Tan Ming Yeow & Anor v Lee Chuen Tiat & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22 NCVC-70 OF 2010
PRASAD ABRAHAM JC
17 JUNE 2011

Legal Profession — Practice of law — Whether agreement made between plaintiff and solicitor for costs to be off set for expenses incurred handling plaintiff's cases — Whether oral agreement suffice to account for fees payable by client to solicitors

The first plaintiff and the defendant, a solicitor by profession, were friends. The first plaintiff was a shareholder of the second plaintiff. A dispute arose between the first plaintiff and the shareholders of the second plaintiff. Upon taking up an offer of the defendant's legal services the plaintiff filed a s 181 of the Companies Act 1965 ('the petition') forcing the shareholders of the second plaintiff to sell their shares to the first plaintiff. The first plaintiff submitted that he had reservation regarding his ability to buy back all the shares and the legal cost incurred by such exercise. However, on both occasion the first plaintiff claimed that the defendant had reassured him that he need not worry. Following the petition, seven related matters follow suit undertaken by the defendant in representing the first plaintiff. Subsequently, the first plaintiff submitted that the defendant would prepare all the court papers which would be signed by the first plaintiff and the defendant failed to inform him the status or the progress of the cases. The defendant informed the first plaintiff almost all the cases were won in the first plaintiff's favour and the cost of the cases would be borne by the first plaintiff. The defendant however, failed to account the costs to the first plaintiff which was revealed to him later. The defendant demanded from the first plaintiff to make payment for all the work done for all the seven cases amounting to RM350,000. Although, the first plaintiff argued that the fees were too high he reluctantly agreed to pay upon the defendant's confirmation the payment would be full and final payment. The defendant denied that he orally agree to accept RM350,000 as full and final payment for all the work done and demanded the first plaintiff to settle a bill for RM450,000 ('the additional bill'). The first plaintiff submitted that by virtue of an oral agreement between the defendant and the first plaintiff, RM350,000 was full and final settlement for all the seven cases. However, by sending the additional bill, the first plaintiff argued that (i) the defendant had breached the oral agreement and thus the oral agreement should be declared null and void (ii) the additional bill should be null and void and (iii) the RM350,000 be refunded to the first plaintiff.

Held, not allowing the refund and dismissing the claim for additional fees:

(1) By virtue of s 116 of the Legal Profession Act 1976 ('Act'), 'the act' if the

first plaintiff relied on the agreement for fees, then there must be a written agreement as to the fees consented to by the first plaintiff. Although the word 'may' was used in s 116, but when read together with ss 116(2) and s 118 of the Act, it clearly make it imperative for there to be a written agreement as to fees. As the first plaintiff's claim was based on an oral agreement, the claim per se must fail. *Tan Soo (f) and Freeman & Madge* [1932] MLJ 42 (see para 7).

(2) The sum of RM350,000 was paid voluntarily by the first plaintiff pursuant to bills raised by the defendant. Based on the work done by the defendant and the type of matters that the defendants had represented the first plaintiff, the sum RM350,000 paid by the first plaintiff to the defendant was reasonable hence, the defendant need not refund the monies paid by the first plaintiff (see para 9).

(3) There was never any agreement between the first plaintiff and the defendant as to costs to be off set for expenses incurred handling all the first plaintiff's cases. The defendant to affirm an affidavit confirming the amount of costs recovered and the same to be refunded to the first plaintiff (see para 10).

[Bahasa Malaysia summary

Plaintif pertama dan defendan, seorang peguam, adalah bersahabat. Plaintif adalah pemegang saham plaintif kedua. Pertikaian berbangkit antara plaintif pertama dan pemegang-pemegang saham plaintif kedua. Selepas menerima tawaran khidmat undang-undang defendan, plaintif memfailkan s 181 Akta Syarikat 1965 ('petisyen') memaksa pemegang-pemegang saham plaintif kedua untuk menjual saham mereka kepada plaintif pertama. Plaintif pertama berhujah bahawa dia berasa sangsi dengan keupayaannya untuk membeli balik kesemua saham-saham dan kos undang-undang yang ditanggung dengan tindakan tersebut. Walau bagaimanapun, pada kedua-dua keadaan plaintif pertama mendakwa bahawa defendan telah meyakinkan yang dia tidak perlu bimbang. Berikutan petisyen tersebut, tujuh perkara berkaitan mengikutinya telah dilakukan oleh defendan dalam mewakili plaintif pertama. Kemudiannya, plaintif pertama berhujah bahawa defendan akan menyediakan semua dokumen mahkamah yang akan ditandatangani oleh plaintif pertama dan defendan gagal untuk memberitahunya mengenai status atau kemajuan kes-kes tersebut. Defendan memberitahu plaintif pertama bahawa hampir kesemua kes dimenangi dengan memihak kepada plaintif pertama dan kos kes-kes tersebut akan ditanggung oleh plaintif pertama. Defendan walau bagaimanapun, gagal untuk mengkreditkan kos-kos tersebut kepada plaintif pertama yang mana kemudiannya dikemukakan kepadanya. Defendan mendesak plaintif pertama untuk membuat bayaran untuk kesemua kerja yang dibuat bagi kesemua tujuh kes tersebut yang berjumlah kepada RM350,000. Walaupun plaintif pertama berhujah bahawa fi adalah terlalu tinggi dia dengan berat bersetuju untuk membayar atas pengesahan defendan yang bayaran

A adalah bayaran penuh dan akhir. Defendan menafikan yang dia secara lisan bersetuju untuk menerima RM350,000 sebagai bayaran penuh dan akhir untuk kesemua kerja yang dibuat dan mendesak plaintif pertama menyelesaikan bil untuk sejumlah RM450,000 ('bil tambahan'). Plaintif pertama berhujah bahawa mengikut perjanjian lisan di antara defendan dan B plaintif pertama, RM350,000 adalah bayaran penuh dan akhir untuk kesemua tujuh kes tersebut. Walau bagaimanapun, dengan menyerahkan bil tambahan, plaintif pertama berhujah bahawa (i) defendan telah memungkiri perjanjian lisan dan oleh itu perjanjian lisan tersebut patut diisytiharkan batal dan tak sah; (ii) bil tambahan tersebut patut menjadi batal dan tak sah; dan (iii) C RM350,000 dikembalikan semula kepada plaintif pertama.

Diputuskan, tidak membenarkan bayaran balik dan menolak tuntutan untuk fi tambahan:

D (1) Mengikut s 116 Akta Profesion Undang-Undang 1976 ('Akta'), jika plaintif pertama bergantung kepada perjanjian untuk fi, oleh itu mesti terdapat perjanjian bertulis mengenai fi yang dipersetujui oleh plaintif pertama. Walaupun perkataan 'may' digunakan di dalam s 116, tetapi apabila dibaca bersama dengan ss 116(2) dan 118 Akta, ia jelas menunjukkan bahawa adalah penting untuk membuat perjanjian E bertulis mengenai fi. Memandangkan tuntutan plaintif pertama adalah berdasarkan atas perjanjian lisan, tuntutan tersebut adalah gagal. *Tan Soo (f) and Freeman & Madge* [1932] MLJ 42 (lihat perenggan 7).

F (2) Jumlah RM350,000 dibayar secara sukarela oleh plaintif pertama berikutan bil-bil yang dikeluarkan oleh defendan. Berdasarkan kerja yang dibuat oleh defendan dan jenis perkara yang diwakilkan oleh defendan bagi plaintif pertama, jumlah RM350,000 yang dibayar oleh plaintif pertama kepada defendan adalah munasabah, oleh itu, defendan tidak perlu membayar balik wang tersebut kepada plaintif pertama (lihat G perenggan 9).

(3) Tidak terdapat apa-apa perjanjian antara plaintif pertama dan defendan terhadap kos untuk ditolak bagi perbelanjaan yang ditanggung bagi menguruskan kesemua kes plaintif pertama. Defendan hendaklah mengesahkan afidavit yang mengesahkan jumlah kos-kos yang H diperolehi dan jumlah untuk bayaran balik kepada plaintif pertama (lihat perenggan 10).]

Notes

I For cases on practice of law, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1638–1707.

Cases referred to

Asbir, Hira Singh & Co v Supramaniam a/l Pitchaimuthu & Ors [2000] 1 MLJ 83, HC (refd)

Dato HL Wrigglesworth v Hj Zakaria bin Yusof [1995] MLJU 124; [1995] 3 CLJ 64, HC (not follld)
Ke Hilborne, Re [1984] 2 MLJ 94 (refd)
Tan Soo (f) and Freeman & Madge [1932] MLJ 42 (follld)

Legislation referred to

Companies Act 1965 s 181
Legal Profession Act 1976 ss 116, 116(2), 118

Justin Voon (Chia Wen Chow with him) (Chia Wen Chow & Associates) for the plaintiff.
Ringo Low (Ting Lee Peng and C P Choy with him) (Ros Lee & Co) for the defendant.

Prasad Abraham JC:

[1] This trial arose out of an irretrievable breakdown of relations between the plaintiff and the defendant not only as solicitor and client but also as friends the plaintiffs being the clients. The trial was completed on 29 March 2011 and I delivered judgment on 29 April 2011 hence this appeal.

[2] The brief facts as set out by the plaintiff are as follows:

(i) It is not disputed that the 1st Plaintiff (Tan) and Lee were friends and started out as friends for many years.

(ii) Thereafter, due to a shareholders dispute between Tan and the other shareholders of the 2nd Plaintiff (the said company), Tan informed Lee of the problems he had.

(iii) Lee then asked about certain background of the said company and how much is the said Company worth, which Tan told him.

(iv) Lee then persuaded Tan to 'fight' the case and he can offer his legal professional services.

(v) When Tan asked Lee about legal fees, Lee assured Tan not to worry and to proceed with the case first, where the price will be 'cheap'.

(vi) Tan naturally must have trusted Lee as a 'friend' and appointed Ms Ros Lee & Co as the Plaintiffs' solicitors.

(vii) Lee first advised Tan to file a 'Section 181 Companies Act Petition' to force the other shareholders in Rong Ji to sell their shares to Tan. Tan asked Lee as to why can't he sell his shares to the other side at a fair price as he may not have sufficient funds.

(viii) Lee then proceeded to advise Tan that he has a 'plan' where Tan should take over the said Company and control it so that he:

— Can quickly collect all the RM1.1 Million from debtors;

A — Sell all the stocks (RM500,000.00); and

— Thereafter distribute all the monies/assets (worth about RM2.4 Million ie RM1.1 Million debts, RM500,000.00 bank balance and RM800,000.00 stocks) and dissipate it and thereafter allow the said Company to be wound up by creditors.

B (ix) Tan informed Lee that he could not agree as he is not comfortable with this suggestion. However, Lee assured Tan 'not to worry and he will take care of the Court proceedings with a fruitful outcome'.

(x) Tan still raised the issue again that he was still worried about legal fees, but Lee assured Tan that it would be very reasonable and he will make it 'worth it' for Tan as well as charged Tan 'low fees'.

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(xi) Tan trusted Lee and did not realize that he mainly wanted to obtain a personal profit and benefit from the Plaintiffs and did not intend to act professionally in this matter. Thais was Tan's first litigation case and he had no previous experience before this.

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(xii) From the 1st Section 181 Petition Suit, the case developed into 7 related matters (including 4 appeals) where the case numbers are as follows:

(a) Kuala Lumpur High Court: D-24-NCC-82-2009

(b) Court of Appeal Malaysia: W-02-3072-2009

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(c) Kuala Lumpur High Court: D-28NCC-4-2010

(d) Kuala Lumpur High court: d-26NCC-6-2009

(e) Court of Appeal Malaysia: W-02(1M)(NCC)-3071-2009

F (f) Court of Appeal Malaysia: W-02-97-2010; and

(g) Court of Appeal Malaysia: W-02(1M)(NCC)-787-2010

(xiii) Lee would prepare all the court papers and affidavits and got Tan sign the Affidavits. Lee never properly explained to Tan the contents of any Court papers nor Affidavits. After the first few occasions, Lee asked Tan to see the Commissioner for Oaths himself to sign and also to file the same in Court according to his instructions (handwritten evidence in Exhibit 'P-1') and Tan also knows the Defendants firm's filing number in Court ie '3884'.

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Tan had to file his own Affidavits in Court and then return everything to Lee.

H (xiv) Lee hardly wrote to Tan to inform him of the status of the cases and neither was Tan informed properly on the progress of each case. He only informed verbally sometimes about the progress.

Before this Suit commenced, from the 7 Suits/appeal numbers, Tan had only received and had in his possession 4 cause papers i.e. the Petition, Order dated 11/3/2010, Grounds of Decision (Enclosure 16), Notes of Proceedings (Enclosure 16) and Affidavit in Support No. (2) (found in page 1-59 of Bundle 'B')

I

(xv) Lee ran the files as if they were his own files and seldom reported nor informed Tan on the status of the cases. However, Lee informed Tan that almost all the

cases were won in his favour with costs in his favour. Lee told Tan all costs belonged to Tan. But Lee did not account the costs to Tan at all and only after this Suit was filed, Lee revealed that he received RM38,500.00 so far.

(xvi) After the cases were substantially over, on/or about 5/5/2010, on instructions of Lee, Tan met Lee at the Defendants' office and Tan was asked to bring his Cheque book. It was a new cheque book for Rong Ji and he knew about this new cheque book because of the change of signatories after Tan won the '181' case.

(xvii) At the office, Lee demanded for RM350,000.00 for all his work for the 7 cases. Tan complained that RM350,000.00 was too high and a lot of money and Tan did not expect the fees to be so high, given that he was willing to give in to the other side earlier and Lee assured Tan earlier he will help him and will charge him low fees.

(xviii) However, Lee insisted that Tan pays him RM350,000.00 and Lee represented to Tan that if he pays him the said amount, it will cover all 7 cases and it is a full and final payment where Lee will not ask for any more monies from Tan.

(xix) Lee insisted on the figure of RM350,000.00 for all 7 cases because the bank balance of Rong Ji was about RM500,000.00 and Lee estimated that to pay the other side for the shares is about RM150,000.00. Lee demanded for the same angrily on the basis that the bank accounts of Rong Ji is sufficient for this. Tan protested as the Company (Rong Ji will not have sufficient monies as there are also creditors but Lee did not care.

(xx) Based on Lee's representation that it was full and final payment and no further payment will be demanded from Tan thereafter for all 7 cases and because Tan felt pressured, he reluctantly agreed and paid him RM350,000.00 for all 7 cases. After Tan wrote the cheque for RM350,000.00 (page 60 Bundle 'B') to him, Lee give him a Bill under 'file ref: LCT/TMT/RJ/2009/L74' ('the 1st Bill') (page 61 Bundle 'B')

[3] The defendant of course denies these facts especially the facts pertaining to the alleged oral agreement.

[4] The plaintiff contends that pursuant to an oral agreement entered into between the plaintiff's and the defendant approximately on the 5 May 2010 the plaintiff agreed with the defendants that the sum of RM350,000 paid to the defendant was in full and final settlement of all bills due to the defendant. By sending out further bills amounting to RM450,000 the defendant had breached the said oral agreement and therefore the oral agreement should be declared null and void, the additional bills for RM450,000 null and void and the said sum of RM350,000 be refunded to the plaintiff. The defendant of course opposes that stand.

[5] The court decided to approach this issue on the basis, of the plaintiff's case ie an oral agreement that the fees to be charged by the defendant was RM350,000 in full and final settlement of all claims of the defendant and by

A the defendant issuing further bills of amounting to RM450,000 had misrepresented to the plaintiff that RM350,000 was full and final settlement of all bills and therefore the said oral agreement should be set aside and the RM350,000 paid by the plaintiff to the defendant should be refunded to the plaintiff.

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[6] I start by examining s 116 of the Legal Profession Act 1976 and I have set out the relevant provisions out for purposes of brevity

C (1) Subject to any written law, an advocate an solicitor *may* make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either that the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.

D (2) *Every such agreement shall be signed by the client and shall be subject to this Part.*

[7] Looking at s 116, if the plaintiff relies on an agreement for fees as the plaintiff has done in its pleaded case then there must be a written agreement as E to fees consented to by the client in this case the plaintiff. I am aware the words in s 116(1) use the words 'may' but read together with ss 116(2) and 118 it clearly make it imperative for there to be a written agreement as to fees. As the plaintiff's case is based on an oral agreement, the claim per sae must fail. I am guided by the principles set out in *Tan Soo (f) and Freeman & Madge* [1932] F MLJ 42. Although the case is rather old, but I find the principles support my reading of s 116 of the Legal Profession Act 1976.

[8] I also make reference to the case of *Dato HL Wrigglesworth v Hj Zakaria bin Yusof* [1995] MLJU 124; [1995] 3 CLJ 64 where His Lordship Idris bin G Yusoff J as he then was held s 116 of the Legal Profession Act 1976 does not make it mandatory for an agreement on fees to be reduced in writing. The facts of that case are distinguishable from the present dispute before me. In that case, parties were dealing with specific bills and in our instant case the court is dealing with the plaintiff pleaded case that there was an oral agreement that H payment of the sum of RM350,000 which was in full and final settlement of all bills due to the defendant and by issuing the further bills for RM450,000 the defendant had misrepresented to the plaintiff which caused the said oral agreement to be rescinded. With respect, and for these reasons, I respectfully declined to follow the decision in *Dato HL Wrigglesworth* case for these reasons I since the plaintiff relied on an oral agreement for fees in their pleaded case, I dismissed the plaintiff claim on that point.

[9] The sum of RM350,000 was paid by the plaintiff pursuant to bills raised by the defendant and I find as a fact paid for voluntarily. Further looking at the

work done and the type of matters that the defendant had represented the plaintiff I find the sum of RM350,000 that was paid by the plaintiff to the defendant to be reasonable and it is for that reason I refused to order the refund of the RM350,000 paid to the defendant back to the plaintiffs' (see the decision of *Asbir, Hira Singh & Co v Supramaniam a/l Pitchaimuthu & Ors* reported in ; [2000] 1 MLJ 83 and in holding 3 of that decision His Lordship Abdul Hamid Embong J as he then was said:

> (3) the burden of *proving fairness and reasonableness of the agreement was on the plaintiff.* The court found that a lot of work had been done by the plaintiff stretching from 1982–1996. The court found that the RM40,000 as agreed between the parties to be fair and reasonable. There was also no evidence to show that the plaintiff was domineering in its conduct towards D1. The execution of HS-5 was a transaction at arm's length and D1 was in no way disadvantaged by reason of the confidential relationship he had with the plaintiff. Further, the plaintiff had satisfactorily rebutted the presumption of undue influence cast upon it by virtue of the existing solicitor-client relationship. D1, on the other hand, had not advance any cogent argument or proof to contradict either the validity of HS-5 or its reasonableness (see pp 92H, 94A–D).

[10] During the cause of the trial evidence had surfaced that cost recovered from the various suits had been used by the defendant forwards the account of fees and disbursements. It is quite clear that there never was any such agreement as to costs to be off set for expenses and for the reasons that I have enunciated earlier. I ordered the defendants to affirm an affidavit confirming the amount of costs recovered and the same to be refunded to the plaintiff.

[11] The court was subjected to going through some grotesque emails exchanged between the defendant and the plaintiff with regards to the issue of fees. Not only were the emails an insight into the vulgarity aspects of the particular Chinese dialect but the court had to bear with a Chinese interpreter explaining in detail what each of these mails meant to the extent that the interpreter was too embarrassed to proceed. The defendant does not deny sending these mails but claims that it was instigated by the plaintiff. The one thing that the defendant must realise is that he was and is an advocate and solicitor of the High Court of Malaya. The plaintiff until the dispute was his client. However angry he may have been he should not have resorted to sending out these emails and this sort of conduct is and unbefitting of an advocate and solicitor and for these reasons I granted an injunction in favour of the plaintiff as prayed for in prayer C of the plaintiff's statement of claim (see the case of *Re Ke Hilborne* [1984] 2 MLJ 94).

[12] I further made no order as to costs in respect of the plaintiff's claim and I accordingly dismissed the defendant's counterclaim with no order as to costs.

A I further gave liberty to the defendant to recover his remaining bills according to the procedure set out under Legal Profession Act 1976.

Refund not allowed and claim for additional fees dismissed.

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Reported by Mashrifah Ravendran

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