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

[2021] SGHC 188

Originating Summons No 454 of 2021

Between

Marisol Llenos Foley

… *Plaintiff*

And

Harry Elias Partnership LLP

… *Defendant*

JUDGMENT

[Legal Profession] — [Bill of costs] — [Professional conduct]

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v
Harry Elias Partnership LLP

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Philip Jeyaretnam JC
9, 23 July 2021

5 August 2021 Judgment reserved.

Philip Jeyaretnam JC:

Introduction

1 When a client of a law firm has paid the bill, what are the special circumstances in which the client may nonetheless obtain an order for taxation?

2 The key to answering this question is that, unique among service providers, a lawyer owes the client a duty to charge fairly and reasonably for work done. The rationale for this duty is that lawyers make their living from the role they play in access to justice. What a lawyer must do to comply with this duty will in part depend on the knowledge and experience of the client.

3 In this case, the client while well-educated and fluent in English, was certainly not used to litigation or dealing with lawyers when she engaged the defendant to represent her in her divorce proceedings.

The parties

4 The plaintiff, Marisol Llenos Foley ("Ms Marisol"), engaged the defendant law firm, Harry Elias Partnership LLP ("HEP") to represent her in divorce proceedings. While she holds a bachelor's degree in sciences and psychology, she appears to have been a homemaker since arriving with her ex-husband in Singapore more than three decades ago.[1] HEP is well-known as a law firm experienced in handling matrimonial disputes.

Background to the dispute

5 Ms Marisol signed HEP's engagement letter on 8 June 2019.[2] Divorce proceedings commenced, and her affidavit of assets and means was filed on 30 October 2019. The divorce was uncontested. Ancillaries were resolved at a one-day mediation conducted on 16 September 2020 under the auspices of the Singapore Mediation Centre ("SMC").[3] HEP's seventh and final invoice was issued on 18 January 2021. It is proceeding for taxation. The previous six had been paid by Ms Marisol.[4] HEP raised Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") s 122 as a bar to taxation in respect of the earlier six invoices.[5]

6 Ms Marisol then filed this originating summons seeking an order under LPA s 120 for taxation of four of the earlier six invoices, namely:

(a) Invoice No. 146421 - $6,730.04

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1 Affidavit of Marisol Llenos Foley (dated 10 May 2021) at p 130.

2 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 2039.

3 Plaintiff's Written Submissions at [2].

4 Plaintiff's Written Submissions at [3].

5 Defendant's Written Submissions at [4]-[5].

(b) Invoice No. 148672 - $23,451.86

(c) Invoice No. 149817 - $12,676.88

(d) Invoice No. 151764 - $8,596.38

7 In her supporting affidavit she set out the facts from which she sought to prove to the court special circumstances within LPA s 122.

Procedural history

8 After hearing counsel, I invited them to file additional written submissions in relation to whether there had been compliance with HEP's obligation under Legal Profession (Professional Conduct) Rules 2015 r 17(5), and if not whether that amounted to a special circumstance under LPA s 122. Both parties availed themselves of this opportunity.

The parties' cases

9 Counsel for Ms Marisol made four points in oral argument. First, he contended that she was an unsophisticated client who was also easily confused. She had an anxiety condition which HEP was aware of. Secondly, the fees eventually charged far exceeded the initial estimates which were never properly revised and notified to her. Thirdly, there was great pressure on her to pay the bills, and she genuinely feared that HEP would discharge themselves from acting for her if she did not pay within the 14 days stipulated. He illustrated her fragile state of mind by reference to how she had even sent a screen shot of her "Safe entry" check-in at her bank to show HEP she was making payment of their bill. Fourthly, all the invoices lacked details and particulars.

10 Counsel for HEP is himself a partner of the law firm. He is mentioned in HEP's engagement letter as part of the team representing Ms Marisol. He contended that she was not unsophisticated, given that she had a university degree and three decades before had held a managerial position in a hotel in the Philippines, where she had grown up. He also argued that her anxiety was no more than one would expect for anyone going through divorce proceedings. As for the fees charged exceeding the original estimates, he accepted that this was the case and that it would have been better practice to have informed her of revised estimates as the matter progressed. However, he argued that this did not amount to a special circumstance. In relation to itemisation of bills, he accepted that a lump sum bill was presented to Ms Marisol but relied on the established practice that bills may be issued on a lump sum basis without itemisation, unless a request for particulars is made. The cover letters to the invoices did refer to the time costs incurred, and in fact the amounts invoiced were always less than those time costs. As for pressure placed on her to pay, he averred from the Bar that HEP would not have discharged themselves if she had been late in payment. He also asserted that had queries been raised, HEP would have answered them.

11 In Ms Marisol's supporting affidavit and in her written submissions, she had also asserted that she did not know what taxation was, and that it was never explained to her by HEP. Consequently she did not know she had a right to have the bills taxed.[6] While the reply affidavit filed by HEP contained a general denial, it did not identify anyone who explained the engagement letter to her or state any belief that she knew of her right to taxation.[7]

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6 Affidavit of Marisol Llenos Foley (dated 10 May 2021) at p 4.

7 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 19.

12 It was because the question of Ms Marisol's knowledge of her right to tax the bills was not fully addressed by HEP whether in written or oral submissions that I invited parties to address it further.

Issues to be determined

13 To determine whether Ms Marisol has proved special circumstances within LPA s 122, I will consider the following:

(a) whether Ms Marisol knew or ought to have known of her right to tax HEP's bills;

(b) if not, whether that amounts to a special circumstance explaining and excusing her paying those bills without invoking or at least reserving her right to taxation.

14 Before addressing these issues, I will consider and make some observations concerning the professional rules and principles governing the relationship of lawyer and client in relation to fees. I will also consider the engagement letter signed by Ms Marisol.

Relevant professional rules and principles

15 Professional rules governing conduct in relation to fees were enacted in 1998, namely the Legal Profession (Professional Conduct) Rules 1998. They were substantially revised in 2015 (S 706/2015). I shall refer to the 2015 edition as the PCR. As the PCR uses the phrase "legal practitioner" I will adopt this phrase in this section, even though generally in this judgment I use the plain word "lawyer". The LPA adopts the names "advocate and solicitor", "advocate" and "solicitor", the last of which is also used in some judgments concerning the

legal profession. I use the name "solicitor" at some points of this judgment as well.

16 PCR r 4 sets out principles that guide the interpretation of the rules. These include two principles relevant to this matter. By PCR r 4(*b*), a legal practitioner must fulfil their duty to the client "in a manner that upholds the standing and integrity of the Singapore legal system and the legal profession in Singapore". By PCR r 4(*e*) a "legal practitioner must facilitate the access of members of the public to justice".

17 The establishment of principles to guide the interpretation of rules governing professional conduct was a conscious and judicious step that signalled both the importance of the spirit and intent of professional rules and the necessity that a legal practitioner always keep in mind the higher ideals of their profession. When practitioners focus only on the letter of professional rules they run the risk of developing ethical myopia.

18 PCR r 17, which governs professional fees and costs, itself starts with the expression of another principle, namely that a "legal practitioner must act in the best interests of his or her client, and must charge the client fairly for work done".

19 PCR r 17(2)(*a*) requires that a legal practitioner "must not undertake work in a manner that unnecessarily or improperly increases the costs that are payable to the legal practitioner". It is common for lawyers to agree hourly rates with their clients; this rule makes clear that time must not be unnecessarily or improperly incurred if charged to the client.

20 PCR r 17(3) sets out specific duties on the legal practitioner to provide information to the client on a continuing basis. It reads:

> (3) A legal practitioner must —
>
> > (*a*) inform his or her client of the basis on which fees for professional services will be charged, and of the manner in which those fees and disbursements (if any) are to be paid by the client;
> >
> > (*b*) inform the client of any other reasonably foreseeable payments that the client may have to make, either to the legal practitioner or to any other party, and of the stages at which those payments are likely to be required;
> >
> > (*c*) to the extent reasonably practicable and if requested by the client, provide the client with estimates of the fees and other payments referred to in sub-paragraphs (*a*) and (*b*), respectively; and
> >
> > (*d*) ensure that the actual amounts of the fees and other payments referred to in sub-paragraphs (*a*) and (*b*), respectively, do not vary substantially from the estimates referred to in sub-paragraph (*c*), unless the client has been informed in writing of any changed circumstances.

21 The wording of PCR r 17(3)(*c*) is a little infelicitous, as it could be read to require a request from the client for an estimate before it can be said that the lawyer must give one. Such a restrictive reading does not fit with the principles that a lawyer must facilitate access to justice and must charge fairly. At a practical level, there can be few if any consumers of services who would not want to know in advance their estimated expense, and the absence of such information undermines consumer choice of service provider. As I do not have to decide whether this rule should be interpreted more broadly for the purpose of this application, I do not reach a final view. What I would observe is that if a lawyer provides an estimate this must be done in a way that is meaningful, and if an estimate is provided it must be matched unless circumstances change and the client is duly notified of the revised estimate under PCR r 17(3)(*d*).

22 PCR r 17(5) is important. It obliges the legal practitioner to inform the client of their right to have the bill taxed as follows:

> If a client of a legal practitioner disputes or raises a query about a bill of the legal practitioner in a matter (whether or not contentious), the legal practitioner must inform the client in writing of the client's right to apply to the court to have the bill taxed or to review any fee agreement, unless the legal practitioner believes that the client knows, or reasonably ought to know, of that right.

23 Finally, I refer to the provisions in PCR r 26 concerning withdrawal from representing a client. Lawyers are entitled to withdraw from representing a client if their bills are not paid, but this is subject to the obligation contained in PCR r 26(6) that the legal practitioner must nonetheless:

> (*a*) take reasonable care to avoid foreseeable harm to the client, including, where the circumstances permit —
>
> > (i) by giving reasonable notice of the withdrawal to the client;
> >
> > (ii) by giving the client a reasonable amount of time to engage another legal practitioner to take over the case or matter; and
> >
> > (iii) by cooperating with the client's new legal practitioner; …

24 Both the letter and the spirit of the PCR are supported by the mechanism of taxation. This is an arcane word, that few lay clients understand. It refers to the procedure by which the court reviews the bills of lawyers to determine if they are fair and reasonable. Clients have the right to invoke this procedure except in three situations. One situation, not relevant to this matter, is where they have entered into an agreement respecting remuneration within either LPA s 109 (non-contentious business) or s 111 (contentious business). Nonetheless, any such agreement may be cancelled by the court if found to be unfair or unreasonable. Another is where a year has passed since the delivery of an

invoice, and the third is where the invoice has been paid. In both such situations however, taxation may be ordered if special circumstances are proved. It is the third situation, and the question of special circumstances, with which this matter is concerned.

25 Importantly, the right to have a bill taxed has been held to have statutorily qualified the common law right to defend an action brought by a solicitor on a bill: per the Court of Appeal in *Koh Kim Teck v Shook Lin & Bok LLP* [2021] 1 SLR 596 at [68] and [69]. The Court of Appeal was considering the taxation regime in the context of an appeal by a client who had failed to pay a solicitor's bills and been served with a statutory demand. In the course of holding that taxation is the exclusive recourse for a client, the court noted that "special circumstances" should not be construed narrowly, making the following comments on LPA s 122:

> 66 We also note that the 12-month time limit provided for in s 122 of the LPA is not cast in stone. An order may be made for taxation outside of the specified period if the court finds that there are "special circumstances" to so order. From the client's perspective, this provides an additional safeguard. As Coomaraswamy J held in *Kosui* at [61], there is no rigid rule as to what kind of circumstances are sufficiently special to justify taxation of a solicitor's bill. Where it is apparent that there has been overcharging, this would be a factor militating in favour of granting an order for taxation, even if the s 122 of the LPA time limit has elapsed (see *Ho Cheng Lay* at [28(b)]). Similarly, if the bills delivered are so lacking in particulars that the client is unable to make an informed decision as to whether to apply for taxation, or if the solicitor did not inform the client of the right to have the bill taxed, the court may lean in favour of ordering taxation, if this is appropriate in all the circumstances.
>
> 67 We add that for the purpose of s 122 of the LPA, the interest of the client is adequately protected if "special circumstances" is not construed narrowly against the client.

> After all, the provision is not intended to allow or encourage solicitors to take advantage of ignorant or unsuspecting clients.

HEP's engagement letter

26 An engagement letter provides the lawyer with the opportunity to fulfil their duties concerning information about costs. Naturally, when a lawyer takes this opportunity, this serves the subsidiary purpose of protecting them should the client subsequently complain about the lawyer's fees. However, the tail of protecting the lawyer from unfair complaints must not wag the dog of treating the client fairly. This reversal of priorities, unfortunately, seems to have animated the drafting of HEP's engagement letter.

27 HEP's engagement letter appears to be drawn from a standard template used by the law firm. It includes several paragraphs relating to fees. I now make some observations about the more relevant parts of the engagement letter.

28 The engagement letter includes a general statement that "legal fees will be based on hourly rates, based on the actual time spent in connection with this matter."[8] The hourly rates of members of the team, designated either by name or by rank, appear in a document described, ungrammatically, as an "Estimated Schedule of Fees"[9] attached to the engagement letter and itself also countersigned by Ms Marisol.

29 The engagement letter describes this estimate in multiply guarded language:[10]

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8 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 2033.

9 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at pp 2040 to 2042.

10 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 2033.

> At your request, we may provide an estimate of our fees as an indication of our likely charges for handling your matter, based on the information known to us at the time the estimate is given. An estimate may be revised and is not binding upon us. Any indication of a likely fee is an estimate only and may change as matters progress and the extent of the work becomes apparent or you change the scope of your instructions.

30 I would note that this rather awkward wording could be read as seeking to limit the effect of PCR r 17(3)(*d*) which obliges the legal practitioner to "ensure that the actual amounts of the fees … do not vary substantially from the estimates … unless the client has been informed in writing of any changed circumstances". However, in my view it is not open to a legal practitioner to limit the operation of the PCR through the engagement letter; rather the engagement letter should be one of the means by which the legal practitioner complies with their professional obligations.

31 As for the Estimated Schedule of Fees, it appears to be a general schedule. There is no notation to relate what would be relevant to Ms Marisol's engagement. The closest entries are one for a "[c]ontested divorce and ancillary matters that are resolved at Court mediation" for which the estimate was about $10,000, and another for "[c]ontested divorce that is resolved at Court mediation and contested ancillary matters that are resolved at Ancillary Matters Hearing" for which the estimate was about $30,000 to 40,000.[11] To recap, in this matter the divorce was uncontested and the ancillaries were resolved at an SMC mediation.

32 HEP's engagement letter also provided for the consequences of non-payment of bills. It warned the client "[i]f you do not pay the bill(s) rendered in accordance with the agreement herein, we are at liberty to stop work on your

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[11] Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 2041.

matter(s) and to discharge ourselves from further acting for you. Rights may be lost if this happens, and we accept no liability for such loss."[12]

33 While it is right to inform clients that non-payment may result in discharge, it is not right to warn of rights being lost as a result and for which the law firm will not be liable. This is language that seems designed to deter clients from questioning bills before paying them. It also overlooks the obligation under PCR r 26(6) to take reasonable care to avoid foreseeable harm to the client when withdrawing from representing them, including where bills have not been paid. In fact, it could be said to be misleading of what the client's rights are.

34 This is compounded by the language used on the one occasion when taxation is referred to. HEP's engagement letter said "[n]otwithstanding that you may be able to apply to tax our bill pursuant to the provisions of the Legal Profession Act, you agree that any disputes on our bills shall be resolved by referring such disputes to the Law Society of Singapore for mediation/arbitration under Cost Dispute Resolve."[13]

35 First, the word "tax' is not explained. It is not plain English at all. It is legalese. To comprehend it requires a legal background, contrary to the claim made in HEP's reply affidavit[14] about the engagement letter. One would expect the use of the word to be followed immediately with an explanation in plain English, along the lines that taxation is a procedure available to the client by which the court would review the bill to determine whether it is fair and reasonable.

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12 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 2034.

13 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 2038.

14 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 20.

36 Secondly, while mediation under the Law Society's Cost Dispute Resolve scheme should rightly be mentioned and offered to the client, this should be presented only as an option. The Cost Dispute Resolve scheme, while commendable and useful, should be an option mutually decided upon when a dispute about fees arises. A law firm should not ordinarily seek at the time of engagement to replace the client's right to taxation of bills with an alternative process for dispute resolution. To the extent an engagement letter seeks to replace the right to taxation, this would be subject to the court's scrutiny for fairness and reasonableness, given the fundamental principles that lawyers must act in the best interests of their clients and charge fairly for work done. HEP did not in these proceedings seek to rely on this clause as an exclusive choice of the Law Society's Cost Dispute Resolve scheme.

37 Thirdly, an important point is missing. The client should be clearly informed that it is possible to pay a bill and reserve the right to have it taxed.

38 The short point is this. A client is not expected to engage another law firm to review the engagement letter of the chosen law firm. The client, especially a lay client seeing a lawyer for the first time, is entitled to rely on the lawyer's duty to act in their best interests. It is a relationship of trust and confidence, and that extends to how fees are estimated and how the client's rights are explained in the process of entry into the engagement. An engagement letter that fulfils the spirit of the PCR should include a meaningful estimate of fees, the basis on which fees will be charged and a clear explanation of a client's right to tax bills.

Issue 1: Did Ms Marisol know or ought she to have known of her right to taxation?

39 Ms Marisol said in her supporting affidavit that she did not know of her right to taxation. She explained that she had not understood the word "tax" that appeared in paragraph 40 of HEP's engagement letter:[15]

> 13. As I was focused on getting on with my divorce and trusted HEP entirely, I did not scrutinise every single paragraph of the Engagement Letter in detail. On the contrary, I had expected a firm such as HEP to act in my best interest by not overcharging me.
>
> 14. After more than 30 years of being a housewife and being at the receiving end of my ex-husband's regular physical and verbal abuses, my self-confidence had been sapped. Further, as a foreigner without family support in Singapore, I felt completely helpless and alone throughout the ordeal.
>
> 15. My ability to understand legalese or technical terms in the Engagement Letter is limited and exacerbated by the stress that I was going through. As far as I can recall, HEP did not explain the terms of the Engagement Letter clause by clause to me, in particular, clause 40 which deals with taxation.
>
> 16. While I understand the gist of the Engagement Letter, looking back clause 40 (on "taxation") or its effect did not particularly strike me at that time and nor do I recall paying much attention to it.
>
> 17. I did not understand the meaning of the word "tax" in clause 40. My understanding of the word "tax" was limited to the usual meaning of the word, namely taxation by the tax authorities. Further, I was focused on engaging HEP as my lawyers. As such entering into a "dispute" with HEP (as clause 40 contemplated) was the last thing on my mind.
>
> 18. I did not know then that to "tax" a bill means seeking the court's aid to review the amount billed by HEP. As I was never provided with the details of the work done (until recently),

[15] Affidavit of Marisol Llenos Foley (dated 10 May 2021) at pp 3 to 4.

> I was left to guess each time I received a bill and trusted HEP not to overcharge me. I was wrong.

40 HEP's reply affidavit did not expressly deny that their engagement letter was not explained to Ms Marisol. HEP did not suggest that any part of it was explained, nor identify any lawyer who did so. While the affidavit contained a general denial of Ms Marisol's allegation, this is a point on which, if HEP disagreed, it was incumbent on it to say so clearly, with particulars.

41 I accept Ms Marisol's evidence that she did not know about her right to tax the bills.

42 Further, when Ms Marisol raised queries about the bills, HEP did not inform her of her right to tax the bills. HEP has contended that she neither disputed nor raised queries on the bills, and hence PCR r 17(5) was never engaged.[16] This is not correct. For example, when Ms Marisol was sent Invoice No. 150435 on 15 June 2020 she immediately asked what the bill was for, given that there had been no activity in the past three months.[17] In HEP's response, they even assured her that if she had "other queries" she could ask them, thus recognising that her email was indeed a query about the bill. Another example is her request for a breakdown of the charges when she was sent Invoice No. 150838.[18] A request for a breakdown is a query about a bill.

43 As they had only made a passing reference to taxation in their engagement letter and had never explained this right to her, there was no reason for the lawyers in HEP to believe that Ms Marisol knew or ought to have known

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16 Defendant's Further Submissions at [5].

17 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at pp 2069 to 2070.

18 Reply Affidavit of Gill Carrie Kaur (dated 4 June 2021) at p 2072.

of her right to tax the bills. Moreover, HEP's reply affidavit contains no statement of any such belief. I conclude that HEP did not comply with PCR r 17(5). I hold that Ms Marisol neither knew nor ought to have known of her right to tax the bills.

Issue 2: Has a special circumstance been proved?

44 The special circumstance must explain and excuse the fact that Ms Marisol paid the bills without reserving her right to tax them (see *Kosui Singapore Pte Ltd v Thangavelu* [2015] 5 SLR 722 at [63]). That she did not know of her right to tax them is a sufficient excuse. If one does not know of a right, one can hardly be faulted for not exercising it. That the taxation regime is the only way a client may challenge a bill makes it all the more important that a solicitor must clearly and in plain English inform the client of the right of taxation.

45 I therefore accept and hold that Ms Marisol has proved a special circumstance such that, notwithstanding her payment of the bills, she may obtain an order for taxation of those bills.

46 I also add that the evidence supports three other special circumstances:

(a) HEP did not comply with PCR r 17(5);

(b) Ms Marisol was in an anxious state of mind, and, being concerned about being left in the lurch by HEP should she not pay the bills within the stipulated period of 14 days, paid them in haste;

(c) The bills, taken together with their accompanying cover letters, were lacking in particulars, both in terms of the work done to date and

> in how each bill related to the anticipated overall bill, whether by reference to an original estimate or a revised estimate.

47 The last point highlights an important principle. The client upon receipt of a bill should be able to understand clearly whether the original estimate holds. This may require additional explanation in the cover letter.

Conclusion

48 Much of HEP's reply affidavit defends the reasonableness of their fees. That is not a matter for this application. It is a matter to be considered at taxation. But I do make one observation. Under LPA s 120(3) it is always open to a lawyer to consent to taxation, even when the bill has been paid. With the lawyer's consent, the registrar may tax the bill without any order for taxation being made. Lawyers facing questions from clients over their bills should not only inform them of the right to taxation, but as a matter of fairness and prudence also offer to have them taxed. Lawyers should take to heart the wise words of Chief Justice Chan Sek Keong in *Law Society of Singapore v Andre Ravindran Saravanapavan Arul* [2011] 4 SLR 1184 at [33]:

> All solicitors should act on the basis that they can have their bills of costs taxed under the law, and they must remember that many clients do not know this. Accordingly, they have an obligation to inform their clients of this option, and they fail or omit to do so at their peril. A solicitor who offers to have his bill

> of costs taxed is, in our view, unlikely to have the frame of mind or intention to overcharge his client.

49 I make an order for taxation under LPA s 120. I will hear counsel both on any directions or conditions to be included in the order and on the costs of this application.

Philip Jeyaretnam
Judicial Commissioner

Yow Choon Seng Morris and Yau Yin Ting Xenia (Infinity Legal LLC) for the plaintiff;
Koh Tien Hua and Chan Qi Ming Eugene (Harry Elias Partnership LLP) for the defendant.
