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CHAMPERTY, PROFESSIONAL LEGAL ETHICS AND ACCESS TO JUSTICE FOR IMPECUNIOUS CLIENTS

Law Society of Singapore v. Kurubalan s/o Manickam Rengaraju[1]

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I. INTRODUCTION

Due to her colonial history, Singapore has inherited the English common law prohibition against maintenance and champerty. Maintenance refers to the officious intermeddling in litigation.[2] Champerty is a particular form of maintenance where one party agrees to assist another to bring a claim such that the former shall receive a share of what may be recovered in the litigation.[3] Criminal and civil liability for champerty was, however, abolished in England by virtue of the United Kingdom's ("U.K.") *Criminal Law Act 1967*,[4] subject that "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" would not be affected.[5] Subsequently, the U.K. permitted a litigant to employ "a person providing advocacy or litigation services" under a conditional fee agreement,[6] and has, in recent legislative amendments,[7] even allowed damage-based agreements akin to the United States-style contingency fees. These U.K. statutory developments are, however, not applicable to Singapore. Thus, the prohibition against champerty and conditional fees remains firmly part of the Singapore legal landscape, albeit with an important judicial exception to such a prohibition, as the case below demonstrates.

A Singapore lawyer was engaged by a client to advise on a claim for personal injuries sustained in Queensland, Australia. The lawyer entered into an agreement with the client which provided for payment of a specified percentage of the amount

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1 [2013] 4 S.L.R. 91 (H.C.) [*Kurubalan*].

2 *Hill v. Archbold* [1968] 1 Q.B. 686 at 693 (C.A.).

3 *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd* [2007] 1 S.L.R.(R.) 989 at para. 32 (C.A.) [*Otech Pakistan*].

4 (U.K.), 1967, c. 58. See also Donald Raistrick, ed., Law Commission Reports, vol. 1 (Abingdon: Professional Books, 1980) at 37.

5 *Criminal Law Act 1967*, *ibid.*, s. 14(2).

6 *Courts and Legal Services Act 1990* (U.K.), 1990, c. 41, s. 58.

7 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (U.K.), 2012, c. 10. s. 45; *The Damage-Based Agreements Regulations 2013*, S.I. 2013/609.

to be recovered.[8] The client later appointed Australian lawyers to act for her in Queensland whilst the Singapore lawyer continued to act as an intermediary by obtaining medical and other expert reports for the Australian lawyer. As it turned out, the parties negotiated a settlement for a sum of AU$3,250,000. Upon request for payment, the client refused to pay the Singapore lawyer the agreed percentage of fees and instead, filed a complaint against him to The Law Society of Singapore ("Law Society"). The Singapore Court of Three Judges, sitting in the High Court, in *Kurubalan* ruled that the conduct of the lawyer was "grossly improper" and in breach of the *Legal Profession Act*,[9] *inter alia*, s. 107(1)(b) that no lawyer shall enter into any agreement with a client to prosecute any suit or action or other contentious proceeding "which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding".[10]

II. The Prohibition Against Champerty in Singapore

Section 107(3) of the *LPA* further stipulates that a solicitor is subject to the law of maintenance and champerty. In this regard, the High Court held that the agreement in question was champertous. Prior to the statutory developments in U.K., the English courts were concerned that a lawyer entering into champertous agreements might be "tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses".[11]

With respect to the public policy considerations in Singapore, the High Court in *Kurubalan* noted that "a lawyer who has a personal economic stake in the litigation and is not otherwise being remunerated for his services faces a potential and often acute conflict of interest."[12] Hence, in order to effectively represent a client's interest, the lawyer must maintain a "sufficient sense of detachment" so as to be able to discharge his paramount duty to the court.[13] Seen in this light, the prohibition against champerty is aimed at protecting the "administration of justice and the related need to safeguard confidence in and the honour of the [legal] profession".[14] In tandem with the position of the old English courts, the Singapore High Court was concerned that lawyers who enter into champertous agreements might be tempted to "descend into wholly inappropriate and unprofessional conduct in order to protect their own interest in windfall gains."[15]

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[8] The precise percentage (either 30% or 40%) to be applied depends on the actual amount recovered: *Kurubalan, supra* note 1 at para. 8.

[9] Cap. 161, 2009 Rev. Ed. Sing., s. 83(2)(b) [*LPA*].

[10] See also *Legal Profession (Professional Conduct) Rules* (Cap. 161, R. 1, 2010 Rev. Ed. Sing.), r. 37, which states that:

> An advocate and solicitor shall not enter into any negotiations with a client—
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> (a) for an interest in the subject matter of litigation; or
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> (b) except to the extent permitted by any scale of costs which may be applicable, for remuneration proportionate to the amount which may be recovered by the client in the proceedings.

[11] *In re Trepca Mines (No. 2)* [1962] 3 W.L.R. 955 at 966 (C.A.) (Lord Denning M.R.).

[12] *Kurubalan*, *supra* note 1 at para. 43.

[13] *Ibid.* at para. 45.

[14] *Ibid.*

[15] *Ibid.* at para. 52.

Prior to the present case, there were only two local precedents on champerty.[16] In both these cases, the Singapore courts struck the lawyers off the rolls for entering into champertous agreements. The precedents were, however, somewhat dated and, in view of the changes in public policy since then, not helpful to the present case.[17] In fact, instead of requesting for the lawyer to be struck off the rolls, the Law Society in *Kurubalan* had sought for the lawyer to be suspended from practice for 12 months.[18]

The determination of the appropriate sentence for professional misconduct in entering into such champertous agreements is underlined by two important rationales: the "protection of public confidence in the administration of justice" and the offender's "degree of culpability".[19] According to the High Court, two main factors exacerbated the gravity of the lawyer's misconduct in this case. Initially, the lawyer attempted to avoid liability by claiming that he was acting only in his personal capacity.[20] The truth, however, was that he had held himself out as the complainant's legal advisor.[21] He had referred several times to the complainant as his client in his communications with the Australian lawyers and had even produced a bill of costs for his professional charges.[22] To the High Court, his conduct revealed his "cynical and dishonourable attempt to evade the prohibition [on champerty]".[23] Secondly, when the complainant resisted his claims for payment, the lawyer had, instead of acknowledging or reflecting on his error, reacted aggressively by threatening civil and criminal proceedings.[24] Such conduct was, to say the least, clearly "unbecoming of an Advocate and Solicitor".[25]

A. *Champertous Agreements in Respect of Litigation in a Foreign Jurisdiction*

An interesting and novel side issue arose in this case relating to the impact on champertous agreements where the law of the place where the litigation occurred permits such agreements. As mentioned, the claim for personal injury was made in Queensland, Australia. Champerty has been decriminalised and conditional fee agreements are permissible in Queensland,[26] though contingency fees or damages-based agreements are still illegal.[27] Moreover, the Singapore lawyer was apparently admitted to practice, not only in Singapore, but also in Queensland.[28]

In response, the High Court ruled that the fact that the claim was initiated in a foreign jurisdiction is not relevant to the *liability* of the lawyer for professional

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[16] *Law Society v. Chan Chow Wang* [1974-1976] S.L.R.(R.) 237 (H.C.); *Lau Liat Meng v. Disciplinary Committee* [1965-1967] S.L.R.(R.) 641 (P.C.).
[17] *Kurubalan*, *supra* note 1 at paras. 69, 70.
[18] *Ibid.* at para. 24.
[19] *Ibid.* at para. 49.
[20] *Ibid*. at paras. 8, 11.
[21] *Ibid*. at para. 51.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid*. at para. 52.
[25] *Ibid.*
[26] See *Legal Profession Act 2007* (Qld.), ss. 323, 324.
[27] *Ibid*., s. 325.
[28] *Kurubalan*, *supra* note 1 at para. 66.

misconduct under the *LPA*, but would be a relevant factor to consider in the *sentencing* of the errant lawyer.[29] With respect to liability, the focus should be the capacity in which the lawyer's impugned acts were carried out.[30] As highlighted in *Re Linus Joseph,* the crucial factor is that the misconduct was "committed by a Singapore solicitor in discharge of his duty as a Singapore solicitor."[31] The prohibition against champerty applies to all types of legal disputes and claims including those conducted in foreign courts.[32] It was clear on the facts that the lawyer was engaged and had acted as an Advocate and Solicitor of Singapore. He was therefore bound by the rules of conduct applicable to local Advocates and Solicitors even if he was also admitted to practise in Queensland.

With respect to sentencing, the High Court acknowledged that reference should be made to the "applicable public policy as reflected in the regulatory framework of the jurisdiction directly affected".[33] This meant that the decriminalisation of champertous agreements and the permissibility of conditional fees in Queensland should be taken into account for sentencing. On this issue, the Court noted that "this was not a case where the Champertous Agreement had *no* impact in Singapore".[34] After all, the lawyer was engaged in Singapore, by a Singaporean client, in his capacity as an Advocate and Solicitor of Singapore, albeit with a view to helping his client initiate proceedings in Australia.

According to the High Court, the normal sanction would be to suspend the errant lawyer.[35] Imposing a fine would not be appropriate as it would merely constitute a "variable in the stakes".[36] Striking him off the rolls would be too draconian a measure given that the lawyer had not acted dishonestly. Finally, it decided on a suspension of 6 months upon a careful balancing of the factors, considering that the offence in question had "limited impact on our jurisdiction and related to a foreign jurisdiction that appeared to take a modest view of its gravity" as well as the presence of the two aggravating circumstances highlighted above.[37]

III. Access to Justice for Impecunious Clients

Though the Singapore lawyer did assist the client to access justice and the client eventually recovered the compensation, much of the work was actually done by the Australian lawyers.[38] Further, the lawyer was certainly not motivated by the "purely altruistic concern"[39] of ensuring that his client was able to pursue her claims but rather, his personal gains. This amply justified the High Court's decision to suspend him from legal practice. Nonetheless, the High Court seized the opportunity to

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[29] *Ibid*. at para. 68.
[30] *Ibid*. at paras. 66, 68.
[31] [1990] 2 S.L.R.(R.) 12 at para. 19.
[32] See *Otech Pakistan*, *supra* note 3 at para. 38 (though the facts of the case concerned a success fee agreement between commercial parties in the context of arbitral proceedings).
[33] *Kurubalan*, *supra* note 1 at para. 68.
[34] *Ibid.* [emphasis in original].
[35] *Ibid*. at para. 35.
[36] *Ibid.* at para. 78.
[37] *Ibid.* at para. 79.
[38] *Ibid*. at para. 55.
[39] *Ibid.*

clarify and expound on a separate (though related) issue, namely, the importance of access to justice for impecunious clients:[40]

> In our judgment, it would be permissible and even honourable for an Advocate and Solicitor to act for an *impecunious* client in the knowledge that he would likely only be able to recover his appropriate fees or disbursements if the client were successful in the claim and could pay him out of those proceeds or if there was a costs order obtained against the other side.

According to the High Court, the above scenario was not contrary to the *LPA* as it did "not amount to acquiring an interest in the fruits of litigation."[41] In fact, in the above scenario, the High Court stated that the lawyer has the "interests of ensuring that the client is not denied the opportunity to seek justice."[42] It quoted with approval the words of Lord Russell of Killowen C.J. in *Ladd v. London Road Car Company* that:[43]

> [I]t was perfectly consistent with the highest honour to take up a speculative[44] action in this sense—viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honour of the profession that the solicitor should take up the action.

Further, the learned judge stated that "justice would very often not be done if there were no professional men to take up their cases *and take the chances of ultimate payment* but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed".[45] The Singapore High Court observed that the Australian and Hong Kong courts had adopted similar approaches in *Clyne v. NSW Bar Association*[46] and *Winnie Lo v. HKSAR*[47] respectively for the benefit of impecunious clients.

But how does the *exception* square with the statutory prohibitions in the *LPA*? Based on the statutory language of s. 107(1)(b) of the *LPA*, quoted above, the scenario envisages that the lawyer, to his knowledge, is likely to be paid his fees and disbursements *only* when the client wins the case. One question is whether the lawyer's knowledge of this contingent payment is shared or understood by the client. If so, such a scenario would conceivably fall within the language of s. 107(1)(b) in that the agreement "contemplates" payment only in the event of success, in which case the retainer might run foul of s. 107(1)(b) regardless of whether it allows the lawyer to obtain the fruits of litigation or otherwise. The High Court's basis (*i.e.* that the lawyer would not be acquiring the fruits of litigation) appears to be consonant

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[40] *Ibid.* at para. 82 [emphasis in original].

[41] *Ibid.* at para. 83.

[42] *Ibid.*

[43] (1900) 110 Law Times Newspaper 80 (H.L.).

[44] Where the client cannot pay the solicitor's costs if he loses the case: see *Leeds City Council v. Carr* [2000] Environmental Law Reports 522 at 529 (Q.B.D.).

[45] *Supra* note 43 [emphasis in original].

[46] [1960] 104 C.L.R. 186 at 203 (H.C.A.): "a solicitor may with perfect propriety act for a *client who has no means*, and expend his own money in payment of counsel's fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings" [emphasis added].

[47] [2012] HKCFA 23 at paras. 108, 109 (Ribeiro P.J.).

with the policy underlying the prohibition against champerty and in s. 107(1)(a) which stipulates that the lawyer should not purchase or obtain an interest in the subject matter of the litigation, rather than s. 107(1)(b).

The permissibility of the High Court's *exception* for the purpose of enhancing access to justice for impecunious clients also brings to mind the controversy in the English courts about 15 years ago concerning arrangements where lawyers would receive his normal fees only when the client wins the case. The English Court of Appeal held in *Thai Trading Co v. Taylor*[48] that a solicitor was entitled to agree with the client that he is to be paid his ordinary costs if he wins but not if he loses. Millett L.J. was of the view that the solicitor in question was "not… charging a fee if he wins, but rather… agreeing to forgo his fee if he loses."[49] In that regard, the agreement should therefore not be considered as contrary to public policy. In fact, Millett L.J. said that:[50]

> [T]here is nothing improper in a lawyer acting in a case for a meritorious client who to his knowledge cannot afford to pay his costs if the case is lost: see *Singh v. Observer Ltd (Note)* [1989] 3 All E.R. 777; *A Ltd. v. B Ltd.* [1996] 1 W.L.R. 665. Not only is this not improper; it is in accordance with current notions of the public interest that he should do so.

Another significant point to note was that Millett L.J. specifically referred to access to justice as a "fundamental human right which ought to be readily available to all"[51] and the "public policy in making justice readily accessible to persons of modest means."[52] The Singapore High Court in *Kurubalan* did not, however, examine this specific issue of the lawyer "agreeing to forgo his fee if he loses" in *Thai Trading*.

Thai Trading was subsequently doubted by the English Court of Appeal in *Awwad v. Geraghty & Co*.[53] There, a solicitor and her client orally agreed that she would charge the client at her normal rate if he won the litigation and would charge him at a lower rate if he lost the litigation.[54] Contrary to *Thai Trading*, Schiemann L.J. ruled that an agreement for a solicitor to act for a client based on such conditional normal fees was contrary to public policy and therefore unenforceable.[55] Moreover, as May L.J. explained, the payment to the solicitor of the difference between her normal charging rate and that to be charged if the plaintiff were unsuccessful was a sum "payable only in the event of success".[56] Which case is more persuasive for Singapore: *Thai Trading* or *Awwad*?

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[48] [1998] Q.B. 781 [*Thai Trading*]. See r. 8 of the *Solicitors' Practice Rules 1990*, made under the *Solicitors Act 1974* (U.K.), 1974, c. 47, s. 31, which prohibits contingency fee agreements. However, the court held at 786 that "the fact that a professional rule prohibits a particular practice does not of itself make the practice contrary to law".

[49] *Ibid.* at 788.

[50] *Ibid*. at 789.

[51] *Ibid*. at 786.

[52] *Ibid.* at 790.

[53] [2001] Q.B. 570 (Lord Bingham of Cornhill C.J., Schiemann and May L.JJ.) [*Awwad*].

[54] *Ibid.* at 575 (Schiemann L.J.).

[55] *Ibid.* at 593 (Schiemann L.J.).

[56] *Ibid.* at 598 (May L.J.). The learned judge also stated at 598 that the ruling in *Thai Trading*, *supra* note 48 at 785 was based on "the fact that a professional rule prohibits a particular practice does not of itself make the practice contrary to law". This was, unfortunately, decided without reference to the House of Lords' decision in *Swain v. The Law Society* [1983] 1 A.C. 598 (that secondary legislation, such as the

It is argued that the public policy engaged in *Awwad* is quite different from the situation prevailing in Singapore. Indeed, the parameters of public policy are ever-shifting and "vary according to the state and development of society and conditions of life in a community."[57] Schiemann L.J. interpreted the public policy in England based on a government white paper which implied that speculative conditional fees (also known as conditional normal fees) were prohibited at that time[58] and the Lord Justice was reluctant to "develop the common law at a time when Parliament was in the process of addressing those very problems."[59] May L.J. took cognisance of the particular statutory developments in U.K. which permitted conditional fees only in limited circumstances[60] and prohibited contingency fees,[61] and therefore did not wish to express a view on public policy which might reach "beyond that which Parliament [had] provided."[62] The learned judge also acknowledged that the issue raised "sharply divergent opinions" within the U.K. without any consensus whatsoever on this matter of public policy.[63] On the other hand, the interpretation in *Thai Trading*, that the lawyer was merely agreeing to forgo his fee should he lose the case (as opposed to being paid only in the event of success), and the rationale of enhancing access to justice as a fundamental human right, supports the High Court's *exception* to the prohibition against champerty. Moreover, the above interpretation in *Thai Trading* could arguably circumvent the potential problem of the prohibition against contingent retainers under s. 107(1)(b) of the *LPA* as discussed above.

A more recent case to highlight is *Sibthorpe v. Southwark London Borough Council*.[64] The solicitor agreed to indemnify his client against a potential liability for the other side's costs.[65] This was held not to be champertous. The principle upon which it is based, that it is "perfectly proper, for solicitors to conduct litigation for a client knowing that, unless the client wins, the solicitors may find it impossible, or will find it hard, to recover their fees",[66] appears substantially similar to the *exception* to champerty as highlighted by the High Court in *Kurubalan*. Further, from an overarching perspective, if one treats the issue of champerty as "a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants",[67] there is good reason to support the *exception* to champerty highlighted in *Kurubalan*.

One important basis in *Kurubalan* for the *exception* to the prohibition against champerty is the status of impecuniosity of the clients. The Singapore High Court did not give any express indications as to how one may ascertain the status of the client as being "impecunious". It seemed, however, to have implied that it would

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Solicitors' Practice Rules, have the force of statute). See also *Sibthorpe v. Southwark London Borough Council* [2011] 1 W.L.R. 2111 at para. 24 (C.A) (Lord Neuberger M.R., Lloyd and Gross L.JJ.).

[57] *Stevens v. Keogh* (1946) 72 C.L.R. 1 at 28 (H.C.A.) (Dixon J.), cited in *Kurubalan*, *supra* note 1 at para. 45.

[58] Lord Chancellor's Department, *Legal Services: A Framework for the Future* (London: His Majesty's Stationery Office, 1989) at para. 14.3, cited in *Awwad*, *supra* note 53 at 593 (Schiemann L.J.).

[59] *Ibid.*

[60] *Courts and Legal Services Act 1990*, *supra* note 6, s. 58; *Awwad, supra* note 53 at 599 (May L.J.).

[61] *Access to Justice Act 1999* (U.K.), 1999, c. 22. s. 27; *Awwad*, *ibid*. at 600 (May L.J.).

[62] *Awwad*, *ibid.*

[63] *Ibid.*

[64] *Supra* note 56.

[65] *Ibid*. at para. 5 (Lord Neuberger M.R.).

[66] *Ibid*. at para. 50 (Lord Neuberger M.R.).

[67] *Giles v. Thompson* [1994] 1 A.C. 142 at 164 (H.L.) (Lord Mustill).

depend on a 'but for' test *i.e.* whether the client, but for the impecuniosity, would have litigated the matter:[68]

> If an Advocate and Solicitor has examined a client's case and concluded in all honesty that there is a good cause of action or defence which, *but for the client's impecuniosity, would likely be litigated*, then he would be doing no wrong if he took on such an engagement. This is so even if he knew that he would likely not be paid his usual fees or even his disbursements unless the claim succeeded or a costs order is obtained.

This seems to be borne out by the High Court's subsequent reference in the judgment to "impecunious clients who would not otherwise be able to afford legal representation."[69] Thus, the High Court's meaning of "impecunious clients" would clearly extend beyond the categories of persons falling below a certain poverty threshold, and even beyond those persons eligible for legal aid based on the means tests as prescribed by statute.[70] The status of impecuniosity is tied, in a sense, to the affordability of litigation. Thus, there cannot be any fixed figure for determining impecuniosity as the claims and costs for litigation would differ from case to case. Another related issue on the impecuniosity of clients which has not been considered is whether the exception to champerty would also apply to corporate clients who might be financially strapped.[71]

The public policy favouring impecunious clients is again evident in the High Court's examination of two practice directions issued by the Council of the Law Society. The first, Practice Direction 3 of 2004, essentially stipulated that agreements with clients to only charge costs at an amount fixed as party and party costs[72] for judgments in default of appearance and payable upon the client's recovery of such costs, or to charge less than the fixed party and party costs if clients do not recover legal costs from the judgment debtor, were contrary to the *LPA*. The second, Practice Direction 2 of 2012, prohibited agreements where solicitor and client costs *and* disbursements are to be limited to whatever party and party costs *and* disbursements are recovered from the other party and in the event that no costs are recovered from the other party, solicitor and client costs will be waived and only disbursements billed. The response given by Council of the Law Society was as follows:[73]

> Any fee arrangement that provides for payment of solicitor-and-client costs that is contingent on the amount of party-and-party costs recovered by a client would

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[68] *Supra* note 1 at para. 86 [emphasis added].

[69] *Ibid.* at para. 89. See also *Bradlaugh v. Newdegate* (1883) 11 Q.B.D. 1 at 11 (Lord Coleridge C.J.): "in all these cases [on maintenance] the interest spoken of is…that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them."

[70] See *e.g.*, the Second Schedule to the *Legal Aid and Advice Act* (Cap. 160, 1996 Rev. Ed. Sing.).

[71] See *R. (Factortame Ltd) v. Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] Q.B. 381 (C.A.) (agreement between claimants, who were corporate clients heavily in debt, and an accountancy firm for the latter to provide ancillary services to the conduct of litigation by the claimant's solicitors was held to have ensured the claimants' access to justice and not contrary to public policy).

[72] The amount payable by a litigant to the other (successful) party for the latter's legal costs.

[73] Article 3a. The full text may be found here: "Council's Practice Direction 2 of 2012: Ethical Propriety of Fee Arrangements with Clients Where Payment of Solicitor and Client Costs and Disbursements is Contingent on Recovery of Party and Party Costs & Disbursements" *The Law Gazette* [*of Singapore*] (July 2012), online: The Law Gazette <http://www.lawgazette.com.sg/2012-07/467.htm>.

> render a solicitor in breach of s 107 of the Legal Profession Act ('LPA') and r 37 Legal Profession (Professional Conduct) Rules ('PCR') because the solicitor would have an interest in the subject matter of the litigation or be purchasing an interest in the client.

This, according to Practice Direction 2 of 2012, also applies to the agreements envisaged in Practice Direction 3 of 2004.[74]

The High Court sought to distinguish the above practice directions on the basis that they "relate to fee agreements entered into with clients who can afford legal services" including and with particular reference to "corporate clients".[75] According to the High Court, the context from which the practice directions arose is quite unlike the exception to champerty involving arrangements for the benefit of *impecunious* litigants for the purpose of ensuring access to justice. Moreover, it stated that this judicial approach is consistent with the initiatives of the Singapore legal profession to encourage lawyers to provide legal services on a *pro bono* basis,[76] efforts which are clearly laudable.

IV. Access to Justice and Conditional Fees: A Matter for Parliament

The High Court in *Kurubalan* noted the developments in the U.K. allowing for conditional fee agreements which were in turn supported by strong public policy considerations to enhance access to justice. It quoted Lord Phillips M.R. in *R. (Factortame Ltd) v. Secretary of State for Transport, Local Government and the Regions (No. 8)*:[77]

> Conditional fees are now permitted in order to give effect to another facet of public policy—the desirability of access to justice. Conditional fees are designed to ensure that those who do not have the resources to fund advocacy or litigation services should none the less be able to obtain these in support [of] claims which appear to have merit.

According to the High Court, the Singapore Parliament, rather than the Judiciary, has to decide whether legal reforms ought to be undertaken as the former institution is more suited to examine the "carefully drawn parameters that regulate the extent to which such fee arrangements would be permitted".[78] The author agrees that the issue of conditional fees involves a potentially wide range of societal, community, professional and industry "parameters" which are probably better dealt with by Parliament.

Issues relating to conditional fees have, to some extent, been on Singapore's radar screen. In the past, concerns have been raised in Parliament that the conditional fee-based system might give rise to financial temptations and result in excessive

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[74] *Supra* note 1 at para. 88.
[75] *Ibid.* at para. 89.
[76] *Ibid.*
[77] *Supra* note 71 at para. 408.
[78] *Supra* note 1 at para. 46.

litigation,[79] and that the lawyer might become "personally and emotionally involved" in a case where his fees are dependent on the success of the litigation.[80] Members of the public have however raised complaints about the high costs involved in enforcing one's legal rights. Commentators have also called for Singapore to seriously consider allowing conditional or contingency fees to address access to justice concerns.[81] A committee chaired by Judge of Appeal V.K. Rajah recommended in 2007 to allow conditional fee arrangements in which the lawyer would be paid an uplift based on the normal fees in the event of success in the legal suit with a legislative cap on the success fee to "minimise the risk of abuse by unscrupulous lawyers".[82] In 2011, a Member of Parliament had called for contingency fees in a limited category of cases to aid low-income Singaporeans "applying for probate or letters of administration to deal with the assets of their loved ones who have passed away".[83] Parliamentary discussions on access to justice in connection with pro bono work by lawyers continue apace.[84] Following the last review in 2007, the means and merits tests under the *Legal Aid and Advice Act* have been further relaxed recently in 2013 to allow more financially challenged litigants to receive legal aid.[85] It is interesting to note that after *Kurubalan* was decided, a journalist[86] and members of public[87] contributed to the on-going discussions and debates, advocating for a regulated contingency fee system with a view to enhancing access to justice. The Ministry of Law had responded, stressing that access to justice remains a key priority of the Government.[88] This emphasis of promoting access to the courts is arguably in sync with Singapore's aspirations to be a more inclusive society.[89]

Clearly, Singapore must decide on the issue of legal reforms, if any, based on her own national interests including those of the less advantaged members of the society. Apart from the members of the public, the likely impact of any legal reforms on the

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[79] Sing., *Parliamentary Debates*, vol. 53, cols. 856, 857 (27 March 1989) (S. Jayakumar).

[80] Sing., *Parliamentary Debates*, vol. 71, col. 1465 (8 March 2000) (S. Jayakumar).

[81] Gary Chan, "Re-examining Public Policy: A Case for Conditional Fees in Singapore?" (2004) 33(2) C.L. World Rev. 130; Adrian Yeo, "Access to Justice: A Case for Contingency Fees in Singapore" (2004) 16 Sing. Ac. L.J. 76.

[82] See *Report of the Committee to Develop the Singapore Legal Sector* (September 2007) at para. 3.23, online: Ministry of Law <http://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclicke1d7.pdf>.

[83] Sing., *Parliamentary Debates*, vol. 88, col. 399 (20 October 2011) (Desmond Lee).

[84] Sing., *Parliamentary Debates*, vol. 88 (6 March 2012) (Hri Kumar Nair).

[85] Sing., *Parliamentary Debates*, vol. 90 (4 February 2013) (Indranee Rajah).

[86] Andy Ho, "Let David take on Goliath in court: Champerty" *The Straits Times* (2 August 2013) (that Singapore should allow lawyers take on cases for a cut of the fees in order to bring "justice within reach of the poor").

[87] Daniel Chia, "Contingency Fees for Lawyers can Promote Dispute Resolution" *The Straits Times* (17 August 2013) (to consider contingency fees whilst disbarring errant lawyers who abuse clients); Leow Zi Xiang, "Benefits of Contingency Fee System for Lawyers" *The Straits Times* (8 August 2013) (advocating contingency fees and regulation and the need to punish errant lawyers).

[88] Gloria Lim, Ministry of Law, "Improving Access to Justice a Key Priority" *The Straits Times* (14 August 2013).

[89] See Lord Neuberger, "From Barretry, Maintenance and Champerty to Litigation Funding" (Harbour Litigation Funding First Annual Lecture, delivered at the Gray's Inn, 8 May 2013) at para. 47: "In order for a state to remain inclusive it must not just express a commitment to the rule of law: it must provide effective mechanisms through which its citizens have genuine access to the courts", online: The Supreme Court <http://supremecourt.uk/docs/speech-130508.pdf>.

legal profession, the courts, the insurance industry, the Legal Aid Bureau and other relevant agencies must be carefully considered. As Singapore reflects on this complex issue, recent comparative developments in the U.K., Hong Kong, New Zealand and Australia should be of interest. Since the introduction of conditional fees via the *Courts and Legal Services Act 1990*,[90] the U.K. has proceeded to regulate third party funding,[91] permit damage-based agreements[92] and disallow the recovery of the conditional fees agreements success fees or after-the-event insurance premiums by the winning party.[93] At present, conditional fees are allowed in Australia, with uplift fees ranging from 25% to 100% depending on the particular state. Conditional fee agreements based on remuneration to the lawyer of a normal fee or a normal fee plus a premium are permitted in New Zealand.[94] On the other hand, the Hong Kong Law Reform Commission in 2007 felt that it was inappropriate to introduce conditional fees in Hong Kong due, in part, to the reluctance of the insurance industry at that time to provide after-the-event insurance to cover the winning party's legal costs, and instead recommended the creation of a conditional legal aid fund.[95] As can be seen, the question of whether to introduce conditional fees and if so, the different modes, extent and their implementation are multi-faceted, and potentially implicates various agencies and actors.

V. Concluding Remarks

Public policy concerns against champertous agreements in Singapore remain due to their potential for abuse by lawyers and the consequent adverse impact on the legal profession and the administration of justice. *Kurubalan* demonstrates quite starkly that certain lawyers may succumb to the temptation of obtaining an unjustified windfall from legal representation in breach of the *LPA*. At the same time, the countervailing arguments for ensuring access to justice for impecunious clients are strong and persuasive. The High Court in *Kurubalan* has carved out an important exception to the prohibition against champertous agreements, namely that a lawyer may act for an *impecunious* client knowing that he would likely only be able to recover his appropriate fees or disbursements in the event the client succeeds in the claim or obtains a costs order against the other party. Whilst the imperative to maintain access to justice for the impecunious client and to encourage pro bono work amongst lawyers cannot be gainsaid, more clarification on the scope of the exception would be welcomed, in particular, the interpretation of s. 107(1)(b) of the

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[90] *Supra* note 6.

[91] See U.K., The Association of Litigation Funders of England and Wales, *Code of Conduct for Litigation Funders* (November 2011), online: Courts and the Tribunals Judiciary <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/Code+of+Conduct+for+Litigation+Funders+(November+2011).pdf>.

[92] *Supra* note 7.

[93] See *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (U.K.), 2012, c. 10, which came into force on 1 April 2013.

[94] *Lawyers and Conveyancers Act 2006* (N.Z.), 2006/1, s. 334.

[95] See The Law Reform Commission of Hong Kong, *Report on Conditional Fees* (9 July 2007), online: The Law Reform Commission of Hong Kong <http://www.hkreform.gov.hk/en/publications/rconditional.htm>.

LPA on contingent retainers. The ultimate question of legal reforms, *i.e.* whether we should permit lawyers to enter into conditional and/or contingency fees in Singapore, involving as it were the complex interaction of multiple concerns from the community, government agencies, professional and industry, should lie within the province of Parliament, rather than the courts.