IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 188

Suit No 964 of 2009
(Assessment of Damages No 6 of 2016)

Between

1. Columbia Asia Healthcare Sdn Bhd
2. PT Nusautama Medicalindo

… *Plaintiffs*

And

1. Edward Hong Hin Kit
2. Albert Hong Hin Kay

… *Defendants*

JUDGMENT

[Damages] — [Assessment]

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v
Hong Hin Kit Edward and another

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Woo Bih Li J
26–28 April; 8, 22 July 2016

9 September 2016 Judgment reserved.

Woo Bih Li J:

Introduction

1 Suit No 964 of 2009 ("Suit 964") was an action by Columbia Asia Healthcare Sdn Bhd ("Columbia") and PT Nusautama Medicalindo ("PTNM") against Edward Hong Hin Kit and Albert Hong Hing Kay (collectively "the Hongs"). There were also two other related suits, *viz*, Suit Nos 861 and 862 of 2008. All three sets of proceedings were consolidated and heard together. The proceedings arose out of an agreement by Columbia to buy shares in a Singapore company, Universal Medicare Pte Ltd ("UMPL") which in turn owned shares in an Indonesian company, *ie*, PTNM, which owned a hospital erected on land in Medan, Indonesia. On 10 April 2014, I issued my judgment ("the Judgment") in respect of the three proceedings. For Suit 964, I granted various reliefs to Columbia against the Hongs. The one that is relevant for present purposes was an order I made granting Columbia judgment against the

Hongs for damages to be assessed for the reasonable costs of taking the necessary measures to remove a charge from the land title certificate. This charge was referred to as "the MEC charge". MEC was the acronym for a Singapore company Medical Equipment Credit Pte Ltd which had lent money to UMPL and its loan was secured by the MEC charge.

2 The Hongs appealed to the Court of Appeal against various decisions of mine in the proceedings including the above particular order for an assessment of damages to be paid by them for the reasonable costs of removing the MEC charge. They failed in their appeal against this particular order.

3 The present hearing is for the assessment of damages which I had ordered. In the assessment, Columbia was claiming to recover legal costs incurred and paid to four law firms:

S/N	Name	Sum	(US$)
1	Kusnandar & Co ("Kusnandar")	US$183,261.90	183,261.90
2	MC Kaban & Associates ("MC Kaban")	IDR2,000,000,000	207,684.00
3	Rajah & Tann ("R&T")	S$18,097.30	13,183.77
4	Alan Lim & Salawati (later known as Tengku Mohamed & Alan Lim) ("TMAL")	MYR44,104	14,466.00
		Total:	**418,595.67**

4 The invoices from three of the law firms were addressed to and paid by PTNM. The invoices from TMAL were addressed to Columbia but apparently paid by PTNM.[1]

Issues

5 The Hongs raised many issues in the assessment. I set out the main issues below.

6 First, they submitted that the order allowed Columbia to recover the reasonable costs incurred by Columbia itself to remove the MEC charge. In other words, it did not allow Columbia to recover costs incurred by PTNM to remove the MEC charge. As some of the removal costs claimed in the assessment were incurred by PTNM, Columbia was not entitled to recover such costs, even if reasonably incurred, from the Hongs.

7 Second, the Hongs submitted that insofar as six invoices (out of 16) from Kusnandar, an Indonesian law firm, were not originals but copies, they should not be admissible in evidence and that the claim based on these six invoices must be rejected outright.

8 Third, the Hongs submitted that even if all the invoices (including the six invoices) and various Statements of Hours were admissible in evidence, the contents thereof are hearsay evidence and ought to be rejected as the maker of the documents were not called to give evidence.

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[1] Transcript (26/4/2016) p 21.

9 Fourth, the Hongs contended that the total amount claimed by Columbia was manifestly excessive and unreasonable. This point covers both the steps taken by various lawyers and the amount charged by them.

The scope of the order on assessment of damages

10 I will first address the scope of my order. The order did not specifically state that Columbia could claim the removal costs only if Columbia had incurred the costs. The Hongs were interpreting the order to have that constraint. On the other hand, it is also true that the order did not specifically state that Columbia could claim the removal costs even where such costs were incurred by PTNM.

11 The answer to this issue lies in the background leading to the making of the order. As Columbia submitted at the assessment hearing, the trial judge was aware that the costs that Columbia was claiming had been incurred by PTNM. The Judgment states at [120] that "Columbia alleged that PTNM incurred costs, including legal costs, to remove the MEC Charge …". The Hongs were also aware that costs had been incurred by PTNM.

12 Since the trial judge was prepared to grant Columbia judgment for the reasonable costs of removing the MEC charge, it would follow that the trial judge intended to allow Columbia to claim such costs even where such costs were not incurred by Columbia itself but by PTNM. Otherwise, the order would have been meaningless right from the time it was made. As the trial judge, I can confirm that that was my intention.

13 In the Hongs' reply submission for the assessment hearing, the Hongs submitted at para 68 that:

> The short point is that the liability for the costs was incurred by PTNM and not Columbia. This was always obvious and if it was the intention to claim for PTNM's loss, an appeal could have been filed on this issue or clarification sought. Columbia must live with the consequences.

14 I am of the view that the above submission applies equally to the Hongs. First, as already mentioned, the parties knew that the costs of removing the MEC charge were incurred by PTNM, not Columbia. Secondly, the Hongs could have sought clarification of my order or filed an appeal. Not having done so, the Hongs must live with the consequences.

15 There is one other point on this issue. Columbia had relied on s 8.4.2 of the share sale agreement ("SSA") to claim the reasonable costs of removing the MEC charge for the assessment hearing. I have set out the terms of s 8.4.2 at [122] of the Judgment. The Hongs submitted at the assessment hearing that at [130] of the Judgment, the trial judge had said that he did not accept that s 8.4.2 was applicable. I would say that the Hongs had taken that ruling out of context. The argument then was whether Columbia was entitled to claim for diminution in the value of the shares it had acquired by reason of the existence of the MEC charge or whether it was entitled to claim only the reasonable costs of removing the MEC charge. The trial judge had concluded that s 8.4.2 did not allow Columbia to claim the diminution in the value of the shares since the diminution was not permanent, as the MEC charge was eventually removed.

16 I was and am of the view that s 8.4.2, and in particular, s 8.4.2.2 of the SSA allows Columbia to claim from the Hongs the reasonable costs incurred to remove the MEC charge even where the costs were incurred by PTNM. In any event, that was and is the scope of my order.

Whether originals of invoices must be produced and whether hearsay evidence is admissible

17 The second and third issues relate to the legal costs paid by PTNM to Kusnandar and may be dealt with together.

18 As already mentioned, the Hongs submitted that the court should reject six out of the 16 invoices from Kusnandar as the originals were not produced. Furthermore, it was argued that the invoices and various Statements of Hours should not be admitted in evidence as the maker of the documents was not called to give evidence.

19 Columbia relied on s 32(1)(*b*)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"). This provision states as follows:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> 32.—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
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> …
>
> **or is made in course of trade, business, profession or other occupation;**
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> (*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —
>
> (i) …

> (ii) …
>
> (iii) …
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> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,
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> and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons;
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> …

20 It is not in dispute that this provision was an amendment to the EA to introduce a more flexible exception to the rule against hearsay evidence. In other words, the business records exception allows business records to be admissible in evidence even though the maker of the document does not give evidence.

21 The Hongs however submitted that Columbia must first satisfy that the invoices are admissible under s 66 of the EA before Columbia can rely on s 32(1)(*b*)(iv). This is because s 66 of the EA requires primary evidence of documents. Secondly, under s 32(3) of the EA, the court may still conclude that evidence which is relevant (or admissible) under s 32(1)(*b*) shall not be relevant if it would not be in the interests of justice to treat it as relevant.

22 I am of the view that the Hongs' reliance on s 66 is misplaced. It is true that s 66 states that documents must be proved by primary evidence except in the cases mentioned in s 67. Under s 64 of the EA, primary evidence means that the document itself must be produced for the inspection of the court. It can be seen that s 66 read with s 64 means that the original must be produced.

That is a different question from whether hearsay evidence may be admitted. The Hongs had conflated the two arguments. An original document may be produced but the maker of the document may not have given evidence on the making of the document. Section 66 deals with the former point and not the latter point.

23 Section 32(1)(*b*) deals with the exceptions to the hearsay rule. Moreover, s 66 must be read subject to s 67A of the EA which states that where a statement in a document is admissible in evidence by virtue of s 32(1) it may be proved by the production of that document (*ie*, the original) or a copy.

24 In summary, insofar as the Hongs submitted that the maker of the document must be called to give evidence, s 32(1)(*b*)(iv) states that this is not necessary under certain circumstances.

25 Insofar as the Hongs submitted that the original must be produced, s 66 must be read subject to s 67A which provides that where s 32(1) applies, a copy may be produced.

26 As Columbia submitted, the Hongs did not dispute that the invoices of Kusnandar are documents which form part of the records of Kusnandar which is a profession of lawyers. They do come within s 32(1)(*b*)(iv) of the EA.

27 The only other point left to the Hongs was that the court should nevertheless refuse to allow the copies of six invoices to be admitted because it would not be in the interest of justice to do so. In fact, this argument could also apply to the other ten invoices because although the originals of these ten

invoices were produced, the maker of these invoices was still not called to give evidence.

28 In my view, the concerns about admitting documents where the maker is not called to give evidence are the authenticity and the reliability of the documents. Here, as Columbia submitted, the Hongs were not suggesting that any of the invoices had been fabricated or were otherwise not genuine invoices of Kusnandar. Yet the Hongs submitted that they are entitled to object to the documents.[2] The Hongs submitted that the primary concern is the danger of unreliability.[3] The argument was that the invoices were sent without supporting material to show the nature and extent of the work done and the time taken to carry out the work.

29 Columbia relied on two sets of Statements of Hours. I will refer to them respectively as "the 1st Set SH and "the 2nd Set SH". The 1st Set SH was said to comprise various Statements of Hours each of which was enclosed with an invoice. The 2nd Set SH was supposed to contain an elaboration of the hours spent by various lawyers. Furthermore, Columbia submitted that it was not relying solely on the two sets of Statements of Hours as the affidavit of evidence-in-chief ("AEIC") of its witness, Aw Tai-Jak ("Aw"), exhibited numerous emails to show the work done.

30 Leaving aside some alleged minor discrepancies in the invoices, I am of the view that they still provided reliable information as to how much Kusnandar had charged for work done in respect of the discharge of the MEC

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2 Defendants' Closing Submissions dated 23 May 2016 ("DCS"), para 83.

3 DCS, para 143.

charge. Whether that information was enough to assist me to determine the reasonableness of the charges was another matter.

31 Accordingly, I conclude that it is in the interest of justice to admit the invoices in evidence. Therefore, all the invoices are admissible and are to be admitted as evidence. This applies to originals and copies.

Reasonableness of the steps and quantum claimed

32 It seems to me that the real issue is the fourth issue, *ie*, the reasonableness of the steps and the amount incurred.

33 The burden of proof is on Columbia to establish the reasonableness of the steps taken by the various lawyers and the amount of fees incurred. As the Hongs submitted, even if the fees charged and paid for were reasonable (from the perspective of PTNM or Columbia), this is not proof of the reasonable cost of cure to remove the MEC charge for which the Hongs are liable. The invoices are only evidence of the costs incurred which PTNM was prepared to pay.[4]

Kusnandar

34 Columbia claimed US$183,261.90 as the fees and disbursements of Kusnandar reasonably incurred to remove the MEC charge.

35 Columbia sought to establish the reasonableness of the charges by relying on the Statement of Hours as well as Aw's AEIC. Aw was at the

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4 Defendants' Reply Submissions dated 15 June 2016 ("DRS"), para 74.

material time the legal counsel of the Columbia Asia group of companies. Aw's AEIC sought to elaborate on the work done by Kusnandar and exhibited the 1st Set SH and emails.

36 Aw said that the 1st Set SH was enclosed with Kusnandar's invoices. However, this set of Statements of Hours did not contain any detail about the number of hours spent by each of Kusnandar's lawyers, the identity of the lawyers or the rate of charge of each lawyer who did the work. It did contain details of the work done by Kusnandar.

37 As mentioned above, there was the 2nd Set SH. Columbia had disclosed this set which contained some breakdown of the hours spent by various lawyers and the amounts charged for each lawyer. With such information one could deduce the hourly rate of the lawyer concerned.

38 The problem for Columbia was that the 2nd Set SH appeared to have been produced for the purpose of litigation. It was not sent in the usual course of Kusnandar's practice. The source documents from which the number of hours were attributed to each lawyer named were not produced. Even though a member of Kusnandar's practice, Adrio Rivadi Setiawan, gave evidence, he was not able to take the matter further as he too did not produce the source documents. Neither did he have personal knowledge of the number of hours spent by each and every lawyer who was involved although he did have some general knowledge of the work done.

39 As for the 1st Set SH, the Hongs raised a question as to whether each Statement of Hours was in fact included with an invoice as stated in Aw's AEIC. However, even if each Statement of Hours was so included, the fact

remained that they did not contain any detail about the number of hours spent by each of Kusnandar's lawyers or the identity of the lawyers. Presumably the 2nd set SH was produced to address this omission but, as mentioned above, the source documents were not produced for the 2nd Set SH. Neither was it produced for the 1st Set SH.

40 As already mentioned, Columbia submitted that it was not relying solely on the Statements of Hours. Aw's AEIC exhibited numerous emails to show the work being done. Unfortunately while those emails did give some information, they still did not give information on the number of hours spent by each lawyer who was involved in the matter.

41 I do not doubt that much work was done by Kusnandar to try and get the MEC charge removed. Although the task of removing the MEC charge was one which appeared capable of simple resolution, that was not the case. If there was no one to sign the discharge of the MEC charge because MEC was in liquidation and the liquidators were apparently no longer available, one possibility was to ask the Official Receiver in Singapore to sign the discharge document. If the Official Receiver was not prepared to do so, a court order from an Indonesian court to direct the removal of the MEC charge should have been a viable alternative since the debt secured by the MEC charge had been paid. Another possible solution was to ask the relevant Indonesian land authority to remove the MEC charge without more since a view was expressed by one of the land authorities that the MEC charge itself was illegal for reasons which I need not elaborate. However, these options were raised and discussed with Kusnandar, but unfortunately they did not make headway. I

also note that the Hongs did appoint their own Indonesian lawyer to get the MEC charge removed and that lawyer too was unsuccessful.

42 Therefore it is important to bear in mind that the matter was not as simple as it might appear to be at first blush, and Kusnandar was faced with various requirements from authorities which could not be met. It is not necessary to restate the requirements here.

43 However, notwithstanding the fact that Kusnandar did much work, the question was whether their entire legal costs should be borne by the Hongs. If, for example, two lawyers from Kusnandar were attending the same meeting, should the Hongs pay for both of them? I agree that it may not be right to weigh Columbia's claim on nice scales but, on the other hand, it also does appear unjust to land the entire legal costs at the feet of the Hongs without more. Columbia still has the burden to establish the reasonable amount the Hongs are liable for.

44 I come now to a different point. Colombia/PTNM had enlisted the help of other lawyers to obtain the discharge of the MEC charge. Kusnandar had to collaborate with each of these lawyers. The question arises whether the Hongs should be liable for Kusnandar's fees (and disbursements) for such collaboration.

45 Firstly, Columbia had enlisted the help of Goldman Sachs ("GS") to appoint GS' lawyers in Indonesia, *ie*, Hiswara Bunjamin & Tandjung ("Hiswara") to get the MEC charge removed. Columbia submitted that the Hongs should bear the cost of Kusnandar's work with Hiswara. This work included overseeing and commenting on the work done by Hiswara. Colombia

submitted that the Hongs were already getting the benefit of Hiswara's services free of charge because Colombia was not claiming reimbursement of Hiswara's fees. However, the Hongs countered that they should not be responsible for this aspect of Kusnandar's work since Kusnandar themselves did not think that Hiswara would achieve anything more than Kusnandar. Indeed, there was written evidence of emails from Kusnandar criticising the work done by Hiswara. It appeared that the idea to enlist the assistance of GS's Indonesian lawyers did not emanate from Kusnandar who were sceptical that such lawyers could add anything much to Kusnanda's own efforts. It was Columbia itself or its lawyers in another jurisdiction that came up with that idea.

46 Although there was no suggestion that Kusnandar lacked the expertise to achieve the desired result, it was not able to do so. So I do not fault anyone for trying to get as much help as possible from any quarter. However, the point is that Kusnandar itself had not recommended the use of GS's Indonesian lawyers and even appeared to be against that idea. In such circumstances, should the Hongs be responsible for Kusnandar's work with Hiswara?

47 I am mindful that Kusnandar also did not support the idea of appointing MC Kaban, another Indonesia law firm, as Kusnandar was not persuaded that MC Kaban could add any value to what had already been done. However, the important difference is the fact that MC Kaban did achieve the desired result, *ie*, the removal of the MEC charge.

48 Even then the question arises as to whether the Hongs should be liable for Kusnandar's work in collaborating with MC Kaban which included overseeing and commenting on information received from MC Kaban. For

example, after MC Kaban had reported that the MEC charge was removed, Columbia asked Kusnandar to obtain verification of this report. I appreciate Columbia's caution. Columbia had been dealing with Kusnandar over the years with respect to the acquisition of the hospital and the land. MC Kaban was a firm that was introduced to Columbia recently. It made sense for Columbia to seek verification. However, the question is whether the Hongs should be liable for Kusnandar's work in overseeing and commenting on MC Kaban's work *in addition* to being liable to reimburse Columbia for the costs of MC Kaban's work or part thereof.

49 The third firm of lawyers that Kusnandar had collaborated with was R&T. R&T had given advice as to whether the Official Receiver in Singapore will sign a document to discharge the MEC charge should the liquidators of MEC be no longer available.

50 I would think that Kusnandar had also liaised with a fourth firm, *ie*, TMAL, the Malaysian lawyers of Columbia. However since there was no issue about this, I will say no more.

51 In the course of submissions, it also appeared that Kusnandar's fees included work to follow up and advise on the efforts of the Hongs to discharge the MEC charge. Kusnandar's fees for this was US$3,150. Although the Hongs did not specifically challenge their liability for this fee during the assessment hearing, I am of the view that they are not liable for it for reasons which will be stated later.

52 I note that Hiswara and MC Kaban are Indonesian law practices. Furthermore, as mentioned, Kusnandar did not support the idea of having

them involved. Hiswara was not successful but MC Kaban was. I am of the view that it is not reasonable for the Hongs to be liable for Kusnandar's services in collaborating with Hiswara.

53 As for Kusnandar's services in collaborating with MC Kaban, the Hongs are already liable in principle to pay for MC Kaban's fees (see [81] below). I am of the view that they should not be liable for Kusnandar's services in collaborating with MC Kaban as well.

54 I used the following analogy to assist me. Columbia, as a company incorporated in Malaysia, was using a Malaysian law firm, TMAL, to coordinate the services rendered by various law firms in various jurisdictions including Indonesia and Singapore. In the three sets of proceedings commenced in Singapore, Columbia was using R&T, a Singapore law practice. I do not know if and to what extent R&T was liaising with TMAL on the Singapore proceedings. Assuming that TMAL was liaising with R&T to some extent, would the Hongs be liable to Columbia for the fees of TMAL in addition to their liability for Columbia's costs in appointing R&T (and even then only on a party and party basis)? While it may be natural for Columbia to have the comfort of advice from external Malaysian lawyers to advise them on the work of R&T and to co-ordinate with R&T, it would be surprising if Columbia were to claim both the costs of appointing TMAL and R&T from the Hongs for the Singapore proceedings. Therefore, in principle, Columbia is not entitled to claim for Kusnandar's fees for collaborating with Hiswara (and the Notary Public) and MC Kaban. Likewise, Columbia is not entitled to claim Kusnandar's fees for overseeing the efforts of the Hongs to discharge the MEC charge.

55 Columbia initially submitted that the sub-total of Kusnandar's fees for collaborating with Hiswara was US$74,843.35.[5] Subsequently, Columbia submitted that the actual sub-total should be US$70,610.79 while the Hongs submitted that it should be US$74,843.35.[6] The difference is US$4,232.56. This US$4,232.56 is derived from an invoice (Number 034/11 dated 12 August 2011) which is for the total amount of US$7,432.56.[7] The relevant sum of US$4,232.56 includes US$3,625 for exploration by Kusnandar of all options including approaching the Medan land office. The balance of US$607.56 is attributed to disbursements for translation fees, out-of-pocket expenses, a deduction for 2% withholding tax and an addition of Value Added Tax of 10%. It appears that Columbia made an error in its initial submission and the US$3,625 should not have been included as a deduction. The amount was for Kusnandar's work *vis-à-vis* the Medan land office. As for the balance of US$607.56, I will divide it equally between Columbia and the Hongs since the US$3,625 is roughly half of the total amount claimed in the invoice. Half of US$607.56 is US$303.78. The total sum to be deducted for this sub-category is therefore US$70,610.79 plus US$303.78, which is US$70,914.57.

56 Columbia initially submitted that the sub-total of Kusnandar's fees for collaborating with MC Kaban was US$20,671.20.[8] Subsequently, Columbia submitted that the actual sub-total should be US$15,079 while the Hongs submitted that it should be US$20,671.20. The difference is US$5,592.20. The US$5,592.20 is derived from an invoice (Number 013/12 dated 26 April

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5 Columbia's Closing Statement dated 23 May 2016 ("CCS"), para 68(c).

6 Columbia's letter dated 22 July 2016 and the appendix thereto.

7 CCS, para 68(c)(vii); AEIC of Aw, p 159.

8 CCS, para 68(f),

2012) for the total sum of US$12,517.20.[9] This sum of US$5,592.20 included US$4,550 for various discussions with the assistant of the Head of the legal department of the Central Land Office and US$1,042.20 for disbursements and a deduction for 2% withholding tax and an addition of Value Added Tax of 10%. For similar reasons as stated above at [55], I will not deduct the US$4,550. As for the balance of US$1,042.20, I will apportion it between the Hongs and Columbia (or PTNM) since the Hongs are liable for only US$4,550 of the principal sums in that invoice. Since US$4,550 is about 40% of the principal sums claimed in that invoice for fees, the amount of the disbursements and taxes for which the Hongs are liable is US$416.88 (*ie*, 40% of US$1,042.20). The remaining US$625.32 (*ie*, 60% of US$1,042.20) is to be deducted. The total sum to be deducted for this sub-category is therefore US$15,079 plus US$625.32, which is US$15,704.32.

57 As for Kusnandar's fees for collaborating with R&T insofar as R&T was giving advice about the execution of a discharge document, such advice was appropriately given by a Singapore law practice since MEC was a Singapore company. It was also appropriately considered by Kusnandar as the MEC charge was registered in Indonesia and Kusnandar was doing the work to obtain the discharge. I am therefore of the view that the Hongs are liable in principle for Kusnandar's fees in collaborating with R&T on that advice.

58 Therefore, Kusnandar's fees are reduced as follows for further consideration:

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[9] CCS, para 68(f)(i); AEIC of Aw, p 182.

Sum claimed:	US$183,261.90
Less:	US$3,150.00 (see [51] above)
Less:	US$70,914.57 (see [55] above)
Less:	US$15,704.32 (see [56] above)
Total:	US$93,493.01

59 As mentioned above, it is still for Columbia to establish the reasonable amount the Hongs are liable for. I do not think a nominal sum would suffice as substantial work was done. However, details of the lawyers involved and time spent were not supported by source documents. Furthermore, there was no oral elaboration as to why so much work had to be done. In the absence of more evidence, I will allow Columbia to claim 50% of US$93,493.01, *ie*, US$46,746.51.

MC Kaban

60 PTNM had instructed MC Kaban to assist in procuring the discharge of the MEC charge. It is not in dispute that MC Kaban succeeded in doing so where others had failed.

61 Columbia's claim for MC Kaban's fees is set out in the table at [3] above. The claim is based on a Success Fee Agreement dated 23 February 2012 which was exhibited in Aw's AEIC.[10] As I will elaborate later, there was

also another Success Fee Agreement which Columbia submitted was the first agreement which was then superceded by the one exhibited in Aw's AEIC. I will therefore refer to the other Success Fee Agreement as "the 1st SFA" and the one exhibited in Aw's AEIC as "the 2nd SFA". I will also refer to both agreements collectively as "the SFAs" or "two SFAs".

62 The 2nd SFA was signed by Ravi Raj Sivaraj, a Vice-President Director of PTNM, and Sumiaty, a Finance Manager of PTNM, for and on behalf of PTNM, and Marcos Confery Kaban, on behalf of MC Kaban. Neither one of these three signatories was produced by Columbia as a witness. Although there was evidence by way of a letter dated 19 August 2015[11] from MC Kaban that Mr Kaban refused to attend before this court for the assessment hearing, no evidence was tendered to establish that both the signatories from PTNM had likewise refused.

63 The Hongs objected to the admissibility of the 2nd SFA as evidence. They submitted that Columbia was not entitled to rely on s 32(1)(*j*)(iv) of the EA to admit the 2nd SFA. This provision states:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> 32.—(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> **or is made by person who is dead or who cannot be produced as witness;**

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10 AEIC of Aw, pp 2071–2076.

11 AEIC of Aw, pp 2286–2287.

> (*j*) when the statement is made by a person in respect of whom it is shown —
>
> (i) …
>
> (ii) …
>
> (iii) …
>
> (iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so;
>
> …

64 The Hongs submitted that MC Kaban's letter dated 19 August 2015 was not an outright refusal to give evidence but merely a statement that Mr Kaban was unwilling to give evidence and therefore reluctant. If further steps had been taken to persuade him, he might have reversed his decision.

65 I am of the view that the Hongs were splitting hairs when they submitted that the letter was not an outright refusal. It was clear from the letter that Mr Kaban had refused to come as a witness.

66 Whether Mr Kaban could have been persuaded to come as a witness if more effort had been put in to persuade him was a separate argument which did not change the fact that Mr Kaban had refused to give evidence, thereby satisfying the requirements of s 32(1)(*j*)(iv) of the EA.

67 In any event, Columbia submitted that its primary position was that the 2nd SFA be admitted under s 32(1)(*b*)(iv) and not s 32(1)(*j*)(iv) of the EA. I have set out s 32(1)(*b*)(iv) in the context of Kusnandar's invoices (see [19] above). Columbia submitted that the 2nd SFA forms part of PTNM's business records. I add that *prima facie*, the 2nd SFA could also be part of the business records of MC Kaban.

68 However, the next argument of the Hongs was based on s 32(3) of the EA, *ie*, that there was so much uncertainty or confusion over the 2nd SFA that it would not be in the interest of justice to treat it as relevant and hence admissible in evidence. This argument requires a more careful consideration of the evidence from Columbia.

69 Aw's AEIC mentioned:

(a) an initial agreement for a success fee of IDR 2bn to be paid to MC Kaban if it managed to remove the MEC charge (at para 136);

(b) an initial payment of IDR300m to MC Kaban for its operating expenses (at para 138); and

(c) an eventual agreement for a success fee of IDR1.7bn, on top of the IDR300m already paid to MC Kaban (at para 139).

70 As mentioned above, Aw's AEIC referred to and exhibited one Success Fee Agreement only which I have referred to as the 2nd SFA.

71 As it turned out, there was another Success Fee Agreement also dated 23 February 2012 signed by the same signatories which was not exhibited in Aw's AEIC.[12] I have referred to this agreement as the 1st SFA. There was also a third document entitled "Statement Letter" dated 4 January 2013 which was apparently signed by the same signatories.[13]

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12 Defendants' Bundle of Documents (Assessment of Damages) ("ADBD"), pp 364–369.

13 ADBD, pp 380–381.

72 I will deal with the two SFAs first. According to Columbia, the 1st SFA was the earlier version of the two. The 1st SFA referred to the services of MC Kaban to secure "the write-off-right of land use" of PTNM for a hospital and provided for a success fee of IDR2bn. It also stated that if PTNM decided unilaterally not to use the services of MC Kaban "in the process of obtaining the write-off" after the signing of the agreement, then MC Kaban was entitled to a success fee of IDR1.5bn. It is not clear to me what the "write-off-right of land use" referred to. The Indonesian version used the word "Raya" and there was some evidence that "Raya" refers to the removal of a charge. Even assuming that the 1st SFA was for the services of MC Kaban to remove the MEC charge on a success fee basis, there was no explanation why MC Kaban should be entitled to IDR1.5bn if PTNM decided to terminate the engagement.

73 Columbia submitted that the 2nd SFA exhibited in Aw's AEIC was the later of the two versions. In this version, the services of MC Kaban were in respect of both a "Raya", apparently meaning the removal of a charge, *and* the extension of the Certificate of Building Permit ("the CBP") for a total success fee of IDR1.7bn. The 2nd SFA also provided that if PTNM were to terminate the services of MC Kaban in handling the extension of the CBP, then MC Kaban would receive a success fee of IDR1.5bn. Columbia submitted that the difference between the IDR2bn figure in the 1st SFA and the IDR1.7bn figure in the 2nd SFA was because IDR300m had already been paid to MC Kaban as an advance payment for operating expenses.

74 However, Aw could not explain why there were two SFAs under cross-examination.[14] Counsel for Columbia suggested during the trial that the

explanation was in Aw's AEIC. But if this were true, then Aw should have been able to repeat the explanation under cross-examination, especially since he is a qualified lawyer. I have referred above (at [69]) to the relevant paragraphs of Aw's AEIC and I will now elaborate on them.

75 Aw's reference (at para 136 of his AEIC) to an initial agreement for a success fee of IDR2bn was in fact to an oral agreement he had had with the two signatories of PTNM. It was not a reference to a formal written agreement between PTNM and MC Kaban. Furthermore, the 1st SFA was not exhibited in his AEIC. When one reads his AEIC, one gets the impression that there was only one SFA and not two. I reiterate that Aw could not explain why there were two SFAs. He even testified that he was not involved in either of the two SFAs even though he had stated in his AEIC that he had agreed to the IDR2bn figure with the two signatories of PTNM. In my view, Columbia's submission on the two SFAs was an attempt to give evidence from the bar.

76 I add that even Columbia's explanation, by way of submission, on the SFAs was not logical. If the total fees payable to MC Kaban was IDR2bn (inclusive of the IDR300m already paid), why was there a need for a second agreement mentioning IDR1.7bn instead of IDR2bn? The fact of an advance payment does not change the total amount agreed to be paid to MC Kaban. Secondly, the 2nd SFA mentioning the IDR1.7bn figure did not mention the advance payment of IDR300m. This should have been done if in fact the total fee was IDR2bn. Thirdly, why were the SFAs both dated the same day? It seemed illogical that after signing one agreement, the parties then signed

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[14] Transcript 27/4/2016, pp 52-55.

another one the very same day for a different figure without mentioning the advance payment of IDR300m.

77 It is also important to bear in mind that the 2nd SFA referred not only to the removal of a charge but also to the extension of the CBP. The Hongs are not liable for the costs of the latter.

78 Furthermore, Aw's AEIC did not refer to the Statement Letter which stipulated a payment of IDR700m "for the extension of building rights", which apparently was the same thing as the extension of the CBP. Neither could he explain how this document applied in view of the two SFAs.

79 Columbia was content to submit that the Statement Letter affirmed the revision of the two versions of the SFA, and that the success fee of IDR700m was for the renewal of the "building rights" (or CBP). However, the Statement Letter still did not explain what this "extension of building rights" referred to. If, under the Statement Letter, MC Kaban was entitled to IDR700m for that extension, then this would mean that the success fee for removing the MEC charge would be IDR1.3bn, *ie*, IDR2bn less IDR700m. Yet, Columbia still claimed IDR2bn for the removal of the MEC charge.

80 In view of the existence of these three documents and the absence of a reasonable explanation for them from any of the signatories, I am of the view that it would not be in the interest of justice to allow either of the SFAs or the Statement Letter to be admitted into evidence.

81 This means that while I accept that Columbia did pay something to MC Kaban for its services in removing the MEC charge, there is insufficient

evidence as to the agreed amount of the success fee for this task. Although there were some payment vouchers from PTNM in respect of various payments totalling IDR2bn to MC Kaban, it is not entirely clear what they were for. Moreover, no invoice from MC Kaban was produced and the receipts from MC Kaban were also general in terms.

82 The Hongs submitted that a reasonable amount for the fees of MC Kaban to secure the removal of the MEC charge would be IDR50m. I presume that this submission was made because this was the figure that the Hongs had themselves agreed with their own Indonesian lawyer on a success fee basis. However, this fee was agreed on much earlier – soon after the completion of the SSA. Bearing in mind that MC Kaban came into the picture only after a number of years of futile attempts by Kusnandar and Columbia, I am of the view that it is likely that PTNM agreed to a higher figure, especially since it must have been more desperate by then. Columbia argues that the agreed success fee was IDR2bn, but there is insufficient evidence to establish that there was an agreement for this amount. I nevertheless agree that the agreed amount is likely to have been much more than IDR50m. In the absence of more evidence, I will fix this figure at IDR100m. Based on the conversion rate used in the table at [3] above, this amount of IDR100m would be more than US$10,000.

R&T's fees

83 R&T's fees were for work in respect of two areas. The first was a claim against GS and the second was an advice given in respect of the execution of a discharge instrument to remove the MEC charge. I have

referred to the latter in the context of Kusnandar's claim for the fees it charged in relation to its collaboration with R&T (at [49] above).

84 R&T's breakdown for the first piece of work amounted to $13,137.30.[15] The main bulk of the work done was in drafting a statement of claim against GS to pressure GS to use its own Indonesian lawyers Hiswara (and the Notary Public) to get the MEC charge removed. I have mentioned this already in the context of Kusnandar's fees, as Kusnandar had to oversee and comment on the work of Hiswara (see [45] above). I will not allow this claim for R&T's fees for several reasons.

85 First, as already mentioned, Kusnandar did not recommend the use of Hiswara and in fact had reservations about this avenue of action. Therefore, I am of the view that the Hongs should not be liable for the work done by R&T in drafting the statement of claim in order to pressure GS to obtain Hiswara's assistance.

86 Secondly, I do not think that the Hongs should be liable for R&T's work done in drafting the statement of claim. Let me elaborate.

87 I appreciate that Columbia wanted to put pressure on GS to render assistance but was it reasonable to do so by means of drafting a statement of claim? True, it could be argued that the statement of claim served its purpose as GS eventually agreed to render assistance. However, it could also be argued that GS would have rendered its assistance in any event.

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[15] CCS, para 123.

88 Even if the former situation were true, I am of the view that it was unlikely that there was a valid claim in the first place. While GS agreed to release all its interests in any outstanding loan, GS did not agree to be responsible for discharging the MEC charge which it did not create. The MEC charge was in favour of MEC not GS. In the absence of more evidence, it was unlikely that GS had undertaken the responsibility of removing the MEC charge in addition to agreeing to release all its interests in any outstanding loan.

89 I am of the view that it is likely that R&T would have been aware of the hurdle Columbia would face in prosecuting the claim against GS. The reason for the statement of claim was an extra-legal one, *ie*, to put pressure on GS. The Hongs should not be liable for the work done in pursuing this extra-legal rationale. I add that, had the claim been pursued and dismissed, Columbia would not have been entitled to claim from the Hongs the party-to-party costs it would have had to pay to GS.

90 I also note that the last item in the breakdown of $13,137.30 was for $1,300.[16] This was for a discussion on further and better particulars requested by the Hongs and for other work. Such particulars seemed to pertain to the three suits and not to the removal of the MEC charge as such. I would have disallowed this item or part of it even if I was minded to allow the claim for the work done by R&T in drafting the statement of claim against GS.

91 I now come to R&T's advice to Kusnandar in respect of the execution of a discharge instrument to remove the MEC charge. It will be remembered

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[16] AEIC of Aw, p 2291.

that one of the questions which arose, when Kusnandar was trying to get the MEC charge removed, was whether someone could sign a discharge instrument for MEC to discharge the MEC charge. R&T's fees in relation to this issue amounted to $4,960. The breakdown for this amount tendered by Aw referred to "Setting advice" with a date of 17 June 2011 and another item of the same nature dated 20 June 2011.[17] In fact, there was only one piece of written advice which was dated 20 June 2011.[18] The fee for this written advice was $1,200. As for the former, R&T clarified that this was not a *separate* piece of written advice but was work done for the written advice dated 20 June 2011. The fee for this work was $2,400. The written advice was a rather lengthy one which included a detailed recitation of the history of events. This recitation, in my view, was not necessary as Columbia and Kusnandar were aware of the history. The crux of the advice was whether the Official Receiver would sign a discharge instrument on behalf of MEC and that was found at the end of the opinion. There were also three other items totalling $1,360, which was part of the $4,960. These were for reviewing a memo prepared by a junior lawyer and internal discussions. As the written advice was relatively straight forward, I am of the view that the Hongs should be liable for $1,100 only, which includes disbursements and GST for that advice.

TMAL's fees

92 Columbia also claim the fees of its external Malaysian lawyers TMAL. As mentioned above, I understand why Columbia would want its external Malaysian lawyers to oversee the work of lawyers in other jurisdictions and

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17 AEIC of Aw, p 2292.

18 AEIC of Aw, p 1469.

advise Columbia on such work. However, that is not an aspect which the Hongs should be liable for. I dismiss Columbia's claim for such fees.

Summary

93 In summary, the Hongs are to pay the following to Columbia as the reasonable costs for work done to remove the MEC charge:

For Kusnandar's fees	US$46,746.51
For MC Kaban's fees	IDR100,000,000.00
For R&T's fees	S$1,100

94 Parties are at liberty to agree to payment in any currency at such exchange rates as may be acceptable to them. If there is difficulty in payment or receipt in any of the above currencies, I grant the parties liberty to apply by letter to this court to determine an alternative currency at an exchange rate also to be determined by this court.

Costs

95 I will hear the parties on the costs of the assessment hearing.

Woo Bih Li
Judge

Harish Kumar and Jonathan Toh (Rajah & Tann Singapore LLP) for the plaintiffs;
Niru Pillai, Liew Teck Huat and Jason Yeo (Global Law Alliance LLC) for the defendants.
