Neutral Citation Number: [2022] EWCA Civ 295

Case No: CA-2021-000724

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD0
Marcus Smith J
[2021] EWHC 1950 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 March 2022

Before :

LADY JUSTICE SIMLER
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between :

PETER FARRAR	**Claimant**
- and -	
CANDEY LIMITED	**Appellant**
- and -	
DAVID MILLER	**Defendant/ Respondent**

- -
- -

Muhammad Haque QC of, and **Hossein Sharafi** instructed by, **CANDEY** for the **Appellant**
Jonathan Cohen QC (instructed by **North Star Law Ltd**) for the **Respondent**

Hearing date : 3 March 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30 on 11 March 2020 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Arnold:

Introduction

1. The issue on this appeal is whether a firm of solicitors which has been acting for a claimant in litigation pursuant to a damages-based agreement can validly take an assignment of their client's cause of action. Marcus Smith J held in a judgment dated 16 July 2021 [2021] EWHC 1950 (Ch) that the answer to that question was no, because the assignment was champertous. The firm of solicitors, CANDEY, now appeals with permission granted by the judge.

Factual background

The proceedings brought by Mr Farrar against Mr Miller

2. On 23 October 2013 the Claimant, Peter Farrar, entered into a damages-based agreement with CANDEY ("the DBA") under which Mr Farrar agreed to pay CANDEY 50% of the proceeds from claims against the Defendant, David Miller, instead of paying CANDEY's fees on an hourly rate basis. The DBA provided that CANDEY would pay all barristers' fees, but Mr Farrar was responsible for paying all other disbursements. The DBA also provided that, in the event that Mr Miller agreed or was ordered to pay Mr Farrar's costs, any sums recovered would reduce the extent of Mr Farrar's liability to make payment out of the proceeds. Although the DBA referred to the possibility of Mr Farrar obtaining after the event ("ATE") insurance to cover any costs he was ordered to pay Mr Miller if the claim failed, Mr Farrar did not obtain such insurance.

3. On 8 April 2014 Mr Farrar issued a claim form against Mr Miller claiming damages for breach of an alleged oral agreement concerning the development and sale of a piece of land in Norfolk known as "Long Stratton". After the service of statements of case Mr Miller issued an application to strike out the claim alternatively for summary judgment dismissing it. On 26 January 2015 Chief Master Marsh acceded to that application. On 15 July 2016 His Honour Judge Barker QC, sitting as a judge of the High Court, dismissed Mr Farrar's appeal, but granted him permission to amend his Particulars of Claim to allege that the proceeds of sale of Long Stratton were held on trust for him by Mr Miller alternatively that the facts gave rise to a proprietary estoppel. The judge refused to grant Mr Farrar permission to introduce a claim for breach of fiduciary duty, however. On 14 February 2018 the Court of Appeal dismissed Mr Miller's appeal against that order, but allowed Mr Farrar's appeal against the refusal of permission to introduce the claim for breach of fiduciary duty. On 31 July 2018 the Supreme Court refused Mr Miller's application for permission to appeal. Since then no steps have been taken in the proceedings. CANDEY's evidence is that the value of the claim, if successful, is in excess of £1.6 million.

The proceedings brought by Leongreen and Galleondeal against Mr Farrar

4. On 7 December 2012 Leongreen Ltd, a company controlled by Mr Miller, brought a claim in the Central London County Court against Mr Farrar for possession of a property which I will refer to as "Artillery Mansions". On 24 February 2014 HHJ Dight made an order for possession and ordered Mr Farrar to pay Leongreen's costs assessed on the indemnity basis. On 29 August 2014 Leongreen and Galleondeal Ltd,

another company controlled by Mr Miller, brought a claim in the High Court against Mr Farrar for lost rent, alternatively mesne profits, and for the costs of repairs to, and of replacement of fixtures and fittings in, Artillery Mansions. This claim was subsequently transferred to the County Court at Central London. On 15 January 2016 HHJ Walden-Smith gave judgment in favour of Galleondeal in the sum of £280,542.27 plus interest in the sum of £46,048.08 and in favour of Leongreen in the sum of £119,143.85 plus interest in the sum of £8,136.72, making a total of £453,870.92 ("the CCCL Judgment"), and ordered Mr Farrar to pay Galleondeal and Leongreen's costs assessed partly on the standard basis and partly on the indemnity basis. On 21 April 2016 Mr Farrar filed an appellant's notice seeking permission to appeal against the CCCL Judgment, but permission to appeal was refused by this Court.

5. The CCCL Judgment remains unsatisfied and interest on it continues to accrue. Mr Miller's evidence is that the total amount due as at 24 February 2021 was £565,023.22 plus costs in respect of which an interim payment of £40,000 had been ordered, making a grand total of £605,023.21. On 5 February 2021 Galleondeal and Leongreen assigned the debts owed by Mr Farrar to Mr Miller.

The bankruptcy proceedings

6. At some point in 2015 Leongreen and Mr Miller petitioned for Mr Farrar to be made bankrupt. This did not result in Mr Farrar being made bankrupt, but by 12 September 2019 Mr Farrar was experiencing financial difficulties and anticipated that Galleondeal and Leongreen would present a further petition based on the CCCL Judgment.

The Assignment, the death of Mr Farrar and the subsequent applications

7. On 12 September 2019 Mr Farrar and CANDEY entered into a fresh damages-based agreement which replaced the DBA. There is no evidence from CANDEY which explains why this was done, but the explanation may lie in the fact that the new agreement discharged a fixed charge over the proceeds of the litigation executed by Mr Farrar on 12 November 2013. Certainly CANDEY has not relied upon the charge for present purposes.

8. Also on 12 September 2019 Mr Farrar and CANDEY executed a deed of assignment of Mr Farrar's claims against Mr Miller ("the Assignment").

9. On 11 October 2019 Mr Farrar unexpectedly died.

10. On 7 May 2020 CANDEY issued an application to be substituted as claimant in place of Mr Farrar. On 25 May 2021 Mr Miller issued an application for an order under section 423 of the Insolvency Act 1986 avoiding the Assignment on the ground that it was a transaction defrauding creditors of Mr Farrar. Both applications came before Marcus Smith J, who dismissed CANDEY's application by order dated 16 July 2021. That made it unnecessary for him to deal with Mr Miller's application.

The Assignment

11. The Assignment contains a number of recitals. Recital A recites the proceedings brought by Mr Farrar against Mr Miller (defined as "the Proceedings") and states that CANDEY's costs to date in respect of the Proceedings are £135,000 (defined as "the Incurred Hourly Rate Costs"). Recital B recites the DBA and the replacement agreement (incorrectly referred to as a "Conditional Fee Agreement") which is said to be terminated by consent with immediate effect. Recital C recites that CANDEY acted for Mr Farrar in the County Court and bankruptcy proceedings brought by Leongreen, Galleondeal and Mr Miller and states that CANDEY's costs to date in respect of those proceedings are £100,000 (defined as "the Other Litigation Hourly Rate Costs"). Recital D recites the CCCL Judgment, and states that Mr Farrar is unable to pay it and anticipates that Galleondeal and Leongreen will present a petition for his bankruptcy.

12. The recitals then state:

> "(E) [Mr Farrar] does not have sufficient funds with which to continue the Proceedings to their conclusion. [Mr Farrar] has fully investigated alternative funding options and, after doing so, has concluded that it is in his best commercial interest to enter into this Deed.
>
> (F) [Mr Farrar] and [CANDEY] agree that entering into this Deed provides each with the best opportunity to recover any monies from [Mr Miller].
>
> (G) [Mr Farrar] has been advised to take independent legal advice in relation to entering into this Deed.
>
> (H) [Mr Farrar] has agreed to assign all of the benefits in the Proceedings (but not any burdens to include any historic adverse costs liability) to [CANDEY] on the terms set out in this Deed.
>
> (I) [Mr Farrar] will receive a distribution from any Recoveries as set out below."

13. As the judge noted, it is not obvious why Mr Farrar's lack of funds should have prevented him from continuing the proceedings, as stated in recital E, given that the claim being was conducted pursuant to the DBA. CANDEY's evidence is that the explanation for this is that Mr Farrar was unable to pay disbursements. CANDEY's evidence does not explain why the Assignment was entered into rather than the DBA being amended to cover such disbursements. The judge found that an obvious reason for this course being adopted was to ensure that the claim would continue even if Mr Farrar was made bankrupt. There is no challenge by CANDEY to that finding.

14. Notwithstanding what is said in recital G, there is no evidence that Mr Farrar in fact obtained independent legal advice before entering into the Assignment.

15. Clause 1 contains the following definitions:

> "**Assigned Claims**: all claims and entitlements arising within and out of the facts of the Proceedings (whether against [Mr Miller] or anyone else) including all claims for damages and/or relief and/or interest and/or costs.
>
> **Recoveries**: any damages, profits, money and/or other benefits derived as a result of the Proceedings in respect of the Assigned Claims."

16. Clause 2 provides:

> "2.1 Subject to the terms of this Deed, [Mr Farrar] hereby assigns unconditionally, irrevocably and absolutely to [CANDEY] all of [Mr Farrar's] title, interest and benefits in and to the Assigned Claims with effect from the Assignment Date.
>
> 2.2 [CANDEY] agrees that it shall accept the assignment referred to in clause 2.1 and distribute any sums in accordance with the Distribution of Recoveries within 28 days of receipt of the Recoveries."

17. Clause 3.1 provides that the Recoveries are to be distributed by CANDEY in the following order of priority until the Recoveries are extinguished:

(a) Payment of any premium for ATE insurance taken out in respect of the Proceedings.

(b) A sum equivalent to:

> "(i) double the amount of all legal costs [CANDEY] has incurred (including, for the avoidance of doubt, all of the Incurred Hourly Rate Costs) and double all future costs incurred pursuant to [CANDEY's] hourly rates as set out in its standard terms of retainer, in connection with the Proceedings (including any appeals and costs proceedings) plus (ii) the Other Litigation Hourly Rate Costs. The amount distributable under this clause is subject to a maximum of 50% of the Recoveries after first deducting the insurance premium referred to in (a) above and the sum of £125,000. If [CANDEY] obtains an order or reaches an agreement that its hourly rate costs and/or expenses are to be paid by [Mr Miller], all such monies recovered will be paid directly to [CANDEY] and, if applicable, will reduce the amount payable to [CANDEY] under this clause."

(c) The balance to Mr Farrar.

18. There is no dispute that clause 3.1(a) envisages that CANDEY will obtain ATE insurance.

19. There is a dispute as to the interpretation of clause 3.1(b). Clause 3.1 does not expressly state that the sum in (b) is retained by CANDEY, but it is common ground that this is implicit. The dispute is as to the calculation of the cap, and in particular as to the effect of the words "and the sum of £125,000". The question is what happens to

the sum of £125,000. CANDEY contends that it goes into the balance payable to Mr Farrar. Mr Miller contends that it remains in the hands of CANDEY. It is not necessary to resolve this dispute for the purpose of this appeal, however.

20. There is no evidence as to what the future costs of pursuing Mr Farrar's claim to judgment were estimated to be at the time of the Assignment, nor as to the level of disbursements which were anticipated.

The common law

21. This case involves three common law rules which are all rooted in public policy, are closely related and are not always distinguished from each other.

Assignments of bare causes of action

22. The first rule is that a bare cause of action (i.e. not one ancillary to a property right or interest) can only be assigned where the assignee has a genuine commercial interest in enforcing the claim. At one time, it was thought that a bare cause of action could never be assigned because that amounted to trafficking in litigation, but that is no longer the law. In *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, the House of Lords held that, as Lord Roskill put it at 703:

> "… in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty … if the assignee had a genuine commercial interest in taking the assignment and enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance."

In that case, however, the assignment was held to be void, even though the assignee had a genuine commercial interest in enforcing the claim, because the assignment was champertous.

Assignments of causes of action by clients to their solicitors

23. The second rule is that a solicitor who has the conduct of litigation may not take an assignment of their client's cause of action prior to judgment. This rule is established by a consistent line of authority going back nearly 240 years. In *Hall v Hallet* (1784) 1 Cox 134, 29 ER 1096 an attorney called Scrase took an assignment from his client Hall of two debts of £620 and £50 in consideration of payment of the sum of £300. Lord Thurlow LC held that the assignment was void, saying at 140, 1099:

> "… no attorney can be permitted to buy in things in a course of litigation, of which litigation he has the management. This the policy of justice will not endure."

24. In *Wood v Downes* (1811) 18 Ves Jun 120, 34 ER 263 Downes was a solicitor who had the conduct of litigation on behalf of Wood concerning an estate. They entered into an agreement for the sale of Wood's share of the estate in consideration of the

payment of £100 and a promise to pay £1000. Lord Eldon LC held that the agreement was void, saying at 127, 265-266:

> "… it is laid down as clear Law, that no attorney can take any thing for his own benefit from his client pending the suit, save his demand; and I add that, as a guardian cannot take any thing from his ward pending the guardianship, or at the close of it, or at any period until his influence has ceased to exist, the obligation upon an attorney to refrain from taking an extraordinary benefit is at least as strong.
>
> The case of *Wells v Middleton* … is an extremely strong case of this kind. It was admitted, that the transaction was liable to no objection as between man and man; but it was overturned upon this great principle the danger from the influence of Attorneys or Counsel over clients, whilst having the care of their property; and, whatever mischief may arise in particular cases, the Law, with the view of preventing public mischief, says, they shall take no benefit, derived under such circumstances. It is not denied in any case that, if the relation has completely ceased, if the influence can be rationally supposed also to cease, a client may be generous to his Attorney or Counsel, as to any other person; but it must go so far."

25. In *Simpson v Lamb* (1857) 7 EL & BL 84, 119 ER 179 an attorney called Scott was on the record for the plaintiffs, but an attorney called Shaen took over the conduct of the case shortly before trial. After the plaintiffs had obtained a verdict for £50 damages, but before judgment, Shaen purchased the plaintiffs' interest in the verdict for the sum of £50. The Court of Queen's Bench held that the transaction was void. Lord Campbell CJ delivering the judgment of the Court consisting of himself, Coleridge, Wightman and Erle JJ said at 93, 1182-1183:

> " … it has been held in several cases, that no attorney can be permitted to purchase any thing in litigation, of which litigation he has the management (*Hall v Hallet* (1 Cox 134), *Wood v Downes* (18 Ves 120) and the authorities therein cited), and considering the relation in which the attorney and client stand to each other, it would seem, as was said in *Hall v Hallet* (1 Cox 134), to be against the policy of the law to permit such a dealing by an attorney, whilst the case is still undetermined by judgment, … whatever might have been the case had the purchase been by a stranger."

26. In *Pittman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110 the plaintiff was a solicitor who had acted for a client called Law in an action against a hotel. Law owed the plaintiff money for the costs incurred. While the proceedings were pending Law and the plaintiff agreed that Law would assign the judgment to the plaintiff. Law obtained judgment for £250, and immediately afterwards assigned it to the plaintiff. Willes J held that the assignment was invalid, and this Court dismissed the plaintiff's appeal. Lord Esher MR, with whom Lopes and Rigby LJJ agreed, said at 111 that the law upon the point was clear:

> "In order to preserve the honour and honesty of the profession it was a rule of law which the court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation. That might be said to be on account of the fiduciary relation between the solicitor and the client. But the doctrine was founded upon a higher rule. The responsibility of persons engaged in the profession of the law was very great, and their conduct must be regulated by the most precise rules of honour. The Court thought that, unless the rule was carried out to its fullest extent, there would be a temptation to solicitors which they should not be subjected to. It was useless to say that in the particular case the solicitor was not tempted and that he acted from the most honourable motives. The law was universal that, without considering the motives of the particular solicitor, a solicitor must not persuade his client, or indeed accept from his client a voluntary offer, so as to obtain any advantage dependent upon the result of the litigation which he was then conducting."

27. This rule is recognised by section 59 of the Solicitors Act 1974 (as amended), which provides (so far as relevant, emphasis added):

> "**Contentious business agreements**
>
> (1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a 'contentious business agreement') providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.
>
> (2) Nothing in this section or in sections 60 to 63 shall give validity to—
>
> (a) *any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding*; or
>
> ..."

28. The rule does not depend on whether the assignment is champertous. Counsel for Mr Miller submitted that it was clear from the authorities that the rationale for the rule was the conflict of interest which would arise between the client and the solicitor if the solicitor could negotiate for an assignment of the client's claim, bearing in mind that the solicitor owed the client fiduciary duties. This analysis was not disputed by counsel for CANDEY, and I accept it.

Champerty

29. The third rule is the rule against champerty. As Lord Phillips of Worth Matravers MR delivering the judgment of the Court of Appeal consisting of himself, Robert Walker and Clarke LJJ explained in *R (Factortame Ltd) v. Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, [2003] QB 381 at [31]-[32], a person is guilty of maintenance if they support litigation in which they have no legitimate concern without just cause or excuse. Champerty occurs when a person supports litigation and stipulates for a share of the proceeds of the action or suit. Although champerty was formerly regarded as an aggravated form of maintenance, more recently it has been recognised that there can be champerty without maintenance: see *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25, [2011] 1 WLR 2111 at [55] (Lord Neuberger of Abbotsbury MR, with whom Lloyd and Gross LJJ agreed).

30. Maintenance and champerty used to be both crimes and torts, and thus a champertous agreement was void. Sections 13(1) and 14(1) of the Criminal Law Act 1967 abolished both the crimes and the torts of maintenance and champerty. Section 14(2) provided, however, that this "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." Thus champerty survives as a rule of public policy capable of rendering a contract unenforceable. As such, the observation of Danckwerts LJ in *Hill v Archbold* [1968] 1 QB 686 at 697 is equally applicable to champerty:

> "… the law of maintenance depends upon the question of public policy, and public policy … is not a fixed and immutable matter. It is a conception which, if it has any sense at all, must be alterable by the passage of time."

31. It is because of the rules against maintenance and champerty that, prior to 1990, it was consistently held that solicitors could not conduct litigation pursuant to agreements under which they only recovered their fees if their client was successful or under which they took a share of the proceeds.

32. Thus Buckley LJ said in *Wallersteiner v Moir (No 2)* [1975] QB 373 at 401-402:

> "A contingency fee, that is, an arrangement under which the legal advisers of a litigant shall be remunerated only in the event of the litigant succeeding in recovering money or other property in the action, has hitherto always been regarded as illegal under English law on the ground that it involves maintenance of the action by the legal adviser. Moreover, where, as is usual in such a case, the remuneration which the adviser is to receive is to be, or to be measured by, a proportion of the fund or of the value of the property recovered, the arrangement may fall within that particular class of maintenance called champerty.
>
> … Before such a system were introduced to our legal regime careful consideration would have to be given to its public policy aspect. Notwithstanding the help we have received from

> counsel, this does not appear to me to be a suitable occasion for attempting to investigate that aspect in depth and for arriving at a final conclusion upon it. We should not, I think, make any declaratory judgment in this respect which we have no power to implement. It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations …"

33. Similarly, Oliver LJ said in *Trendtex Trading Corp v Credit Suisse* [1980] QB 629 at 663:

> "There is, I think, a clear requirement of public policy that officers of the court should be inhibited from putting themselves in a position where their own interests may conflict with their duties to the court by the agreement, for instance, of so-called 'contingency fees' …"

34. Likewise, in *Giles v Thomson* [1994] 1 AC 142 at 163 Lord Mustill said:

> "In the most recent decades of the present century maintenance and champerty have become almost invisible in both their criminal and their tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant."

35. In *Awwad v Geraghty & Co* [2001] QB 570 this Court held that it was contrary to public policy for a solicitor to act for a client pursuant to a conditional fee agreement in circumstances which were not sanctioned by the Courts and Legal Services Act 1990 (as to which, see below), and therefore such an agreement would not be enforced. In concurring with Schiemann LJ, May LJ, with whom Lord Bingham of Cornhill CJ agreed, said at 600:

> "I accept … that modern perception of what kinds of lawyers' fee arrangements are acceptable is changing. But it is a subject upon which there are sharply divergent opinions and where I should hesitate to suppose that my opinion, or that of any individual judge, could readily or convincingly be regarded as

> representing a consensus sufficient to sustain a public policy. The difficulties and delays surrounding the introduction of conditional fee agreements permitted by statute emphasise the divergence of view. In my judgment, where Parliament has, by what are now (with section 27 of the Access to Justice Act 1999) successive enactments, modified the law by which any arrangement to receive a contingency fee was impermissible, there is no present room for the court, by an application of what is perceived to be public policy, to go beyond that which Parliament has provided."

36. In *Factortame* Lord Phillips said at [60] that there was "good reason why the principles of maintenance and champerty should apply with particular rigour to those conducting litigation", citing the passage from the judgment of Buckley LJ in *Wallersteiner v Moir* set out above. He went on at [61] to note that in *Awwad v Gerachty* the Court of Appeal had held that there was "no scope for the court to hold that the common law permitted conditional fee agreements that did not conform to the requirements imposed by section 58 [of the 1990 Act]".

37. The law was thoroughly examined by Lord Neuberger in *Sibthorpe v Southwark*. After surveying the authorities, he concluded:

> "40. In my judgment, when it comes to agreements involving those who conduct litigation or provide advocacy services, the common law of champerty remains substantially as it was described and discussed in *Wallersteiner v Moir* ... and *Awwad*'s case …. This is for two main reasons. The first is to be found in the passages in the judgments of Buckley LJ in the former case at … 401, and of Oliver LJ in the *Trendtex* case … 663. The second reason, articulated in *Awwad*'s case … by Schiemann and May LJJ, is that, in section 58 of the 1990 Act (as amended) the legislature has laid down the rules as to which previously champertous agreements may be entered into by those conducting litigation and those providing advocacy services, and which may not.
>
> 41. There is a third reason, at least in my judgment, for this conclusion. As already indicated, there is obvious attraction in the notion that there should be no general rule as to whether an agreement with a person conducting the relevant litigation which involves him benefiting from the success of the litigation, is unlawful, and that each case should be assessed on its merits. However, there is also much to be said for clear rules so that all parties, solicitor and claimant client as well as the defendant, know where they stand rather than waiting for a determination as to the validity of a potentially champertous agreement on the overall merits. There is also 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."

38. Finally, in *Rees v Gateley Wareing* [2014] EWCA Civ 1351, [2015] 1 WLR 2179 this Court held that a contingency fee agreement between the claimants and the defendant firm of solicitors in respect of work done in relation to the recovery of sums owing to the claimants as a result of the sale of property, including work on litigation conducted by another firm of solicitors, under which part of the defendant's charges would be a percentage of the recoveries was unenforceable as being champertous since it did not fall within section 58 of the 1990 Act. As Lewison LJ, with whom Elias and McFarlane LJJ agreed, stated at [33]:

> "Where legislation has provided for conditional fees and contingent fees to be lawful in certain cases, those cases must be taken to be the limits of what is permissible, and the courts should not create any further cases: *Awwad v Geraghty & Co* [2001] QB 570, 593G, 600E; *Factortame Ltd (No 8)*, para 61."

Statutory intervention: conditional fee agreements and damages-based agreements

39. Statute has intervened to make conditional fee agreements and damages-based agreements enforceable where certain conditions are complied with.

40. First, section 58 of the Courts and Legal Services Act 1990 (as substituted by section 27(1) of the Access to Justice Act 1999 and amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012) provides:

> "**Conditional fee agreements**
>
> (1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.
>
> (2) For the purposes of this section and section 58A—
>
> (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances;
>
> (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances; and
>
> (c) references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase.

(3) The following conditions are applicable to every conditional fee agreement—

(a) it must be in writing;

(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—

(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.

(4A) The additional conditions are applicable to a conditional fee agreement which—

(a) provides for a success fee, and

(b) relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.

(4B) The additional conditions are that—

(a) the agreement must provide that the success fee is subject to a maximum limit,

(b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,

(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and

(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.

(5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable."

41. By virtue of article 3 of the Conditional Fee Agreements Order 2013 (SI 2013/689), the percentage specified for the purpose of section 58(4)(c) is 100%. Thus the success fee charged by solicitors cannot exceed 100% of the base costs.

42. Secondly, section 58AA of the 1990 Act (as inserted by the Coroners and Justice Act 2009 and amended by the 2012 Act) provides:

"**Damages-based agreements**

(1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.

(2) But (subject to subsection (9)) a damages-based agreement which does not satisfy those conditions is unenforceable.

(3) For the purposes of this section—

(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.

(4) The agreement—

(a) must be in writing;

(aa) must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;

(b) if regulations so provide, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;

(c) must comply with such other requirements as to its terms and conditions as are prescribed; and

(d) must be made only after the person providing services under the agreement [has complied with such requirements (if any) as may be prescribed as to the provision of information.

(5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.

(6) Before making regulations under subsection (4) the Lord Chancellor must consult—

(a) the designated judges,

(b) the General Council of the Bar,

(c) the Law Society, and

(d) such other bodies as the Lord Chancellor considers appropriate.

(6A) Rules of court may make provision with respect to the assessment of costs in proceedings where a party in whose favour a costs order is made has entered into a damages-based agreement in connection with the proceedings.

(7) In this section—

'payment' includes a transfer of assets and any other transfer of money's worth (and the reference in subsection (4)(b) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);

'claims management services' has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act).

(7A) In this section (and in the definitions of 'advocacy services' and 'litigation services' as they apply for the purposes of this section) 'proceedings' includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

> (8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).
>
> (9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable.
>
> (10) For the purposes of subsection (9) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.
>
> (11) Subsection (1) is subject to section 47C(8) of the Competition Act 1998."

43. By virtue of regulation 4(3) of the Damages-Based Agreement Regulations 2013 (SI 2013/609), a damages-based agreement must not provide for a payment above an amount which is equal to 50% of the sums ultimately recovered by the client.

The judge's judgment

44. In his judgment the judge noted that CANDEY did not contend that the Assignment was either a conditional fee agreement or a damages-based agreement within the 1990 Act as amended. He proceeded to analyse CANDEY's argument before him as involving two alternative contentions, a broad contention and narrow contention. The broad contention was that the Assignment was not champertous because it was in the public interest since it was similar in effect to a damages-based agreement. The narrow contention was that the Assignment was not champertous because it was preceded by the DBA and did no more than enable Mr Farrar's claim against Mr Miller to be continued in circumstances where Mr Farrar was impecunious.

45. The judge rejected CANDEY's broad contention for the reason he expressed at [35] as follows:

> "In my judgment, [the judgment of Lord Neuberger in *Sibthorpe v Southwark*] is a fatal (and on me binding) answer to Candey's 'broad' contention. As Lord Neuberger has made clear, there is now a very hard distinction between potentially champertous transactions between non-lawyers and potentially champertous transactions involving a lawyer. The former cases are considered according to the broad and flexible standard articulated in paragraph 34(1) above. The latter cases are assessed according to an altogether different standard: they are either sanctioned by statute or they are not; and if they are not, the common law does not ride to the rescue. In this case, the Assignment is not sanctioned by the 1990 Act and - assuming it to stand alone - clearly fails as a champertous transaction."

46. The judge rejected CANDEY's narrow contention for two reasons. First, he held at [58] that "the Assignment creates a very marginal benefit in terms of access to justice, against a number of very real issues in terms of undermining the purity of justice". The benefit flowed from the fact that, under the DBA, Mr Farrar was responsible for disbursements other than counsel's fees ([43]-[45]). The issues were as follows: (i) control of the litigation would pass from Mr Farrar to the lawyers conducting the litigation who had no legitimate interest in pursuing the claim apart from recovering their own fees; (ii) the Assignment improved CANDEY's position with respect to the recovery of its fees compared to its position under the DBA, in particular because: (a) it covered the Other Litigation Hourly Rate costs which were not covered by the DBA; (b) Mr Farrar would lose his right to have CANDEY's costs assessed by the court under section 70 of the 1974 Act; and (c) there was a risk that the Assignment would alter the priority of recoveries that would otherwise pertain under the DBA, in particular because it eliminated the risk that CANDEY would recover less than its entitlement under the DBA due to Mr Miller taking an assignment of the debts owed by Mr Farrar to Galleondeal and Leongreen and setting them off against any damages awarded to Mr Farrar ([54]).

47. Secondly, the judge held at [57] that, in any event, the reasoning of Lord Neuberger in *Sibthorpe v Southwark* and of Lewison LJ in *Rees v Gateley Wareing* applied with equal force to a transaction which, like the Assignment, replaced a 1990 Act-compliant damages-based agreement, but which was not itself so compliant.

The appeal

48. CANDEY appeals on two grounds. The first is that the judge applied the wrong test to determine the validity of the Assignment, and that the test he should have applied was to ask whether CANDEY had a genuine commercial interest in taking the Assignment and enforcing the claim for its own benefit, that being the test applied to transactions with parties other than lawyers in *Trendtex*. The second is that, even if the judge applied the correct test in asking whether the Assignment was contrary to public policy, he was wrong to conclude that it was.

49. Counsel for CANDEY did not pursue the first ground in his oral submissions. He accepted that *Trendtex* was authority for the proposition stated in paragraph 22 above, and that it did not provide an answer to the problems that the Assignment was an assignment of a claim from a client to the solicitors who had been acting for the client and that on its face it was champertous.

50. As for the second ground of appeal, the gravamen of counsel for CANDEY'S argument was that the Court should recognise that, in the light of the statutory interventions in this area, it was no longer contrary to public policy for an assignment like the Assignment to be entered into. Common law rules based on public policy were susceptible of modification when modern conceptions of public policy changed, as illustrated by the decision of the House of Lords in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 abrogating advocates' immunity from suit. Counsel emphasised that the distribution of recoveries under the Assignment was essentially the same as under the DBA, which was permitted by the 1990 Act. The 1990 Act showed that it was no longer contrary to public policy for solicitors to receive up to 50% of the proceeds of claims, because it was now recognised that such agreements promoted access to justice. The Assignment did not, counsel contended, enlarge the benefit to CANDEY

from pursuing the claim compared to the DBA; on the contrary, Mr Farrar's estate would be better off assuming that CANDEY's construction of clause 3.1(b) was correct. Furthermore, in so far as the public policy against champerty had been based on concerns about solicitors potentially acting in a manner that was inconsistent with their position as officers of the court, this was no longer a real concern because the solicitors' profession was now a tightly regulated one. In any event, such concerns had not prevented damages-based agreements being allowed by the 1990 Act. In so far as the public policy against solicitors taking assignments of their clients' claims had been based on concerns about a conflict of interest between client and solicitor, again this was no longer a real concern due to the regulation of the profession. The potential for such a conflict of interest was present in a damages-based agreement, and yet such agreements were permitted under the 1990 Act. Furthermore, in this case Mr Farrar had been advised to take independent advice. As for the interests of creditors of Mr Farrar, such as Mr Miller, these were adequately protected by provisions of the 1986 Act, including section 423.

51. I do not accept this argument for two reasons, each of which can be shortly stated. The first is that this Court is bound by its previous decision in *Pittman v Prudential* that a solicitor acting for a client in legal proceedings may not validly take an assignment of the client's cause of action prior to judgment. The second is that this Court is bound by its previous decisions in *Awwad v Gerachty* and *Rees v Gately Wareing*, reinforced by the powerful obiter dicta in *Factortame* and *Sibthorpe v Southwark*, that a champertous agreement not sanctioned by the 1990 Act remains contrary to public policy and is therefore unenforceable.

52. When confronted with the problem of precedent during the course of argument, counsel for CANDEY's response was to argue that this Court was not bound by its own precedents in circumstances where statute demonstrated that the underlying public policy had changed. He was unable to cite any authority in support of this submission, however. In any event, *Awwad v Gerachty* and *Rees v Gateley* are recent decisions of this Court which establish that there has been no relevant change in public policy. Even if it was open to this Court to depart from the previous authorities, I would not do so. I consider the reasoning in those cases and in *Factortame* and *Sibthorpe v Southwark* to be entirely convincing. Section 58(1) of the 1990 Act is explicit that conditional fee agreements that do not comply with all the relevant conditions are unenforceable. The same is true of section 58AA(2) of the 1990 Act and damages-based agreements. It is no answer to this point that the Assignment is neither a conditional fee agreement nor a damages-based agreement: what section 58(1) and section 58AA(2) show is that Parliament, being well aware of the common law rules, decided to go so far towards relaxing them as sections 58 and 58AA provide and no further.

53. In those circumstances it is not necessary to decide whether the judge was correct to conclude on the facts of this case that the Assignment was offensive to justice. I would merely observe that it is far from obvious to me that his concerns were misplaced.

Conclusion

54. For the reasons given above I would dismiss this appeal.

Lord Justice Phillips:

55. I agree.

Lady Justice Simler:

56. I also agree.