In the Supreme Court of St. Helena

Nos: SHSC 531/2024 & 507/2024 & 510/2024 & 512/2024

Civil

Ruling on Conditional Fee Arrangements and Costs

RAYMOND HERNE
(A PERSONAL REPRESENTATIVE OF JOYCELYN HERNE DECEASED)
Proposed Plaintiff

- V –

THE ATTORNEY GENERAL OF ST HELENA ON BEHALF OF THE CROWN (HEALTH DIRECTORATE)
Proposed Defendant

(1) PHILIP YON

&

(2) JEREMY CAIRNS-WICKS

&

(3) TONY THOMAS

Plaintiffs

-V-

ATTORNEY GENERAL

Defendant

Judgement dated 19 July 2024

The Chief Justice Rupert Jones sitting with Acting Judge of the Supreme Court, Duncan Cooke:

1. This judgment follows a hearing on 4 July 2024 before a Divisional Court of the Supreme Court of St Helena consisting of the Chief Justice and the Chief Magistrate acting as Judge of the Supreme Court. It concerns the funding of legal representation in two separate actions, specifically by way of conditional fee arrangements (CFAs).

2. The first action is a proposed plaint (claim) brought by Raymond Herne, proposed plaintiff, as personal representative for Joycelyn Herne in respect of alleged medical negligence of the Health Directorate.

3. The second action is brought by six plaintiffs who have issued plaints (claims) alleging constitutional breaches relating to their time as prisoners in HMP Jamestown. All six plaintiffs seek the joinder of their plaints. However, before that application can be determined, Messrs Yon, Cairns-Wicks and Thomas, three of those plaintiffs said to be currently without funding, seek the court's approval to enter into CFAs to fund their legal representation.

4. The issue for this court to decide is whether, and to what extent, the plaintiffs can fund their counsel by use of a CFA. Our ruling seeks to provide guidance on the use of CFAs and costs in civil proceedings.

5. Mr Hitchens appeared as counsel for the plaintiffs and Mr Gareth Rhys appeared on behalf of the Attorney General. The Attorney General, understandably adopted a neutral approach on the applications because of his role as Defendant or proposed Defendant in proceedings. However, the Court had invited him to participate in order to assist the court on the matters of principle being considered.

6. We are grateful to both counsel for their assistance and submissions which have enabled us to make our decision.

The Proceedings

7. In the first action, Mr Hitchens appeared as counsel only for the purposes of the pre-action application for the court to approve the CFA to be entered into. Other counsel has been instructed by the Public Solicitors Office ('PSO') in respect of the proposed plaint - to draft the Particulars of Claim and Schedule of Loss on behalf of the

Plaintiff. Counsel's estimate of fees is £3,000 and £1,000 has been granted in Legal Assistance Fund ('LAF') funding. Counsel has agreed to accept an initial payment of £1,000 and thereafter work on a CFA. As the plaint (claim) has not been issued, and cannot be issued until counsel has drafted the pleadings, which will require PSO to enter the CFA, the PSO is unable to issue a formal application within the claim.

8. The three Plaintiffs in the second action have issued proceedings before the St Helena Supreme Court claiming breach of constitutional rights during their time as prisoners in HMP Jamestown. The Public Solicitors Office have been instructed and they in turn have instructed Mr Hitchens of counsel. LAF funding has been granted in relation to three of the six plaintiffs. The issue is whether Mr Hitchens is permitted to represent the remaining Plaintiffs in the substantive proceedings under CFAs.

Costs and Conditional Fee Arrangements

9. Costs in civil proceedings in St Helena are provided by section 20 of the Civil Procedure Ordinance 1968 as follows:

(1) Subject to any prescribed conditions and limitations, and to any law in force, the costs of and incidental to all causes, matters and issues are in the discretion of the court and the court has full power to–

a) decide by whom and out of what property and to what extent the costs are to be paid; and

b) give all necessary directions for that purpose aforesaid.

(1A) The fact that the court has no jurisdiction to try the cause or matter is no bar to the exercise of the powers conferred by subsection (1), but the costs of any cause, matter or issue must be awarded to the party in whose favour the judgment or order in the cause, matter or issue is pronounced or made unless the court, for reasons to be recorded in writing, otherwise orders.

(2) The court may order interest on costs to be paid at any rate not exceeding 6% per annum and the interest must be added to the costs and are recoverable as such.

10. Section 20 gives the court very wide powers in dealing with costs and litigants quite rightly require some assistance from the courts as to how costs be approached.

11. In *Attorney General v Chapman* dated 14th May 2014 ('*Chapman*') the former Chief Justice Charles Ekins gave guidance on the awarding of costs in civil proceedings. At paragraphs 5 to 10 of this ruling he made the following remarks:

> 5. Before I deal with the Public Solicitor's application itself, I propose to try to give guidance as to how costs as a matter of general principle should be approached by the Courts of St Helena and Ascension Island. I am not aware that such guidance has been given in the past-certainly the issue has not come before me as Chief Justice.
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> 6. In England and Wales, where parties are not legally aided generally costs will follow the event although ultimately it is a matter within the discretion of the trial judge. That is not to say that all costs incurred by the successful party will be recovered. In more straightforward cases the trial judge at the conclusion of the hearing will assess costs, disallowing those considered to be unreasonable, unnecessarily incurred or excessive. In more complex cases, and in the absence of agreement between the parties, costs will be taxed at a separate post hearing taxation hearing.
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> 7. I have given careful thought as to whether a similar approach is appropriate to St Helena. I am clear that it is not. St Helena is very different to England and Wales in many respects, not least in terms of the affluence of St Helena's residents. Even in England and Wales aspiring litigants who do not qualify for legal aid and who cannot find a solicitor to undertake their case on a contingency fee basis are often deterred from seeking redress, however good their cases, through fear of ruin should the case in fact fail, and they be ordered to pay costs. The theoretical principle of access to justice for all is thus in reality often illusory. Were this approach to be adopted on St Helena, then this illusion would be exacerbated many times over and the fear of costs might well effectively deny to all but a very small minority of residents of St Helena the undeniably desirable right of access to justice for all.
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> 8. For the future, therefore, Courts should be loathe to make orders for costs against the unsuccessful party in civil litigation where the issue of costs might otherwise arise. Costs orders should only be made where one or other party has acted in a patently unreasonable fashion either in pursuing a wholly unreasonable claim or in maintaining an unsupportable defence. An order for costs should also be considered where one party has refused an offer made without prejudice save as to costs and subsequently recovers less than the offer made, or declines to accept a payment into court in circumstances where the award subsequently is less than the amount paid in. Even in these circumstances, however, each case will turn upon its own facts.

9. I am aware that this approach may give rise to hard cases. There may be cases for example where a successful litigant has privately funded the cost of an expert to assist whose fees will thus diminish the amount actually received by the litigant in his/her pocket. Careful thought will therefore have to be given as to whether the expert is in fact needed or whether a joint expert, instructed by both parties should be engaged to minimise such costs. The fact that such cases may arise however, seem to me to be outweighed by the general undesirability that a vast swathe of the population of St Helena should feel deterred from seeking proper redress through a fear of costs.

10. This approach should not be taken as set in stone for all time. If as hoped, the advent of the airport sees the St Helena economy develop rapidly and promotes the arrival of commercial lawyers on St Helena then no doubt a change will become necessary. For the time being however, the Courts should be guided by the principles outlined above.

12. The principle that everyone should have access to the courts regardless of financial circumstances is fundamental to ensuring the right of access to justice[1] and one we very much endorse. The lack of affluence of St Helena residents is still very much a factor in 2024 as it was in 2014. That litigants should be able to commence proceedings after having taken good quality advice without fear of a costs order being made against them in most circumstances promotes the fundamental principle of access to justice that this court strives to maintain.

13. It is also right that having availed themselves of this protection against an award of costs, that litigants who behave unreasonably, or do not accept reasonable offers of settlement that they then do not go on to better, should no longer have that protection.

14. The former Chief Justice made it clear that this approach should not be set in stone and with economic development circumstances may change. It is a sad fact that the economy has not developed to any great extent in the past 10 years. St Helena is still a relatively poor territory. The median wage in 2014/15 was £8,060 yet in 2022/3 it was £9,970. GDP per capita in 2021/22 was £8,850. In the UK, where many of the lawyers

[1]See *Unison* and our reasons given at paragraphs 21 and 22 below. It is a precondition of the right to a fair trial enshrined in section 10(10) of the Constitution: '(10) For the determination of the existence or extent of his or her civil rights and obligations, every person shall have the right to a fair hearing within a reasonable time before an independent and impartial court, tribunal or other authority established by law.' This subsection gives local effect to article 6(1) of the European Convention on Human Rights.

who practice in St Helena come from, it was £33,497. It is uncontroversial to note that St Helena is also going through a period of significant pressure on its public finances. The time envisaged by the Chief Justice in paragraph 10 of *Chapman* is, unfortunately, a long way off.

15. The decision in *Chapman* was revisited in *Bakos and others v Attorney General SHSC 511/2016, 551/2015 & 524/2016* decided on 28 September 2016 ('*Bakos*'). *Bakos* addressed the applicability of CFAs to St Helena.

16. In summary, the Chief Justice Charles Ekins decided in *Bakos* that CFAs are applicable to St Helena as an exception to the general rule on costs but with some modifications. Firstly, that they would only be available for personal injury cases where the instruction of an expert or experts is necessary for the pursuit of the claim; secondly the defendant must be either the Attorney General or insured; thirdly that there should be no success fee charged; fourthly that the litigant should have a reasonable claim but funding not be available from the Legal Assistance Fund.

17. The former Chief Justice expressed the view that in reality such cases would be very limited, that the first port of call should always be the Public Solicitor and if a litigant chose to instruct an offshore lawyer under a CFA then whether it would be reasonable to do so would be the subject of rigid scrutiny if Qualified One-Way Cost Shifting (QOCS)[2] were to apply.

18. The Judge's reasoning was as follows:

> The issues raised by this application are of fundamental importance to the question of access to justice on St Helena. It may well be that there have never before been civil claims before the

[2] Qualified one way costs shifting (QOCS) was introduced in the UK in April 2013 in respect of personal injury claims.

In a nutshell where the claimant is awarded damages and interest, enforcement of any costs award in the defendant's favour, usually orders for costs following interim applications or failing to beat a Part 36 offer made by the defendant, can be enforced up to the level of damages and interest awarded to the claimant.

If the claimant is unsuccessful with a claim for personal injury the claimant will not be liable for the defendant's costs.

Supreme Court of the sort that are now before the Court which is why these issues have not previously been addressed.

I am very mindful that it is not for the Court to usurp the function of Legislative Council. However, Section 20(1) of the Civil Procedure Ordinance is very clear: "the costs of and incidental to all causes and matters and issues shall be in the discretion of the Court and the Court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid…" The Civil Procedure Ordinance is also an instrument of Legislative Council and unequivocally the power to award and determine costs is within the Court's "full" power. The Section does not seek to limit the Court's power by reference to any other enactment. In determining what may or may not be appropriate in terms of the regime adopted by the Court of how costs are to be awarded and what is reasonable in terms of the costs awarded, I do not consider that the Court would be usurping the function of Legislative Council. Indeed, if the Court were to be circumscribed in the way contended for by Mr Channer, there would be the potential for serious injustice. The Attorney General's Chambers are not circumscribed in the level of expertise sought on any given matter, nor, so far as I am aware, reliant upon the LAF for funding decisions or rates of funding in any given case. The prospect arises therefore, of a considerable inequality of arms where litigation is pursued against the Attorney General. Of itself, this might be sufficient to engage Section 10(10) of the Constitution irrespective of the additional submissions made by Mr Willems in this respect which I am satisfied are also valid. The Public Solicitor and litigants must have the same ability as the Attorney General to seek relevant expertise of a similar quality in appropriate cases irrespective of the rates by which the LAF may from time to time be guided by.

In the circumstances, I am satisfied that the QOCS system is the system by which the Courts should be guided in any claim for personal injury where the instruction of an expert or experts is necessary for the pursuit of a claim and where either the defendant is protected by indemnity insurance or where the Attorney General is the defendant to the proceedings. As Mr Willems points out the QOCS system has safeguards against the pursuit of fraudulent or frivolous claims or the continued pursuit of a claim in the face of an offer which is reasonable. Furthermore, the Courts will be vigilant to ensure that any costs incurred are reasonable and in determining what is reasonable the Courts will consider both whether expert evidence is in fact necessary and whether adequate expertise could have been obtained more cheaply given the nature and seriousness of the claim.

I consider next the question of CFAs and whether they have been imported into St Helenian law by virtue of Section 58 of the Courts and Legal Services Act 1990. I have found this

question more difficult. The 1990 Act permitted, inter alia, a success fee which have since been abolished under legislation which post-dates 1st January 2006 and which has not therefore been incorporated into St Helenian law. Success fees were abolished for good reason and would not be appropriate in any event to local circumstances on St Helena. However, it seems to me that there are circumstances, albeit very limited, in which CFAs, absent any provision for a success fee, could be both suitable and applicable to St Helena. Those circumstances would arise where a litigant had a reasonable claim but where for example the LAF was unwilling or unable to provide the necessary funding to pursue the claim. In those circumstances the Public Solicitor would be of limited assistance unless the litigant had sufficient funds to pay the costs up front. The litigant in those circumstances would be able nevertheless to pursue the claim under a CFA. In the circumstances I am satisfied that CFAs are suitable and applicable to St Helena but only to a very limited extent. The English Law Application Ordinance provides that the English law will apply where suitable and applicable to local circumstances "subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary." A CFA, as introduced by the 1990 Act is, I am satisfied, suitable and applicable to St Helena but modified and adapted in the following ways: that it makes no provision for a success fee and is limited to personal injury cases where the instruction of an expert or experts is necessary for the pursuit of the claim and where the defendant is either protected by indemnity insurance or where the Attorney General is the Defendant to the proceedings.

In reality the use of CFAs will be very limited. The Public Solicitor should almost always be the first port of call in cases such as these. A CFA should only subsequently become necessary if there is difficulty in funding through the LAF. If a litigant nevertheless chooses as a first option to instruct an offshore lawyer under a CFA then whether it is reasonable or not to have done so will be the subject of rigid scrutiny under the QOCS system.

19. Having heard the submissions of Mr Hitchens, who appears for the Plaintiffs, we have looked again at *Bakos*.

The Submissions

20. Mr Hitchens relied upon the judgment in *Willers v Joyce and another (No 2) [2016] UKSC 44* at para 9 for the principle that this court, which holds all the jurisdiction, functions and power of the High Court in England and Wales, should follow the judgment in *Bakos* unless there is a powerful reason for not doing so:

9…So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see Patel v Secretary of State for the Home Department [2013] 1 WLR 63 , para 59. I would have thought that Circuit Judges should adopt much the same approach to decisions of other Circuit Judges.

21. Mr Hitchens developed his submissions by reference to *R (on the application of Unison) v Lord Chancellor [2017] UKSC 51* (‘*Unison*’) particularly paragraphs 68, 69, 73, 74 and 78. In summary, Lord Reed explained that courts exist to ensure that laws made by Parliament and the common law are applied and enforced. For courts to carry out their role, people must have in principle unimpeded access to them or else laws become a dead letter and the work done by Parliament becomes a meaningless charade, thereby undermining the democratic process. Access to the courts is not just of benefit to individuals but to society generally (paras 68-9 and 73-4).

22. The *Unison* case at paras 78-80 addressed the issue of restricting access to legal advice and the judgment reiterated the point in *Raymond v Honey [1983] 1 AC 1* and *R v Secretary of State for the Home Department, Ex p Anderson [1984] QB 778* that hindrances or impediments to access to the courts are matters that would have to be provided for in primary legislation. Mr Hitchens argued that if his clients can only access legal advice through a CFA then any restriction on this which effectively makes such access impossible falls foul of the principles in *Unison.*

23. Mr Hitchens made the point that there is no guarantee that those unable to access the Legal Assistance Fund (‘LAF’) could themselves fund complex litigation.

24. Mr Hitchens returned to the proposition in paras 78-80 of *Unison* and submitted that the Supreme Court of St Helena is a creature of statute and consequently any restriction on access to the court is a matter for the legislature through primary legislation. This militates in favour of CFAs being available for constitutional claims and not just limited to personal injury claims where expert reports are required as is the position in *Bakos.*

25. In respect of the requirement that an expert report is a necessary precondition of a CFA, Mr Hitchens argued that there is no rational basis for this that he can see.

26. In respect of protection of the public purse, he relied on the fact that taxation of legal fees or costs (the assessment carried out by the court or expert costs assessor on the fairness, reasonableness and proportionality of costs claimed or awarded) can prevent unreasonable and disproportionate costs being claimed or awarded. There can also be costs budgeting as part of the case management process.

27. As Mr Hitchens is instructed by the Public Solicitors Office ('PSO') he accepted in those circumstances counsel should not have a claim against the PSO for unpaid fees and this should be written into any CFA agreement. He further submitted that the court has no role in issuing prior approval for a CFA before one is entered into by the Plaintiffs, this being a matter of privity of contract.

28. Mr Hitchens was asked to address the issue of whether, as is envisaged in *Bakos*, the PSO should always be the first port of call when residents in St Helena seek to instruct lawyers for legal advice and representation. He contended that this was an unnecessary restriction that limits access to a lawyer of choice.

29. In terms of applicable rates to be paid to counsel, Mr Hitchens argued that limiting the rates as those payable to counsel to those who work for the UK Government (on the Civil Panel of Counsel for the Attorney General of England and Wales) would not attract sufficiently qualified lawyers nor achieve equality of arms, that is despite his opponent in the Constitutional claim of *Cruyff Buckley v Attorney General of St Helena* (which Mr Hitchens was on the island to argue) being paid at the 'C' panel rate.

30. Mr Rhys understandably and rightly made no submissions on the applications before the court but advised that the Attorney General of St Helena instructs counsel at rates approved by the Financial Secretary.

Discussion

31. We are grateful to former Chief Justice Charles Ekins for laying down the principles which we should consider in respect of costs in this jurisdiction in his prescient judgments in *Chapman* and *Bakos*. While we endorse much of what the former Chief Justice said about CFAs in *Bakos*, we are satisfied that circumstances have changed since that judgment was handed down and there are powerful reasons to modify its effect in some respects.

32. In respect of the first action, the proposed medical negligence claim, Mr Hitchens was only instructed in respect of the CFA authorisation application and not in relation to the substantive claim. In respect of the second action, the substantive matter in which Mr Hitchens is instructed, the plaints are not personal injury claims but constitutional claims and they do not require expert reports.

33. Nonetheless, we agree with Mr Hitchens that restricting CFAs to personal injury or medical negligence cases where expert reports are required is unnecessary, lacks rationale and acts as an unjustified impediment or barrier to accessing the courts per *Unison*.

34. Mr Hitchens has 6 clients in the constitutional claims relating to the prison, 3 have LAF funding and at least 2 of the 3 Plaintiffs before this court do not. In respect of the six plaintiffs in the constitutional claims, there is some confusion over which plaintiff has LAF funding and which has not but Messrs Yon and Thomas certainly do not. Whatever the circumstances in this case the principle that those who cannot access LAF funding should not be in a worse position in terms of access to the courts than those who can access funding is a sound one and consistent with *Unison*. This is so in all cases and not just those who have personal injury claims that require an expert.

35. Having regard to *Willers v Joyce* we consider that access to CFAs solely limited to personal injury or medical negligence claims where expert reports are required runs contrary to the principles in *Unison* and cannot be sustained.

36. We also agree that it is no longer necessary that the first port of call for St Helena residents seeking to instruct a lawyer should always be the Public Solicitor. There are lawyers other than the Public Solicitor now practising on St Helena and the ability to

select a lawyer of choice without restriction is also justified by the principle of access to justice and legal representation. Circumstances that existed at the time of *Bakos*, namely that access to lawyers practising in St Helena was almost always through the PSO, have changed.

37. The Chief Justice in *Bakos* had in mind that the PSO provides low, or no, cost legal advice to St Helena and that off island lawyers would by their nature be more expensive to the public purse when he said: '*In reality the use of CFAs will be very limited. The Public Solicitor should almost always be the first port of call in cases such as these. A CFA should only subsequently become necessary if there is difficulty in funding through the LAF. If a litigant nevertheless chooses as a first option to instruct an offshore lawyer under a CFA then whether it is reasonable or not to have done so will be the subject of rigid scrutiny under the QOCS system*.'

38. The principle that the ability to select lawyers should not be at the expense of or detrimental to the public purse is an important one so long as access to lawyers of sufficient standing and equality of arms can be maintained. St Helena has never been a place where litigation is expensive and it is very much in the interests of St Helenians, as well as the public purse, that litigation remain affordable to all those involved, Plaintiffs and Defendants alike.

39. The circumstances that brought about the authorisation of CFAs in England, namely removing personal injury claims from the scope of legal aid, do not apply on St Helena. It is the case that public funding can be granted and we agree with the view of Chief Justice Ekins that for a CFA to be available with the benefit of QOCS, a) either the Government must be the defendant or the defendant must have indemnity insurance; and b) a meaningful and properly formulated application to the Legal Assistance Fund should first be made and have been refused.

40. The Legal Assistance Fund (LAF) is governed by the Legal Aid, Assistance and Services Ordinance, 2017. The trustees of the fund are the Chief Magistrate, up to 3 Justices of the Peace, the Public Solicitor and the Clerk of the Peace. The Fund is financed by St Helena Government and has the following aims:

(a) to promote and encourage the establishment of schemes or arrangements for the dissemination of information about the law and its administration; and
(b) to ensure (so far as is practicable) that legal advice and assistance is available to members of the public by whom it is sought.

41. The Trustees have set criteria for granting funding from the fund or alternatively recommending to the Financial Secretary that he make funding available by special warrant. The Fund applies a means test to establish who are eligible for funding. The means limit is currently set at £10,000 a year which is on a par with median income. There are then further allowances for dependants. However, and of importance, these limits are not set in stone and the trustees have a discretion to dis-apply them, although in those circumstances a contribution from the applicant is usually sought.

42. Applications are determined by reference to a number of criteria including the capacity of the Public Solicitors Office to undertake the work (the PSO being funded to provide low or no cost legal advice), the proposed fees charged by counsel or expert, the benefit to the applicant in making a grant, the likelihood of that benefit being obtained, the public interest in granting the application, the criteria for grant or otherwise of legal aid in England (which includes a merits test – that any claim has reasonable prospects of success) and any other matters the trustees consider relevant. It is very unusual for the Public Solicitor to take part in any decisions on the grant or otherwise of funding.

43. If the Fund's Trustees find that there should be funding but cannot financially support the grant it makes a recommendation to the Financial Secretary that public funding be made available.

44. In those circumstances, the general rule in *Chapman* should continue to apply that: 'Costs orders should only be made where one or other party has acted in a patently unreasonable fashion either in pursuing a wholly unreasonable claim or in maintaining an unsupportable defence. An order for costs should also be considered where one party has refused an offer made without prejudice save as to costs and subsequently recovers less than the offer made, or declines to accept a payment into court in circumstances where the award subsequently is less than the amount paid in. Even in these circumstances, however, each case will turn upon its own facts.' This applies in

all civil litigation in St Helena whether a person is funding their lawyers wholly or partly through public funds or private means and whether they instruct the PSO or a private firm of lawyers.

45. The judgment in *Bakos* continues to apply as an exception to that general rule but with the following modifications.

46. In summary, CFAs are permitted to be entered into by any plaintiff instructing the PSO or any lawyer practising in St Helena and are enforceable in all civil cases or proceedings before the courts of St Helena[3] where the defendant is the Attorney General or is protected by indemnity insurance but only when LAF funding is not available to that litigant because it had been refused following a properly formulated application. In those circumstances, the plaintiff will retain the benefit of QOCS – if they are successful in the litigation (as defined under the CFA) then their legal costs will be payable by the unsuccessful party (the defendant) but it they are unsuccessful then they will have not to have pay costs of the successful party or their own lawyer (subject to any condition in the contract that requires a contribution towards the costs of their own lawyer) – unless they or their representatives have behaved unreasonably.

47. Mr Hitchens agreed with the proposition that only if funding through the Legal Assistance Fund was not available, because it had been refused following a meaningful application having been made, would a CFA then become available and enforceable in respect of a Plaintiff who would also retain the benefit of QOCS.

48. We also agree with Mr Hitchens that CFAs should include a clause that only those fees that are approved on taxation as reasonable and proportionate are enforceable by lawyer against client under the agreement.

[3] *Bakos* dealt with whether CFAs were suitable to local conditions in St Helena and decided they were not, with the exception of specified types of court proceedings, namely personal injury claims where experts were to be instructed. In our judgment, CFAs are generally available in civil proceedings before the courts of St Helena on the conditions we outline but not in litigation or civil disputes to be resolved outside the courts. We have not been asked to address whether CFAs or equivalent arrangements could apply in litigation or legal disputes which are not before the courts but we emphasise that neither *Bakos* nor this judgment extends CFAs or equivalent funding arrangements beyond proceedings before the courts.

49. LAF funding has the very real benefit of keeping costs to the public purse of litigation at manageable levels but ensuring money remains available to plaintiffs who are entitled to compensation. For that reason, we have not considered the applicability to St Helena of Damages Based Agreements (DBAs) – a type of contingency fee arrangement where payment of a litigant's legal costs is made as a percentage of the amount of compensation they are awarded by the court rather than paid by the unsuccessful party. Therefore, we do not need to consider the Attorney General's submission that such arrangements may also offend the rule against champerty.

50. Fees payable to lawyers from public funds (whether paid in respect of their own lawyers or an opposing party's lawyers) should always be affordable and reasonable (proportionate to the local economy). Given the average salary and GDP per capita of the average St Helenian, the relatively low cost of living and overheads on island and the pressure on the public finances, St Helena must remain a low costs jurisdiction when it comes to litigation.

51. St Helena benefits from enrolment rules that allow those from jurisdictions other than those in the UK to practice on the island. There are many common law jurisdictions where the cost of practising is significantly lower than in the UK.

52. Choice of access to a lawyer at public expense does not translate to access to a lawyer at any cost. Costs of practising on St Helena are low. Rents are low, staffing costs are low and there are no business rates. St Helena rates of pay to lawyers should always be commensurate with local conditions. The maximum fee the PSO charges any business or non-St Helenian client is £150 per hour and for St Helenians it is £50 per hour for those earning over £30,000 p.a. For those on the median wage there are no costs associated with instructing the PSO.

53. The fees for counsel on London panel 'C' rates of the Attorney General's Panel of Civil Counsel are £80 per hour but these have not increased since 1997. Had they risen in line with the consumer price index they would now be £152.

54. To ensure access to lawyers at a reasonable cost, and having regard to the maximum costs that can be paid to the PSO, it seems to us that hourly rates for solicitors or counsel

not exceeding £150 per hour should be the norm where it is the public purse that will, or may, foot the bill. Such a rate is still higher than counsel instructed by the UK government (even the A panel) and are likely to be higher than rates paid to many UK lawyers under the legal aid scheme. Such rates will ensure that access to lawyers of sufficient standing and expertise will be maintained. The precise rates and fees that are judged to be reasonable and proportionate will have to be decided on a case by case basis on taxation.

55. In addition to this, solicitors will have to think carefully if attendance on counsel at court is necessary and will have to be prepared to justify this on taxation.

56. It is agreed by Mr Hitchens that CFAs should not contain success fees and we approve that position and can see no requirement to deviate from Chief Justice Ekins' ruling in *Bakos* in that regard.

Summary of Ruling

57. To summarise:

i. CFAs are permitted to be entered into by plaintiffs instructing the PSO or any lawyer practising in St Helena in all civil cases or proceedings before the courts of St Helena where the defendant is a) the Attorney General or b) is protected by indemnity insurance but only c) when LAF funding is not available to that litigant because it has been refused following a properly formulated application;
ii. No success fees can be charged under CFAs;
iii. Court approval is not required for a CFA;
iv. CFAs should include a clause that only those fees that are approved on taxation as reasonable and proportionate are enforceable by lawyer against his or her client under the agreement;
v. Rates payable to lawyers (both solicitors and counsel) should not normally exceed those chargeable by the PSO or counsel instructed by HM Government in England and Wales where Qualified One-Way Costs Shifting applies and where the burden of paying those costs will fall on the public purse; and
vi. There is no longer a requirement to approach the PSO as the first choice for legal advice and representation for any litigant.

vii. These are exceptions to the general rule as set out in *Chapman*, that in civil cases - the standard rule is that the unsuccessful party should not pay the successful party's costs unless they or their representatives have acted unreasonably.

58. Given that we have decided that court approval is not required for a plaintiff to enter into a CFA in respect of civil proceedings before the courts of St Helena and the specific conditions under which CFAs are available and enforceable, we make no further ruling as to how the proposed Plaintiff and three Plaintiffs in these two sets of proceedings may fund their litigation.

Rupert Jones
Chief Justice

Duncan Cooke
Acting Judge of the Supreme Court

19 July 2024

(paras 34 & 58 amended 22nd July 2024)