxx had common management and that arrangements had not been made for the two entities to have separate legal advice. DLA drafted the Direction Letter and so must have understood the nature of the transactions. Yet it appears that DLA continued to act without drawing the obvious conflict of interest to the attention of the Board of Directors. The advice obtained by the JOLs is that under New York law the existence of an attorney-client relationship does not depend upon the existence of a formal retainer agreement or the payment of a fee. Instead, the court will examine the factual circumstances and may infer the existence of an attorney-client relationship where the evidence establishes the existence of an explicit undertaking to perform a specific task, in this case drafting the Directions Letters addressed to the LaSalle Bank NA, among other things.

8. Under New York law the proposed actions against Barclays and DLA for aiding and abetting a breach of fiduciary duty are subject to a six year limitation period which had not expired at the time this Court made its first order in May 2013. Actions for legal malpractice are subject a three year limitation period, calculated from the date upon which the malpractice took place, rather than the date upon which it was discovered or the date

upon which the resulting damage occurred. Subject to some form of equitable tolling, the cause of action against DLA would therefore appear to be statute barred under New York law. However, the JOLs have been advised that it is possible for a legal malpractice action to be commenced against DLA in any state in which the firm has an office. Under the law applicable in the District of Columbia, in which the firm does have an office, the three year limitation period does not begin to run until the client actually suffers damage resulting from the malpractice. Unlike New York, the law applicable in the District of Columbia also recognises various equitable tolling doctrines encompassing "the discovery rule", "the lulling doctrine" and "the continuous representation doctrine". In circumstances where ICP Management and Mr Priore were acting against the interests of the Funds in breach of their fiduciary duties and DLA were (allegedly) aiding and abetting the breach, there is obvious scope for arguing that the Funds did not discover the legal malpractice until after the appointment of the JOLs in 2010.

Application to sanction the commencement of proceedings

9. The JOLs sought the sanction of the Court to commence proceedings in the names of the Funds against both Barclays and DLA. The Third Schedule to the Companies Law (2013 Revision) identifies whether particular powers of official liquidators are exercisable with or without the sanction of the Court. The decision whether or not to sanction the exercise of a power which falls within Part I of the Third Schedule is a decision for the Court. It is not a decision which can be taken by the official liquidator in the absence of the Court's sanction. In deciding whether or not to sanction a proposed transaction or course of action of this sort, the Court must consider whether the interests of the creditors or contributories (as the case may be) are likely to be best served by permitting it or not permitting it. In cases falling within Part II the Court is asked to control the exercise of a power for which the official liquidator does not require the sanction of the Court. If the official liquidator has taken a decision which he is entitled to take without its sanction, the Court should only interfere if the official liquidator is not acting *bona fide* or his decision is one which no reasonable liquidator could take in the circumstances of the case. This is the approach adopted by the English Court of Appeal in *Re Greenhaven Motors Ltd (In Liquidation)* [1999] 1 BCLC 635. Although there are material differences between the insolvency legislation applicable in the United Kingdom and the Cayman Islands, the reasoning of Chadwick LJ (who is now president of the Cayman Islands Court of Appeal) in *Greenhaven* is followed in this jurisdiction.

10. By Part I, paragraph 1 of the Third Schedule, an official liquidator's power to "bring or defend any action or other legal proceeding in the name and on behalf of the company" is exercisable only with the sanction of the Court. In deciding whether or not to sanction the commencement of proceedings in the names of the Funds as plaintiff, the Court must be satisfied that they do have causes of action against the proposed defendants with a reasonable prospect of success and that the interests of the creditors will be best served by allowing proceedings to be commenced. As officers of the Court, official liquidators are

expected to behave in an exemplary manner and to perform their duties and exercise their powers fairly. The Court will not allow its official liquidators to threaten or commence litigation speculatively as a means of extracting a settlement from a party against whom there is no genuine cause of action or no evidence from which to infer that a possible cause of action has any real prospect of success. For the reasons which I have already explained, I am satisfied that there is a good arguable case against both Barclays and DLA. In the case of DLA, I am also satisfied that there is an arguable basis upon which the limitation defence can be met, at least if the proceeding is commenced in the District of Columbia.

11. However, this conclusion is not, by itself, sufficient to justify making the order sought by the JOLs. Even though the Court is satisfied that good arguable causes of action do exist, it does not necessarily follow that the interests of the stakeholders would be best served by commencing proceedings. Although it may ultimately be to their advantage if litigation is successfully prosecuted and a judgment obtained in favour of the company, there are concomitant risks. An adverse outcome is likely to result in the depletion of the funds which would otherwise be available for distribution, even if the litigation can be conducted in a jurisdiction in which the loser will not be ordered to pay the winner's costs. There may be circumstances (which do not arise in this case) in which the downside risks of litigation would fall upon the creditors, whereas the upside benefit would go, in part, to shareholders who bear no corresponding risk. It follows that the Court's decision to sanction the commencement of litigation can never be entirely divorced from questions about how and by whom it will be financed.

Law relating to litigation funding agreements and contingency fee agreements

12. In the present context, I use the expression "litigation funding agreement" to mean a contract made between an official liquidator and a funder (who may or may not have an interest in the liquidation as a creditor or contributory) by which the funder will advance money to the official liquidator for the purpose of funding the prosecution of a cause of action belonging to the company on terms that the funder's return is limited to the receipt of a share of the proceeds of the claim that is being funded. The funder's obligation is to advance money which the official liquidator will use to pay legal fees and other litigation expenses. Depending upon the jurisdiction in which the action is commenced, the funded expenses may include the provision of security for adverse costs orders. A litigation funding agreement (as defined) is therefore a species of limited recourse loan agreement by which the lender's recourse is limited to sharing in the proceeds (if any) of the litigation. I use the expression "contingency fee agreement" in a narrow sense to mean a contract made between an official liquidator and a (foreign) law firm by which it agrees to conduct a cause of action belonging to the company on terms that the law firm's right to be remunerated arises only if the litigation is successful and is limited to a share of the proceeds of the claim. The law firm's obligation is to provide advice and perform all the work reasonably and properly required to litigate the action to a final conclusion. Typically, the law firm's obligation is limited to the performance of work and the official

liquidator will have an obligation to fund the out of pocket expenses, including the fees payable to expert witnesses. One of the distinctions between these two types of funding arrangement, which is important from a public policy perspective, is that a litigation funding agreement enables the official liquidators' lawyers to be paid (at the firm's normal hourly rates) in any event, whereas under a contingency fee agreement their right to receive any remuneration at all is contingent upon the outcome of the litigation.

13. It is also relevant to mention "conditional fee agreements". I use this express to mean an agreement by which the amount of a law firm's fee is expressed to be conditional upon the outcome of the litigation. By such agreements, the law firm is paid on a time spent basis but the amount payable is subject to an uplift or bonus in the event that the litigation is deemed to have been successful. The uplift or bonus is usually expressed as a percentage uplift in respect of the total time charges or an enhanced scale of hourly rates. The law firm will be paid in any event. It may be said that the law firm is financing the litigation only to the extent that it is offering discounted hourly rates in consideration for the chance of earning enhanced rates (in excess of the firm's 'normal' hourly rates) in the event that the pre-determined success criteria have been achieved. In this case I am concerned only with a proposal to enter into a contingency fee agreement (as narrowly defined).

14. Historically, the funding of litigation by third parties, who have no interest in the dispute, has been characterised as maintenance or champerty and such funding arrangements have been held to be unlawful. However, in the context of insolvent liquidation proceedings it has been recognised by the English courts, at least since 1888[2], that creditor funded litigation did not contravene the common law principles of maintenance and champerty. Official liquidators have a statutory power to sell the company's property which includes power to assign the proceeds (or a share in the proceeds) of a cause of action belonging to the company. There is a distinction between a transfer or assignment of property which carries with it as a matter of course the right to prosecute any cause of action closely related to that property and the assignment of a bare cause of action, meaning a purely personal right to claim damages for a tortious wrong, unconnected with any property rights. The former may be the subject of an absolute legal assignment, whereby the assignee can sue in his own name. The latter is not assignable, but a distinction is also drawn between a cause of action and the proceeds (or fruits) of a cause of action. In *Glegg –v- Bromley* [1912] 3 KB 474 Fletcher Moulton LJ said "we are all agreed that you cannot assign a cause of action for a personal wrong" but went on to hold that there is no objection to assigning the fruits of the action provided that the assignee is not in a position to control the litigation. It follows that a litigation funding agreement made between an official liquidator and a funder, who has no interest in the liquidation as a creditor or shareholder, will only contravene the principles of maintenance and champerty if the funder is in a position to control or exercise a significant degree of influence over the conduct of the litigation. In *Grovewood Holdings Plc –v- James Capel & Co Ltd* [1995] Ch. 80

[2] *Guy –v- Churchill* (1888) 40 Ch. D. 481

an official liquidator of an insolvent company, who had failed to obtain litigation funding from the creditors and shareholders, entered into an agreement with an anonymous sponsor by which the sponsor agreed to fund the litigation in consideration for 50% of the proceeds. Lightman J. stayed the action on the application of the defendants on the ground that the agreement was contrary to public policy because it purported to give the funder the right to conduct the litigation in the name of the company "without being subject to the control or interference of the liquidator." It was held that the official liquidator's statutory power to sell the company's property did not apply to a sale of the proceeds of a bare cause of action and therefore did not constitute a statutory exception to the principles of maintenance and champerty.

15. There is a further distinction between the causes of action belonging to a company in liquidation which are assignable and the statutory rights of action available only to official liquidators personally which are not assignable. An official liquidator's power under paragraph 8 of Part I of the Third Schedule to the Companies Law to "sell any of the company's property" means the assets which are the property of a company at the time of the commencement of the liquidation and the property representing it, including rights of action which might have been pursued by the company itself prior to the liquidation. Statutory rights of action available only to the official liquidator as a result of the winding up order having been made, such as the right to pursue preference claims, do not form part of the "company's property" which official liquidators are empowered to sell because such rights are an incidence of office and must be exercised by the officeholder personally, subject to the supervisory control of the Court. *Re Oasis Merchandising Ltd* [1998] Ch. 170 concerned a litigation funding agreement made between an official liquidator and a litigation funding company called London Wall Litigation Claims Ltd ("LWL") for the purpose of financing wrongful trading proceedings against the company's former directors. The agreement provided that LWL would finance the litigation in consideration for a share of the proceeds. The action was to be commenced in the name of the official liquidator, but on terms that LWL would be entitled to exercise a high degree of control over the manner in which the litigation would be conducted. The Court of Appeal upheld Walker J's decision that the proceeds of a wrongful trading action did not form part of the "company's property" with the result that the official liquidator could not rely upon the statutory power of sale as authority to enter into a champertous agreement. The underlying policy, which justified granting the directors' application for a stay of the action, was described by Peter Gibson LJ in the following terms (at page 186, letter C) –

> "As a matter of policy we think that there is much to be said for allowing a liquidator to sell the fruits of an action ..... provided that it does not give the purchaser the right to influence the course of, or to interfere with the liquidator's conduct of, the proceedings. The liquidator as an officer of the court exercising a statutory power in pursuing proceedings must be free to behave accordingly. We are far from happy with the right of interference given to LWL to dictate how the liquidator is to conduct the action. Indeed, despite [counsel's] argument to the contrary, it seems to us to enable LWL to prevent the liquidator from exercising his statutory right ... to apply to the court for directions in relation to this litigation."

16. The decision in *Re Oasis Merchandising Ltd* was recently followed by Ramsey J. in *Ruttle Plant Limited –v- Secretary of State for Environment and Rural Affairs* [2008] EWHC 238. The plaintiff was the purported assignee of the fruits of statutory rights of action vested in the official liquidator of Farm Assist Limited pursuant to a litigation funding agreement, the terms of which permitted it to conduct the proceedings "in as full a manner as the Company or the Liquidator could have done and free from all control or any interference by the Liquidator". The defendant's challenge to the validity of the agreement was upheld on the ground that it amounted to an unlawful surrender by the official liquidator of his fiduciary powers and on the ground that it was champertous. Ramsey J. said –

> "(43) In my judgement the reason why the assignment is objectionable is because the Liquidator is assigning the rights of action he has under the 1986 Act and is thereby assigning a discretionary power which, being part of the statutory powers of a liquidator is personal to the liquidator, just as is his appointment: *Re Sankey Furniture ex parte Harding* [1995] 2 BCCL 594, 600g. The intention in this case, as demonstrated by the Deed, is that the liquidator's right to prosecute and carry on the action is passed to a third party so as to deprive the Liquidator of any control or "interference" in these proceedings. I such circumstances, I respectfully adopt what Lightman J. said in *Grovewood* at 89G: *'I cannot see how a Liquidator can properly or at all surrender his fiduciary power to control proceedings commenced in the name of the company'*."

17. The present state of the English law on the subject of litigation funding agreements generally was summarised by Coulson J. in *London &Regional (St. George's Court Ltd) Ltd –v- Ministry of Defence* [2008] EWHC 526, paragraph [103] as follows :-

> "(a) the mere fact litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable;
> (b) in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closets attention to the nature and surrounding circumstance of a particular agreement;
> (c) the modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable;
> (d) the rules against champerty, so far as they have survived, are primarily concerned with the integrity of the process in this jurisdiction."

Whether or not point (a) reflects Cayman Islands law in the light of Smellie CJ's decision in *Quayum –v- Haxagon Trust Company (Cayman Islands) Limited* [2002] CILR 161 (discussed in paragraph 20 below) is not something which I have to decide for the purposes of this case.

18. In the context of liquidation proceedings, I would add the following points to Coulson J's summary of the law. First, 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 of 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 this 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. Third, a purported assignment of a right of action or 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.

19. I now turn to examine the circumstances in which this court can properly allow an official liquidator to enter into a contingency fee agreement, which is a particular kind of litigation funding agreement in which the prosecution of the company's cause of action is financed by the lawyers themselves in consideration of a share in the proceeds. It follows that the considerations which apply to litigation funding agreements generally apply equally to contingency fee agreements, but there is an additional public policy consideration which renders all contingency fee agreements (as narrowly defined) unlawful and unenforceable if they relate to litigation which will be conducted in this jurisdiction. In *Wallersteiner –v- Moir (no.2)* [1975] QB 373 Buckley LJ explained the public policy question in this way –

> "It may, however, be worthwhile to indicate briefly the nature of the public policy in 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 unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser of 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."

20. The attitude in England towards contingency fee arrangements generally has changed very significantly since Buckley LJ made this statement, but it was cited by Smellie CJ in *Quayum* and accepted as the reason why contingency fee agreements (as narrowly defined) continue to be regarded as contrary to Cayman Islands public policy. However, Smellie CJ went on to say that "there is another equally important and compelling interest: that of ensuring that everyone has access to justice." This observation was made in the context of a case in which the plaintiffs were employees of an insolvent bank who had been defrauded of moneys which should have been invested in their staff benefit trust.

They were unemployed and ineligible for legal aid with the result that they did not have the means to fund their proposed 'salvage claim' against the trustee. They therefore entered into an agreement with a local firm of attorneys that it would be paid on a time spent basis at enhanced hourly rates (which later turned out to be no more than the normal rates) if the litigation was successful. The local attorneys engaged English counsel on terms that he would be paid an uplift of 50% over his normal hourly rates in the event that the litigation was successful. The attorneys and counsel were to be paid nothing in the event that the litigation was unsuccessful. Smellie CJ characterised these arrangements as a 'conditional fee agreement' as opposed to what I have called a 'contingency fee agreement' – the distinction being that the fees were to be determined on a time spent basis, not as a percentage of the proceeds of the litigation. The defendant trustee contended that the agreement constituted maintenance and was effectively champertous, although the amount payable to the attorneys and counsel was not expressed as a share in the proceeds. Smellie CJ accepted that the common law principles of maintenance and champerty form part of the common law of the Cayman Islands but held that the agreements did not fall foul of these principles as they applied to the attorney-client relationships in question. He reached this conclusion by finding that the uplift was not a disguised share in the proceeds of the litigation but, rather, recognition of the risk of non-payment in the event of failure. He concluded that conditional fee agreements would be valid and enforceable if approved by the court, whereas contingency fee agreements are not justified by public policy and therefore continue to be void.

21. In *Latoya –v- Attorney General* (Unreported, 14 February 2012) the Court of Appeal considered the decision in *Quayum* in the context of a different, but related issue. The question was whether the amount payable by the successful plaintiff to his lawyers pursuant to a conditional fee agreement (which had been sanctioned by the court in accordance with the guidance laid down in *Quayum*) was recoverable on taxation pursuant to an order for costs made against the unsuccessful defendant. The Court of Appeal held that, on a true construction of the applicable Rules and the Guidelines relating to Taxation of Costs (Practice Direction #1/2001), this sum was not recoverable from the unsuccessful party. In so doing, the Court of Appeal made no observation about the broader public policy issues and the correctness of the decision in *Quayum*, because it was not necessary to do so and (per Chadwick P.) because it would also be inappropriate to do so bearing in mind that the matter has been referred to the Law Reform Commission.

22. I think that I should follow *Quayum* and conclude that contingency fee agreements (as narrowly defined) are contrary to Cayman Islands public policy and therefore void and unenforceable. It is also self-evidently right to say that the Court cannot properly authorise an official liquidator to enter into any contract which would be contrary to Cayman Islands public policy. Furthermore, the Court's sanction could not validate a contract made by an official liquidator which would otherwise be void and unenforceable in accordance with its proper law. However, this does not necessarily lead to the

conclusion that I must refuse to sanction the JOLs' decision to enter into a contingency fee agreement (as narrowly defined) with the New York law firm, RCT, for the purpose of conducting the actions against Barclays and DLA in the United States. I was referred to the *Rules of Professional Conduct* applicable in the New York State Unified Court System from which it is clear that the actions against Barclays and DLA do fall within those categories of litigation which are permitted to be conducted pursuant to contingency fee agreements in the New York courts.

23. Official liquidators are empowered to engage lawyers, whether domestic or foreign, only with the sanction of the Court (under paragraph 11 of Part I of schedule 3 to the Companies Law) and only on terms of engagement which comply with the requirements of CWR Order 25, rule 1, the material parts of which provide as follows –

> "(2) The terms upon which lawyers are engaged by the official liquidator must be stated in writing and shall be signed by both parties.
>
> (3) Every engagement letter or retainer agreement shall contain particulars of the basis upon which the lawyers will be remunerated, including, if applicable, a statement of the agreed hourly rates.
>
> (4) The official liquidator shall not retain (whether directly or indirectly) any foreign lawyer he (being a sole practitioner) or the firm of which he is a partner or employee has signed an engagement letter or retainer agreement which expressly states that –
>
> (a) the contract is governed by Cayman Islands law;
>
> (b) the lawyer/law firm submits to the exclusive jurisdiction of the [Grand Court of the Cayman Islands] for all purposes in connection with the engagement; …."

Rule 2(1) is also relevant in that it provides –

> "(1) All lawyers engaged by the official liquidator shall be remunerated on a time spent basis (at agreed hourly rates which are stated in the engagement letter) unless the Court has sanctioned some other basis of remuneration."

24. CWR Order 25 says nothing expressly about contingency fee agreements. Rule 1(4)(a) excludes any possibility of giving sanction for the JOLs to enter into a contingency fee agreement expressed to be governed by New York law. However, it seems to me that Rule 2(1) leaves open the possibility of sanctioning official liquidators to engage foreign lawyers to conduct litigation in a foreign court in consideration for a share in the proceeds, if such a contract would be binding and enforceable in accordance with Cayman Islands law as well as the law of the country in which it will be performed. 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 that it 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. Whether such a contract is regarded as valid will depend upon the nature and scope of the public policy considerations raised by the contractual terms in question.

25. The authors of Dicey, Morris & Collins' *The Conflict of Laws* (14th Edition) recognise (at paragraph 32-233) that "some rules of public policy are concerned only with cases having a connection with England, or based upon considerations which are purely domestic." I think that the common law rules relating to champerty clearly fall into this category. The learned authors go on to state at paragraph 32-238 that –

> "Where a contract is governed by English law [or Cayman Islands law], the application of the usual principles of public policy may require some modification if the place of performance is abroad. Thus it will not be contrary to English [or Cayman Islands] public policy to contract to oust the jurisdiction of a foreign court, and it may not be contrary to English [or Cayman Islands] public policy to contract to stifle a foreign prosecution".

Where a contract is required by its terms to be performed wholly outside the Cayman Islands, it seems to me that it will only be void on public policy grounds if the public policy in question is regarded as being of such fundamental importance that it must be given universal application. The public policy considerations relating to conditional fee agreements and contingency fee agreements do not fall into this category because they relate only to the administration of justice in our domestic courts. There is no suggestion in any of the modern case law that any kind of fee agreement which gives a litigant's lawyer a direct or indirect financial interest in the outcome of the litigation is so fundamentally wrong in principle that it would be impossible to devise rules of court and rules of professional conduct capable of countering any tendency for the proper administration of justice to be undermined. To the contrary, Smellie CJ concluded in *Quayum* that conditional fee agreements, which give rise to the same general public policy concerns as contingency fee agreements, can be regulated by the court in a way which meets these concerns. Chadwick P. recognised in *Latoya -v- Attorney General* that the balance of public policy about contingency fee agreements might change, but expressed the view that it would be more sensible for such change to be brought about by legislation rather than through judicial re-interpretation of the common law. It seems to me that in both *Quayum* and *Latoya –v- Attorney General* there was judicial recognition of the proposition that contingency fee agreements (as narrowly defined) are not regarded as so manifestly and fundamentally wrong in principle that the public policy against such arrangements must be recorded as having universal application. I think that the public policy underlying the Cayman Islands common law of champerty relates only to litigation conducted in our domestic courts.

26. I find support for this conclusion in the dictum of Steyn LJ in *Giles –v- Thompson* [1993] 3 All E.R. 321 at page 332 b-d –

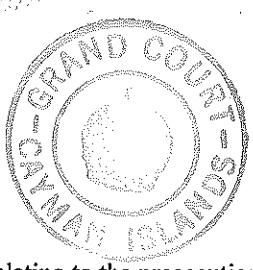
> "The doctrine is further limited in application to the extent that it only applies to agreements governing English litigation: see *Re Trepica Mines Ltd* [1963] Ch. 199 at 218. An agreement of a champertous nature made in England is valid if it relates to litigation in a country where champerty is lawful. This illustrates that one 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.

Contingency fee agreements are nowadays perhaps the most important species of champerty. Such agreements are still unlawful. Yet an English solicitor may share in a contingency fee earned in foreign litigation: ..... This reinforces the point that the docrtrine of champerty serves to protect the integrity of English public justice. It is based not on grounds of morality but on a concern to protect the administration of justice in this country."

It follows that a contingency fee agreement (as narrowly defined), which is expressed to be governed by Cayman Islands law, will be valid and enforceable provided that its terms require that it will be performed wholly in a foreign country where its performance will be lawful and permissible in accordance with the applicable local law and rules of professional conduct.

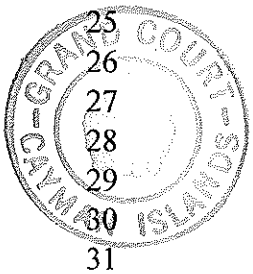
27. It is therefore open to the Court to sanction the contingency fee agreement[3] intended to be made between RCT and the Funds (acting by the JOLs) for the purpose of pursuing the claims against Barclays and DLA in the US Federal District Court for the Southern District of New York or the District of Columbia, provided that the following criteria are met. First, the proposed agreement must comply with the requirements of CWR Order 25, rule 1 and I am satisfied that it does. I would add that contingency fee agreements concluded between official liquidators and foreign lawyers should normally take the form of detailed commercial contracts, not simple engagement letters even though the latter might be sufficient to comply with the rules of professional conduct applicable in the jurisdiction in which the litigation will be conducted. Second, the performance of the agreement in question must be permitted by the law and professional conduct rules applicable in the country in which the litigation is to be conducted. I am satisfied that there is nothing in this agreement which is in any way inconsistent with the rules of profession conduct applicable to the conduct of litigation in New York or the District of Columbia. Third, the official liquidator must not fetter his fiduciary power to control the litigation. The Court must be satisfied that the terms of the agreement will not, as a practical matter, tend to inhibit the official liquidator from exercising complete control over the manner in which the litigation is conducted. This necessarily involves the Court engaging in a careful review of the contractual terms.



[3] The JOLs are proposing to enter into two separate agreements – one relating to the prosecution of the claims against Barclays and DLA in the District Court and another agreement relating to an ancillary petition to the Bankruptcy Court pursuant to Chapter 15 of the Bankruptcy Code. The terms are materially different. The first is a contingency fee agreement pursuant to which RCT will be paid a percentage of the proceeds in the event of a successful outcome. The second agreement provides for RCT to be paid on a time spent basis at the firm's ordinary hourly rates irrespective of the outcome of the Chapter 15 application, but it is a limited recourse agreement in that the firm has a right to receive payment only out of the proceeds of the other litigation.

28. Counsel for the JOLs drew my attention to the following salient points. RCT expressly recognises that the JOLs have the final and exclusive right to make settlement decisions, subject to obtaining this Court's sanction. The parties agree that this Court shall have exclusive jurisdiction to determine any dispute relating to the agreement through the mechanism of a sanction application, for which purpose it is agreed that RCT and its co-counsel shall have a personal right (to the extent permitted by law) to attend and be heard on any such application. The capital adequacy of the counterparty to any litigation funding agreement or contingency fee agreement will always be an important consideration for the official liquidator. The Court will be concerned to satisfy itself that appropriate due diligence has been conducted. This litigation is likely to last several years and consume thousands of hours of work on the part of a team of lawyers and support staff. The agreement does contain appropriate representations and warranties on the part of RCT that it does have the financial and human resources to enable it to conduct the litigation to a final conclusion. The Court also needs to be satisfied, as I am, that the JOLs are in a position to fulfil the financial obligations imposed upon the Funds to set aside and maintain an expense fund of $500,000 from which to meet RCT's out of pocket expenses.

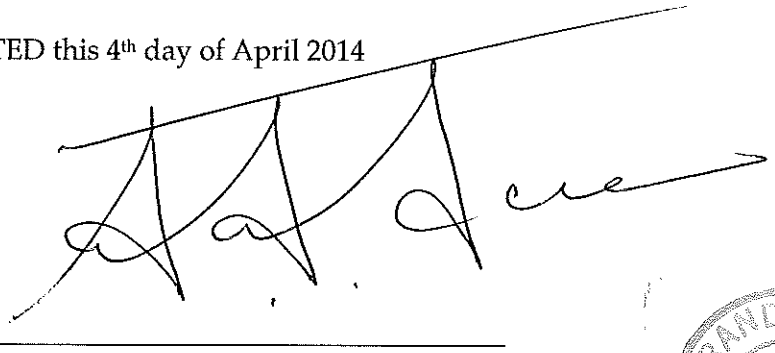
29. Contingency fee agreements should address expressly the scope of the law firm's reporting obligations. Typically, the foreign law firm will be expected to prepare or assist in the preparation of reports to creditors/shareholders, the liquidation committee and the Court. The lead lawyers may be expected to appear in person in connection with sanction applications made to this Court in connection with the conduct or settlement of the litigation. This agreement does express RCT's reporting obligation in an appropriate way. The Court will always be concerned to ensure that the termination provisions are appropriate. The counterparty to a litigation funding agreement or contingency fee agreement should have no right to terminate the contract and cease paying legal fees or undertaking legal work, as the case may be, without the consent of the liquidator or the sanction of the Court. Conversely, a foreign law firm should have no right to insist upon continuing to prosecute a claim which is no longer considered by the official liquidator to be meritorious. Nor should the foreign law firm be in a position to insist upon payment of a fee calculated on a time spent basis in the event that the liquidator gives instructions for the action to be discontinued. This subject is addressed appropriately in this agreement which provides that any issue as to whether it has been terminated with or without cause and any dispute as to RCT's right to remuneration in the event of termination shall be determined by this Court.



30. I am satisfied that the Court can properly sanction the commencement of proceedings against Barclays and DLA in the US courts on the basis that it will conducted by RCT in accordance with a contingency fee agreement. I am also satisfied that the terms of this agreement comply with the requirements of CWR Order 25 and meet the criteria necessary to obtain the Court's sanction.

31. Orders accordingly.

DATED this 4th day of April 2014



The Hon. Mr. Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT