Privy Council Appeal No. 13 of 2003

(1) Kenneth L. Kellar and
(2) Carib West Limited *Appellants*

v.

Stanley A. Williams *Respondens*

FROM

THE COURT OF APPEAL OF THE
TURKS AND CAICOS ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 24th June 2004

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Present at the hearing:-
Lord Hope of Craighead
Lord Hutton
Lord Scott of Foscote
Lord Carswell
Dame Sian Elias
*[Delivered by **Lord Carswell**]*

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1. This appeal from the Court of Appeal of the Turks and Caicos Islands concerns the costs of two extensive and long drawn-out pieces of litigation, in which the respondent was successful on most issues against the appellants. The effect of the decision against which the appeal is brought is that the respondent's several bills of costs are to be taxed on the basis of a *quantum meruit*. The appellants challenge the correctness of that decision and also maintain that the contract between the respondent and his attorneys

was unenforceable, since it constituted an unlawful conditional fee agreement, and that the respondent accordingly cannot recover any costs against the appellants.

2. Prior to 1993 the respondent Stanley A Williams and the appellant Kenneth L Kellar held between them the entire shareholding in a shipping company Sunrise Agency Ltd. The respondent was also the general manager of the appellant company Carib West Ltd, a liquor retailer of which Mr Kellar was the major shareholder and in effect beneficial owner. Differences arose between the respondent and Mr Kellar, in consequence of which Mr Kellar petitioned to have Sunrise Agency Ltd wound up and dismissed the respondent from his post with Carib West Ltd.

3. The respondent embarked upon two main pieces of litigation, in both of which he was ultimately successful. In one he brought an action against Carib West Ltd to recover monies which he claimed to be due under his terminated contract of employment. He succeeded in this action at first instance and on appeal. In the second set of proceedings he brought on the petition for the winding up of Sunrise Agency Ltd, which Mr Kellar does not appear to have pursued. The court made a winding up order and gave the respondent his costs, to be paid out of the assets (order of

10 June 1993). He then sought and obtained a direction in his favour about the treatment of funds belonging to Sunrise Agency Ltd, the issue being whether certain funds were to be treated as capital contributions or shareholder loans. By an order of 19 May 1995 the respondent was given his costs of the issue, to be paid by the company. The appeals brought by Mr Kellar against the direction were dismissed by the Court of Appeal and the Privy Council.

4. The respondent obtained the above-mentioned orders for the payment to him of his costs of the several sets of proceedings. Since the dispute in the winding up of Sunrise Agency Ltd, which was solvent, was treated as being between the individual contributories and since the shareholding in Carib West Ltd was beneficially owned by Mr Kellar, the taxations became in effect an issue between the respondent and Mr Kellar.

5. Following the decision of the Privy Council in February 2000 the respondent's attorneys prepared bills of costs and furnished them to the appellant's attorneys. As they were not agreed a taxation hearing was held in July 2001 before the taxing officer, the registrar of the Supreme Court and the Court of Appeal. Counsel for the appellants raised a large number of objections to the bills

but advanced in particular two preliminary points about the respondent's entitlement to costs, first, on the ground that no fee notes had been rendered to him by his attorneys and, secondly, because it was claimed that he and his attorneys had entered into an unenforceable conditional fee agreement.

6. It is not necessary for the purposes of this judgment to set out the several costs orders and details of the bills submitted by the respondent's attorneys for payment by Mr Kellar, which the latter's attorneys claimed were fluctuating and unreliable. In order to judge the correctness of the submissions advanced before the Board by counsel for the appellant one must make some reference to documents which were produced at the hearing before the registrar, upon which the appellant relied in making those submissions.

7. On 30 September 1996 the respondents' attorneys had filed applications to tax bills of costs relating to the winding up of Sunrise Agency Ltd. There were annexed to the applications documents entitled "Draft bill of costs on a party and party basis". One of these draft bills specified a brief fee of $40,000.00, setting out a number of factors to which the attorneys had particular regard. The factor numbered (g) read as follows:

> “the overwhelming success of Williams on all grounds in having Kellar’s position rejected by the Court and Williams position fully endorsed by the Court, together with numerous findings of credibility against Kellar and in favour of Williams.”

It was claimed on behalf of the appellant that this was evidence of the existence of an arrangement that a higher fee would be charged in the event of success, which constituted an unenforceable conditional fee agreement. It should be mentioned at this point that the brief fee referred to was not the same as a separate and specific fee paid to counsel conducting the case on the instructions of the attorneys. The profession is fused in the Turks and Caicos Islands, and it was the practice at that time to seek remuneration for litigation by charging a lump sum, termed a brief fee, in respect of the lawyers’ conduct of the proceedings in court, together with hourly charges for preparatory and other work done. In November 1999 the Chief Justice ruled in another matter that it was not legitimate to seek both brief fees and hourly charges in such a way as to involve double charging. In his judgment in the present case he observed that the import of this ruling appeared to have been misunderstood by the respondent or his attorneys.

8. The taxation of costs did not proceed at this time and it appears that the parties adopted Mr Kellar's suggestion that it be deferred until the Privy Council gave judgment in the appeal in the winding-up matter. After the completion of the litigation the respondent's attorneys commenced the task of preparing what they referred to as "revised bills of costs" in the two matters for taxation, which were for larger amounts than those prepared in 1996. In a letter dated 6 October 2000 to the appellants' attorneys Mr Richard Savory, the principal of the firm, specified seven bills of costs which he expected to submit and went on:

> "Bills of cost previously prepared in my office, based on my agreement with Stanley, have been calculated on the basis an hourly rate of $350 plus brief fees. However, with a view to simplifying the procedure, and to make your consideration of the bills easier (as well as the Court's if that becomes necessary), I propose to submit revised bills based on time alone and agreed hourly rates.
>
> My firm's hourly rates have increased over time and I have applied different rates to different matters, with the highest rate always being applied to commercial matters and cases such as those here. Where in the past fees recovered on

> taxation have included brief fees, that has increased the effective hourly rate in some cases quite considerably. Also, I believe that there is a case for higher hourly rates in the Court of Appeal and Privy Council, but for present purposes have not made that distinction."

The letter asked the appellant's attorneys to agree schedules of hourly rates for work done by specified persons in the respondent's attorneys' firm.

9. On 21 June 2001 the respondent swore an affidavit, entitled his seventh affidavit, in the course of which he stated in paragraph 2(a), (b) and (e):

> "2. Particulars of the agreement which I have had with Richard Savory since his firm Savory & Co. began representing me in these proceedings are as follows:
>
> (a) The firm's fees would be such as were normally charged by Savory and Co. from time to time in commercial cases before the courts of Turks & Caicos.

(b) At the time we first made our agreement, I understood that lawyers generally followed the Bar Association Scale of Minimum Fees which had been in existence since 1980, as applied by the Court from time to time. In relation to this case, I understood that Savory & Co. would charge for time spent by its attorneys and law clerks at hourly rates according to the qualifications and experience of the person concerned, but that in relation to preparation for and attendance at Court, fees would be charged on the basis of a reasonable 'brief fee' determined according to a number of factors, including the complexity of the matter, the expertise and experience of the attorney, the length of the trial, the number and importance of the documents involved, and the amount of money involved. I understood that the common practice was for the amount of the brief fee to be arrived at after the trial, when all the factors involved were able to be taken into account, and that the brief fee so determined would be either agreed with the other side or assessed for reasonableness on a taxation. I understood that fees for cases in the Court of Appeal and Privy Council would be higher than those in the Supreme Court. In or about April last year, Mr Savory informed [me] that there were new

Supreme Court Rules, and that the Chief Justice had ruled in another case that unless the amount of a brief fee had been specifically agreed beforehand, such a fee could not be claimed, and that all attendances should be charged on a time-spent basis. I agreed that instead of proceeding on the previous system which allowed for a substantial brief fee to be charged in long and complicated trials, Savory & Co. would charge the whole matter on the basis of time-spent by its lawyers and law clerks. I agreed that it was proper to charge higher hourly rates for preparation for and attendance at court. We agreed that the hourly rates to be charged would be those agreed to by the other side or, if not agreed, as approved by the Court.

* * * * *

(e) It was understood that although I would probably not be able to pay all of Savory & Co's fees and charges as and when rendered, I would make payments on account when I could afford to. Altogether, I have so far spent nearly $65,000 on account of Savory & Co's fees and expenses. I expected to have to pay Savory & Co. even if we were not successful, although I knew I had a strong case and

was always confident of winning. The only question in my mind was the extent to which Mr Kellar would go in dragging the matter out."

10. The respondent's attorneys delivered detailed written responses to objections made by the appellants' attorneys to the bills, following which the respondent on 2 July 2001 swore a further affidavit, entitled his eighth affidavit. He stated in paragraphs 4 and 5:

> "4. In relation to the first matter, as is mentioned in paragraph 2(b), the new arrangement made with Savory & Co. was in or about April 2000, which was *after* the decision had been rendered by the Privy Council. There was therefore no question when coming to that new agreement as to what fees I would pay Savory & Co. if I had lost.
>
> 5. In relation to the second matter, it was my understanding up until the Privy Council's decision that if I lost I would have to pay Savory & Co. for time spent at its normal hourly rates for commercial litigation, plus any brief fees that might be charged (always expecting the same would be reasonable). Indeed, when in London immediately after the

> Privy Council hearing Mr Savory and I were discussing the case and I mentioned then that if for some reason the decision went against me I would have to sell a significant amount of my property to meet Savory & Co.'s costs and the costs awarded to Kenneth Kellar."

11. The hearing for taxation of costs by the registrar commenced on 2 July 2001. He was asked by the parties to rule on three preliminary points:

(i) whether the taxing party is entitled to tax costs when no fee notes have been rendered to him by his attorney;

(ii) what is the nature of the agreement between the receiving party and his attorney and can that be construed/described as a conditional fee agreement;

(iii) are conditional fee agreements allowable within the Turks and Caicos Islands.

On the first issue the registrar held that the lack of fee notes did not prevent the respondent from having his costs taxed. This ruling was not strenuously contested on appeal and is not the subject of any issue in the appeal before the Board.

12. The registrar gave his ruling in writing on 24 July 2001. He set out the history of the matter and recorded that the respondent had paid sums totalling $88,641.14 to his attorneys on account of costs. He was more than a little critical of the attorneys' handling of the charging of costs and concluded by ruling on the second issue in the following terms:

> "1. The attempted alteration of the alleged fee paying agreement was ineffective.
>
> 2. On a balance of probabilities, due to the conflicting evidence it is impossible for me to determine the precise nature of the fee paying agreement in this matter.
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> 3. I accept that Mr Williams expected to pay Savory and Company even if he were not successful. In attempting to determine the level of the cap for indemnity principle purposes I made a finding that Mr Williams had a liability to Savory and Company up to the level of the monies he had already paid on account of costs. I also found that it was impossible for me to ascertain what if any additional liability Mr Williams has to Savory and Company.

> 4. There is insufficient evidence for me to infer that there was a conditional fee agreement in place."

He went on to hold *obiter* that conditional fee agreements were not permissible and hence were unenforceable in the Turks and Caicos Islands. For reasons appearing later in this judgment their Lordships do not propose to express an opinion on the correctness of this part of his ruling.

13. The appellants sought a review of taxation in order to challenge the registrar's rulings. The review was heard before Ground CJ, who gave his decision in a written judgment on 21 December 2001. The Chief Justice held, first, that the variation of the charging basis agreed in April 2000 was ineffective as against the paying party, because it had been made after the order for costs had been made and so should be disregarded. Secondly, he held that the April 2000 variation did not constitute a conditional fee agreement, and if it did, it must be disregarded in any event, so leaving the original fee agreement validly in effect. Thirdly, he rejected the registrar's conclusion that the respondent was not liable to pay his attorneys more than the sums which he had already paid them (with the consequence that the paying party's liability was limited to the amount of those sums). Finally, he held that because of the

uncertainty as to the terms of the fee charging agreement between the respondent and his attorneys the taxing officer "should approach the matter on the basis that the firm is entitled to be remunerated on a *quantum meruit*". He stated:

> "In an action between Savory & Co. and Mr Williams for their fees for work in fact done in respect of these matters, I see no reason why the firm could not claim on a *quantum meruit* notwithstanding any uncertainty as to the hourly rate or whether court work would be remunerated on a brief fee or an hourly rate or some combination of both. I consider, therefore, that the appropriate cap for the purposes of the application of the indemnity principle is the amount that the firm would have been paid on a *quantum meruit*, assessed as at the time the work was performed."

He ruled accordingly on the review of taxation, but made no order as to the costs of the hearing before the registrar or the review.

14. The appellants appealed to the Court of Appeal, which affirmed the decision of the Chief Justice, though on differing grounds. The court (Zacca P, Rowe JA and Mottley JA), held that there was consideration for the April 2000 variation, but that because it

constituted a conditional fee agreement it was unenforceable for reasons of public policy. The original fee agreement was, however, valid on its own and the registrar should proceed to tax the costs on the basis of a *quantum meruit*, as ordered by the Chief Justice. The court dismissed the appeal with costs, but declined to interfere with the Chief Justice's order as to costs of the hearing before the registrar or the taxation review.

15.The appellants appealed to the Privy Council against the decision of the Court of Appeal. The respondent cross-appealed, as he had done to the Court of Appeal, on the ground that –

(a) the taxations should proceed on the basis of the original agreement as varied;

(b) alternatively, if the Chief Justice's ruling was correct, they should proceed on the basis of the original agreement.

16.Before the Board the argument presented on behalf of the appellants centred round the following propositions:

(a) the variation of April 2000 constituted a conditional fee agreement, which should not be enforced on the ground of public policy;

(b) alternatively, the variation agreement was void for want of consideration;

(c) the original agreement was itself a conditional fee agreement;

(d) alternatively, it was too uncertain to be enforced, and accordingly the bills presented under it could not be taxed and there was no basis for a *quantum meruit.*

A large part of the argument presented by Mr Griffiths for the appellants was founded on the premise that the lawfulness of the fee agreement was rebutted on examination of the facts by the raising of an issue by the appellants that it was unlawful, with the consequence that the respondent then had to shoulder the burden of proof that the fee agreement was not a conditional fee agreement and was not unenforceable on that ground.

17.The parties agreed on the basic proposition that costs were taxed between party and party on the indemnity principle, that is to say, the costs recoverable by the receiving party are limited to those which he is liable to pay to his own solicitor, subject to the limitation that they were reasonably incurred and were reasonable in amount: see *The General of Berne Insurance Co v Jardine*

Reinsurance Management Ltd [1998] 1 WLR 1231 at 1234, per May LJ, and cf section 60(3) of the Solicitors Act 1974.

18.It is clear in their Lordships' opinion that the original arrangement between the respondent and his attorneys was an informal one, such as is commonly encountered, that they would undertake the litigation for him, without entering into any contentious business agreement by which the rates of charge were governed. As such it was inherent in the agreement that it was not intended to be gratuitous, but the hourly rates or other charges were not discussed or agreed. In these circumstances the law will imply an agreement to pay a reasonable rate, on the basis set out by Lord Atkin in *Way v Latilla* [1937] 3 All ER 759 at 763:

> "But, while there is, therefore, no concluded contract as to the remuneration, it is plain that there existed between the parties a contract of employment under which Mr Way was engaged to do work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous. Mr Way therefore is entitled to a reasonable remuneration on the implied contract to pay him *quantum meruit*."

This situation is classified in Chitty on Contract, 29th ed, (2004) vol 1, para 29-071 and Anson's Law of Contract, 28th ed, (2002) p 649 as one of those in which the person who carries out the work is entitled to payment on the *quantum meruit* basis.

19. The respondent is accordingly correct in his contention that on the original agreement the costs could have been taxed on the basis of the bills as presented, with the implication of reasonable hourly rates or brief fees. In this their Lordships agree with the decision of Ground CJ and the Court of Appeal, reversing the ruling of the registrar that the respondent's recovery is limited to the amounts actually paid by him to his attorneys. It then has to be decided what effect the variation has between the parties and whether the fee agreement is unenforceable to any extent.

20. Their Lordships are not satisfied that the arrangement proposed in the letter of 6 October 2000 between the attorneys, if it had been accepted by the respondent and the firm acting for him, constituted any change of substance in the fee paying agreement between them. They consider that it was at most the substitution of one method of calculating fees for preparation for and appearance in court for that which had thitherto been understood to apply, and as such it was quite a rational method of calculation of the respondent's liability

for fees. It was quite open to the respondent and his attorneys to vary the fee agreement to an hourly charging arrangement if they so wished, and their Lordships consider that there was clearly good consideration for such a variation. When the bills are taxed, they could be prepared, if the respondent's attorneys choose, on the hourly charging basis and then be subject to the normal process of ascertainment of the hours properly to be charged and of the applicable rates or rates to be applied to the work done. If, however, it were likely to produce a larger costs bill than the original framework, an amalgam of hourly rates and brief fees (which appears to be unlikely from the terms of the letter), the appellants' attorneys would be entitled simply to refuse to accept the amended basis and require the respondent to revert to the original framework. They could do so on the ground, as the Chief Justice correctly held, that that amendment had come into existence subsequent to the making of the costs basis and so could be disregarded by the paying party if he wished.

21.It then has to be considered whether the fee agreement, 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 practising conditions. They would point only to the views expressed by Millett LJ giving the judgment of the Court of Appeal in *Thai Trading Co v Taylor* [1998] QB 781 and by May LJ in *Awwad v Geraghty & Co* [2001] QB 570 at 600. 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.

22.Counsel for the appellants relied on two matters contained in the documents as evidence of the existence of such an agreement, and which in his submission raised the issue and required the respondent to prove the propriety of his arrangements with his attorneys. The first was the item numbered (g) in the draft bills filed on 30 September 1996, with its reference to the respondent's success as a factor to be taken into account in calculating the brief fee. This did not in their Lordships' opinion give rise to any inference that the respondent had agreed to pay a larger sum if he won than if he lost. There is no evidence of such an agreement having been made, and accordingly he could if he chose have

declined to allow the brief fee to be increased by reference to that factor (if indeed it was to be) and required his attorneys to disregard it.

23. The second matter to which the appellants pointed was the reference in paragraph 2(b) of the respondent's seventh affidavit to his understanding that the brief fee and hourly rates would be those agreed by the first appellant or, if not agreed, as approved by the court. It was contended that the inference to be drawn from this was that the respondent would pay his attorneys only if he won the case. Their Lordships consider that such an inference has not been established. The respondent made it sufficiently clear in paragraph 2(e) of his seventh affidavit and in his eighth affidavit that he would have been liable for costs if he lost, even though he might have had difficulty paying them at once. Their Lordships accordingly consider that the evidence falls well short of that which is required to put the respondent on proof of the lawfulness of the fee agreement. They agree with the observation of Harrison J in *Hazlett v Sefton Metropolitan Borough* Council [2000] 4 All ER 887 at 894:

> "... the mere non-acceptance by a defendant that an agreement between the complainant and his solicitor is a

> proper private fee agreement would not of itself be sufficient to call for evidence from the complainant. The defendant must show that there is a genuine reason for believing that it is not a proper private fee agreement before the complainant should need to consider adducing evidence to support the presumption in his favour."

24. Their Lordships accordingly consider that the taxation can proceed on the basis proposed by the respondent's attorneys in their letter of 6 October 2000, subject to the appellants' right to require, if they think it in their interest to do so, that the fees for the court work should be assessed by charging brief fees instead of hourly rates. It will be for the registrar to tax the bills in the customary fashion, where the items are not agreed, by assessing the number of hours properly charged and fixing the appropriate hourly rates, by reference to reasonable levels of remuneration.

25. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed and the cross-appeal be allowed, with the costs of both to the respondent. Since the respondent has succeeded on all the issues in the costs litigation, the Board considers that he should receive the costs of the review before the Chief Justice and the preliminary issue before the registrar.

26.Their Lordships do not wish to leave this matter without expressing their regret that such a disproportionate amount of time and money has been expended on this satellite litigation. They hope that the parties may reach early agreement on the basis of the opinions expressed in this judgment which will resolve the differences between them and put an end to the matter.