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CHAMPIONING CHAMPERTY

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INTRODUCTION

In the 1998 film *"A Civil Action"*, John Travolta plays Jan Schlichtmann, a flamboyant and tenacious American personal-injury attorney who engages clients almost exclusively on a contingent fee basis. Under such an agreement, the lawyer agrees to render professional services in obtaining a judgment or settlement for the client, in exchange for a fee equal to a certain percentage of the ultimate recovery. Where the claim is defeated and no recovery is made, the lawyer receives no fee whatsoever. Film-viewers follow Schlichtmann as he absorbs a torrent of legal costs and resources, even driving his firm to the brink of bankruptcy, in pursuit of a meritorious but nebulous and unduly drawn-out claim which is contested at every turn.

While all-or-nothing contingent fee agreements may make for dramatic Hollywood fodder, they do not always enjoy the same unanimous support in the legal sphere. The common law has traditionally condemned such agreements as a form of champerty. In *Wallersteiner v Moir*[1], Lord Denning MR stated the general rule in the following terms:

> In its origin champerty was a division of the proceeds (*Campi partitio*). An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty... It mattered not whether the sum to be received was to be his sole remuneration, or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost.

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[1] *Wallersteiner v Moir* (No 2), [1975] QB 373 at 393.

This essay seeks to outline the arguments for and against champertous agreements, before exploring whether such agreements have a role to play in our evolving legal landscape. Ultimately, I argue for the increased liberalisation of champertous agreements, in the name of enhancing access to justice.

HOW CHAMPERTOUS AGREEMENTS WORK

In the legal domain, champertous agreements often take the form of a lawyer offering to take up cases brought by clients who are unable to pay their legal fees upfront. In exchange for legal services, the client agrees to pay the lawyer a portion of the settlement or recovery if the claim is successful. The amount paid usually amounts to a higher sum than what the lawyer would have received under a conventional fee system. This is often referred to as a contingent fee agreement.

Variations on the contingent fee agreement also exist, such as the uplift fee agreement, where a basic minimum legal fee is agreed upon, but an additional sum is payable to the lawyer if the claim is successful.

Such agreements are generally referred to as champertous or conditional fee agreements, as payment of legal fees is conditional upon the success of the claim. Under such agreements, a person that is not well-to-do can nevertheless engage a lawyer, with the obligation to pay largely arising only if the claim is successful. The client is put at no financial risk if the claim is unsuccessful, as the burden is borne by the lawyer.

While such fee agreements seem like a surefire way to increase access to justice by enabling the less wealthy to have their day in court, the concept has seen more than its fair share of criticisms.

TRADITIONAL CRITICISMS

Critics have long contended that champertous agreements pose a risk to the sanctity of the legal industry. They argue that such agreements could tempt lawyers to cherry-pick the strongest claims as they would be investing their own time and money into uncertain prospects of

recovery. Far from guaranteeing access to justice, champertous agreements could indeed have the opposite effect.[2]

There exists the fear that champertous agreements may tempt lawyers to inflame damages, suppress evidence, or even suborn witnesses for their own personal gain.[3] This may potentially become the norm in a legal market where attorneys become financially invested in the suit, concerned with achieving a higher rate of return through an increased number of clients and suits. This could lead to a reduction in the quality of legal work and the commitment to principles of justice, as lawyers would be motivated to seek the quickest methods of settling a claim and getting a pay-out, instead of working towards the most beneficial solution for their clients. The role of a lawyer as an impartial advocate of his client's cause would correspondingly be perverted.[4]

Another criticism is the inevitable consequence that those who are forced to rely on such agreements end up paying much more for identical services than the wealthy, who are able to afford legal services charged on a conventional basis.[5] This is especially apparent for claims involving large sums. While the wealthy client who can afford conventional legal fees pays a flat hourly rate for legal services, the impecunious client relying on a champertous agreement pays a percentage of the sum recovered, which may end up being much higher than the conventional rate.

This may be perceived as unjust and unfair discrimination, in essence offering "access to justice" to the impecunious at a significant mark-up.

THE POSITION IN SINGAPORE

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[2] *Law Society of Singapore v Kurubalan* [2013] SGHC 135, [2013] 4 SLR 91 at [27].

[3] M P Furmston, ed, *Cheshire, Fifoot and Furmston's Law of Contract*, 2nd ed, (Singapore: Butterworths Asia, 1998) at 639.

[4] *Contingent Fee: Champerty or Champion*, Arthur L. Kraut, 21 Clev. St. L. Rev. 15 (1972).

[5] *Supranote* 2, at [27].

All these criticisms seem to have been acknowledged locally, with s 107 of the *Legal Profession Act*[6] prohibiting solicitors from acquiring any interest in any suit, action or proceeding, and from entering into agreements which provide for payment only if the claim is successful. Similarly, Rule 18 of the Professional Conduct Rules[7] expressly prohibits contingent fee agreements. Both provisions seem to be premised on the conventional wisdom that advocates and solicitors must maintain their independent and professional standing (unaffected by any personal interest in the outcome of the matter) in order to be able to act effectively in representing the client's interests.[8] Contravention of the aforementioned provisions may lead to disciplinary sanctions, including the offending lawyer being struck off the rolls.[9]

The SGHC in *Law Society of Singapore v Kurubalan* [*Kurubalan*][10] recognized that a key element in effectively representing a client's interest is the ability of the lawyer to maintain a sufficient sense of detachment so as to be able to discharge his duty to the court. This duty ultimately paramount and trumps all other duties.[11]

Such is the commitment of the Singaporean courts to preserve justice and safeguard confidence in the profession that the doctrine has been extended as a general principle beyond the confines of court proceedings. Steps have been taken to bar champertous agreements in other areas of legal work such as arbitration,[12] or even where local lawyers are involved in proceedings brought in foreign jurisdictions.[13]

VALID CONCERNS OR EXAGGERATIONS?

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[6] *Legal Profession Act* (Cap 161, 2001 Rev Ed Sing), s 107.

[7] *Legal Profession (Professional Conduct) Rules 2015* (S 391/2011 Sing), r 18.

[8] Jeffrey Pinsler SC, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor,* (Singapore: Academy Publishing, 2007).

[9] *Supra* note 6, at s 83(2)(j).

[10] *Supra* note 2.

[11] *Supra* note 2 at [45].

[12] *Otech Pakistan Pvt Ltd v Clough Engineering,* [2006] SGCA 46, [2007] 1 SLR (R) 989 at [38].

[13] *Supra* note 2 at [64]-[66].

However, are such concerns well founded? While it is conceded that champertous agreements may potentially be abused, it is also undeniable that they allow cases to be brought which would otherwise never have had their day in court.

While lawyers may cherry-pick the most meritorious or profitable cases, this is surely only confined to the pool of potential cases where the claimant was in any case unable to afford conventional legal fees. There is no reason why less meritorious claims cannot continue to be brought by claimants willing and able to pay conventional legal fees. While the claims which are both unfunded and unmeritorious may continue to go unheard, this in no way detracts from the fact that champertous agreements can and will lead to a net increase in access to justice.

For truly meritorious claims, financial constraints will no longer be a barrier to justice. Although the claimant may be paying a higher proportion of legal fees than in a comparable claim with a conventional fee agreement, it must not be forgotten that the alternative is to recover nothing at all. Surely some recovery is better than none?

While this is a lacuna arguably fillable by *pro bono,* it is submitted that the local *pro bono* scene is not yet sufficiently developed to fully cater to the needs of society. It must first be acknowledged that commendable efforts and resources are being put in by the authorities, leading to more and more lawyers dedicating time to *pro bono*. However, it is undeniable that there is still a strata of society unable to avail themselves of publicly available *pro bono* services, perhaps due to the stringent means testing conducted by entities such as the Legal Aid Bureau.[14] Unfortunately, such categorisation is unavoidable as long as manpower constraints remain. Until the day our *pro bono* system is sufficiently comprehensive and so well-staffed that it can cater to all meritorious but unfunded claims, it is submitted that champertous agreements should step in to provide some relief.

As for the concern that legal work will suffer as lawyers become more profit-focused, it is arguable that the converse could occur as well. Where lawyers stand to gain more or lose everything from each case, they could well be motivated to work even harder to champion their client's cause.

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[14] Legal Aid Bureau, "Do I Qualify for Legal Aid?" (1 July 2016), online: Ministry of Law <https://www.mlaw.gov.sg/content/lab/en/eligibility/do-i-qualify-for-legal-aid.html>.

While some doubts may still remain regarding the potential abuses, it is submitted that we should not be ruled by fear. There is no clear evidence that relaxing the doctrine of champerty will definitely lead lawyers to pervert the law to win at all costs. Concerns regarding the possibility of profit-driven lawyers abandoning their duties to the court and instead abusing the legal process for personal gain, while valid, can be addressed through strict regulations. When lawyers "play by the rules", champertous lawsuits can be fought just as honourably as those conventionally funded.

A SLOWLY CHANGING LEGAL LANDSCAPE?

There is some evidence that the local stance on champerty is slowly softening. The SGHC in *Kurubalan* recognized two previous local decisions[15] concerning disciplinary proceedings arising out of champertous agreements. In both instances, the offending solicitors were struck off the roll. The court in *Kurubalan* however went on to dismiss the two decisions as dated and of "limited use or relevance",[16] instead proclaiming that the starting point for sentencing in such cases ought to be a period of suspension.[17]

In addition, the court took the deliberate step of clarifying that it was permissible and even honourable for a lawyer to act for an impecunious client in the knowledge that he would likely only be able to recover his appropriate fees if the claim was successful. This is premised on the idea that where a lawyer 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 to take on such an engagement.[18]

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[15] See *Law Society v Chan Chow Wang*, [1974] SGHC 16, [1974-1976] SLR (R) 237 and *Lau Liat Meng v Disciplinary Committee*, [1967] SGPC 1, [1965-1967] SLR (R) 641.

[16] *Supra* note 2 at [69].

[17] *Ibid* at [78].

[18] *Ibid* at [86].

The decision in *Kurubalan* has since been construed as a local exception to the doctrine of champerty,[19] and the apparent relaxation of the court's stance on champerty has been extended recently in *SATS Construction v Islam Md Ohidul* [*SATS*][20] to cover *pro bono* cases. In *SATS,* Debbie Ong JC held that there was no reason why legal costs should not be awarded when the pro bono lawyer had rendered substantial work.[21] In both cases however, the courts drew the line at champertous agreements where fees are calculated as a percentage of or on the basis of the amount recovered in the claim.

With respect, it is submitted that Singapore is well-poised to go a step further and endorse a restricted version of champerty where fees may be derived from the amount recovered *beyond* a minimum legal fee. This might in fact further incentivise lawyers to act for impecunious clients with meritorious claims, giving a welcome boost to access to justice in Singapore.

As fears regarding the potential perversion of the law understandably remain, perhaps a cue can be taken from Australia, where limited forms of champerty have been legalised in some states. The *Queensland Legal Profession Act* [*QLPA*][22] provides a fine example, where conditional costs agreements involving uplift fees are allowed but subject to strict limits. Under the *QLPA*, where a cost agreement involves an additional uplift fee payable only on the successful outcome of the claim, such a fee is capped at 25% of the legal costs, and an estimate of the uplift fee must be provided before the agreement is signed.

The *QLPA* strikes an appropriate balance between the merits of increased access to justice and the perils of unrestrained and profit driven contingent fee agreements. Under an uplift fee agreement, the basic legal fee payable is usually lower than commercial rates, making it more affordable. If the claim is unsuccessful, the client need only pay the discounted basic legal fee. However, if the claim is successful, the client then pays the additional uplift fee out of the monies recovered such that the lawyer receives a total sum of remuneration similar to or slightly

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[19] Reynard Chua, "The Future of Champerty in Singapore?", online: (2013) 5 Juris Illuminae 6 <http://www.singaporelawreview.com/juris-illuminae-entries/2015/the-future-of-champerty-in-singapore>.

[20] *SATS Construction v Islam Md Ohidul* [2016] SGHC 99.

[21] *Ibid* at [19].

[22] *Legal Profession Act 2007* (Qld), s 324.

higher than conventional rates. Where clients are impecunious and unlikely to be able to pay any substantial legal fees for an unsuccessful claim, the availability of such a fee agreement might incentivise lawyers to bear the risk and take on such a claim.

Similarly, the United Kingdom has decriminalised champertous agreements in 1967.[23] In addition, conditional fee agreements are now permissible under the s 58 of the *Courts and Legal Services Act,*[24] albeit subject to certain conditions. This includes requiring the agreement to be in writing, as well as compliance with other conditions as may be prescribed by the Lord Chancellor.

It is submitted that Singapore can and should adopt a similar stance which could greatly enhance access to justice whilst restraining unscrupulous lawyers from abusing the system.

CONCLUSION

While some risks may remain, the potential of champertous agreements to carve out a substantial new avenue for access to justice cannot be ignored. As long as robust regulations and sufficient supervision remain in place, potential abusers of the system can likely be kept in check. Other common law jurisdictions such as the United Kingdom and Australia have already largely embraced champerty, and it is high time Singapore joins their ranks in championing champerty.

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[23] *Supra* note 2 at [62]-[63].

[24] *Courts and Legal Services Act 1990* (UK), c 41.