Ho Cheng Lay v Low Yong Sen
[2009] SGHC 56

Case Number : OS 1070/2008

Decision Date : 09 March 2009

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Lee Chin Seon (C S Lee) for the plaintiff; P Padman (K S Chia Gurdeep & Param) for the defendant

Parties : Ho Cheng Lay — Low Yong Sen

Legal Profession – Bill of costs – Time limit for taxation – Section 122 Legal Profession Act (Cap 161, 2001 Rev Ed) – Section 6 Limitation Act (Cap 163, 1996 Rev Ed) – Payment of bills of costs – Special circumstances to allow taxation

9 March 2009

Kan Ting Chiu J:

1 I granted an application that a solicitor presents five bills for taxation. The solicitor is the defendant, Low Yong Sen, who is not in practice currently, and the applicant is the plaintiff, Ho Cheng Lay, his former client.

2 The plaintiff became a client of the defendant in June 1998 when he appointed the latter to act for him in his divorce. At that attendance, the defendant who was then practising as the sole proprietor of Y.S. Low & Partners ("YSL&P") obtained from the plaintiff a warrant to act in the divorce proceedings dated 15 June 1998 captioned "Divorce Proceedings And Ancillary Matters".

3 Subsequently, the defendant also acted for the plaintiff in other matters, as described in four other warrants to act dated 27 July 1998, 12 October 1998, 11 May 2000 and 20 June 2000 with the captions "Personal Protection Order Proceedings (SS 1519/1998)", "Criminal Proceedings (DAC 27967/98)", "Matrimonial Proceedings (Summons-In-Chambers Proceedings)(SIC 750799/2000)" and "Matrimonial Proceedings (Summons-In-Chambers Proceedings)(Variation of Order of Court dated 19 July 1999)".

4 In November 2001, the plaintiff's divorce proceedings were concluded, and his matrimonial house was sold, and the proceeds were to be shared equally with his former wife. When the plaintiff went to collect his share of the proceeds, the defendant paid over to him $7,107.86 by a cheque dated 16 November 2001 and retained $40,250.00 from the plaintiff's share of the proceeds as payment of his costs. At the same time, the defendant issued to the plaintiff a "Completion Account" which showed that the plaintiff's net share of the proceeds of $52,398.87 was reduced to $7,107.86 after the deduction of six bills of YSL&P (one dated 12 October 2001 and five dated 9 November 2001). The defendant contended that the plaintiff had agreed to the deduction. The plaintiff on the other hand denied this and claimed that he complained about the excessive charges and asked for copies of his bills. He did not get them, but only had sight of the bills in the course of proceedings of the Disciplinary Committee hearing his complaint against the defendant. The defendant disputed this by producing a copy of a letter from YSL&P dated 26 November 2001 to Liang Poh & Boh Lim, the solicitors acting for the plaintiff at that stage, forwarding the Completion Account together with the bills. Notably, there was no mention in YSL&P's covering letter that the bills had been delivered to the

plaintiff previously or that he had agreed that they be paid out of the sale proceeds.

5 The Disciplinary Committee proceedings referred to in the foregoing para are DC/SEC/05/2004. The Committee's findings are reported in *The Law Society of Singapore v Low Yong Sen Vincent* [2006] SGDSC3. After a hearing over five days, the Committee delivered its findings on 10 February 2006. Two of the Committee's findings are of particular relevance to the present application. Firstly, the Committee did not accept the defendant's evidence that the plaintiff had agreed to allow him to deduct his fee from the sale proceeds[note: 1]. Secondly, the Committee found that the defendant had over charged the plaintiff in five bills (which are now the subject matter of the present application [note: 2]). Following the Committee's findings, the Council of the Law Society reprimanded the defendant and ordered him to pay penalties amounting to $22,500 and costs of $40,000. The defendant did not apply to Court to set aside the Council's order.

6 After receiving the decision of the Disciplinary Committee, the plaintiff did not have the means to engage solicitors to act for him and applied for legal aid to take up his complaint over the bills. In January 2008, the Legal Aid Bureau referred the application to Mr Lee Chin Seon for his opinion. Mr Lee looked into the matter actively and rendered his opinion in June 2008, whereupon legal aid was granted in the same month. Following that, Mr Lee filed the present application on behalf of the plaintiff in August 2008.

7 The defendant resisted the application on three grounds[note: 3]:

(i) the application was out of time under s 122 of the Legal Profession Act (Cap 161 2001 Rev Ed) ("LPA");

(ii) by reason of the plaintiff's laches, he is prejudiced in that he has disposed of his files; and

(iii) the application is time-barred under s 6 of the Limitation Act (Cap 163 1996 Rev Ed).

8 Section 122 reads:

> After the expiration of 12 months from the delivery of a bill of costs, or after payment of the bill, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the solicitor and under special circumstances to be proved to the satisfaction of the court.

9 It is to be noted that there are three elements to the operation of the provision, (i) the delivery of a bill of costs, (ii) the payment of the bill, and (iii) the existence of special circumstances.

10 In the course of arguments before me, Mr Lee submitted that the bills were not proper bills under s 122. The bills were YSL 2144/01 "Re: Divorce Proceedings No. 2685 of 1998", bill YSL 2145/01 "Re: Summons-in-Chambers Application SIC No. 751220/2000", bill YSL 2146/01 "Re: Summons-in-Chambers Application SIC No. 750799/2000", bill YSL 2147/01 "Re: Criminal Proceedings DAC 27967/98" and bill YSL 2148/01 "Re: Personal Protection Order Proceedings SS 1519/98", each containing the statement "Towards account of our retainer inclusive of disbursements" and the amount charged i.e. $10,250.00, $5,000.00, $5,000.00 and $15,000.00 respectively.

11 The plaintiff cannot take that point after making the application for taxation. By filing the application, he acknowledged that there were bills to be taxed. If the plaintiff disputed the validity of the bills, he should have sought a declaration that the bills delivered were not proper bills and he was not under any liability to pay them.

12 That does not mean that the form and contents of the bills are not relevant to the determination of the application. This is so because if a bill presented is lacking in particulars, that is a factor in favour of requiring it to be taxed.

13 A vast majority of solicitor-and-client bills are paid without taxation. Unlike bills drawn for taxation, which are governed by Order 59 of the Rules of Court (R5 2006 Rev Ed), there are no provisions for bills not drawn for taxation.

14 What are the requirements for such bills? This has not been addressed in any reported decision in Singapore. The courts of England, however, have dealt with this question for a long time. In *Keene v Ward* (1849) 13 QB 515, Patteson J stated at p 521 that:

> In requiring the delivery of an attorney's bill, the Legislature intended that the client should have sufficient materials for obtaining advice as to taxation …

15 Patteson J's statement was referred to and followed in subsequent cases. In *Haigh v Ousey* (1857) 7 E & B 578, Lord Campbell CJ ruled that a bill must disclose on the face of it sufficient information as to the nature of the charges, and cited Patteson J's ruling as authority.

1 6 *Keene v Ward* and *Haigh v Ousey* were discussed in the much more contemporary decision of the English Court of Appeal in *Ralph Hume Garry (a firm) v Gwillim* [2003] 1 WLR 510 where Ward LJ stated:

> 31 What help can we get from this trilogy of cases [*Keene v Ward*, *Haigh v Ousey* and *Cook v Gillard* (1852) 1 E & B 26] where the dispute arose in contentious business not because of any insufficiency in the description of the work done but because of a want of identification of the court in which the business was conducted? We must bear in mind the statutory background, viz: (i) the client's only protection against overcharging was to seek taxation; (ii) the bill to be taxed was the bill as delivered ('refer *such* bill … to be taxed'); (iii) if less than one-sixth was taxed off that bill, the client paid the costs of taxation; (iv) the Georgian statute stating that jurisdiction to tax was given to the court in which the greater part of the business had been done and that different scales of charges prevailed in different courts had been repealed: now taxation could take place in all of the superior courts on substantially the same principles and on a uniform scale of charging.
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> 32 Against that background the principles to be deduced from those cases appear to me to be these. (1) The legislative intention was that the client should have sufficient material on the face of the bill as to the nature of the charges to enable him to obtain advice as to taxation. The need for advice was to be able to judge the reasonableness of the charges and the risks of having to pay the costs of taxation if less than one-sixth of the amount was taxed off. (2) That rule was, however, subject to these caveats: (a) precise exactness of form was not required and the rule was not that another solicitor should be able on looking at the bill, *and without any further explanation from the client*, see on the face of the bill all information requisite to enable him to say if the charges were reasonable; (b) thus the client must show that further information which he really and practically wanted in order to decide whether to insist on taxation had been withheld and that he was not already in possession of all the information that he could reasonably want for consulting on taxation. (3) The test, it seems to me, is thus, not whether the bill on its face is objectively sufficient, but whether the information in the bill supplemented by what is subjectively known to the client enables the client with advice to take an informed decision whether or not to exercise the only right *then* open to him, viz, to seek taxation reasonably free from the risk of having to pay the costs of that taxation. (4) A balance has to be struck between

> the need, on the one hand, to protect the client and for the bill, together with what he knows, to give him sufficient information to judge whether he has been overcharged and, on the other hand, to protect the solicitor against late ambush being laid on a technical point by a client who seeks only to evade paying his debt.
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> [Emphasis in original]

17 Much of the matters referred to also apply in Singapore. Section 120 of the LPA allows a party liable to pay a bill to apply for it to be taxed, and s 128(1) provides that if upon taxation, less than a sixth part is taxed off, the paying party which applied for the taxation has to pay the costs of taxation. Consequently, the reasoning employed in the English decisions is also applicable to Singapore. On that basis, the skeletal bills the defendant presented fell short of the standard set in *Keene v Ward* and expanded on in *Ralph Hume Garry (a firm) v Gwillim.*

18 That leads to the next issue whether there was any payment within the contemplation of s 122. Payment under that provision must be an act of the paying party. He can make direct payment of the costs after receiving the bill. He can also agree that the solicitor pay himself out of funds that the solicitor is holding for him, e.g. in this case, if the plaintiff authorises the defendant to pay the bills out of the sale proceeds.

19 In fact, the plaintiff had not done anything to effect payment of the bills. The bills were paid because the defendant had, without his consent, applied a large portion of the sale proceeds towards the payment of the bills.

20 Does this form of transaction amount to the payment of the bills? This issue was considered in *In re Jackson* [1915] KB 371. The facts of the case are set out in the headnote to the report:

> A solicitor was retained to defend a man charged with embezzlement and to act for him in a civil action in which he was defendant. Both retainers were in writing. By the retainer in the criminal proceedings, which was dated June 14, 1912, the client agreed that the solicitor should receive the proceeds of the sale of certain furniture "to cover" the charges of the defence. The solicitor received these proceeds. By the retainer in the civil action the solicitor was to act for the client in the conduct of the action for an inclusive fee of 100 guineas. …
>
> On February 10, 1914, the appellant, [the] administrator of the client's property… applied … to set aside the agreements as to costs, as being unfair and unreasonable, and for the delivery of a bill of costs and for taxation.
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> The solicitor in answer to the application contended (inter alia) that the amount agreed by the civil retainer had been paid more than twelve months before the application, inasmuch as he had collected, with, as he alleged, the authority of the client, the sum of 100l. from a debtor of the client, and that, … the application was out of time.

21 The application was granted by a Master, but was set aside on appeal by a judge in chambers. On further appeal to the Divisional Court, the application was ordered to go back to the Master for further inquiry into the circumstances the solicitor received and retained the 100*l.* obtained from the client's debtor. Rowlatt J explained at p 383 that:

> Payment is an operation in which two parties take part. If a man collects a debt due to his debtor and purports to pay his own debt in that way, it is not really a payment unless the other party knows what is being done and agrees that the sum received in that way by his creditor shall be

used in the payment of his debt.

22 Rowlatt J's statement was endorsed in *Forsinard Estates Ltd v Dykes & Ors* [1971] 1 WLR 232. In this case the plaintiff, a company owner had mortgaged an estate. The mortgagee exercised its power of sale and instructed the defendants, a firm of solicitors to act for it. In the course of the sale of the estate, the defendants received the deposit of the sale of the estate. The defendants deducted their costs from the deposit and sent the balance to the mortgagee with the full knowledge and consent of the company. Subsequently, the plaintiff was wound up and the liquidator of the plaintiff applied for the defendants' costs to be taxed. The application was dismissed on the ground that the deduction was made with the full agreement and consent of the company. Stamp J in his judgment at p 237 considered the situation where no acknowledgment or consent is obtained, and stated that:

> It is clear that if a solicitor without the knowledge or approbation of his client pays his own bills out of monies of his client and hands over the proceeds, that is not payment within the meaning of section 69 of the Solicitors Act 1957.

23 In the present case, the defendant had no interest in the sale proceeds. When he presented his bills he only had a claim for his fees. The plaintiff had not agreed to pay him and the defendant had not sued for them. There was no judgment debt to set off against the sale proceeds. It can be argued that the defendant's action constituted a breach of trust in respect of that part of the sale proceeds that he used to pay to bills. It cannot be said that the plaintiff had paid the bills when the deductions were made without his agreement and consent.

24 Having established that the five bills were deficient in content and had not been paid, one obstacle remained in the application for them to be taxed. Under s 122, a bill that has been delivered for more than 12 months would not be taxed except under special circumstances. The special circumstances are not set out, and there are no judicial discussions on that in the context of s 122.

25 The rule that a bill may be taxed more than 12 months after delivery where there are special circumstances is not unique to s 122. This has been a feature in English legislation relating to solicitors' bills of costs. For example, 6 & 7 Vict. c. 73 s 37 provided that no bill shall be ordered to be taxed "after the Expiration of Twelve months after such Bills shall be delivered … except under special circumstances, to be proved to the satisfaction of the Court or Judge…". Section 41 of that act provided that payment of a bill shall not preclude the Court or Judge for making an order for taxation "if the special circumstances of the case shall in the opinion of such Court or Judge appear to require the same …"

26 "Special circumstances" in the context of s 41 was discussed by Bowen LJ in *In re Boycott* 29 Ch D 571 at p 579, where he said:

> Special circumstances, I think, are those which appear to the Judge so special and exceptional as to justify taxation. I think no Court has a right to limit the discretion of another Court, though it may lay down principles which are useful as a guide in the exercise of its own discretion.

Bowen LJ's view on special circumstances within s 41 was applied to the same phrase in s 37. In *In re Norman* (1886) 16 QBD 673, Lord Esher MR, Lindley LJ and Lopes LJ referred to and adopted Bowen LJ's view in *In re Boycott*.

27 I do not see any reason for not applying the same approach to the treatment of "special circumstances" in s 122.

28 Were there, then, any special circumstances? Several matters should be taken into consideration:

(1) The bills delivered were lacking in particulars;

(2) The defendant overcharged the plaintiff in those bills;

(3) The defendant had paid them out of the proceeds of sale without the consent or agreement of the plaintiff. It *appears* that by so doing, the defendant was acting in breach of trust (I am not making a determinative finding on this issue); and

(4) By his actions, the defendant had obtained the benefit of the money and put the plaintiff out of the money over the intervening years.

29 The defendant, on the other hand, argued that the bills should not be taxed now because that would prejudice him. He pleaded in his affidavit dated 5 September 2008:

> I am severely handicapped in responding to all of the Applicant's allegations since I have actually disposed of this particular file sometime last year. Under Law Society guidelines, such files need to be retained only for 6 years. So after 6 years, I disposed of the file.

30 One would ask why the defendant disposed of the file when he should have known that further action may be taken in relation to the bills and the deducted payments following the Disciplinary Committee proceedings.

31 In any event, not all the records are lost. The report of the Disciplinary Committee referred to the timesheets, attendances notes and a mitigation plea that the defendant produced during the Disciplinary Committee hearing. Unlike the defendant, the Disciplinary Committee does not destroy these documents, and the defendant can have access to them. He can also obtain copies of any cause paper he needs from the relevant court files. With these documents, the defendant should have no trouble in drawing his bills for taxation (I am informed that he had drawn the bills after I made my order).

32 Taking all the foregoing matters into account, I found that there are special circumstances for me to order the bills to be taxed.

33 Is the right to taxation under s 122 time-barred? The defendant contended that it is time-barred under s 6(1) of the Limitation Act which reads:

> **6.** —(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognizance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture.

and submitted that:

a. Section 6 of the Limitation Act imposes a time bar of 6 years for all causes of action founded on contract or tort. ..

b. It is trite that a solicitor's retainer is a contract between him and his client, and that in respect of bills, normal limitation rules apply.[note: 4]

34 This line of argument is flawed and unsustainable. While a retainer creates a contractual relationship between a solicitor and his client, that does not mean that all the rights and liabilities between solicitor and client are solely contractual in nature. Legislation such as the LPA confer statutory rights and impose duties on the parties.

35 The plaintiff's right under s 122 to have the bills taxed is a statutory right. It may expire 12 months after the delivery of the bills, and not after six years as the defendant submitted. However, the 12-month limitation period does not apply when there are special circumstances. As I have found that there are special circumstances, the plaintiff's right to have the bills taxed is not time-barred under s 6 of the Limitation Act or s 122 of the LPA.

36 For all the reasons above, I granted the plaintiff's application. The defendant is not satisfied with my decision and has appealed against it.

[note: 1]Para 105

[note: 2]Para 106

[note: 3]Respondent's Submissions para 3

[note: 4]Respondent's Submissions para 12(a) and (b)