IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 325

Originating Summons No 128 of 2017

Between

LEGIS POINT LLC

… Plaintiff

And

TAY CHOON AI

… Defendant

JUDGMENT

[Legal Profession] — [Remuneration] — [Fee agreements]
[Legal Profession] — [Remuneration] — [Contingent fee arrangements]
[Civil Procedure] — [Costs] — [Party-and-party costs]

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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.

Legis Point LLC
v
Tay Choon Ai

[2017] SGHC 325

High Court — Originating Summons No 128 of 2017
George Wei J
15 May, 10 October 2017

28 December 2017 Judgment reserved.

George Wei J:

Introduction

1 This application relates to a fee arrangement between a law firm and its client which went awry after the conclusion of the legal matter for which the client was being represented. The plaintiff law firm, Messrs Legis Point LLC ("the Plaintiff"), filed the present originating summons under s 113 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA") against its client, Ms Tay Choon Ai ("the Defendant"), for an order that the Plaintiff be entitled to tax its costs incurred in accordance with the terms of the fee agreement between them. However, both sides have presented differing interpretations of the fee agreement in question. At the heart of the dispute is whether the fee agreement imposed what may be loosely termed a "hard cap" on the amount of fees and disbursements that could be charged by the law firm.

2 Having heard the parties' arguments, I agree with the Defendant's interpretation of the written agreement. Accordingly, I find that there is a cap of $28,000 on the amount of professional fees and disbursements incurred by the Plaintiff in the course of its representation of the Defendant. I also find that this sum includes the costs of all work done by the Plaintiff on the matter, including all drafting work whether prior to or after the filing of the writ of summons, negotiation with opposing counsel and work done in respect of mediation sessions. Accordingly, I dismiss the Plaintiff's application with costs.

Background facts

The Plaintiff's representation of the Defendant in the KKS Suit

3 The Defendant is a secretary at a law practice, Messrs Lim & Co, which is a sole proprietorship run by Mr Lim Loo Leong ("Mr Lim").[1]

4 In November 2014, the Defendant found herself in need of legal representation in a dispute between her and a company named KKS International (S) Pte Ltd ("KKS") relating to minority shareholder oppression,[2] and was referred to the Plaintiff by her employer Mr Lim. Certain lawyers at the Plaintiff knew of Mr Lim as a senior and experienced solicitor. The Defendant subsequently decided to engage the Plaintiff to represent her in her dispute with KKS.[3]

5 On 18 November 2014, the Plaintiff issued a letter of representation to the Defendant ("the Letter of Representation"), enclosing its standard terms of

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1 1st affidavit of Charmaine Chan-Richard, paras 4 and 6.

2 Bundle of written submissions for hearing on 10 October 2017 ("BWS"), Tab 1, p 4, para A(1); 1st affidavit of Charmaine Chan-Richard, CCR-6.

3 1st affidavit of Charmaine Chan-Richard, paras 6 and 7.

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appointment and a warrant to act ("the Warrant to Act"). The engagement was in respect of the matter titled "Claim Against KKS International (S) Pte Ltd" as set out in the e-mails, letters from the Plaintiff and the Warrant to Act.[4]

6 The Letter of Representation stated that the director in charge of the Defendant's matter was Mr Samuel Chacko ("Mr Chacko"), who would be assisted by Mr Christopher Yeo ("Mr Yeo"). The other relevant clauses of the Letter of Representation are as follows:[5]

> 5. … Mr. Chacko's usual charge-out rate during office hours is $800 per hour, and Mr. Yeo's usual charge-out rate during office hours is $330 per hour (excluding disbursements and GST). We are pleased to inform you that Mr Chacko will be waiving all his professional charges in respect of this matter.
>
> 6. From time to time, your work may be performed by or delegated to other lawyers, either because of special expertise possessed by that lawyer, or for the purpose of providing services on an efficient and timely basis. The charge-out rates of the associates and associate directors of our firm range from $310 per hour to $400 per hour.
>
> 7. Our fees are based on, unless otherwise agreed, the time spent on the matter and the hourly charge-out rates of the lawyers involved.
>
> 8. In view of the fact that your matter was referred to us by Mr. Lim Loo Leong, we will cap any charges in this matter (other than disbursements) at the level of party and party costs. Prior to issuing any bills, we will discuss and agree on any charges to be levied as professional costs. Any disbursements will be billed as and when incurred.

I will refer to the agreement between the parties as to the fees payable to the Plaintiff, as set out in the Letter of Representation, as "the Fee Agreement".

7 The Defendant signed the Warrant to Act on 19 November 2014, thereby agreeing to the Plaintiff's fees and terms of appointment as set out in

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4 1st affidavit of Charmaine Chan-Richard, CCR-2.

5 1st affidavit of Charmaine Chan-Richard, CCR-2.

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the Letter of Representation.[6] I note that the reverse side of the Warrant to Act sets out "Standard Terms of Appointment" which include provisions on personal data protection, payment of costs by others, risk of liability for costs payable to others, mediation and applicable law. In addition, the standard terms on fees, aside from stating that fees depended on the seniority of lawyers involved, *etc*, include specific reference to the nature and duration of hearings and/or trials in court, arbitration or mediation proceedings. The standard terms on fees conclude with the statement, "Where possible we will give you an estimate of our fees." As noted, cl 8 of the Letter of Representation (which enclosed the Warrant to Act) states that charges in this matter (other than disbursements) were to be capped at the level of party-and-party costs.

8 After the engagement of the Plaintiff, Mr Lim also assisted the Defendant in her matter against KKS by accompanying her to meetings with the Plaintiff, where he provided his input and raised queries. E-mails between the parties regarding her matter against KKS were sent to and from the same e-mail address used by Messrs Lim & Co, with Mr Lim's consent.[7]

9 Between November 2014 and July 2015 ("the pre-writ period"), the Plaintiff engaged in a series of correspondence and settlement negotiations on the Defendant's behalf, with KKS and its solicitors. During this period, the Plaintiff did work such as reviewing documents and correspondence, advising the Defendant, drafting correspondence, and preparing for and attending settlement negotiation meetings with KKS.[8]

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6 1st affidavit of Charmaine Chan-Richard, CCR-4.

7 1st affidavit of Charmaine Chan-Richard, paras 11 to 13; 1st affidavit of the Defendant, paras 13 and 14.

8 1st affidavit of Charmaine Chan-Richard, paras 19 and 20.

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10 As the Defendant and KKS were unable to reach a settlement, the Defendant decided to commence legal proceedings against KKS, its director and its parent company. In August 2015, the Plaintiff began preparing the writ of summons and the statement of claim for the Defendant.[9] Upon the Plaintiff's request, the Defendant placed a deposit of $5,000 with the Plaintiff to cover the costs of disbursements.[10] Invoices issued by the Plaintiff for disbursements incurred were deducted from this $5,000 deposit.[11]

11 The suit against KKS ("the KKS Suit") was filed on 8 September 2015. Subsequently, in October 2015, the defendants in the KKS Suit filed and served their defence. The Defendant then filed and served her reply, as well as an amended statement of claim. In December 2015, the parties to the KKS Suit filed and served their respective lists of documents and proceeded with discovery.[12]

12 Between October and December 2015, the solicitors in the KKS Suit had exchanged correspondence discussing the possibility of mediation. On 7 December 2015, parties agreed to refer the dispute to the Singapore Mediation Centre ("the SMC").[13] After two mediation sessions, they were still unable to reach amicable settlement.[14] The Defendant made payments to the SMC amounting to $11,889.69 and $5,763.02 (including a deposit of $2,830) for the costs of the two mediation sessions respectively.[15]

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9 1st affidavit of Charmaine Chan-Richard, paras 21 and 22.

10 1st affidavit of Charmaine Chan-Richard, paras 26 to 34.

11 1st affidavit of Charmaine Chan-Richard, para 39.

12 1st affidavit of Charmaine Chan-Richard, paras 32 and 41–44.

13 1st affidavit of Charmaine Chan-Richard, paras 45 and 46.

14 1st affidavit of Charmaine Chan-Richard, paras 62 and 68.

15 1st affidavit of Charmaine Chan-Richard, paras 55 and 62 and CCR-21.

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13 Following some further offers to settle, the parties eventually agreed on 8 March 2016 to settle the KKS Suit for the sum of $700,000 payable by the defendants to the Defendant (as the plaintiff in the KKS Suit).[16] The parties also agreed to have the costs of the litigation decided by the court at the upcoming pre-trial conference.[17] The Plaintiff proposed submitting the sum of $50,000 as party-and-party costs payable to the Defendant, and the Defendant accepted this proposal.[18]

14 Ms Charmaine Chan-Richard ("Ms Chan-Richard") from the Plaintiff attended the pre-trial conference on 29 March 2016 ("the PTC"), and submitted that party-and-party costs in the KKS Suit should be in the sum of $50,000.[19] Ms Chan-Richard also informed the Senior Assistant Registrar ("the SAR") that disbursements amounted to about $3,700.[20] The work done by the Plaintiff during the pre-writ period and in respect of the SMC mediation was not raised at the PTC.[21] The solicitor representing KKS and the other defendants submitted the sum of $25,000. The SAR fixed party-and-party costs at $28,000 to be paid by the defendants in the KKS Suit to the Defendant.[22] On 13 April 2016, the Defendant received the total sum of $728,000 from the defendants in the KKS Suit by way of a cashier's order.[23]

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16 1st affidavit of Charmaine Chan-Richard, paras 75 and 76.

17 1st affidavit of Charmaine Chan-Richard, paras 96 and 97.

18 1st affidavit of Charmaine Chan-Richard, para 98.

19 1st affidavit of Charmaine Chan-Richard, paras 99 and 100.

20 1st affidavit of Charmaine Chan-Richard, para 143.

21 Notes of evidence ("NE") of hearing on 29 March 2016.

22 1st affidavit of Charmaine Chan-Richard, paras 99 and 100.

23 1st affidavit of Charmaine Chan-Richard, paras 105 and 107.

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15 A total of $5,445.43 remained in the Plaintiff's client account for the Defendant, being the remainder of the $5,000 deposit after the payment of two invoices for disbursements and the SMC's filing fee for the mediation, plus the $2,830 deposit paid by the Defendant and refunded by the SMC.[24]

Correspondence between the parties regarding the Plaintiff's fees

16 On 21 April 2016, Mr Chacko sent an e-mail to the Defendant, attaching a summary of services that the Plaintiff had rendered to her. Mr Chacko's e-mail stated that the total time costs on the matter came up to approximately $136,000, but he would waive his own time costs of $49,000. The remaining time costs of the other lawyers engaged on the matter came up to approximately $87,000. Mr Chacko proposed rendering the Defendant an invoice of $70,000 plus disbursements and goods and service tax ("GST"), representing the Plaintiff's professional charges incurred in the matter.[25]

17 On 15 May 2016, the Defendant replied by e-mail asking why the Plaintiff was contemplating charging her "so many times more than what [the parties had] agreed upon". The Defendant took the position that the Plaintiff had agreed to cap its fees at the level of party-and-party costs, being the $25,000 in costs and $3,000 in disbursements fixed by the SAR during the PTC.[26] I note that the Defendant stated that the delay in her response was due to the fact that she had been away for eye surgery.[27]

18 On 23 May 2016, Ms Chan-Richard responded by e-mail explaining that the Defendant was "operating under a misapprehension" as to the meaning of

24 1st affidavit of Charmaine Chan-Richard, paras 110 to 116.

25 1st affidavit of Charmaine Chan-Richard, paras 117 to 120 and CCR-37.

26 1st affidavit of Charmaine Chan-Richard, paras 121 to 123 and CCR-38.

27 1st affidavit of Charmaine Chan-Richard, CCR-38.

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the Fee Agreement. Ms Chan-Richard's e-mail set out the Plaintiff's position that by stating in the Letter of Representation that the Plaintiff's professional charges for the matter would be capped at the level of party-and-party costs, this meant that the Plaintiff's fees would be assessed on a standard basis rather than on an indemnity basis. Even on the Defendant's interpretation of the Fee Agreement, the party-and-party costs fixed by the court only related to work done in connection with the KKS Suit, and did not include work done during the pre-writ period and in relation to the SMC mediation. At the end of her e-mail, Ms Chan-Richard asked the Defendant to let the Plaintiff know if she had an alternative figure in mind, and stated that in the event that they could not reach an agreement, the Plaintiff was agreeable to having its solicitor-and-client costs taxed in court on a party-and-party basis.[28]

19 As the Defendant did not respond by 4 July 2016, Ms Chan-Richard sent a further e-mail to the Defendant stating that the Plaintiff would proceed on the footing that the Defendant had no objections to being invoiced $70,000 plus disbursements and GST.[29] The Defendant however replied on 7 July 2016 reiterating her position.[30]

20 On 15 July 2016, Ms Chan-Richard sent an e-mail stating that notwithstanding the fact that the Plaintiff did not agree with the Defendant's interpretation of the Fee Agreement, the Plaintiff had acceded to the Defendant's request to cap its professional fees at $28,000. Attached to the e-mail was an invoice from the Plaintiff for a total of $31,695.18, being $28,000 plus disbursements and GST ("the Bill").[31]

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28 1st affidavit of Charmaine Chan-Richard, paras 125 to 132 and CCR-39.

29 1st affidavit of Charmaine Chan-Richard, para 133.

30 1st affidavit of Charmaine Chan-Richard, para 135.

31 1st affidavit of Charmaine Chan-Richard, paras 137 to 140 and CCR-42.

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21 The Defendant replied by e-mail on 28 July 2016 asserting that the Plaintiff was only entitled to invoice her the sum of $24,300 (*ie*, $28,000 less $3,700 for disbursements) for professional fees. This was because the SAR had fixed party-and-party costs at $28,000 inclusive of disbursements.[32]

22 On 5 August 2016, Ms Chan-Richard sent an e-mail to the Defendant stating that the latter's conduct to date amounted to a repudiatory breach of the Fee Agreement, and that the Plaintiff accepted this breach. Ms Chan-Richard's e-mail informed the Defendant that the Plaintiff would proceed to apply to court for the appropriate relief.[33]

23 The parties continued to exchange e-mail correspondence reiterating their own positions. The Plaintiff later invited the Defendant to refer the dispute between the parties to the SMC for mediation, but the Defendant expressed that she saw no need to do so.[34]

24 On 9 February 2017, the Plaintiff filed the present application against the Defendant under s 113 of the LPA for the following relief:

(a) a declaration that the Fee Agreement constitutes an agreement for costs in respect of contentious business under s 111 of the LPA;

(b) a declaration that the Fee Agreement is valid and binding on the parties;

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32 1st affidavit of Charmaine Chan-Richard, paras 141 to 144 and CCR-43.

33 1st affidavit of Charmaine Chan-Richard, paras 146 to 149.

34 1st affidavit of Charmaine Chan-Richard, paras 150 to 155.

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(c) an order that the Plaintiff be entitled to tax its costs incurred in respect of services rendered to the Defendant, in accordance with the terms of the Fee Agreement;

(d) an order that the Defendant pay the Plaintiff the taxed costs under (c) forthwith;

(e) alternatively, a declaration that the Defendant has acted in repudiatory breach of the Fee Agreement, which said repudiatory breach the Plaintiff has accepted, and consequently, an order that the Plaintiff be entitled to tax its costs incurred in respect of services rendered to the Defendant as if the Fee Agreement had not been made; and

(f) costs and any further relief.

The parties' cases

25 Both parties agree that the Fee Agreement constitutes an agreement for costs in respect of contentious business under s 111 of the LPA, and that the Fee Agreement is valid and binding on the parties.[35] However, they diverge in terms of the interpretation of the Fee Agreement, specifically cl 8 which provides that the Plaintiff will "cap any charges in this matter (other than disbursements) at the level of party and party costs".

26 The Plaintiff's position is that cl 8 means that the Plaintiff's professional fees are to be billed to the Defendant on a standard basis, rather than on an indemnity basis. On top of the professional charges, the Defendant would be billed for disbursements incurred. In support of its interpretation of cl 8, the Plaintiff argues that:

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[35] BWS, Tab 1, p 6, para 7.

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(a) Clause 8 further provides that the parties will discuss and agree on any fees to be charged. The Plaintiff submits that such discussion would be unnecessary if the Plaintiff's fees were to simply be the amount of party-and-party costs fixed by the court.[36]

(b) According to the Defendant's own evidence,[37] Mr Chacko had proposed rendering a bill of $70,000 at a meeting on 1 April 2016, yet she did not tell Mr Chacko that the Plaintiff was only entitled to bill her $28,000.[38] The Plaintiff asserts that this indicates that the Defendant's current position is an afterthought.

(c) In interpreting the Fee Agreement, the court should prefer a construction which entails that the contract and its performance are lawful (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [131]). The Fee Agreement may be illegal and unenforceable on the Defendant's interpretation of cl 8 for amounting to a contingent fee arrangement. The Plaintiff cites the Council of the Law Society's Practice Direction No 2 of 2012 ("the 2012 Practice Directions"), which addresses the impropriety of a particular arrangement under which solicitor-and-client costs and disbursements are limited to whatever party-and-party costs and disbursements are recovered from the other party, and under which the solicitor-and-client costs would be waived and only disbursements billed in the event that no costs are recovered from the other party. The 2012 Practice Directions states at para 3(a) that

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36 BWS, Tab 1, p 9.

37 Defendant's 1st affidavit, para 25.

38 BWS, Tab 1, pp 11 to 12.

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the Council has taken the position that such a fee arrangement would be improper, as:

> Any fee arrangement that provides for payment of solicitor-and-client costs that is contingent on the amount of party-and-party costs recovered by a client would render a solicitor in breach of s 107 of the Legal Profession Act ("LPA") and r 37 Legal Profession (Professional Conduct) Rules [1998] because the solicitor would have an interest in the subject matter of the litigation or be purchasing an interest in the client …

The Plaintiff thus submits that the court should not accept the Defendant's interpretation of cl 8.[39]

(d) Moreover, the court will avoid an interpretation of an agreement that leads to an unreasonable result, unless it is required by clear words and there is no other tenable construction (*Zurich Insurance* at [131]). If the Defendant's dispute with KKS had been settled during the pre-writ period, there would have been no costs awarded by the court. In such a situation, the Plaintiff would not have been entitled to bill the Defendant at all, and would have been out-of-pocket in such a situation. The Plaintiff submits that such an unreasonable result militates against the Defendant's interpretation of cl 8.[40]

27 The Defendant first raises a number of preliminary objections.

(a) First, the Defendant contends that the prayers sought by the Plaintiff in the present application are misconceived. The parties do not dispute that the Fee Agreement amounts to an agreement for costs in respect of contentious business under s 111 of the LPA, or that it is

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39 BWS, Tab 1, pp 12 to 14.

40 BWS, Tab 1, p 15.

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binding (see [25] above). The dispute is really as to whether the Plaintiff is entitled under the Fee Agreement to bill the Defendant for more than $28,000. While the Plaintiff has stated in its written submissions that "the sole issue for the Court's determination in this application [is] whether the Plaintiff's or the Defendant's interpretation of [cl 8] is to be preferred", the Plaintiff has not included this in its prayers.[41]

(b) Next, the Defendant submits that the present application should not have been brought under s 113 of the LPA. Instead, according to the Defendant, the Plaintiff should have either sued her for the payment of the Bill, or applied for an order of taxation under s 120 of the LPA. In the case of the latter, the Plaintiff would have to first advise the Defendant according to rr 17(5) and 17(6) of the Legal Profession (Professional Conduct) Rules 2015 (GN No S 706 of 2015) ("the 2015 Rules") of, *inter alia*, her right to apply to court to have the Bill taxed. The Defendant thus asserts that it was procedurally improper for the Plaintiff to have filed this application.[42] Moreover, as more than 12 months had elapsed since the delivery of the Bill, any application under s 120 of the LPA would now be time-barred.[43]

(c) Third, the Bill is still in existence and remains unpaid. The Defendant argues that the Plaintiff is bound by the amount stated in the Bill (*ie*, $31,695.18) and estopped from seeking payment of a larger amount, unless and until it obtains leave of court to withdraw the Bill.[44]

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41 BWS, Tab 5, pp 106 to 107.

42 BWS, Tab 5, pp 108 to 109.

43 BWS, Tab 5, p 114, para 80.

44 BWS, Tab 5, pp 110 and 114.

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(d) Finally, in response to the Plaintiff's prayers in the alternative, the Defendant submits that none of her actions can be deemed to have been a repudiatory breach of the Fee Agreement. All she had done was to insist that the Plaintiff was only entitled to $28,000 in payment.[45]

28 As for the substantive issue of the interpretation of cl 8 of the Letter of Representation, the Defendant reads cl 8 to mean that the Plaintiff can only bill her up to $28,000, being the amount of party-and-party costs (plus disbursements) ordered by the SAR at the PTC in the KKS Suit.[46] In support of this interpretation, the Defendant argues that:

(a) This interpretation accords with the plain meaning of the words in cl 8, which state that the Plaintiff's fees would be capped at the level of party-and-party costs.[47]

(b) There is no illegality or impropriety arising from the Defendant's interpretation of cl 8. The payment of fees to the Plaintiff was not contingent on the Plaintiff's success in the KKS Suit. "Party-and-party costs" in cl 8 includes costs ordered to be paid by the Defendant, if costs were to have been ordered against her in the KKS Suit. The interpretation of cl 8 to impose a cap on the Plaintiff's costs according to the amount of party-and-party costs awarded does not contravene s 107(1)(*b*) of the LPA which prohibits solicitors from entering into agreements contemplating payment only in the event of success in the litigation, nor the underlying rationale that a solicitor should not be personally interested in the subject matter of the litigation. This is

45 BWS, Tab 5, p 113.

46 BWS, Tab 5, p 116.

47 BWS, Tab 5, p 116, para 90.

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supported by the examples set out in the 2012 Practice Directions. In any event, s 107 is a prohibition against the solicitor, and does not state that any fee agreement that runs afoul of it will be null, void or illegal.[48]

(c) In the event that no costs were awarded by the court, such a situation would be covered by that part of cl 8 which provides that parties are to discuss and agree on the fees payable.[49]

(d) As the Letter of Representation was drafted by the Plaintiff's lawyers, any ambiguity therein must be resolved against the Plaintiff according to the *contra proferentem* rule.[50]

29 At the first hearing on 15 May 2017, I invited parties to tender further submissions on the scope of work covered when a matter is sent for taxation of party-and-party costs, and the extent to which party-and-party taxation can include work specifically done for mediation.[51] The main purpose was to clarify the background costs framework in the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") and the LPA against which cl 8 of the Letter of Representation is to be interpreted. I note that it is undisputed that the Plaintiff did not raise or discuss the work done during the pre-writ period and for mediation at the PTC before the SAR.[52]

30 The Plaintiff takes the position that such work does *not* fall within the scope of work considered during the taxation of party-and-party costs.

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48 BWS, Tab 5, pp 116 to 118.

49 BWS, Tab 5, p 116, para 93.

50 BWS, Tab 5, p 116, para 95.

51 BWS, Tab 3, p 1, para 1.

52 BWS, Tab 3, p 56, para 5.

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(a) First, Appendix G of the Supreme Court Practice Directions which sets out the guidelines for party-and-party costs awards ("the Costs Guidelines") does not make any reference to mediation or pre-writ work.[53]

(b) Second, the court's discretion to award costs under O 59 r 2(2) of the ROC is generally confined to "costs of and incidental to proceedings in the Supreme Court or the State Courts" and therefore does not apply to costs of non-court proceedings such as mediation or arbitration proceedings (*Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) ("*Singapore Civil Procedure*") at para 59/2/1, citing *Chin Yoke Choong Bobby and another v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907 ("*Bobby Chin*") at [27]).[54]

(c) Finally, the Plaintiff argues that the court may not take into account "without prejudice" negotiations between the parties in the KKS Suit when awarding party-and-party costs. The $28,000 sum ordered by the court thus could not have included any work done by the Plaintiff on these negotiations on the Defendant's behalf.

31 The Defendant takes the contrary position that such work can fall within the scope of work considered when party-and-party costs are taxed. The Defendant points to O 59 r 31(1) of the ROC, which states that the provisions in Appendix 1 to O 59 (on costs on taxation) shall generally apply to the taxation of all costs with respect to "contentious business". "Contentious business" is defined in O 59 r 1(1) of the ROC read with s 2(1) of the LPA as "business done

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53 BWS, Tab 3, p 56, para 7.

54 BWS, Tab 3, p 58.

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in or *for the purposes of proceedings* begun before a court of justice or before an arbitrator" [emphasis added]. The Defendant thus argues that this includes work done before the commencement of proceedings.

(a) Appendix 1 to O 59 states at para 2(6) that "[w]ork done in the cause or matter includes work done in connection with the negotiation of a settlement".[55]

(b) Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) ("*Pinsler on Civil Procedure*") at p 1024 similarly supports the view that "contentious work" includes work done in the negotiations for a settlement for the purposes of O 59.[56]

(c) Finally, O 59 r 5(*c*) provides that the court, in exercising its discretion as to costs, shall take into account the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution, where appropriate.[57]

The Defendant thus contends that work done in the pre-writ period and in respect of mediation may be considered when party-and-party costs are taxed.

Issues

32 The issues arising from this application for my determination are as follows:

(a) whether the present application is procedurally improper for any of the reasons raised by the Defendant at [27] above;

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55 BWS, Tab 5, pp 103 to 104.

56 BWS, Tab 5, pp 103 to 104.

57 BWS, Tab 4, pp 90 to 91.

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(b) whether the Defendant's conduct amounted to a repudiatory breach of the Fee Agreement;

(c) how the Fee Agreement – in particular, cl 8 – should be interpreted; and

(d) whether costs incurred as a result of work done during the pre-writ period and in respect of the SMC mediation are to fall within the $28,000 in party-and-party costs ordered by the SAR, or to be taxed separately.

Whether the present application is procedurally improper

33 I begin with the Defendant's preliminary objections to the Plaintiff bringing this application under s 113 of the LPA, and it will be sufficient to address these arguments briefly.

34 Section 113 of the LPA provides in relevant part that:

> (1) No action or suit shall be brought or instituted upon any such agreement as is referred to in section 111.
>
> (2) *Every question respecting the validity or effect of the agreement may be examined and determined*, and the agreement may be enforced or set aside without suit or action on the application by originating summons of any person or the representatives of any person, party to the agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges or disbursements in respect of which the agreement is made, by the court in which the business or any part thereof was done or a Judge thereof, or, if the business was not done in any court, then by the High Court or a Judge thereof.
>
> (3) Upon any such application, if it appears to the court or Judge that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court or Judge by rule or order, in such manner and subject to such conditions (if any) as to the costs of the application as the court or Judge thinks fit.

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> (4) If the terms of the agreement are deemed by the court or Judge to be unfair or unreasonable, the agreement may be declared void.
>
> [emphasis added]

35 As mentioned at [25] above, there is no dispute that the Fee Agreement amounts to an agreement in respect of contentious business under s 111 of the LPA, and that the Fee Agreement is valid and binding upon the parties. It is clear that ss 111 and 113 apply to the Fee Agreement. Because of this, I see no need to grant any declarations to this effect, which the Plaintiff seeks in its first two prayers (see [24(a)]–[24(b)] above).

36 The key issue as to the interpretation of the Fee Agreement amounts to a "question respecting the … effect of the agreement" and therefore falls squarely within s 113(2) of the LPA. As such, it was procedurally proper for the Plaintiff to have filed an application under s 113(2). Although the interpretation issue is not explicitly stated in the Plaintiff's originating summons, it does indirectly arise from the prayer for an order that the Plaintiff be entitled to tax its costs in accordance with the terms of the Fee Agreement (see [24(c)] above). The Defendant has always clearly known what case she has to meet.

37 As the Plaintiff only seeks an order that it be *entitled* to tax its costs, rather than the actual taxation of its costs, I do not consider this to be an application for an order for taxation under s 120 of the LPA. That said, I accept that the Plaintiff's prayer for an order that the Defendant pay the Plaintiff the taxed costs forthwith (see [24(d)] above) does appear misplaced. But in any event, in view of my interpretation of the Fee Agreement, I do not think that any order to this effect will be necessary.

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38 As for the argument that the Plaintiff may not seek payment of any amount over $31,695.18, I see no justification or authority for finding the Plaintiff to be bound to the amount stated in the Bill. This is especially considering that amount in the Bill was arrived at as a result of the Plaintiff's attempt to make a compromise with the Defendant. There cannot be estoppel on these facts when the Plaintiff has made no representation that it would refrain from seeking a higher amount or an order for taxation if the Defendant did not agree to the amount under the Bill, and when there has clearly been no detrimental reliance on the Defendant's part (see *The Bunga Melati 5* [2016] 2 SLR 1114 at [12]).

39 As none of these objections by the Defendant amount to reasons for dismissing the Plaintiff's application outright, I will proceed to consider the substantive issues.

Whether the Defendant's actions amounted to a repudiatory breach of the Fee Agreement

40 I will first briefly deal with the Plaintiff's alternative argument that the Defendant's actions amounted to a repudiatory breach of the Fee Agreement. I note that this issue was not seriously canvassed by the Plaintiff, and only arose in the course of oral submissions at the second hearing when I specifically asked the parties about it. No authorities were cited by the parties on the issue of repudiatory breach.

41 The legal principles on the right to terminate a contract in view of a repudiatory breach are set out in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [91]–[99] (see also *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at

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[153]–[157]). The Court of Appeal in *RDC Concrete* identified four situations which entitle the innocent party to elect to treat the contact as discharged as a result of the other party's breach. The first situation is where the contractual term in question clearly and unambiguously provides for the right to terminate the contract upon the occurrence of certain events. The second is where the party in breach renounces the contract and clearly conveys to the innocent party that it will not perform its contractual obligations at all. The third is where the term breached is a condition of the contract. The fourth is where the breach deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract.

42 It is clear to me that none of the above situations apply to the present facts. All the Defendant did was to challenge the Plaintiff's interpretation of the Fee Agreement in their e-mail exchanges, and to assert her own. Especially considering that cl 8 of the Letter of Representation stated that the parties would discuss and agree on the fees to be charged, the Defendant's actions do not amount to a breach, let alone a repudiatory breach that would allow the Plaintiff to set aside the Fee Agreement. I therefore dismiss the Plaintiff's claims in the alternative at the outset.

Interpretation of the Fee Agreement

The plain meaning of cl 8

43 I now turn to the main issue of how the Fee Agreement – in particular, cl 8 – should be interpreted. I start with the text of cl 8, which reads:

> In view of the fact that your matter was referred to us by Mr. Lim Loo Leong, we will cap any charges in this matter (other than disbursements) at the level of party and party costs. Prior to issuing any bills, we will discuss and agree on any charges to be levied as professional costs. Any disbursements will be billed as and when incurred.

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44 In my view, a plain reading of cl 8 supports the interpretation put forward by the Defendant. The reference to a "cap" indicates a ceiling or maximum limit, which accords with the Defendant's interpretation. The Plaintiff's interpretation on the other hand does not involve the same notion of an absolute or determinable maximum amount, only the question of what basis on which the costs should be assessed.

45 The literal wording in the phrase "party and party costs" also points in favour of the Defendant's interpretation, which is simply that costs are to be capped at the amount of party-and-party costs awarded. If the Plaintiff meant that costs would be assessed on a standard basis, it is puzzling why it did not simply say so instead. One would also expect a brief explanation to the client as to what "costs on a standard basis" means, and how that relates to party-and-party costs. No such explanation was provided in the Letter of Representation. I note that party-and-party costs are usually assessed on a standard basis, but not always (see O 59 r 27(3) of the ROC). The Plaintiff's interpretation thus relies on a questionable assumption equating party-and-party costs to costs on a standard basis, and this was also not explained in the Letter of Representation.

46 While the Plaintiff raises the fact that cl 8 mentions the "usual charge-out rates" of its lawyers, I am unable to see how this detracts from the Defendant's interpretation. The hourly rates of the Plaintiff's lawyers apart from Mr Chacko are still relevant and would still be assessed as usual, up until the "cap" amount.

47 Similarly, the requirement that the parties "discuss and agree" on the charges does not advance the Plaintiff's interpretation, as it simply appears to be a courtesy extended by the Plaintiff to the Defendant as a client. As the

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Defendant argues, such a clause would also cover situations where the court has not made any order as to party-and-party costs.

48 I note also that the printed "Standard Terms of Appointment" set out on the reverse side of the Warrant to Act contains a section on "Fees" which concludes with the statement, "Where possible we will give you an estimate of our fees." Clause 8 of the Letter of Representation states that since the matter was referred to the Plaintiff by Mr Lim, charges in that matter (other than disbursements) were capped at the level of party-and-party costs. There is nothing in the standard terms on fees which is inconsistent with the interpretation that cl 8 sets out a hard cap pegged to the party-and-party costs awarded. The cap on fees is set at "the level of party and party costs" and not expressed in terms of limiting the fees to the sum chargeable "at the standard rate of assessment". The use of the words "cap" and "level" and the absence of any explanation or reference to "standard rate of assessment" make it clear that what was intended was a hard cap pegged to the actual party-and-party costs awarded.

49 The fact that the Defendant was a secretary at a law firm and had the assistance of Mr Lim does not make any difference. The solicitor is bound to provide a clear explanation of the fees chargeable to the client, and I make some further observations on this at [68]–[71] below. The Letter of Representation and the Warrant to Act form the contract between the Plaintiff and the Defendant. The provision on fees relates to the fees which the Plaintiff as solicitor is entitled to charge the Defendant as client. Party-and-party costs, on the other hand, are about the costs payable (ordinarily) by the losing party to the winning party. It is against this backdrop that my decision was reached. I shall turn to the position where no party-and-party costs at all are awarded, at [63]–[66] below.

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50 Having found the Defendant's interpretation to be consonant with the plain meaning of the Fee Agreement, I shall now consider whether there are any reasons why the Plaintiff's interpretation or any other interpretation should be preferred. I briefly note at the outset that I do not give much weight to the Plaintiff's argument that the Defendant had failed to mention her interpretation of the Fee Agreement to Mr Chacko at their meeting on 1 April 2016, and only did so later when the Plaintiff proposed rendering her an invoice of $70,000. There are many reasons why the Defendant might have initially omitted to raise this to Mr Chacko, and it does not exert much influence on my interpretation of the meaning of the Fee Agreement.

Whether the Defendant's interpretation would make the Fee Agreement unlawful or improper

Whether the Fee Agreement would amount to a contingent fee arrangement

51 The Plaintiff takes the position that if the Defendant's interpretation was accepted, the Fee Agreement would amount to a contingent fee arrangement prohibited under s 107(1)(*b*) of the LPA. I disagree.

52 Section 107(1)(*b*) of the LPA 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.

53 The Defendant, however, does not posit that costs would only be payable if party-and-party costs were awarded in her favour. Instead, she takes the position that regardless of her success or failure in the KKS Suit, she would have to pay costs capped at the amount of party-and-party costs awarded to *either party*. This does not contravene the wording or spirit of s 107(1)(*b*), which prohibits fee arrangements that are contingent on the client's success in

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the proceedings, thereby preventing lawyers from having a stake in the litigation or purchasing an interest in the client (see the 2012 Practice Directions, para 3(a)).

54 Next, r 18 of the 2015 Rules provides that:

> A legal practitioner or law practice must not enter into any negotiations with a client of the legal practitioner or law practice —
>
> (*a*) for an interest in the subject matter of litigation or of any other contentious proceedings; or
>
> (*b*) except to the extent permitted by any applicable scale of costs, for remuneration proportionate to the amount which may be recovered by the client in the proceedings.

Rule 18 of the 2015 Rules is closely similar in form and substance to r 37 in the Legal Profession (Professional Conduct) Rules 1998 (GN No S 156 of 1998, 2010 Rev Ed) ("the 1998 Rules"), which was the version of the Rules in force prior to the 2015 amendments at the time that the Letter of Representation was sent.

55 It may appear at first glance that r 18(*b*) of the 2015 Rules might be relevant, considering that the Defendant's interpretation of the Fee Agreement would make the Plaintiff's costs somewhat proportionate to (or at least capped by) the amount of party-and-party costs ordered by the court. However, a significant difference is that r 18(*b*) refers to "remuneration proportionate to the amount which may be recovered *by the client* in the proceedings" [emphasis added]. As mentioned at [53] above, the Defendant's interpretation is that the amount of party-and-party costs awarded will serve as a cap regardless of whether the costs were awarded in favour of the Defendant or the KKS side. On this view, the prohibition in r 18(*b*) would not apply.

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56 This is made clearer by the illustrations in the 2012 Practice Directions, which were incorporated into the Council of the Law Society's Practice Directions 2013 at para 58C. The 2012 Practice Directions at para 2 sets out the situation where a lawyer's costs and disbursements are limited to the party-and-party costs and disbursements "recovered from the other party", and where the lawyer's costs would be waived if no such costs are recovered from the other side. Unsurprisingly, the 2012 Practice Directions stated that such an arrangement would be improper under s 107 of the LPA and r 37 of the 1998 Rules. However, for the reasons already mentioned, the present situation is quite different from what is envisioned in the 2012 Practice Directions.

Whether there would be a conflict of interest for the Plaintiff

57 In the Plaintiff's further submissions, it advances the further argument that even if the Fee Agreement is not prohibited for being a contingent fee arrangement under the Defendant's interpretation, it would at least amount to a conflict of interest on the Plaintiff's part that is prohibited under r 22(4) of the 2015 Rules.

58 Rule 22(4) of the 2015 Rules provides that:

> Where a law practice has an interest in any matter entrusted to it by its client —
>
> > (*a*) in any case where the interest is adverse to the client's interests, the law practice must withdraw from representing the client, unless —
> >
> > > (i) the law practice makes a full and frank disclosure of the adverse interest to the client;
> > >
> > > (ii) the law practice advises the client to obtain independent legal advice;
> > >
> > > (iii) if the client does not obtain independent legal advice, the law practice ensures that the client is not under an impression that the law practice is protecting the client's interests; and

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> (iv) despite sub-paragraphs (i) and (ii), the client gives the client's informed consent in writing to the law practice acting, or continuing to act, on the client's behalf; or
>
> (*b*) in any other case, the law practice must withdraw from representing the client, unless —
>
> (i) the law practice makes a full and frank disclosure of the interest to the client; and
>
> (ii) despite sub-paragraph (i), the client gives the client's informed consent in writing to the law practice acting, or continuing to act, on the client's behalf.

This rule corresponds to r 27 of the 1998 Rules.

59 The Plaintiff essentially argues that it would have been placed in a position of conflict if the Defendant had lost the KKS Suit and had to pay costs to the KKS side, as it would have been in the Plaintiff's interests (and contrary to the Defendant's) to submit a high figure for costs before the SAR so as to receive a higher amount of fees.

60 I acknowledge the Plaintiff's point. However, this position of conflict did not actually materialise in this case, as the Defendant was awarded costs in the KKS Suit. If it became likely that the Defendant would be ordered to pay costs, it might then have been prudent for the Plaintiff to provide full and frank disclosure, advise the Defendant to obtain independent legal advice, and obtain the client's informed written consent to the Plaintiff acting for her in the costs hearing before the SAR, as stipulated under r 22(4)(*a*). But the possibility of potential conflict at the costs hearing (a small part of the Plaintiff's overall representation of the Defendant) later down the line, and requiring the Plaintiff to satisfy certain conditions to submit for costs on the Defendant's behalf in such an event, do not render the Defendant's interpretation of the Fee Agreement illegal or improper in any way.

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61 Moreover, I have some hesitations about reading r 22(4) so broadly as to include all potential conflicts regarding the amount of legal fees that may be earned from the client. For instance, lawyers often advise their clients as to whether to appeal, and it could equally be said that a lawyer would be faced with a conflict between advising his client to pursue the appeal which would generate more fees in the lawyer's own interest, or acting in the client's interests by advising him not to pursue an unmeritorious appeal. In such situations, it seems preferable to rely on other ethical obligations and provisions in the LPA and the 2015 Rules, such as the lawyer's duty to be honest to the client and to act in his interests under r 5 of the 2015 Rules. It may be too broad to read such situations as falling within r 22(4) as matters "[w]here a law practice has an interest in any matter entrusted to it by its client".

62 In short, I am not satisfied that the Defendant's interpretation of the Fee Agreement would be illegal or improper, whether because it would amount to a contingent fee arrangement or a conflict of interest. Further, as the Defendant submits, the provisions cited by the Plaintiff are ethical obligations for legal practitioners, and do not suggest that any fee arrangement in contravention of any such prohibitions would be void or unenforceable, especially not where the legal practitioner seeks to avoid the fee arrangement to his benefit. I accept that these considerations can nonetheless inform the court's interpretation of the fee agreement in the appropriate circumstances, but on these facts, I do not find the Defendant's interpretation of the Fee Agreement to be illegal or improper.

Whether the Defendant's interpretation would lead to an unreasonable result

63 The Plaintiff contends that the Defendant's interpretation of the Fee Agreement would lead to an unreasonable result in situations where the court does not award party-and-party costs. The Plaintiff cites the example that if the

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Defendant's dispute with KKS had been settled during the pre-writ period, the Plaintiff would not have been entitled to bill the Defendant any costs at all, and would have been out-of-pocket in such a situation.

64 I do not consider the outcome of the Plaintiff's cited example to be unreasonable. It is apparent under the Fee Agreement that the Plaintiff was extending the Defendant a favour and a preferential rate "[i]n view of the fact that [her] matter was referred to [the Plaintiff] by Mr. Lim Loo Leong". The Plaintiff had also agreed to waive all of Mr Chacko's fees in the matter. If the dispute had been settled even prior to the formal commencement of the KKS Suit, it is not altogether unreasonable to expect that the Plaintiff would have been willing to waive any costs (other than disbursements) that had been incurred to date.

65 Furthermore, the "discuss and agree" part of cl 8 would operate in all other situations where party-and-party costs are not awarded by the court. I add that given the absence of any order as to party-and-party costs in such situations, it seems that there would simply be no cap within the meaning of cl 8, such that costs could be taxed as usual if the parties were unable to reach an agreement after discussion.

66 For the above reasons, I do not see any reason to depart from the plain meaning of cl 8 on the basis that such an interpretation would lead to an unreasonable result.

Other observations on the interpretation of the Fee Agreement

67 In any case, even if there are any ambiguities in the terms of the Fee Agreement that cannot be resolved, the *contra proferentem* rule will apply such that a viable interpretation that is against the interests of the draftsman is to be

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preferred (see *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [51]). As the Letter of Representation was drafted by the Plaintiff, any unresolvable ambiguities should be interpreted in favour of the Defendant.

68 On the present facts, I further note that this was not an ordinary contractual agreement where parties negotiated terms at arm's length and on equal footing. The Plaintiff is a law firm that was representing the Defendant as its client. Law firms have a duty to exercise utmost scrupulousness when entering into agreements with their clients who are unlikely to have separate legal representation. This is why rr 17(3) to 17(4) of the 2015 Rules place firm obligations on legal practitioners to inform their clients at the outset about the fees for professional services to be charged, and to provide the necessary explanations so that clients can fully understand how they will be charged. These rules correspond to rr 35 and 36 of the 1998 Rules, which were in force at the time that the Letter of Representation was sent.

69 The onus should be on law firms to make their fee agreements clear and unambiguous, and it would be an improper and unsatisfactory outcome if law firms could simply take undue advantage of ambiguities in their fee agreements by insisting on their interpretation of the fees at the close of the solicitor-client relationship.

70 As stated in Jeffrey Pinsler, *Legal Profession (Professional Conduct) Rules 2015: A Commentary* (Academy Publishing, 2016) at para 17.021, "the client must be fully informed so that he is absolutely clear about the extent of his actual or potential liability for fees and expenses related to the retainer". In this regard, the learned author rightly states at para 17.023, "Where the fees are agreed between a lawyer and his client, the amount must not be increased

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unilaterally by the lawyer unless the agreement clearly provides for such an eventuality in the event that the circumstances change or new work needs to be done."

71 For example, in *The Law Society of Singapore v Joseph Chen Kok Siang* [2016] SGDT 4, the engagement provided payment of $8,000 for work to be done (as set out in the letter) and for any party-and-party costs that were payable by the defendants to be paid to the client. The matter had been set down for eight days (although the lawyer claimed that he was unaware of this). The lawyer subsequently rendered an invoice for $35,000 in legal costs. The disciplinary tribunal ruled that the lawyer had agreed to the fees and that he was not entitled to raise the amount without the agreement of the client even if the solicitor "had underestimated the time and effort required for that agreed scope of work". The tribunal's observations on terms on agreed or capped fees bear setting out:

> This case illustrates the importance of having clear fee arrangements which reflect the course of litigation, and the consequent work to be done. Clients increasingly ask solicitors for agreed or capped fees. In setting out agreed or capped fees in their engagement, solicitors should:
>
> (a) Clearly identify the stage of the work that such agreed or capped fees apply to;
>
> (b) Set out the agreed or capped fees for each stage, so that the effect of any unexpected event does not impact on the fees to be charged beyond that stage;
>
> (c) Clearly identify the circumstances in which the agreed or capped fee arrangement can be changed and the process for change and notification.
>
> (d) Use clear, simple and unambiguous language in communicating with the client, particularly in matters involving fees.

72 While I have already found in favour of the Defendant's interpretation of the Fee Agreement based on a plain reading and the surrounding context, I

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note that this finding is one that accords with public policy and the ethical obligations of lawyers.

Whether costs for pre-writ and mediation work fell within the party-and-party costs ordered

73 Having found that the professional fees payable by the Defendant to the Plaintiff under the Fee Agreement are to be capped at the amount of party-and-party costs ordered by the court, I now consider the question of what the $28,000 figure ordered by the SAR at the PTC really entails. In particular, parties disagree over whether costs incurred as a result of work done by the plaintiff during the pre-writ period and in respect of the SMC mediation are to fall within the $28,000 sum or to be taxed separately.

74 I set out the relevant parts of the SAR's notes of evidence of the PTC, where the abbreviations "DC", "PC" and "CT" stand for KKS' counsel, Ms Chan-Richard and the SAR respectively:

> DC: My client's basic position is as stated in the last PTC (ie, that the acceptance of Offer to Settle is in full and final settlement of all claims including costs) but they will be willing to pay reasonable costs.
>
> PC: Parties spoke outside and agree for Your Honour to fix costs. 1 round of discovery done and copies of documents exchanged. We submit that costs should be in the region of $50,000 (all in).
>
> CT: So high? Costs guidelines say $6,000 - $35,000.
>
> PC: I will submit $35,000 then. There were 70 documents in our List of Documents and 94 on my learned friend's List. Our disbursements is about $3,700.
>
> DC: We submit $25,000 (all in).
>
> CT: Costs fixed at $28,000 (all in) from Defendant to Plaintiff. …

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75 It is not in dispute that the Plaintiff did not raise or discuss the work done during the pre-writ period and for mediation at the PTC, or that the sum of $28,000 (which the SAR clearly stated as an "all in" figure) includes disbursements.

Work done during the pre-writ period

76 I turn to the first aspect of the dispute, *ie*, whether the SAR could have properly taken into consideration the work done by the Plaintiff during the pre-writ period, namely (i) the drafting and preparation of the writ of summons and the statement of claim; and (ii) communications and negotiations with opposing counsel.

(1) Preparation of the writ of summons and the statement of claim

77 On the work done in preparation of the writ of summons and the statement of claim, it is clear to me that such work must be capable of being taken into consideration when the court orders party-and-party costs. Indeed, the Plaintiff did not really press this argument hard during oral submissions, and its only argument is that the Costs Guidelines do not make any reference to pre-writ work. But the Costs Guidelines are certainly not meant to comprehensively set out all the work that may be taken into consideration by the court in awarding costs. Moreover, the Costs Guidelines at part III(A)(ii) specify a range for party-and-party costs for matters that are settled at the close of pleadings ($5,000 to $20,000). If work done in the preparation of pleadings cannot be considered by the court in awarding costs, it is puzzling what these suggested costs would constitute.

78 The court's discretion in awarding costs under O 59 r 2(2) of the ROC covers "costs of and incidental to proceedings in the Supreme Court". I accept

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that the costs incurred by the Plaintiff in the drafting and preparation of the writ of summons and the statement of claim in the KKS Suit are "incidental to proceedings in the Supreme Court". That said, the question of whether work done in respect of negotiations is similarly "incidental to proceedings in the Supreme Court" is a trickier matter.

(2) Communications and negotiations with KKS

79 Order 59 r 31(1) of the ROC states that Appendix 1 to O 59 (on costs on taxation) is applicable to the taxation of all costs with respect to "contentious business", subject to rr 1 to 30. "Contentious business" is in turn defined in O 59 r 1(1) of the ROC read with s 2(1) of the LPA as "business done in or for the purposes of proceedings begun before a court of justice or before an arbitrator".

80 The definition of "contentious business" in s 2(1) of the LPA is largely similar to that in s 87(1) of the Solicitors Act 1974 (c 47) (UK) ("the UK Solicitors Act 1974"), which includes the similar phrase "in or for the purposes of proceedings begun before a court or before an arbitrator". The Defendant cites *Bilkus v Stockler Brunton (a firm)* [2010] 1 WLR 2526, wherein the English Court of Appeal held at [44] that "[w]ork 'for the purposes of proceedings' may be carried out before the proceedings are begun (taking instructions, writing a letter before claim, obtaining evidence and so on)". Such work, unlike work done after the completion of the proceedings, falls within the definition of "contentious business". In the same vein, it is clear to me here that the work done by the Plaintiff in the pre-writ period amounts to "contentious business" and that Appendix 1 to O 59 of the ROC should therefore apply. Paragraph 2(6) of Appendix 1 then makes clear that "[w]ork done in the cause or matter includes work done in connection with the negotiation of a settlement".

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81 More generally, the Defendant also cites the English decision of *In re Simpkin Marshall Ltd* [1958] 1 Ch 229 ("*Simpkin*") at 235–236 for the proposition that all business "done before proceedings are begun provided that the business is done with a view to the proceedings being begun, and they are in fact begun" fall within the definition of "contentious business". While *Simpkin* preceded the UK Solicitors Act 1974, the earlier 1957 version of that Act contained the same phrase "in or for the purposes of proceedings begun before a court or before an arbitrator" (see s 86(1) of the Solicitors Act 1957 (c 27) (UK)), which the court in *Simpkin* focused on (at 233). In the present case, the negotiations with KKS were indeed in view of the KKS Suit that was later begun. Nonetheless, I do note that this proposition in *Simpkin* was strictly *obiter*, as on the unique facts of that case, no proceedings had begun in respect of the matters advised on by the solicitors apart from compulsory winding up proceedings that had already been commenced.

82 *Pinsler on Civil Procedure* does, however, clearly state the following at p 1024:

> Although Order 59 of the Rules of Court is entitled "Costs", it is primarily concerned with costs related to contentious work, which is described as "business done, whether as solicitor or as advocate, in or for the purposes of proceedings begun before a court of justice or before an arbitrator". *This includes the work performed prior to the commencement of proceedings for the purpose of the impending proceedings. Furthermore, the time which a lawyer puts into the negotiations for a settlement is regarded as being part of his court work.* If the case is settled prior to the commencement of court proceedings, the work would be classified as non-contentious.
>
> [emphasis added; internal footnotes omitted]

In the footnotes to the above passage, the learned author cited O 59 r 31(1) of the ROC, Appendix 1 to O 59 and *Simpkin*. The Plaintiff, however, contends that the above propositions in *Pinsler on Civil Procedure* were made in the context of discussing solicitor-and-client costs, not party-and-party costs, which

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are the issue at hand.[58] Indeed, in Jeffrey Pinsler, *Singapore Court Practice 2017*, Vol II (LexisNexis, 2017) ("*Singapore Court Practice*") at para 59/28/1, the learned author makes the same point in reference to O 59 r 28, which is on costs payable to a solicitor by his own client. While I acknowledge that the two English cases were both concerned with solicitor-and-client costs, and that the above passage in *Pinsler on Civil Procedure* was preceded by discussion on solicitor-and-client costs, I see no cogent reason why these principles should not apply to party-and-party costs as well. Nothing in O 59 r 31(1), Appendix 1 to O 59, or s 2(1) of the LPA on the definition of "contentious business" states that these provisions only apply when solicitor-and-client costs are being considered. Instead, these provisions are framed to apply generally to the ascertainment of costs on taxation by the court.

83 Indeed, *Singapore Court Practice* at para 59/31/3 states, with reference to O 59 r 31, that "the [taxing] registrar's objective is to ensure that the amount of costs to be paid to the receiving party, *whether in a party and party or solicitor and own client taxation*, is just and fair in all the circumstances" [emphasis added]. It goes on to explain, with reference to O 59 r 2, that the party receiving costs is only allowed the costs of and incidental to any proceedings, and cites *Re Gibson's Settlement Trusts* [1981] 2 WLR 1 at 7, in which Sir Robert Megarry V-C held that costs incurred as part of the preparation for negotiations which are relevant to the proceedings may well be incidental to the proceedings.

84 For the above reasons, I find that it would have been proper for the SAR to have taken into account all of the pre-writ work done by the Plaintiff.

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58 BWS, Tab 6, para 26.

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"WITHOUT PREJUDICE" NEGOTIATIONS

85 A corollary and significant issue that has arisen with regard to the work done by the Plaintiff in the negotiations to settle the dispute with KKS is whether the SAR could have taken into account the "without prejudice" negotiations between the parties in the KKS Suit when awarding party-and-party costs. The Plaintiff argues that in the absence of a *Calderbank* letter, *ie*, a letter marked "without prejudice save as to costs" (see *SBS Transit Ltd (formerly known as Singapore Bus Services Limited) v Koh Swee Ann* [2004] 3 SLR(R) 365 ("*SBS Transit*") at [2] and [16], referring to *Calderbank v Calderbank* [1976] Fam 93), it could not have raised the existence of these negotiations to the SAR. Accordingly, the Plaintiff takes the position that the $28,000 sum ordered by the SAR could not have included any work done by the Plaintiff on the negotiations with KKS, at least some of which was expressly stated to be "without prejudice".

86 The Plaintiff cites two cases.

(a) In *SBS Transit*, the appellant offered to settle the respondent's potential claim for damages through a *Calderbank* letter, which the respondent did not accept. The respondent also did not accept two subsequent formal offers to settle made by the appellant. The matter went to trial, and the appellant was ordered to pay the respondent damages and costs. The appellant was dissatisfied with the costs order, and contended that the respondent was not entitled to costs as the judgment sum awarded in the respondent's favour was lower than the amount that was offered in the *Calderbank* letter. The Court of Appeal found that it had no jurisdiction to hear the appeal for other reasons, but remarked at [24] that a *Calderbank* letter can be a relevant factor if the

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result of litigation is less favourable to the litigant than the offer in the letter.

(b) The second case that the Plaintiff cites is *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 ("*Shi Fang*"), a family law case the facts of which are not relevant for our present purposes. When the Court of Appeal turned to the question of costs to be awarded, it noted at [54] that the judge below had taken into account a "without prejudice" offer of $230,000 made by the husband to the wife in settlement of all of her claims, and later offers of $150,000 and $170,000 made on a *Calderbank* basis. The judge below noted that the $230,000 "without prejudice" offer was very close to the $240,000 lump sum maintenance that the wife had ultimately received. The Court of Appeal remarked at [55] that the judge below should not have taken into account the husband's "without prejudice" offer, which was inadmissible on the question of costs. On the other hand, it was permissible for the judge below to have considered the two subsequent offers made in the *Calderbank* letters which were substantially below the amount that was awarded.

87 In my view, neither *SBS Transit* nor *Shi Fang* advances the Plaintiff's argument here. *SBS Transit* simply stands for the proposition that an offer under a *Calderbank* letter can be considered by the court in its determination of the costs to be awarded. The Court of Appeal's remarks in *Shi Fang* should not be read so widely as to suggest that the very existence of negotiations between parties cannot be raised to the court in its determination of costs, even when the substance of the negotiations and the offers made by either party are kept confidential. The Plaintiff did not have to disclose any details about any "without prejudice" negotiations between the parties to the KKS Suit.

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88 I, therefore, do not accept that the SAR could not have considered costs incurred in respect of work done in respect of negotiations to settle the KKS Suit, whether or not the negotiations were conducted "without prejudice". In any event, it appears from the schedule of services rendered by the Plaintiff to the Defendant[59] that only *two* meetings out of a number of meetings and letters to KKS were stated to be "without prejudice". There was nothing before me to suggest that all of the correspondence and meetings were meant to have been "without prejudice".

Work done in respect of the SMC mediation

89 The final issue is whether the work done by the Plaintiff in respect of the mediation could have been taken into account by the SAR in awarding party-and-party costs to the Defendant. I note that this does not include the costs of the SMC mediation sessions itself, which were already borne by the Defendant by way of about $17,000 to the SMC (see [12] above). This is a close question in my view, as none of the authorities cited by the parties are illuminating.

90 The Plaintiff cites *Bobby Chin*, a case in which the respondent commenced fresh proceedings in the High Court to recover the costs of an arbitration against a company that had gone into receivership. The Court of Appeal held at [31] that the respondent should not have done so, as the proper procedure was to apply to the arbitral tribunal for an order of costs instead. First, O 59 r 2(2) of the ROC (which the respondent had relied on) does not create an independent cause of action under which a party may bring an action to sue for costs of earlier proceedings that had been awarded in his favour (at [26]). The second reason identified by the Court of Appeal at [27] may be more pertinent:

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[59] 1st affidavit of Charmaine Chan-Richard, CCR-5.

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> The second flaw in the respondents' reasoning was that a careful reading of O 59 r 2(2) would reveal that the provision is confined to "costs of and incidental to proceedings in the Supreme Court or the [State] Courts". *It therefore does not apply to costs of non-court proceedings*, such as arbitration proceedings. Order 59 r 2(2) therefore does not confer upon the courts the power to order costs of arbitration proceedings, as it may for court proceedings.
>
> [emphasis added]

91 The Plaintiff emphasises the Court of Appeal's remark that O 59 r 2(2) "does not apply to costs of non-court proceedings", which the learned authors of *Singapore Civil Procedure* interpret to include mediation and arbitration proceedings (at para 59/2/1). However, I am hesitant about whether the Court of Appeal means that O 59 r 2(2) does not apply to work done in respect of mediation under these circumstances before me.

92 The circumstances in *Bobby Chin* are distinguishable in that there were no existing court proceedings there, only arbitration proceedings. Here, in contrast, there were existing litigation proceedings in the Supreme Court, and the costs from work done in respect of the mediation to settle the KKS Suit could reasonably be described as "incidental to" these court proceedings, within the meaning of O 59 r 2(2).

93 The Court of Appeal further noted at [28] that s 6 of and the First Schedule to the Arbitration Act (Cap 10, 1985 Rev Ed) conferred upon arbitrators a wide discretion to award costs. This is not the case with mediators, who do not have any discretion to award costs. On the present facts, it appears that the parties to the KKS Suit did not make any provision in their settlement as to who should bear the costs of the work done for the mediation, and were content to simply submit the matter of costs in general to be decided by the courts. The thrust of the Court of Appeal's reasoning in respect of arbitration

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proceedings does not pertain to mediation in the same way. I would, therefore, be slow to interpret its *dicta* about "non-court proceedings" in general as being intended to apply to costs incurred from work done in respect of mediation.

94 Furthermore, having decided at [79]–[84] above that costs from negotiation work can be taken into account in the award of party-and-party costs, it would be a somewhat unsatisfactory position if certain negotiation work were excluded simply because it was conducted under the auspices of the SMC mediation. I reiterate that mediators at the SMC do not have the discretion to award costs, and that my decision does not extend to fees that are charged by the SMC or other mediation bodies. The type of work done by the lawyers when negotiating to reach settlement is still very much the same, and the reasoning and provisions on negotiation work (for example, Appendix 1 to O 59, para 2(6)) should similarly apply.

95 For completeness, I note that Defendant makes an argument based on O 59 r 5(*c*) of the ROC, which requires the court, in exercising its discretion as to costs, to take into account the parties' conduct in relation to any attempt at resolving the cause or matter by mediation, where appropriate. This rule refers to the court taking into account the parties' *conduct* in attempting to settle the case, and not the costs of the work for mediation. As such, I have not placed much weight on this rule in coming to my decision.

96 In summary, I find that all of the work done by the Plaintiff on the KKS matter, including drafting and negotiation work done pre-writ, and work done in respect of mediation work, could have been taken into consideration by the SAR when awarding party-and-party costs at the PTC. I, therefore, take the $28,000 sum awarded by the SAR to include all of these costs, including disbursements.

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97 Even if I am wrong in my finding that the SAR could take into account any of these costs, I note that the cap on charges in cl 8 was drafted very widely. I refer back to the wording of the first sentence of cl 8:

> In view of the fact that your matter was referred to us by Mr. Lim Loo Leong, we will cap *any charges in this matter* (other than disbursements) at the level of party and party costs.
>
> [emphasis added]

Clause 8 clearly refers to "any charges in this matter". It is clear that the "matter" in question refers to the entire dispute between the Defendant and KKS. The point has been made that the standard terms on fees in the "Standard Terms of Appointment" includes specific reference to the nature and duration of hearings and/or trials in court, arbitration or mediation proceedings. It is clear that the Letter of Representation and the standard terms envisaged or anticipated that a variety of types of work might be undertaken, including work to settle the matter through mediation. As noted, the provisions on fees relate to the fees which the Plaintiff as solicitor is entitled to charge the Defendant as client. Party-and-party costs, on the other hand, are about the costs payable (ordinarily) by the losing party to the winning party. The discussion of what items fall within party-and-party costs at taxation and the extent to which the items (such as pre-writ work and work done to settle a suit through mediation) could have been taken into account in and for the purposes of party-and-party taxation, is part of the backdrop against which cl 8 of the Letter of Representation is to be interpreted. I, therefore, interpret the Fee Agreement to mean that the cap of $28,000 applies to *all* charges payable, *including any charges for drafting, negotiation and mediation*.

98 Finally, cl 8 states that the cap on the charges payable by the Defendant to the Plaintiff does not include any disbursements. However, the $28,000 figure awarded by the SAR was an "all in" figure that was inclusive of disbursements.

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I, therefore, find that under the Fee Agreement, the Defendant is only required to pay the Plaintiff up to the total amount of $28,000, which includes both professional fees and disbursements.

Conclusion

99 For the above reasons, I dismiss the Plaintiff's application. The Plaintiff may only charge the Defendant up to $28,000 in professional fees and disbursements for work done in respect of the Defendant's dispute with KKS.

100 It follows that the Plaintiff is to pay the costs of this application to the Defendant, which may be offset against the amount to be paid by the Defendant in respect of the professional fees and disbursements. I shall hear the parties if they are unable to agree on the amount of costs.

George Wei
Judge

Lim Shack Keong and Anne-Marie John (Legis Point LLC) for the plaintiff;
Bachoo Mohan Singh and Too Xing Ji (Bachoo Mohan Singh Law Practice) for the defendant.

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