Wee Soon Kim Anthony v Chor Pee & Partners
[2005] SGCA 53

Case Number : CA 43/2005

Decision Date : 06 December 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; V K Rajah J; Yong Pung How CJ

Counsel Name(s) : Appellant in person; Alvin Yeo SC (Wong Partnership), Andre Arul and Ling Leong Hui (Arul Chew and Partners) for the respondent

Parties : Wee Soon Kim Anthony — Chor Pee & Partners

Legal Profession – Remuneration – Solicitor proposing legal fee to client – Client asking solicitor to cap fee on global basis – Solicitor reverting with revised fee on lump sum basis – No reply by client to revised proposal – Solicitor petitioning for leave to tax bill of costs – Client resisting application on ground that agreement on legal fee existing – Whether any agreement between solicitor and client on legal fee payable – Sections 111(1), 111(2) Legal Profession Act (Cap 161, 2001 Rev Ed)

6 December 2005

Chao Hick Tin JA (delivering the judgment of the court):

1 The present appeal concerned the question of whether there was an agreement between a client and a solicitor as to the fee payable in connection with a contentious matter which the solicitor was to handle on the client's behalf. The appellant in this appeal was the client and the respondent, the firm in which the solicitor was the senior partner. The judge below held that there was no agreement between the parties as to the fees due to the solicitor and that the respondent was entitled to have its bill of costs taxed. We heard the appeal on 26 October 2005 and thought otherwise. We thus allowed the appeal and held that there was an agreement that the solicitor would charge the appellant a lump sum of $275,000 for attending to the contentious matter. We now give our reasons.

The facts

2 Sometime in March 2003, the appellant, Anthony Wee Soon Kim ("Wee"), approached the solicitor, Lim Chor Pee ("Lim"), to take over and handle the on-going action in Suit No 834 of 2001 ("S 834" or "the action" as may be appropriate), which was then part-heard. Lim agreed to the request. Before this, the action was first handled by M/s Engelin Teh & Partners and then by M/s Goh Aik Leng & Partners. In S 834, Wee was the plaintiff and was suing his banker for misrepresentation, breach of duty and/or negligence in relation to losses which he suffered on account of some foreign exchange transactions.

3 The trial of S 834 was resumed on 23 June 2003 and judgment was delivered on 8 December 2003, when Kan Ting Chiu J dismissed the action. Subsequently, Wee unsuccessfully appealed (Civil Appeal No 1 of 2004) to this court.

4 We should add that in addition to acting for Wee in the appeal, Lim had also acted for Wee in three other ancillary matters which arose from S 834. They were:

a. the bill of costs of Thomas Sim, a witness in S 834;

b. a complaint by Wee to the General Council of the Bar of England and Wales against Gerald Godfrey QC, whom Wee had thought of engaging to assist in S 834; and

c. bill of Costs No 112 of 2003, which concerned the costs order made in Civil Appeal No 114 of 2002, which was Gerald Godfrey QC's appeal against the decision of the High Court refusing to admit him as an advocate and solicitor for the purpose of acting for Wee in S 834.

We should, at this juncture, also add that before this court, Wee did not seriously dispute that Lim was entitled to have the fees due to him in respect of CA 1/2004 and the three ancillary matters taxed by the Registrar.

5 Soon after Lim agreed to act for Wee in S 834, they discussed the question of fees. At 4.45pm on 2 April 2003, Lim sent Wee an e-mail with an attachment ("the 4.45pm e-mail"). It was assumed by the parties at the court below that the attachment to the e-mail was the following:

Fee Agreement between ASK Wee and Chor Pee & Partners

Global Brief Fee including all court attendances	$275,000.00
Payable as follows:	
1st instalment upon confirmation of retainer	$ 50,000.00
2nd instalment upon filing Notice of Change of Solicitors and SIC to amend Statement of Claim on or before 30 April 2003	$ 50,000.00
3rd instalment on or before 15 May 2003	$ 50,000.00
4th instalment on or before 30 May 2003	$ 50,000.00
5th instalment on or before 15 June 2003	$ 50,000.00
6th instalment on or before 30 June 2003	$ 25,000.00
Total	$275,000.00

This attachment will be referred to hereinafter as "the Attachment".

6 Some 25 minutes later, Wee replied, also by e-mail ("the 5.10pm e-mail"), to Lim in these terms, and it is necessary that we set out the two paragraphs.

I thank you for your proposal. Please let me know if you [are] prepared to cap your professional fees and not on a per day basis because one of Davinder Singh's object is to take days over cross examination and if things are allowed to go his way we will never be able to finish the case.

In the circumstances, I will be comfortable if we cap costs on a global basis.

7 At 7.12pm on the same day, Lim responded by e-mail to Wee's request for a lump sum fee in handling S 834, stating "[h]erewith revised fee agreement on a lump sum basis up to conclusion of

trial including any settlement or discontinuance but excluding all court fees and disbursements" ("the 7.12pm e-mail"). It was common ground at the trial that this "revised fee agreement" was never sent to Wee (see [2005] 3 SLR 433 at [52]).

8 On the next day, the respondent issued an invoice to Wee for the sum of $50,000 which was duly paid. On the following dates, further invoices were issued by the respondent to Wee for various sums in relation to the action, all of which were paid by Wee:

8 April 2003	$30,000
16 April 2003	$30,000
28 April 2003	$35,000
6 May 2003	$25,000
14 May 2003	$30,000
26 May 2003	$ 3,000
27 May 2003	$20,000
2 June 2003	$33,000

9 Lastly, there was the invoice dated 12 June 2003, where an entire account of previous payments made by Wee to the respondent was given and where a balance of $34,733 was claimed. This sum was also paid up by Wee. As this invoice was of some significance in our evaluation of the evidence to determine whether there was an agreement between the parties for a lump sum fee in handling S 834, we shall set it out *in extenso*.

Re: Suit No 834 of 2001R	Disbursements	Costs
To our fees		$275,000.00
	GST	$ 11,000.00
		$286,000.00
Paid to-date		$253,000.00
		$ 33,000.00

Disbursements

1.	Record of proceedings	$ 37.50
2.	Oath fees	$ 90.00
3.	Book on capital markets	$ 80.00
4.	Filing fee for Order of Court	$ 109.50

5. Anticipated filing fees

(within next few days) for

Appellant's Case, Record of

Appellant's Case and Core Bundle $1,000.00

$1,317.00

6. Photocopying, fax, phone

and courier charges, transport

and miscellaneous incidental $ 400.00

GST $ 16.00

$ 416.00

$1,733.00 $33,000.00

$34,733.00

10 Subsequently, there were communications between the parties as to the fees payable by Wee to Lim in relation to CA 1/2004. Wee also agreed with Lim that in connection with the preparation of the Appellant's Case for the appeal, a retired member of the Judiciary now in practice ("the consultant") would be consulted. The fees charged by the consultant, inclusive of the Goods and Services Tax (GST), came up to $36,771.00. On 11 March 2004, Lim forwarded to Wee the consultant's invoice for the balance of $11,771 for payment. On 18 March 2004, Wee's personal assistant ("PA") faxed a note to Lim stating "Mr Wee feels that [the consultant] did all the work. How about Mr Lim contribut[ing] towards the costs". Understandably, Lim was peeved by this remark as he responded to the PA, stating that the consultant's draft was "based substantially on the draft Appellant's Case which [Lim] prepared in [December 2003] together with the discussions [Lim] had with [Wee]". Lim further added that if "Mr Wee does not appreciate [Lim's] work – he need not pay [Lim and Lim] will stop all further work".

11 It was quite clear that Wee wanted Lim to continue to handle the appeal. Thus, on 12 April 2004, Lim wrote to Wee in these terms:

> For the avoidance of doubt, we would like to confirm the following terms of our retainer:
>
> 1. As regards Civil Suit No 834 of 2001R in respect of which we were instructed to take over in the middle of the trial, the agreed fee was $275,000 (which we have received).
>
> 2. Our retainer for the appeal is $75,000 + GST (excluding disbursements) provided that if party and party costs are recovered, we will be entitled to render a further bill to the extent of such costs (less costs previously incurred by you).
>
> 3. The Written Submissions will be prepared by us in consultation with [the consultant] who will approve the final draft (after considering your input).

4. As counsel, my oral contribution will be based on the Appellant's Case and the Written Submissions.

5. Kindly confirm the above by signing and [returning] to us a copy of the letter.

12 Wee did not confirm as requested. Instead, he wrote on that part of the letter on which his confirmation was requested the remark "No!!". There is another version of this document with the remark "No!! for what". The parties did not seem to say which was the correct version. The judge below seemed to have taken the remark "No !! for what" to be that communicated to Lim (see [7] *supra* at [27]).

The decision below

13 The judge below held that in view of the fact that the attachment to the 7.12pm e-mail, which was to set out the lump sum fee, was never communicated to Wee, and that there was no further communication from Wee, there could not have been any agreement between Wee and Lim on a lump sum fee in the handling of S 834.

14 The judge also felt that her views on the 7.12pm e–mail were fortified by Wee's subsequent conduct and here, she referred to the letter of 12 April 2004 (see [11] above) where Wee, on being requested to confirm the matters stated therein commented "No!! for what". She said (at [7] *supra* [53]) that the remark could only be "reasonably interpreted to mean he disagreed with the entire contents of the letter".

Statutory provisions on fees

15 Section 111 of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the LPA") governs any agreement between a solicitor and client as to costs for contentious matters. It reads:

> 111. — (1) Subject to the provisions of any other written law, a solicitor or a law corporation may make an agreement in writing with any client respecting the amount and manner of payment for the whole or any part of its costs in respect of contentious business done or to be done by the solicitor or the law corporation, either by a gross sum or otherwise, and at either the same rate as or a greater or a lesser rate than that at which he or the law corporation would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to the provisions and conditions contained in this Part.
>
> ("s 111(1)" and "s 111(2)" respectively)

16 To better appreciate the scope and purport of s 111, it is necessary to understand the common law position as well as the development of the English statutory provisions with regard thereto. It should be noted that s 111(1) is entirely permissive, enabling a solicitor to make an agreement with a client in writing in relation to costs for a contentious matter.

17 Statutory provisions governing fees due to a solicitor would appear to have been first introduced in England by s 4 of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict c 28) ("the 1870 Act"). The state of the common law at that point was alluded to by Fletcher Moulton LJ in *Clare v Joseph* [1907] 2 KB 369 at 376:

> At that date [*ie*, as at the coming into operation of the 1870 Act] agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense. But when it appeared that the agreement was favourable to the client, the Courts often held the solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind.

18 Section 4 of the 1870 Act read:

> An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated …

19 In *Clare v Joseph*, the English Court of Appeal rejected the argument that, pursuant to s 4, no agreement as to remuneration between solicitor and client was binding unless it was in writing. Lord Alverstone CJ explained (at 374):

> [I]f the Legislature had been considering the question from the point of view of affording protection to the solicitor, it would have used words importing that an agreement in writing might be made between a solicitor and his client, and not merely words which say that a solicitor may make an agreement in writing. The scheme of the section is that it empowers a solicitor to enter into such an agreement with his client, and this he might indeed have done before the Act, and occasionally he might have been able to enforce it; when this agreement has received the client's signature it comes within the machinery provided in the later part of the Act. In my view the section made it necessary that an agreement should be in writing if it bound the client to pay the solicitor on a different scale of remuneration from the ordinary scale.

20 Fletcher Moulton LJ was also of the same view when he said, at 376, that s 4 was:

> a purely enabling, and not a disabling, section, and the Court would not, unless forced to do so, construe such a section so as to take away or alter powers already in existence, except indeed by extending them.

21 Therefore, in *Clare v Joseph*, which concerned a verbal agreement to take remuneration at a lesser rate than the solicitor would otherwise have been entitled to charge, the English Court of Appeal held that the solicitor could not set up the defence that the agreement was not binding upon him because it was not in writing. Similarly, in *Gundry v Sainsbury* [1910] 1 KB 645, an oral agreement on remuneration between a solicitor and a client was given effect to at the instance of the party sued by the client.

22 Furthermore, in *In Re R G Thompson ex parte Baylis* [1894] 1 QB 462 and *Bake v French (No 2)* [1907] 2 Ch 215, it was held that a document signed by the client alone was sufficient to satisfy s 4 of the 1870 Act. It was not absolutely necessary to have the solicitor's signature as well.

These two cases disapproved of the decisions of Fry J in *Re Raven, Ex parte Pitt* (1881) 45 LT 742 and Pollock B in *Pontifex v Farnham* [1892] 62 LJQB 344 respectively, which held that for an agreement to come within s 4, it must be signed by both solicitor and client.

23 The aspect of non-contentious business was taken out of s 4 of the 1870 Act by the Solicitors Remuneration Act 1881 (UK) ("the 1881 Act"). The Solicitors Act 1932 (UK) ("the 1932 Act") repealed the 1870 Act and the 1881 Act but maintained the separation of the two classes of business, contentious and non-contentious. The 1932 Act was replaced by the Solicitors Act 1957 (UK) ("the 1957 Act"), which again maintained the separation. Section 59 of the 1957 Act, which governed contentious business, provided:

> A solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business … providing that he shall be remunerated either by a gross sum, or by salary, or otherwise, and at either a greater or a less rate than that at which he would otherwise have been entitled to be remunerated.

It will be noted that the phraseology used in s 59 was similar to that of s 4 of the 1870 Act.

24 In *Electrical Trades Union v Tarlo* [1964] Ch 720, Wilberforce J reiterated the point made in *Clare v Joseph* that s 59 (and also s 57 which related to non-contentious business) of the 1957 Act were "superimposed upon the common law". There, he said (at 731) that:

> [S]ection 59 preserves the position as established by *Clare* v. *Joseph*, and … a client may take advantage of a special agreement in contentious business even though that agreement is not in writing.

25 Thus, in *Cordery's Law Relating to Solicitors* (Butterworths, 8th Ed, 1988), the learned author at pp 156–157 summarised the common law position with regard to contentious matters as follows:

> The common law enables a client to enforce a parol or written agreement which is favourable to himself, e.g., an agreement by the solicitor to charge nothing at all or less than his ordinary remuneration. Thus, it was a good defence to an action by the solicitor that he had agreed to charge nothing for his trouble, or to charge costs out of pocket only, or that the costs out of pocket should not exceed a limited sum. …
>
> The common law does not draw any distinction between written and unwritten agreements where the client is seeking to enforce his rights, and it is doubtful if it does so in the case of the solicitor, for whilst a special agreement (whether in writing or not) was not binding on the client so as to preclude the delivery and taxation of a proper bill, in the absence of a plea of no signed bill delivered, the solicitor could recover in an action.
>
> Thus the common law rights may still be of importance, not only because of the client's right to rely on an oral agreement but also because his opponent in litigation (since costs inter partes are awarded as an indemnity) may desire to do so.

26 It will be apparent that the phraseology of s 111(1) of the LPA follows very closely that of the English provisions. It is thus an enabling provision and is not intended to replace the common law. Indeed, s 111(1) essentially reflects much of the common law position. In a sense, it can be said that the provision is for the benefit of the solicitor as it means that upon the solicitor ensuring that the written agreement has the signature of the client, and in the absence of there being any vitiating

factors, the solicitor will be able to enforce the agreement against the client. In another sense, one can also say that s 111 was enacted to protect the client, so that no agreement, not even a written agreement, would bind the client unless the client signified his consent thereto by his signature. However, the absence of the solicitor's signature would not preclude the client from enforcing it against the solicitor. Section 111(2) enshrines that position. Accordingly, Tan Yock Lin in *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998) states at p 685:

> Section 111 has nothing to do with validity but is concerned only with enforceability by the solicitor. Being an empowering section, it does not affect the position of a client who sets up an agreement as to costs. Before the enactment of section 111, a client could enforce an oral agreement as to costs against his solicitor and that remains true after the enactment.

In other words, a client can enforce an oral agreement against a solicitor but not the other way round.

The present case

27 In the present case, it was the client, Wee, who asserted that there was in existence an agreement between the parties on fees in relation to S 834. Thus, the absence of a written agreement bearing the signatures of either or both of the parties was not material. The judge below had, quite rightly, approached the question as to the existence of an agreement purely on the common law basis.

28 While the parties had assumed that the Attachment was the document that was enclosed in the 4.45pm e-mail, we entertained considerable doubt whether that could, in fact, be the case. It would have been totally senseless for Wee to send out the 5.10pm e-mail to ask for a lump sum fee if the Attachment was indeed the document attached to the first e-mail. The contents of the Attachment would not have evoked the sort of request made in the 5.10pm e-mail. If the Attachment indeed came with the 4.45pm e-mail, Wee would have either agreed to it or, if he did not agree, asked for a reduction of the proposed global fee. To our minds, something was clearly amiss in the assumption that the Attachment came with the 4.45pm e-mail. If the parties had carried out a more thorough search, the correct attachment to the first e-mail (*ie*, the 4.45pm e-mail) might have been uncovered.

29 Be that as it may, while there was no reply to the 7.12pm e-mail, the fact of the matter was that from 3 April 2003 to 12 June 2003, various sums were invoiced by the respondent and paid by Wee which in total added up to the sum of $275,000 (see [9] above). Of particular significance was the following part of the 12 June 2003 tax invoice:

> Re Suit No 834 of 2001R
>
> To our fees $275,000

There was no assertion or indication that the payments made, and the final payment to be made, were towards account of fees due to the respondent which were yet to be determined. The way in which the various items were set out in the invoice, inclusive of GST of $11,000 and disbursements, showed that it was a final invoice in relation to S 834. The actions of the parties and the invoice clearly evidenced that there was an agreement for $275,000 as the lump sum fee due to the respondent in respect of S 834.

30 The next communication of significance was the letter of 12 April 2004 written by Lim to Wee (see [11] above). The respondent had relied on the remark scribbled by Wee on this letter to contend that there was no agreement. What seemed to us to be of utmost relevance was the first paragraph which stated "As regards Civil Suit No 834 of 2001R … the agreed fee was $275,000 (which we have received)". Of critical importance were the words "agreed fee" and the fact that the fee of $275,000 had already been paid. The remark made by Wee in response to the request for confirmation could hardly have meant that he disagreed with the "agreed fee" of $275,000 which he had already paid in accordance with the tax invoice of 12 June 2003. The remark obviously had relevance only in relation to items 2 to 4 of the letter. Wee obviously did not see the need to give any confirmation. After all, even in relation to the fee for S 834, he had not given any written confirmation. His confirmation came in the form of action: in paying what he had agreed. By April 2004, S 834 was over and done with, and the respondent had been paid. It would make no sense to impute that Wee intended by his remark to question item 1 of the letter. To give this remark the sense that Wee meant to reject even this item would be completely unwarranted.

31 For the reasons above, we respectfully disagreed with the judge below who held that there was no agreement between Wee and Lim as to the fee for handling S 834. Accordingly, we allowed that part of Wee's appeal with costs. The security for costs was ordered to be refunded to Wee.