

**Tetuan Ros, Lee & Co**

v

**Tan Ming Yeow**

**Court of Appeal** – Civil Appeal No. W-02(NCVC)-2910-11/2011  
Abu Samah Nordin, Alizatul Khair Osman Khairuddin,  
Anantham Kasinather JJCA

November 2, 2012

*Professions – Advocates and solicitors – Remuneration – Recovery and taxation of costs – Appellant issued gross sum bill and subsequently another set of four detailed bills of costs in relation to same work – Whether detailed bills of costs rendered gross bill to be of no effect – Whether appellant ought to have proceeded with taxation on detailed bills – Whether appellant barred by doctrine of res judicata from raising in subsequent proceedings, matters which ought to have been litigated in previous proceedings in which its counterclaim was dismissed – Legal Profession Act 1976*

The appellant had represented the respondent in several contentious matters and had submitted to the respondent, two gross sum bills for payments, the first of which was for RM350,000 (“the first bill”) and the second, for RM450,000 (“the second bill”). The bills were issued purportedly pursuant to an agreement between the parties that the sum of RM800,000 was payable as full and final settlement for the legal work undertaken by the appellant on behalf of the respondent.

The respondent disagreed with the appellant’s claim that the fees payable was RM800,000. Having paid only the sum of RM350,000, the respondent then engaged another firm of solicitors which demanded on his behalf, a detailed bill in respect of the second bill. The appellant obliged by forwarding four detailed bills of costs which had already been filed for taxation. The respondent disputed the bills and commenced proceedings (“the first suit”) seeking inter alia a declaration that the same are void and unenforceable and in the alternative, an order that the appellant be restrained from proceeding with the hearing or taxation thereof. The appellant amended its defence to the first suit, to include a claim for the aggregate of the four detailed bills of costs amounting to RM822,310.25 in all and in the alternative, the sum of RM450,000 as demanded in the second bill. The High Court dismissed the respondent’s claim and the only prayer for the amount of the first bill sought by the appellant and ordered that the appellant be at liberty to recover the remaining bills according to the procedure set out under the Legal Profession Act 1976. The respondent appealed unsuccessfully to the Court of Appeal against the said decision.

Subsequent thereto, the appellant filed a suit against the respondent (“the second suit”) claiming the aggregate of the four detailed bills of costs, amounting to RM822,310.25. The respondent’s application to strike out the second suit was allowed by the High Court on the grounds that there was duplicity in the appellant’s claim and counterclaim in the first and second suits. Hence the instant appeal.

## 1 Issue

Whether it is open to the appellant to pursue its claim for RM822,310.25 by way of the second suit.

## 5 Held, dismissing the appeal with costs

1. Applying the proposition of law laid down in *Siew Kuen Williams v Yong Siew In* [1984] 1 MLJ 95 ("*Siew Kuan Williams*"), when the appellant submitted the four detailed bills of costs to the respondent, its earlier gross sum bill for RM450,000 ceased to be of any effect. Following *Siew Kuan Williams* the cause of action that was available to the appellant when it applied to amend its counterclaim, was to seek an order to have its four detailed bills of costs taxed. [see p 160 para 10 line 32 - p 161 para 10 line 9]
2. The High Court was right in dismissing the appellant's claim as at the time of filing its counterclaim, it had already issued the four detailed itemised bills of costs in place of the second bill. Based on *Siew Kuan Williams*, it ought to have sought an order for the four detailed bills of costs to be taxed by the registrar in the first suit although strictly, taxation of a detailed bill of costs is possible without an order. The doctrine of res judicata in its wider sense extends to preclude a litigant from raising, in subsequent proceedings, matters which could and have been litigated in the earlier proceedings. Applying the wider doctrine of res judicata to the facts of this case, the appellant has only itself to blame for pursuing the claim for RM450,000 when based on the authority of *Siew Kuan Williams*, it ought to have pursued the claim for RM822,310.25. The fact that the respondent's claim revolved around the alleged agreement on costs, is no excuse for the appellant not to have pursued its claim for the RM822,310.25 since a counterclaim is independent of the respondent's original claim based on the agreement for costs. In the circumstances, the High Court was right to have struck out the second suit for offending the doctrine of res judicata. [see p 161 para 11 lines 16-33; p 162 para 11 lines 26-35]
3. The appellant cannot claim that the aggregate of the four detailed bills of costs has become a debt on the basis that the respondent did not require the bills to be submitted for taxation, bearing in mind that the respondent had in the first suit challenged the validity of the said bills which took the form of bills which were to be submitted for taxation and since the appellant had by consent agreed not to tax the same until the disposal of the first suit. Accordingly, even if the appellant's claim in the second suit is not prohibited by the doctrine of res judicata, there was no debt due from the respondent to the appellant based on the four itemised bills of costs. [see p 163 para 11 lines 3-18]

## Cases referred to by the court

- Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 AMR 2559;  
[1995] 3 CLJ 783, SC (ref)  
40 *Greenhalgh v Mallard* [1947] 2 All ER 255, CA (ref)

*Henderson v Henderson* [1843] 3 Hare 100, HC (*ref*) 1  
*Siew Kuen Williams v Yong Siew In* [1984] 1 MLJ 95, HC (*foli*)  
*Taxation of Costs, Re; In Re Solicitors* [1943] KB 69 (*ref*)  
*Yat Tung Investment Co v Dao Heng Bank (PC)* [1975] AC 581, PC (HK) (*ref*)

**Legislation referred to by the court** 5

Legal Profession Act 1976, ss 116, 121(1)(a), 124(1), 126(1)  
 Rules of the High Court 1980, Order 18 r 19

*Appeal from High Court, Kuala Lumpur – Suit No. 22NCvC-423-2011*

*Ringo Low* (Ringo Low & Associates) for appellant 10  
*Justin Voon and Chia Wen Chow* (Chia Wen Chow & Associates) for respondent

*Judgment received: November 20, 2012*

**Anantham Kasinather JCA** (*delivering the judgment of the court*) 15

**Background facts**

[1] The appellant was the solicitor for the respondent in a matter involving several contentious legal matters involving a company known as Rong Ji. On completion of the several contentious matters, the appellant submitted two gross sum bills to the respondent for payment by him. According to the appellant, the two bills were in respect of the seven different contentious matters that the appellant had acted as the solicitor for the respondent. The first gross sum bill for RM350,000 (“first bill”) was dated April 26, 2010 and was in respect of three of these contentious matters. The second gross sum bill for RM450,000 (“second bill”) was also dated April 26, 2010 and was in respect of the four remaining contentious matters. According to the appellant, the first and second bills were despatched pursuant to an oral agreement reached between the parties whereby the respondent agreed to pay RM800,000 by way of full and final settlement for the legal work undertaken by the appellant for and on behalf of the respondent in respect of these seven contentious matters. 20

[2] The respondent paid RM350,000 claiming that this amount was the agreed amount payable by way of fees and not RM800,000 as alleged by the respondent. Following the payment of RM350,000 the respondent engaged a new firm of solicitors and the new firm of solicitors demanded a detailed bill in respect of the second bill. The appellant duly obliged and forwarded four detailed bills of costs in respect of the four contentious matters forming the subject matter of the second bill. The four detailed bills of costs were all dated October 15, 2010. 25

[3] The respondent, not being satisfied with the detailed bills of costs rendered by the appellant filed an action with the Kuala Lumpur High Court bearing 30

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1 Civil Suit No. S-22-NCVC-70-2010 ("the first suit"). In this suit, the respondent claimed, inter alia, the following:

5 (i) A declaration that the four detailed bills of costs are void and unenforceable or alternatively, the appellant to be restrained from proceeding with the hearing or taxation of the said four details bills of costs;

10 (ii) The appellant be directed to resend fresh bills of costs for all the seven cases limited to the sum of RM350,000 or such other sum as is appropriate; and

(iii) The appellant be directed to refund the sum of RM350,000 to stakeholders to pay towards the taxed costs of the seven cases aforementioned.

15 [4] The four detailed bills of costs rendered by the appellant took the form of bills of costs which had already been filed for taxation. Hence, prayer (1) above. The respondent concerned that the appellant may proceed with the taxation of the four bills of costs whilst the first suit was pending disposal, filed an injunction to prevent the appellant from proceeding with the taxation of the four detailed bills of costs until the first suit was determined. In the event, with the consent of the appellant, a consent order was recorded on 20 November 9, 2010 in the first suit whereby the appellant agreed to stay all taxation proceedings until the final disposal of the first suit (see pp 288 and 289 or AR jilid 4, bahagian C).

25 [5] The defence filed by the appellant in the first suit in its original form did not include a counterclaim. However, the appellant applied on December 29, 2010 to amend its statement of defence in order to include a counterclaim. The counterclaim incorporated a claim for the aggregate of the four detailed bills of costs amounting to RM822,310.25 in all and in the alternative the amount of RM450,000 demanded in the second bill (see p 305, jilid 5, bahagian C). 30 According to counsel for the respondent, the appellant during the course of the trial elected to abandon its claim for RM822,310.25 and instead pursued the alternative claim for the sum of RM450,000 contained in the second bill.

35 [6] On the conclusion of the first suit, the learned Justice Prasad dismissed all of the prayers sought by the respondent and the only prayer for the amount of the first bill sought by the appellant on the single ground that under s 116 of the Legal Profession Act 1976 any agreement on costs has to be in writing. Since both the claim and the counterclaim to be valid required a written agreement under s 116 and there was none on the facts of this case, His Lordship dismissed both the claim and the counterclaim. However, the judgment of His Lordship included the following words: 40

I further gave liberty to the defendant to recover his remaining bills according to the procedure set out under the Legal Profession Act 1976. 1

Notwithstanding holding the agreement on costs to be invalid, His Lordship did not order prayer (iv) which required the respondent to refund the sum of RM350,000 paid by the respondent pursuant to the oral agreement on costs. 5

[7] The judgment of Justice Prasad formed a subject matter of an appeal and the appeal was heard by the Court of Appeal on September 12, 2011. The respondent appealed against the order of the learned judge denying all the prayers in the first suit and the words in italics above. The Court of Appeal dismissed the appeal but deleted the words in italics. 10

[8] On May 24, 2011, the appellant filed Civil Suit No. 22-NCVC-423-2011 ("the second suit"). In this second suit, the appellant claimed the aggregate of the four detailed bills of costs amounting to RM822,310.25. The respondent applied under Order 18 r 19 to strike out the claim of the appellant citing, inter alia, that the appellant's claim was barred by the doctrine of res judicata. The appellant in the affidavit filed an opposition to the Order 18 r 19 application averred that it was entitled to pursue for the sum of RM822,310.21 because Justice Prasad had granted it liberty to proceed with its claim under the Legal Profession Act (see paragraph 7 of the affidavit of Mr Lee Chuen Tiat at p 352 of jilid 5, bahagian C). This assertion ceased to be true following the decision of the Court of Appeal on September 12, 2011. 15 20

[9] Justice VT Singam heard the respondent's application on October 17, 2011 and granted the same. His Lordship in striking out the appellant's claim ruled that there was duplicity in the claim pursued by the appellant in the first suit and the counterclaim in the second suit in that the claims in both suits were substantially similar in terms of the facts, the issues and in substance. 25

### Decision of the court

[10] We heard this appeal on February 3, 2012 and dismissed the same. In our judgment, the first issue which needs to be addressed is the effect in law of the replacement of the earlier gross sum bill by an itemised bill of costs at the request of the respondent. This very issue was addressed to the court in *Siew Kuen Williams v Yong Siew In* [1984] 1 MLJ 95 (included in the bundle of authorities of the respondent). Her Ladyship Siti Norma Yaakob J (as Her Ladyship then was) answered this question by adopting the answer provided in *Re Taxation of Costs; In Re Solicitors* [1943] KB 69 that: 30 35

The gross sum bill shall thereupon be of no effect.

Applying this proposition of law to the facts of this case, as of October 15, 2010 when the appellant submitted the four detailed bills of costs to the respondent, the earlier gross sum bill for RM450,000 ceased to be of any effect. In our judgment, following the authority of *Siew Kuen Williams v Yong Siew* 40

1 *In*, the cause of action available to the appellant when it applied to amend  
its counterclaim on December 29, 2010 was to seek an order to have its four  
detailed bill of costs taxed by the registrar of the court. This is evident from  
the following passage in the same judgment where Her Ladyship quoted  
5 Goddard LJ to have said in the same case when it came on appeal that:

If a solicitor delivers a gross sum bill and his client asks for a detailed bill, the  
solicitor must withdraw his gross sum bill and is treated as if it has never been  
delivered. The detailed bill becomes the material bill and is subject to taxation.  
(See p 96 of the reported judgment of the court).

10 On the facts of this case the appellant instead of seeking an order for the  
taxation of the same, claimed the sum of RM450,000. To make matters worse,  
the appellant pursued the claim for RM450,000 after abandoning the pleaded  
claim for RM822,310.25.

15 [11] The question posed to us in this appeal was whether it is open to the  
appellant to pursue the claim for RM822,310.25 by way of the second suit.  
In our judgment, the learned Justice VT Singam was right to dismiss the  
appellant's claim for the following reasons:

(a) The fact of the matter is that at the time of filing the counterclaim on  
20 December 29, 2010, the appellant had already issued the four detailed  
itemised bills of costs in place of the second bill. Accordingly, based  
on the authority of *Siew Kuen Williams v Yong Siew In*, the appellant  
ought to have sought an order to have the four detailed bills of costs  
taxed by the registrar in the first suit although strictly taxation of a  
25 detailed bill of cost is possible without an order (see s 126(1) of the  
Legal Profession Act 1976). The only explanation proffered by learned  
counsel for the appellant for not doing this was that the first suit only  
concerned the existence, if any, of a valid agreement on costs. The  
four detailed bills of costs had no relevance to the issue of whether  
30 the parties had reached agreement on costs. With respect, we beg to  
differ. It has long been established that the doctrine of *res judicata* in its  
wider sense extends to preclude a litigant from raising in subsequent  
proceedings matters which could and therefore should have been  
litigated in earlier proceedings. The locus classicus of this aspect of  
the *res judicata* doctrine is best captured in the words of Wigram VC  
35 in the case of *Henderson v Henderson* [1843] 3 Hare 100. Wigram VC  
explained the doctrine at p 115 of the reported judgment of the court  
in the following manner:

... where a given matter becomes the subject of litigation in, and of  
adjudication by, a court of competent jurisdiction, the court requires the  
parties to that litigation to bring forward their whole case, and will not  
40 (except under special circumstances) permit the same parties to open  
the same subject of litigation in respect of matter which might have been

brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Lord Kilbrandon in *Yat Tung Investment Co v Dao Heng Bank (PC)* [1975] AC 581 after adopting the above passage in the judgment of Wigram VC highlighted that in the subsequent case of *Greenhalgh v Mallard* [1947] 2 All ER 255. Somervell LJ expended on the Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" to mean:

... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... It covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

Our Federal Court in the case of *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 AMR 2559; [1995] 3 CLJ 783 followed the decision of the Privy Council in *Yat Tung Investment Co v Dao Heng Bank (PC)* and Somervell LJ's pronouncements in *Greenhalgh v Mallard*. Peh Swee Chin FCJ (as His Lordship then was) opined that public policy considerations demand that a litigant be required to raise a cause of action based on the same facts or issues in the original earlier action to prevent multiplicity of actions. Applying the wider doctrine of *res judicata* to the facts of this case, the appellant has only itself to blame for pursuing with the claim for RM450,000 when following the authority of *Siew Kuen Williams v Yong Siew In*, it ought to have pursued with the claim for RM822,310.25. The fact that the respondent's claim revolved around the alleged agreement on costs, with respect, is no excuse for the appellant not having pursued its claim for RM822,310.25 since a counterclaim is independent of the respondent's original claim based on the agreement for costs. Accordingly, in our judgment, the learned judge was right to strike out the appellant's claim in the second suit for offending the doctrine of *res judicata* as understood in the wider sense.

- (b) There is yet another reason why the appellant's claim is not sustainable in law. The appellant's claim in the second suit is premised on the aggregate of the four itemised bills of costs already being a debt due from the respondent to the appellant purportedly because of the failure of the respondent to demand that the four bills be submitted for taxation before the expiration of one month. This submission has no merit based on the pronouncements of Goddard LJ in *Re Taxation of Costs; In re Solicitors* (supra) and adopted by Siti Norma Yaakob J

1 in *Siew Kuen Williams v Yong Siew In* (supra) that a detailed bill of  
costs must of necessity be submitted for taxation (see s 121(1)(a) read  
with s 124(1) of the Legal Profession Act 1976). In any event, on the  
particular facts of this case, the appellant is precluded from claiming  
5 that the respondent did not demand that the appellant submit its four  
detailed bills of costs for taxation since prayer (a) of the first suit filed  
by the respondent challenged the validity of the four detailed bills of  
costs. Secondly, the detailed bill of costs forwarded by the appellant  
took the form of bills which were to be submitted for taxation (see  
10 pp 206-234 of jilid 4, bahagian C). Thirdly, the parties entered into a  
consent order on November 9, 2010 wherein the appellant agreed not  
to tax the four detailed bills of costs until the disposal of the first suit. In  
the face of the aforesaid facts, it sounds ill in the mouth of the appellant  
to now claim that the aggregate of the four detailed bills of costs have  
15 become a debt because the respondent did not require the bills to be  
submitted for taxation. Accordingly, even if the appellant's claim in  
the second suit is not prohibited by the doctrine of *res judicata*, in our  
judgment, there is no debt due from the respondent to the appellant  
based on the four itemised bills of costs.

20 [12] Accordingly, we dismiss the appeal with costs. The appellant to pay  
costs of RM10,000 to the respondent. By consent the deposit to be refunded  
to the appellant.

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