the failure of the trial judge to elaborate the reasons for his decision, coupled with the absence of a transcript of the evidence, meant that it was unable to say that the judgment was clearly right. The Court of Appeal's decision was no doubt well meaning and, as an exhortation to judges to give adequate reasons wherever possible, it may be useful; but it is respectfully suggested that the outcome was neither proportionate to the matter at issue nor just in its result.

J.A. JOLOWICZ

COMMON LAW INVALIDITY OF CONDITIONAL FEE AGREEMENTS FOR LITIGATION: "U TURN" IN THE COURT OF APPEAL

THE Court of Appeal in *Awwad* v. *Geraghty & Co. (a firm)* [2000] 1 All E.R. 608 has confirmed that conditional fee agreements are invalid at common law. The court rejected the contrary decision in *Thai Trading Co. (a firm)* v. *Taylor* [1998] Q.B. 781, C.A. (noted [1998] C.L.J. 469).

Mr. Awwad engaged Miss Geraghty, a solicitor, to act for him in a libel action. She wrote saying that her hourly rate for this work would be £90. But that letter was a half-truth. Rougier J. found that the parties had further orally agreed that she would charge him more, her normal profit rate, if she won the case. The oral agreement imported an element of reward for success. This proved decisive.

After Mr. Awwad had settled the libel claim, Miss Geraghty sent him her bill calculated at the £90 rate, but he refused to pay, contending that the fee agreement was unenforceable because it infringed public policy. Both Rougier J. and the Court of Appeal agreed, and so Miss Geraghty did not receive a penny for her work.

Public policy intrudes here because the common law abhors fee agreements which give lawyers a financial stake in the outcome of litigation. Such a stake can consist of (i) a percentage of the value of any eventual judgment (or settlement) won by the client; or (ii) some other success fee, such as normal fees plus a specified percentage of those fees; or (iii) it might be agreed that the normal fee will be reduced or waived if the client loses; or (iv) the fee agreement might combine the elements in (ii) and (iii).

Fee agreements falling within categories (ii), (iii) or (iv) are valid if they satisfy sections 58 and 58A of the Courts and Legal Services Act 1990 (substituted by section 27 of the Access to Justice Act

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1999 and effective from 1 April 2000) (hereafter "the 1990 Act (as amended)"). But category (i) remains contrary to English law: it is the American "contingency fee". However, a success fee calculated as a percentage increase upon the normal fee, and so falling within category (ii), can be "capped" by reference to a percentage of the damages awarded (Civil Procedure Rules (1998) Part 48, *Practice Direction* para. 2.16(*c*)).

This statutory scheme was not in force when Miss Geraghty contracted with her client and in any event the scheme requires the fee agreement to be in writing and signed by the lawyer and client (Conditional Fee Agreements Regulations 2000 (S.I. 2000/692), reg. 5). The court in *Awwad* held that at common law such a conditional fee agreement is unlawful and unenforceable. The court considered the decision in the *Thai* case was wrong on one definite count and, possibly, on a second.

The first and possible ground of error concerns the effect of prohibitions contained in the Solicitors' Practice Rules 1987 (now the 1990 Rules). Rule 8 of the 1987 edition of these Rules prohibited conditional fee agreements except where statute permitted them. In a different context the House of Lords in *Swain* v. *The Law Society* [1983] 1 A.C. 598 held that these Rules, which are subordinate legislation made under the Solicitors Act 1974, have legal force (applied in *Mohamed* v. *Alaga & Co. (a firm)* [1999] 3 All E.R. 699, 706 D, C.A.). However, Millett L.J. in the *Thai* case, without the benefit of the *Swain* decision, took the opposite view, that the Rules cannot affect questions of public policy. The Court of Appeal in *Awwad* suggested that "the court in the *Thai Trading* case may have been in error in asserting that breach of a professional rule did not involve any illegality". On this point the *Thai* decision had already been twice doubted by the Divisional Court, in *Hughes* v. *Kingston upon Hull C.C.* [1999] Q.B. 1193 and *Leeds C.C.* v. *Carr*, *The Times*, 12 November 1999. Meanwhile, in the wake of the *Thai* case, rule 8 was amended in January 1999 to create a further exception validating agreements "permitted ... by the common law": see *The Guide to the Professional Conduct of Solicitors* (8th edn., 1999), p. 278. The *Awwad* decision shows that there is no such further exception based upon the common law. The 1999 amendment can now be deleted!

The court in the *Thai* case, having (wrongly) regarded the Solicitors' Practice Rules as not decisive, went on to decide that a "no win, no fee" agreement was no longer against public policy. On this second point, the court in *Awwad* unequivocally rejected the *Thai* decision. May L.J. said bluntly, at p. 635: "there is no present room for the court, by an application of what is perceived to be

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public policy, to go beyond that which Parliament has provided". May L.J.'s view is now vindicated by section 58(1) of the 1990 Act (as amended) which states that conditional fee agreements are unenforceable unless validated by that statute (briefly noted in *Awwad* at p. 622).

Therefore, Miss Geraghty's contractual claim failed. But the court further decided that she could not obtain remuneration for her services by a restitutionary claim. It distinguished *Mohamed* v. *Alaga & Co. (a firm)* [1999] 3 All E.R. 699, where the Court of Appeal awarded a *quantum meruit* in favour of an interpreter who had performed work for a firm of solicitors under an unlawful contract. The contract included an illegal arrangement for payments to the claimant for introducing new clients to solicitors, a matter prohibited by professional rules. Schiemann L.J. in *Awwad* at p. 631 distinguished *Mohamed*'s case: "The interpreter was blameless and no public policy was infringed by allowing him to recover a fair fee for interpreting: the public policy element in the case only affected fees for the introduction of clients". In the present case, Miss Geraghty's restitutionary claim would directly infringe public policy.

The position is now clear, strict and perhaps not unsatisfactory. A conditional fee agreement is unenforceable at common law. A lawyer cannot recover even the "reasonable value" of her litigation services performed under such an unenforceable agreement. Conditional fee agreements must comply with the statutory scheme.

NEIL ANDREWS

THE INADMISSIBILITY OF EVIDENCE RELATING TO INTERCEPTED COMMUNICATIONS

THE White Queen, probably parodying Tertullian, boasted to Alice that she could sometimes believe as many as six impossible things before breakfast. Students of the law of evidence must occasionally perform similar feats.

In general, English law holds logically probative evidence admissible. If obtained illegally or if its admission would otherwise reflect adversely on the fairness of the proceedings, however, the court has discretion to exclude such evidence under section 78 of PACE (see also *Sang* [1980] A.C. 402). Along with the law governing confessions (which, regardless of their probative force, may be excluded under section 76 of PACE if the Crown cannot establish that they were obtained lawfully), the Interception of Communications Act 1985 affords a notable exception to the

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