Riaz LLC *v* Sharil bin Abbas (through his deputy and litigation representative, Salbeah bte Paye)
[2013] SGHCR 18

Case Number : Bill of Costs No 193 of 2012

Decision Date : 25 June 2013

Tribunal/Court : High Court

Coram : Sngeeta Devi AR

Counsel Name(s) : Mr Ezekiel Peter Latimer (Peter Ezekiel & Co) for the applicant; Mr Raj Singh Shergill (Lee Shergill LLP) for the respondent.

Parties : Riaz LLC — Sharil bin Abbas (through his deputy and litigation representative, Salbeah bte Paye)

Legal Profession – Bill of Costs

25 June 2013

AR Sngeeta Devi:

Introduction

1 Disputes between solicitors and clients concerning costs payable by the latter are often resolved through a process of taxation by a Registrar. Invariably, the dispute often revolves around the quantum of costs payable. However, the taxation of this particular bill of costs presented a rare but interesting objection by the client's litigation representative. The solicitor had entered into a contract with his client, who had suffered a severe brain injury in a traffic accident. The client's litigation representative argued that the solicitor was not entitled to any costs as the contract was voidable due to the lack of mental capacity of the client. After hearing submissions and analysing the medical evidence, I refused to allow any costs to the solicitor on the ground that the contract was indeed voidable, at the option of the client. As the taxation raised interesting issues, I now set out the reasons for my decision.

Background

2 Mr Sharil bin Abbas ("Sharil") was involved in a traffic accident on 11 December 2007, in which he suffered severe injuries including traumatic brain injury. The applicant in this bill of costs, Messrs Riaz LLC, filed Suit No 539 of 2009 ("Suit 539") on 22 June 2009, in which Sharil claimed for damages against the driver of the vehicle involved in the accident ('the defendant"). The defendant in Suit 539 added the driver of another vehicle as a third party ("the third party"). Mr Riaz Qayyum ("Mr Riaz") acted on behalf of Sharil.

3 On 28 June 2010, a notice of change of solicitors for Sharil was filed wherein the conduct of Suit 539 was taken over by Messrs Lee Shergill LLP with Mr Raj Singh Shergill ("Mr Singh") acting on behalf of Sharil. At a Pre-trial Conference on 8 July 2010, Mr Singh informed the Court that in the process of interviewing Sharil, he started having doubts over his mental capacity and hence he would be sending Sharil for a medical examination. On the basis of the resulting medical evidence, Mr Singh filed an application under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("the MCA"), on behalf of Sharil's mother, Mdm Salbeah bte Paye, seeking for, *inter alia*, an order that she be appointed as

Sharil's Deputy. On 11 November 2010, a District Judge made an order declaring Sharil as being "unable to make various decisions for himself in relation to a matter or matters concerning [his] personal welfare and property and affairs because of an impairment of, or a disturbance in the functioning of [his] mind or brain" and appointed Sharil's mother as his Deputy. The order gave her, *inter alia*, the power to conduct legal proceedings in Sharil's name or on his behalf. Thereafter, Mr Singh applied to amend the writ of summons in Suit 539 to show that Sharil was suing through his Deputy.

4 On 19 May 2011, an interlocutory judgment by consent was recorded for Suit 539 before a Judge, in which the defendant and third party were to pay 80% and 10% respectively of Sharil's damages which would be assessed by a Registrar, to whom costs and interests were reserved to.

5 On 31 October 2011, an Assistant Registrar approved a settlement sum agreed between the parties on the damages payable to Sharil and recorded a consent judgment accordingly. On party and party costs, the Assistant Registrar ordered that the defendant and third party pay Sharil's costs and disbursements, to be agreed or taxed. On solicitor and client costs between Sharil and his solicitor, the Assistant Registrar ruled that the costs be taxed, if not agreed with the Public Trustee.

Requirement for solicitor and client costs to be taxed

6 Section 18 of the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) ("the MVA") seeks to ensure that solicitors' remuneration is fair, to both the solicitor and the client. The relevant portions of s 18 are as follows:

> (2) No person, other than a public officer or an advocate and solicitor properly acting in the course of his profession, shall, directly or indirectly, for personal gain make or commence or cause to be made or commenced on behalf of any other person any claim or action for damages for the death of or bodily injury to any person arising out of the use of a motor vehicle or negotiate, settle or compromise that claim or action when made or commenced.
>
> (3) Notwithstanding the provisions of any other written law, a public officer or *an advocate and solicitor, acting in respect of the matters referred to in subsection (2), shall not receive or accept any payment of money for so acting other than —*
>
> (a) such costs as are agreed between him and the Public Trustee;
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> (b) taxed costs, in default of such agreement with the Public Trustee; or
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> (c) such costs as the Public Trustee may determine to be the costs of the public officer or advocate and solicitor, if the public officer or advocate and solicitor fails to begin proceedings for taxation of costs within 3 months after the relevant date unless before that time the public officer or the advocate and solicitor has agreed with the Public Trustee on costs.
>
> [emphasis added]

7 Mr Singh informed me that the Public Trustee's Office had directed him to present his bill for taxation as the matter encompassed two sets of solicitors claiming for costs. Mr Singh was also told to ensure that both bills were fixed for taxation together. Hence, Mr Singh filed his bill of costs on 7 September 2012 ("Bill of Costs No 182 of 2012") and informed Messrs Riaz LLC about the hearing date which subsequently filed this bill on 28 September 2012.

8 By a letter dated 8 November 2012, the Public Trustee's Office informed Mr Singh that pursuant to paragraphs 17 and 18 of the Public Trustee's Practice Circular No. 1 of 2004, the Public Trustee will not make any recommendations on the costs where previous solicitors are involved and the solicitors are unable to reach an agreement on their respective solicitor and client costs. The Public Trustee would also not be present at the taxation proceedings, unless required to do so by the Court.

9 Both bills were heard by me but this grounds of decision relates only to the bill filed by Messrs Riaz LLC. There was no overlap in the costs claimed as both solicitors claimed for work done over different periods of time.

10 It is important to note here that there was another reason for costs to be taxed. This was a matter involving a claim made by a person who lacked mental capacity. Hence, by virtue of O 59 r 29 of the Rules of Court (Cap 322, R5, 2006 Rev Ed), solicitor and client costs should be taxed by Court. The relevant parts of O 59 r 29 are as follows:

> (1) This Rule applies to —
>
> > (a) any proceedings in which money is claimed or recovered by or on behalf of, or adjudged or ordered or agreed to be paid to, or for the benefit of, a person who is a minor, or who lacks capacity within the meaning of the Mental Capacity Act (Cap. 177A) in relation to matters concerning his property and affairs or in which money paid into Court is accepted by or on behalf of such a person;
> >
> > …
>
> (2) *The costs payable to his solicitor by any plaintiff in any proceedings to which this Rule applies by virtue of paragraph (1) (a) or (b), being the costs of those proceedings or incident to the claim therein or consequent thereon, shall be taxed under Rule 28*; and no costs shall be payable to the solicitor of any plaintiff in respect of those proceedings except such amount of costs as may be certified in accordance with this Rule on the taxation under Rule 28 of the solicitor's bill of costs to the plaintiff.
>
> (3) On the taxation under Rule 28 of a solicitor's bill to any plaintiff in any proceedings to which this Rule applies by virtue of paragraph (1) (*a*) or (*b*) who is his own client, the Registrar *shall also tax any costs payable to that plaintiff in those proceedings* …
>
> [emphasis added]

11 Since the Order of Court dated 31 October 2011 permitted costs on a party and party basis to be agreed between the parties and Mr Singh informed me that they had already done so, I could not tax the costs payable to Sharil by the defendant and third party.

The Respondent's Position

12 In the Notice of Dispute filed on 7 November 2012, the respondent disputed the bill of costs on the basis of both principle and quantum. In relation to the objection on principle, the respondent stated that:

> Retainer was contracted with a person under disability who had no capacity to contract with solicitors. They were put on notice by [Sharil's] mother and had notice of the serious head injuries to the point that [Sharil] could not make a police report. Yet they took no steps to

appoint a litigation representative or to secure appointment of a Deputy. The Deputy appointed under the MCA has treated the contract as void.

In his submissions before me, Mr Singh argued that the contract was voidable, at the option of the client.

13 In an affidavit filed on 3 January 2013, Sharil's mother, as the litigation representative, asserted that Mr Riaz would have surely known that Sharil had no mental capacity to enter into any sort of contractual agreement with him. The key reasons highlighted by her were as follows:

(a) It would have been obvious to anyone who met Sharil that he was not in the right frame of mind;

(b) Messrs Riaz LLC had written to the Traffic Police on 27 May 2008 informing them that Sharil was seriously injured and was brain damaged. This suggested that Mr Riaz was aware of the acute mental condition of Sharil but simply chose to ignore it;

(c) In a letter to the defendant's insurer, Mr Riaz had quantified Sharil's claim in Suit 539 at $1 million, citing traumatic brain injury with contusion in both hemispheres. This again pointed to the fact that Mr Riaz was familiar with the seriousness of the injuries suffered by Sharil and the effect it had on his mental capacity; and

(d) When Mr Riaz met Sharil in hospital, he was shrieking and incoherent.

14 Through a letter dated 22 March 2012, Mr Singh had informed Messrs Riaz LLC, that Sharil's mother had decided to treat the contract between the applicant and Sharil as void. By a letter dated 2 April 2012, Mr Singh had also requested for a copy of their warrant to act. However, this was not provided.

15 Interestingly, neither party filed any application to determine whether the contract was voidable or to seek any redress on the issue.

The Applicant's Position

16 In an affidavit filed on 14 December 2012, Mr Riaz took the position that there was no reasonable ground to consider the retainer as void or to deny his firm fair and reasonable costs for work that was done in good faith.

17 The affidavit also annexed the warrant to act, which stated that Sharil had authorised Messrs Riaz Advocates & Solicitors to act on his behalf, in respect of the accident. The warrant to act was not dated and contained a signature with a thumbprint next to it. Mr Ezekiel Peter Latimer ("Mr Ezekiel") who represented the applicant in this bill, explained that the thumbprint was Sharil's and the signature belonged to his mother. The respondent did not deny this.

18 In an affidavit filed on 28 May 2013, Mr Riaz asserted that:

I was informed that [Sharil] was making a good recovery from his serious head injury but due to

> the nature of the injury and the family informing me that [Sharil] was emotional and prone to outbursts of emotion, I not only obtained instructions to act from Sharil but his mother as well. … It was not obviously apparent to me, unlike in a situation where a person is in a coma or suffers from severe and very obvious brain damage which is immediately apparent with no recovery over months, that the client was mentally disabled. … In any event, the issue of [Sharil's] capacity does not even arise as the circumstances were such that I obtained [Sharil's mother's] instructions to act at the hospital at the first meeting.

19 Before me, Mr Ezekiel took the position that while his mother had signed the warrant to act, only Sharil was the client. There was no reason for Mr Riaz to suspect that Sharil lacked mental capacity. He added that the Order of Court declaring Sharil to lack mental capacity was only obtained in 2010 while the warrant to act was executed much earlier. Sharil may have had the mental capacity to execute the warrant to act at that point. Even if he did not have the requisite mental capacity, it was not immediately apparent to the solicitor.

The Applicable Law

20 A contract executed by a person who had no mental capacity to do so, was voidable but not void. If the contract was not to be enforced against him, the person who lacks capacity has to prove that the other contracting party knew or ought to have known of the lack of capacity. The test for whether a person lacked capacity to enter into a transaction was whether there was understanding of the transaction on his part: see *Che Som bte Yip and others v Maha Pte Ltd and others* [1989] 2 SLR (R) 60 ("*Che Som*") at [23]–[24] and *The Law of Contract in Singapore*, (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at pp 530–531.

21 In *Wong Meng Cheong and another v Ling Ai Wah and another* [2012] 1 SLR 549, Justice Lai Siu Chiu held that the statutory test under the MCA on mental capacity was consistent with common law definitions. She observed, at [27], that:

> The statutory test is consistent with the common law definitions which were applied to determine whether decisions made in other contexts should be upheld … The common law definitions uphold the value of autonomy because capacity is a necessary condition for an individual to behave autonomously. In a similar vein, the underlying philosophy of the MCA emphasises an individual's autonomy and the right to decide for himself. For example, the MCA provides that decisions cannot be taken on behalf of another person unless it is established that he lacks statutorily-defined capacity in relation to the specific matter. As a corollary, if a person possessed statutorily-defined capacity, his decision should stand as it is an autonomous one, assuming that other vitiating factors are absent. Given that the MCA was enacted to guide proxy decision-making and not to alter the pre-existing conception of autonomy embodied in the common law, its concept of capacity was not different from the common law's.

22 According to s 3(2) of the MCA, a person is assumed to have capacity unless it is established that he lacks capacity. Section 4(1) of the MCA provides that:

> For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

23 Section 5(1) of the MCA defines a person as being unable to make a decision for himself if he is "unable to understand the information relevant to the decision, to retain that information, to use or weigh that information as part of the process of making the decision or to communicate his decision

(whether by talking, using sign language or any other means)".

24 Therefore, while this was not an application under the MCA, the principles above should be instructive when determining whether a person lacks the necessary mental capacity to understand and enter into a transaction.

Issues for consideration

25 Applying the law to the facts, Sharil would have to show, first, that at the time of entering into the contract with Messrs Riaz LLC, he lacked the mental capacity to understand what he was doing and second, that this incapacity was known or ought to have been known by Messrs Riaz LLC. The warrant to act was not dated but Mr Ezekiel submitted that it was likely to have been executed in the time period between January and June 2008. Mr Singh did not dispute this.

26 Three issues arose for my decision:

(a) Whether a Registrar has the power to determine whether the contract was voidable at a taxation hearing;

(b) Whether the court has the authority to depart from any agreement between the parties on the costs payable; and

(c) If the answers to the above two issues are in the affirmative, whether the contract was indeed voidable.

Determining whether the contract was voidable at a taxation hearing

27 I had asked both counsel to make submissions on whether, as the taxing Registrar, I could determine whether the contract was voidable.

28 Mr Singh submitted that a taxing Registrar definitely had the power to make this determination. In aid of his submission, he cited O 59 r 13 of the Rules of Court which reads as follows:

(1) The Registrar may, in the discharge of his functions with respect to the taxation of costs —

(a) take an account of any dealings in money made in connection with the payment of the costs being taxed, if the Court so directs;

(b) require any party represented jointly with any other party in any proceedings before him to be separately represented;

(c) examine any witness in those proceedings; and

(d) direct the production of any document which may be relevant in connection with those proceedings.

By virtue of the above provision, a taxing Registrar would have the power to examine witnesses.

29 Mr Singh also relied on O 92 r 4 of the Rules of Court, which provides that nothing in the Rules of Court "shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or prevent an abuse of the process of the Court".

30 Mr Ezekiel, on the other hand, preferred to limit his submission to saying that the taxation process was not suitable for the determination of such an issue. He did not register any arguments on how the issue should be resolved and if a trial was necessary.

31 In *Giannarelli v Wraith (No 2)* [1991] 171 CLR 592, the High Court of Australia held that that if the taxing officer was of the opinion that there is a genuine factual issue between the parties, he could exercise the powers under O 71 r 70 of the High Court Rules of Australia applicable then, which provided as follows:

> The taxing officer may, for the purposes of taxation of costs —
>
> (a) summon and examine witnesses either orally or upon affidavit;
>
> (b) administer oaths;
>
> (c) direct or require the production of books, papers and documents;
>
> (d) issue subpoenas;
>
> (e) make separate or interim certificates or allocaturs;
>
> (f) require a party to be represented by a separate solicitor; and
>
> (g) do such other acts and direct or take all such other steps as are directed by these Rules or by the Court or a Justice."

32 McHugh J observed, at 599–600, that:

> If the taxing officer thinks that there is a genuine factual issue between parties, then, in my opinion, he or she can exercise the powers under O. 71, r. 70. As long as the taxing officer exercises those powers "for the purpose of taxation of costs", and not capriciously or unreasonably, he or she need not have any evidence before him or her. As Hobhouse J. said in *Pamplin*:
>
> > "it is well within the discretion and expertise of the master to decide when there is in truth a factual issue which needs to be decided, and therefore calls for the adducing of evidence by the claimant. It is essential to the efficient and economic conduct of the taxation that the master should have this discretion."

The relevant rule remains unchanged in their current High Court Rules, 2004.

33 In my opinion, where the determination of an issue is of utmost importance to and fundamental to the taxation proceeding, a taxing Registrar undoubtedly has the discretionary power to make that determination. Here, as the taxing Registrar, I had to ascertain whether a valid contract was even in place before deciding on the costs that should be granted to the solicitor, given the uncertainty surrounding the signing of the warrant to act (whether the client was mentally incapable of entering into the contract when he signed the warrant to act).

34 Moreover, O 32 r 9 (1) provides as follows:

> (1) The Registrar of the Supreme Court shall have power to transact all such business and exercise all such authority and jurisdiction under any written law as may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these Rules be expressly directed to be transacted or exercised by a Judge in person.

Neither the Chief Justice nor the Rules of Court have directed that issues relating to mental capacity have to be determined by a Judge in person. In fact, both *ex parte* and *inter partes* applications under the MCA, are heard by the District Court by virtue of the Supreme Court of Judicature (Transfer of Mental Capacity Proceedings to District Court) Order 2010 (S 104/2010). Previously, applications for an inquiry on the mental state of a person and the appointment of a committee of the person and/or the estate under the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed) could be heard by a Registrar, see Practice Direction No. 2 of 2008, The Supreme Court of Singapore.

35 Having validated my power to preside over the determination of the issue, I needed to assess if I should stay the proceedings for the issue to be determined by a Judge, after a trial. By virtue of O 5 r 2, proceedings in which a substantial dispute of fact is likely to arise, shall be begun by writ.

36 However, upon examining the cases put forth by both counsel, I was convinced that a substantial dispute of fact was unlikely to arise in this case. While the parties had differing views on the issue of whether Sharil had the mental capacity to enter into a contract with the applicant, there was little evidence or counter argument from the applicant to dispute the material facts presented by the respondent. Therefore, I did not see any reason to stay the proceedings for a trial which would undoubtedly cause unnecessary delay and expense.

Whether the court has the authority to depart from any agreement between the parties on the costs payable

37 After the taxation proceedings had already commenced and partially heard before me, the parties agreed on a settlement which would require the respondent to pay $8,000 exclusive of disbursements to the applicant. According to Mr Singh, Sharil's mother wanted to avoid additional expenses and conclude the matter immediately through the settlement.

38 The applicant submitted that I should recognise the fact that the parties had agreed to conclude the matter and record the consent agreement accordingly.

39 In *Wong Foong Chai v Lin Kuo Hao* [2005] 3 SLR(R) 74 ["*Wong Foong Chai*"], Judicial Commissioner Andrew Phang (as he then was) made the following observations on the rationale of the MVA, at [42]:

> The legislative intention is clear. It is to ensure that *claimants or plaintiffs* are protected and that they pay their respective solicitors only such charges as are *fair and reasonable*. As we have already seen above (at [36]), it used to be the situation that *all* charges so payable were *subject to taxation* and that, to alleviate the situation, an exception was made in respect of a judgment or settlement for a sum not exceeding $5,000 (see above at [38]). The amendments effected by this latest Act were, as the extracts from the parliamentary debates just quoted above (at [40]) clearly confirm, intended to streamline the situation further by excluding the necessity for taxation if the Public Trustee agreed with the charges by the solicitor.

This is in fact the very pith and marrow of s 18(3)(a) itself. **It follows, therefore, that s 18(3) is *not* intended to sanction agreements for costs between solicitor and client without more.**

[emphasis in original in italics, emphasis added in bold italics]

40 The learned Judge went on to add at [51]:

.. the court has an overriding jurisdiction to examine every agreement for legal costs notwithstanding any prior written agreement. In cases where a solicitor enters into an agreement for costs with a client unschooled in the ways of commerce, the court will take particular care in scrutinising such agreements for fairness and appropriateness. This would be *a fortiori* the case where, as in the present proceedings, there are overriding public policy considerations involved as well.

41 *Wong Foong Chai* makes it clear that s 18 of the MVA is an overriding provision and cannot be subject to, or constrained by, any prior agreement as to costs between client and solicitor. In fact, as discussed above at [10], there is an additional reason for costs to be taxed here. The rationale for requiring costs between solicitors and clients to be taxed in cases involving persons with a disability must be to ensure that his position is not taken advantage of by a solicitor who might otherwise claim excessive costs, see *Singapore Civil Procedure 2013* (GP Selvam gen ed) (Sweet & Maxwell Asia, 2013) at p 952. This rationale would be defeated if the Court merely rubber stamps the settlement between the solicitor and the client. Hence, I refused to simply record a consent order without examining the issue of Sharil's mental capacity.

Whether the contract was voidable

42 Having confirmed my authority to determine whether the contract was voidable at a taxation hearing and that the Court has the power to depart from an agreement between the parties, I began to assess whether the contract was indeed voidable.

43 Mr Singh applied for Dr Ho King Hee ("Dr Ho"), a consultant neurologist with K H Ho Neurology & Medical Clinic at the Gleneagles Medical Centre, to give evidence before me. I allowed him to do so and in turn, gave leave to the applicant to arrange for a doctor of its choice as well. Mr Ezekiel agreed to call upon Dr Chou Ning, the neurosurgeon who had examined Sharil around the time when the warrant to act was executed, to provide evidence. Both counsel agreed that the losing party would bear the costs relating to the attendance of the doctors.

44 However, the applicant eventually decided against adducing medical evidence. In fact, prior to the hearing at which Dr Ho was supposed to give evidence, the applicant informed Mr Singh that Mr Ezekiel would not be cross-examining Dr Ho and the applicant was not willing to bear the costs of his attendance. Nonetheless, Mr Ezekiel finally decided to cross-examine the doctor.

45 In his medical report dated 22 July 2010, Dr Ho, who has more than 20 years of experience as a neurologist, opined that Sharil's memory and cognitive deficits were such that he was not able to handle his own affairs. Apart from his own examination of Sharil, his report also took into consideration, information from Sharil's mother and some available documents, which included a medical report dated 15 April 2008 from Dr Chou Ning. The relevant portions of Dr Ho's report are as follows:

Mr. Sharil sustained a very severe head injury with loss of consciousness and prolonged post-

traumatic amnesia … Head injury of his nature would be expected to lead to a significant organic brain syndrome. His reported behavioural changes and memory deficits are entirely compatible with the latter. However at this time…they can be regarded as permanent in nature without likelihood of any further improvement.

Clinical examination finds unequivocal objective evidence of bilateral right > left brain hemispheric damage… He is unable to walk normally and to use his arms optimally, especially on the left side. These clinical signs cannot be voluntarily simulated. These signs are consistent with his previous clinical findings and provide strong support for the veracity of his more subjective reported behavioural and memory problems.

46 Before me, Dr Ho basically reaffirmed the content of his medical report. He added that while he did not examine Sharil in 2008, there was a record of his admission to Tan Tock Seng Rehabilitation Centre on 23 January 2008 and it was clear to him that Sharil could not have appeared normal, either physically or mentally at that time. I asked Dr Ho for his opinion on whether it was possible that the organic brain syndrome developed some time after the accident. The material portion of his response is as follows:

There is no doubt that his cognitive and physical deficits would have been maximum at the time of the accident and that progressively, improved … In other words, if I or other practitioners had found Mr Sharil to be mentally incompetent in 2010, *there is no likelihood that he could be competent in 2008, a time nearer the time of the accident.*

[emphasis added]

47 In relation to the warrant to act, the following exchange between Mr Singh and Dr Ho is pertinent:

Mr Singh:	This is a contract of retainer with terms and conditions set out therein. Based on your evidence this far, can you opine as to the extent, if any, to which Mr Sharil would have been able to comprehend the terms, conditions and obligations, that arose from such a contract, relevant date being earlier to mid 2008. In other words, can you comment on the extent to which Sharil's lack of capacity would affect his ability to enter into this contract of retainer?
Dr Ho:	I have seen Mr Sharil's medical reports which refer to a time roughly similar to the time the contract is said to have been entered into. Given the nature of the language involved in this warrant to act, I am practically certain that Mr Sharil would not have been able to comprehend the entirety of this document.
Mr Singh:	And in your opinion, to what extent would the lack of capacity have been apparent to a person seeking to explain the document and take instructions from Sharil pertaining to the facts of the accident, his injuries, disabilities and the impact of his lifestyle and earning capacity?
Dr Ho:	I take it that you referring to a time period in early 2008?
Mr Singh:	Yes.

Dr Ho: If you look at the second page of my report … It is clear to me that Mr Sharil could not have appeared to be normal either physically or mentally at that time. Even when he was examined by me, more than two years later, he did not appear normal enough to sign or agree to a legal document such as the warrant to act that I have been shown. I would say that his abnormal condition should have been a reason for anyone attempting to enter into a contract with him to take special pains to ensure that he was indeed mentally capable of entering into such an agreement. But as I have previously said, in my opinion, it is not possible that Mr Sharil would have had the capacity in any case.

48 Dr Ho's evidence was clear and consistent with his earlier findings. There was no reason for me to doubt his evidence. Neither was there any contrary medical evidence provided by the applicant. From Dr Ho's evidence, it is difficult to imagine how Sharil could have given instructions to Mr Riaz to act on his behalf or how he could have possibly understood the effect of the warrant to act. It was thus, clearly evident that he could not have appreciated the nature of the document on which he was affixing his thumbprint on.

49 The contract between the applicant and Sharil was therefore voidable. If the contract was not to be enforced against Sharil, it must be shown that Mr Riaz either knew or ought to have known about the lack of mental capacity.

50 Mr Ezekiel cross-examined Dr Ho on whether it was possible that the symptoms of mental incapacity were subtle. The relevant portions of Dr Ho's evidence are as follows:

Mr Ezekiel: Finally, you mentioned that granted mental deficits sometimes are subtle and requires certain tests to come to a conclusion and can be done by qualified persons. Is it possible, that in your opinion, that the symptoms of mental incapacity were subtle enough that a layperson could reasonably be deceived into thinking that this person could have the capacity or would improve to have the capacity in a reasonably short period of time? First question, could these subtleties have deceived someone or misled someone into believing that he had the capacity at that time or not so blatantly apparent?

Dr Ho: Clear cut case. Not talking about subtle mental deficits. Totality of this man's physical and mental deficits, is such that it is not possible that anyone would reasonably arrive at a conclusion that he was mentally competent.

Ct: A layman, for example, a taxi driver ferrying him from location a to b, would he have reason to suspect that Sharil lacks capacity?

Dr Ho: I believe so. He is obviously having physical problems. And pattern of speech would not be normal. It would also have been very difficult for him, for instance to guide the taxi driver to go to a particular destination. I have stated in my report that Mr Sharil, is not capable of independent living. And will require some form of supervision for life. I cannot imagine that he would be able to take a taxi alone.

In light of the above, it is obvious that any reasonably minded person dealing with Sharil would have reason to suspect that Sharil lacks mental capacity.

51 In fact, Mr Riaz's own actions provide evidence that he was indeed aware of Sharil's lack of mental capacity:

(a) First, is his decision to get Sharil's mother to sign the warrant to act. I failed to understand why a solicitor would get the mother of his client to sign the warrant to act if there was no reason to suspect a lack of mental capacity. The warrant to act did not name the mother as a client and therefore her signature on the warrant to act was irrelevant. In fact, it is imperative to note that upon hearing the medical evidence, the applicant sought to orally amend its bill to add Sharil's mother as a respondent, arguing that she was also a client for Suit 539. I dismissed the application as it was made very late in the day and would cause prejudice to the respondent which could not be compensated by costs. Moreover, the applicant had not complied with the provisions of the Legal Profession Act (Cap 161, 2009 Rev Ed) on the delivery of a bill of costs to the client (Sharil's mother in this case) and/or obtaining an order for taxation. My dismissal of the oral application to amend was made without prejudice to the applicant's right to file any application against Sharil's mother for costs separately.

(b) Second, in his letter to the Traffic Police dated 27 May 2008, Mr Riaz stated as follows:

> Our client was seriously injured and is brain damaged. Please release Traffic Police Report to us. Please ask IO to check on client condition to see if he can file police report if you insist this is needed.

(a) If Mr Riaz held the belief that Sharil may not be able to file a police report, how could he have then reasonably believed that Sharil was able and competent to execute a warrant to act?

52 Based on the above, I can confidently conclude that Mr Riaz knew about Sharil's lack of mental capacity.

53 It is interesting to note that The Law Society in New South Wales has published a guide, *When a client's capacity is in doubt, A Practical Guide for Solicitors*", 2009, to provide guidance to their solicitors on what to do and what resources are available to assist them, if they are concerned that their client may lack capacity to give instructions or make their own legal decisions. The guide also provides a list of "warning bells and red flags", at p 4, to identify when a client's capacity may be an issue. The list included the following scenarios:

- A client is disoriented;
- A client is in hospital or a residential aged care facility when instructions are taken;
- A client is accompanied by many other friends, family or carers to interviews with the solicitor but is not given the chance to speak for themselves; and
- A client shows a limited ability to interact with the solicitor.

54 While the above guide may not be conclusive and much depends on the circumstances of each case, the above indicators were present in this case.

Conclusion

55 The evidence before me unwaveringly pointed to the conclusion that Sharil could not have had the mental capacity to understand the contract with the applicant and that it was inconceivable that Mr Riaz was not aware of this lack of capacity. The contract was therefore undoubtedly voidable, at the option of the client.

56 During submissions before me, Mr Ezekiel took the position that if I found the contract to be voidable on the ground that Sharil lacked mental capacity at the time of execution of the warrant to act, and that this was known or ought to have been known to Mr Riaz, he would have no claim for costs under this bill. He did not seek to persuade me that costs should be allowed to the applicant for work done even though I found the contract to be voidable.

57 In any case, it would have been against public policy to grant any costs to a solicitor who knows about his client's lack of capacity to instruct him and yet proceeds to act on his behalf. The settlement entered into by the parties was clearly unreasonable and unfair to the respondent.

58 I therefore did not allow any costs to the applicant under this bill and consequently, ordered the applicant to bear the costs of the taxation proceedings, including the costs relating to Dr Ho's attendance.