IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 26

Originating Application No 1008 of 2023

In the matter of Order 6 of the Rules of Court 2021

And

In the matter of Section 113 of the Legal Profession Act (Cap 161)

Between

Arbiters Inc Law Corporation

… *Applicant*

And

(1) Arokiasamy Steven Joseph
In his personal capacity and in his capacity as administrator of the estate of Salvin Foster Steven, the deceased

(2) Tan Kin Tee

… *Respondents*

JUDGMENT

[Civil Procedure — Costs — Taxation]

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Arbiters Inc Law Corp
v
Arokiasamy Steven Joseph (in his personal capacity and in his capacity as administrator of the estate of Salvin Foster Steven, the deceased) and another

[2024] SGHC 26

General Division of the High Court — Originating Application No 1008 of 2023
Choo Han Teck J
11 January 2024

31 January 2024 Judgment reserved.

Choo Han Teck J:

1 In this application, the applicant, a law corporation, is suing the respondents, Arokiasamy Steven Joseph and his wife, Tan Kin Tee who were the first and second plaintiffs in Suit 833 of 2020 ("the plaintiffs"), for payment of the applicant's legal fees. Mr Anil Balchandani was engaged by the plaintiffs to sue two doctors and the Institute of Mental Health ("IMH") (collectively "the defendants") for damages for an alleged breach of duty and negligence that led to the plaintiffs' son, "SFS" committing suicide. The action was commenced by Mr Balchandani on 2 September 2020 on behalf of both plaintiffs. Mr Vijay Rai submitted that the applicant was subsequently instructed in November 2020 to assist Mr Balchandani.

2 The plaintiffs thus signed a letter of engagement on 25 November 2020 for the applicant to represent them in this action. Mr Rai submitted that "Subsequently, due to certain matters which arose that are confidential and which are subject to solicitor and client privilege, the [plaintiffs] decided that it would be prudent for them to be separately represented." The plaintiffs have not claimed privilege. But Mr Rai submitted that the first plaintiff signed a fresh letter of engagement on 8 April 2021 whereby he would be represented by the applicant, and the second plaintiff remained represented by Mr Balchandani.

3 The action was fixed for trial to begin on 12 January 2023. On the first day of trial, Mr Rai applied for leave to file the affidavit of his client's expert witness, Prof Eleni Palizidou ("Prof Eleni"), and for her to testify from London by video link. Mr Jansen Aw and Ms Kuah Boon Theng SC ("Ms Kuah"), counsel for the first and third defendants, Dr Lee Boon Chuan Nelson and the IMH, respectively, objected to Mr Rai's application. The second defendant, Dr Gomathinayagam Kandasami was no longer involved because the plaintiffs had discontinued their claim against him.

4 Ms Kuah's objection was that the trial was commencing that morning, so the plaintiffs ought not be permitted to file an affidavit of expert opinion, not so much at the last minute before the trial, but worse, at the first minute of trial. She reminded Mr Rai that at a pre-trial conference before this court on 10 October 2022, Mr Rai applied to have an expert, Prof Eleni, testify at the trial. Counsel argued that Prof Eleni is an expert psycho-pharmacologist who will testify that the drugs prescribed to SFS were wrong or inappropriate. At that time, the trial date (12 January 2023) had already been fixed, and the list of witnesses and their affidavits of evidence filed. Mr Rai submitted that he was unable to engage Prof Eleni because she was suffering from cancer and undergoing chemotherapy. Ms Kuah objected to Mr Rai's application, but I had

Version No 1: 31 Jan 2024 (17:20 hrs)

allowed Mr Rai's application on the condition that he files Prof Eleni's affidavit by 25 October 2022, and I deferred the question of Prof Eleni testifying by video link.

5 It transpired that her affidavit was not filed on 25 October 2022 as directed, and on 10 November 2022, Ms Kuah enquired of Mr Rai whether Prof Eleni was still to be giving evidence at trial. There was no indication from Mr Rai until the trial commenced on 12 January 2023 when Mr Rai made a fresh application to file Prof Eleni's affidavit. Ms Kuah opposed the application on the ground that a material affidavit should not be allowed at the start of the trial when the witness disobeyed the court's direction to file it months before the trial. Nonetheless, I allowed Mr Rai's application because from the issues raised in the pleadings, without expert evidence, the plaintiffs were not likely to prove an important part of their case, even assuming that they were able to prove all the crucial facts. I thus adjourned the trial to 11 September 2023.

6 On 2 August 2023, Mr Rai filed an application "to record a settlement". But this was not a record of settlement of the usual kind or in the usual course. It transpired that Mr Balchandani and Mr Rai had been discharged by their clients on 26 July 2023. Leave is required from the court for a lawyer to be discharged, especially when nearing the trial. The litigants may not know the procedure, but the lawyers ought to know and apply for leave to be discharged. The plaintiffs then contacted the first and third defendants themselves to explore a settlement and secured a settlement without admission of liability. In such circumstances, the plaintiffs (having discharged their lawyers) would have to attend court with the defendants' lawyers to record the settlement.

7 In this case, having been discharged, the applicant and Mr Rai no longer had the standing to file the application on the plaintiffs' behalf to record the

Version No 1: 31 Jan 2024 (17:20 hrs)

settlement. Mr Rai then retreated and fired a Parthian shot in which he sought leave to be joined as a party to Suit 833 of 2020, and for an order that the settlement sum be paid into court in satisfaction of his fees. I dismissed Mr Rai's applications and his subsequent application for the costs of those two applications. My judgments in [2023] SGHC 230 and [2023] SGHC 291 were released on 14 August 2023 and 13 October 2023, respectively. The settlement between the plaintiffs and the first and third defendants was recorded by the court on 14 August 2023.

8 The applicant thus applied by this OA 1008 of 2023 for a declaration that the letter of engagement dated 25 November 2020 signed by the plaintiffs and a further one signed on 8 April 2021 by the first plaintiff were "valid and binding contentious business agreement[s]". On the strength of the 25 November 2020 letter of engagement, Mr Rai now asks that the two plaintiffs pay the applicant $85,072.28 (less $56,065.60 that had already been paid).

9 The applicant is claiming a further sum of $341,410.75 from the first plaintiff on the strength of the 8 April 2021 letter of engagement. The applicant is also asking that the plaintiffs pay £12,300 as the fees due to Prof Eleni. Alternatively, Mr Rai says that the applicant prays for the bills to be taxed, and he is happy to leave it to this court to fix the fees payable. Mr Paul Seah who now represents the plaintiffs, pro bono (without charge), asks for both bills to be taxed.

10 Mr Rai submits that both letters of engagement recorded that he would be the lawyer in charge of the matter and that he would be assisted by a Legal Associate. Their hourly rates were stated as $1,000 an hour for Mr Rai and $250 an hour for the Legal Associate. In both agreements, the plaintiffs were informed by clause 22 (identical in both agreements) that:

Version No 1: 31 Jan 2024 (17:20 hrs)

> A dispute such as the present one, if it proceeds up to trial/arbitration, can take up to 1 to 2 days. We estimate the total professional fees, exclusive of disbursements to be about SGD150,000 (Singapore Dollars One Hundred and Fifty Thousand). If the matter is settled before trial, as happens in many litigious matters, our professional fees will be correspondingly lower. Please note that this estimate of likely professional fees is provided for your guidance only and that our invoiced professional fees will in any event be based on the actual time spent by the lawyer(s) handling this matter.

By clause 17 (identical in both agreements) it was stipulated that the applicant proposes to "collect $1,500 every month to account" which may vary according to work done and time expended. A total of $56,065.60 had been paid to the applicant, and $10,588.20 to Mr Balchandani. The applicant, by this application, claims a balance of fees and disbursements due from the plaintiffs amounting to $29,006.68 (under the 25 November 2020 letter of engagement), and $341,410.75 from the first plaintiff (under the 8 April 2021 letter of engagement). In relation to the former, professional fees of $36,000 have been paid, and $22,562.50 remain outstanding, with the rest being disbursements. In relation to the latter, $340,437.50 out of the sum of $341,410.75 is based on 224.65(sic) hours for Mr Rai and 463.15 hours for the Legal Associate. The total professional fees claimed by the applicant is $399,000 ($340,437.50 + $22,562.50 + $36,000), not including disbursements and fees to the experts.

11 There are also expert fees of around $20,541 for Prof Eleni. Mr Balchandani has separately issued a bill for $145,061.55, of which $143,300 are for professional fees. The combined unpaid bills of the applicant and Mr Balchandani is thus, $515,478.98 ($29,006.68 + $341,410.75 + $145,061.55). This is not inclusive of the expert fees claimed for Prof Eleni ($20,541), or the sums the plaintiffs had already paid out to Mr Rai ($56,065.60), to Mr Balchandani ($10,588.20), and the costs the plaintiffs were ordered to pay when the suit against the second defendant was discontinued

Version No 1: 31 Jan 2024 (17:20 hrs)

($48,000). Mr Arokiasamy calculated the total professional fees charged by Mr Rai and Mr Balchandani (excluding disbursements and expert fees) as $543,222.47 (as compared to $399,000 + $143,300 = $542,300). The discrepancy in the context is not large and can be sorted out later.

12 Mr Arokiasamy says that he retired from the Ministry of Defence three years ago, he does not say what his occupation there was. His wife, Mdm Tan has been working as a relief teacher since 2021. They live in a Housing Development Board flat. They say that they have no means to pay the legal fees claimed by their lawyers — except, of course, the sum of $330,000 paid to them by the defendants as an ex-gratia payment, without admission of liability. That sum includes $30,000 towards contribution of legal costs.

13 Mr Balchandani has not been present in the past two hearings concerning the applicant's claim for costs. Mr Rai informed Mr Seah that Mr Balchandani will not insist on his costs ($145,061.55) should the applicants succeed in claiming its outstanding costs ($370,417.43). On the face of it, this seems like a bland statement, but it raises questions that need to be answered — questions connected to the applicant's bill. I will refer to them shortly.

14 I shall deal, first, with Mr Rai's argument that the two letters of engagements amount to "contentious business agreements" under s 111(1) of the Legal Profession Act 1966 (2020 Rev Ed) ("LPA"), which provides as follows:

> Subject to the provisions of any other written law, a solicitor or a law corporation… may make an agreement in writing with any client respecting the amount and manner of payment for the whole or any part of its costs in respect of contentious business done or to be done by the solicitor or the law corporation… , either by a gross sum or otherwise, and at either the same rate as or a greater or lesser rate than that at which [the solicitor] or the law corporation… would otherwise be entitled to be

Version No 1: 31 Jan 2024 (17:20 hrs)

> remunerated." Section 112(4) of the LPA provides that where there is a contentious business agreement, the solicitor or law corporation's bill "shall not be subject to taxation.

15 Mr Rai therefore argues that the plaintiffs' agreement to pay him his hourly rate of $1,000 and his Legal Associate's rate of $250 an hour is not subject to taxation, effectively compelling them to pay the amount claimed by the applicant. I agree with Mr Seah that the two letters of engagement are not contentious business agreements. A lawyer can pad a letter of engagement with many clauses that may be useful and helpful, but the omission of crucial terms or the inclusion of contradictory or vague terms adulterates the agreement. A contentious business agreement must allow the client and his lawyer both to know the precise terms as to how much the legal fees will be at the end of the contentious business. That means that what the end means must be clearly specified. And more importantly, merely agreeing to the lawyer's hourly rate without more is not enough to prevent the bill from being taxed. Indeed, if that were so, most bills would not be taxed because many lawyers in recent times will have agreed their hourly rates with their clients.

16 The purpose of s 111 of the LPA is to allow the lawyer and his client in a contentious business matter, whether by litigation or arbitration, or even just negotiation, to find a start and an end to the business in question, and then agree on the fee payable. That fee may be determined outright as, say, $300,000 or be determined by a formula such as a rate of $1,000 an hour.

17 But in this case, the letters of engagement in the present case both estimated the "total professional fees exclusive of disbursements" to be $150,000. That estimate is way off mark to enable the letter of engagement to be of any use as a contentious business agreement. No advice was given as to what sort of disbursements are needed. At the time, the critical expert was not

Version No 1: 31 Jan 2024 (17:20 hrs)

engaged, let alone the determination of her fees. The way clause 22 was written may give the clients the impression that the trial would only last a day or two. And the statement that "the total professional fees" may or may not be a reference to a two-day trial. There is no provision as to what happens when the trial exceeds two days. In the face of such uncertainty the client must be entitled to have his bill taxed. The applicant is therefore not entitled to the fees it claims without taxation.

18 The LPA, and the courts have to balance two competing interests. First, legal fees must not be so exorbitant, especially to those who cannot afford them, and secondly, that lawyers should earn a comfortable living. The idea of access to justice means not only must a litigant be able to find a lawyer, but that there will be lawyers for him to find. Taxation of the lawyer's bill of costs is the means that maintains the reasonableness of the fees charged so that the competing interests are properly balanced. To obviate the taxation mechanism, the contentious business agreement must be clear and comprehensive, and the client must have understood what it means.

19 Section 113(2) of the LPA provides that the High Court is entitled to examine the validity and effect of such contentious business agreements, and is empowered to enforce or set it aside. The court may order that the fees and disbursements be taxed. For the reasons above, I am of the view that the letters of engagement relied upon by the applicant shall not be enforced as contentious business agreements. It remains as to how the applicant's fees (and that of Mr Balchandani's) are to be determined.

20 Under s 113(5) of the LPA, this court has the power to order that the agreement be given up or cancelled, and direct that the fees and disbursements be taxed. This provision does not specifically mention that the court may

Version No 1: 31 Jan 2024 (17:20 hrs)

proceed to fix costs but counsel before me have agreed that the costs be fixed in the event that I do not accept that the letters of engagement amount to contentious business agreements. The next matter, therefore, is what is the appropriate costs to be fixed. In this regard, I have also examined the detailed bill of costs submitted by Mr Rai on behalf of the applicant.

21 Given the unusual circumstances of this case, the fairest way to proceed is to consider what a reasonable lawyer in the positions of Mr Rai and Mr Balchandani would have done, and the fees that a reasonable lawyer would have charged. In this regard, we should start with the cause of action and the defence. Although the merits of the action had not been ventilated at trial, the pleadings are helpful in determining what sort of work a case like this entails.

22 The main case as pleaded on behalf of the plaintiffs was that the doctors and the IMH prescribed a drug (Concerto) that was inappropriate and not suitable for SFS. The second major claim was based on the allegation that the doctors and the IMH failed to note the acute suicidal tendency of SFS, and consequently, were negligent in failing to prevent his suicide. The plaintiffs had 18 witnesses of fact and one expert witness. The critical one seemed to be the psycho-pharmacologist, who Mr Rai almost did not call; and whose importance was realised when he was at the doorstep of trial. Considering the issues and the reports of the experts, but without pronouncing on the merits of their opinions, I am of the view that the issues are clear and specific. The medical question as to the suitability of the drugs given was important but neither complicated nor complex. The issues of fact as to whether the doctors and the IMH had sufficient knowledge or notice to have done more to prevent the suicide are also straightforward.

Version No 1: 31 Jan 2024 (17:20 hrs)

23 Thus, I am of the view that the legal fees and disbursements for filing the action and taking it through the interlocutory applications would be between $60,000 to $100,000. This case was settled before trial. It was fixed for trial twice. The first trial was vacated under circumstances that do not seem to me fair to require the plaintiffs themselves to bear the costs of vacating the trial. The defendants would have been entitled to ask for costs of vacating the trial a month before it was fixed to start. That costs might have been as high as $50,000 depending on how much preparation costs had to be thrown away; but Dr Nelson Lee and the IMH had graciously not insisted on costs.

24 However, when the plaintiffs discontinued their claim against Dr Gomathinayagam on 3 December 2021, they were ordered by Jeyaretnam J to pay $32,000 costs for the discontinuation, and another $16,000 to Dr Gomathinayagam and the IMH for a related application. Trial dates were fixed on 15 November 2022 for 17 days in two sittings, one in January 2023 and the other in September 2023.

25 There is another unusual aspect of this case to consider. Since Mr Rai was engaged to take over the matter, Mr Balchandani ought either to have transferred the case to the applicant, or merely instruct Mr Rai as counsel. By representing the plaintiffs separately where there does not appear to be any conflict of interests, as indeed Mr Balchandani so believed (for he commenced the action on behalf of both), the legal costs for the plaintiffs were unnecessarily expanded. This unusual situation has implications on the costs that the plaintiffs had to bear.

26 As to what the fees ought to be, I am of the view, a reasonable lawyer acting for the plaintiffs in these circumstances would have charged about $60,000 up to the trial. There would be no costs for the trial since the action was

Version No 1: 31 Jan 2024 (17:20 hrs)

settled. Bearing in mind that some work might have been done by Mr Balchandani, I order the solicitor and client costs for the applicant to be $60,000 inclusive of reasonable disbursements. The sum of $56,065.60 shall be taken as part payment.

27 Mr Balchandani had written by way of a letter dated 19 January 2024 to explain his absence from the hearing of this application and also why the respondents required separate representation. The relevant passage of his letter reads:

> We take a short sojourn to explain that the parents were separately represented for the following reasons: they were on the verge of divorce (and indeed asked our firm for such assistance), *inter alia*, and more importantly, they were blaming each other for the deceased's death (a symptom of their complex bereavement disorder).

This is not the same reason Mr Rai proffered in chambers on 14 August 2023 in which I had recorded in the court minutes as follows:

> This action was commenced by Mr Balchandani on behalf of both plaintiffs. He was not experienced in medical negligence. He sought to have us come on board. He played a passive role as counsel for second plaintiff. This settlement came about by virtue of my involvement until the penultimate stage — where second plaintiff sought to communicate with third defendant's solicitors.

28 Although not a party to this application, I have directed that Mr Balchandani submit his claim for costs under Suit 833 of 2020. Ordinarily, in such circumstances, his costs between solicitor and client ought to be taxed, but by his letter of 29 January 2024, he has left it to me to fix his costs. In that letter, he claims:

> costs of $50,000. This is broken down in the following way: $48,238.45 in professional fees, plus $12,349.75 in disbursements, minus $10,588.20 paid by the Respondents herein.

Version No 1: 31 Jan 2024 (17:20 hrs)

29 There is no question that Mr Rai is entitled to his fees from his client. The issue is whether he is entitled to the full amount that he is claiming. For the reasons in this judgment, I am of the view that his fees as claimed is excessive and am ordering that a sum of $60,000 inclusive of disbursements to be the fees payable. In my view, Mr Balchandani is also entitled to his fees, but given his overall contribution, I will order that his fees as between him and his client be fixed at $25,000 inclusive of disbursements. Any sums previously paid shall be taken as part payment.

30 The applicant is not claiming disbursements but is claiming £12,300 (or $20,541) as Prof Eleni's unpaid fees. The professional fees of an expert witness are not part of legal fees; they are part of disbursements. That is why the solicitor in charge has to ensure that her fees are paid. He may do so by negotiating a reasonable and acceptable fee, and then getting the client to secure payment. Disbursements are subject to taxation just as the lawyers' fees. Otherwise, there may be no redress where an expert demands an exorbitant fee. I do not think that Prof Eleni's fees would be considered exorbitant, but I do think that her contribution, based on her report, $20,541 is excessive. She did not have to attend court, and her report mainly consisted of answering questions from counsel. I would award her $9,000.

31 I therefore order accordingly, and given that the award is far less than what the applicant claims, the costs of this application shall be paid by the applicant to the plaintiffs. In fixing this set of costs, I am mindful that some costs had been awarded, but also that the applicant had spurned all invitations to have its bill taxed. I am also mindful that Mr Seah is acting pro bono, but that only means that he would not charge the plaintiffs for his services, and it does not preclude the plaintiffs from an award of costs as the costs awarded may be

Version No 1: 31 Jan 2024 (17:20 hrs)

used to compensate the pro bono lawyer. I therefore order that the applicant pay the plaintiffs a sum of $2,000 each.

- Sgd -
Choo Han Teck
Judge of the High Court

Vijay Kumar Rai and Jasleen Kaur (Arbiters Inc Law Corporation)
for the applicant;
Paul Seah Zhen Wei and Nayo Leong (Tan Kok Quan Partnership)
for the respondents.

Version No 1: 31 Jan 2024 (17:20 hrs)