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Pactum de quota litis/Contingency Fees/Conditional Fees

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In England and Wales, the "conditional fee" is a matter of practical and political reality rather a matter for esoteric ethical debate.

I will, therefore, first, describe briefly the recent history of the conditional fee and, the present factual position in England and Wales before going on to consider the ethical issues.

The recent history begins with the Report of the Civil Justice Review Body (Cm 394; June 1988). It recommended that "the prohibition on contingency fees and other forms of incentive scheme should be open to re-examination".

In January 1989 the Government published a Green (consultative) Paper on Contingency Fees (Cm 571) and invited comments on the desirability of relaxing restrictions to permit the charging of contingency fees.

In July 1989, the Government published a White Paper (Cm 740) called "Legal Services: A Framework for the Future". In describing the response to the Green paper it stated:-

"There was .... little objection to the proposal that arrangements following the model of the Scottish speculative action (payment of normal fees only if successful) should be allowed in England and Wales, and some support for the proposition that the client and his lawyers should be able to agree an uplift to those costs when acting on this basis."

Legislation enabling Conditional Fees Agreements was passed through the British Parliament, under a Conservative Government, in Section 58 of the Courts and Legal Services Act 1990. The ostensible reason for this was concern that "middle income" groups who did not qualify for Legal Aid on financial grounds, but who had meritorious cases, were deterred from bringing those cases by fear of the cost and, in particular, by fear of the liability for the defendant's costs should they lose.

Section 58, specifically, permits an advocate or litigator, in respect of specified proceedings, to enter into a written agreement with the client by which he receives an enhanced fee if the case is won and a reduced fee (or no fee at all) if the case is lost, provided that the amount of the enhancement is expressed as a percentage of the fee which he would have charged if there had been no conditional fee agreement.

After a period of consultation, secondary legislation specifying the proceedings in respect of which conditional fees were permitted was enacted by the Conditional Fee

Agreements Order 1995 (S.I. 1995 No 1674) and the Conditional Fee Agreements Regulation 1995 (S.I. 1995 No 1675) which came into force on 5<sup>th</sup> July 1995.

The Order specified three types of proceedings for which conditional fees would be permitted. They are proceedings:-

- a. for personal injuries
- b. by companies in administration or winding up or by their administrators or liquidators and by trustees in bankruptcy
- c. before the European Commission of Human Rights and the European Court of Human Rights.

The Regulations deal with the contents of the agreement and, in particular, require it to be in writing and signed by the client and the solicitor.

At the same time, the Law Society amended the Practice Rules affecting solicitors. Practice Rule 8 now reads:-

- "(1) A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingency fee in respect of that proceeding.
- (2) Paragraph (1) of this rule shall not apply to a conditional fee agreement relating to specified proceedings as defined in Section 58 of the Courts and Legal Services Act 1990 provided the agreement complies with all the requirements of that section and any order made thereunder.
- (3) Paragraph (1) of this rule shall not apply to an arrangement in respect of an action, suit or other contentious proceeding in any country other than England and Wales to the extent that a local lawyer would be permitted to receive a contingency fee in respect of that proceeding."

Further guidance to the profession in respect of permitted conditional fee agreements includes:-

1. Conditional fees are an alternative to – not a replacement for - Legal Aid (if it is available).. A solicitor has an obligation to discuss with a client eligible for legal aid whether he should apply for legal aid or pursue his case under a conditional fee agreement.
2. The maximum percentage by which a normal fee may be increased under a conditional fee agreement is 100%.
3. A Model form of agreement is published by the Law Society. Use of it is not mandatory.
4. "It is fundamental to the relationship between solicitor and client that a solicitor should be able to give impartial and frank advice to the client free from any external or adverse pressures or interests which would destroy the

solicitor's independence, the fiduciary relationship with the client or the client's freedom of choice."

5. "Because of the fiduciary relationship which exists between solicitor and client, the solicitor must not take advantage of the client. In considering, therefore, whether a conditional fee agreement would be appropriate in the circumstances of any particular case, a solicitor should take care to ensure that his or her financial interests are not placed above the general interests of the client."
6. "Should the client opt to proceed on a conditional fee basis the contents of the agreement should be clearly explained and care must be taken to ensure that the terms of the agreement are fair and reasonable in the circumstances"
7. "Solicitors should always consider their overriding duty to act in the best interests of the client in achieving a suitable settlement for the client irrespective of the solicitor's own interest in receiving early payment of costs in accordance with the agreement. "

Amendments to the Rules of the Supreme Court allow the courts to review the amount of the uplift in a conditional fee agreement and to reduce it.

That, then, is a very quick account of the present position in England and Wales. Conditional fees have arrived and, I am convinced, are with us to stay.

The reaction of the profession to these changes has been mixed.

The Law Society, recognising that the introduction of conditional fees was inevitable, co-operated with Government to frame regulations to help to make them work.

Individuals in the profession have mixed views. Some are unqualified enthusiasts arguing that conditional fees will improve access to justice for middle income groups and that it is good for the lawyer/client relationship for the client to feel that the lawyer has a personal interest in the outcome of a case.

Others are less enthusiastic. Some (although, in my judgement, they are a relatively small minority in the profession) are opposed to conditional fees as a matter of principle. Others argue that there are still problems in a conditional fee environment which have yet to be solved and that it is too early to say that they are a success - or that whatever success they may have had in the context of personal injury claims is not a guarantee that they will work in other fields.

There are, however, very few solicitors, to my knowledge, who are prepared to argue that conditional fees are so objectionable on ethical grounds that solicitors generally should have nothing to do with them. Accordingly, the vast majority of solicitors are now reconciled to the fact that, if they want to stay in business, they must be prepared to undertake work on a conditional fee basis.

The story in England and Wales does not, I am afraid, end there.

As soon as the Conservative Government in 1990 enacted legislation paving the way for conditional fees, the profession suspected that the Lord Chancellor's "hidden agenda" was to save money on the Legal Aid Budget by replacing Legal Aid with conditional fees. That suspicion has now become a reality under Lord Irvine, the Lord Chancellor in the new Labour Government. He has proposed that:-

- a. conditional fee agreements be extended to cover all money claims in the civil courts; and
- b. that, at the same time – or soon afterwards - , legal aid be withdrawn from all types of claim for which a conditional fee agreement is available.

This proposal has been met with alarm both in the profession and outside.

The arguments which are now being deployed may be summarised as follows:-

1. The reason for the success of conditional fees in personal injury cases is the high success rate of such cases. This has meant that the insurance industry has been willing to sell insurance against the risk of losing at a premium which even the most impecunious plaintiff can afford - or, if he can't, his solicitor might pay for him. The premium is less than £100 for a personal injury claim arising out of a road traffic accident and £165 for personal injury claims in all other cases.
2. This will not be the case in other fields of work. Much concern has been expressed, for example, about medical negligence cases where the lawyer must invest a great deal of time and effort in the preliminary investigation of the case before being in any position to advise on the merits of it - let alone take a commercial decision as to whether he wants to run the case on a "no win, no fee" basis.
3. Conditional fees in "heavyweight" cases do run the risk of getting in the way of the independence and objectivity of the lawyer. This objection does not apply to "routine" personal injury work.
4. Lawyers will not be able to afford the change. At present, if their client is on legal aid, they can deliver interim bills – for both costs and disbursements - to the Legal Aid Board as the case proceeds. Under a "no win, no fee" arrangement they get paid nothing until the case is finished. This will have a massive and detrimental effect on the cash flow of the solicitor's practice as a business.
5. Plaintiffs will still be deterred in "heavy" cases from pursuing their rights because of the risk of losing and being liable for the costs of the defendant. The insurance industry have, so far, not shown much enthusiasm for offering insurance against this risk in anything other than personal injury cases where the risk is low. A typical premium quoted for insurance against the risk of losing a medical negligence claim is £6,000. Very few potential plaintiffs can afford that, and, of those who can, few may be willing to risk it.

6. Therefore, legal aid for such cases should be retained. Otherwise, members of the public with meritorious cases will be denied access to justice because they cannot afford to finance them.

The arguments on these matters continue as we speak. However, in my view, the likelihood is that, eventually, the Lord Chancellor will have his way and will withdraw legal aid for all civil money claims and leave the marketplace to work out whether such claims can successfully be funded on a conditional fee basis. We shall have to wait and see. However, the fact that conditional fees are with us for personal injury claims is a matter of fact which I would regard as irreversible - with respect to whatever resolutions may or may not be passed at conventions of lawyers such as this one.

Before, finally, getting to the ethical considerations which are at the heart of this meeting, there is one other recent development in England to which I would wish to draw attention. It is the attitude of the judiciary.

Recently, our Court of Appeal has had to determine the question whether a contingency fee agreement (NOT a conditional fee agreement) is, as a matter of law, (NOT as a matter of professional conduct) against public policy and, therefore, unenforceable. The agreement in question was one in which the lawyer simply agreed to charge nothing if the case was lost. He was not looking for an increased fee if the case was won. The agreement was not a permitted conditional fee agreement because the proceedings to which it related did not fall within the specified three types of case in which such agreements are permitted. The Court upheld the agreement although precedent would have suggested that such an agreement was, as a matter of law, against public policy.

What is more interesting than the decision in this case is what the Court said in reaching it. It recognised that a contingency fee arrangement was prohibited by the Solicitors Practice Rules, but said:-

"The fact that a professional rule prohibited a practice did not of itself make the practice contrary to law. ... Moreover, the Solicitors Rules were based on a perception of public policy derived from judicial decisions the correctness of which was in question in the present appeal ... It was time to consider the matter afresh in the light of modern conditions".

The Court adopted three propositions:-

- "1. If it was contrary to public policy for a lawyer to have a financial interest in the outcome of a suit that was because, and only because, of the temptations to which it exposed him. At best he might lose his professional objectivity; at worst, he might be persuaded to pervert the course of justice.
2. There was nothing improper in a lawyer acting in a case for a meritorious client who to his knowledge could not afford to pay his costs if the case was lost. Not only was that not improper, it was in accordance with current notions of the public interest that he should do so.

3. If the temptation to win at all costs was present at all, it was present whether or not the lawyer had formally waived his fee if he lost. It arose from the knowledge that in practice he would not be paid unless he won."

The final quotation which I will give from this case is as follows:-

"It was, in his Lordship's judgment, fanciful to suppose that a solicitor would be tempted to compromise his professional integrity because he would be unable to recover his ordinary profit costs in a small case if the case was lost. Solicitors were accustomed to withstand far greater incentives to impropriety than that.

Current attitudes to these questions were exemplified by the passage into law of the Courts and Legal Services Act 1990. That showed that the fear that lawyers might be tempted by having a financial incentive in the outcome of litigation to act improperly was exaggerated and that there was a countervailing public policy in making justice readily accessible to persons of modest means." (Thai Trading Co (a Firm) v Taylor The Times 6<sup>th</sup> March 1998)

So, with that very long introduction, I can now turn to the issue raised by the resolution before this meeting as to whether or not conditional fees are, or ought to be, prohibited by its terms.

I must start that analysis by trying to distinguish between a contingency fee, a conditional fee and a pactum de quota litis.

I adopt, as a definition of a contingency fee words from The Guide to the Professional Conduct of Solicitors (Seventh Edition 1996):-

"A contingency fee is any sum (whether fixed, or calculated as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution or defence of any action, suit or other contentious proceeding. The fact that an agreement further stipulates a minimum fee in any case, win or lose, will not prevent it from being a contingency fee." (14.05.1 at p 236),

This is, obviously, a much wider definition than what we might call the European perception of an American contingency fee. It is an arrangement by which the lawyer gets paid nothing if he loses and takes a percentage of the damages if he wins. The fee bears no relation to the amount of work which the lawyer has actually done. He gets paid the same fee whether the case is settled after writing a single letter or proceeds to a fully contested trial.

On the English definition of a contingency fee which I have quoted, a conditional fee is a particular type of contingency fee under which the enhancement "payable only in the event of success" is related to the amount of work the lawyer does. He gets an additional fee, under English regulations, no more than doubling what he would have been paid on the traditional basis.

For the definition of a pactum de quota litis, I rely on paragraph 3.3.2 of the CCBE Code. It is "an agreement between a lawyer and his client entered into prior to final conclusion of the a matter to which the client is a party, by virtue of which the client

undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon conclusion of the matter".

The Commentary on the CCBE Code says:-

"The provisions are not intended to prevent the maintenance or introduction of arrangements under which lawyers are paid according to results or only if the action or matter is successful provided that these arrangements are under sufficient regulation and control for the protection of the client and the proper administration of justice."

I would draw the following conclusions from this analysis:-

1. The features of contingency fees on the American model which we, in Europe, should find objectionable are first, that the fee is calculated directly as a percentage of the damages and, secondly, that the fee bears no relationship to the amount of work actually done.
2. Conditional fees suffer from neither of these objectionable features.
3. It is not, per se, objectionable for a lawyer to enter into an arrangement whereby he is paid nothing if he loses. That condition is, significantly, not included in the definition of a pactum de quota litis. It is, as Lord Justice Millett said in the Thai Trading Case, a sham to suggest that it is improper to enter into a formal agreement to charge nothing if a case is lost, whilst tolerating a situation in which a lawyer takes on cases knowing that, in fact, he will not get paid unless he wins, because the client simply does not have the means to pay him. The temptations to which the lawyer is subject are exactly the same in both cases.
4. A conditional fee is not a pactum de quota litis. It does not involve the lawyer "sharing in the result" of the matter. In any event, it is permitted by the commentary to the CCBE Code as an arrangement which is sufficiently regulated to protect the interest of the client and the administration of justice.

It must be a truism that, for a lawyer's practice to survive as a business, if a lawyer enters into any arrangement with a client whereby his fee will be greater if he wins and less if he loses:-

- a. His fee if he wins must be more than he would have charged had he not entered into the arrangement (to reflect the risk he takes that he will be paid less – or nothing - if he loses); and
- b. His fee if he loses must be less than he would have charged had he not entered into the arrangement (to reflect the risk which the client takes of paying a premium to the lawyer if the case is won).

Therefore, whether under a contingency fee or a conditional fee or a pactum de quota litis, there is always a commercial incentive on the lawyer to win the case.

The ethical question must be "At what point does the "incentive" referred to become a "temptation" to win at all costs so damaging the objective nature of the lawyer's duty to advise his client and, in extreme cases, possibly damaging the interests of justice?".

The English Courts have answered that question by indicating, at least in a case where the lawyer gets paid nothing if he loses and a standard fee if wins, that the lawyer's integrity can be relied upon to protect the interests both of the client and of justice.

The British Parliament has gone further and reached the same conclusion in a case where the lawyer gets nothing if loses and an enhanced fee if he wins, provided the enhancement is no more than a doubling of the standard fee and is not calculated as a percentage of the damages.

These, as I have said, are, in England and Wales, matters of law and not ethics.

I cannot, as a humble English solicitor, say that that which the Courts and Parliament have declared to be lawful is, nevertheless, unethical.

The resolution before us today appears to be confused as to what is, or is not, objectionable about any arrangement between lawyer and client providing for a bigger fee in the event of success and a smaller fee (or no fee at all) in the event of failure.

It does not disapprove of all such arrangements altogether (para 3), but it does favour retention of the prohibition of the pactum de quota litis (para2).

For my part, I would suggest that the most objectionable feature of any arrangement between lawyer and client is one by which the lawyer is paid a share of the damages. A conditional fee agreement does not offend that principle.

Para 4 of the resolution suggests that, if an arrangement is to be regarded as not objectionable, it must provide for a basic level of fee and for payment of the disbursements by the client. A conditional fee agreement does not comply with either of these tests.

I, therefore, conclude that conditional fees are, at least, against the spirit of that paragraph of the resolution if not against the letter of it. It is not sensible for any lawyer to vote to say that that which his domestic Courts and legislature have declared to be lawful in his country - and which many of his colleagues are doing daily in their practising lives - is unethical. For that reason alone, if the words of the resolution remain precisely in their present form, I would, on behalf of my Society, be compelled to abstain on any vote on the resolution as a whole.