

SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2021] SCSC 470
CC 08/2017

In the matter between:

NATHALIE LEFEVRE
(rep. by Frank Elizabeth)

Plaintiff

and

BEAU-VALLON PROPERTIES LTD & ORS
(rep. by Elvis Chetty)

Defendants

Neutral Citation: *Lefevre v Beau Vallon Properties & Ors* (CC 08/2017) [2021] SCSC 470
(28 July 2021)

Before: Esticot, Registrar

Summary: Application refused

Heard: Written submission

Delivered: 28 July 2021

ORDER

The application by Mr. Elizabeth to have his legal fees which are the subject of a Contingency Fee Agreement with his client to be paid by the Respondents is refused.

ORDER

ESTICOT, REGISTRAR

Introduction

[1] This Order arises out of a Bill of Costs filed by Mr. Frank Elizabeth, Counsel for the Plaintiff on 27th February 2020 and was scheduled to be taxed on 30th June 2020 before Deputy Registrar for the Criminal Division, Ms. Marie-Angele Barbe but was not taxed because the Bill of Costs referred to a legal fee in the sum of SR3,266,282.20 equivalent

to GBP145,247.50 which was not reflected in the Order dated 3rd February 2020 by the then CJ Twomey. Mr. Elizabeth referred to an endorsement of a Contingency Fee Agreement which was endorsed by the then CJ and agreed to provide us with a copy of the said Agreement which was received on 21st August 2020. He agreed to file an amended Bill of Costs to attach all relevant receipts pertaining to the sum claimed as legal fee.

- [2] Ms. Alexandra Madeleine, Counsel for the Defendant stated that she will object to the Contingency Fee Agreement because the said Agreement was endorsed in her absence. Mr. Elizabeth requested that the said Bill of Costs be taxed before the Registrar of the Supreme Court for he will be raising a point of law which will be submitted in writing.
- [3] An amended Bill of Costs was filed on 17th September 2020 and was scheduled to be taxed on 27th November 2020. Ms. Madeleine was served with a copy of Mr. Elizabeth's submission and she filed her own written submission on 18th January 2021. On 16th February 2021, Mr. Elizabeth filed his response to Ms. Madeleine's submission.

Applicable law and discussion

What is a contingency fee agreement?

- [4] A **contingency fee agreement** (CFA) is a form of billing that allows for an attorney to be paid a percentage of the damages awarded at the end of the case instead of an hourly rate. In exchange, the attorney is paid a certain percentage of the damages that the client is awarded at the end of the case.
- [5] In a typical contingency fee agreement, the plaintiff is only responsible for paying their attorney if they win the case, with the payment coming as a percentage of the winnings, usually around 30%. A contingency fee is a type of payment to an attorney that only occurs when his client receives some kind of monetary recovery in the client's case.

Attorney Fees: Does the Losing Side Have to Pay?

The winning side usually has to pay its own attorney's fees.

[6] The losing side doesn't usually pay the winning side's attorney's fees. In the United States, the rule (called the American Rule) is that each party pays only their own attorneys' fees, regardless of whether they win or lose.

[7] Clients often ask if they can get the other side to pay their attorney fees. The answer is usually no. In courts in the U.S., the general rule is that each party pays their own attorney fees regardless of who wins and who loses.

[8] However, there are exceptions. The most common exceptions are:

- 1) A contract between the parties shifts the burden of attorney fees, and
- 2) A statute applies to the cause of action which shifts the attorney fees.

Attorney Fees by Contract

[9] Parties to a contract can include an attorney fees provision within their contract. For example, a provision can state that if litigation arises, the losing party must pay the winning party's attorney fees. Another example is an entity indemnifying another entity for liabilities, including attorney fees, for claims a third party brings against it. That is, if one entity is sued by a third party, the second entity will pay for the action and the first entity's attorney fees. Contractual provisions like these are not always enforceable, but courts generally allow them.

Attorney Fees by Statute

[10] The second most common way attorney fees can be shifted to a losing party is if a statute allows it. Some of the above statutes allow a party to collect attorney fees if they are successful. Others require the party not only to be successful but also to prove that the losing party brought the action in bad faith or that their claim was frivolous. In practice, however, it is more common that each party is responsible for their own attorney fees.

When a Court Might Impose Attorneys' Fees

- [11] A court can sometimes act in the interest of justice and fairness to require one side to pay the attorneys' fees. U.S. courts have significant discretion when it comes to the awarding of attorneys' fees, and while judges do not generally like departing from the American Rule, they might require a losing side to pay the other's attorneys' fees in certain limited situations.
- [12] One type of attorney fee statute that is common in many American states allows a judge to require attorneys' fees to be paid to the winning party in a lawsuit that benefited the public or was brought to enforce a right that significantly affected the public interest.
- [13] Another common state law allows for attorneys' fees to be paid by the losing side if an attorney for the losing side filed a lawsuit knowing there was no reason, or "grounds," for the lawsuit, such as bringing an unwarranted appeal or filing a case in the wrong venue. And a Wisconsin law calls for the losing side to pay attorneys' fees if their attorney files an appeal only to delay court proceedings.

Equitable Remedies

- [14] Judges can use an equitable remedy to require the losing side to pay attorneys' fees if they believe it would be unfair not to do so. (In law, equity generally means "fairness," and an equitable remedy is a fair solution that a judge develops because doing otherwise would lead to unfairness.) This type of equitable remedy—granting attorneys' fees to the winning side—is often used when the losing side brought a lawsuit that was frivolous, in bad faith, or to oppress the defendant, and the defendant wins.
- [15] Also, once in a while, a judge will grant attorneys' fees in cases of extreme attorney misconduct, to warn the offending attorney.

Is the contingency fee recoverable from a losing defendant in the UK?

- [16] In the UK, the existence of a contingency fee arrangement will not increase the amount of the defendant's costs liability. It may however decrease the defendant's costs liability.

[17] For example, if a claimant has agreed a contingency fee of 30% with its lawyer and is awarded damages of £1 million. The claimant owes its lawyer £300,000.

- If the costs recoverable from the defendant are assessed at £200,000, then the claimant has to pay its lawyer the excess £100,000 out of its damages – i.e. the claimant keeps £900,000 of the damages.
- If the assessed costs are £400,000 then the defendant only has to pay the lower contingency fee figure of £300,000 due to the indemnity principle, and there is nothing further for the claimant to pay its lawyer.

Contingency fee agreements in Seychelles

[18] Having above set out the general rules applicable to contingency fee agreements in the US and UK, we now consider the position in Seychelles.

[19] In Seychelles, contingency fee agreements are recognized by the **Courts Fees (Supreme Court) and Costs Act, Cap. 53**. S. 17(1) of the Act provides:

*17(1) Notwithstanding any provision of this Act, **an attorney may make an agreement in writing with his client** respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements, including counsel's fees, in respect of work done or to be done by such attorney, either by a gross sum, or by commission or percentage, or by salary or otherwise and either at the same rate as, or at a greater or less rate than, the rate at which he would otherwise be entitled to be remunerated.*

(2) No such agreement that provides for remuneration at a rate, or in a manner, which either generally or in respect of any item, is different from that at or in which the attorney would otherwise be entitled to be remunerated, shall be enforceable or upheld on taxation, unless

(a) it is in writing, dated, and authenticated by signature, mark or other sign by, or on behalf of, the client and any other person liable to make payment thereunder; and

(b) the attorney has lodged an authenticated copy of such agreement in the chambers of the Chief Justice, and, in the case of any agreement in this paragraph hereinafter mentioned, has so lodged such copy within fourteen days of the authentication thereof that is to say any such agreement which concern work done or to be done

(i) in respect of any cause, matter or proceeding of any kind in any court, whether or not such cause, matter or proceeding is actually commenced; or

(ii) for a minor or an interdicted person; or

(iii) payment for which may fall to be made by a minor or an interdicted person, or out of any moneys (including the proceeds of any litigation) in which a minor or an interdicted person has any interest.

[20] S. 6 of the Act allows an attorney to recover a larger sum than that allowed by taxation if the contingency fee agreement provides for such larger sum. Specifically, s. 6 of the Act provides as follows:

*6. Counsel's fees and attorneys' bills of costs shall, subject to the provisions of section 17, be taxed in accordance with the provisions of this Act and of the second schedule hereto and no counsel, attorney or party shall be entitled to recover any larger sum by way of fees or costs than that allowed on taxation **except, that in the case of an agreement enforceable under the provisions of section 17, an attorney shall be entitled to recover from a person liable thereunder the amount payable by that person under the terms thereof** adjusted where necessary pursuant to review under subsections (3) and (4) of section 17.*

[21] Note that s. 6 provides that such larger sum is recoverable from “**a person liable thereunder**”, meaning a person liable under the contingency fee agreement under s. 17(1) of the Act. Such a person can only be the client of the attorney or counsel.

[22] Note that under the US and UK systems, a losing party may be made to pay the legal fees of the winning party’s counsel under a CFA if pursuant to –

- i. a contractual provision; or
- ii. a statutory provision, or
- iii. a court imposes or orders payment.

[23] In Seychelles the Act does not provide for any of these situations. The only provision made is for a review of taxation by a judge under s. 16 of the Act which provides as follows:

16. Any party to a cause or matter and any attorney or client who is dissatisfied with the taxation of the taxing master may apply by petition to a Judge to review such taxation and the Judge on receipt of such application shall fix a date for reviewing the taxation in his chambers. The Registrar shall give a note of the date and time so fixed to the

applicant and shall send to the adverse party or person notice thereof by a registered letter sent through the post, or in such other manner as the Judge may direct. If any party to whom notice has been duly given fail without sufficient excuse to attend at the time fixed by such notice, the Judge may review the taxation in the absence of such party. The Judge after hearing the parties attending shall either confirm the taxation of the taxing master or shall alter it as he may consider fit. The decision of the Judge shall be final and not subject to appeal.

[24] In the present case, Mr. Elizabeth, counsel to the Petitioner, has applied to have his legal fees which are the subject of a Contingency Fee Agreement with his client be paid by the Respondents. He cited the case of *Re: Ailee Development Corporation Ltd (2008) SLR 87* in support of his application to the Registrar. Ms. Madeleine in her written submission distinguished the circumstances in *Re: Ailee Development Ltd* and the present case –

“in that the agreement in Ailee Development Corporation Ltd was made before the conclusion of the case. In the present case, the CFA is entered into after the conclusion of CC8/2017. The case is completed and then the agreement is made. The agreement is submitted to the Chief Justice for endorsement under section 17 of the Court Fees (Supreme Court) and Costs Act on 8th September 2019. Secondly, in Alee Development, there was a change of counsel before the conclusion of the case. The circumstances of the case of Ailee Development as considered by the then Chief Justice to award the costs as he did are different to the one in issue”.

[25] However, s. 17(2)(b) of the Act appears to allow Mr. Elizabeth to enter into the CFA with his client after the conclusion of the case as it provides that a copy of the CFA which covers “**work done or to be done**” must be lodged with the Chief Justice within 14 days of execution of the CFA.

[26] That said, and as noted in paragraph 7 above, the position in the US is that each party pays its own attorney’s fees, whether winner or loser. In Seychelles there are no provisions allowing the successful party’s attorney to claim fees under a CFA from the losing party under the Act.

[27] If recourse is to be had to English law, *sections 58 and 58A of the Courts and Legal Services Act 1990* had made provision as regards the regulation of conditional fee agreements (“CFAs”) and the recoverability of success fees payable under a CFA. Under

these provisions, all proceedings may be the subject of an enforceable CFA, *save for specified family proceedings and all criminal proceedings other than those under section 82 of the Environmental Protection Act 1990 (c.43).*

[28] However, sections 58 and 58A of the *Courts and Legal Services Act 1990* were amended by *section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*. The effect of the amendments is that **a success fee payable under a CFA may no longer be recovered by a lawyer from a losing party, but, subject to additional conditions under section 58(4A) and (4B), will be recoverable by a lawyer from their successful client.**

[29] Specifically, s. 44(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides as follows:

Conditional fee agreements: success fees

“44.(1) In section 58 of the Courts and Legal Services Act 1990 (conditional fee agreements), in subsection (2)—

(4)For subsection (6) of that section substitute—

*“(6)A costs order made in proceedings may **not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement.**”*

Decision

[30] Where, as in the present situation, no provision of the Act deals with the issue of a CFA being payable by a losing party, and if recourse is to be had to English law, then the position must be that a successful party must bear its own legal fees under a CFA in Seychelles.

[31] In view of the above findings, I refuse Mr. Elizabeth’s application for taxation of his legal fee under his CFA with his client.

Signed, dated and delivered at Ile du Port on 28th July 2021.

ESTICOT, REGISTRAR