Re-examining Public Policy—a Case for Conditional Fees in Singapore?

Gary Chan Kok Yew*

Abstract Conditional fee agreements are currently prohibited in Singapore. The Singapore courts still adhere to the public policy considerations expressed in the English common law which proscribe maintenance and champerty. However, the United Kingdom as well as Ontario (Canada) and Australia have recently ‘departed’ from the old system prohibiting conditional fee agreements. It is thus timely for Singapore to re-examine the public policy arguments against conditional fee agreements and inquire whether a conditional fee based system ought to be introduced. Apart from the above jurisdictions, lessons will also be drawn from the problems and issues faced by the US and the rest of Canada in the implementation of conditional fees.

I. Introduction

There has been a flurry of activity and debate in recent years in the United Kingdom, Australia, Ontario (Canada) and several Commonwealth states relating to the ubiquitous issue of ‘lawyers’ fees’: should conditional fee agreements between lawyers and their clients be permitted and, if so, to what extent? The United Kingdom has recently enacted the Access to Justice Act 1999 and implemented accompanying regulations and orders to expand further the scope of its existing conditional fee based system. Several Australian States have passed relevant legislation and issued Law Commission reports on this topic. Academics and practitioners have urged New Zealand¹ to permit conditional fee agreements. South Africa has recently enacted the Conditional Fees Act of 1997 to allow conditional fees with respect to

personal injury claims. Ontario, for some time the sole remaining province in Canada prohibiting conditional fees, has recently passed the Justice Statute Law Amendment Act 2002\(^2\) to permit contingency fee agreements. Relatively speaking, the United States\(^3\) and the rest of Canada\(^4\) are ‘veterans’ in this area of conditional fees.

In contrast, it is relatively quiet on the Singapore front in so far as the issue of conditional fees is concerned. Apart from the few queries from Members of Parliament and ministerial replies, members of the public have generally been fairly reticent on this issue of conditional fees. The Law Society of Singapore had embarked on a study of conditional fees\(^5\) but there has not been any public consultation. There have been few academic writings\(^6\) on the issue of conditional fees per se in Singapore, though there are other related articles on legal aid\(^7\) and champertous contracts.\(^8\)

Yet, the fact is that the Singapore public is not unconcerned about costs, including legal costs.\(^9\) There have been numerous press reports on rising legal costs in Singapore and the related concerns that they may be out of the reach of ordinary Singaporeans.\(^10\) Even concerns over the rise of legal fees in the United Kingdom have found their way

2 Royal Assent was received on 9 December 2002.
5 See ‘No win, no fee legal system being studied here’, The Straits Times (1 May 1995). It was reported that the Law Society of Singapore wanted to look at the implementation of conditional fees in the UK and the problems involved before deciding whether a change was needed here. This writer has been informed that the Law Society of Singapore had subsequently decided against endorsing conditional fees in Singapore pursuant to a dialogue session with its members. The precise reasons for the decision are not known to the writer.
9 See e.g. ‘Rising Costs of Justice’, The Straits Times (27 November 1994). See also Singapore Parliamentary Reports, vol. 71, col. 1285 (6 March 2000): enquiries relating to legal aid and disputes ranked amongst the top eight concerns of Singaporeans (including enquiries relating to job matching, family matters, financial assistance, training schemes and so on) based on the number of calls made to the Community Development Council (CDC) National Helpline between 3 January 1998 and the end of 1999.
10 See ‘Rising Costs of Justice’, above n. 9.
into the local newspapers.\textsuperscript{11} Several Members of Parliament have spoken out in favour of relaxing the means test under the current legal aid system in Singapore.\textsuperscript{12} Some public-spirited lawyers have voluntarily offered their time to provide free legal advice.\textsuperscript{13} The Chief Justice of Singapore has publicly expressed his concerns on rising legal costs in Singapore.\textsuperscript{14} More recently, the fixed scale costs for conveyancing fees have been abolished in Singapore\textsuperscript{15} after years of public debate, consultation and press coverage.\textsuperscript{16}

With this background in mind, this writer hopes to assess whether it would be feasible to introduce conditional fees to address the issue of litigation costs in Singapore. This writer will discuss how the legal developments in the United States, Canada, United Kingdom and Australia can contribute to the debate on the issue of conditional fees in Singapore. More specifically, the issue of whether a conditional fee based system (or any appropriate variant thereof) ought to be introduced in Singapore will be examined.

The three main models of conditional fee agreements which have been identified are as follows:\textsuperscript{17}

1. where the lawyer accepts the client’s normal fee only if the action was successful (a ‘speculative action’ or a ‘conditional normal fee’ agreement);
2. where the lawyer accepts the client’s normal fee with an agreed uplift amount in the event of success so as to compensate the lawyer for the risks of not being paid in the event of failure (a ‘conditional uplift fee’ agreement); and
3. where the lawyer retains an agreed percentage of the client’s recovery, and is paid nothing if the action is unsuccessful, to

\textsuperscript{11} See ‘Outrage over British QCs’ high fees’, \textit{The Straits Times} (7 June 1998); see also ‘Top British judge attacks exorbitant lawyers’ fees’, \textit{The Straits Times} (5 June 2002).
\textsuperscript{12} See \textit{Singapore Parliamentary Reports}, vol. 73, cols. 520–3 and 526–7 (9 March 2001).
\textsuperscript{13} See ‘Lawyers dish out legal advice at CC—for free’, \textit{The Straits Times} (14 February 2002).
\textsuperscript{14} Singapore lawyers will probably not forget the example given by the Honourable Chief Justice of a law firm which had filed a bundle of documents containing more than 2,000 pages for a hearing for which the filing fees amounted to S$19,000, which is an extravagant sum by Singapore standards. To top it all, not a single page of the bundle was cited by counsel during his submission before the court; see ‘CJ to errant lawyers: Shape up or pay up’, \textit{The Straits Times} (5 January 2003).
\textsuperscript{15} The Legal Profession (Solicitors’ Remuneration) Order 2003 (S. 2003/40) which came into force on 1 February 2003.
\textsuperscript{16} See ‘Fixed scale for charges kept to protect people’, \textit{The Straits Times} (10 November 1995).
compensate for the risks of not being paid in the event of failure (the American model or the ‘percentage contingency fee’).  

In this paper, each of the above agreements will be referred to broadly as ‘conditional fee agreements’ since the payment of lawyers’ fees is conditional upon the outcome of the litigation in each case. The United Kingdom and Australia currently allow models 1 and 2 conditional fee agreements (subject to specified legislative requirements), but not model 3 contingency fee agreements. The model 3 ‘contingency fee agreement’, a species of the more general category of ‘conditional fee agreements’, is practised in the United States and Canada.

The current law in Singapore prohibiting conditional fees forms part of the English common law which has been imported into Singapore.19 With the abolition of appeals to the Privy Council in 1994,20 the Singapore Court of Appeal became the highest court of the land and is no longer, strictly speaking, bound by decisions emanating from the Privy Council sitting in London.21 However, in practice, as it strives to develop its autochthonous system, it continues to regard English and Australian court decisions as well as, to a lesser extent, the United States and Canadian court decisions, in areas untouched by local legislation, as persuasive precedents.

The Singapore courts continue—in the context of conditional fee agreements—to adhere to the public policy considerations expressed in the English common law which proscribe maintenance and champerty. As Singapore proceeds to develop her own unique legal system, it may be anomalous for her to continue to endorse such common law principles, unless this is supported by public policy considerations which take into account Singapore’s own interests. Hence, it is particularly timely for Singapore to re-examine the public policy arguments against conditional fee agreements, just as the United Kingdom, Ontario and Australia have ‘departed’ from the old system prohibiting conditional fee agreements. Apart from these jurisdictions, lessons may also be drawn from the problems and issues faced by the US and the rest of Canada in the implementation of conditional fees.


20 The Judicial Committee Repeal Act 1994 (No. 2 of 1994).

21 See also the Practice Statement on Judicial Precedent [1994] 2 SLR 689. This states that whilst the decisions of the Privy Council are not binding on the Singapore Court of Appeal, the latter will continue to treat prior decisions of the Privy Council as ‘normally binding’. Whilst the Singapore Court of Appeal will have the right to depart from such prior decisions, this power will be exercised ‘sparingly’; see the local case of PP v Manogaran s/o R Ramu [1997] 1 SLR 22 where the Singapore Court of Appeal departed from its own previous decision in Abdul Rahman bin Yusof v PP [1996] 3 SLR 15.
II. The Public Policy Arguments for Conditional Fees in Singapore

The prohibitions against conditional fee agreements, maintenance and champerty in Singapore in respect of contentious proceedings are encapsulated in both statutory and common law. The statutory law in fact preserves and reinforces the common law position in Singapore. Under section 107(1)(b) of the Singapore Legal Profession Act, no solicitor shall enter into any agreement by which he is retained or employed 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, act or proceeding. Further, section 107(3) of the Act provides that a solicitor shall, notwithstanding any provision of the Act, be subject to the law of maintenance and champerty like any other person.

Though criminal and tortious liability based on maintenance and champerty have since been abolished in England, any rule prohibiting champertous contracts on the basis that they are contrary to public policy and/or otherwise illegal has been preserved. The English courts have generally held that conditional fee agreements (being champertous agreements) are void and unenforceable. The historically ‘strong anti-professional attitude’ in the United States may have given rise to the perception that the practice of law was a commercial endeavour which made contingency fees more acceptable there, unlike the more purist attitudes adopted in England towards the professionalism of barristers. The English courts have observed that a lawyer with a direct financial stake in the action is more likely to compromise the client’s interests. There was a concern that the lawyer may be tempted to subvert his duties to the court by, for example, suppressing evidence to gain an unfair advantage in litigation, and in the process adversely affect the due administration of justice. As such, frivolous or vexatious litigation might be encouraged and the

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22 There are no similar prohibitions in Singapore against conditional fee agreements made in the context of non-contentious proceedings: see the Legal Profession (Solicitors’ Remuneration) Order 2003 (S. 2003/40).
23 Cap. 161, 2001 Rev. Ed.
24 English Criminal Law Act 1967, s. 14(2).
25 In Wallersteiner v Moir (No. 2) [1975] 1 QB 373, Lord Denning stated plainly that ‘English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a “contingency fee”, that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty’. See also Lord Denning in Trendtex Trading Corp v Credit Suisse [1980] 3 All ER 721.
27 As Buckley LJ in Wallersteiner v Moir (No. 2) [1975] QB 373 at 402 had indicated, an advocate should provide a client with ‘a clear eye and an unbiased judgment’ (emphasis added).
28 Re Trepca Mines (No. 2) [1963] Ch 199 at 219–20, per Lord Denning MR.
29 Thai Trading Co (a firm) v Taylor [1998] 3 All ER 65 at 71, per Millet LJ.
interests of the opposing party unduly prejudiced. Against the tide of public policy prohibitions of conditional fees and champerty, however, the English Court of Appeal held in *Thai Trading Co (a firm) v Taylor* that it was not improper for a solicitor to agree to act on the basis that he is to be paid his *ordinary costs* if he wins but not if he loses. However, this was promptly rejected in the subsequent case of *Awwad v Geraghty & Co (a firm).* The court ruled that such fee agreements, in circumstances not sanctioned by statute, are against public policy and hence unenforceable. This English common law position has, however, been overtaken in the UK by legal reforms permitting conditional fees via the *Courts and Legal Services Act 1990* and its accompanying regulations, and this was subsequently extended via the *Access to Justice Act 1999.*

Pursuant to the United Kingdom’s proposals on conditional fees prior to the enactment of the *Courts and Legal Services Act 1990*, a Member of Parliament raised the issue in the Singapore Parliament as to whether conditional fees would also be considered for implementation in Singapore. In response, the Minister for Law cited some objections which have been canvassed against the conditional fee based system as follows:

1. that there is a danger that lawyers are anxious to get their remuneration as quickly as possible;
2. that the introduction of a conditional fees system may result in more litigation which overloads the system; and
3. that unscrupulous lawyers may be tempted to cut deals behind the scenes in order to get their cut quickly (citing an article in the *Straits Times* which quoted the then Lord Chancellor of the United Kingdom).

At the same time, the Minister for Law, whilst not excluding the possibility of changes in this area, suggested that he would like to

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30 Lord Mustill in *Giles v Thompson* [1993] 2 WLR 908 at 911 indicated that champerty could also result in ‘exploitation of worthless claims’ which the defendant lacked the resources and influence to withstand’ (emphasis added).
31 See Millet LJ’s judgment, above n. 29 at 72 (emphasis added).
32 [2000] 1 All ER 608.
33 The fee agreement in question was entered into in 1993, prior to the introduction of the conditional fee based system in the United Kingdom in 1995.
34 *Courts and Legal Services Act 1990*, s. 58.
36 *Access to Justice Act 1999*, ss. 27 and 28 replaced the *Courts and Legal Services Act 1990*, s. 58 with a new s. 58 and added ss. 58A and 58B.
37 The Member of Parliament also asked a related question whether the Official Assignee should be empowered to employ professionals to conduct investigations to pursue debtors on a contingency fee basis: see *Singapore Parliamentary Reports*, vol. 53, cols. 851–2 (27 March 1989).
38 *Singapore Parliamentary Reports*, vol. 53, cols. 856–7 (27 March 1989). It was not entirely clear whether the Minister for Law, in raising the objections, was targeting the American-style contingency fees, the United Kingdom proposals for a limited form of conditional fees, or both.
tread ‘cautiously’ and that the matter be debated by lawyers first.\footnote{Ibid.} In a subsequent Parliamentary debate some 11 years later, another Member of Parliament proposed the relaxation of the means test under the civil legal aid scheme with a view to allowing poorer Singaporeans to have greater access to justice. The Member of Parliament also commented that poorer Singaporeans are unlike the poorer citizens in the United States, whom the Member of Parliament said are not similarly prejudiced because of the contingency fee system there. The Member of Parliament did not, however, refer to the conditional fee system in the United Kingdom. In response, the Minister for Law indicated that to introduce conditional fees in Singapore would be a fundamental change to the solicitor-client relationship and that a lawyer may become ‘personally and emotionally involved’ in a case where his fees are dependent on whether he succeeds or not.\footnote{\textit{Singapore Parliamentary Reports}, vol. 71, col. 1465 (8 March 2000).}

This paper suggests four broad reasons for permitting conditional fee agreements in Singapore. It will examine public policy reasons (from a comparative perspective) for the implementation of conditional fees in Singapore and, at the same time, attempts will be made to address the possible objections to conditional fees. The discussion will relate to the following concerns:

1. access to justice and the likelihood of increased litigiousness and frivolous claims;
2. the merits and demerits of the state civil legal aid scheme as an alternative to conditional fees;
3. the likelihood of the lawyer (acting pursuant to a conditional fee agreement) to compromise his or her professional duties to the client and the courts; and
4. the impact of conditional fees on alternative dispute resolution (particularly mediation and negotiation) in Singapore.

\textit{i. Access to Justice, Increased Litigiousness and Frivolous Claims}

Having ‘access to justice’ means that the potential litigant is capable of vindicating his legal rights within the parameters of the legal system, whether to initiate or to defend a claim in the courts. It is noted that, as solicitor-client costs constitute a substantial portion of the entire legal costs for the potential litigant,\footnote{The total legal costs would consist of party-party costs, solicitor-client costs plus disbursements (including hearing and other court fees).} self-representation could well save large sums of money. However, the layperson would be hard put to argue a case effectively before the courts if he or she does not possess the rudiments of legal knowledge as well as litigation experience. Moreover, under the Singapore adversarial mode of litigation, litigants are expected to be able to gather and present evidence, call
and examine witnesses and be familiar with the rules of evidence and procedure. The ‘substantive’ capacity and ability of the litigant to pursue his or her case in the courts is therefore very significant, as far as the notion of ‘access to justice’ is concerned. There is evidence that indigent litigants are more likely to be illiterate or poorly educated compared with the well-off in Singapore and hence are less likely to possess the requisite knowledge to pursue a case in the courts without the assistance of a lawyer.

Conditional fees, if permitted in Singapore, would allow such indigent persons at least the opportunity to litigate based on a conditional fee agreement. These persons are likely to consist of those who do not qualify for legal aid under the stringent criteria contained in the Legal Aid and Advice Act and who also cannot afford lawyers’ fees. The introduction of conditional fees, however, does not necessarily remove the entire costs burden for the potential claimant. Under the ‘costs follow the event’ principle in Singapore, the losing party in civil litigation would generally still be required to pay legal costs to the winning party. This requirement may be obviated, as in the United Kingdom, if the litigant took up litigation expenses insurance (LEI) against the risks of having to pay such legal costs to the winning party. If this is the case, his or her financial risks would be further reduced. However, irrespective of whether he or she purchases such insurance, the fact remains that the losing party under a conditional fee agreement need not pay legal fees to his or her own lawyer (and this usually constitutes substantial ‘savings’ from his or her total legal expenses). As such, his or her access to justice is enhanced to the extent that the financial burden to pay his or her own lawyer is obliterated or minimized.

The introduction of conditional fees in Singapore would not only lead to increased access to justice, but also, and more importantly, to the ‘equalization’ of access to justice. Conditional fees allow a poor individual claimant the opportunity to vindicate his or her legal rights against the big corporation. The US academic Galanter regarded this as a form of structural imbalance in litigation which favours the ‘repeat players’ as opposed to the ‘one-shotters’. Conditional fees can


43 In addition, it might even be said that conditional fees are likely to afford a litigant greater liberty in selecting and engaging quality legal representation which he or she may not otherwise be able to afford under the present regime.


45 Strictly speaking, conditional fees need not necessarily be tied to LEI.

help in restoring this structural imbalance and move towards greater ‘equalization’ of access to justice between the ‘haves’ and the ‘have-nots’. Permitting conditional fee agreements between lawyers and clients would also remove the ‘barriers to entry’ into the litigation market of potential litigants with meritorious claims or defences and hence would ensure a more level playing-field.

It should, however, be noted that legal costs constitute only one facet to the all-embracing notion of ‘access to justice’. The notion of ‘access to justice’ may be impacted by several other factors such as the use of information technology to ‘expedite’ access to justice, extending the jurisdiction of small claims tribunals, efficiency of court procedures, independence of the courts and the ability to enforce court judgments, even the degree of reliance on extended family support to maintain litigation and so on, which are not directly (though they may be indirectly) related to the use of conditional fee agreements.

The right of access to justice should be regarded as a significant right enforceable and recognized in Singapore. The bases of access to justice in respect of conditional fees have been expressed in case law precedents, statutes and Law Commission reports in the United Kingdom, United States, Australia and Ontario. For example, Millet LJ in Thai Trading felt that access to justice is a ‘fundamental human right’ which ought to be readily available to all. Whilst the learned judge was concerned that lawyers would be tempted by financial incentives on the outcome of the litigation, he recognized that this would be outweighed by the countervailing public policy to make justice available to persons with modest means. There was no direct comment in Awwad v Geraghty on Millet LJ’s pronouncement of access to justice as a ‘fundamental human right’, although Schiemann LJ did recognize the public policy basis, amongst others, of greater access to the courts by members of the public. In Gore v Justice Corp Pty Ltd, the Full Court of the Federal Court of Australia stated that with the high costs of litigation, there are ‘risks that citizens with justifiable causes of action may be kept out of courts because of their inability to pay the costs of litigation or because they fear the financial risks of litigation’. The Senate Standing Committee on Legal and Constitutional Affairs in New South Wales, Australia has echoed similar sentiments that ‘the high cost of justice in Australia has resulted in the legal system being inaccessible to sections of the community’. Taking a similar line, the Canadian courts have also emphasized the need to

47 [1998] 3 All ER 65 at 73.
48 [2000] 1 All ER 608 at 623.
49 [2002] FCA 354 (also cited in Treacy & Ors v Rylestone Pty Ltd & Ors [2002] WASC 178 (Supreme Court of Western Australia) at para. 58).
facilitate access to justice through contingency fee agreements. The Ontario Court of Appeal in McIntyre Estate v Ontario had also urged the Ontario government to enact legislation to permit contingency fees.

Moreover, the English courts have also recognized access to the courts as a basic constitutional right (derived from the common law) which can only be abrogated by express provision in an Act of Parliament. The constitutional right to counsel exists in the US to assist indigent litigants at least for certain types of claims.

In the Singapore case of Amar Hoseen Mohammed v Singapore Airlines Ltd, K.S. Rajah JC (as he then was) stated, in the context of a security for costs application, that ‘courts are slow to whittle away a natural person’s right to litigate despite poverty. The requirement for security for costs from a foreigner, a natural person, making on the face of things a genuine claim against a large airline must not appear to deny him access to our courts’. In the Malaysian case of Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor, the court regarded the liberty of an aggrieved person to seek relief in the courts as one of the many facets of personal liberty guaranteed under Article 5(1) of the Federal Constitution, which is in pari materia with Article 9(1) of the Singapore Constitution. Article 9(1) provides that no person shall be deprived of his life or personal liberty save in accordance with the law. The court specifically referred to the English case of R v Lord Chancellor, ex p. Witham but stated that, unlike the United Kingdom, as Malaysia has a written constitution, the Malaysian Parliament is not empowered to limit the constitutional right of access to the courts. Thus, in the context of Singapore which has a written

55 [1995] 1 SLR 77 (emphasis added). In Pandian Marmuthu v Guan Leong [2001] 3 SLR 400, the Singapore High Court, in deciding an application for security for costs, took into consideration, inter alia, the fact that it should be circumspect to ensure that the defendant’s purpose of seeking security for costs is not to quell the claimant’s quest for justice.
56 [1998] 3 Malayan Law Journal 289. In another Malaysian case, Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1990] 3 Malayan Law Journal 481, the defendant obtained a variation of an existing Mareva injunction against him to allow him to take from his assets urgently needed funds for his legal expenses in respect of two legal proceedings abroad (a habeas corpus application and a case before the European Commission of Human Rights) which involved his personal liberty.
57 Above n. 53.
58 It should be noted that the right to access to justice in the United Kingdom may be derived from another source, i.e. Art. 6 ECHR which grants a right to a fair trial (see R v Lord Chancellor, ex p. Witham, above n. 53) and the UK Human Rights Act 1998.
constitution, it may be, *a fortiori*, argued that access to justice is tantamount to a constitutional right or, alternatively, a quasi-constitutional right.

References can also be made to the notion of ‘access to justice’ in specific Singapore legislation. The Supreme Court of Judicature Act imposes an obligation on the High Court to assign an advocate and solicitor to a person against whom an order under section 74 (that is, an order preventing legal proceedings or discontinuation thereof by a vexatious litigant) has been made and who is ‘unable on account of poverty’ to engage a lawyer.\(^{59}\) Apart from court decisions, references to the Constitution and legislation, one can also point to statements from Parliamentarians extolling the need for access to justice. Members of Parliament have received feedback from their constituents indicating the high costs involved in enforcing one’s legal rights\(^{60}\) and the consequent need to expand access to justice. The Singapore judiciary has also made significant pronouncements, outside of the court-rooms, on the need for access to justice.\(^{61}\) The Chief Justice has recently, in his speech to the subordinate courts which handle 95 per cent of the court cases in Singapore, stated that ‘the Judiciary must guard against the obstruction to justice, or more accurately, access to justice. We must strive to ensure that the public, and especially those who are *indigent*, can seek the redress available through the judicial process’\(^{62}\). Hence, it is submitted that, on balance, access to justice is a significant right which should outweigh the perceived public policy reasons against conditional fees. Moreover, as will be seen later, these perceived public policy reasons are not as persuasive as the older case law precedents had envisaged.\(^{63}\)

The converse argument raised against conditional fees in Singapore is that, in the process of enhancing access to justice, a more litigious society may result which would be bad for Singapore. The Minister for Law had raised this issue in Parliament concerning increased litigation which may overload the legal system. There is a perception that conditional fees would unduly encourage injured victims to make claims against the defendants, even frivolous and vexatious claims which translate to higher legal costs.

It is submitted, however, that these fears are not persuasive in the final analysis. First, greater litigiousness in a society *per se* is not necessarily an undesirable state of affairs. An increase in litigiousness

59 Supreme Court of Judicature Act, s. 74(2) (Cap. 322, 1999 Rev. Ed.).
60 See *Singapore Parliamentary Reports*, vol. 74, col. 1205 (15 May 2002).
63 Indeed, some arguments will be proffered in this Part (see *iii* below) as the bases for rejecting the above-mentioned public policy reasons against conditional fees.
may reflect the fact that more people are availing themselves of the opportunities to vindicate their legal rights within the parameters of the legal system. It is clear that attitudes towards litigation differ between countries, such as the contrast between England and the United States. Looking at the issue from a more ‘universalist’ perspective, it cannot be said that increased litigiousness per se is intrinsically undesirable.

Secondly, there is no evidence that conditional fees will necessarily result in a flood of litigation. One may need to look at various other factors apart from contingency fees for the relatively high litigiousness in certain jurisdictions such as the United States (for example, the lack of a medical insurance scheme and limited welfare). Though this does not preclude contingency fees in the US as a possible contributory factor, it is noted that increased litigation is not the crux of the problem, but frivolous and vexatious claims. Indeed, it has been observed in Australia that conditional fees may actually work to filter out unmeritorious claims as lawyers will not bear the risk in such cases. Further, instead of viewing the conditional fee based system as one which contributes to the overall costs of a society, one could regard it as a method whereby the legal risks or costs are spread or allocated (or sometimes shifted) amongst the client, the lawyer and the opposing litigant, a form of insurance against legal risks borne by the client.

Some related issues which Singapore should consider carefully before any implementation of conditional fees are first, whether the client under a conditional fee agreement should be backed up by insurance against the risk of having to pay the legal costs to the winning party (as in the United Kingdom) and secondly, whether this would ‘create’, for the potential litigant, a ‘risk-free’ zone such as to generate unnecessary litigation and costs? A totally ‘risk-free’ zone for the potential litigant (as referred to by the English court in Callery v Gray) may not be a desirable state of affairs. Indeed, the relevant question should be as follows: what would be the appropriate amount of costs which the potential litigant should bear if he or she loses the case? A proper balance should be struck between the need to enhance

67 [2002] 3 All ER 417.
access to justice and the requirement to act responsibly before litigating. This issue certainly merits further study and is likely to require more socio-economic data relating to demography, costs of living including legal costs and litigants’ behaviour in Singapore.

The public policy reason that champerty may lead to ‘exploitation of worthless claims’ has already been referred to above. However, it is contended that there is no real danger of an increase in vexatious and frivolous claims arising from conditional fees. Sufficient safeguards lie in the power of the court to strike out vexatious and frivolous pleadings in accordance with the Rules of Court as well as its inherent jurisdiction to prevent vexatious and frivolous proceedings which constitute an abuse of the process of the court. The High Court also has a statutory right to prevent a vexatious litigant from instituting any legal proceeding in any court or to require him or her to discontinue any pending legal proceedings.

In practical terms, the lawyer is less likely to accept a case based on a conditional fee agreement where the claim is frivolous or vexatious with little or no likelihood of success. The lawyer would not relish the prospect of spending time and effort on a case which is not likely to derive any monetary benefit. Brickman, for example, refers to the high success ratios of American contingency fee lawyers in tort cases as evidence that such lawyers generally accept cases where there is at least a good prospect for recovery after careful case selection.

The lawyer is also likely to be deterred from taking up a frivolous and vexatious claim as he or she may run the risk of having to pay the other party’s costs and, in addition, forgo solicitor-client costs under the courts’ wasted costs jurisdiction. Where costs have been incurred ‘unreasonably or improperly’ in any proceedings, the lawyer may be personally liable for costs. A lawyer may be regarded as failing to act ‘reasonably’ if he pursues a case when it is obvious that there are no prospects for success. In a similar vein, there are local cases which have held that a non-party may have to pay the opposing party

68 Order 18, r. 19 of the Rules of Court. This power to strike out pleadings will be exercised in plain and obvious cases; see the Singapore Court of Appeal decision in The Osprey [2000] 1 SLR 281.
70 Supreme Court of Judicature Act, s. 74 (Cap. 322, 1999 Rev. Ed.).
72 Order 59, r. 8 of the Rules of Court. In England, the courts have held that the lawyer will not be exposed to any greater risk to pay costs personally in a case where there was a conditional fee agreement as compared with a case under another fee agreement (see Hodgson and others v Imperial Tobacco Ltd and others [1998] 1 WLR 1056). See D. Luban, above n. 17 at 102 on the role of the US ‘rule 11 sanctions’ under the Federal Rules of Civil Procedure in deterring frivolous claims.
73 See the English case Secretary of State for the Home Department, ex p. Abassi, The Times (6 April 1992).
the costs incurred by the latter if the non-party had caused unnecessary proceedings or litigious expenses or had initiated an unwarranted action. The decisions in these cases are not based on wasted costs jurisdiction. Thus, a lawyer acting for a client in respect of a frivolous and vexatious claim may find himself or herself liable to pay the opposing party’s costs.

ii. Conditional Fees and Civil Legal Aid

In the United Kingdom, one of the primary reasons for the implementation of conditional fees is to reduce the government budget for legal aid so as to be able to channel it to better use. It is recognized that many of the peculiar problems and circumstances which necessitated the legal aid reforms in the United Kingdom may not be entirely applicable to Singapore. The Singapore government, in the financial year 2002, set aside a relatively small sum (compared with the United Kingdom) for providing legal aid. Nevertheless, it is submitted that such an amount constitutes potential savings for the government which can be utilized in more appropriate ways, if the legal aid budget is reduced.

As indicated earlier, there have been several calls for the Singapore government to relax the means test to allow more people to be granted legal aid in Singapore. One problem that the legal aid system of a country will face, notwithstanding the increase in the legal aid budget, is that public debate will continue to rage on the insufficiency of legal aid. The writing is on the wall—the amount of legal aid is never enough. Even as the Singapore government adjusted the means test for granting legal aid recently, there have been calls from Members of Parliament clamouring for another adjustment, barely two years from the most recent adjustment in 2001.

Under the Legal Aid and Advice Act, the Legal Aid Bureau is empowered to administer the means test as well as a merits test to determine the persons eligible for civil legal aid. To fulfil the means test under the Legal Aid and Advice Act, the applicant should not

75 See The Karting Club of Singapore v David Mak & Ors (Wee Soon Kim Anthony, Intervener) [1992] 2 SLR 483, Singapore High Court.
76 Ibid., the court stated that it had an unfettered power under Ord. 59, r. 2(2) of the Rules of Supreme Court 1970 to determine by whom costs are to be paid.
77 Criticisms have been levelled against the legal aid system in the United Kingdom (including a lack of supervision over the quality of legal services provided, the rapid rise in legal aid expenditure and the use of legal aid funds in cases of insufficient merit): see White Paper, Modernising Justice—The Government’s plans for reforming legal services and the courts, Cm 4155 (1998) para. 3.8.
78 The total sum of S$3.8 million would amount to just about S$1 per capita of the population.
possess nor be entitled to disposable capital exceeding S$7,000 and disposable income should not exceed S$10,000 per annum. The means test is, however, not linked to economic variables such as basic wage or costs of living, though the Minister is empowered to introduce modifications to the means test, presumably to adapt to changing conditions (including economic conditions). In addition, the applicant is required to pass the merits test based on the ‘reasonable’ opinion of the Legal Aid Board. There is a wide discretion on the part of the Director of the Legal Aid Bureau to refuse legal aid if it appears to him or her ‘unreasonable that the applicant should receive it in the particular circumstances of the case’.

It is submitted that the present civil legal aid scheme is not sufficiently ‘sensitive’ to the potential legal costs involved in a particular case. Where a person who would fail the means test intends to pursue a meritorious and huge claim against a big corporation and legal costs are likely to escalate, the strict application of the means test would prevent him or her from obtaining legal aid. Further, the potential legal costs would often seriously deter ordinary people (save for the well-off) from taking out such a claim in the first instance. The potentially huge legal costs involved should therefore be taken into account in determining whether a person should be granted legal aid, and not merely based on a strict application of the means test. Thus, there is no built-in system currently which necessarily takes into account the potential legal costs involved in an action in determining the granting of legal aid. In contrast, unlike the current legal aid system, the conditional fees lawyer would necessarily take into account, as part of the exercise of determining the appropriate ‘success fees’, the potential legal costs involved as well as, assuming an American-style contingency fee model, the expected amount of damages to be recovered.

The issue of conditional fees as linked to the sufficiency of state legal aid was in fact raised in the Singapore Parliament recently. The Members of Parliament opined that, amongst other reasons, the means test under the Legal Aid and Advice Act was too stringent and as a result, there are many people who are unable to afford lawyers and who could not qualify for legal aid. To the credit of the legal aid

80 Legal Aid and Advice Act, s. 8(2) read with sch. 2 (Cap. 160, 1996 Rev. Ed.). The definitions of ‘disposable capital’ and ‘disposable income’ are contained in sch. 2 which indicates the allowable deductions. The S$10,000 figure for disposable income was set on 1 April 2001.
81 See Yeo in Tan (ed.), above n. 7 at 455.
82 Legal Aid and Advice Act, s. 24.
83 Ibid., s. 8(2)(a). The Legal Aid Board consists of the Director and at least two private practitioners (acting as independent members): see ibid., s. 8.
84 Ibid., s. 8(3).
scheme, however, the number of persons granted legal aid has increased since the 1 April 2001 revision. However, in view of the rising costs of litigation, there would still be a proportion of people ineligible for legal aid who would be strongly deterred from either taking out a claim or defending an action. The fact is that the amount of costs being awarded to lawyers in Singapore has risen quite drastically in recent years. Further, even if the potential litigant is able to pay the litigation costs, it would wipe out a substantial part of his or her savings intended for other useful purposes. Litigation costs are also uncertain: what may be projected or estimated as reasonable costs to be incurred prior to commencement of an action may turn out to be grossly underestimated if the matter becomes more contentious than expected. Moreover, under the present regime, the winning party would still have to pay the solicitor-client costs which are usually higher than the party-party costs which would be received from the losing party.

A party funded by legal aid has no liability for costs to the other party though costs can be awarded against the unaided party in favour of the aided person, which costs are then paid to the Legal Aid Fund maintained by the Legal Aid Bureau. This non-reciprocal and unfair approach under the Legal Aid and Advice Act between the aided person and the unaided person appears particularly glaring in the case of a successful unaided defendant who is left to bear his or her own costs, notwithstanding the fact that the action by the aided claimant has failed. The United Kingdom was saddled with the same unfortunate predicament prior to its introduction of a conditional fee based system. Under a conditional fee based system, however, this non-reciprocal approach to legal costs does not exist. According to the ‘costs follow the event’ principle, the losing party will be required to pay the party-party costs to the winning party including the ‘success fee’ agreed under the conditional fee agreement between the winning party and his or her lawyer, since this is what the winning party has to pay his or her lawyer as part of the solicitor-client costs. As mentioned above, in the United Kingdom and in certain Australian

87 See ‘CJ to errant lawyers: Shape Up or Pay Up’, above n. 14. It was reported that the average amount of costs awarded to lawyers from 1995 to August 2001 went up by 8 times, though the amount has been reduced since then.
88 See the editorial in The Straits Times (25 August 1995), ‘Whither the costs of justice?’, which discusses the view of a reader as to why, in spite of winning an appeal with costs, he was ‘left poorer because of his solicitor’s costs’.
89 Legal Aid and Advice Act, s. 12(4)(c).
90 Ibid. s. 16(2).
91 See Yeo in Tan (ed.), above n. 7 at 460; see also Hilborne, above n. 7 at xlv.
92 Callery v Gray [2002] 3 All ER 417 at 419, per Lord Bingham.
States respectively, the losing party could take out litigation expenses insurance against having to pay the winning party’s costs or seek legal assistance from the government to indemnify him or her against adverse costs orders in specific circumstances. Moreover, there is no right of appeal for aggrieved applicants who have been refused legal aid under the Legal Aid and Advice Act. One solution for the aggrieved applicant would be to apply for judicial review of the decision of the Legal Aid Bureau. However, that would merely add undue financial pressure on the applicant if he or she were genuinely indigent in the first place.

There is little financial incentive for the private counsel sitting on legal-aid panels to provide legal aid to indigent persons since the payments for their services are meagre, whether the case is won or lost. A local writer has commented on the poor participation of private counsel in legal-aid panels. In contrast, the lawyer acting under a conditional fee agreement for his or her client would have a more direct financial interest in the success of his or her client’s case and would enjoy the prospects of obtaining a success fee if he or she wins the case. The effect of such an incentive cannot be underestimated.

At present, the Legal Aid and Advice Act does not cover non-Singaporeans and non-permanent residents. It is submitted that there are good reasons for marketing and making available our justice system to foreigners via conditional fee agreements. Singapore’s judicial system should be made accessible to as many people as possible. It would be a test of the rule of law if Singapore is able to ensure foreigners with meritorious claims or defences access to justice in our courts against the defendants (even if they are errant Singaporeans).

94 This apparent lack was already pointed out more than four decades ago by Hilborne (see above n. 7 at xliv).
95 See Yeo in Tan (ed.), above n. 7 at 450.
96 Under the Legal Aid and Advice Regulations (Cap. 160, reg. 1, 1990 Ed.), the solicitor is only entitled to 50 per cent of the taxed amount of solicitor and client costs. The sum payable to a solicitor investigating and reporting or giving an opinion upon applications for the grant of legal aid or giving legal advice is a meagre $50 per hour for work done; see reg. 15.
97 See Yeo in Tan (ed.), above n. 7 at 451.
98 The Singapore judiciary takes pride in maintaining its high ranking in the world for its efficiency and speed in handling cases; see ‘CJ to errant lawyers: Shape Up or Pay Up’, above n. 87. It was ranked first in Asia by the Political and Economic Risks Consultancy (PERC) in respect of a court’s ability to address requirements of business operations and first in the world by the International Institute for Management Development for its contribution to the competitiveness of the economy; see Subordinate Courts Singapore Annual Report 2002 at 59.
99 This would be in line with the Singapore government’s policy of attracting foreign professionals and workers to Singapore which is based, inter alia, on the need to enhance foreign direct investment. In 2002, Singapore attracted S$9 billion of foreign direct investments which are estimated to create 22,000 jobs (of which 15,000 are slated to be taken up by Singaporeans); see Ministry of Manpower Annual Report 2002 at 60 at http://www.mom.gov.sg.
Foreigners with meritorious claims or defences should be allowed access to our courts to vindicate their rights. Such foreigners may include foreign workers or domestic helpers, who may not have sufficient funds to take out a claim or to defend themselves. However, it would be contrary to Singapore’s public interest to use public funds of taxpayers to aid the litigation of foreigners directly. As such, it is suggested that the conditional fee based system can be utilized by the foreigners instead to fund the litigation.

It is suggested that the civil legal aid scheme in Singapore should continue albeit in a more limited role. The civil legal aid scheme should aid those persons who may still be deterred from obtaining access to justice through the conditional fee based system. In particular, it should aid persons with meritorious claims or defences who have engaged a lawyer under a conditional fee agreement, but would still find it onerous to pay the insurance premiums or the disbursements to the lawyer if they should lose the case. The availability of civil legal aid is tied to the issue of the scope of the conditional fee based system and whether it would be desirable for the claimant to operate in a totally risk-free environment. The decision of the Legal Aid Bureau to pay such premiums or disbursements on behalf of the aided person should be limited to the poorest in Singapore, hence reducing the legal aid budget. In cases where the litigation does not involve monetary compensation (for example, injunctions) such that conditional fee agreements may not be applicable, the Legal Aid Bureau can still play a limited but useful role.

Another suggestion is perhaps to merge conditional fees with the legal aid system, forming a hybrid system of sorts. Under such a ‘hybrid’ system, it is suggested the aided litigant be required to pay into the Legal Aid Fund a portion of the damages recovered or such other ‘success fees’ (in addition to costs) in the event that he or she wins the case. If this suggestion is implemented, the means test could be relaxed so as to aid persons who would not have been eligible under the current legal aid system. At the same time, such a system maintains the legal aid budget at an acceptable level with the potential

100 Even if conditional fees were implemented in Singapore, the Legal Aid Bureau should still continue with the provision of ‘legal advice’ which is not tied to any means test and is available to persons resident and present in Singapore. ‘Legal advice’ is defined as ‘oral advice on legal questions’ and ‘shall not include advice on any law other than the law of Singapore’ (Legal Aid and Advice Act, s. 20).

101 Hong Kong set up a Supplementary Legal Aid Fund in 1984 for personal injury cases (excluding medical negligence) where the claim exceeds HK$60,000. The aided persons under the scheme are required to contribute a portion of the proceeds of litigation. The scheme was funded by a HK$1,000,000 loan facility from the state lotteries fund; however, by 1990, out of the 97 concluded cases under the scheme, 95 were successful and there was a surplus of HK$1,000,000 in 1990: see Zindel, above n. 1 at 297. Northern Ireland has also set up a Contingency Legal Aid Fund: see D. Capper, ‘The Contingency Legal Aid Fund: A Third Way To Finance Personal Injury Litigation’ (2003) 30 Journal of Law and Society 66.
contributions of ‘success fees’ paid into the Legal Aid Fund. Whilst this ‘hybrid’ system results in enhanced access to justice, there are potential problems. It puts added pressure on the Legal Aid Bureau to win the cases to sustain the state ‘coffers’ and in this regard, the unaided opposing party may be forgiven for thinking that he or she has taken up arms not merely against the aided litigant but against the government as well! Further, if the aided litigant were to lose the case, the Legal Aid Bureau does not bear the financial burden of the aided litigant to pay damages to the winning party; hence, it appears non-reciprocal as between the Legal Aid Bureau and the aided litigant if the latter is required to pay a portion of the damages to the Legal Aid Bureau if he or she wins the case under the ‘hybrid’ system. However, it may be argued that notwithstanding this problem of non-reciprocity, the overall position of the aided person would have been enhanced under the ‘hybrid’ system since he or she would not have been eligible for legal aid in the first place under the current legal aid system.

### iii. Conditional Fees and Professional Ethics

The main public policy reasons against conditional fee agreements can be conveniently summarized under two primary headings:

1. conditional fee agreements give rise to conflicts of interest between the lawyer and the client as the lawyer is potentially tainted by financial interest in the outcome of the client’s case (‘Duty to Client’); and
2. under a conditional fee agreement, the lawyer may be motivated to act in a manner inconsistent with his or her duties to the court (‘Duty to Court’).^102

First, under a conditional fee based system, as the fee payable is conditional upon the outcome of the case, it may be argued, from the outset, that the financial interest of the lawyer in the case is more closely aligned with that of the client^103 compared with that under the present regime. Moreover, it is submitted that the ‘Duty to Client’ and ‘Duty to Court’ arguments are unfounded or at least exaggerated. Let us assume for instance that the lawyer is representing himself or herself in his or her own case claiming legal rights to a piece of property. The stakes are clearly higher for the lawyer fighting his or her own case than if he or she were merely representing a client claiming rights to that property under a conditional fee agreement. Yet, most of us are unlikely to suspect that the lawyer claiming rights to the property alleged to belong to him or her would be actuated by improper motives with respect to the litigation. By the same token, it

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would be inappropriate to suggest that the conditional fees lawyer representing his or her client would be actuated by improper motives in conflict with the client’s interests or duties to the court.

Perhaps it is incorrect to compare a lawyer litigating his or her own case and one representing a client under a conditional fee agreement. It may be argued that this is not comparing ‘apples with apples’ for, in the former case, there is no lawyer-client relationship in the first place. It may be more appropriate, then, to compare a conditional fees lawyer with a lawyer acting for his or her client under the present regime based on hourly charges. Under the latter arrangement, the fees agreed to be paid are dependent on the amount and complexity of work done by the lawyer, typically based on an hourly charge (which amount usually varies with the seniority and experience of the lawyer). Short of negligent handling of the litigation resulting in the client losing the case, the lawyer will receive the same amount of fees based on hourly charges as he or she would if the client had won the case. In such a situation, there is no direct and close alignment of the financial interest of the lawyer and the client’s interest in ‘winning’ the case as the lawyer will still be paid the agreed legal fees based on the hours clocked up, whatever the outcome of the case. Apart from the temptation for lawyers to bill more hours than the actual work done, Luban also raised the spectre of clients ‘subsidizing’ the learning opportunities of lawyers who lack adequate expertise on particular cases. Thus, although the lawyer under the present regime may still be affected financially (albeit indirectly) by the outcome of the case (for example, diminished reputation), in the final analysis, however, there is a sufficient basis for submitting that there is a closer alignment of direct financial interests between the lawyer and the client under a conditional fee agreement, though in varying degrees. Under the speculative as well as conditional uplift model, the success fee chargeable is still based (albeit in part) on the normal hourly charges payable, unlike in an American-style contingency fee model. Hence, it is recognized that the United Kingdom and Australian conditional fee model is not entirely free from the drawbacks of the hourly charge system under the present regime.

Secondly, there is no real concern that conditional fees lawyers would be able to earn more with less effort (compared with lawyers under the present regime) if the case is settled at an early stage. Though it is recognized that the lawyers may pocket high success fees

104 Luban, above n. 17 at 118.
105 Millet LJ remarked in Thai Trading Co (a firm) v Taylor, above n. 29 at 73, in the context of a conditional normal fee agreement, that the solicitor who acts for a multinational company in a heavy commercial action knows that if he loses the case his client may take his business elsewhere.
in some cases due to early settlements, there is no evidence that this is the norm. Some reasons are advanced as follows:

1. The client can circumvent this by agreeing with his or her lawyer on a two-stage (or, for that matter, a multiple-stage) success fee, whereby a rebate on the success fee is discounted from the sum payable by the client to the lawyer if the litigation is settled at an earlier stage stipulated in the conditional fee agreement. This means that if the case is settled earlier, the lawyer is paid less. Each of the stages may correspond with the varying rebate amounts as a rough estimate of the amount of time and effort which would have been expended by the lawyer at that relevant stage(s) of the proceedings.

2. One has to see the issue in the larger context. In the event that the case is proceeded with to trial and the client eventually loses the case, there would not be any payment for the vast amounts of time and effort put in by the lawyer on behalf of the client.

3. The lawyer should be ‘rewarded’ for his or her ability to facilitate the settlement at an early stage of the proceedings and this is consistent with the alternative dispute resolution (ADR) movement in Singapore to encourage settlements.

Thirdly, it is submitted that conditional fees do not unduly encourage lawyers to lay their hands on the fees more quickly. The concern is that in a conditional fee based system, as clients do not need to pay monies to their lawyers upfront or before the case is won, lawyers may be tempted to expedite the proceedings ‘unduly’ to achieve a successful resolution so as to obtain the success fee more quickly. There is no problem with lawyers being motivated to expedite the case to begin with; in fact, one might consider that to be laudable and consistent with the aim of improving efficiency in the litigation process in line with the Singapore judiciary’s objective. Moreover, the discerning lawyer would realize that his or her desire to expedite proceedings would be constrained by the preparation work required (including the time needed to garner proper evidence) so that he or she can achieve a desired outcome. Further, as part of the judiciary’s case management system, existing court schedules in Singapore are already fairly tight.


107 The English Court of Appeal in Callery v Gray, above n. 92 at 885 remarked that this two-stage success fee process allows parties to consider the merits of the claim during the protocol period and is also in accordance with the Civil Procedure Rules initiated by Lord Woolf.

108 See iv below for a discussion of the Singapore ADR movement and conditional fees.

109 See e.g. Chief Justice’s speech, ‘Opening of Legal Year 2002’, 5 January 2002 at http://www.supcourt.gov.sg on the case management regime in the subordinate courts and the need for lawyers to cooperate with the courts towards a just, expeditious and economic disposal of the cases.
Whilst the writer is aware of the argument that a lawyer operating under a conditional fee agreement may be relatively more ‘incentivized’ in ensuring that the client’s interests (read: lawyer’s interests) are advanced, it is submitted that the possible moral frailty of lawyers in the face of temptation cannot be reason enough to override the public interest for access to justice. Moreover, even if it is true that lawyers would more likely be tempted to compromise their professional integrity if they were acting for clients under conditional fee agreements, it is submitted that there are sufficient safeguards within the existing system to deter the lawyers from falling into such temptation. However, no one can vouchsafe that all conditional fees lawyers will be beyond reproach in the face of temptation, just as no one can guarantee the professional integrity of all lawyers under the present regime. Nevertheless, the legal profession is expected to act with integrity in the interests of clients and there are existing rules to ensure that the legal profession as a whole maintains that professional integrity.

Some illustrations of the existing safeguards (and their related concerns) will suffice here. First, there is imposed on the lawyer the duty to discharge himself or herself or withdraw from a case where his or her interests conflict with those of the client. A difficult issue, though, arises upon such discharge or withdrawal: whether the lawyer acting under a conditional fee agreement should be entitled to some form of remuneration for work done up to the point of the discharge or withdrawal, or would any payment depend on the successful outcome of the litigation in accordance with the terms of the conditional fee agreement? Brickman has proposed, in the context of the United States, that a *quantum meruit* should be paid to the lawyer only upon the successful outcome of the litigation and that the percentage stated in the contingency fee agreement should be the limit of the lawyer’s fees. This proposal has the merit of allowing the parties to adhere to the contract they have entered into, prevents the client profiting from a ‘last minute’ discharge of the lawyer to avoid paying fees and, at the same time, does not undermine the client’s legal rights to discharge the lawyer without cause. Whilst substantially in agreement with the proposal, an academic from the United Kingdom expressed a concern, however, with the ‘unfairness’ that may result if the remuneration of the discharged lawyer is dependent on the work

100 These safeguards are backed by sanctions (e.g. disciplinary control by the Supreme Court) pursuant to the Legal Profession Act (see e.g. s. 83) as well as the Singapore Professional Conduct Rules. See *Re Chan Chow Wang* [1982–3] SLR 413 in the context of a reinstatement application by a lawyer who was struck off the rolls for entering into a champertous agreement.

111 Singapore Professional Conduct Rules, r. 26.

112 See L. Brickman, ‘Setting the fee when the client discharges a contingency fee attorney’ (1993) 2 *Emory LJ* 367.
of the subsequently retained lawyer. In this regard, it is suggested that if there has been a change of lawyer mid-stream, the client, the discharged and the newly retained lawyer should be encouraged to enter into an agreement on, inter alia, the sharing of the success fees in an agreed proportion as between the lawyers.

Secondly, there are pre-existing safeguards against overcharging of fees generally. The concern that the lawyer may take advantage of the client by exaggerating the risks involved in the case (so as to charge a higher success fee than would be justifiable) is ameliorated in a situation of free market competition, where the client is free to engage another lawyer who stipulates a lower ‘success fee’. Yet the writer is aware of the possible tendency of contingency fees lawyers as in the US to administer a standard percentage in most cases and the lower bargaining power of the client vis-à-vis the lawyer in this respect, as well as specific complaints in Canada with regard to the high percentages charged by lawyers. There is thus a need for safeguards (apart from free market mechanisms) to protect the client. These can be in the form of supervision or determination of the appropriate fee by the Singapore courts on the grounds of fairness and reasonableness. In South Australia, for example, the Legal Practitioners Act permits contingency fees subject to the power of the court to rescind or vary if the terms of such an agreement are not fair and reasonable. If deemed necessary, the maximum allowable uplift or the percentage can be legislated, as in the United Kingdom, Ontario (Canada) and Australia. To ameliorate any rigidity that may result from fixing a maximum premium or percentage, parties may be allowed to agree on a premium or percentage beyond the maximum, as contained in the Ontario legislation, subject to the court’s approval

114 The legal expenses insurers (if any) would probably need to be notified (if not consulted) in the event of a change of lawyers.
115 The aggrieved client can complain to the Law Society of Singapore in respect of overcharging by his lawyers under the present regime: see Re Abdul Rahim Rajudin [1989] 1 Malayan Law Journal 289.
116 See Annand and Green, above n. 106 at 86–8.
118 See Re Stuart [1893] 2 QB 201 at 204–5. See also the Malaysian High Court case of Shamsudin bin Embun v P T Seah & Co [1988] 2 Malayan Law Journal 546: the onus is on the lawyer (not the client) to prove its fairness and reasonableness.
119 Ontario Justice Statute Law Amendment Act 2002, sch. A, para. 4. The Lieutenant Governor in Council may make regulations setting a scale for the maximum percentage that may be charged for a contingency fee.
120 The Legal Profession Act 1987 (NSW) and Legal Practice Bill 1996 (Vic) stipulate that the uplift on the costs payable in the event of a successful outcome cannot exceed 25 per cent of those costs. The Queensland Barristers’ Rules allow barristers to charge up to a maximum of 50 per cent of the usual fee. In South Australia, the corresponding limit is double the normal fees chargeable by the lawyer (Professional Conduct Rules, r. 8.10 and Legal Practitioners Act 1981, s. 42(6)(c)).
upon parties’ application.\footnote{121} Possible guidance outside the legislative sphere may also be sought from the court’s assessment of the success fees payable.\footnote{122} It is realized that, during the initial stages of implementation, the determination of the appropriate success fee or percentage may be difficult (and controversial) due to the lack of precedents and data relevant to Singapore, as experienced by the English Court of Appeal in Callery.\footnote{123} The determination of the appropriate premiums may not always be based on invariable and purely quantitative factors\footnote{124} but, as the reader would be aware, neither is the computation of common law damages by the courts. It is believed, however, that the uncertainty (and, for that matter, litigation relating to premiums) can be reduced over time if the bases for the determination of the success fee are discussed and reviewed amongst the courts, insurance industry, lawyers, members of the public and so on, prior to and during any implementation of conditional fees in Singapore.

Thirdly, the courts can prevent abuse of process in their inherent jurisdiction as well as under the wasted costs jurisdiction under the Rules of Court. This has already been discussed above.

Fourthly, to reduce the likelihood of lawyers taking advantage of the client in conditional fee arrangements, Parliament could enact legislation stipulating the requirements of a valid and enforceable conditional fee agreement. The US Code and Rules respectively require the method of fee determination (including agreements on the percentage fee, litigation and other expenses to be deducted, etc.) to be specified in writing.\footnote{125} The United Kingdom legislation and regulations mandate the obligation of the lawyer to inform and explain the risks involved and the liabilities of the client to make payments of fees

\begin{itemize}
\item \footnote{121}{See the Justice Statute Law Amendment Act 2002, sch. A, para. 4.}
\item \footnote{122}{See Callery v Gray, above n. 92 at 881 on the factors relating to the solicitors’ ‘experience of the work done and the likelihood of success or failure of the particular class of litigation’.}
\item \footnote{123}{Ibid. at 884. In the subsequent case of Halloran v Delaney [2002] EWCA Civ 1258, Brooke LJ, relying on Woolf LJ’s judgment in Callery v Gray which was endorsed by the House of Lords, indicated that for simple claims settled without need for proceedings, judges should \textit{ordinarily} decide to allow an uplift of 5 per cent on claimants’ lawyers’ costs (including in respect of costs-only proceedings in the United Kingdom), but this can be departed from in special circumstances; for criticisms of the 5 per cent rule as being too low to be viable, see M. Zander, ‘Where Are We Heading With the Funding of Civil Litigation?’ (2003) 22 \textit{CLQ} 23 at 30. Subsequently, in Re Claims Direct Test Cases [2003] EWCA Civ 136, Brooke LJ clarified that the 5 per cent rule applies to cases where prospects of success are virtually 100 per cent.}
\item \footnote{124}{Risk assessment may depend on the certainty of the particular area of law(s) in question in the litigation proceedings: see M. Clarke, \textit{Policies and Perceptions of Insurance: An Introduction to Insurance Law} (Clarendon Press: Oxford, 1997) 40–1.}
\item \footnote{125}{See ABA Code of Professional Responsibility, r. 2–106(d) and Model Rules of Professional Conduct, r. 1.5(c).}
\end{itemize}
or disbursements to the lawyer,126 but this assumes that the con-
ditional fee structure and terms are not too complex for the layperson. Protection for the client could be reinforced by instituting, as in Australia, a ‘cooling off period’ for the client to terminate the con-
ditional fee agreement, if he or she so desires.127 Another form of regulation could be in respect of stipulating the types of proceedings amenable to the conditional fees system. In most jurisdictions (includ-
ing the United States, United Kingdom and Australia), criminal and matrimonial proceedings are excluded from the conditional fees sys-
tem due to public policy concerns.128

**iv. Conditional Fees and Alternative Dispute Resolution (ADR)**

The current prohibition against conditional fees is targeted at such agreements entered into in respect of contentious proceedings. Under the Legal Profession Act, ‘contentious business’ is defined as ‘business done, whether as solicitor or as advocate, in or for the purposes of proceedings begun before a court of justice or before an arbitrator’.130 It is submitted that the term ‘contentious proceedings’ should be sim-
ilarly construed.131

It is suggested that the proposal for a conditional fee based system is not meant to, and its implementation would not, supplant or dilute other alternative dispute resolution mechanisms such as mediation and negotiation (and their variants).132 The concern that conditional fees will necessarily lead to undesirable litigiousness is unfounded. The conditional fee system can co-exist with and complement the

126 The Conditional Fee Agreements Regulations 2000 (SI 2000/692). It is still possible, however, that a reasonable risk assessment made prior to or at the time of the execution of the conditional fee agreement may appear unjustified with the benefit of hindsight or due to a change of circumstances. But such a situation can also occur in respect of fee estimates and caps in normal fee agreements under the present regime.

127 See, for example, South Australia’s Professional Conduct Rules, r. 8.10(a)(ii).

128 Public policy arguments for the exclusion of criminal proceedings from the ambit of conditional fees include: (a) the consequences of a lawyer being tainted by his or her financial interest in his or her conditional fee client are more serious in a criminal matter than in a civil matter as the former impinges on one’s liberty and life; (b) there is usually no monetary compensation recovered by an acquitted person in criminal proceedings; and (c) the bargaining power of an accused is likely to be relatively lower vis-à-vis a claimant in civil proceedings. It is also against public policy, in the context of matrimonial proceedings, to provide financial incentives via conditional fee agreements to a lawyer to discourage reconciliation: see Tokeley, above n. 1 at 24–5.

129 See generally, T.B.J. Lee, ‘The ADR Movement in Singapore’ in Tan (ed.), above n. 7 at 414–45. Lee referred to ‘ADR’ as ‘Appropriate Dispute Resolution’ on the basis that it more accurately brings across the idea that lawyers engage in many different forms of dispute resolution and, at any point in time, one form may be more ‘appropriate’ than another.

130 Legal Profession Act, s. 2.

131 See also Bevan Ashford v Geoff Yeandle (Contractors) Ltd (in liquidation) [1998] 3 WLR 172 at 182.

132 Variants such as Med-Arb, Neg-Med and Mini-Trial; see Lee, above n. 129.
ADR movement in Singapore.\textsuperscript{133} Existing court practice\textsuperscript{134} requiring lawyers to inform and advise clients of the option of using mediation or ADR may be maintained alongside the conditional fee system. One of the avowed aims of ADR is to reduce legal costs for the disputing parties and such an objective is not inconsistent with the proposal for conditional fees.\textsuperscript{135}

Conditional fee agreements can accommodate various variations. They may, for instance, stipulate that the payment of the success fee be triggered by the recovery of a specified sum of money by the client in a case, whether by way of a court order mandating such recovery or via an out-of-court settlement through ADR mechanisms such as negotiation or mediation. In this way, the ADR processes are in-built within the conditional fee system. Under a carefully thought out two-stage (or multiple-stage) agreement, it is also possible to structure the payment of success fees to encourage settlement of the case at an earlier stage of the proceedings instead of either commencing an action in the courts or bringing the claim to the trial stage when the costs would have escalated. It is noted that contingency fee agreements in the United States typically provide for a standard percentage fee if the claim is settled without action and increased percentages where the action is filed or if the case goes to trial.\textsuperscript{136}

We also need to address the concern that conditional fee agreements may discourage lawyers from facilitating the settlement of a case due to divergence of interests of the lawyer vis-à-vis the client,\textsuperscript{137} which it is suggested may be somewhat exaggerated. The conditional fee agreement may stipulate that the success fee will be paid if, say, $100,000 is recovered on behalf of the client, whether by way of a court order stipulating such recovery or via a binding agreement signed by parties pursuant to third party mediation or negotiation. The objection which may be raised here is that the lawyer may be

\textsuperscript{133} See L. Boulle and H.H. Teh, \textit{Mediation: Principles, Process, Practice} (Butterworths Asia: Singapore, 2000) 198–213 on the mediation movement in Singapore. Whilst it is recognized that there may be arguments against the ADR movement in Singapore, the ADR movement has gained so much momentum that one would have to ignore its present-day significance in Singapore at one’s peril; for a good overview of the issues relating to the need for regulation of mediation in Singapore, see Law Reform and Revision Division, Attorney-General’s Chambers, Singapore, \textit{Need for Mediation Laws?}, LRRD No. 5/2001.

\textsuperscript{134} Subordinate Courts Practice Directions (1999 edn), para. 25(5), Practice Direction No. 1.

\textsuperscript{135} Factors which determine the appropriateness of a particular dispute resolution process include the significance of privacy and confidentiality, cultural norms, expertise and neutrality of the third party decision-makers, costs involved, preserving relationships between disputing parties and so on. The purpose of this Part of the paper is not to assess the comparative advantages of litigation vis-à-vis ADR. Suffice it to say that it would be naïve to assume that all disputes can be handled by out-of-court mediation and negotiation just as it is to suppose that all disputes should be resolved by the Singapore courts.

\textsuperscript{136} Brickman, above n. 71 at 287.

\textsuperscript{137} See e.g. in the context of the US, H.M. Kritzer, \textit{‘Seven Dogged Myths Concerning Contingency Fees’} (2002) 80 \textit{Wash U LQ} 739 at 774–6.
discouraged from entering into any settlement agreement where the amount recovered is below $100,000 as, in that event, he or she will not be paid any fees by his or her client. However, it is suggested that this overlooks the fact that the lawyer would have arrived at this figure of $100,000 after evaluating the risks involved and the chances of securing recovery of that amount on behalf of the client based on his or her experience and legal knowledge.

Moreover, it is open to the lawyer and the client to agree on a graduated scale or range of recovery amounts, depending on assessment of the risks and chances of recovering $100,000 or more. The conditional fee agreement should be sufficiently flexible to accommodate the degrees of risks involved. For instance, if the lawyer is not entirely confident of recovering $100,000 and thinks it reasonable from his or her experience that the client would be able to recover a little less than $100,000, it may be stipulated in the conditional fee agreement that for the recovery of amounts ranging from $70,000 to $99,999, the lawyer will also receive a success fee, albeit slightly lower than that if the amount recovered were $100,000 or more. The lower success fee payable at the stage of a mediated or negotiated settlement prior to trial would likely be arrived at based on the assessment of the lawyer as to the appropriate amount of time and effort which would be expended at that relevant stage. The graduated scale of fees payable in the conditional fee agreement would lessen the impact of the lawyer ‘missing the mark’ in terms of assessment of risks, without prejudicing the objective of settlement.

Under a conditional fee agreement, the lawyer bears the legal risks and would have to assess the merits (and corresponding risks) of the client’s claim or defence before deciding to take up the case. This will, in all likelihood, prompt the lawyer to be better prepared before the commencement of the client’s case by the issue of the originating process in the courts. This is consistent with the judiciary’s call to shorten the time period from the commencement of a case to its eventual judgment (or settlement).138

Let us now examine the issue from the client’s perspective with regard to litigation costs. Will conditional fee agreements discourage the client, in the midst of contentious proceedings, from settlement? This will depend again on how the conditional fee agreement is structured. If the conditional fee agreement provides for payment of a graduated scale of ‘success fees’, it may benefit the litigant to settle for lower compensation (than was originally claimed) if he or she can save monies by paying a lower ‘success fee’ to his or her lawyer, not to mention avoiding a prolonged litigation and suffering the prospect of not obtaining any compensation at all at the end of a gruelling court trial. A fortiori, if the same litigant is not required to pay any ‘success fee’ for settlement at the lower compensation under an ‘un-

138 See generally Lim and Liew, above n. 61 at ch. 2.
graduated’ conditional fee agreement, he or she may actually be more encouraged to settle at that compensation amount.

Another question arises: assuming that contentious proceedings have not commenced, would the prospect of entering into a conditional fee agreement encourage a client, in terms of the costs factor only, to start proceedings in the courts or arbitration at the expense of negotiation or mediation processes? First, it is recognized that if the litigant is ‘freed’ of litigation costs entirely under a conditional fee based system, he or she may be more encouraged to pursue litigation and arbitration at the expense of negotiation and mediation.139 This relates to the Callery debate mentioned above as to what extent the conditional fee based system should remove litigation costs for the potential litigant. Whilst it is recognized that one of the important objectives of conditional fees is to enhance access to justice, it is suggested that litigation costs should not be removed entirely. Indeed, it has been suggested that the absence of a ‘loser pays’ costs rule in the US has in part resulted in irresponsible litigation.140 Subject to further data collection and study on the relative costs of litigation and mediation, it is tentatively suggested that the litigant should pay disbursements to his or her lawyer as well as the insurance premiums to the insurer (where applicable). No doubt the premiums will be set by the market and/or regulators, though the writer understands that prohibitive premiums141 (as in the United Kingdom for certain types of claims) can result in a disincentive to litigate. If it can be demonstrated that the litigant would be hard-pressed based on his or her extreme financial hardship to pay the disbursements and/or insurance premiums, it has already been suggested that the Legal Aid Bureau can and should play a useful role in alleviating that financial hardship. The underlying principle to bear in mind is that the introduction of conditional fees should not ‘unduly’ motivate disputing parties to litigate or arbitrate at the expense of mediation and negotiation, where the latter are more appropriate processes to deal with the dispute at hand based on a holistic assessment.

III. Conclusion

The core thesis of this paper is that there are good public policy reasons to re-examine the current position in Singapore prohibiting

139 The overall incentives available to encourage mediation and negotiation will need to be weighed against the benefits of litigation or arbitration under a conditional fee agreement; see e.g. waivers for court hearing fees to parties who have attempted mediation but were unsuccessful in reaching settlement: Supreme Court Registrar’s Circular No. 4 of 1997 and Subordinate Courts’ Registrar’s Circular No. 1 of 1997.


conditional fee agreements. It has also argued how some of the perceived objections and concerns about conditional fees may be unfounded or exaggerated when applied to the Singapore context. However, any steps to implement conditional fees in Singapore should be taken only after careful consideration of the various issues involved as well as the likely impact on the legal profession, the courts, the insurance industry, the Legal Aid Bureau and members of the public. Further market research, collection of data and consultations amongst interested parties are required to ascertain if the proposals will indeed advance Singapore’s overall public interests (after taking into consideration the costs, administrative or otherwise, required in order to implement the new system). It is hoped that this essay has done part of the groundwork for these further—and highly important—investigations.

There are a few broad-based issues which should be considered from the outset if Singapore should decide to adopt conditional fees. The first relates to whether we should adopt the American-style Model 3 contingency fee agreement in Singapore or merely the more limited Models 1 and 2 conditional fee agreements as currently practised in the United Kingdom and Australia. There is a concern that the prospect of obtaining a percentage of the recovered amount in litigation (Model 3) may constitute a greater temptation for the lawyer than under the Models 1 and 2 conditional fee agreements. Another concern is that the percentage stipulated may not correspond to (or worse, be inconsistent with) the actual amount of time and effort expended by the lawyer in monetary terms. Moreover, the United States does not operate according to the ‘costs follow the event’ principle whereby, in Singapore, the losing party pays the legal costs of the winning party. These concerns merit further study but the following are some tentative reasons why American-style contingency fees should not be brushed aside too quickly. First, it is conceivable (at least mathematically) that the success fee under the American model may well be less than that under the United Kingdom or Australian models. Secondly, the concerns may be alleviated by legislating a cap on the fee percentage of the amount recoverable under the American-style contingency fee system. Thirdly, unlike in the United Kingdom (and, for that matter, the United States), assessment of damages is decided by the judges in Singapore. Hence, the concern that juries may inflate the damages recoverable (in particular, the expansion of punitive damages awards in the United States) which in turn impacts on the ‘success fee’ under a contingency fee agreement is not a genuine problem in Singapore. Lastly, the American model ensures

142 See Brickman, above n. 71 at 277–8.
143 It has been noted that the jury in the United States recognizes that a substantial part of the damages may be recovered by the lawyer and hence compensate by increasing the amount of the award; see P.A. Thomas, ‘Contingency Fees: A Case Study For Malaysia’ (1978) 5 Journal of Malaysian and Comparative Law 45 at 55.
greater proportionality between the success fee chargeable and the damages recoverable in an action compared with the United Kingdom and Australian models.

The alternative proposal of a hybrid between the conditional fee based system and legal aid needs to be explored in greater detail. The thrust of that exploration should be, in my view, to find a compromise which perhaps avoids some of the perceived weaknesses under a pure conditional fees system (for example, greater temptation for lawyers to compromise professional integrity) as well as the disadvantages under the current legal aid regime (for example, unfair costs indemnity principle against unaided person and dissatisfaction with means test, etc.). At the same time, we should attempt to capitalize on some of the strengths and advantages of conditional fees as discussed in this paper.

One suggested strategy might be to permit conditional fees in stages or in a piecemeal fashion based on specific types of proceedings or matters (such as personal injury claims, inheritance claims or summary-type proceedings for a simple debt) as part of a pilot project or trial. This would allow the system to be tested and fine-tuned if necessary.144 It is neither possible nor practicable, from the outset, to design a comprehensive conditional fee system for implementation in Singapore. The issues surrounding conditional fees are complex and wide ranging. One suspects that as the system evolves, the legal practitioners, courts, insurance professionals as well as other relevant participants would have to try to learn from their experiences (inevitably) through trial and error, as well as to draw lessons from the experiences of those countries which have trodden that path, with a view to resolving the initial teething problems.

Finally, if conditional fees do ‘take root’ in Singapore, there should be adequate publicity of the system to ensure that the general public are aware of the existence of and their rights under the conditional fee based system (or any appropriate variant). As one of the main objectives of conditional fees is enhanced public access to justice, it is paramount that the general public be adequately informed of the legal reforms, before they are implemented in Singapore.

144 A law academic and a researcher have noted that the speedy move from legal aid to conditional fees for personal injury cases in the United Kingdom was a ‘bold and potentially hazardous step’; see R. White and R. Atkinson, ‘Personal Injury Litigation, Conditional Fees and After-The-Event Insurance’ (2000) 19 CJQ 118 at 131.