

MOUNTING HURDLES IN SECURITIES LITIGATION

Addressing the Funding and Collective Action Issues

The retail securities investor typically holds only a small stake in a listed security. As such, even when she has a compensable right for a securities wrong, the prosecution of the claim is not likely to be economically feasible. While a “class action” may potentially accumulate similar claims and render economical claims which are individually non-economical, securities class actions face a variety of obstacles. They range from information asymmetry issues and collective action problems to the uncertain liability for counter-party costs. These conspire to sap the investors’ willingness to fund the litigation. This article looks at the current disincentives to securities investors participating in a class action and examines the possible solutions to overcoming the current structural disincentives.

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I. Introduction

1 The retail investor typically holds only a very small stake in a listed corporation. Even if his finances allow for the purchase of a substantial stake, the portfolio theory of investment¹ suggests to the investor that he should hold a diversified portfolio. Whether one is an institutional investor flushed with funds or an individual investor with more modest savings, one is likely to operate by the salutary principle that one’s eggs should not all be placed in the same basket. In the event of a securities wrong – be it a market manipulative action or a misrepresentation about the financials of a company – the cumulative loss to this group of investors may be a large one. Yet, for each investor, his small individual stake is likely to mean that the cost of prosecuting his rights – together with the odds of litigations – do not justify one’s

* The author is grateful for the comments of the anonymous referee. All errors and omissions remain the author’s responsibility.

1 H M Markowitz, “Portfolio Selection” *Journal of Finance* vol 7 pp 77–91 (March 1952). More generally, see Edwin J Elton, *Modern Portfolio Theory and Investment Analysis* (Hoboken, NJ: J Wiley & Sons, 7th Ed, 2007).

seeking legal recourse. That is, his claim is individually non-recoverable.² The typical circumstances of these investors render it rational for them to be individually apathetic. Given a three to one chance of prevailing, a calculating investor who has suffered, say, a loss of \$10,000 will not find it rational to incur a cost of \$40,000. This, even if he is entitled to recoup his legal expenses upon a judgment in his favour.³

2 The logical step for such investors to take is to aggregate their claims so that their claims justify the resources to be spent in prosecuting the claims. In a number of common law jurisdictions, the class action procedure is available to collectivise the claims of such investors.⁴ Singapore does not have a class action procedure as such. Paragraphs 4–22 of this article investigate the question: to what extent does the absence of a dedicated class action procedure present an obstacle to retail investors aggregating their claims and sharing in the costs of litigation?

3 Even when legal costs can be shared, the holder of a small claim will have to consider whether he should contribute money towards the group claim where the legal issues are typically complex, and more, whether he should expose himself to the prospect of being made liable (if proportionately) for counter-party costs should the litigation fail. Paragraphs 23–46 of this article investigate the cost and funding issues

2 Ontario Law Reform Commission, *Report on Class Actions* (Ontario: Ministry of the Attorney-General, 1982) at 116; Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (Canberra: Australian Government Publishing Service, 1988) at para 17. Both Reports adopt the nomenclature earlier proposed in Note, “Developments in the Law: Class Action” (1976) 89 Harv L Rev 1318. See also Watson & Lindblom, “Complex Litigation – A Comparative Perspective” (1993) 12 CJQ 33; Lindblom, “Individual Litigation and Mass Justice” (1997) 45 Am J Comp Law 805 at 821.

3 The expected value here is $-\$2,500 (= 0.75 \times \$10,000 + 0.25(-40,000))$. This, without taking into account the potential liability to pay the defendant’s cost in the event the suit fails.

4 Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004). As pointed out in *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398; (1995) 127 ALR 76, “class action” has a number of meanings. In its broadest sense, it is a generic term to cover any procedure that allows “the claims of many individuals against the same defendant to be brought or conducted by a single representative”: Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (Canberra: Australian Government Publishing Service, 1988) at 1. At other times, it has been used to refer to the extension of the traditional representative procedure to cover claims for damages: *Carnie v Esanda Corp Ltd*. Under this understanding of the phrase, *Irish Shipping v Commercial Union Assurance Co plc* [1991] 2 QB 206; [1990] 2 WLR 117; [1989] 3 All ER 853 (CA) would be a “class action”. Third, it refers to class action, as first conceived in the US. Use of the term “class action” in this article is more closely related to the US sense, that is, a procedure in which a representative brings an action on behalf of a class of persons with common issues, with safeguards against opportunism by the representative.

that attend participation in a group action. Paragraphs 23–41 examine the question whether the rule that the losing party has to pay the legal costs of the victorious party is more or less advantageous to the plaintiff compared to the American rule, in which each side is *prima facie* responsible for its own costs. The holder of a small claim who is invited to participate in a group claim faces at least two agency problems. First, the reliance that should be placed on the lawyer's advice to litigate and the concern that the advice is affected by the lawyer's self-interest. The second agency problem lies in the degree of trust that can be placed on the plaintiffs who form the litigation committee, *viz*, whether they possess the competence and the expertise to supervise the lawyers and to make the critical decisions affecting the litigation. One strategy for mitigating the first agency problem is for the lawyer to structure his compensation agreement so as to signal the credibility of his advice that the litigation is a worthwhile undertaking. Paragraphs 42–46 examine why this is foreclosed under the current conception of the lawyer-client relationship. Other solutions to this funding problem, which has been compounded by the twofold agency problem, will have to be found elsewhere. Paragraphs 47–85 look at the prospect of commercial litigation funders fulfilling the role, as well as the legal and policy issues which attend their activities. This market-based solution, if one situated within the constraints of the current legal framework, is premised on profit-driven private enterprises fulfilling the funding and litigation assessment function. Paragraphs 86–93 look at an alternative model, one that has been adopted in Taiwan – the use of a non-profit organisation to overcome the incentive and capacity problems which weigh down collective action on the part of investors.

II. Does the absence of a dedicated class action procedure impair the realisation of investors' rights?

4 To what extent is the absence of a dedicated class action procedure an obstacle to retail investors aggregating their claims and pursuing their claims collectively?

5 The answer to this question will depend on the extent to which existing procedures found in Singapore facilitate the collectivisation of claims and the spreading of costs amongst the multiple claims. There are a number of existing procedures that can perform such a role. Where there is some common question of law or fact and all rights to relief claimed arise out of the same transaction or series of transactions, a joinder of parties is available under O 15 r 4 of the Rules of Court.⁵ Indeed, this was the procedure used by the subscribers of debentures in

5 Cap 322, R 5, 2006 Rev Ed.

*Drincqbrier v Wood*⁶ when they sued the directors of an issuer under s 3 of the Directors' Liability Act 1890 for untrue statements found in the prospectus. Alternatively, plaintiffs may call on the broad discretion conferred on the court in O 4 r 1 of the Rules of Court to make orders suitable for handling multiple claims which have common elements or which arise out of similar circumstances:

Where 2 or more causes of action are pending, then, if it appears to the Court –

- (a) that some common question of law or fact arises in both or all of them;
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
- (c) that for some other reason it is desirable to make an order under this rule,

the court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

6 It has been expressly acknowledged that the purpose of the procedure is “to save costs, time and effort and for reasons of convenience in the handling of the hearing of the several actions which are linked by one of the common threads provided in the rules”.⁷ Indeed, O 4 r 1 of the Rules of Court⁸ is the basis for the test case procedure in which a test case is advanced while the other actions are stayed pending the resolution of the test case. The test case, however, is not binding unless the parties consent to it having such an effect.

7 Lead actions are also premised on O 4 r 1 of the Rules of Court.⁹ This technique of handling multiple claims is suitable where there are multiple claims with common issues but where liability can only be finally determined after further proof of matters particular to individual plaintiffs. In such circumstances, one or more “lead actions” can be selected to proceed in order to determine the common issues.¹⁰ The matters particular to these lead actions may also be tried at the same time, though it is not contemplated that these will have ramifications beyond the immediate cases. The lead actions approach has been England's response to the phenomenon of mass claims. It was through

6 [1899] 1 Ch 393. See also *Frankenberg v Great Horseless Carriage* [1900] 1 QB 504 where the subscribers sued the company for rescission and the directors for damages.

7 *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 141 at [4], per Lai Kew Chai J.

8 Cap 322, R 5, 2006 Rev Ed.

9 Cap 322, R 5, 2006 Rev Ed.

10 *Davies v Eli Lilly & Co* [1987] 1 WLR 1136.

such test cases and lead actions – and importantly, innovation in judicial orders – that the complex litigation in the past two decades have been managed in England.¹¹

8 Both O 4 r 1 and O 15 r 4 of the Rules of Court¹² are predicated on the plaintiffs having consciously chosen to participate in the litigation. Where the claims are atomised and the attainment of a critical mass of claimants determines whether the prosecution of the claims is viable, the “opt-in” feature of these procedures may stultify the formation of the critical mass. The smallness of the claim lends itself to inertia on the part of the potential plaintiff. Add in the additional element of costs and the inertia may solidify into reticence. In addition to contributing towards the direct litigation costs (disbursements and lawyer’s costs), there is the worrying potential liability for adverse party costs in the event the litigation fails. Further, to the extent that the action is likely to be managed by a litigation committee, the potential plaintiff will have concerns about the expertise and competence of its members. That the potential plaintiff might mitigate this problem by offering to sit on the litigation committee raises other problems. For one, there is the important personal question whether the opportunity costs which attend one’s being taken away from other more productive or enjoyable activity are worth incurring. The obvious way to overcome the collective action problem and the problem with building a critical mass of litigants lies in a procedure which permits a litigant to sue on behalf of another without necessarily having obtained the consent of the latter. Amongst the existing procedures, this feature can only be found in the representative action located in O 15 r 12 of the Rules of Court.

9 Order 15 r 12 of the Rules of Court,¹³ which finds its origins in the UK Judicature Act of 1873,¹⁴ prescribes:

[W]here numerous persons have the same interest in any proceedings, ... the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against anyone or more of them representing all or as representing all except one or more of them.

10 The purport of the rule is, as its name suggests, to permit one person to act on behalf of others who have the “same interest” as himself. This phrase has historically performed the gatekeeping function over the availability of the procedure. In *Duke of Bedford v Ellis*,¹⁵ the

11 See, eg, the Pertussis Vaccine Litigation: C Hodges, *Multi-party Actions* (Oxford: OUP, 2001) ch 17.

12 Cap 322, R 5, 2006 Rev Ed.

13 Cap 322, R 5, 2006 Rev Ed.

14 Rule 10 of the Rules of Procedure, which were annexed to the Supreme Court of Judicature Act 1873 (UK).

15 [1901] AC 1.

House of Lords elaborated on what this entailed:¹⁶ “Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.” In repudiating the notion that the representative action was only available to persons having a common beneficial proprietary right,¹⁷ *Duke of Bedford v Ellis* contemplated a liberal attitude towards use of the representative procedure for group action. Such a development was prevented by the decision of the English Court of Appeal in *Markt & Co v Knight Steamship Co Ltd*.¹⁸

11 In *Markt & Co v Knight Steamship Co Ltd*,¹⁹ Fletcher Moulton LJ articulated two restrictions which served to fetter the utility of the representative action as a procedure for collectivising multiple claims. The first may be termed the “separate contracts” restriction.²⁰ In essence, the restriction precludes use of the representative action when the plaintiffs’ actions arise from more than one contract. It matters not that the contracts have similar or even identical terms. According to Fletcher Moulton LJ: “[I]t is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language.”²¹ To Fletcher Moulton LJ, then, the similarity of terms (or for that matter similarity in circumstances) does not come within the concept of “common interest”. For him, common interest requires a connection between the claims – a “common source of right”.

12 The second restriction – the restriction against use of the representative action procedure where the relief sought is damages – affects especially actions for torts and breach of contract:²²

16 *Duke of Bedford v Ellis* [1901] AC 1 at 8 (decided 10 December 1900). This three-part test has been described the “most authoritative statement” of the same interest requirement: *Markt & Co v Knight Steamship Co Ltd* [1910] 2 KB 1021 at 1035, per Moulton Fletcher LJ. The formulation in *Duke of Bedford v Ellis* has found widespread acceptance in practically all the Commonwealth jurisdictions that have transplanted the English civil procedure rules: see, for example, Ontario Law Reform Commission, *Report on Class Actions* (Ontario, Canada: Ministry of the Attorney General, 1982) vol I at 19 *et seq.*

17 A restriction arising from *Temperton v Russel* [1893] 1 QB 435 (“This expression only extends ... to persons who have or claim some beneficial proprietary right, which they are asserting or defending in the cause, or matter”; per Lindley LJ.)

18 [1910] 2 KB 1021, 103 LT 369 (judgment delivered 7 July 1910).

19 [1910] 2 KB 1021, 103 LT 369.

20 Mulheron, *The Class Action in Common Law Legal Systems* (Oxford: Hart Publishing, 2004) at p 80; Ontario Law Reform Commission, *Report on Class Actions* (Ontario, Canada: Ministry of the Attorney General, 1982) vol I at 19.

21 *Markt & Co v Knight Steamship Co Ltd* [1910] 2 KB 1021 at 1040.

22 *Markt & Co v Knight Steamship Co Ltd* [1910] 2 KB 1021 at 1040–1041.

Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.

13 Doctrinally, this restriction was imposed on the premise that the relief sought must be the same for all the parties.²³ When an injunction or a declaration is sought, this requirement for the identity in relief is satisfied. In an action for damages in which each plaintiff's loss has to be separately proved, however, use of the representative action is precluded by this principle. The need to prove damages due to each individual plaintiff does not comport with the notion of identical relief.

14 Of the two restrictions, the one precluding "separate contracts" is the less compelling one. One can credibly argue that a common interest can consist of a shared legal (or factual) issue. Indeed, this restriction has been doubted in New Zealand.²⁴ In England, Vinelott J in *Prudential Assurance v Newman Industries*²⁵ interpreted "same interest" as requiring not one common contract but "some element common to the claims of all members which he purports to represent".²⁶ Due perhaps to the less compelling argument for the existence of this requirement, it has often been conflated with the restriction against damages.²⁷ The Australian Law Reform Commission's report on class actions, for example, did not cite it as a distinct element.²⁸ In Canada, the restriction has been expressly embraced²⁹ – but even there, the restriction was side-stepped when the contracts on which the causes of action were based were in common form.³⁰ After *Irish Shipping v*

23 *Markt & Co v Knight Steamship Co Ltd* [1910] 2 KB 1021.

24 *RJ Flowers v Burns* (1987) 1 NZLR 260 at 271, per McGechan J: "The traditional concern to ensure that representative actions are not to be allowed to work injustice must be kept in mind. Subject to those restraints however the rule should be applied and developed to meet modern requirements."

25 [1981] Ch 229.

26 *Prudential Assurance v Newman Industries* [1981] Ch 229 at 251–252.

27 *Palmco Holding Bhd v Sakapp Commodities (M) Sdn Bhd* [1988] 2 MLJ 624 and *Voon Keng v Syarikat Muzwina Development Sdn Bhd* [1990] 3 MLJ 61.

28 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (Canberra: Australian Government Publishing Service, 1988) at para 40 *et seq.*

29 *Shields v Mayor* [1953] OWN 5, [1953] 1 DLR 776 (CA), *Agnew v Sault Ste Marie Board of Education* (1976) 2 CPC 273 (Ont HCJ).

30 *Cobbold v Time Canada Ltd* (1976) 13 OR (2d) 567; 71 DLR (3d) 629. The action was by subscribers of *Time* magazine, which had unilaterally suspended the Canadian edition of the magazine, replaced the subscriptions with the US edition, and reduced the unexpired subscription period on grounds that the US edition costs more. The subscription contract was in standard form. Start J dismissed the "separate contracts" objection in the following words: "From the evidence before the Court, it appears to me that the subscription contracts are identical, except in one particular, the length of term of the subscription. Under the contracts, the magazine to be delivered is the same, and the annual price is also the same. The

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Commercial Union Assurance Co plc,³¹ in which a representative action was allowed to proceed on behalf of all potential claimants who derived their rights from identical shipping documents, it is doubtful whether there is any life left in this preclusion.

15 It is the restriction against use of the representative action for claims in damages that has historically imposed a real and substantial obstacle to its utility for collectivising multiple claims. This restriction precluded use of the representative procedure for consumer cases and mass torts.³² It was the perceived over-restrictiveness of this preclusion that led some jurisdictions to remove it statutorily.³³ While Singapore has not adopted such an amendment, case-law development has rendered that unnecessary.

16 The damages restriction was repudiated in *Irish Shipping v Commercial Union Assurance Co plc*.³⁴ The Court of Appeal decided, after a review of the authorities, that there was no rule that a claim for debt or damages is outside the scope of a representative action merely because it is brought by or against a number of parties severally:³⁵

It is not in my judgment the law that claims for debt or damages are automatically to be excluded from a representative action merely because they are made by numerous plaintiffs, severally or resisted by numerous defendants severally. The rule is more flexible than that.

17 The two leading commentaries on Singapore civil procedure have embraced this position.³⁶ It is also no surprise that in the recent

unilateral breach of the subscription contract affects each paid up subscriber equally.” ((1976) 13 OR (2d) 567 at 569)

See also *Naken v General Motors of Canada Ltd* (1978) 21 OR (2d) 780, 92 DLR (3d) 100 (CA, Ont).

31 *Irish Shipping v Commercial Union Assurance Co plc* [1991] 2 QB 206; [1990] 2 WLR 117; [1989] 3 All ER 853 (CA). See also the note by Merkin [1989] LMCLQ 389.

32 Harlow & Rawlings, *Pressure through Law* (London/New York: Routledge, 1992) at p 127.

33 Victoria (Australia) legislated a “no bar” amendment (Supreme Court Act 1986 (Vic) ss 34, 35), while South Australia changed the formulation of the rule (see current r 80(1) of the Supreme Court Civil Rules 2006 (SA) which sets the condition as “common interest in the subject matter of an action or proposed action”).

34 [1991] 2 QB 206; [1990] 2 WLR 117; [1989] 3 All ER 853.

35 *Irish Shipping v Commercial Union Assurance Co plc* [1991] 2 QB 206; [1990] 2 WLR 117; [1989] 3 All ER 853 at 864, per Staughton LJ.

36 Jeffrey Pinsler, *Singapore Court Practice 2009* (Singapore: LexisNexis, 2009) at para 15/12/2; *Singapore Civil Procedure 2007* (G P Selvam editor-in-chief) at para 15/12/3.

case of *Raffles Town Club Pte Ltd v Tan Chin Seng*,³⁷ there was no difficulty with using the representative procedure for claims in damages.

18 Yet this unfettering of the representative action has not unleashed the use of representative procedure to sue on behalf of other investors. The puzzle is why this has not happened.

19 It is apposite at this point to be reminded of Moulton Fletcher LJ's motivations in restricting the use of the procedure. Moulton Fletcher LJ was much disturbed by the prospect of one plaintiff conducting litigation on behalf of another without that other's consent, and more objectionably, that the suing plaintiff in so doing binds the other person:³⁸

It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest. And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form, but having no relation whatever to the subject-matter of the other contract, is in my opinion at variance with our whole system of procedure and is certainly not within the language of [the rule].

20 It was this same concern which motivated Young J in *Carnie v Esanda Finance Corp Ltd*³⁹ to require the representative plaintiff to give notice to all the represented parties after the landmark decision by the High Court of Australia reinterpreting the scope of the representative procedure. The High Court of Australia had, earlier in the same case,⁴⁰ rejected the traditional conception of the procedure's scope and purpose;⁴¹ instead, it rendered a variety of formulations on how the "same interest" formulation should be understood. Common to all the judgments was the notion that "same interest" should not be the device for addressing the policy concerns. Rather, these policy concerns should be tackled through the judicial discretion to allow or disallow use of the action. After unshackling the representative procedure from the

37 [2005] 4 SLR(R) 351, reversing *Tan Chin Seng v Raffles Town Club Pte Ltd* [2005] 2 SLR(R) 302 on assessment of damages.

38 *Markt & Co v Knight Steamship Co Ltd* [1910] 2 KB 1021 at 1040. On *res judicata*, see also *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384 at 401ff; 118 ALR 165 at 181ff; *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 423–424, *per* Toohey and Gaudron JJ.

39 (1996) 38 NSWLR 465. Noted J Wilkin, "Representative proceedings in Victoria: No change in contract cases?" (August 1996) *Law Institute Journal* 36–40. See also Damian Graves & Ken Adams, *Class Actions in Australia* (Pymont, NSW: Lawbook Co, 2005) at p 37.

40 (1995) 182 CLR 398.

41 The traditional approach was adopted by the New South Wales Court of Appeal: (1992) 29 NSWLR 382.

doctrinal fetters accumulated over time and holding that the facts crossed the doctrinal threshold posited by the “same interest” requirement, the High Court of Australia remitted the case back for determination as to whether the case should be permitted to proceed. The issue before Young J was whether the court should order the discontinuance of the representative procedure. Young J considered the matter to be one involving case management. As the proceedings involved the potential liability of group members to pay the respondents, Young J was of the view that their liabilities should not be determined without their exercising a conscious choice to opt in to the proceedings. Accordingly, he ordered that notices be sent to the 88 persons who might constitute the class members; the notices were to set out the consequences if the representative prevailed and if the defendant successfully defended the suit. They were invited to provide notice as to whether they wished to join in the proceedings. However, the representative was expected to bear the cost of sending out these notices. As the representative indicated that he was not prepared to bear the cost of issuing the required notices, Young J exercised his discretion to “otherwise order” that the representative action be discontinued.⁴²

21 The final resolution of *Carnie v Esanda Finance Corp Ltd*⁴³ is instructive. The falling away of the damages restriction throws into sharp relief the substantive concerns that have previously held back the broadening of the scope of the action. These concerns stem principally from the absence of a mechanism to address the objection that the consent of the represented has not been sought. This gives rise to other concerns. As the law currently stands, the representative plaintiff has full prerogative over the conduct of the action. He is considered *dominus litus* – the master of the litigation.⁴⁴ The other class members have little power to affect the manner in which the action should be conducted. Another concern is that there is no provision for court supervision over the representative making a settlement. *Prima facie*, the representative plaintiff’s power of settlement is not scrutinised for abuse. There is thus a very real risk that the plaintiff may prefer his personal interest in a

42 In Victoria, the class action regime under O 18A of the Supreme Court (General Civil Procedure) Rules came into operation on 1 January 2000; this was replaced by Pt 4A of the Supreme Court Act 1986 (Vic) *vide* Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic) s 13. While the Victoria rules for class actions posit an opt-out procedure, they also posit notifications (though not necessarily personal notifications). Insofar as the representative in *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465 was deterred by the cost of preparing and sending out notifications to the represented parties, the final resolution may have been no different under the present Victoria class action rules.

43 (1996) 38 NSWLR 465.

44 *Wolff v Van Boonen* (1906) 94 LT 502; *McPherson v Gedge* (1883) 4 OR 246 (CP).

settlement, rather than settle the suit in the best interest of the class members.⁴⁵

22 Yet it is the same “litigation-on-behalf-of” feature that renders more credible the prospect of claims by investors. In this commentator’s view, these concerns will continue to weigh down the potential of the representative procedure for greater access to justice. If the procedure is to be capable of harnessing both the individually non-recoverable claims and the claims of the ignorant, the consent question has first to be addressed. Given that the litigation-on-behalf-of feature is inextricably tied to the notion that the representative party has the power to compromise the represented party’s substantive rights without necessarily having obtained the latter’s agreement, the sounder way to proceed is through a rule-change after a substantive consideration of the policy issues that attend the creation of such a class action procedure.⁴⁶ Unless current judges are willing to develop the procedure through a robust re-interpretation of the procedure, it is unlikely that the procedure will be permitted to harness the claims of those who have not opted to participate in the lawsuit.

III. Legal costs and funding

A. *How great an obstacle does the fee shifting rule present to group claimants?*

23 The general rule for litigation in Singapore is for costs to follow the event.⁴⁷ Also known as the fee-shifting rule, the rule requires that the

45 The author would argue that this concern can easily be addressed by the court exercising its inherent jurisdiction to regulate proceedings: Sir Jack Jacob, *The Inherent Jurisdiction of the Court* (1970) 23 CLP 23; M S Dockray, “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 LQR 120; J A Jolowicz, “Practice Directions and the Civil Procedure Rules” (2000) 59 Cambridge LJ 53. It should be within the court’s power, in order to protect the interests of the represented parties, to supervise any settlement reached on behalf of represented parties. This can take the form of an “unless” order, for which there are ample precedents. See, eg, *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67 (CA).

46 This was the subject of challenge in *Schutt Flying Academy (Australia) Ltd v Mobil Oil Australia* [2000] 1 VR 545. One of the principal arguments was that the group proceedings order then found in O 18A of the Supreme Court Rules (Vic) was invalid because it affected the represented parties’ common law rights to recover damages without their consent. The arguments were rejected by the Victoria Court of Appeal. Mobil lodged an application for an appeal to the High Court of Australia; however, before the appeal was heard, the Legislature rendered the issue moot when it gave statutory backing to the rules by the Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic) (Act No 78 of 2000).

47 Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 59 r 3(2). See *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501; *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 3 SLR(R) (cont’d on the next page)

losing party pay the costs incurred by the victor. Indeed, it may be described as a fairly strong default as the victor is, as a matter of course, *entitled* to costs.⁴⁸ In this regard, the fact that the victor raised issues or made allegations which ultimately failed is not sufficient in itself to take away his entitlement.⁴⁹

24 There is a compensatory element to the rule that costs should ordinarily follow the event. The victor is compensated for the costs he has incurred as a result of the counterparty either bringing the suit in the first place, or (if the loser is a defendant) failing to concede what is later adjudged to be an insufficient defence. Incorporated within the rule is a deterrence element: a party who chooses to prosecute (or defend) a case should be sufficiently confident about his case, so much so that he is willing to risk paying the costs of the other side.

25 How great an obstacle does this rule present to collective claims that are otherwise individually non-recoverable? Does the fee-shifting rule present a greater obstacle than the “American rule” in which each party bears his own costs?

26 Whether a potential claimant considers litigation a viable proposition depends on the expected value to be obtained from prosecuting the action. This, in turn, depends on a number of factors: one’s perception of the probability of emerging victorious, the amount claimed and one’s potential liability for the costs of the action.

27 Under the fee-shifting (“English”) rule, the expected value EV_E is represented by:

$$EV_E = (P_s)(Q) + (-1)(1 - P_s)(C_p + C_d) \quad \dots \text{Equation (1)}$$

where P_s is the probability of success

Q is the amount claimed

C_p is the plaintiff’s costs

C_d is the defendant’s costs.

253, following the principles laid out in *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 at 1214 (CA).

48 It should be noted that the court has wide discretion on costs. Indeed, this extends even to directing that non-parties be made to pay costs: *Karting Club of Singapore v Mak David* [1992] 1 SLR(R) 786, *per* Chan Sek Keong J (the court’s power to award costs under O 59 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) is “completely unfettered”). In the UK, where the lead plaintiff procedure has been adopted to manage multiple and complex claims, the claimants whose actions were stayed were held potentially liable for costs – albeit severally for their proportionate share: *Davies v Eli Lilly* [1987] 1 WLR 1136; *Ward v Guinness Mahon plc* [1996] 1 WLR 894.

49 Principle 3 in *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 at 1214.

28 Under the American cost rule, the expected value is computed differently:

$$\begin{aligned} EV_A &= P_s(Q - C_p) - (1 - P_s)(C_p) \\ &= P_s Q - P_s C_p - C_p + P_s C_p \\ &= P_s Q - C_p \quad \dots \quad \text{Equation (2)} \end{aligned}$$

29 The two components in Equation (2) reflect the fact that the amount recovered in a successful claim has to be reduced by one's costs. The fee-shifting regime is advantageous if one prevails, since one's costs are recoverable from the counterparty; the downside to the fee-shifting regime, of course, is that one bears the risk of paying the defendant's costs if one loses. This basic difference between the two point to neither rule being necessarily superior from an access to justice perspective.

30 If the expected value under the American rule is necessarily higher than the expected value under the fee-shifting rule, subtracting Equation (1) from Equation (2) will yield a result that is always greater than zero.

$$\begin{aligned} &\text{Equation (2) - Equation (1)} \\ &= [P_s Q - C_p] - [(P_s)(Q) + (-1)(1 - P_s)(C_p + C_d)] \\ &= C_d(1 - P_s) - C_p(P_s) \dots \dots \dots \text{Exp (3)} \end{aligned}$$

31 This expression is not necessarily greater than zero. Assuming the plaintiff and defendant's costs to be equivalent, a (perceived) probability of success that is more than 0.5 will result in the expression yielding a number less than zero. That is, the fee-shifting rule is superior in this circumstance! A concrete example better illustrates the point. Take a person who has a potential claim for \$10,000. If he prevails, he might be able to recover the sum of \$10,000 plus his costs. Assume that the anticipated cost of the suit is \$40,000 for each side, and that there is a 70% chance of the claimant prevailing. The expected value under a fee shifting system will be $0.7(10,000) + 0.3(-80,000) = -\$17,000$. In a system with American cost rules, the expected value is $0.7(10,000 - 40,000) + 0.3(-40,000) = -\$33,000$! Under this scenario, it may be said that the American cost rule imposes a greater obstacle than the fee-shifting (English) rule.

32 To further pursue this scenario: if a similarly situated group of plaintiffs are able to group together under the above cost and probability assumptions, the degree of collective action is less onerous under the English rule than under the American rule. Assuming that the incremental costs are zero and that \$40,000 represents the total cost of litigation for each side, it takes only the co-operation of 3.43 similarly situated plaintiffs to bring the expected value to zero. Under the American rule, it takes the cumulative claims of 5.71 plaintiffs to bring

the expected value to zero. In other words, under some conditions, the fee-shifting rule presents less of an obstacle to potential claimants. If the probability of success and the cost to the plaintiff are high relative to the probability of failure and the defendant's cost, the entitlement to recover costs is an advantage to the claimant.

33 Conversely, the fee-shifting rule presents a greater obstacle in other circumstances. Assuming that the legal costs on both sides are equivalent, the American rule will be more advantageous in cases with lower probability of success. Why? Seeing that he has a lower than even chance of success, such a claimant has a good chance of bearing the counterparty's costs under the fee-shifting rule, something he is not obliged to do under the American rule. In short, the rule that the victor claims against the loser holds less of an advantage for such a claimant; to the contrary, it poses a greater threat.⁵⁰

34 Ultimately, whether the American cost rule or the fee-shifting rule presents a greater obstacle to a potential group of claimants depends on how the parameters balance out.⁵¹ As such, the answer to the question posed at the beginning of this section does not attract a straightforward answer – *for it all depends*. Access to justice is not necessarily increased by moving from the fee-shifting rule to the American cost rule.

35 Expression (3) above does, however, point to some policy ramifications in the choice of one cost rule over another. On balance, they reinforce the case for retention of the present cost rule.

36 First, claimants with a strong case derive a greater benefit under the fee-shifting rule than under the American rule. Seen from another perspective, the fee-shifting rule poses a greater deterrence to weak cases than the American rule.

37 Second, the American rule permits the claimant greater room to exploit the cost differentia where the defendant bears the greater cost burden. The claimant knows that the defendant who has a strong claim

50 This is consistent with Rosenberg and Shavell's proposition that the English rule is more likely than the American rule to deter "nuisance" suits: Rosenberg & S Shavell, "A Model in which Suits are Brought for Their Nuisance Value" (1985) *International Review of Law and Economics*, vol 5(1): 3-13.

51 The conclusions here are consistent with those of Neil Rickman who investigates the effects from a hypothetical shift from the English to American cost rule. The effects investigated include: parties' expenditure on litigation, likelihood of filing a case, whether more high merit cases filed, settlement, accidents and number of cases going to trial. See Neil Rickman, "The Economics of Cost-shifting rules" in *Reform of Civil Procedure: Essays on Access to Justice* (Zuckerman & Cranston eds) (Oxford: OUP, 1995) ch 17.

will nonetheless settle when the amount is less than the costs to be incurred in defending oneself. In a fee-shifting regime, the defendant's confidence that he will recover his costs undercuts the aforesaid room for exploiting the differentia. Indeed, the cost differentia cuts the other way since the claimant may need to bear his opponent's costs. A jurisdiction where each side bears his own costs is thus more capable of attracting nuisance suits than one where the loser pays the victor's fees.⁵²

38 Third – and this is a counterpoint to the second point above – the defendant might exploit the fee-shifting rule to threaten the plaintiffs with huge potential liability for adverse party costs.⁵³ The degree to which potential liability for counterparty costs acts as a disincentive increases with the degree of risk aversion inhering in a plaintiff. The holder of an individually non-recoverable claim would hesitate to bring suit first, because the counterparty's costs are not within his control. This is exacerbated when the defendant has high stakes and thus the incentive to employ every legal device within reach to defeat the claims; in the process of doing so, the defendant ratchets up her costs, and thus increases the threat value of the adverse cost liability. Strategically exploited, the plaintiff who otherwise has a good claim might be intimidated into not pursuing his claim.

39 The key to increasing access to justice for the small investors lies in containing within acceptable limits the potential exposure of the claimants for costs. In the Singapore legal system, this will involve both the cost of prosecuting the action as well as the potential liability for the counterparty's costs. In the US, the allowance for contingency fee arrangements alters Equation (2):

$$EV_{\text{plaintiff}} = P_s(Q)(1 - F) \dots \text{Equation (3)}$$

where F is the percentage of recovered sum to be paid as contingency fee

40 This removes completely the downside for the claimants. The cost of litigation does not, of course, disappear but is shifted to the plaintiff's lawyers, who now become the "gatekeepers" of the decision whether to litigate.⁵⁴ In a fee-shifting regime, greater access to justice for investors requires management of an additional component – the

52 See para 33 of this article.

53 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (Canberra: Australian Government Publishing Service, 1988) at paras 34, 144–145; B Murphy & C Cameron, "Access to Justice and the Evolution of Class Action Litigation in Australia" (2006) 30 Melb U L Rev 399 at 410.

54 The expected value to the plaintiff's lawyer is $EV_{\text{lawyer}} = P_s(Q)(F) - k$, where k is his cost.

exposure to the counterparty's costs. Expanding Equation (1) into its discrete components:

$$EV_E = (P_s)(Q) - (1 - P_s)(C_p) - (1 - P_s)(C_d) \quad \dots \text{Equation (1A)}$$

41 The typical investor's claim is individually non-recoverable if he has to bear the full legal costs – and additionally, the exposure to counterparty costs. Aggregating the multiple claims of small investors helps increase the viability by increasing the total quantum claimed (Q). Nonetheless, there needs to be a certain degree of predictability if these claimants are to be willing to step forward. Otherwise, the uncertainty of these two elements acts as a structural dampener on the willingness of victims to pursue their rights. This is especially so given that the defendant is in a position to increase the amount spent on her defence – and hence the threat value of adverse party costs; it should of course be noted this is mitigated by the fact that the court is in a position to check on excessive cost claims since a cost order is, at the end of the day, issued at the court's discretion. The mechanisms that can serve to limit the exposure to legal costs and to the defendant's costs are discussed later in this article at paras 47–85 (commercial litigation funders) and paras 86–93 (non-profit organisations).

B. *Obstacles to risk sharing and incorporating credible signals in the lawyer's compensation agreement*

42 The mass securities claims context provides a good number of challenges from the funding perspective. There is first the collective action problem. A sufficient number must agree to contribute before the lawsuit is viable. Added to this is the problem of free-riding; as the limitation period for a tort action is six years,⁵⁵ other victims may choose to wait out the result of an earlier litigation rather than participate. Such a tactic avoids not only the uncertainty of the earlier investment in the lawsuit, but also the risk of liability for the other person's costs. Certainly, the difficulties and costs of co-ordination efforts are now much mitigated by the internet discussion forums and the ease with which an internet portal can be set up to organise collective action.⁵⁶ The structural difficulties with collective action – opportunity costs, ignorance, differential evaluation of information, wariness of dumping good money after bad – persist. These will

55 Securities and Futures Act (Cap 289, 2006 Rev Ed) s 254(5) (statutory right of action under s 254(1) for misleading statements or omissions in a prospectus); Securities and Futures Act s 234(4) (statutory right of action under s 234(1) for contravention of any of the proscribed conduct contained in Pt XII); Limitation Act (Cap 163, 1996 Rev Ed) s 6(1) (for torts generally).

56 See, for example, the portal set up for aggrieved members of Raffles Town Club: <<http://www.rafflesmembers.com.sg>> (accessed 30 June 2009).

continue to weigh down the willingness of litigants to participate in the funding of the group action.

43 One obvious strategy for overcoming the problem of asymmetric information between the lawyer and holders of individually non-recoverable claims lies in the lawyer credibly signalling the veracity of his advice. Such a credible signal can be found in a compensation contract in which the lawyer “invests” in the litigation and holds a real stake in the outcome of the litigation. In so doing, the lawyer lends creditability to his advice that the investment in the litigation is worthwhile; he thereby signals to the holders of individually non-recoverable claims the credibility of his advice.

44 The problem with such a strategy is that such a compensation agreement is prohibited by the rules of professional conduct governing Singapore lawyers. The Legal Profession Act⁵⁷ quite explicitly proscribes contingency agreements. Section 107(1)(b) of the Legal Profession Act provides that 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, action or proceeding.

45 While this provision does not on its face cover differential fees for success and failure, there is little doubt that such a contract infringes the common law prohibition against champerty. By s 107(3) of the Legal Profession Act,⁵⁸ a solicitor is “notwithstanding any provision of this Act, ... subject to the law of maintenance and champerty like any other person”. An agreement falling within the common law prohibition against maintenance and champerty is void and will be unenforceable against the client.⁵⁹ Under the indemnity principle, the loser is only obliged to pay what the victor is obliged to pay his lawyer. If the victor’s agreement with his lawyer is a champertous one, the counterparty who loses the lawsuit may argue that the agreement is a void one and that he is accordingly not obliged to pay the victor’s costs.⁶⁰ Another ramification is that the solicitor will be unable to look to his professional indemnity insurance to cover his losses flowing from a champertous agreement.⁶¹

57 Cap 161, 2009 Rev Ed.

58 Cap 161, 2009 Rev Ed.

59 *Grell v Levy* 16 CB (NS) 73; *In re a Solicitor* [1912] 1 KB 302.

60 *Re Trepca Mines Ltd (No 2)* [1963] Ch 199; *Thai Trading v Taylor* [1998] EWCA Civ 370; [1998] 2 WLR 893.

61 *Haseldine v Hosken* [1933] 1 KB 822.

46 Further, under r 37 of the Legal Profession (Professional Conduct) Rules,⁶² “[a]n advocate and solicitor shall not enter into any negotiations with a client ... for remuneration proportionate to the amount which may be recovered by the client in the proceedings”. A lawyer courts serious consequences for daring to enter into a contingency agreement. All Singapore lawyers are subject to the control of the Supreme Court.⁶³ Upon due cause being demonstrated, the lawyer may be struck off the rolls, suspended or censured. Such due cause may be shown in a number of ways: (i) “grossly improper conduct in the discharge of his professional duty”; (ii) breach of any usage that amounts to improper conduct, and (iii) breach of any rule made by the Council under its powers of delegated legislation.⁶⁴ Breach of r 37 would clearly be a ground for disciplinary action, as would a breach of s 107(3) of the Legal Profession Act⁶⁵ (which provision statutorily incorporates the common law prohibition against maintenance and champerty). Apart from these statutory statements against champerty, it is clear that contracting a champertous agreement constitutes grossly improper conduct. In the two reported Singapore cases where the lawyers were struck off the roll of solicitors for champerty, the Singapore courts had little doubt that champerty constitutes grossly improper conduct.⁶⁶ So obvious was the proposition that the courts did not see a need to refer to more explicit statutory provisions. Unless there is a rule change, a lawyer risks putting his professional career at stake if he engages in such contracts.

IV. Commercial litigation funders

47 The funding gap might instead be filled by professional litigation funders. In addition to providing funds and accumulating what would otherwise be individually non-recoverable claims, litigation funders perform the valuable function of assessing whether the costs to be incurred in pursuing the claims are worthwhile.⁶⁷ Through

62 Cap 161, R 1, 2010 Rev Ed. The rules are made by the Council of the Law Society under the Legal Profession Act (Cap 161, 2009 Rev Ed) s 71.

63 Legal Profession Act (Cap 161, 2009 Rev Ed) s 83(1).

64 Legal Profession Act (Cap 161, 2009 Rev Ed) s 83(1)(b).

65 Cap 161, 2009 Rev Ed.

66 *Law Society of Singapore v Chan Chow Wang* [1974–1976] SLR(R) 237 (HC), affirmed in *Chan Chow Wang v Law Society of Singapore* [1977–1978] SLR(R) 475 (PC). Also *Lau Liat Meng v Disciplinary Committee* [1965–1967] SLR(R) 641, where the charge preferred against the solicitor entering into a percentage contingency fee agreement was that he was guilty of “grossly improper conduct in the discharge of his professional duty”.

67 As was pointed out by Austin J in *ACN 076 673 875*: “... there is the commercial certainty that [the litigation funder] would not, acting rationally, prosecute litigation at its expense unless there were a reasonable prospect of a verdict or settlement ...” [2002] NSWSC 578; (2000) 42 ACSR 296.

introducing a budget for legal costs, litigation funders potentially instil an element of financial discipline in the claims process. In the UK, where conditional fees have been in operation since 1995, the indemnity principle was extended in 1999 to include success fees and after-the-event insurance premiums;⁶⁸ the removal of the downward demand pressure otherwise exerted by claimants resulted in the rise in these costs that the courts were poorly positioned to police.⁶⁹ To the extent that litigation funders assume the responsibility for legal costs, they exercise discipline over the same. As repeat players in the industry, they are also better situated to handle the uncertainties that so often deter claimants unfamiliar with the legal process. Their familiarity with the risks attending litigation and their ability to manage the risks on a portfolio basis helps individual claimants who are poorly situated to assess the uncertainties of litigation and to bear the losses of individual cases. In this section, two principal issues are explored. First, the extent to which existing law impedes the litigation funding industry. Second, a policy question – what measures should be put in place if the litigation funding industry is to be encouraged.

A. *Maintenance, champerty and abuse of process – Legal impediments or minor inconveniences?*

(1) *Champerty and litigation funding*

48 The very basis of the business model for litigation funding – the funder contracts for payment out of the fruits of a successful claim – is, *ex facie*, at variance with the traditional prohibition against champerty. Champerty is regarded as an aggravated form of maintenance.⁷⁰ Whereas maintenance consists of the support of litigation without just cause or excuse,⁷¹ champerty contains an additional ingredient – a division of the spoils of litigation.⁷² To be sure, the rule against maintenance has never been an absolute one.

68 Access to Justice Act 1999. The provisions are an outworking of the notion that the costs incurred by the prevailing plaintiff should include the uplift as well as the cost of the indemnity insurance.

69 *Callery v Gray (Nos 1 & 2)* [2002] UKHL 28; [2002] 3 All ER 417 at [12]–[16], *per* Lord Nicholls, [18], [32], *per* Lord Hoffman.

70 *Giles v Thompson* [1994] 1 AC 142; [1993] 3 All ER 321 (CA). Champerty is “maintenance aggravated by an agreement to have a part of the thing in dispute”: [1993] 3 All ER 321 at 328, *per* Steyn LJ.

71 The oft-cited definition of maintenance is that given by Lord Denning MR in *Re Trepcza Mines Ltd (No 2)* [1963] 1 Ch 199 at 219: “... improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.” Another oft-cited definition is that found in *Neville v London “Express” Newspaper Ltd* [1919] AC 368 at 382, *per* Lord Finlay LC: “... intermeddling with litigation in which the intermeddler has no concern.”

72 *Giles v Thompson* [1994] 1 AC 142 at 161 (HL).

49 Against the simple notion that one should be slow to foster litigation is the steady tide of common law development driven by the desire to provide greater access to justice. The courts have consistently reiterated that the public policy which animates the law of maintenance is not fixed and immutable.⁷³ To this end, the legitimate interest exception to maintenance has been adapted to cover scenarios where a non-profit organisation assists its members in prosecuting their rights. In *Hill v Archbold*,⁷⁴ a trade union was held to possess a legitimate interest in helping two of its officials sue on libellous statements which alleged that they were unfit for their office. In doing so, the English Court of Appeal reversed *Oram v Hutti*⁷⁵ which had held that it was obnoxious to the law of maintenance for a trade union to indemnify its Secretary-General who had successfully sued for slander but who was unable to fully recover his costs from the defendant. Similarly, an association for protecting the rights of fishery operators may support an action by its members for alleged pollution.⁷⁶ Thus, it should similarly be justifiable for an investors' association to advise and fund investors who have compensable losses. Another established category of lawful maintenance is where an insurer supports or carries on litigation on behalf of its insured.⁷⁷

50 Does falling within one of these categories of lawful maintenance immunise the funder against the taint of (unlawful) champerty even if the arrangement contains an additional element – the sharing of the spoils of litigation? In other words, might it be champerty if an investor's association funding investors' litigation were to require a percentage of the recovery to be paid into the coffers of the association? Here then is a conceptual question – whether *unlawful* maintenance is a necessary condition to champerty, or whether champerty merely finds its roots in the concept of maintenance. This conceptual question is of some moment – for if the lawfulness of a type of maintenance sanctifies the division of spoils, a funding arrangement that passes muster as lawful maintenance may quite safely be varied to include a division of spoils. This approach – call it the “pass-through justification” approach – may be found in *Clairs Keeley v Treacy*, a decision of the Western Australia Court of Appeal:⁷⁸

73 *Stevens v Keogh* (1946) 72 CLR 1 at 28, *per* Dixon J: “Notions of public policy are not fixed but vary according to the state and development of society and conditions of life in a community.”

74 [1968] 1 QB 686; [1967] 3 All ER 110.

75 [1914] 1 Ch 98.

76 *Martell v Consett Iron Co Ltd* [1955] Ch 363.

77 *Hill v Archbold* [1968] 1 QB 686 at 694–695; *TGA Chapman Ltd v Christopher* (1997) EWCA Civ 2052; *Halliday v High Performance Personnel Pty Ltd* (1993) 113 ALR 637 at 639.

78 [2003] WASCA 299 at [52].

There cannot be champerty without maintenance. And there cannot be maintenance unless the assistance or encouragement (by way of litigation funding, for example) is unjustified. If, therefore, the maintainer has a legitimate interest in the proceedings, or a justifiable motive for his involvement, the fact that he stipulates for a share of the proceeds of litigation, will not, of itself, render the relevant agreement champertous.

51 This resonates with Lloyd LJ's *dictum* in *Brownnton v Edward Moore*:⁷⁹

There is no difference between the interest required to justify maintenance of an action and the interest required to justify the taking of a share in the proceeds, or the interest required to support an out-and-out assignment.

52 The better view, however, is that articulated by Millett LJ in *Thai Trading v Taylor*:⁸⁰ “[T]here can still be champerty even if the maintenance is not unlawful.” Maintenance and champerty may stem from the same policy concerns. However, the introduction of a financial interest in the outcome of litigation places a new ingredient into the mix, requiring a fresh consideration of whether that additional ingredient alters the complexion of the underlying policy concerns. At base, the tension is between a more formal approach to champerty, and one which stays close to the policy concerns animating champerty. There is a legitimate role for both kinds of reasoning. Insurers, together with non-profit organisations that fund litigation pursuant to their objectives, are established categories of funders with deemed legitimate interests in maintaining litigation. To the extent that the insurer is driven by its own financial interest, the deemed extension of its legitimate interest in maintaining litigation to a legitimate interest in pursuing its financial interest obviates the champerty argument. Similarly, an allowance for an association not only to maintain an action but also to participate in the proceeds of litigation allows the association to be placed on a financially self-sustaining path. In extending the funder's legitimate interests from maintenance to champerty, the funder is granted a zone of immunity from the operation of champerty. In these two categories, the conflation of the legitimate interest in maintaining litigation and the legitimate interest in participating in the proceeds of recovery can be justified by the funder having a corollary financial interest which is not seen to sully the legal process.

53 It does not follow that the extension of the justification applies whenever one has a legitimate interest in maintaining a suit. Thus, while

79 [1985] 3 All ER 499.

80 [1998] 1 QB 781 at 786; [1998] 3 All ER 65 at 69 (CA).

one may maintain the suit of a blood relation,⁸¹ it does not follow that one also has a legitimate interest in sharing the amounts recovered.⁸² Apart from those categories where the law deems the legitimate interest in maintaining a suit to extend also to participating in the moneys recovered, there is no reason why an otherwise lawful maintenance should not be subject to scrutiny for the concerns underlying champerty when it also contemplates the sharing of the spoils. A substantive inquiry into the policy concerns that undergird champerty is due and proper when the sharing of spoils reveals risks that the legal system has not yet deemed acceptable. (As a counterpoint, just as formal reasoning may be adopted to extend the funder's legitimate interest to the sharing of spoils, the law may deem certain types of recovery sharing as champertous. A percentage contingency fee with a lawyer would fall under this typology.)

54 More recent case law suggests that the courts take a close examination of the real risk that an *ex facie* champertous agreement might corrupt the judicial process. In shaping champerty to fit the current policy concerns, the notion that unlawful champerty consists of maintenance coupled with the sharing of spoils is no longer (if it ever was) accurate. A recent case that indicates the current approach that courts are likely to take when faced with a litigation funding agreement is *R (Factortame Ltd) v Secretary of State for Transport, Environment and the Regions (No 8)*⁸³ ("*Factortame*"). Here the claimants had run out of money in pursuing their claim against the UK Government which had prohibited them from fishing in UK territorial waters. A firm of chartered accountants, to whom the claimants were already indebted, undertook to appoint and fund an independent fisheries expert and an independent expert accountant to create a computer model for calculating the losses suffered. The accountants also provided services which are customarily undertaken by solicitors, including the assembly of documentary evidence, liaising with claimants in Spain and advising on settlement. Their compensation was set at 8% of the damages recovered. The agreement was found not to be champertous. The Court of Appeal chose not to adopt a formalistic notion that an agreement to divide the spoils of litigation amounts to champerty. Instead, it focused on whether the facts and circumstances revealed a tendency to "act in an unethical manner in order to achieve ... maximum recovery" or "sully the purity of justice".⁸⁴ The approach is significant. The court examined the facts to ascertain whether there was substance to the fear that the maintainer might "inflare the damages ... suppress evidence ... suborn

81 *Rothewel v Pewer* (1431) YB 9 Hen 6 at 64; *Harris v Brisco* (1886) 17 QBD 504 at 512–513.

82 *Hutley v Hutley* [1873] LR 8 QB 712.

83 [2002] 3 WLR 1104 (CA).

84 [2002] 3 WLR 1104 at [84].

witnesses or otherwise undermine the ends of justice”⁸⁵. Faced with a funding agreement, *Factortame* indicates that the modern approach is for the court to engage in an inquiry into the nature of the funding agreement: whether it is equitable,⁸⁶ and whether the facts and circumstances point to a substantial risk that the funder might deviate from the path of rectitude.⁸⁷ Sharing the spoils of a litigation one maintains merely suggests champerty; it does not define champerty.

55 What is interesting is that the English Court of Appeal in *Factortame* made express reference to access to justice as the countervailing policy consideration to the traditional concerns of champerty. Indeed, this concession for access to justice is not an isolated instance, but one amongst many instances where English and Australian courts have given credence to this imperative.⁸⁸

56 If one were to adopt the traditional notion of champerty, one might very well arrive at the conclusion that a litigation funding agreement is champertous by reason only of its contemplating a sharing of the spoils of litigation. Insofar as the genuine commercial interest and legitimate interest justifications to maintenance are founded on an interest existing *prior* to the act or agreement to maintain the suit, a litigation funding agreement will fall short. With the rise of the access to justice imperative – and the accommodation of it through a substantive inquiry into the dangers that a particular recovery sharing agreement poses – it would be premature to consider a litigation funding agreement champertous without examining its details and the circumstances in which it operates.

85 [2002] 3 WLR 1104 at [36].

86 *Giles v Thompson* [1994] 1 AC 142 at 164, *per* Lord Mustill; *Stoczniak Gdanska SA v Latvian Shipping Co (No 2)* [1999] 3 All ER 822 at 831, *per* Toulson J. The circumstances of *Quach v Hunttoff* [2003] NSWSC 932 bear a striking resemblance to *Giles v Thompson*. The rental of vehicles to those involved in accidents was accompanied by “loaded invoices”; a stay of the proceedings on grounds of abuse of process was nonetheless refused. *Cf Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 where both the majority and minority questioned whether they were prepared to scrutinise the fairness of the litigation funding agreement: Gummow, Hayne and Crennan JJ (majority) at [92], Callinan and Heydon JJ (minority preferring the traditional view that law of maintenance was for safeguarding the interests of the counterparty) at [251] and note 318.

87 [2002] 3 WLR 1104 at [84].

88 *Hamilton v Fayed (No 2)* [2003] QB 1175; [2002] 3 All ER 641; *R (Factortame Ltd) v Transport Secretary (No 8)* [2002] 3 WLR 1104 at [80]. To be sure, this is not the only countervailing consideration. In *Giles v Thompson* [1994] 1 AC 142, the court was concerned not to chill the socially beneficial activity of providing owners of cars that had been involved in accidents with hire cars. While the car rental companies could, on one view, be seen to be increasing the cost of accidents, the House of Lords found them to have a legitimate commercial interest in maintaining litigation through their interest in the hire of cars to the owners.

57 Indeed, in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*⁸⁹ (“*Fostif*”), the New South Wales Court of Appeal made the broad statement that: “The law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled.” And that:⁹⁰

Public policy now recognizes that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.

58 It would nonetheless be going too far to posit from this that litigation funding agreements now constitute a category of lawful purpose, removed from the scrutiny of champerty law because it is deemed to serve a socially desirable end. That time may yet come, but the law has yet to develop far enough for such a categorical statement to be made. When *Fostif* reached the High Court of Australia, Callinan and Heydon JJ (dissenting)⁹¹ characterised the status of litigation funding contracts narrowly:

It would be truer to say that the law *prevents litigation funding contracts from being enforced*, even though they may offer access to justice, if they have the character of maintenance or champerty, and the law looks neutrally on the prosecution of the proceedings being funded unless they are an abuse of process. [emphasis added]

59 Callinan and Heydon JJ’s categorical classification of litigation funding agreements as champertous sits oddly with the current, more nuanced approach to champerty. The majority consisting of Gummow, Hayne and Crennan JJ questioned the very ambit of champerty as they saw the public policy animating champerty as very much in flux. Significantly, they repudiated the notion that the litigation funders who profit from the maintenance or control the litigation “warrant condemnation as being contrary to public policy.”⁹² The authorities in both England and Australia point to a trend away from a categorical approach towards one that closely analyses the policy to which the rule is intended to give effect, especially now with the access to justice imperative shaping the development of the common law.

60 Of what moment is the determination that a litigation funding agreement is champertous? England and a number of Australian states

89 [2005] NSWCA 83; (2005) 63 NSWLR 203 at [105].

90 [2005] NSWCA 83; (2005) 63 NSWLR 203 at [105], affirming the dicta of Lord Phillips MR in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA 92 at [53].

91 [2006] HCA 41 at [256].

92 [2006] HCA 41 at [88].

have abolished maintenance and champerty as crimes and torts,⁹³ which even prior to their abolition have been largely eviscerated through common law restrictions.⁹⁴ What remains is the invalidating potential on the litigation funding agreement. An agreement for maintenance or champerty is unenforceable as between the contracting parties.⁹⁵ The litigation funder would, therefore, be unable to sue the funded parties for its agreed share of the proceeds. However, if a third party is constituted a trustee of the proceeds of litigation, the unenforceability of the agreement between the funder and the claimant does not prevent the trustee from paying according to the terms of the trust created.

61 The unlawful nature of a champertous agreement does not necessarily taint contracts with third parties who know of the champertous agreement. Thus, the fact that a lawyer knows that a client is funded by another under a champertous agreement does not disentitle the lawyer's claim for costs. In *Trepca Mines (No 2)*,⁹⁶ the English Court of Appeal came to the conclusion that the lawyer is disbarred from claiming remuneration only if he actively participates in the champertous agreement. For this purpose, it is insufficient that the lawyer knows that by taking on the case, he is carrying out an unlawfully maintained litigation that will lead to a division of the spoils. Active participation requires more, for example, the drafting of the champertous agreement and taking steps to share out the proceeds in accordance with the champertous agreement. Following from *Trepca Mines (No 2)*, the lawyer's retainer agreement with the claimant may be tainted by the lawyer's foreseeable participation in the distribution of the proceeds. This has consequences for the lawyer's right to claim compensation against his client (as happened in *Trepca Mines (No 2)*), and a prevailing claimant's right to seek costs against the defendant under the indemnity principle. *Trepca Mines (No 2)* was, however, decided before maintenance and champerty were abolished as crimes

93 England: Criminal Law Act 1967 ss 13 and 14. NSW: Maintenance, Champerty and Barratry Abolition Act 1993. Vic: Wrongs Act 1958 (Vic) s 32 (since 1969). South Australia: Criminal Law Consolidation Act 1935 (SA), Sched 11 (since 1992).

94 *Neville v London "Express" Newspapers Ltd* [1919] AC 368. See also the ruling that where a maintained action has failed, a claim for damages fails unless it is shown that no action could have been brought without the assistance of the maintainer: *Wm Hill (Park Lane) v Sunday Pictorial* The Times (5 April 1961) cited in Great Britain Law Commission, *Proposals for Reform of the Law relating to Maintenance and Champerty* (London: HMSO, 1966) at pp 4–5..

95 *Cole v Booker* (1913) 29 TLR 295 at 297 (maintenance). *Hutley v Hutley* (1873) LR 8 QB 112 (champerty). More recently, see *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All ER 695 and *Fraser v Buckle* [1996] 2 ILRM 34 (SC). On the latter, see David Capper, "The Heir-Locator's Lost Inheritance" (1997) 60 Mod L Rev 286. In *James v Kerr* (1888) 40 Ch D 449, the funder was able to recover the sums advanced with an allowance for 5% interest.

96 [1963] 1 Ch 199 at 220, *per* Lord Denning MR; at 230, *per* Pearce LJ.

and torts in England.⁹⁷ The “active participation” ruling rests on the lawyer’s conduct amounting to the aiding and abetting of a crime. In jurisdictions where maintenance and champerty are no longer crimes – England, New South Wales, Victoria, South Australia⁹⁸ – the question resolves into whether the lawyer’s participation in an unenforceable agreement affects his right to compensation. In Singapore, where maintenance and champerty are neither common law crimes nor crimes under the Penal Code, it is submitted that the lawyer’s right to remuneration is unlikely to be tainted by their continued existence as torts. The tort is illusory. If the action succeeds, the costs incurred in defending the suit do not constitute recoverable damages.⁹⁹ It is also well established that courts do not issue injunctions against unlawfully maintained actions. Given the lifeless theoretical existence of the tort of maintenance, it is questionable whether a lawyer’s foreseeable participation in distributing the proceeds of litigation between the litigation funder and the claimant taints his right to remuneration merely because the maintained action brings up the spectre of a lifeless tort. The increased importance placed on “access to justice” and the increasing acceptance of litigation funding arrangements will probably incline the courts against such a finding.

62 The limited effect of maintenance and champerty probably explains why the Australian litigation funders have been willing to fund non-insolvency litigation that would *ex facie* attract the scrutiny of the law on maintenance and champerty.¹⁰⁰ Property rights are largely unaffected, especially if the property is held by a third party (the solicitor) for the benefit of the litigation funder. By creating a trust over moneys paid over by the defendant, the litigation funder avoids the need to sue the claimants for payment; the solicitor, who is constituted the trustee over these funds, can be relied upon to administer the trust funds in the manner directed by the instrument creating the trust. An example of this technique for circumventing the unenforceability of champertous contracts is found in the multiparty funding agreement used by IMF (Aust) Ltd, Australia’s largest litigation funder that grew out of funding actions of insolvent companies:¹⁰¹

97 England: Criminal Law Act 1967 ss 13 and 14. NSW: Maintenance, Champerty and Barratry Abolition Act 1993. Vic: Wrongs Act 1958 (Vic) s 32 (since 1969). South Australia: Criminal Law Consolidation Act 1935 (SA) Sched 11 (since 1992).

98 England: Criminal Law Act 1967 ss 13 and 14. NSW: Maintenance, Champerty and Barratry Abolition Act 1993. Vic: Wrongs Act 1958 (Vic) s 32 (since 1969). South Australia: Criminal Law Consolidation Act 1935 (SA) Sched 11 (since 1992).

99 See n 94 of this article.

100 See cases cited at paras 77–85 of this article.

101 Clause 9.3 of the Multiparty Funding Agreement, IMF (Aust) Ltd. Available from: <<http://www.imf.com.au/funding.asp?content=fundingforms>> (accessed 30 June 2009).

The Lawyers will hold that part of the Resolution Sum disposed of or otherwise due to IMF under this IMF Agreement on trust for IMF and the balance on trust for the Applicant to be dispensed in accordance with the directions of the Applicant.

63 It may yet be that the validity of the trust will be challenged. However, unless the champertous contract taints the trust and renders it void, impressing the proceeds of recovery with a trust in favour of the funder gives the latter some measure of protection over its financial interest. From this perspective, then, the rule against maintenance and champerty has not deterred the litigation funding industry, though the legal risk to the business has been acknowledged.¹⁰² The potential unenforceability of litigation funding agreements is, on balance, more a risk factor than an obstacle to litigation funding.¹⁰³

(2) *Satellite litigation revolving around litigation funding*

64 Even prior to the abolition of maintenance and champerty as a crime and a tort, the defendant to the action was unable to obtain a stay of the action on the ground that the action against him was unlawfully maintained or champertous.¹⁰⁴ This remains true.¹⁰⁵ Maintenance, and by extension champerty, is not a defence to an action.¹⁰⁶ The defendant needs to satisfy the court that there is an abuse of process. However, merely because an action is unlawfully maintained or champertous does not mean that it is an abuse of process. More is required – especially in a jurisdiction that has enacted statutes abolishing maintenance and champerty as crimes and torts.¹⁰⁷ The defendant needs to demonstrate

102 The IMF (Australia) Ltd Prospectus for a rights issue of convertible notes (dated 9 December 2005), for example, alludes to this in the Risks Specific to the IMF Cases (s 8.4): “*Changes in the Law*. It is possible that statute law or the interpretation of the common law may change in a way which is adverse to the interests of the Company. There are now numerous Court decisions in Australia and the United Kingdom (both single Judge and Courts of Appeal) over the past six years supporting the business model of the Company, but it is possible that higher courts may disagree with existing authority and such decisions may impact adversely on the Company’s business model.” Available from <<http://www.imf.com.au/pdf/prospectus.pdf>> (accessed 20 September 2007).

103 This is not to say that the question whether a funding contract is champertous is a trivial one. If the funder’s charges (which may include investigation and litigation management services in addition to funding) do not amount to unlawful champerty, they may be seen as costs incurred in prosecuting the claim and recoverable from the defendant. See *R (Factortame Ltd) v Secretary of State for Transport, Environment and the Regions (No 8)* [2002] 3 WLR 1104.

104 *Martell v Consett Iron* [1955] Ch 363.

105 *Abraham v Thompson* [1997] 4 All ER 362.

106 *Lim Lie Hoa v Ong Jane Rebecca* [1997] 1 SLR(R) 775 at [55].

107 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 at [84]–[85].

how the facts and circumstances surrounding a maintained action amount to an abuse of process.

65 Abuse of process has been one of the principal grounds of satellite litigation involving litigation funding. Defendants canvass the details of the litigation funding arrangement in support of their allegation that the suit amounts to an abuse of process. These challenges extend beyond mere peculiarities of individual funding arrangements, for they deal with features that determine the viability of the business model on which litigation funders operate.

66 A knowledgeable client may not need the assistance of litigation funders in instructing lawyers and advising on the critical decisions that affect the course of litigation; all that it requires of the funder might be money and the willingness to assume the risk of adverse cost orders. The same may not be true of less sophisticated clients. For these, the litigation funder potentially supplies, first, the valuable service of assessing the viability of the claim, and second, expertise in managing the decisions affecting the course of litigation. This role is aligned with the litigation funder's interest, who is after all putting in money and resources to support the litigation. On one perspective, making the litigation funder a joint decision maker (or delegated decision maker) flows naturally from this. Decisions such as whether to include certain potential defendants and whether to make certain procedural applications have cost consequences; that the litigation funder wishes to be consulted in such decisions can only be expected. Since the claimant has only his claim to lose and the incremental cost is not his to bear, he has little incentive to exercise restraint in committing the (funder's) resources. If one views the funder as performing a socially desirable function and an economically useful role of disciplining the budget, one will tend to view his participation less as officious intermeddling but more that of a financier overseeing his investment. From a systemic perspective, the fact that the litigation funder is laying out its own resources and seeking to achieve the best result with the minimum resources aligns very well with the efficiency imperative of the civil justice system. At the same time, it better equips the claimant with equality in arms, giving him a better chance at matching the resources of an otherwise better financed defendant. This is particularly true for individually non-recoverable claims. For these claimants, the litigation funder plays a socially beneficial role, providing the means and the know-how to realise the claimants' rights. If the symbiotic nature of the relationship between the litigation funder and the claimants had been accepted, many of the defensive applications for stay or dismissal on the ground of abuse of process could have been readily resolved.

67 The idea that the claimant's suit is in fact steered by a third party will sound repugnant to one wedded to the traditional view that

the client should control the course of litigation. A funder's influence over the course of litigation can be seen as a perversion of the traditional model of the solicitor-client relationship. Such influence, therefore, provides the ammunition for an application to stay the action on the ground that it is an abuse of process. This consideration shaped the trilogy of cases: *Clairs Keeley (No 1)*,¹⁰⁸ *Clairs Keeley (No 2)*¹⁰⁹ and *Clairs Keeley (No 3)*.¹¹⁰ In *Clairs Keeley (No 1)*, the Western Australian Court of Appeal¹¹¹ determined that the action should be stayed "at least until some safeguard was put in place to ensure that [the funder's] role was *confined to funding*"¹¹² [emphasis added]. Although the solicitor-client relationship was formally between the claimants and the solicitors, the court took the view that "in substance, the plaintiffs will simply do as they are advised by IMF";¹¹³ and that there was in effect a "*de facto* assignment of their causes of action".¹¹⁴ Using this approach, few funded suits will pass muster. It is commercially unsustainable for a funder to provide money without influence over the direction of the litigation. Consistently applied, this approach places little store on the structure of the formal legal relationships. That the claimant signs a direct retainer with the solicitor who undertakes to submit critical decisions for his decision is insufficient if the circumstances suggest that the funder will have a strong influence over the decision. In *Clairs Keeley (No 2)* where there was an application for the lifting of the stay after the funder and solicitors had made some adjustments to their relationships, the Court of Appeal admitted the need for the funder to exercise a degree of control if it were to play a role in affording access to justice. While affirming that the plaintiffs must be entitled to make informed decisions critical to the litigation, the court implicitly recognised the legitimacy of the funder retaining a significant level of control over the litigation. The court then embraced a "consent-centred" approach, concentrating its scrutiny on whether the claimants were giving fully informed consent to the funding arrangements. By the time the application for lifting of the stay was resubmitted in *Clairs Keeley (No 3)*, the *de facto* control argument was largely ignored.

108 [2003] WASCA 299.

109 [2004] WASCA 277.

110 [2005] WASCA 86.

111 The proper appellation of the Court of Appeal at that point was "Full Court"; it was renamed the Court of Appeal in 2004 when it was fused with the Court of Criminal Appeal. See <<http://www.supremecourt.wa.gov.au/content/procedure/appeal.aspx>> (accessed 22 June 2009).

112 [2003] WASCA 299 at [44].

113 [2003] WASCA 299 at [134].

114 [2003] WASCA 299 at [134].

68 The argument was similarly aired in New South Wales in *Fostif*,¹¹⁵ where the funder commenced a class action and actively solicited claimants. The matter was appealed all the way to the High Court of Australia. A notable aspect of the judgments of the New South Wales Court of Appeal and the High Court of Australia is the little weight given to the control issue, and corollary to that, the prominence of the access to justice consideration. The minority, it is true, were concerned with litigation funders having unregulated control over the suits of others. The majority, however, saw little issue with funders having control of the litigation. They needed to be convinced of the reality of the risk that the processes of the court might be corrupted.¹¹⁶

69 This decision, while not granting to litigation funders an immunity from attack, acknowledges the much needed legitimacy of litigation funders having control over funded actions. In doing so, it preserves an ingredient vital to the viability of litigation funding agreements. *Fostif*¹¹⁷ is all the more significant as it was a class action in which the funder sought to commence a representative action on behalf of potential claimants. That the litigation funder was instigating the action and was in control of the process was starkly before the court. While this troubled the minority in *Fostif*, the majority were willing to accept that this was a necessary incident to the litigation funder's involvement in providing access to justice, whether for individually non-recoverable claims or others.

70 With *Fostif*,¹¹⁸ stay of proceedings on the basis that a litigation funder is in *de facto* control is likely to require a fact intensive analysis. Indeed, the preferred position is well summed up by Ipp JA in *Project 28 Pty Ltd v Barr*:¹¹⁹

In appropriate circumstances, therefore, the law countenances complete or absolute control of litigation by a person who prosecutes litigation in the name of another party. In my view, without intending any disrespect to the opinions of others who have held to the contrary, the mere existence of such control in the hands of a person not

115 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 (CA, New South Wales), *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (HC, Australia). For a critique of *Fostif*, see David Capper, "Maintenance and Champerty in Australia – Litigation in Support of Funding" (2007) 26 CJQ 288.

116 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 at [93], per Gummow, Hayne and Crennan JJ.

117 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 (CA, New South Wales), *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (HC, Australia).

118 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 (CA, New South Wales), *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (HC, Australia).

119 [2005] NSWCA 240 at [77].

formally a party to the litigation does not, on its own, constitute an abuse of the process of the Court. It is, however, a relevant factor when regard is had to the whole picture, which is required when considering whether or not to grant a stay on the grounds of abuse of process.”

71 The English courts have yet to consider the extent to which control by professional funders amounts to an abuse of process. In the costs context, they have demonstrated sensitivity to the role of litigation funding by third parties in providing access to justice. In *Hamilton v Fayed (No 2)*,¹²⁰ the English Court of Appeal denied an application for cost orders against pure maintainers,¹²¹ citing explicitly the social benefit associated with affording access to justice. The access to justice consideration has also tampered the English Court of Appeal’s approach to professional funders. Balancing access to justice against the prevailing defendant’s interest in obtaining costs under the fee-shifting rule, the English Court of Appeal held in *Arkin v Borchard*¹²² that the professional funder should be liable for counterparty costs only to the extent of the funding provided to the claimants.¹²³

72 If *Factortame*¹²⁴ is indicative of the approach that the English courts will adopt with respect to whether a funding arrangement amounts to an abuse of process, they are likely to take a close analysis of the reality of the risk that the process of justice will be corrupted. Given the nuanced approaches that are found in England and Australia, the Singapore courts are likely to adopt a similar approach, though the Singapore courts have yet to articulate how they perceive the way “access to justice” reshapes traditional attitudes towards maintenance and champerty. At heart, the relevance of litigation funders’ control to abuse of process is a tension between the traditional view which *prima facie* regards third-party maintainers with suspicion, and the developing view that litigation funders play a legitimate role in affording access to justice.¹²⁵ Until the parameters of acceptable litigation funding are

120 [2003] QB 1175; [2002] 3 All ER 641.

121 “Pure funders” are “those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way to seek to control it”: [2003] QB 1175; [2002] 3 All ER 641 at [40]. This is now the accepted approach: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 at [25] (PC); *Petroleo Brasileiro SA v Petromec Inc* [2005] EWHC 2430 (Comm) at [32].

122 [2005] EWCA Civ 655; [2005] 1 WLR 3055 at [41].

123 As the funders had provided £1.3m toward the prosecution of the claim, they were ordered to pay a further £1.3m to the defendants as costs: [2005] EWCA Civ 655; [2005] 1 WLR 3055 at [45].

124 [2002] 3 WLR 1104 (CA).

125 England: Civil Justice Council “Improved Access to Justice – Funding Options & Proportionate Costs” (June 2007) Part II(C). Australia: Standing Committee of Attorneys-General, *Discussion Paper: Litigation Funding in Australia* (May 2006). Available from <[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/\\$file/Litigation.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/$file/Litigation.pdf)> (accessed 27 January 2010).

established, one can continue to expect satellite litigation stemming from the traditional distaste for third party support of litigation.

B. *Issues attending litigation funding for enhancing access to justice*

(1) *Consumer protection*

73 Litigation funding inserts another agency relationship between the funder and the claimant. In doing so, it introduces another potential agency problem. In the exceptions involving trustees in bankruptcy and liquidators – who have statutory powers to dispose of all property (including causes of action)¹²⁶ – this agency issue is arguably less problematic. The insolvency practitioners engaging the litigation funders and disposing of the insolvent persons' properties are professionals. The inequality of bargaining power between the funder and the (insolvent) claimant is mitigated by the involvement of these insolvency practitioners, whose professional reputation depends on keeping a good track record. In this context, advantage-taking by the funder does not present a serious concern. For unsophisticated claimants, there is cause for regulating the funding contracts. Given that unsophisticated claimants are unlikely to bargain as effectively as insolvency practitioners and that the terms are likely to be dictated by the litigation funders, the risk that the claimants might be taken advantage of, if not exploited, is not a remote one.

74 In order to enhance competition and to facilitate claimants making an informed choice, the fundamental terms on which funding is provided should be the subject of a mandatory disclosure obligation. Comparing between the terms of different funders is best carried out when there is a common template for the disclosures. In addition to a funder's obligation as to legal costs, the disclosure document should also state whether the funder is liable for adverse cost orders, security for costs and investigation costs. Claimants should be informed of any potential financial outlay, as well as their potential liability for costs. At base, there is the prospect of the funder becoming insolvent; while this is a commonplace risk of which many would be aware, the possibility

126 Corporate insolvency context: *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234, construing Companies Act 1862 (UK) s 95(3). Bankruptcy context: *Seear v Lawson* (1880) 15 Ch D 426, construing Bankruptcy Act 1869 (UK) s 3, 17 and 25. *Freightex Ltd v International Express Co Ltd* (15 April 1980) (CA) interpreting Companies Act 1948 s 242(2)(a) (see now Insolvency Act 1986 ss 166, 167, 436 and Sched 4 para 6). Australia: *Re Movitor Pty Ltd* (1998) 64 FCR 380, *Re Tosich Construction Pty Ltd* (1997) 73 FCR 233, *UTSA Pty Ltd v Ultratune Australia Pty Ltd* (1996) 14 ACLC 1262, interpreting Corporations Law s 477(2)(c) (now Corporations Act 2001 (Cth) s 477(2)(c)). Singapore: Companies Act (Cap 50, 2006 Rev Ed) s 272(2)(c).

should nonetheless be brought home to the claimants and the ramifications highlighted. The terms of the funder's right to terminate should be clearly set out. The claimant has an interest in knowing the funder's responsibility for the ancillary costs that follow on the suit being discontinued as a result of the funder's withdrawal.

75 If the litigation funder is providing investigation services, it should be made clear whether the cost of such investigation is a deduction to be made against the moneys recovered or whether it is absorbed within the funder's right to a proportion of the recovered amount. If the investigation services are performed by a related entity, that fact should be disclosed.

76 The documentation should also state with clarity whether the claimant is in charge of instructing his solicitor. In a group action scenario, it may be possible that the claimants form a litigation committee to pursue their rights. However, where their stakes are fairly small, the issue arises as to whether the litigation funder may be delegated the power to instruct the lawyer and make decisions relating to the course of the litigation. Such express delegation can serve as ammunition for satellite litigation by the defendants. In individually non-recoverable claims where a representative or class action is used for economising the costs of litigation, control is likely to be in the hands of the litigation funder. This commentator is of the view that it is more pragmatic to accept this realism, and work with the fundamental matters that cannot be delegated. This is preferable to having documentation that places formal control in the hands of the claimants while, in actuality, the litigation funders are the persons "calling the shots". Until the relevance of control to the abuse of process is settled, this is likely to engender more satellite litigation. Given that the litigation funder holds the purse-strings and will undeniably be influential in affecting the course of litigation, recognition of the funder's legitimate interest in safeguarding the prudence of decisions affecting its investment will go some way towards chilling the satellite litigation that feeds on the uncertain relevance of control.

(2) *The use and limits of litigation funding in affording access to justice to investors*

77 In Australia, litigation funding has made a noticeable impact in helping public shareholders assert their rights. Between 1998 and August 2006, there were nine shareholder class actions, more than half of which were supported by litigation funders.¹²⁷ The numbers are fairly modest. This is because non-insolvency litigation funding in Australia is

127 Marcus Priest, "High Court ruling triggers new wave of class actions", *Australian Financial Review* (31 August 2006). Available from Factiva database.

a fairly recent phenomenon. Litigation funders had operated within the well-established exception found in the insolvency context.¹²⁸ The venture by commercial litigation funders into what *ex facie* appears to be champertous agreements starting in the late 1990s has met, expectedly, with aggressive opposition by the defendants. The *Clairs Keeley* saga,¹²⁹ centring around attacks on the solicitor's retainer and the funding agreement, is illustrative of the procedural manoeuvres adopted by defendants. With the High Court of Australia in *Fostif*¹³⁰ diminishing the reliance that defendants can place upon the funding agreement to stay the action, litigation funding has been placed on a firmer footing. By giving a nod of approval to litigation funding, an increase in the number of investor class actions can be expected; certainly, corporate executives, lawyers and insurers predict an increase in the number of shareholder class actions.¹³¹ It is still too early to tell how big the increase will be, and importantly, whether the increase will prompt Australian legislators to regulate the activities of litigation funders.¹³²

78 In May 2006, the Standing Committee of Attorneys-General (SCAG) issued a Discussion Paper – “Litigation Funding in Australia” – which invited submissions to litigation funding issues that had been identified.¹³³ Amongst the issues were:

- (a) whether the criteria for legally acceptable funding agreements should be formalised;
- (b) whether there was a need for prudential regulation; and
- (c) whether litigation funders should be subject to mandatory disclosure requirements.

128 *Re Park Gate Waggon Works Co* (1881) 17 Ch D 234; *Cotterill v Bank of Singapore (Aust) Ltd* (1995) 37 NSWLR 238; *Re Movitor Pty Ltd* (1996) 64 FCR 380; *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219; and *Re William Felton & Co Pty Ltd* (1998) 28 ACSR 228.

129 *Clairs Keeley (No 1)* [2003] WASCA 299; *Clairs Keeley (No 2)* [2004] WASCA 277; *Clairs Keeley (No 3)* [2005] WASCA 86.

130 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 (CA, New South Wales), *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (HC, Australia).

131 M Mills, “Case for an eye on litigation funders”, *The Age* (9 October 2006). Available from Factiva database.

132 In the meantime, corporate defendants are finding sufficient ammunition within the existing law to thwart funded group actions. See, for example, *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 where the defendant succeeded in arguing that the funded class action amounted to an unregistered “managed investment scheme” as defined in s 9 of Corporations Act 2001 and regulated by ch 5C of the same Act.

133 Australia: Standing Committee of Attorneys-General, *Discussion Paper: Litigation Funding in Australia* (May 2006). Available from <[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/\\$file/Litigation.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/$file/Litigation.pdf)> (accessed 27 January 2010).

79 Overall, the Discussion Paper placed litigation funding in a positive light. This is not surprising as litigation funding had been providing access to justice in diverse types of suits and there had yet to be seen “hyperlexis”.¹³⁴ To date, the SCAG has yet to issue a position paper. Given that litigation funders may readily be regulated as purveyors of financial products under the Corporations Act 2001 (Cth), one expects an extension of this current federal scheme to cover prudential and consumer protection aspects of litigation funding. As the effects of *Fostif*¹³⁵ have yet to be fully worked through, the effluxion of time will reveal what aspects of litigation funding are problematic and require regulation. This may account for the delay in a follow-up paper to the Discussion Paper issued in May 2006.

80 One contribution of litigation funders has been to enable the commencement of actions for breach of the full disclosure obligation expected in a prospectus. The Concept Sports litigation involved a prospectus issued on 18 May 2004.¹³⁶ In it was a forecast that revenues for the six months ending 30 June 2004 would be A\$20.6m and that expected profits would be A\$1.6m. Within three months, the company revised its revenue forecast downwards by 30%. The expected profits turned into a pre-tax loss of some A\$2.2m. The suit was for aggregate damages of A\$5m. The settlement was said to be about A\$3m, with contributions by the directors, auditors and legal advisers. Shareholders thus received some compensation for what appeared to be a “particularly bad prospectus”.¹³⁷

81 Litigation funding has also given life to suits for breach of periodic disclosure obligations contrary to s 674 of the Corporations Act 2001.¹³⁸ Aristocrat Leisure Limited, the second largest gaming machine manufacturer in the world, was sued for A\$190m over premature recognition of income and non-compliance with the Australian Accounting Standards.¹³⁹ In addition to s 674 of the Corporations Act 2001, the claimants alleged that the corporation’s

134 Australia: Standing Committee of Attorneys-General, *Discussion Paper: Litigation Funding in Australia* (May 2006). Available from <[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/\\$file/Litigation.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/$file/Litigation.pdf)> (accessed 27 January 2010) at [2.1].

135 *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 (CA, New South Wales), *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (HC, Australia).

136 *Cadence Asset Management Pty Ltd v Concept Sports Ltd* [2005] FCA 1280 (14 September 2005). See also IMF fact sheet on Concept Sports Limited, available from <<http://www.imf.com.au/cases.asp?ID=30>> (accessed 15 May 2007).

137 Andrew Watson, principal of Maurice Blackburn Cashman, as quoted in Rebecca Urban, “Concept bosses take class action hit”, *The Age* (4 October 2006).

138 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483 at [6].

139 IMF fact sheet on Aristocrat Leisure Ltd, available from <<http://www.imf.com.au/cases.asp?ID=27&showlist=1>> (accessed 15 May 2007).

projections had no reasonable basis¹⁴⁰ and that misleading statements had been made.¹⁴¹ Investors who purchased its shares based on its forecasts, found the company's capitalisation decreasing from \$2bn to \$1bn, and at one point to \$0.5bn.¹⁴² The decline took place within the period of one year. The class action was settled for A\$144.5m on 28 August 2008.¹⁴³ IMF received revenue of \$35.4m and made a profit of \$24m.¹⁴⁴

82 Amongst the shareholders who have signed up with litigation funders in the above actions are institutional investors. In face of litigation funders offering to underwrite the cost of litigation, institutional investors have had to examine what their duty to act with diligence requires of them.¹⁴⁵ In July 2006, the president of the Australian Council of Super Investors was quoted as saying that Super Funds have a fiduciary duty to join class actions unless there is an overwhelming reason not to do so.¹⁴⁶ This may put the matter too strongly. Trustees and managers of funds are invariably given the discretionary power to decide whether or not to participate in a suit. After reviewing the circumstances of a proposed suit, they may decide that there are insufficient grounds for them to participate or, alternatively, that they can afford to adopt a wait and see attitude. Nonetheless, in face of an *ex facie* actionable case to recover damages, institutional investors will need a sufficient basis for not joining in the action. The pressure is probably less one of legal liability than one of market pressure. If the institutional investor declines to participate and the action succeeds or settles, the market may judge the institutional investor for having failed to prosecute the interests of its stakeholders. Thus, unless there are reasons to suggest that an action is a frivolous one, the institutional investors abstain from participation with some risk. By removing the cost consideration from institutional investors, the incentives are skewed *towards* institutional investors participating in class actions. After all, a litigation funder has assessed the claim and put its money behind its

140 Corporations Act 2001 (Cth) s 769C(1), Australian Securities and Investments Commission 2001 (Cth) s 12BB or Trade Practices Act 1974 (Cth) s 51A. *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483 at [5].

141 Corporations Act 2001 (Cth) s 1041H(1), Australian Securities and Investments Commission Act 2001 (Cth) s 12DA(1) or Trade Practices Act 1974 (Cth) s 52. *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483 at [5].

142 Maurice Blackburn Cashman fact sheet on Aristocrat Leisure Ltd Class Action, available at <<http://www.mauriceblackburncashman.com.au/areas/class%5Factions/aristocrat.asp>> (accessed 15 May 2007).

143 See <http://www.mauriceblackburn.com.au/areas/class_actions/current/aristocrat.asp> (accessed 22 June 2009).

144 See <<http://www.imf.com.au/cases.asp?ID=27>> (accessed 22 June 2009).

145 Annabel Hepworth, "Big Funds in Class Act", *Australian Financial Review* (28 July 2006). Available from Factiva database.

146 Annabel Hepworth, "Big Funds in Class Act", *Australian Financial Review* (28 July 2006). Available from Factiva database.

recommendation that the claim is worth pursuing; the institutional investor who resists participation will be well advised to document why it did not join in the lawsuit.

83 While accumulating the claims of diverse investors and affording them the valuable opportunity of realising their rights, the question is whether the legal system is comfortable with the litigation funder being sufficiently self-disciplined not to engage in extortionate or frivolous litigation. A corollary question is whether there are sufficient safeguards – legal and economic – against them engaging in such behaviour. The usefulness of the two way fee-shifting rule in disciplining frivolous litigation has been previously cited.¹⁴⁷ Admittedly, in providing investors with “equality of arms”, it is possible that the litigation funder will have more ammunition than a defendant. It is thus conceivable that the defendants will offer a settlement to rid itself of a claim not because it does not think it can prevail, but due to the costs (both actual costs and opportunity costs) that attend defending the suit. In short, a payoff to rid the defendant of a “nuisance suit”. While this may appear to be a nuisance suit from the defendant’s perspective, the investors might legitimately regard the lawsuit as an attempt to right a wrong. In affording investors an institutional mechanism to resolve the issues with funding and collective action, the involvement of litigation funders is something to be welcomed. Litigation funders have good reason to fear backlash if they behave opportunistically towards corporate defendants, who singularly or collectively possess power to influence regulatory changes. There will be some knock-on effects. Director liability insurance cost will probably rise to take into account the greater risk of liability. Some corporations may be dissuaded from a public listing. However, insofar as litigation funders provide dispersed investors a real opportunity to realise their rights, the involvement of the litigation funders should be welcome.

84 There are, however, limits to what can be expected of litigation funding. According to the May 2006 SCAG Discussion Paper, litigation funders in Australia at present fund only large claims. Depending on the litigation funder, the minimum threshold varies from \$0.5m to \$2m.¹⁴⁸ In its submission to the SCAG Discussion Paper, IMF (Australia) Ltd revealed that it regarded claims of less than A\$2m “rarely commercially viable”.¹⁴⁹ These figures set out the present limits to which litigation

147 See paras 23–41 of this article.

148 Australia: Standing Committee of Attorneys-General, *Discussion Paper: Litigation Funding in Australia* (May 2006). Available from <[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/\\$file/Litigation.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/Litigation.pdf/$file/Litigation.pdf)> (accessed 27 January 2010) at para 1.1.

149 Submission by IMF Managing Director, Mr John Walker, to Mr Laurie Glanfield, Secretary, Standing Committee of Attorneys-General (dated 11 August 2006) at 14.

funders in Australia assist investors who have suffered losses. If, after aggregating the losses suffered by diverse investors, the suit is still considered commercially non-viable, litigation funding reaches its limits in providing assistance to investors. Investors in such a situation may need to wait for the regulator to establish the facts in a regulatory enforcement action before moving forward to assert their claims.

85 To go beyond the profit motive and the limiting effect of the market, one might turn to non-profit organisations whose institutional mission it is to protect the interests of investors. To this we now turn.

V. The non-profit organisation as a possible solution

86 The obstacles facing small investors seeking to obtain redress for wrongs committed are similar to those confronting consumers. They face, in common, issues with collective action, funding and inequality of arms. In the context of consumers, one strategy has been to locate in a government agency or a non-profit organisation the right to take action on behalf of consumers. This strategy animates the European Union's Injunctions Directive.¹⁵⁰ Under this Directive, the Government of each Member State is obliged to appoint government bodies and consumer interest groups who are invested with the power to apply for injunctions against traders who infringe the collective interests of consumers. The appointed body may seek to restrain continued use of unfair terms in consumer contracts, for example, a credit agreement concluded between a bank and its customer.¹⁵¹ The injunction is available in a wide variety of contexts: from misleading advertising,¹⁵² to package travel,¹⁵³ to timeshares¹⁵⁴ and distance selling.¹⁵⁵

87 The model of a regulator taking on a protective role can be extended to applying its expertise to assessing and asserting their constituents' rights on their behalf. Under s 87(1B) of the Trade Practices Act 1974 (Australia), the Australian Competition and Consumer Commission ("ACCC") is empowered – upon finding that a

150 Directive 98/27/EC.

151 Directive on Unfair Terms in Consumer Contracts (93/13/EEC). See, for example, its use against terms in a credit agreement in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481. On the effectiveness of policing unfair terms, see Bright, "Winning the Battle against Unfair Contract Terms" (2000) 20 Legal Studies 331.

152 84/450/EEC as amended by 97/55/EC.

153 90/314/EEC.

154 94/47/EC.

155 97/7/EC.

defendant has contravened relevant provisions of the Act¹⁵⁶ – to seek compensation on behalf of consumers who have suffered losses as a result. The representative action contemplated by s 87(1B) of the Trade Practices Act 1974 is, however, predicated on consumers opting in to the action. In a creative stroke, the ACCC has appropriated the federal class action procedure to sue on behalf of consumers,¹⁵⁷ as it does not require the consent of class members for their inclusion.¹⁵⁸ For securities and investments, the Australian Securities and Investments Commission (“ASIC”) is empowered to commence an action for recovery of damages or property on behalf of a person who has suffered actionable losses under s 50 of the Australian Securities and Investments Commission Act 2001.¹⁵⁹ Where the person who has suffered a loss is an individual, an opt-in rule applies, *viz*, the person must give his consent to ASIC acting on his behalf. However, the ASIC may (if it chooses to do so) follow the lead of the ACCC in appropriating the federal class action procedure for circumventing the limitations of s 50 of the Australian Securities and Investments Commission Act 2001.

88 On one level, it might be said that the UK has adopted a similar strategy of regulator action for the benefit of investors who have suffered losses. In cases of market abuse, the Financial Services Authority (“FSA”) is empowered under s 383 of the Financial Services and Markets Act 2000 to seek restitution orders for the benefit of those who have suffered losses as a result of market abuse.

89 More recently, Taiwan has applied a modified strategy to help investors seek compensation for securities wrongs.¹⁶⁰ Under the Securities and Futures Traders Protection Act, the stakeholders in the Taiwanese capital market set up the Securities and Futures Investor Protection Center (“SFIPC”),¹⁶¹ which the Act invests with the power to

156 There must first be a finding by the court under s 79 or 80 that the defendant has contravened Pt V of the Trade Practices Act 1974 (Cth): *ACCC v The Shell Company of Australia Ltd* [1997] FCA 73.

157 Section 33E in Pt IVA of the Federal Court Act 1976 (Commonwealth), which was introduced in 1993.

158 *ACCC v Golden Sphere Int Inc* (1998) 83 FCR 424; *ACCC v Internic Technology Pty Ltd* (1998) ATPR 41-648, noted in C Wood [1998] UNSWLJ 57; *ACCC v Giraffe World Aust Pty Ltd (No 2)* (1999) 95 FCR 302.

159 The consent of the person who has suffered loss must first be obtained.

160 For an article arguing why the model is well suited to the circumstances of Taiwan, see Wallace Wen-Yeu Wang & Chen Jian-Lin, “Reforming China’s Securities Civil Actions: Lessons from PSLRA Reform in the US and Government-Sanctioned Non-Profit Enforcement in Taiwan” (2008) 21 Colum J Asian L 115.

161 The Securities and Futures Traders Protection Act was passed on 17 July 2002 while the Securities and Futures Investor Protection Center (“SFIPC”) was formally established on 22 January 2003. The SFIPC finds its origins in the Investor Service and Protection Centre, which was established in 1998 by the ROC Securities and Futures Market Development Institute (“SFI”); the SFI, in turn, was first created in 1984 at the direction of the Ministry of Finance as the Securities
(cont’d on the next page)

prosecute class actions on behalf of investors.¹⁶² Investors who participate in a class action led by the SFIPC are not required to make any contribution towards the costs of litigation. It is only in the event of a successful action that the SFIPC will recover disbursements out of the compensation payable to the investor.¹⁶³ The SFIPC, however, cannot lawfully charge for the litigation services provided whether or not the action is successful.¹⁶⁴ In short, the litigation incentives are structured such that there is no downside for the investor. The SFIPC serves as a clearing house for investors' grievances. With a legally-trained staff dedicated to handling investor disputes, the SFIPC performs an evaluative function. The information barriers that confront investors – knowledge of the law, evaluation – are mediated by the SFIPC.

90 As a non-government organisation with investor protection as its mission, the risk that it would put profit above the interests of investors is avoided. The seed fund for the SFIPC was provided by the major stakeholders in the Taiwanese securities and futures industry.¹⁶⁵ At its inception, NT\$1.031bn (approx US\$31.8m) was raised.¹⁶⁶ Continued funding for its operation comes from a levy on, first, contracts put through securities and futures firms, and second, transactions on the

Market Development Institute. The mandate of the ISPC was similar to that for SFIPC: (i) consultation and mediation services; (ii) the institution of derivative suits for disgorgement of short-swing profits obtained by insiders; (iii) the commencement of class action on behalf of investors; (iv) investor education programs. Securities and Futures Institute, *Annual Report 2002* at 9–10. The activities of the ISPC were dogged by their legal standing; the establishment of the SFIPC sought to put the activities of the investor protection institution on a firm legal basis. When the latter took over the functions of the ISPC, funds and personnel of the ISPC were transferred to the SFIPC. See Andrew Lin, "The Unique Role of the Securities and Futures Investors Protection Center – Contemporary Issues of Taiwan's Investor Protection System" (Working Paper, on file with author) pp 10–11.

162 Securities and Futures Trader Protection Act, Art 28. The SFIPC must, however, receive the mandate from at least 20 affected investors before it can exercise this power.

163 Securities and Futures Trader Protection Act, Art 33. Under the Taiwan Code of Civil Procedure, the court filing fees payable are 1% for amounts up to NT\$1m, and gradually decreasing thereafter for subsequent tranches. The SFIPC's liability for court filing fees is capped at the maximum of the first tranche, *ie*, NT\$10,000 (approximately US\$308).

164 Securities and Futures Trader Protection Act, Art 33.

165 These include the Taiwan Stock Exchange, Taiwan Futures Exchange, GreTai Securities Market (OTC market), Taiwan Securities Central Depository, Taiwan Securities Association, Securities Investment Trust and Consulting Association, Taipei Futures Association, Fuhwa Securities, Global Securities Finance, Fubon Securities and Entie Securities. Securities and Futures Investors Protection Center, *Annual Report 2004* p 20.

166 Securities and Futures Investors Protection Center, *Annual Report 2004* at 20 (approximate US dollar figures supplied by author based on NT\$1m = US\$30,800).

exchanges. From January 2003 to December 2005, the SFIPC received a total contribution of NT\$1.54bn (approximately US\$32.5m) from the industry.¹⁶⁷ As the stakeholders have committed to providing a steady stream of funding for the SFIPC, the bottom line consequences of a suit are secondary. Indeed, the SFIPC is legally prohibited from seeking remuneration for its litigation services.¹⁶⁸ Accordingly, there are not the same agency problems such as the lawyer's incentive to settle when he works on a contingency fee agreement. As a non-profit organisation enjoying public and private sector support, the law also makes special provision for waiving the security deposit normally required for a provision injunction, attachment or execution.¹⁶⁹

91 The two features of the Taiwanese model outlined above – expertise and funding – commend the use of the model in other jurisdictions. As a non-profit organisation whose adherence to its mission is policed by its diverse stakeholders, an institution like the SFIPC can perform its evaluative function and recommend courses of action untainted by profitability considerations. While budgetary considerations will undeniably continue to apply, the insertion of a non-profit organisation removes the incentive to institute nuisance suits for economic gain, a nagging concern in for-profit litigation funding.

92 Accountability can be built into its governance structure. In the Taiwan SFIPC, assessment of cases is done by its staff but approval of the board must be obtained. The board of the SFIPC, two-thirds of which must comprise academics, thus exercises direct supervision over the litigation commenced by the SFIPC.¹⁷⁰ A variety of alternative

167 Securities and Futures Investors Protection Center, *Annual Report 2005* at 21. Each securities firm contributes 0.000285% of the total consideration for each securities transaction, while the levy on each futures transaction ranges from NT\$0.44 to NT\$1.88. The Taiwan Stock Exchange, the Taiwan Futures Exchange and the GreTai Securities Market (an OTC market) contribute 5% of the total transaction fees. Investor Protection Act, Art 18, para 1. When the SFIPC Fund reaches NT\$5bn and more than ten years have elapsed since a stakeholder first made contributions, the competent authority may suspend the contribution obligations: Investor Protection Act, Art 18, para 3.

168 Securities and Futures Trader Protection Act, Art 33.

169 Securities and Futures Trader Protection Act, Art 36. The burdens exacted by the requirement to provide filing fees are significant: see Yu-Hsin Lin, "Modeling Securities Class Actions Outside the United States: The Role of Nonprofits in the Case of Taiwan" (2007) 4 NYU L & Bus 143 at 171.

170 By law, the board of the Taiwan SFIPC must comprise representatives of stakeholders and academics; the latter group must comprise no less than two-thirds of the board: Investor Protection Act, Art 11. The appointing authority is the Securities and Futures Commission. Currently, the industry representatives are the chairmen of the Taiwan Stock Exchange, the Taiwan Futures Exchange and the Taiwan Central Depository Corporation. There are eight directors from the academic community, who are variously drawn from the disciplines of accounting, finance, financial management and law. As to the nature of the supervision
(cont'd on the next page)

arrangements can, of course, be mooted to ensure that such an institution keeps true to its objectives and is not captured by those it seeks to regulate. The appointment of these representatives can be made directly by stakeholders subject to the approval of the securities regulator. Alternatively, appointments may be made by the executive branch after informal consultations with stakeholders. Public accountability can be brought about through annual reports to Parliament and the relevant government ministry, with additional oversight hearings before a parliamentary select committee if necessary.¹⁷¹

93 The model is also attractive from a financing perspective. The aggrieved investor does not make a direct financial contribution in order for the SFIPC to litigate on his behalf. Its income is “taxed” out of the revenue stream of the securities and futures firms, as well as those of the exchanges. All investors contribute to it, if indirectly. The financing scheme is therefore akin to an insurance scheme, in which every investor makes an indirect contribution through a small portion of the transaction cost that is paid to the securities firms and exchanges. Indeed, it may be seen as a compulsory legal expenses insurance scheme to which each investor is enrolled once he transacts on the market. Such a scheme has the merit that it pools the market abuse risks of all transactions on the market, avoiding the moral hazard that typically plagues an after-the-event insurance scheme. From a public finance perspective, the budget does not come out of the public coffers; instead, it comes out of investors, securities firms and the securities exchange. This funding model is not novel. In fact, it is already practised, to a greater extent by the UK FSA, which derives its revenues from the fees it charges investment exchanges and the firms that it regulates.¹⁷² The operational costs of the Australia Securities and Investment Commission¹⁷³ and the Monetary Authority of Singapore¹⁷⁴ are also partially offset by the fees they collect, though the former depends to a

exercised by the board, see Andrew Lin, “The Unique Role of the Securities and Futures Investors Protection Center – Contemporary Issues of Taiwan’s Investor Protection System” (Working Paper, on file with author) at 24.

171 See, for example, the accountability mechanisms governing the UK Financial Services Authority: <<http://www.fsa.gov.uk/Pages/About/Who/Accountability/Parliament/index.shtml>> (accessed 24 May 2007).

172 Financial Services and Markets Act 2000 Sched I, Pt III, para 17. See also <<http://www.fsa.gov.uk/Pages/About/Who/Funded/index.shtml>> (accessed 27 January 2010).

173 Financial Statements to ASIC Annual Report 2005–2006, available from <<http://www.asic.gov.au/asic/asic.nsf/byheadline/annual%20reports?openDocument>> (accessed 20 September 2007).

174 Financial Statements to MAS Annual Report 2006–2007, available from <http://www.mas.gov.sg/about_us/annual_reports/annual_reports.html> (accessed 20 September 2007).

great extent on parliamentary appropriations while the latter derives a significant part of its revenues from assets under its charge.

VI. Conclusion

94 Why have we not observed any securities class actions in Singapore? This article suggests that the answer lies partly in the civil procedure and substantive rules. It is not that the civil procedure rules prevent the aggregation of claims. Rather it is that the current rules are undergirded by the notion that a claim should not be prosecuted unless the claimant has consented to the action. This consent requirement weighs down the aggregation of individually non-recoverable claims, and thus impedes the quick aggregation of claims to reach levels which render their prosecution economical.

95 This leads one to the question why consent might not be forthcoming. Leaving aside those who are ignorant or the apathetic, the investor who contemplates participation in a group action has to consider, first, whether to contribute towards the litigation costs, and second, whether to bear the risk of adverse party costs. Such a decision depends as much on the financial resources of the investor as on her assessment of whether the claim is worthwhile pursuing. Professional rules prevent lawyers underwriting the litigation costs; from an economic incentive perspective, therefore, they are unable to signal the veracity of their advice through a compensation contract in which they participate in the risks of the litigation they recommend. From the group litigation perspective, while the rule requiring the losing party to pay the costs of the prevailing party is not *necessarily* more advantageous than the American rule in which no costs are recoverable, the rule would surely have a chilling effect upon the enthusiasm for one who is risk-averse. The uncertainty affecting the possibility and quantum of counterparty costs is compounded by the reality that these costs are not within the plaintiff's control.

96 The solution, it is suggested, can be found in institutional mechanisms which address holistically the collective action, information processing and cost problems. Commercial litigation funders can fulfil this role, as they have in Australia. More importantly, it would appear that their activities can be accommodated within the present Singapore legal framework. That they are not currently observed in Singapore would point to the economic viability of the business model in the Singapore context rather than the legal system's hostility to the activities of commercial litigation funders. The operations of commercial litigation funders would undoubtedly give rise to issues, in particular those relating to consumer protection. It is suggested that the government sponsored non-profit organisation along the lines found in

Taiwan might be more attractive to Singapore, first, because the consumer/investor protection can be given priority over profitability, and second, because the funding model is functionally an insurance scheme funded by the investors and stakeholders in the securities industry.
