# Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–562 OF 2002
SU GEOK YIAM J
7 SEPTEMBER 2013

*Legal Profession — Costs — Suing for costs — Getting up fees — Whether getting up fees awarded by senior assistant registrar sufficient — Whether exorbitant, unduly inflated and unreasonably high — Whether award ought to be increased — Whether senior assistant registrar erred in decision of granting award — Whether correct principles applied in arriving at decisions — Whether getting up costs enriched solicitors — Rules of Court 2012 O 92 r 4*

The second defendant applied via encl 103 under O 92 r 4 of the Rules of Court 2012 ('ROC') to review the amount of RM60,000 for getting up fees awarded by the senior assistant registrar ('SAR') and sought for it to be increased to RM150,000. Meanwhile, the first defendant sought for the court to review the getting up fees it was awarded with, via encl 104, which was RM66,188.60 and submitted that it should be increased to RM300,000. The plaintiff argued that the amount of getting up costs claimed by the first and second defendants were exorbitant, unduly inflated and unreasonably high. In opposing the first and second defendants' applications, the plaintiff submitted that the plaintiff's claim was mainly a contractual claim; the full trial involved mainly disputed facts to be decided by the court; that the issues to be decided between the parties were not complicated; the principles of law involved were entrenched; that the law was reasonably clear and hence the getting up fee should not be unduly inflated despite the research indulged in; that there were no complex or novel questions of law involved; that the cause or matter was far more important to the plaintiff than the defendants because if the plaintiff did not succeed in its claim the plaintiff would, apart from suffering the loss of profit, also suffer by having incurred expenses for the engagement of other subcontractors under the expectation that a proportion of the project would be awarded to the plaintiff; and that the getting up cost for a case should not be taxed to enrich a defendant.

**Held,** allowing the applications:

(1) The court allowed encls 103 and 104 with costs of RM5,000. The amount of RM60,000 awarded to the second defendant and the amount of RM66,188.60 awarded to the first defendant for the getting up were unduly low and, therefore, unreasonable and ought to be increased to a

sum of RM150,000 each for the first and second defendants which was fair and reasonable to the second and first defendants (see para 10–14).

(2) There were many complicated issues involved which had been raised by the first and second defendant's counsel in defending the plaintiff's case during the full trial. The plaintiff's claim was not only a contractual claim as it also revolved around complicated issues of construction tender, legal issues and various facts which were argued, heard and decided by the court. The SAR had decided on the amount of the getting up fee based on a wrong principle of law and it had to be increased to reflect the amount of work and research which had been done by the first and second defendants' solicitors and/or counsel because of the many complicated issues involved and the complexity of the case (see paras 23 & 35).

(3) The SAR erred when she failed to consider that in order to increase the prospects of success of the defence of the first and second defendants in the full trial of the instant case, their solicitors and/or counsel had to prepare their clients' cases in greater depth. Hence, they had expended a lot of time and labour in taking instructions from their clients to defend their clients against the plaintiff's claim. This entailed the perusal of the particulars of the pleadings and the consideration of the facts and law by their learned counsel. The SAR did not take into account the fact that the plaintiff's claim took almost nine years to be disposed off. This fact was important because it showed that the first and second defendants' solicitors and/or counsel had to attend to this case for almost nine long years, which was a considerable length of time, for any case (see paras 42–44).

(4) The SAR erred when she overlooked the importance of the cause or matter to the first and second defendants as the plaintiff's claim against all the three defendants arose from a project which was worth RM69,300,000. This case involved the reputation, business and livelihood of the first defendant and the first defendant was forced to engage a lawyer to defend itself and the plaintiff's failure to revise its quotation coupled with the filing of the plaintiff's claim have caused damage to the first defendant. Not only was the first defendant not appointed as the main subcontractor for the project but the first defendant's reputation was also severely affected. The second defendant was also a company engaged in the business of building and civil engineering construction with a good reputation. It was very important for him to prepare the case for the second defendant in such a way as to enhance the prospects of the second defendant succeeding in its defence in the full trial (see paras 52–55).

**[Bahasa Malaysia summary**

Defendan kedua telah memohon melalui lampiran 103 di bawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KM') untuk mengkaji semula jumlah

A RM60,000 sebagai fi permulaan yang diawardkan oleh penolong kanan pendaftar ('PKP') dan memohon agar ia dinaikkan kepada RM150,000. Manakala, defendan pertama memohon mahkamah mengkaji semula fi permulaan yang diawardkan kepadanya, melalui lampiran 104, iaitu RM66,188.60 dan berhujah bahawa ia patut dinaikkan kepada RM300,000.
B Plaintif berhujah bahawa jumlah kos permulaan yang dituntut oleh defendan-defendan pertama dan kedua adalah terlalu tinggi, terlalu melambung dan tidak berpatutan kenaikannya. Dalam membantah permohonan-permohonan defendan-defendan pertama dan kedua, plaintif berhujah bahawa tuntutan plaintif adalah terutamanya satu tuntutan
C kontraktual; perbicaraan penuh yang terlibat terutamanya mempertikaikan fakta yang perlu diputuskan oleh mahkamah; bahawa isu-isu yang perlu diputuskan antara pihak-pihak adalah tidak rumit; prinsip-prinsip perundangan yang terlibat adalah termaktub; bahawa undang-undang agak
D jelas dan justeru fi permulaan tidak patut terlalu tinggi kenaikannya meskipun kajian telah dibuat; bahawa tidak melibatkan persoalan undang-undang yang rumit dan baru; bahawa kausa atau perkara itu lebih penting kepada plaintif daripada defendan-defendan kerana jika plaintif tidak berjaya dalam tuntutannya plaintif akan, selain daripada mengalami kehilangan keuntungan,
E juga menghadapi kesukaran disebabkan perbelanjaan yang ditanggung untuk pelantikan subkontraktor lain di bawah jangkaan bahawa bahagian projek itu akan diawardkan kepada plaintif; dan kos permulaan untuk suatu kes tidak patut dikenakan cukai untuk memperkayakan defendan.

F **Diputuskan**, membenarkan permohonan-permohonan:

(1) Mahkamah membenarkan lampiran-lampiran 103 dan 104 dengan kos RM5,000. Jumlah RM60,000 yang diawardkan kepada defendan kedua dan jumlah RM66,188.60 yang diawardkan kepada defendan pertama untuk bermula adalah terlalu rendah dan, oleh itu tidak munasabah dan
G patut dinaikkan kepada jumlah RM150,000 untuk setiap defendan-defendan pertama dan kedua yang mana adalah adil dan munasabah kepada defendan-defendan kedua dan pertama (lihat perenggan 10–14).

H (2) Terdapat banyak isu-isu rumit yang terlibat telah ditimbulkan oleh peguam-peguam defendan-defendan pertama dan kedua dalam membela kes plaintif semasa perbicaraan penuh. Tuntutan plaintif bukan sahaja satu tuntutan kontraktual kerana ia juga berkisarkan isu-isu rumit berhubung tender pembinaan, isu-isu perundangan dan pelbagai fakta
I yang telah dihujah, didengar dan diputuskan oleh mahkamah. PKP telah memutuskan tentang jumlah fi permulaan berdasarkan prinsip undang-undang yang salah dan ia perlu dinaikkan untuk menggambarkan jumlah kerja dan kajian yang telah dilakukan oleh peguamcara-peguamcara dan/atau peguam-peguam defendan-defendan

pertama dan kedua kerana isu-isu rumit yang banyak terlibat dan kes yang rumit itu (lihat perenggan 23 & 35).

(3) PKP terkhilaf apabila beliau gagal untuk mengambil kira bahawa bagi tujuan untuk meningkatkan prospek kejayaan pembelaan defendan-defendan pertama dan kedua dalam perbicaraan penuh kes ini, peguamcara dan/atau peguam-peguam mereka hendaklah menyediakan kes-kes anakguam mereka secara terperinci. Justeru, mereka telah meluang masa dan tenaga yang lama dalam mengambil arahan-arahan daripada anakguam mereka untuk membela anakguam mereka daripada tuntutan plaintif. Ini melibatkan semakan butiran pliding dan pertimbangan fakta dan undang-undang oleh peguam-peguam mereka yang bijaksana. PKP tidak mengambil kira fakta bahawa tuntutan plaintif mengambil masa hampir sembilan tahun untuk selesai. Fakta ini adalah penting kerana ia menunjukkan bahawa peguamcara dan/atau peguam-peguam defendan-defendan pertama dan kedua terpaksa menghadiri kes ini untuk hampir sembilan tahun lamanya, yang merupakan tempoh masa yang panjang, untuk apa-apa kes (lihat perenggan 42–44).

(4) PKP terkhilaf apabila dia terlepas pandang kepentingan kausa atau perkara kepada defendan-defendan pertama dan kedua kerana tuntutan plaintif terhadap kesemua tiga-tiga defendan timbul daripada satu projek bernilai RM69,300,000. Kes ini melibatkan reputasi, perniagaan dan mata pencarian defendan pertama dan defendan pertama terpaksa melantik peguam untuk membela dirinya dan kegagalan plaintif untuk menyemak semula sebut harganya beserta pemfailan tuntutan plaintif telah menyebabkan kerugian kepada defendan pertama. Defendan pertama bukan sahaja tidak dilantik sebagai subkontraktor utama untuk projek itu tetapi reputasi defendan pertama juga terjejas teruk. Defendan kedua juga adalah sebuah syarikat yang terlibat dalam perniagaan berhubung pembinaan bangunan dan kejuruteraan sivil dengan reputasi yang baik. Adalah amat penting untuk dia menyediakan kes defendan kedua dalam cara sedemikian demi meningkatkan prospek defendan kedua berjaya dalam pembelaannya semasa perbicaraan penuh (lihat perenggan 52–55).]

**Notes**

For cases on suing for costs, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1459–1461.

**Cases referred to**

*Bar Council v Datuk V Kanagalingam* [2000] 3 CLJ 697, FC (refd)

*Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [[1990] 1 MLJ 292; [1990] 1 CLJ (Rep) 699, HC (refd)

A *Chan Kok Choon JP v MBf Finance Bhd* [2001] 1 MLJ 5; [2000] 4 CLJ 453, CA (refd)

*Coon v Diamond Tread Co (1938) Ltd* [1950] 2 All ER 385, Ch D (refd)

*Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors* [2010] 8 MLJ 749, HC (refd)

B *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583, SC (refd)

*JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors* [1994] 1 MLJ 47; [1994] 3 CLJ 318, HC (refd)

*John Tan Chor-Yong v Lee Chay Tian* [1971] 1 MLJ 240; [1969] 1 LNS 6 (refd)

C *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [2002] 3 MLJ 705, FC (refd)

*Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374; [1999] 7 CLJ 481, HC (refd)

D *L & M Airconditioning & Refrigerator (Pte) Ltd v SA Shee & Co (Pte) Ltd* [1993] 3 SLR 482, HC (refd)

*Malaysia International Consultants Sdn Bhd v RR Chelliah Brothers* [2009] MLJU 107; [2009] 4 CLJ 731, CA (refd)

*Ogilvie, Re* [1910] P 243, CA (folld)

E *Pallant v Morgan* [1952] 2 All ER 951, Ch D (refd)

*Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97; [1997] 1 CLJ Supp 232, HC (refd)

*Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 4 MLJ 764, HC (refd)

F *Sarjit Singh Khaira v State Public Service Commission* [2007] 8 MLJ 86; [2007] 5 CLJ 156, HC (refd)

*Southern Finance Co Bhd v Zamrud Properties Sdn Bhd (No 3)* [1998] 7 MLJ 168; [1999] 4 CLJ 754, HC (refd)

*Tan Boon Bak Trading Sdn Bhd v Chua Choong Yin* [2004] 3 CLJ 695, CA (refd)

G *Union Insurance Malaysia Sdn Bhd v Chan You Young* [2003] 3 MLJ 484; [2003] 7 CLJ 50, HC (refd)

*United Malayan Banking Corp v Indah Sejati Sdn Bhd* [1992] 1 AMR 71, HC (refd)

*Yii Suok Ting v Sibu Municipal Council* [1995] 4 CLJ 108, HC (folld)

H *Yong Teck Lee v Harris Mohd Salleh & Anor* [2009] 6 MLJ 437; [2010] 1 CLJ 156, FC (refd)

**Legislation referred to**

Rules of Court 2012 O 59 r 16(1), O 92 r 4

I Rules of the High Court 1980 O 59, Part X, Appendix 1 s 1(2)

*Koong Hui Jiun (Michael Chow) for the plaintiff.*
*Zaidah bt Ibrahim Husaimi (Ho & Company) for the first defendant.*
*Liang Chor Soon (Justin Voon Chooi & Wing) for the second defendant.*

**Su Geok Yiam J:**

ENCLOSURE (103)

[1] Enclosure (103) is the second defendant's application made vide a notice of application filed on 15 August 2012, pursuant to the inherent jurisdiction of the court under O 92 r 4 of the Rules of Court 2012 ('RC 2012'), to the judge in chambers, to review the registrar's certificate in respect of item 69 of the second defendant's bill of costs dated 2 August 2012, encl (83A), for getting up (for which the second defendant had sought a sum of RM240,000).

[2] In its application, the second defendant is seeking for an increase in the amount of RM60,000 which was awarded by the learned senior assistant registrar ('SAR') ie on 9 May 2012 which was maintained by the learned SAR on 6 August 2012, upon a review made pursuant to the application of the second defendant to the learned SAR, encl (94).

[3] Before me, the second defendant's learned counsel has submitted that the amount awarded for the getting up fee ought to be increased from RM66,000 to RM150,000 based on the grounds as set out in his written submissions and the authorities as contained in the bundle of authorities.

ENCLOSURE (104)

[4] Enclosure (104) is the first defendant's notice of appeal dated 15 August 2012 to the judge in chambers to review the amount of the getting up fee in the first defendant's bill of costs, encl (84A), which was awarded by the learned SAR on 9 May 2012. The first defendant's learned counsel had sought a sum of RM300,000.

[5] The learned SAR had awarded a sum of RM66,188.60 for the getting up fee together with a sum of RM5,206 as an allocator.

[6] Before me, the first defendant's counsel has submitted that the amount awarded for the getting up fee ought to be increased from RM66,188.60 to RM300,000 based on the grounds as set out in her written submissions and the authorities as contained in her bundle of authorities.

THE PLAINTIFF'S SUBMISSIONS IN RESPECT OF ENCLS (103) AND (104)

[7] The plaintiff is resisting the second defendant's application for a review of

A the registrar's award and the first defendant's notice of appeal against the registrar's award on the ground that the amount of getting up costs claimed by the first and second defendants in their respective bills of costs is exorbitant, unduly inflated (see *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97; [1997] 1 CLJ Supp 232; *JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn* B *Bhd & Ors* [1994] 1 MLJ 47; [1994] 3 CLJ 318; and *L & M Airconditioning & Refrigerator (Pte) Ltd v SA Shee & Co (Pte) Ltd* [1993] 3 SLR 482) and unreasonably high and that the court in determining the total getting up costs ought to take into account the established principle of law that the amount of cost claimed is reasonable in all the circumstances (see *Union Insurance* C *Malaysia v Chan You Young* [2003] 3 MLJ 484; [2003] 7 CLJ 50).

[8] In its skeletal submissions dated 5 November 2012 which were filed in a single bundle together with the authorities referred to, the plaintiff submitted D as follows:

(a) that the plaintiff's claim was mainly a contractual claim;

(b) that the full trial involved mainly disputed facts to be decided by the court;

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(c) that the issues to be decided between the parties were not complicated;

(d) that the principles of law involved were entrenched;

(e) that the law is reasonably clear and hence the getting up fee should not be F unduly inflated despite the research which was indulged in by both learned counsel (see *John Tan Chor-Yong v Lee Chay Tian* [1971] 1 MLJ 240; [1969] 1 LNS 6 and *Yong Teck Lee v Harris Mohd Salleh & Anor* [2009] 6 MLJ 437; [2010] 1 CLJ 156 where the trial took 28 days but the court only awarded a sum of RM80,000 for the getting up costs);

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(f) that there were no complex or novel questions of law involved;

(g) that not all the documents in the voluminous bundles of documents filed were relevant as the main document which was important to the plaintiff's claim was only the pre-tender agreement since it was the H plaintiff's contention that the pre-tender agreement was a valid and enforceable agreement against the defendants;

(h) that the cause or matter is far more important to the plaintiff than the defendants because if the plaintiff did not succeed in its claim the I plaintiff would, apart from suffering the loss of profit, also suffer by having incurred expenses for the engagement of other subcontractors under the expectation that a proportion of the project would be awarded to the plaintiff;

(i) that there was no great severance of defence between the first and second

defendants ie if the first defendant succeeded in its defence, the plaintiff's claim against the second defendant would be similarly dismissed;

(j) that the getting up cost for a case should not be taxed to enrich a defendant (see *Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors* [1995] 4 MLJ 764); and

(k) that if this court were to allow the sums of RM300,000 and RM240,000, respectively, as claimed by the first and second defendants, for the getting up fee it would have the effect of converting the getting up costs into a penalising costs and that this would go against the principle that the party to party costs are designed to indemnify that party against the expense which he has been put to by the litigation.

**[9]** Hence, the plaintiff prayed that encls (103) and (104) be dismissed with cost and that the award of the registrar be maintained.

DECISION OF THE COURT

**[10]** Having heard and considered the written submissions of the parties and the authorities cited by them, the court agreed with and accepted the submissions of and the authorities cited by learned counsel for the second and first defendants. The court, consequently, allowed the second defendant's review application, encl (103), and the first defendant's notice of appeal, encl (104), with costs of RM5,000, respectively.

**[11]** The court, accordingly, set aside the award of the learned SAR in respect of the second and first defendants and substituted a sum of RM150,000 for the getting up fee for the second defendant and another sum of RM150,000 for the getting up fee for the first defendant.

**[12]** Being dissatisfied with the decision of the court in respect of each of the two enclosures, the plaintiff has filed two separate notices of appeal against the decision upon obtaining the leave of the Court of Appeal.

REASONS FOR THE DECISION OF THE COURT

**[13]** Below are the reasons why I decided in that manner.

**[14]** In my judgment, the amount of RM60,000 which was awarded to the second defendant and the amount of RM66,188.60 which was awarded to the first defendant for the getting up were unduly low and, therefore, unreasonable and ought to be increased to a sum of RM150,000 each for the second and first defendants which is fair and reasonable to the second and first defendants based

A on the reasons hereinafter stated.

BACKGROUND FACTS

B [15] I shall first deal with the undisputed background facts which are as follows:

(a) the taxation of costs by the learned SAR arose from a judgment dated 29 January 2010 of the High Court after a full trial;

C (b) the learned trial judge had dismissed the plaintiff's claim against all the three defendants with costs to be taxed and paid by the plaintiff and damages to be assessed by the registrar;

(c) before the learned SAR, the second defendant had sought a sum of RM240,000 for the getting up fee but the learned SAR had taxed off a D sum of RM180,000 and awarded a sum of RM60,000 which was 1/4 of the sum prayed for in item 69 of its bill of costs;

(d) before the learned SAR, the first defendant had sought a sum of RM300,000 for the getting up fee but the learned SAR had taxed off a E sum of RM233,811.40 and awarded a sum of RM66,188.60 which was slightly more than 1/5 of the sum prayed for in item 67 of its bill of costs;

(e) the plaintiff, the first defendant and the second defendants are companies engaged in the business of building and civil engineering constructions;

F (f) the plaintiff had sued the first and second defendants on the basis that the plaintiff was invited by them to jointly participate with them in a joint venture ('the JV') to submit a tender to the Jabatan Bekalan Air Negeri Pahang in respect of a project known as 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina Dan Menyiapkan Empangan Serta G Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan Pahang Darul Makmur' ('the project');

(g) pursuant to the JV, the plaintiff proceeded to prepare the tender;

(h) the essential feature of the JV was, inter alia, that the plaintiff would be H awarded a portion of the works arising from the project ('the plaintiff's portion') and the balance of the works would be shared between the first and second defendants;

(i) subsequently, the first defendant and the plaintiff entered into a I pre-tender agreement ('the PTA') wherein it was agreed, inter alia, that the first defendant would subsubcontract the plaintiff's portion of the project to the plaintiff;

(j) it was specifically provided in the PTA that the PTA would be void in the event the first defendant was not awarded the subcontract of the project

and the relationship between the plaintiff and the first defendant in relation to the PTA would come to an end;

(k) subsequently, as a result of the high rates quoted by the plaintiff in the tender and the plaintiff's unwillingness to make the necessary adjustments in the tender to lower its rates, the first defendant was not awarded the subcontract for the project;

(l) yet, the plaintiff sued the first, second and third defendants based on the PTA and this had caused the first and second defendants to incur unnecessary costs in defending themselves against the plaintiff's suit;

(m) in its writ of summons and amended statement of claim filed on 22 July 2002, the plaintiff prayed for, inter alia, the following reliefs against the three defendants:

(i) a declaration that a joint venture is constituted and continuing between the plaintiff and the first defendant;

(ii) a declaration that the defendants through AAY-MMN Joint Venture hold the plaintiff's portion as constructive trustees for the plaintiff;

(iii) an account of profits made by the defendants from the plaintiff's portion;

(iv) an order for specific performance of the PTA for the plaintiff's portion as evidenced by, inter alia, the pre-tender agreement; and

(v) an order that the defendants pay to the plaintiff the profits found to have been made by them on taking of the account.

(n) the first defendant filed its statement of defence and counterclaim on 6 August 2002 in which the first defendant counterclaimed for losses and damage which it had suffered as a result of the plaintiffs refusal to lower its price as quoted in the tender which had caused the first defendant to lose the subcontract for the project; and

(o) the second defendant defended the plaintiff's action on the ground that the plaintiff had no cause of action against the second defendant.

THE LAW

**[16]** It is trite law that the court will not interfere with the decision of the taxing officer unless the taxing officer has exercised his or her decision based on wrong principles or when the taxing officer has disregarded material matters or had taken into account irrelevant matters (see *Yong Teck Lee v Harris Mohd Salleh & Anor* [2009] 6 MLJ 437) and *Pang Kok v Leong Fock Hap & Anor* [1997] 4 MLJ 97; [1997] 1 CLJ Supp 232).

A **[17]** It is trite law that the court will not interfere with the decision of the taxing registrar upon a mere question of quantum unless it can be clearly shown that the registrar had made an obvious error or acted on mistaken principles in exercising his or her discretion (see *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [2002] 3 MLJ 705 (FC)).

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**[18]** In the Supreme Court case of *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583, the learned judge, namely, Abdul Malek Ahmad FCJ cited with approval the English case of *Coon v Diamond Tread Co (1938) Ltd* [1950] 2 All ER 385 wherein the dicta of Buckley LJ in *Re Ogilvie* [1910] P 243 was
C relied on, holding as follows:

> *On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of quantum the judge is not nearly as competent as the*
D *taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have gone wholly wrong.* If a question of principle is involved, it is different; *on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive.* (Emphasis added.)

(See also *Tan Boon Bak Trading Sdn Bhd v Chua Choong Yin* [2004] 3 CLJ 695
E (CA) and *Chan Kok Choon JP v MBf Finance Bhd* [2001] 1 MLJ 5; [2000] 4 CLJ 453).

**[19]** It is trite law that the award of costs remains at the discretion of the court. The guidelines to determine the amount of the getting up fee are clearly
F set out in s 1(2) of Appendix 1, Part X of O 59 of the former Rules of the High Court 1980 and in O 59 r 16(1) of the present Rules of Court 2012.

**[20]** In exercising his discretion, the taxing officer must have regard to all
G relevant circumstances and in particular to the following matters:

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the
H time and labour expended by, the solicitor of counsel;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

I (e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value; and

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in

relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

(See also *United Malayan Banking Corp v Indah Sejati Sdn Bhd* [1992] 1 AMR 71 and *Pang Kok v Leong Fock Hap* [1996] 4 MLJ 97; [1997] 1 CLJ Supp 232 in which these guidelines have been reproduced by the respective learned judges).

**[21]** In my judgment, in the instant case, the learned SAR had exercised her discretion based on wrong principles and she had also failed to consider material or relevant matters which ought to be taken into account.

**[22]** The learned SAR had failed to take into consideration the following material or relevant matters:

(a) there were many complicated issues involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;

(c) the number and the importance of the documents prepared or perused;

(d) the importance of the cause or matter to the client; and

(e) the current economic situation.

## THERE WERE MANY COMPLICATED ISSUES INVOLVED

**[23]** In my judgment, there were many complicated issues involved which had been raised by the first and second defendants' learned counsels in defending the plaintiff's case during the full trial. The learned SAR failed to appreciate that the plaintiff's claim was not only a contractual claim as it also revolves around complicated issues of construction tender, legal issues and various facts which were argued, heard and decided by the court.

**[24]** These issues can be summarised as follows:

(a) the exact nature of the relationship between the parties ie the alter ego issue and the plaintiff's cause of action;

(b) the PTA ie the interpretation of the terms, the scope, extent and price of the subcontract to be awarded to the plaintiff (if at all), the validity and/or enforceability of the PTA and its rationalisation;

(c) the *Pallant v Morgan* [1952] 2 All ER 951 equity;

(d) the first defendant's counterclaim; and

A (e) the appropriate relief and remedy (if any) to be granted to the plaintiff ie the abandoned claim for specific performance by the plaintiff.

**[25]** The decision of this case has been reported in *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Ors* [2010] 8 MLJ 749.

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**[26]** The complexity, difficulty and novelty of the issues can be seen from the 'statement of issues to be tried' which was filed by the parties and marked as 'J' by the trial court. These have been summarised in the second defendant's bill of
C cost, at pp 12–19, which involved 36 complicated issues.

**[27]** A lot of research and work were carried out by the first and second defendants' learned solicitors and/or counsel in defending the plaintiff's claim because of the complexity of the issues involved. This is reflected in the cause
D papers filed by the parties which are contained in the bundle of pleadings and six written submissions and bundles of authorities filed by the respective parties.

E **[28]** The learned SAR had erred when she held that the learned trial judge did not cite the 17 authorities which were referred to by the second defendant's learned counsel in his submissions or all the issues raised by the second defendant's learned counsel as a ground for making and maintaining her award on the getting up fee. The omission by the trial judge to refer to the 17
F authorities in her grounds of judgment and also to address all the complicated and complex issues raised by the parties in the full trial before her is irrelevant when it comes to the amount of the getting up fee which ought to be awarded to the second defendant.

G **[29]** What is relevant is the amount of research and work which had been put in by the first and second defendants' learned solicitors and/or counsel in order to prepare for the full trial of the instant case and having done those matters they are clearly entitled to their getting up fee (see *Southern Finance Co Bhd v Zamrud Properties Sdn Bhd (No 3)* [1998] 7 MLJ 168; [1999] 4 CLJ 754).

H

**[30]** In that case, the learned SAR found that there were only two issues decided by the learned judge. Hence, the getting up fee was awarded based on those two issues. However, it was increased by the learned judge who said as
I follows at p 172 (MLJ); p 756 (CLJ):

> *It is wrong for the learned SAR to have only considered the two issues identified by me in the judgment. He erred in failing to take account of the fact that the defendant had researched and submitted on all the other issues for which the defendant is entitled to getting up fees.* As was said by his Lordship Chong Siew Fai J (as he then was) in *Lloyds*

*Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127*an advocate and solicitor should not be precluded from preparing his client's case in greater depth to enhance chances of success.*

In the circumstances, the defendant is entitled to all the getting up necessary for the preparation of the case and not just the issues relied on by the court in arriving at the decision.

Needless to say there were at least six–seven other issues raised by the defendant which I felt unnecessary to decide upon. There is no need for me to recount and narrate these other issues for the purposes of this review. (Emphasis added.)

**[31]** In *Sarjit Singh Khaira v State Public Service Commission* [2007] 8 MLJ 86; [2007] 5 CLJ 156, the court awarded costs of RM235,814.56 on the ground that '... there were many complicated issues of both fact and law involving extensive legal research ...' (at p 93 (MLJ); p 163 (CLJ)).

**[32]** In *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292; [1990] 1 CLJ (Rep) 699, the court held as follows:

[3] For purposes of costs running down actions could be considered to be the simplest of cases. It should attract for getting up about the amount arrived at by applying the Subordinate Courts Rules 1980 scale. For the more complicated cases and those not as common place as running down actions, there should be a gradual scaling upwards of the costs for getting up from that starting point of what should be awarded in a running down action.

**[33]** The principle which was enunciated by the learned judge in the above case was referred to and applied in *Yii Suok Ting v Sibu Municipal Council* [1995] 4 CLJ 81.

**[34]** In that case the court held as follows at p 109 under 'Held [4]':

*In view of the complexity, the numerous issues involved, the difficult and complicated points of law* ... the present day inflation and the long lapse of time before the case was finally disposed of, a sum which is just and fair would be RM30,000. (Emphasis added.)

**[35]** Therefore, upon applying the above principle of law to the facts of the instant case, I was satisfied that the learned SAR had decided on the amount of the getting up fee based on a wrong principle of law and it had to be increased to reflect the amount of work and research which had been done by the first and second defendants' learned solicitors and/or counsel because of the many complicated issues involved and the complexity of the case.

**[36]** I also noted that in view of the complexity of the case and the

A complicated issues raised, six material witnesses were called in the full trial. Out of the six material witnesses, two were the witnesses for the plaintiff, namely, Kok Bee Chuan ('PW1') and Lim Chor Pin ('PW2') and four were the witnesses for the defendants, namely, Yip Kok Weng ('DW1'), the first defendant's witness, Yip Kok Sun ('DW2'), the second defendant's witness, B Hasri Bin Basri ('DW3'), the third defendant's witness, and Mohamed Mokhtar bin Dato' Nadzi ('DW4'), the third defendant's witness.

**[37]** In my judgment, the learned SAR had overlooked this fact, when she allowed only a sum of RM60,000 in respect of the second defendant's getting C up fee and RM66,188.60 in respect of the first defendant's getting up fee.

**[38]** Therefore, the getting up fee ought to be increased to take into account this fact.

D

THE SKILL, SPECIALISED KNOWLEDGE AND RESPONSIBILITY REQUIRED OF, AND THE TIME AND LABOUR EXPENDED BY THE SOLICITOR OR COUNSEL

E

**[39]** In *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374; [1997] 7 CLJ 481, the court awarded RM40,000 as getting up fees although there was only one issue involved which was not a novel one because '... the issue required specialised knowledge and many authorities were F perused and prepared for citing before the court'.

**[40]** In *Union Insurance Malaysia Sdn Bhd v Chan You Young* [2003] 3 MLJ 484; [2003] 7 CLJ 50, a running down action, the learned judge awarded getting up fees of RM200,000 on the ground that there were some special skill G and knowledge required in interpreting the vicarious liability issue.

**[41]** In the instant case, in my judgment, the learned SAR failed to take into account that this case required the specific skill and the specialised knowledge of Mr Yoong How Vey, the senior associate in the first defendant's firm of H solicitors, in defending the plaintiff's claim and that learned counsel of the first and second defendants succeeded in showing to the court that the plaintiff's claim was frivolous and vexatious. Hence, she ought to have considered that the burden of defending the plaintiff's claim ought not to be borne by the first and second defendants in the first place.

I

**[42]** The learned SAR also erred when she failed to consider that in order to increase the prospects of success of the defence of the first and second defendants in the full trial of the instant case, their learned solicitors and/or counsel had to prepare their clients' cases in greater depth. Hence, they had

expended a lot of time and labour in taking instructions from their clients to defend their clients against the plaintiff's claim. This entailed the perusal of the particulars of the pleadings and the consideration of the facts and law by their learned counsel.

[43] The learned SAR also erred when she overlooked the fact that the full trial took seven days instead of five days. This is clearly borne out in her (registrar's) certificate in which she had erroneously held that 'RM60,000 was justly awarded (to the second defendant's counsel) having considered the number of witnesses called and the five days of trial'.

[44] Furthermore, in my judgment, the learned SAR did not take into account the fact that the plaintiff's claim took almost nine long years to be disposed off, as it was filed in 2002 but it was only disposed off in 2010. This fact is important because it shows that the first and second defendants' learned solicitors and/or counsel had to attend to this case for almost nine long years, which is a considerable length of time, for any case.

THE NUMBER AND THE IMPORTANCE OF THE DOCUMENTS PREPARED OR PERUSED

[45] I also noted that the learned SAR erred when she did not consider that the plaintiff's claim against the second defendant involved numerous documents which were prepared and perused by the second defendant's learned counsel for the purpose of defending his client in the full trial.

[46] The voluminous bundles of documents containing the numerous documents are as follows:

(a) non-agreed bundle of documents (I) which had been divided into Vol 1–6 and consisting of thousands of pages;

(b) non-agreed bundle of documents (II) which had been divided into Vol 1–2;

(c) non-agreed bundle of documents (III);

(d) non-agreed bundle of documents (IV);

(e) non-agreed bundle of documents (V);

(f) non-agreed bundle of documents (VI);

(g) the first defendant's bundle of documents; and

(h) the second defendant's bundle of documents.

[47] In my judgment, the learned SAR erred when she held that 'the main

issue (in the full trial) was based on the pre-trial agreement (it should be the 'pre-tender agreement') thus not all documents filed in court was (it should be 'were') relevant for the purpose of the trial'.

[48] She had failed to consider that the numerous documents in the eight bundles of documents had been prepared and perused by the first and second defendants' learned solicitors and/or counsel irrespective of whether all the documents have been referred to in the full trial and that there were 65 documents which were tendered through the witnesses and marked as exhibits even though the main issue in the instant case concerned the PTA.

[49] The first defendant's solicitors had acted reasonably and properly in preparing for the case, in conducting a thorough research on the legal issues raised and in drafting and preparing 28 pages of written submissions and 19 pages of submissions in reply together with the cited authorities.

THE IMPORTANCE OF THE CAUSE OR MATTER TO THE CLIENT

[50] In *Malaysia International Consultants Sdn Bhd v RR Chelliah Brothers* [2009] MLJU 107; [2009] 4 CLJ 731, Gopal Sri Ram JCA (later FCJ) held that getting up fees of RM140,000 was justified even though the solicitor prepared only a defence and was subsequently discharged and replaced by a newly appointed solicitor because of '... the nature of the claim, its seriousness, the importance of litigation to the client and the nature and extent of the work that must have been done in preparing the kind of defence that was made available ...' (at p 735, para 6).

[51] In *Sarjit Singh Khaira v State Public Service Commission*, the court held as follows:

> In determining the getting-up fee, the taxing officer should be chiefly guided by the amount at stake and the importance of the issues involved ... *More importantly, the threat to have the second defendant (by counterclaim) struck off the Bar must have forced the latter to undertake a lot of work and research in the preparation to defend himself. Added to that, there was also the agony that the second defendant had to go or gone through.* (Emphasis added.)

[52] In my judgment, in the present case, the learned SAR erred when she overlooked the importance of the cause or matter to the first and second defendants as the plaintiff's claim against all the three defendants arose from the project which is worth RM69,300,000.

[53] This case involved the reputation, business and livelihood of the first defendant and the first defendant was forced to engage a lawyer to defend itself

and the plaintiff's failure to revise its quotation coupled with the filing of the plaintiff's claim have caused damage to the first defendant. This is because not only was the first defendant not appointed as the main subcontractor for the project the first defendant's reputation was also severely affected.

[54] The second defendant is also a company engaged in the business of building and civil engineering construction with a good reputation.

[55] Hence, I agree with the submission of the second defendant's learned counsel that it was very important for him to prepare the case for the second defendant in such a way as to enhance the prospects of the second defendant succeeding in its defence in the full trial.

[56] This will vindicate, protect and preserve the good reputation of the second defendant in the building and civil engineering construction industry and prevent other developers and/or the public who are involved in project tendering from mistakenly forming the impression that the second defendant is not a reliable and trustworthy company. If this was not done there is a strong possibility that the second defendant could lose out on potential future construction contracts due to the suit which was filed by the plaintiff against the second defendant.

[57] This factor ought to have been taken into account by the learned SAR without the necessity of proving it in the full trial (see *Bar Council v Datuk V Kanagalingam* [2000] 3 CLJ 697).

[58] In that case, the court, in awarding a sum of RM120,000 as the getting up costs due to the importance and/or seriousness of the cause or matter to the client, held as follows at p 704 (CLJ):

> In contrast to the contention of the appellant that this was just a case involving simple issues with no difficult points of law requiring special skills involved, *I consider it a matter of considerable importance in that the livelihood and professional reputation of the respondent was in jeopardy.* The respondent was therefore entitled to pursue his case to the full and to leave no stones unturned, even to the extent of appointing Queen's Counsel, consulting expert or making researches overseas to protect or restore his reputation and image in the eyes of his peers and the same reckoning, *I could not be persuaded to treat the question of costs awarded as if it were only ordinary costs given in a summary judgment application.* (Emphasis added.)

[59] In *Yong Teck Lee v Harris Mohd Salleh & Anor*, the court, in enhancing the getting up costs from RM16,000 to RM100,000 due to the importance and/or seriousness of the cause or matter to the client, said as follows:

A [36] *Another factor that the deputy registrar failed to give due prominence is the importance of the cause or matter to the client* (see item (e) of Part X in Appendix 1 of the Scale of Costs of the RHC). Though the deputy registrar admitted that this is one of the many factors to be considered, she failed to give significance to it. In this case the applicant, an elected representative of the state assembly of Sabah, was B challenged by two candidates of substance who took part in the same election. The first was a former Chief Minister of Sabah and the other, an ex Senator. The decisions of the election court, if upheld, have far reaching consequences. For the applicant, it means not only vacating his seat in the state assembly but also disqualification from participating in an election for five years. And for the C respondents and general public, particularly those electorates in the Likas constituency, there will be a new election. *So the cause or matter weigh heavy consequences to the respondents and forms an important and relevant factor for consideration when determining the amount of getting up fees.* (Emphasis added.)

D **[60]** In my judgment, in the instant case, the learned SAR erred when she held that the second defendant had to specifically prove that the second defendant's goodwill has been prejudiced because she could have easily drawn a reasonable inference that this has occurred from the proved primary facts in the baseless suit filed by the plaintiff against the defendants which was E dismissed by the learned trial judge after a full trial.

**[61]** This is what the learned SAR erroneously said in her (registrar's) certificate:

F We have to remember that this was never proven to this Court and the second Defendant had proven to the public that they are not the party at fault when the Court delivered judgment in their favor.

THE CURRENT ECONOMIC SITUATION

G

**[62]** In my judgment, the learned SAR also erred when she did not take into account the current economic situation such as, present day inflation, and the diminution in the purchasing power of the ringgit in determining the amount of getting up costs to be awarded to the first and second defendants. In *Yii Suok* H *Ting v Sibu Municipal Council*, the learned judge held that the present day inflation and the long lapse of time before the case was finally disposed of were relevant considerations.

I **[63]** The learned judge said as follows at p 109 under 'Held [4]':

In view of the complexity, the numerous issues involved, the difficult and complicated points of law ... *the present day inflation and the long lapse of time before the case was finally disposed of,* a sum which is just and fair would be RM30,000. (Emphasis added.)

CONCLUSION

**[64]** Based on the facts and the law as set out above, I increased the getting up fees for the first and second defendants to RM150,000, respectively, as I was satisfied that this was a fair amount as the increase was justified in view of the nature of the plaintiff's claim; the seriousness and effect of the plaintiff's claim on the first and second defendants; the importance of defending the plaintiff's claim to the first and second defendants; the many complicated and complex issues raised; the numerous and important documents prepared and perused; the seven days of full trial with six material witnesses; the skill, specialised knowledge and responsibility required of the solicitor or counsel and the time and the extent of the work and the depth of the legal research that were done by their learned solicitors and/or counsel to enhance their clients' prospects of success in defending, resisting and opposing the plaintiff's claim; the current economic situation; and the fact that it took almost nine long years before the suit was finally disposed of after a full trial.

*Applications allowed.*

Reported by Afiq Mohamad Noor