CIVIL LITIGATION UPDATE

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by Jeffrey **PINSLER**

JUDICIAL PROTECTION OF CLIENT'S RIGHT TO BE FAIRLY CHARGED

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A Introduction

1 The court's supervisory role in holding lawyers accountable for the fees they charge their clients has been brought into sharp relief in recent years. For example, in *Marisol Llenos Foley v Harry Elias Partnership LLP* [2022] 3 SLR 585 ("*Marisol*"), the High Court considered the letter of engagement and the law practice's approach to the client and found, among other determinations, that it had not complied with its obligation to inform the client in writing of the client's right to apply to the court to have the bill taxed pursuant to r 17(5) of the Legal Profession (Professional Conduct) Rules 2015 ("LP(PC)R").[1] In *Law Society of Singapore v Syn Kok Kay* [2023] 4 SLR 669 ("*Syn Kok Kay*"), the Court of Three Judges suspended the respondent for three years and nine months for overcharging and a related disciplinary offence.[2] A few years earlier, the Court of Appeal was concerned by the apparently excessive sums claimed by a law practice against a vulnerable client and, consequently, issued a complaint which resulted in disciplinary action (see *The Law Society of Singapore v Yeo Khirn Hai Alvin* [2019] SGDT 3 at [8]; *Law Society of Singapore v Yeo Khirn Hai Alvin* [2020] 4 SLR 858 ("*Alvin Yeo*")).[3]

2 More recently, in *Arbiters Inc Law Corp v Arokiasamy Steven Joseph* [2024] 2 SLR 844 ("*Arbiters Law*"), the Appellate Division of the High Court ("Appellate Division") referred the conduct of a lawyer in *Arbiters Inc Law Corp* ("the law practice") to the Law Society for investigation over concerns including: overcharging; the apparent failure of the lawyer concerned to advise the respondents that the fees were escalating beyond what was estimated in the letters of engagement; whether the lawyer's conduct had unnecessarily compounded costs; and whether he had misled the court regarding the parties' amenability to the assessment of costs (see *Arbiters Law* at [94]–[95]). As the status of potential disciplinary proceedings is unknown at this time, this article focuses solely on the issues raised, and pronouncements made, by the court. The ethical considerations are examined within the scope of the judgment itself.

B Circumstances in Arbiters Law

3 S was the son of H and W. S committed suicide. S had a history of mental illness and had previously been a patient in the Institute of Mental Health ("IMH"). H and W engaged a lawyer ("Y") to advise on claims against two of the attending doctors and IMH for breach of duty and negligence allegedly resulting in S's suicide. H sued in his personal capacity and as the administrator of S's estate. W sued in her personal capacity. Subsequently, Y advised H and W to engage X (a lawyer in the law practice).

4 H and W signed a letter of engagement ("1st LOE") for the law practice to represent them alongside Y's law practice. X claimed that H and W had subsequently "decided that it would be prudent for them to be separately represented" (see *Arbiters Law* at [9]). H then signed a further LOE ("2nd LOE") to the effect that he would be represented by the law practice. *Arbiters Law* concerned an application by the law practice to enforce the 1st LOE and 2nd LOE ("the LOEs") as "contentious business agreements" ("CBAs") within the meaning of s 111(1) of the Legal Profession Act 1966 (2020 Rev Ed) ("LPA"), so that the law practice could compel H and W to pay the legal fees/costs.

C Effect of CBA

5 Pursuant to s 111(1) of the LPA, which applies to work done in "proceedings begun before a court of justice or before an arbitrator" (s 2 of the LPA defines

1 This case is examined in December 2021 Issue 9 (2021) CLU 9.

2 This case is examined in February 2023 Issue 2 (2023) CLU 2.

3 Although the disciplinary tribunal acquitted the respondent, the High Court set aside its determination and directed the Law Society to apply to the Chief Justice for the appointment of another disciplinary tribunal to hear and investigate the complaint.

"contentious business"), a lawyer and a client may enter into a binding agreement ("the CBA") concerning the fees and costs to be paid by the latter to the former. The primary consequences of the CBA (if it is valid) are that the client loses the right to request for a bill of costs to be issued and sent for assessment (see s 112(4) of the LPA) and is liable to pay the amount agreed upon even if it is well above the sum that would normally be charged for such work (see *Arbiters Law* at [44]; *Sports Connection Pte Ltd v Asia Law Corp* [2010] 4 SLR 590 at [13]). However, s 111 does not entitle lawyers to agree to an unreasonable fee and lawyers who overcharge may be subject to disciplinary proceedings (see ss 17(7) and 17(8) of the LP(PC)R; Practice Direction 5.2.2 of the Council of the Law Society and *Arbiters Law* at [46]).

D Requirements of CBA

6 To constitute a CBA under s 111 of the LPA, the agreement must be in writing, signed by the client and, as dictated by case law, its terms must be sufficiently certain and precise (see *Arbiters Law* at [43]). The court held that all three conditions were satisfied (see *Arbiters Law* at [53]). Regarding the condition of certainty and precision, the court considered whether it was sufficient for the agreement to simply include hourly rates with an estimate of overall fees (in this case, $150,000). Section 111(1) of the LPA, which refers to "a gross sum or otherwise", does not require the agreement to include a fixed sum or maximum cap on fees. The court accepted (as a matter of principle) that a fee agreement between a solicitor and a client, which provides for an agreement as to the solicitor's charge-out rates (as opposed to a lump-sum fee), can constitute a CBA within the meaning of s 111 of the LPA (see *Arbiters Law* at [56]). The court added the following important caveat (see *Arbiters Law* at [56]):

> However, merely specifying the hourly rates of the assigned solicitors in the agreement, without more, may not always enable the client to make a reasonable forecast as to the total amount of costs to be incurred. Therefore, where possible, such agreements ought to provide a fair estimate of the overall charge. Without such an estimate, a client would have less certainty as to what his or her aggregate exposure in fees might ultimately be, at the time the client enters into the agreement.

7 The court also observed that where expert evidence is likely to be required, "the letter of engagement should alert the client of this likelihood as well as the need to engage an expert and obtain estimates of such costs as soon as possible" (see *Arbiters Law* at [60]).

8 Lawyers should also bear in mind that the standard letter of engagement ("standard letter") set out in Appendix 11C of the Law Society's Practice Management Guide 2017 is not meant to be a template for a CBA. This is primarily because cl 52 of the standard letter preserves the client's right to have the bill of costs taxed or reviewed in the event of a dispute. Such a contingency would be inconsistent with the agreement being a CBA (see para C5 above). And the use of the standard letter with the omission of that clause would not render the letter of engagement a CBA (see *Arbiters Law* at [57]).

E CBA must be fair and reasonable

Essential principles

9 To be valid[4] and enforceable, the terms of the CBA must be fair and reasonable failing which the court would declare it to be void and direct the bill of costs to be assessed (see ss 113(3) and 113(4) of the LPA and *Arbiters Law* at [45]). Section 113(2) of the LPA provides that the court may examine and determine "[e]very question respecting the validity or the effect of the agreement". This means that the court may consider every aspect of the agreement including the nature,

4 To be valid, a CBA must satisfy certain requirements. These are set out in full in *Arbiters Law* at [43].

extent and duration of the work, the standing of the lawyer and the range of fees payable in the action (see *Arbiters Law* at [48]).

10 If fees are charged on a time basis, "overcharging may occur if the number of hours billed for has been inflated, or where the solicitor enlarged the size of the total bill by deliberately engaging in work unnecessary to achieve the purpose of the retainer or taking an unnecessarily long time for the work by failing to act with reasonable due diligence to increase the actual time taken for the work" (see *Arbiters Law* at [49]). In such circumstances, the court may declare the CBA to be void and unenforceable under s 113(4) of the LPA even if its terms *appear* to be fair or reasonable (see *Arbiters Law* at [49], citing *Law Society of Singapore v Andre Ravindran Saravanapavan Arul* [2011] 4 SLR 1184 at [30] and *Ho Seow Wan v Morgan Lewis Stamford LLC* [2018] SGHC 31 at [81]).

11 Although the court in *Arbiters Law* ruled that the LOEs were CBAs, the terms of the LOEs were unreasonable within the meaning of s 113(4) of the LPA. In its view, the fees claimed by the law practice under the LOEs were excessive and amounted to overcharging. Therefore, the court declared the LOEs void and unenforceable (see *Arbiters Law* at [63] and [65]). The reasons provided for this conclusion may be considered in the context of the lawyer's continuing obligation to keep the client informed about fees, the significance of the settlement sum when the matter is amicably resolved, and the consequences of the lawyer's conduct of the case on the fees charged. These three points are separately considered under the following headings in bold italics below.

Lawyer's continuing obligation to keep client informed about fees

12 The total professional fees charged by the law practice ($399,000) was more than 2.5 times the sum of $150,000 estimated in the LOEs. In contrast, the LOEs stated that, the fees would be "correspondingly lower" than the estimate of $150,000 if the matter was amicably resolved before trial. The court observed: "There was no satisfactory explanation for the variance and whether the respondents had been given any prior notice that the fees would be much more than the initial estimate. In the circumstances, the sum of $399,000 was disproportionate and excessive." (see *Arbiters Law* at [65]). Furthermore, the sum of $399,000 "reflected the inappropriate appreciation that [X] had of the matter". In the court's view, "a reasonable lawyer acting for the respondents in these circumstances would not have charged such an excessive sum for his total professional fees up to the trial" (at [70]).

13 X submitted that the bills sent to the clients were "essentially monthly reports that kept them apprised of the costs". The court ruled (at [90]) that these bills did not constitute proper estimates: "… these bills were somewhat confusing and not easy to understand. They certainly did not do much to inform the respondents of the continued upward trajectory of costs as the matter progressed." X's submission that he had orally informed the respondents about the escalating costs could not be accepted by the court in the absence of supporting evidence such as attendance notes (at [91]). This re-iterates how crucial it is for law practices to provide documentary proof of the communication of fee estimates to clients.

Significance of settlement sum to costs when matter is amicably resolved

14 H and W had recovered $330,000 in the settlement of their case against the attending doctors and IMH (see para B3 above for the facts). In *Arbiters Law*, X argued that the court ought to have regard to the actual value of the claim ($2m) in awarding costs (as H and Y had initially instructed that they would not settle for less than this amount). This submission was rejected by the court, which emphasised that the settlement sum is a "material consideration" in determining the amount of fees (at [66]). While the value of a claim may be indicative of the complexity of a case (see O 21 r 2(2)(*b*) of

the Rules of Court 2021), on the facts "there was no basis to suggest that the sum of $2m was anything more than an arbitrary figure that [H and W] wished to recover" (at [67]). Indeed, it is common for parties (often with the advice of their lawyers) to inflate claims in the hope manoeuvring towards a more favourable settlement. The Appellate Division in *Arbiters Law* has made it abundantly clear that puffed-up claims do not entitle lawyers to charge correspondingly high fees.

Consequences of lawyer's conduct of case on fees charged

15 One of the fundamental duties of a lawyer in litigation is to determine the most appropriate process(es) to engage to achieve the optimal or most favourable result for his client. This entails taking care to avoid an avenue which is unnecessary, or which offers a limited benefit disproportionate to the costs of pursuing it. It will be recalled that in the suit, H and W sued in their personal capacities and H sued administrator of S's estate (see para B3 above).

16 In *Arbiters Law*, the court questioned whether it was viable for H and W to sue in their personal capacities considering that the statement of claim (which was filed after X took over the case from Y) failed to specify any duty owed to them by the defendants in the suit and did not indicate how any such duty was breached. Moreover, H and W were advised to discontinue their claim against one of the doctors more than a year after X's law practice began representing them. The delay in discontinuing the suit resulted in H and W being ordered to pay costs of at least $48,000 (at [68]).

17 The court also questioned whether separate legal representation was justified in the circumstances of the case. The court observed (at [83]): "[X's] inability to precisely articulate why the respondents had to be separately represented, as well as his contradictory explanations, made it difficult to accept his explanation that there was a potential conflict of interest that necessitated the respondents' separate legal representation." The separate representation of H and W unnecessarily expanded their costs. As the court put it (at [84]): "[T]his reflected on the issue of whether Arbiters Law's own costs had been reasonably incurred as there was some doubt as to whether the solicitors knew what they were doing even on relatively simple issues." (see also *Arbiters Law* at [94(c)]).

18 Another issue concerned the organisation of expert witnesses. The law practice's failure to bring in another relevant expert at an earlier stage of the proceedings eventually resulted in the trial being vacated on the date it was scheduled to commence (it was adjourned for nine months). The Appellate Division agreed with the statement of the judge in *Arbiters Inc Law Corp v Arokiasamy Steven Joseph* [2024] SGHC 26 ("*Arokiasamy*") at [23] that "the first trial was vacated under circumstances that do not seem to me fair to require the [respondents] themselves to bear the costs of vacating the trial" (see *Arbiters Law* at [88]).

F Ethical mettle

19 The ethical mettle of a lawyer is tested when he faces potential censure from the court. If he is ethical, he is straightforward and honest about the facts regardless of the consequences to himself. In *Arbiters Law*, the court raised this issue through its observation that X gave "the misleading impression to the court" that his law practice was amenable to assessment for the costs and that H and W were not (at [92] and [94(d)]). X claimed that his law practice "had repeatedly invited the respondents to propose a reasonable amount of costs, or even to apply for taxation if they so wished, but instead they got abusive and vulgar messages in response" (at [92]). The Appellate Division in *Arbiters Law* pointed out (at [92]) that in *Arokiasamy* at [31], the judge stated that X's law practice "had spurned all invitations to have its bill taxed". On the facts, "it was misleading for [X] to maintain

that it was [H and W] who were unwilling to assess the legal costs" (at [92]).

G Court's supervisory role and the responsibility of senior lawyers

20 In *Arbiters Law*, the court observed (at [50]): "The basis for the court's supervisory role and power of intervention is the court's recognition of the unequal relationship between the solicitor and client, and the influence of a solicitor over his client (citing *Shamsudin bin Embun v P T Seah & Co* [1985-1986] SLR(R) 1108 ("*Shamsudin*") at [27]). A lawyer "is in a better position to evaluate the appropriate and reasonable remuneration for the legal work done for the client. Even where a client is well-educated and fluent in English, the court recognises that, more likely than not, he or she would not be accustomed to litigation or dealing with lawyers when engaging a solicitor" (citing *Marisol* at [3]). The court in *Arbiters Law* observed (at [51]):

> We also cannot overemphasise the broader point: costs are a major barrier for the ordinary client in getting access to justice. An unfair or unreasonable fee agreement presents a major obstruction in this regard and can undermine confidence in the administration of justice. In fact, it is for these same reasons that where a client seeks to impeach the fairness or reasonableness of an agreement for costs on contentious matters, the onus is on the solicitor who wishes to enforce the CBA against his client to prove its fairness and reasonableness (citing *Shamsudin* at [24], [33]–[38]).

21 The court's supervisory role has become more crucial in recent years in the face of increasing incidents of overcharging and related issues concerning the bill of costs. It is particularly worrying that the lawyers involved in proceedings which result in judicial expressions of concern, recrimination or disciplinary action concerning fees are often very senior. In the cases mentioned in para A1 above, the lawyers referred to had been in practice for decades and some had leadership roles.[5] In *Arbiters Law*, X, whose conduct was referred to the Law Society for investigation (see para A2 above), is indicated as the managing director of the law practice involved in the case.[6]

22 It is vital to the ethical health of the legal profession that senior lawyers lead by example. By virtue of their status, they must see themselves as role models for their younger colleagues throughout the legal profession. There was a time when youthful lawyers would engage each other in awed conversation about senior lawyers admired for their moral fibre, integrity and professional fairness to clients, and their profound respect (even reverence) for the court. The author recalls many such conversations including one in the old squeaky metal elevator (with manually operated doors) in the original Supreme Court building.

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5 In *Syn Kok Kay*, the court stated at [4]: "The respondent is a solicitor of 29 years' standing". In *Marisol*, the court stated at [10] that a lawyer mentioned in the law practice's engagement letter was a partner. And in *Alvin Yeo*, the court stated at [3] that the lawyer was a Senior Counsel and "leading partner" of a law practice.

6 It is stated in the separate case of *The Law Society of Singapore v Rai Vijay Kumar* [2023] SGDT 11 at [2]: "The Respondent is an advocate and solicitor of more than 32 years' standing, having been admitted to the rolls on 14 March 1990. At all material times, the Respondent was the managing director of Arbiters Inc Law Corporation."

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Singapore Academy of Law 1 Coleman Street #08-06 The Adelphi Singapore 179803 Tel No: (+65) 6332 4388 Fax No: (+65) 6333 9747 E-mail: academypublishing@sal.org.sg