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22. LEGAL PROFESSION

Khelvin **XU**[1]
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Partner, Rajah & Tann Singapore LLP.

I. Introduction

22.1 This review covers:

(a) cases relating to ethics and professional responsibility,[2] which touch on conflicts of interest, statements to the media, and respect to the courts; and

(b) other cases relating to the legal profession,[3] which cover the overall disciplinary framework, how privileged/confidential material and statements obtained in investigations should be handled, and the discharge of counsel right before trial.

II. Professional misconduct in relation to preparation of wills

22.2 One of the most high-profile matters involving the legal profession in 2020 was the Court of Three Judges' decision in *Law Society of Singapore v Lee Suet Fern*,[4] which followed the disciplinary tribunal's ("DT") decision.[5] Much media attention arose from the fact that the matter involved the last will of the late Lee Kuan Yew ("LKY").

22.3 The respondent solicitor is the daughter-in-law of LKY, and a very senior practitioner. Between 20 August 2011 and 2 November 2012, LKY executed six wills. Between 29 November 2013 and 3 December 2013, LKY discussed changes to his latest will with another very senior practitioner ("KKL"), who had prepared each of the six wills. LKY intended to execute a codicil to his latest will. On 16 December 2013 at 7:08pm, the respondent sent an e-mail to LKY, copying her husband ("LHY", one of LKY's sons) and KKL ("the 7:08pm E-mail").

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1 The author wishes to thank, in no particular order, P Padman, Andrew Tan, Lim Yuan Jing, and an anonymous referee for their assistance and insightful comments. All errors and omissions remain the author's own.

2 See paras 22.2–22.60 below.

3 See paras 22.61–22.118 below.

4 [2020] 5 SLR 1151.

5 *The Law Society of Singapore v Lee Suet Fern* [2020] SGDT 1.

22.4 In the 7:08pm E-mail, the respondent attached a draft will, under which LHY was a beneficiary. The respondent stated that this was "the original agreed Will", that is, the first will dated 20 August 2011 ("the First Will"). LKY would have believed, when signing this will ("the Last Will"), that it was the same as the First Will. However, the Last Will differed from the First Will in a number of respects.

22.5 Subsequently, at 7:31pm, LHY sent an e-mail to the respondent, copying LKY and LKY's personal secretary ("the 7:31pm E-mail"). The 7:38pm E-mail was addressed to LKY, and LHY removed KKL from the list of addressees. LHY told LKY that he was unable to contact KKL and believed that she was away, that he did not think that it was wise for LKY to wait for KKL to be back before executing the Last Will, and that the respondent could arrange for one of her partners to come around with a copy of the Last Will for execution and witnessing. The respondent made arrangements, and LKY agreed to proceed with execution without waiting for KKL.

22.6 The Last Will was executed the next day. After execution, the respondent e-mailed KKL, informing her that the signing of the Last Will had "been dealt with already". In this e-mail, the respondent did not include any of the e-mails which KKL had been excluded from.

22.7 About two weeks after the Last Will was executed, LKY prepared and executed a codicil. He passed away around a year later.

22.8 Subsequently, a complaint was made against the respondent, and the Law Society ("the LS") preferred two charges against the respondent, relating to: (a) the respondent's alleged failure to advance LHY's interest unaffected by her or LHY's interest; and (b) her acting in connection with the significant gift that LKY intended to give LHY by will, and failing to advise LHY to be independently advised in respect of that gift. The DT held that there was cause of sufficient gravity for disciplinary action, and the LS applied to the Court of Three Judges for a striking-off order.

22.9 The Court of Three Judges considered the following issues:

(a) whether there was an implied retainer between the respondent and LKY;

(b) if so, whether the respondent's conduct was grossly improper conduct in the discharge of her professional duty, or improper conduct or practice as an advocate and solicitor;

(c) if there was no implied retainer, whether the respondent's conduct nevertheless amounted to misconduct unbefitting an advocate and solicitor; and

(d) if the respondent was guilty of any of the charges, the appropriate sanction.

22.10 As to whether there was an implied retainer, the question was whether, on an objective analysis of the circumstances from the perspectives of both parties, they should be taken to have understood and believed that they were in a solicitor–client relationship. The factors include:

(a) who is paying the solicitor's fees;

(b) who is providing instructions;

(c) whether a contractual relationship existed between the solicitor and the client in the past;

(d) whether express advice was given by the solicitor, and if so, whether the client relied upon the advice;

(e) if express advice was given, the nature of such advice;

(f) whether the solicitor asked the client to seek independent advice; and

(g) whether the solicitor rendered advice without qualification.

22.11 The Court of Three Judges held that there was an implied retainer from the respondent's perspective:

(a) LKY had informed LHY that he wanted to change his will and revert his will to his First Will. LHY then informed the respondent and asked her to liaise with KKL.

(b) The respondent retrieved, from her records, a copy of what she thought was a final draft of the First Will, and sent it to LKY to have it re-executed. She did not establish whether the draft was the same as the executed version of the First Will, but she assumed this to be so, and represented it as such to LKY when she forwarded the First Will to LKY by way of the 7:08pm E-mail and stated that it was "the original agreed Will which ensures that all 3 children receive equal shares" ("the Representation"). The Representation amounted to legal advice, but was false. The respondent did not inform LKY that she had not and could not have checked whether the draft will was the same as the executed First Will.

(c) As of this point in time, no implied retainer had arisen as KKL was on the list of addressees. The respondent had asked KKL to see to the engrossing of the draft Last Will attached to the e-mail, which suggested that the respondent believed, at that

stage, that KKL would check the will against LKY's instructions before arranging for execution.

(d) However, KKL was then excluded from the 7:31pm E-mail, in which LHY told LKY, *inter alia*, that all that was left to be done was for witnesses to be arranged for the execution of the Last Will. The exclusion of KKL meant that LKY was being asked to proceed with execution on the basis of the Representation.

(e) The respondent aligned herself with LHY's position that all that remained was for LKY to sign the Last Will before two witnesses. This was despite the fact that had KKL been involved as LKY had originally intended, KKL would have to do a number of things, including verifying that LKY was being presented with a document that he actually wished to sign, and which the respondent could not have been sure of. Further, since LHY (the respondent's husband) was a significant beneficiary under the Last Will, she should not have continued to assist with the Last Will without KKL's involvement. Further, as LKY did not have the First Will before him at the time of signing, he would not have known whether the Last Will reproduced the First Will.

(f) The respondent then arranged for the signing of the Last Will, which supported the conclusion that the respondent had positioned herself as LKY's solicitor for the preparation and execution of the Last Will. She then informed KKL that the Last Will had been executed without informing KKL of the circumstances of execution, and saw to the safekeeping of an original copy of the Last Will (whereas original copies of the previous six wills had been kept by KKL).

(g) Based on these events, the respondent could not have reasonably thought that there was no implied retainer between LKY and her, at least to the limited extent of locating a copy of the executed version of the First Will, checking the draft Last Will against it, and ensuring that the draft Last Will was ready for execution.

22.12 However, the Court of Three Judges was not satisfied that from LKY's perspective, he would have objectively appreciated that the respondent was acting as his solicitor for the preparation and execution of the Last Will. It held that LKY had decided to proceed without waiting for KKL because he did not imagine that the respondent, his daughter-in-law, would misrepresent the contents of the draft Last Will to him, and he never stopped regarding KKL as his solicitor. Further, LKY had proceeded due to LHY's advice, and not because he regarded the respondent as his solicitor for the Last Will.

22.13 Given that a retainer could only be implied where all parties intended to enter into such a relationship, and LKY had no such intention, no implied retainer arose. As such, the respondent was acquitted of the charges which were predicated on a solicitor–client relationship.

22.14 Turning, however, to whether there was misconduct even if there was no implied retainer, the Court of Three Judges held that there was misconduct:

> (a) The respondent was told by LHY, her husband (a significant beneficiary under the First Will), that LKY intended to revert to the First Will. She was tasked to find a copy of the First Will urgently. She found a draft of the First Will without verifying with LKY that he intended to revert to that will, and did not check whether this was the final draft.
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> (b) The respondent forwarded the draft to LKY and made the untrue Representation. She knew, or ought to have known, that she was not in a position to make the Representation, as she did not check if the draft First Will she located was the final draft, and she did not know if it was the same as the executed version. She could not have checked without KKL's assistance, but she acquiesced in the exclusion of KKL. Given her experience and the importance of wills, she should have known that she needed to check the veracity of the Representation. She knew that LKY would have believed and relied on the Representation.
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> (c) When LHY removed KKL from the list of addressees to the 7:31pm E-mail and suggested going ahead with the execution of the Last Will, the respondent should have told LHY that the execution could not be rushed. She should also have told LKY that she could not be sure if the draft Last Will was the same as the executed First Will, and that LKY needed to either await KKL's return or get independent advice from another solicitor.
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> (d) There was no basis for concluding that KKL would remain uncontactable. When the respondent found out that LKY had asked, during execution of his will, who had drafted the Last Will, the respondent should have realised the importance of ensuring that LKY knew of the respondent's state of knowledge as to whether the Last Will was the First Will, but she did not correct any misapprehension on LKY's part rising from the Representation.
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> (e) The respondent did not inform KKL of the true circumstances surrounding the preparation of the Last Will. KKL was not informed that LKY had decided to proceed because LHY thought it was unwise to wait until she was back. The respondent

might have mitigated her culpability if she had briefed KKL fully and frankly on all that had transpired.

(f) The respondent facilitated the execution of the Last Will in a rush, even though she ought to have been alive to the danger that it was LHY, and not LKY, who was in a rush to have the Last Will executed. Further, LHY was a significant beneficiary under the Last Will. If there was a solicitor–client relationship, she would have been in breach of her duties. She had divided loyalties to LHY (her husband), who wished to rush the execution of the Last Will, and to LKY, who she would reasonably have regarded as her client and who should have been fully apprised of the facts before executing the Last Will.

(g) The respondent acted imprudently and disregarded LKY's interests. Her failure to stop LHY's efforts to rush the execution of the Last Will was improper. Such conduct amounted to misconduct unbefitting an advocate and solicitor.

22.15 As to the appropriate sanction, this case was analogous to conflict of interest cases where a solicitor preferred their own interests over those of a client. The respondent focused on doing what LHY wanted her to do, without considering LKY's interests. The conflict of interest could not have been waived by LKY because he was not apprised of all material facts prior to execution of the Last Will.

22.16 Since there was no solicitor–client relationship, the presumptive penalty of a striking-off would be disproportionate. The Court of Three Judges went on to consider various factors and, having regard to the moderate degree of culpability and harm, as well as precedents, suspended the respondent for 15 months.

22.17 While space does not permit a deeper dive into the decision, this case highlights, once again,[6] the importance of approaching wills with meticulous care and attention, *especially* in a familial context where the practitioner may be a beneficiary, or related to one. If a practitioner is asked to arrange for a family member's will, they should approach the matter as though the request comes from an external client. They should consider in particular whether they are in a position of conflict – a risk magnified by the likelihood of the practitioner being a beneficiary, or being related to one. The safest policy may well be for the practitioner to expressly disclaim all responsibility and refer the family member to an independent practitioner. This may not be a practical approach for all

6 See *Low Ah Cheow v Ng Hock Guan* [2009] 3 SLR(R) 1079, on solicitors' duties when drafting wills.

families nor gel with family expectations, but this case demonstrates the risks of involvement.

III. Conflict of interest

22.18 In *Law Society of Singapore v Govindan Balan Nair*,[7] the respondent was retained by MSK Building Services Pte Ltd ("MSK") to act in a dispute with JKC Consultant ("JKC"). The respondent entered appearance on 10 August 2017. MSK's defence was due on 24 August 2017, and the respondent met MSK's sole director for the first time that day. However, the respondent did not inform MSK of the deadline (although he was aware of it) and advised MSK that it had a good defence and counterclaim. The terms of engagement and a warrant to act were signed on that day.

22.19 The respondent was instructed to file its defence. The respondent asked MSK's director to check if he had other documents for the counterclaim. The next day, the director informed the respondent that he could not find the documents, and gave instructions to file the defence without the counterclaim. However, the defence was not filed and enquires from MSK went unattended.

22.20 Default judgment was entered against MSK on 31 August 2017. MSK's director only found out on 18 September 2017 when he went to the State Courts to check on the status of the suit. The director confronted the respondent, who sought to persuade the director to file an affidavit stating that the defence was filed late due to MSK's delay in providing details to its lawyers. The director refused.

22.21 On 21 September 2017, the respondent obtained the director's consent to send a letter to JKC's solicitors, stating that he had instructions to set aside the default judgment and seeking JKC's indulgence for MSK to file its defence and counterclaim in the suit. On 16 October 2017, the director lodged a complaint.

22.22 The gravamen of the LS's charges was that upon finding out about the default judgment, the respondent did not follow the procedure set out in r 22(3)(*a*) of the Legal Profession (Professional Conduct) Rules 2015[8] ("PCR"). The DT found that no adverse interest arose between MSK and the respondent by virtue only of default judgment having been entered,

7 [2020] 5 SLR 988.
8 S 706/2015.

and there was therefore no contravention of r 22 of the PCR.[9] However, the DT was prepared to find that there had been a negligent omission on the respondent's part. It administered a reprimand (which was not based on any of the charges) and ordered the respondent to pay costs. The LS applied for a review under s 97 of the Legal Profession Act[10] ("LPA").

22.23 The High Court first held that the DT's reprimand was a breach of natural justice as it was not based on the charges. The DT ought to have requested the Council of the LS ("the Council") to prefer amended or additional charges, ascertained if the respondent or the LS required any relevant evidence to be brought before it, then come to a conclusion as to the penalty. Further, it was for the Council (and not the DT) to administer any fine or reprimand.

22.24 Turning to whether the respondent had breached r 5 or 22 of the PCR, the High Court held that that r 22 applied, as the respondent possessed an interest in the matter which was "adverse" to the client's interest. This included any interest that could actually or potentially compromise his duty to advance the client's best interest in any way and to whatever extent, and reflects *any* situation that would give rise to any disadvantage to the client. Once a practitioner's own interests derogate from pursuing the best course for the client, conflict arises under r 22(2), and there need not be harm to the client. However, minor errors would generally not occasion a conflict of interest, and a full and frank disclosure to the client would allow the client to decide whether to obtain independent legal advice.

22.25 In the present case, a conflict arose because once there was negligence and a breach of r 5 of the PCR (duties of honesty, competence and diligence), the best interests of MSK would have been served by being informed of the circumstances of the legal practitioner's negligence and breach, as well as its rights in that situation. However, this interest was adverse to the respondent, as giving such information and advice would have exposed the practitioner to liability, disciplinary action or being discharged by the client. Once the adverse interest arose, the practitioner should have:

> (a) made full and frank disclosure to the client of the adverse interest;
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> (b) advised the client to obtain independent legal advice; and

9 *Law Society of Singapore v Govindan Balan Nair* [2019] SGDT 8.
10 Cap 161, 2018 Rev Ed.

(c) thereafter, obtained the client's informed consent to continue acting.

Without this process, r 22(3) of the PCR requires the practitioner to timeously withdraw from acting.

22.26 Finally, the High Court also held that there was a potential breach of r 5 of the PCR (duties of honesty, competence and diligence) when the respondent (a) did not contact MSK at all until the day the defence was due to be filed; (b) failed to inform MSK that the defence was due that very day; (c) failed to abide by MSK's instructions to prepare the defence quickly; and (d) was oblivious to default judgment being entered. The respondent admitted, in cross-examination, his negligence in these areas.

22.27 In conclusion, the High Court held that the respondent had breached r 22(3) of the PCR. It set aside the DT's reprimand and determined that the respondent should be ordered to pay a penalty of between $15,000 and $20,000.

22.28 In the event of a deadline being overlooked and the client's interests being potentially affected, it may be tempting for the practitioner to sweep the matter under the carpet and suggest corrective steps without making full and frank disclosure. This decision demonstrates the perils of doing so.

IV. Disclosure to media

22.29 There were also two disciplinary cases involving disclosure of information to the media.

22.30 *The Law Society of Singapore v Koh Tien Hua*[11] ("*Koh Tien Hua*") involved the disclosure of the brief grounds of a decision ("the Brief GD") to the media. The respondent acted for the applicant in an application that was dismissed by the District Judge, who delivered her Brief GD orally. Written copies of the Brief GD were extended to the respondent and the Attorney-General's Chambers ("AGC"), who was representing the other party. Two days later, newspaper articles and social media postings published quotes from and/or copies of the Brief GD. The same day, the AGC wrote to the respondent asking if his firm and/or his client were responsible for disseminating copies of the Brief GD. The respondent replied the same day stating, *inter alia*, that his firm had, at the hearing, expressly sought leave from the District Judge for the Brief GD to be

11 [2020] SGDT 6.

released to the applicant's "friends and relatives", and that such leave had been granted with no conditions imposed. However, the respondent had made no such request. The respondent also did not mention that he had provided copies of the Brief GD to the media. It was subsequently confirmed that the respondent did not make such any request at the hearing, and that the Brief GD was not meant for publication.

22.31 The respondent was charged with violating r 9(1) of the PCR as to a legal practitioner's duty to assist in the administration of justice, and on the basis that he had breached r 671 of the Family Justice Rules 2014[12] ("FJR"). The alternative charge was that the respondent's actions were misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession. Two other charges (and their alternate charges) were eventually dismissed by the DT.

22.32 The respondent admitted to disseminating the Brief GD to the media without having obtained the court's permission to do so ("the Unauthorised Dissemination"), but explained that he had provided the Brief GD under the "honest and *bona fide* understanding that the court had permitted him to do so".[13] The respondent denied that the Unauthorised Dissemination breached the FJR, and contended that (a) he had ensured that the identities of his client and his child remained private and confidential; (b) the Brief GD were the final, complete, and only available grounds of decision; and (c) the respondent was merely communicating the outcome of the matter he was personally involved in. This was contrary to the position taken in his defence – that he had applied for leave and had mistakenly thought it was granted, implicitly accepting that he had to obtain leave for such dissemination.

22.33 In any case, the DT disagreed with the respondent's interpretation of the FJR. It was clear that judgments delivered during *in camera* hearings cannot – except with the court's leave and on terms the court may impose – be made available to the public or to non-parties. Since the respondent had disseminated the Brief GD to the media without having obtained the DJ's permission to do so, the respondent had breached the FJR and thus violated r 9(1)(*a*) of the PCR. This meant that the respondent was guilty of misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession under s 83(2)(*h*) of the LPA.

12 S 813/2014.

13 *The Law Society of Singapore v Koh Tien Hua* [2020] SGDT 6 at [23].

22.34 As the Unauthorised Dissemination did not involve any deceit or dishonesty, a reprimand and financial penalty were appropriate. No cause of sufficient gravity existed for disciplinary action under s 83 of the LPA and the DT recommended a penalty of $15,000, plus costs.

22.35 In *The Law Society of Singapore v Ravi s/o Madasamy*[14] ("*Ravi s/o Madasamy*"), the complaint arose from the case of one Nagaenthran s/o K Dharmalingam ("Naga"), a Malaysian who was arrested at the Woodlands Checkpoint carrying not less than 42.72g of diamorphine and sentenced to death after a trial in the High Court in 2010. His appeal was dismissed in 2011. In November 2012, the Misuse of Drugs Act[15] was amended, and counsel for Naga filed a criminal motion for re-sentencing. The resentencing application was dismissed by the High Court in 2017, and the appeals thereof were dismissed in May 2019. The respondent did not act for Naga.

22.36 However, on 29 July 2019, the respondent held a press conference in Kuala Lumpur and issued a statement to the media ("the Media Statement"). The Media Statement was also published on a website, and the respondent shared a link to the website on his Facebook page. The complaint related to five statements that were contained in the Media Statement:[16]

> First, in considering the views of psychiatrists, the State has been shown to be inherently biased in its attitude towards independent psychiatrists – this is highly prejudicial to accused persons and accordingly breaches their rights to a fair trial (the '**First Statement**').
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> In 2010, then Principal Senior State Counsel (Chief Prosecutor) – Mr Bala Reddy, accused defence psychiatrists as being 'hired guns', claiming that they were not objective and [were] untruthful in court. In contrast, he charged that State-appointed Psychiatrists from the IMH were known to be 'objective' and 'impartial' (the '**Second Statement**').
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> The objectivity required of Prosecuting authorities at all stages of the trial process engages the right to a fair trial contemplated within the interpretation of Articles 14 of the ICCPR – which forms a part of customary international law. By viewing and tarring all indepdent (sic) psychiatrists as 'hired guns', Mr Reddy has shown that the State has lost their objectivity at the outset – imbuing an institutional bias viz. an innate desire to challenge the findings of indepdendent (*sic*) psychiatrists (the '**Third Statement**').
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> Mr Reddy's bias can be further seen in his suggestion for all offenders to be sent to the IMH for examinations. Such a suggestion is clearly impractical due to lack

14 [2020] SGDT 8.
15 Cap 185, 2008 Rev Ed.
16 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [4].

> of resources and specialty expertise factors which could be heavily prejudicial to accused persons. To compound matters, Mr Reddy pointed out that:
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> > 'It will not do the reputation of forensic psychiatrists any good if their conclusions are constantly challenged.'
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> The statement suggests that only reports of independent psychiatrists can be challenged, and that those of IMH psychiatrists will be readily viewed as unimpeachable. Such a practice plainly shows scant regard of the objectivity required of the State, tainting the entirety of the Prosecutorial process irreversibly.
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> … Further, it is of note that Mr Reddy now sits as a Judge in the State Court (the '**Fourth Statement**').
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> In the circumstances, we would respectfully invite the ICJ to find that there has been a breach of Naga's right to a fair trial and additionally, to re-assess the expert reports tendered by the Prosecution.
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> It will therefore become incumbent on the ICJ to consider in Naga's case the issues of fair trial rights, the rights of mentally impaired persons especially so in the context of death penalty judgments and the right to life. The bar on executing persons with mental impairment has today evolved into customary international law and Singapore ought to be compelled to be bound by it (the '**Fifth Statement**').

22.37 The LS framed three charges and their alternates against the respondent. The primary charges ("the Primary Charges") were framed as breaches of s 83(2)(*b*)(i) of the LPA (read together with rr 9(1)(*a*), 13(2) and 13(6)(*b*) of the PCR) as follows:

> (a) First Charge: The First, Third and Fourth Statements contained attacks against the impartiality and integrity of State Prosecutors in Singapore without any basis;
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> (b) Second Charge: The Second, Third and Fourth Statements contained unsupported attacks against a sitting Judge of the State Courts of Singapore ("the SDJ"), alleging that the SDJ was biased against defence psychiatrists; and
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> (c) Third Charge: The Fifth Statement was an unjustified attack on the Singapore Courts but also a collateral attack on the Court of Appeal's decision by alleging that Naga was not afforded a fair trial.

22.38 The alternate charges followed the language of each of the respective Primary Charges, save that they were each framed as a breach of s 83(2)(*h*) of the LPA instead.

22.39 After a complaint was made against the respondent, the respondent's former solicitors wrote to the LS stating, *inter alia*, that

the respondent had "withdrawn the … allegations forming the subject matter of the Complaint and unconditionally apologised for them".[17] The respondent also made a Facebook post to this effect. The post was eventually removed from the website.

22.40 At the start of the hearing on 19 March 2020, the respondent's former solicitors informed the DT that the respondent would plead guilty to the charges. Since the charges only involved questions of law, the DT was at liberty to find that the charges were not made out and reject his plea. The respondent then addressed the DT and seemingly took the view that while he had apologised at the outset and although he was willing to plead guilty to the charges, the DT should still consider whether the charges were made out, and if not, the DT could decide to reject his plea. After a short adjournment for the respondent to confer with his former solicitors, the respondent decided that he would be contesting the charges and took the stand.

22.41 After considering submissions, the DT held, *inter alia*, that:

(a) Rules under Part 3, Division 1 of the PCR impose obligations on *all* lawyers and are not limited to "regulating a practitioner's conduct before a court or tribunal".[18]

(b) Given that parties had proceeded on the basis that r 9(1)(*a*) does impose substantive obligations, the DT proceeded to consider whether the respondent had breached r 9(1)(*a*). The LS had to show that the respondent had breached his duty to "assist in the administration of justice" and his duty to "act honourably in the interests of the administration of justice".

(c) Rules 9 and 13 should not be approached collectively, even though there was "a degree of overlap between the obligations imposed".[19]

22.42 The DT held that the Primary Charges were not made out against the respondent:

(a) The respondent had not breached his obligations under r 9(1)(*a*), as it "imposes a positive obligation on a lawyer to '*assist*'. It does not contain a prohibition against acting contrary to the administration of justice. That is found elsewhere, including Rule 13(6)(*b*)" [emphasis in original].[20]

17 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [51].
18 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [93].
19 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [103].
20 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [106].

As to what it means to "act honourably in the interests of the administration of justice" under r 9(1)(*a*), examples of lawyers failing to act "honourably" would include failing to (i) honour an undertaking; (ii) take steps to withdraw an unlawful letter; and (iii) apprise a fellow solicitor of the truth. This is "quite different from an allegation of conduct 'plainly calculated to prejudice the administration of justice', which appears to be more appropriately considered within Rule 13(6)(*b*)".[21]

(b) The respondent did not breach r 13(6)(*b*), which does not cover scandalising contempt of court, but which the respondent was accused of. Such conduct is dealt with under r 13(6)(*a*).

(c) The respondent did not breach r 13(2). While this rule was not addressed by the parties, the DT took the liberty to consider its scope and found that it had not been breached.

22.43 However, the first alternate charge, in respect of the First, Third and Fourth Statements, was made out. "The underlying thread in the First, Third and Fourth Statements was the respondent's complaint that the State is biased against defence private psychiatrists, which in turn prejudices accused persons because it breaches their right to a fair trial."[22] The respondent had "not established the basis for such criticism".[23] Further, the respondent's allegations were attacks "against the impartiality and integrity of State Prosecutors in Singapore without any basis".[24] Under s 83(2)(*h*) of the LPA, the test is whether a reasonable person, on hearing about what the legal practitioner had done, would have unhesitatingly said that as a legal practitioner he should not have done it. Applying this test, "the Respondent should not have made baseless allegations about the State's attitude towards psychiatrists".[25]

22.44 The second alternate charge, targeting the Second, Third and Fourth Statements, was also made out. Significantly, the last sentence of the Fourth Statement ("Further, it is of note that Mr Reddy now sits as a Judge in the State Court") "was intended to impugn the impartiality of [the SDJ] '*as a Judge in the State Court*'" [emphasis in original].[26] The respondent did not establish fair criticism as he did not identify an objective basis upon which he had criticised the SDJ.

21 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [109].
22 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [148].
23 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [149].
24 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [150].
25 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [157].
26 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [177].

22.45 As for the third alternate charge, targeting the Fifth Statement, it did not rise to the level of an unjustified attack on the Singapore Courts, or a collateral attack on the decision of the Court of Appeal, as "[t]he focus of the Respondent's criticism here was against the State and the statutory provisions of the MDA, and not the judiciary".[27] Further, "criticism of a court decision *per se* does not amount to misconduct".[28] "[E]ven if the Respondent's allegation that Naga was '*not afforded a fair trial*' amounted to an imputation of judicial impartiality or impropriety, this would not appear to be conclusive evidence of misconduct" [emphasis in original].[29]

22.46 In conclusion, while the respondent intended to "cast aspersions of bias"[30] against State Prosecutors, and against the SDJ as a judge, his intentions did not establish due cause of sufficient gravity. The DT recommended that the respondent pay a penalty of at least $10,000, plus costs.

22.47 Intriguingly, the respective DTs in *Koh Tien Hua*[31] and *Ravi s/o Madasamy*[32] appeared to reach different conclusions as to whether a practitioner's actions, which are contrary to the administration of justice, can be said to breach the duty under r 9(1)(*a*) of the PCR to *assist* in the administration of justice. The DT in *Ravi s/o Madasamy* appears to have embarked on a deeper analysis in reaching its conclusion (that r 9(1)(*a*) is not the appropriate rule to apply when a practitioner has acted contrary to the administration of justice), but it remains to be seen which interpretation will be adopted by the courts.

22.48 On a more general note, considering the social media age we live in, and the ease with which information can be disseminated (whether to the media or other parties), practitioners may wish to keep in mind the LS's Practice Direction 6.1.1,[33] which provides that all members are to, when sharing facets of their professional lives, exercise proper discretion and to refrain from making inappropriate comments, improper disclosures or inaccurate statements. In particular, practitioners should, *inter alia*, (a) maintain confidentiality; (b) have regard to the risk of further dissemination, decontextualisation or distortion by third parties or the public; and (c) avoid comments that may prejudice matters *sub judice* or that may be in contempt of court.

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27 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [191].
28 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [193].
29 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [194].
30 *The Law Society of Singapore v Ravi s/o Madasamy* [2020] SGDT 8 at [245].
31 See para 22.30 above.
32 See para 22.35 above.
33 31 January 2019.

22.49 The Practice Directions also sets out examples of inappropriate comments or improper disclosures, such as (a) comments in relation to ongoing proceedings; (b) about clients, judges, opposing parties and/or counsel; and (c) confidential information. Practitioners should also adhere to standards imposed by the Personal Data Protection Act 2012.[34]

V. Allegations in affidavits

22.50 The disciplinary proceedings in *The Law Society of Singapore v Carolyn Tan Beng Hui and Au Thye Chuen*[35] arose out of interpleader proceedings commenced by a legal practice, Tan & Au LLP ("TALLP"), to claim its stakeholder fees from sale proceeds from the sale of a property. The respondents were represented by Central Chambers Law Corporation ("CCLC") and Yeo-Leong & Peh LLC (now known as Adsan Law LLC) ("YLP").

22.51 In the course of the interpleader proceedings, there was a housekeeping session in chambers before the Honourable Dedar Singh Gill JC ("the JC"). TALLP then applied to recuse the learned JC from hearing the interpleader proceedings ("the Recusal Application"), and filed various documents and affidavits. Carolyn Tan Beng Hui ("TBH") and Au Thye Chuen ("ATC") are partners at TALLP.

22.52 The first charge against TBH was for an alleged breach of r 29 of the PCR, brought about by TBH's allegation against another legal practitioner, Twang Kern Zern ("TKZ") of CCLC. These allegations were set out in an affidavit TBH filed on behalf of TALLP in the Recusal Application ("the Recusal Affidavit").

22.53 The DT found that r 29 of the PCR was engaged even though TBH was acting as a partner of TALLP, the litigant, and not as a practitioner. Although TBH may have been wearing two hats in relation to the Recusal Affidavit, that did not excuse her from r 29. However, the first charge was not made out because her statements were not directed at the conduct of TKZ and was an expression of opinion, as opposed to an allegation against TKZ.

22.54 Separately, TBH did not provide TKZ the opportunity to respond to the allegations. TBH argued that TKZ had been given the opportunity to respond to the statements in an affidavit he filed subsequently. The DT did not come to a view on this submission, but did point out that r 29

34 Act 26 of 2012.
35 [2020] SGDT 10.

"contemplates the opportunity to respond being given *prior* to the filing of the document" [emphasis added] in which allegations are made.[36]

22.55 The second charge against TBH concerned statements made in the Recusal Affidavit against the learned JC. TBH made statements to the effect that the learned JC was biased against TALLP and had already made up his mind without hearing parties or reviewing submissions. The DT found that TBH had breached r 13(2) of the PCR, by failing to be respectful to the court:

> (a) Rule 13 of the PCR was not only concerned with the presentation and conduct of a case to the court, but also the factual statements made for the purposes of the case.
>
> (b) The language used by a legal practitioner need not rise to the level of contempt of court to be contrary to r 13(2). Although the language used by TBH in the Recusal Affidavit was not contemptuous, it was not respectful to the court.
>
> (c) Even though TBH may have acted *bona fides*, she was required to show respect and her subjective state of mind would not excuse her.

22.56 TBH also faced another charge under r 13(2) of the PCR for filing skeletal arguments and closing submissions which containing references to a document which the learned JC had ruled should not be admitted. TBH had tendered hard copies of skeletal arguments and bundle of documents in the interpleader proceedings. The learned JC ruled that he would not allow page 98 of the bundle of documents to be admitted. TALLP subsequently filed written closing submissions which referred to page 98. The LS framed a charge against her on the basis that by referring to page 98 in her written closing submissions, which was against the court's orders, she was discourteous of the court. However, the DT dismissed this charge and found that TBH did not consciously and deliberately include the reference, and its inclusion was inadvertent.

22.57 Turning to the final charge against TBH, she was found guilty of a breach of r 29 of the PCR, for filing documents containing allegations against David Kong Tai Wai ("KTW") of YLP. TBH sent a letter to the court on behalf of TALLP, containing an allegation that KTW had lied on oath. The DT held that it was a serious accusation, and "it would generally be inappropriate to allege misconduct on the part of another

36 *The Law Society of Singapore v Carolyn Tan Beng Hui and Au Thye Chuen* [2020] SGDT 10 at [34].

solicitor for a purpose other than to lodge a formal complaint with the [LS]".[37] As such, the charge was made out.

22.58 The DT concluded that while there was no cause of sufficient gravity for disciplinary action under s 83, TBH should be ordered to pay a penalty sufficient and appropriate to the misconduct under s 93(1)(*b*)(i) of the LPA.

22.59 ATC faced similar charges as those brought against TBH above. However, the charges against ATC were dismissed as there was insufficient evidence of ATC's involvement in the preparation of the Recusal Affidavit, skeletal submissions and closing submissions.

22.60 The DT also made it a point to highlight the need for professional courtesy, common decency, civility, and camaraderie within the profession. Practitioners should also take note of the LS's Practice Direction 8.5.9[38] (setting out the need to observe good manners and courtesy towards fellow practitioners, and to avoid acrimony and offensiveness). Practitioners should also be careful not to disrespect the court when applying for the presiding judge to be recused. In the present case, the Recusal Affidavit had been prepared in a rush and in an agitated state of mind. Practitioners who find themselves in similar situations should take the time to consider the contents of their drafts.

VI. Reviews/appeals against decisions of the Council/ disciplinary tribunal

22.61 Somewhat unusually, there were no fewer than three separate decisions in 2020 in which decisions of the LS/DT were challenged.

22.62 The starting point should be the Court of Appeal's decision in *Iskandar bin Rahmat v Law Society of Singapore*.[39] The complainant filed a complaint against his defence lawyers who had represented him in a murder trial. The Inquiry Committee ("IC") recommended that the complaint be dismissed, and the Council dismissed the complaint. The complainant applied to the High Court for a review of the Council's

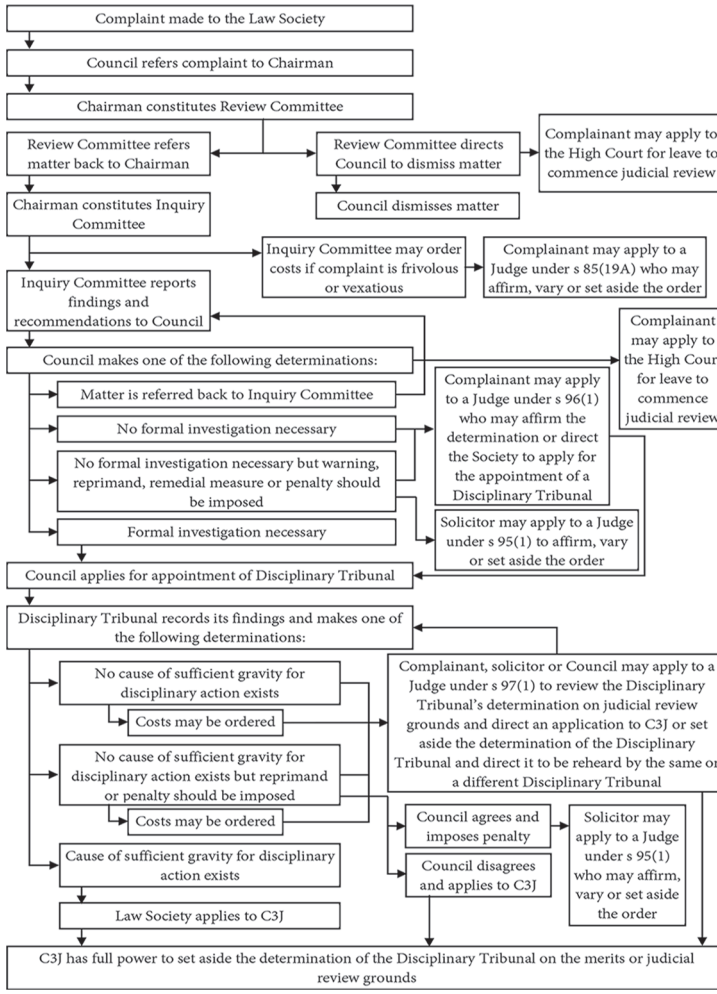
37 *The Law Society of Singapore v Carolyn Tan Beng Hui and Au Thye Chuen* [2020] SGDT 10 at [85].

38 31 January 2019.

39 [2021] 1 SLR 874. While this judgment was released in January 2021, it would be wholly artificial to discuss the High Court's decision (*Iskandar bin Rahmat v Law Society of Singapore* [2020] SGHC 40, which was released in 2020) without considering this decision; as such, the author has taken the liberty to include this judgment in this review.

determination. His application was dismissed by a High Court judge.[40] The complainant then sought to appeal to the Court of Appeal against the High Court judge's decision. The LS sought to strike out the appeal, arguing that the Court of Appeal had no jurisdiction in light of its earlier decision in *Law Society of Singapore v Top Ten Entertainment Pte Ltd*[41] ("*Top Ten*").

22.63 Before going into the issue on appeal, the author reproduces below a diagram of the disciplinary framework which was set out in the decision:[42]



40 *Iskandar bin Rahmat v Law Society of Singapore* [2020] SGHC 40.
41 [2011] 2 SLR 1279.
42 *Iskandar bin Rahmat v Law Society of Singapore* [2021] 1 SLR 874 at [35].

22.64 With this framework in mind, the Court of Appeal then turned to whether there is a right of appeal against judges' decisions under ss 95, 96 and 97 of the LPA (pertaining to IC or DT proceedings). The Court of Appeal embarked on a detailed analysis of the earlier decisions and concluded that there *was* such a right of appeal, given that such a decision would be (a) a decision of the High Court; and (b) made in the High Court's exercise of its civil jurisdiction. In coming to this decision, the Court of Appeal overturned its decision in *Top Ten*, in which the Court of Appeal had decided that there was no such right of appeal against judges' decisions under ss 95, 96 and 97 of the LPA.

22.65 Part VII of the LPA (which the Court of Appeal referred to as "enigmatic and in need of review and reform")[43] can therefore be summarised as follows:

> (a) *Review Committee*: A Review Committee ("RC") may direct the Council to dismiss the complaint or refer it back to the Chairman of the Inquiry Panel. Where the complaint is dismissed, the complainant may seek leave from a judge of the general division of the High Court to commence judicial review proceedings (see O 53 of the Rules of Court,[44] read with O 1 r 4). The judge's decision is appealable to the Appellate Division of the High Court;[45]
>
> (b) *Inquiry Committee*: Where the complaint is referred back to the Chairman of the Inquiry Panel, it must be referred to an IC. An IC can recommend that:
>
> > (i) a formal investigation is not necessary. The Council considers the IC's report and determines whether to accept the recommendation. If the Council accepts the recommendation, the complainant may apply to a judge of the General Division of the High Court under s 96 to reverse the Council's decision. The judge's decision under s 96 is appealable to the Appellate Division of the High Court;
> >
> > (ii) no cause of sufficient gravity exists for a formal investigation but the solicitor should be given a warning, reprimanded, order to comply with remedial measures or ordered to pay a penalty. The Council considers the IC's report and determines whether to

43 *Iskandar bin Rahmat v Law Society of Singapore* [2021] 1 SLR 874 at [34].
44 Cap 322, R 5, 2014 Rev Ed.
45 See *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 read with s 35(2) of the Supreme Court of Judicature Act (Cap 322 2007 Rev Ed).

accept the recommendation. If the Council accepts the recommendation, the solicitor may apply to a judge of the General Division of the High Court under s 95 to set aside the Council's determination, and the judge may affirm, vary or set aside that order. The complainant may apply to a judge of the General Division of the High Court under s 96 to reverse the Council's decision. The judge's decision under s 95 or 96 is appealable to the Appellate Division of the High Court; or

(iii) there should be a formal investigation by a DT. The Council is obliged to refer the matter to a DT. Concurrently, a complainant or solicitor may commence judicial review proceedings of the Council's determination, which presumably encompasses any concerns as to the IC proceedings. The outcome of these judicial review proceedings is appealable to the Appellate Division of the High Court;

(c) *Disciplinary Tribunal*: A DT may determine that:

(i) no cause of sufficient gravity for disciplinary action exists. The complainant, the solicitor, or the Council may apply to a judge of the general division of the High Court under s 97 for a review of the DT's decision (although logically, no solicitor in this situation would make such an application);

(ii) while no cause of sufficient gravity for disciplinary action exists, the solicitor should be reprimanded, ordered to comply with remedial measures, or ordered to pay a penalty. The Council may agree or disagree. If the Council accepts this recommendation from the DT, the solicitor may apply to a judge of the General Division of the High Court under s 95 seeking to set aside the decision of the Council. The complainant, the solicitor, or the Council may apply to a judge of the General Division of the High Court under s 97 for a review of the DT's decision. If the Council disagrees with the DT, it can also apply to the Court of Three Judges under ss 94(3) and 94(3A); or

(iii) cause of sufficient gravity for disciplinary action exists. The Council must accept this determination, upon which there is no further appeal and the matter must proceed to the Court of Three Judges. Judicial review proceedings of the DT's decisions cannot be commenced outside the statutory framework; and

(d) *Court of Three Judges*: The Court of Three Judges can (i) set aside the determination of the DT on the traditional grounds of judicial review or on its merits; or (ii) make an order under s 98(1) if due cause is shown.

22.66 This case is required reading for any practitioner who (a) is subject to disciplinary proceedings, and wishes to know their options at each stage of the process; (b) has been instructed to advise a complainant as to the steps that can be taken to pursue a complaint; or (c) has been instructed to act for the LS in disciplinary proceedings (where the Council has decided to take out an application to court).

22.67 We turn now to the remaining decisions in which complainants sought to review determinations of the Council/DT.

A. Review of Council's determination after considering Inquiry Committee's report

22.68 In *Tan Ng Kuang v Law Society of Singapore*,[46] the complainants were insolvency practitioners who were appointed as judicial managers for two companies. The respondent practitioners acted for the ultimate parent company of the two companies. The complaint related to whether there was an agreement for the respondents to hold a sum as a deposit for the complainants' fees, and whether the respondents had abetted the parent company in not making payment to the complainants. ICs were constituted for each of the respondents. The ICs were of the view that no formal investigation by a DT was required, and recommended dismissing the complaint. The Council eventually determined that formal investigations were not necessary. The complainants applied to a High Court judge under s 96 of the LPA, seeking an order for the LS to apply to the Chief Justice for the appointment of a DT.

22.69 The judge held that the IC should channel a complaint to a DT wherever there is a *prima facie* case of ethical breach which ought to be heard formally and determined by the DT. There would be a *prima facie* case if there were "some evidence (not inherently incredible) which, if [a judge] were to accept as accurate, would establish each essential element in the alleged offence".[47]

22.70 In the present case, there was a factual dispute as to the agreement between the parties, and the IC had accepted the respondents'

46 [2020] SGHC 127.

47 *Tan Ng Kuang v Law Society of Singapore* [2020] SGHC 127 at [8], citing *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 at [17].

version of events. However, there was a *prima facie* case because (a) the complainants' conduct was consistent with their version of events, and their version of events was averred to on affidavits. The assertions on oath was evidence which was not inherently incredible, and ought to be tested in cross-examination before being dismissed; (b) the correspondence was consistent with the complainants' version of events, and the respondents' explanation (which the correspondence called into question) ought to be tested in cross-examination; and (c) the respondents had not been queried why they did not clarify that the moneys held were client moneys.

22.71 In assessing whether there was a *prima facie* case, the IC ought to have confined themselves to considering if there was evidence, which was not inherently incredible, that would satisfy the elements of the alleged misconduct. Once such *prima facie* evidence of misconduct was presented, the IC should not have gone further to conclude that there was no agreement. The judge held that the allegations should be tested in proper hearings by DTs, and directed the LS to apply for DTs to be appointed.[48]

22.72 Members of ICs should pay particular attention to this decision. Where there are disputes of fact, the IC should limit itself to determining if there is a *prima facie* case of misconduct. If there is not even a *prima facie* case, the IC should recommend that the complaint be dismissed. But if there is, at the very least, a *prima facie* case, then the IC should recommend either sanctions, or formal investigation by a DT. The IC should *not* go on to make findings of fact.

B. Review of disciplinary tribunal's decision

22.73 In *Law Society of Singapore v Yeo Khirn Hai Alvin*,[49] the practitioner was charged with overcharging. The DT determined that no cause of sufficient gravity existed for disciplinary action. The LS and the Attorney-General ("AG") applied for the determination to be set aside. The High Court judge set aside the determination and ordered the LS to apply to the Chief Justice for the appointment of another DT to investigate the complaint.

22.74 The judge held, *inter alia*, that the complaint included mental capacity issues, concerning the adequacy of steps taken to ensure that the client was capable of instructing her lawyers and agreeing to their fees. The charges did not engage the mental capacity issues, and the DT did not investigate these issues. Section 93(1) of the LPA stipulates that a DT

48 *Tan Ng Kuang v Law Society of Singapore* [2020] SGHC 127 at [18].
49 [2020] 4 SLR 858.

was required to hear and investigate the "matter" referred to it, which was the complaint. The LS had a duty to frame charges that reflected the gravamen of the complaint, and if it erred in framing the charge, the DT's determination was liable to be set aside.

22.75 Since the charges were erroneous, (a) the determination was erroneous; and (b) the DT lacked jurisdiction. The determination was set aside in full, as the analysis of whether there was overcharging had to take mental capacity issues into account. The LS was also granted an extension of time for its application for a review of the DT's decision.

22.76 This case highlights (a) the importance of the LS framing charges that reflect the gravamen of the complaint; and (b) the possibility of complainants (who disagree with a DT's dismissal of their complaint) considering whether the LS had erred in framing the charge(s).

VII. Legal professional privilege over material seized by Singapore Police Force

22.77 In *Ravi s/o Madasamy v Attorney-General*,[50] the High Court laid out the procedure for handling legally privileged material seized by the Singapore Police Force ("the Police") or another investigating authority. The Police were investigating the plaintiff, an advocate and solicitor, for alleged offences under the Administration of Justice (Protection) Act 2016.[51] In the course of investigations, the Police seized electronic devices from the plaintiff ("the Devices"). The plaintiff claimed that the Devices contained communications between him and his clients that were protected by legal professional privilege. The plaintiff applied for leave under O 53 r 1(*b*) of the Rules of Court to commence judicial review, in order to prohibit the AG and the Police from reviewing the contents of the Devices, until the court determined if the materials were privileged ("the Prohibiting Order").

22.78 The High Court held that the seizure and review of the Devices was susceptible to judicial review. However, it dismissed the application, as the remaining two requirements for leave were not met.

22.79 First, there was no *prima facie* reasonable suspicion that the plaintiff might succeed in obtaining the Prohibiting Order, as the plaintiff did not adduce sufficient evidence to establish a *prima facie* case of reasonable suspicion that the contents of the Devices were legally

50 [2020] SGHC 221.
51 Act 19 of 2016.

privileged. The plaintiff did not identify the clients who were asserting privilege, the specific documents which were privileged, or why these documents were privileged. If the plaintiff had difficulty identifying the materials, he should have taken up the AGC's invitation for him to access the Devices to identify privileged material.

22.80 Further, assuming that the Devices contained privileged material, the High Court considered whether various steps proposed by AGC, for the review of the material to determine whether it was privileged, should be allowed to proceed. The High Court referred to four other jurisdictions and formulated a guide as to how to handle a claim of legal privilege over documents lawfully seized by the Police:

> (a) The AGC, rather than the court, should review the seized materials for legal professional privilege if (i) AGC does not accept, at face value, the claim to privilege; or (ii) there is a reasonable basis to think that privileged material will be encountered in a review of seized material. The review should be conducted by a team of AGC offices who will *not* be involved in the underlying investigation ("the AGC Privilege Team"). Seized documents are not to be handed to the investigation or prosecution team until after any dispute over privilege has been settled by the court.
>
> (b) Where materials have been seized from a lawyer involved in criminal defence work, or a non-lawyer who is or was involved in other criminal investigations, the AGC Privilege Team should *not* be made up of officers from AGC's Crime Division. Where the seized material allegedly includes privileged documents involving lawsuits that AGC is or was a party to, the AGC privilege team should *not* be made up of officers from AGC's Civil Division (or an equivalent team involved in the government's civil lawsuits).
>
> (c) The lawyer whose items have been seized should co-operate with the AGC Privilege Team by identifying the specific documents which are protected by legal privilege. If the lawyer cannot remember which specific documents are privileged, AGC should provide supervised access to the materials so that privileged material can be identified. If the lawyer or person refuses to co-operate, the AGC Privilege Team may proceed to review the material to determine if privilege exists.
>
> (d) The AGC Privilege Team may accept a claim of privilege at face value, or review the materials to determine if they agree that the materials are privileged. Privileged material should be returned or isolated.

(e) If there is dispute as to whether the material is privileged, AGC should inform the lawyer that the materials will be handed to the investigating authority. The lawyer should consult the client on whether to insist on or waive privilege. If privilege is insisted upon, the client can file an application under O 53 of the Rules of Court for leave for a prohibiting order, or (if this is not feasible) object to the admission of the material into the evidence.

22.81 After laying out this procedure, the High Court held that there was no *prima facie* case of reasonable suspicion that the plaintiff would succeed in his application for a Prohibiting Order. The High Court did not elaborate on how it reached this conclusion, but the effect of the High Court's conclusion is that the AGC Privilege Team would *always* be entitled to review the material. As such, the plaintiff would not have succeeded in obtaining an order preventing the Police and the AG from reviewing the material, since such review could and would take place pursuant to the procedure.

22.82 Further, the plaintiff did not have standing:

(a) The plaintiff did not suffer the violation of a right personal to him. The alleged legal professional privilege belonged to the plaintiff's clients and not the plaintiff, who did not identify who these clients were. Since the plaintiff did not identify the privileged material, there was no evidence that the clients' personal rights had been violated;

(b) No "public right" had been breached, and the plaintiff had not suffered any "special damage".

(c) No public body had made an egregious breach of a public duty.

22.83 Finally, the High Court indicated that moving forward, the plaintiff and the AGC should follow the procedure highlighted in the judgement. It remains to be seen whether the plaintiff's clients will commence a similar application, after the procedure laid out has been adhered to and if there remain disputes as to privilege.

22.84 The issue of disclosure of privileged communications, in the context of investigations, is not new. As far back as 2009, the LS had, in its report on the draft Criminal Procedure Code Bill 2009, recommended that the Criminal Procedure Code[52] ("CPC") be amended to include

52 Cap 68, 2012 Rev Ed.

a procedure to resolve claims of privilege.[53] However, no such procedure was included. Subsequently, in 2017, when amendments to the CPC were proposed, the proposed amendments included procedures to protect privilege during investigations.[54] However, the proposed amendments were eventually not introduced. Instead, the Ministry of Law stated that a Code of Practice would be agreed upon amongst the AGC, law enforcement agencies, and the Criminal Bar.[55] This Code of Practice may well have been superseded by the High Court's decision, but it remains to be seen whether further issues arise in practice.

VIII. Disclosure of statements recorded by Commercial Affairs Department for disciplinary purposes

22.85 In *Shanmugam Manohar v Attorney-General*,[56] the crux of the issue was whether statements recorded by the Commercial Affairs Department ("CAD") could be disclosed to the LS for disciplinary purposes. In the course of a police investigation, various statements were recorded in relation to a motor insurance fraud scheme. Upon conclusion of the investigations, the CAD did not find any further offence of cheating. The CAD's findings and the statements were forwarded to the AGC.

22.86 The AG later referred the information received from the CAD to the LS pursuant to s 85(3) of the LPA. The information related to a practitioner's alleged touting practices (a breach of r 39 of the PCR) and the fact that the practitioner had given to a third party copies of his firm's warrant to act, for clients to sign without attending at the firm. To prepare its case against the practitioner, the LS requested from AGC, *inter alia*, the statements of (a) the third party; and (b) the practitioner's partner ("the Interviewees"). The AGC asked the CAD to check if the Interviewees consented to being contacted by the LS, but they refused. Parenthetically, the practitioner's consent was unnecessary because he was being investigated and his own statement to the CAD had direct relevance.

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53 Law Society of Singapore, *Report of the Council of the Law Society on the Draft Criminal Procedure Code Bill 2009* (17 February 2009).

54 Ministry of Law, *Public Consultation on Proposed Amendments to the Criminal Procedure Code and Evidence* (24 July 2017) Annex B, "Table of Proposed Legislative Changes to the Criminal Procedure Code ('CPC') and the Evidence Act" <https://www.mlaw.gov.sg/files/news/public-consultations/2017/07/AnnexB.pdf> (accessed 12 June 2021).

55 Ministry of Law, "Responses to Feedback Received from the Public Consultation on Proposed Amendments to the Criminal Procedure Code and Evidence Act" (28 February 2018) <https://www.mlaw.gov.sg/files/news/press-releases/2018/02/Response%20to%20Public%20Consultation%20Feedback.pdf> (accessed 12 June 2021).

56 [2021] 3 SLR 600.

22.87 When the AG updated the LS on the refusals, the LS informed the AG that without the statements, it had no evidence on which to prosecute the matter before a DT, and suggested proceeding under s 85(3)(*a*) of the LPA instead to first convene an IC. The AGC then asked if the CAD would object to them sending the statements to the LS. The CAD had no objection, and the AG then forwarded the Interviewees' statements and the practitioner's statement to the LS. A DT was appointed pursuant to s 85(3)(*b*) of the LPA.

22.88 The practitioner subsequently filed an originating summons for various declaratory orders against the AG, CAD and the LS, the essence of which was that the Interviewees' statements should not have been forwarded to the LS.

22.89 The High Court dismissed the practitioner's application. The High Court considered, in particular, the following issues:[57]

> (a) whether s 91A of the LPA applied to oust the jurisdiction of the court;
>
> (b) if s 91A of the LPA did not oust the jurisdiction of the court, how the court would exercise its discretion in respect of the declarations prayed for;
>
> (c) whether the practitioner's statement was recorded *ultra vires* in relation to the CAD's power to record statements for being recorded for a collateral purpose; and
>
> (d) whether the CAD and the AG were entitled to disclose the statements to the Law Society.

22.90 On the first issue, s 91A of the LPA provides that "there shall be no judicial review in any court of any act done or decision made by the [DT]". The High Court disagreed with the LS's argument that s 91A of the LPA ousted the court's jurisdiction. As the practitioner was seeking declarations "on issues that the DT had not had the opportunity to consider, there was no 'act done or decision made' by the DT, and s 91A … did not apply".[58] The High Court therefore had jurisdiction.

22.91 On the second issue, there was no reason for the High Court to exercise its discretion to grant the declaratory relief sought. The purpose of s 91A of the LPA was to consolidate judicial review and hearings on the merits into one process in order to expedite the disciplinary process. Since the declarations sought concerned the use of statements as evidence

57 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [18].
58 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600 at [27].

by the DT, it was a factual matter within the DT's remit, and thereafter, the High Court or Court of Three Judges if there was any review of the DT's determination.

22.92 On the third issue, the CAD officer, who exercised his power to examine witnesses under s 22 of the CPC and recorded statements, did not act unlawfully. Where a statutory provision confers authority to obtain information for a specific purpose, and the public authority exercised its power to obtain the information for more than one purpose, the exercise of power is lawful if the true and dominant purpose of the exercise of the power was authorised by the specific statutory provision.

22.93 In the present case, the true and dominant purpose of recording the practitioner's statement was to investigate a criminal offence (motor insurance fraud). The officer's purpose in exercising the power was relevant to the legality of the taking of the statement. The High Court found that the police officer had pursued a sensible line of inquiry.

22.94 On the fourth issue, the disclosure of the practitioner's statement to the LS did not breach the duty of confidence, as it came within the public interest exception to confidentiality. There is a strong public interest in ensuring that errant lawyers are brought to task. Therefore, where evidence of disciplinary breaches is presented to the Police in the course of investigations, there is a public interest in disclosure being made to the relevant regulatory body.

22.95 The practitioner also argued that disclosure was not necessary as the matter could have proceeded under s 86 of the LPA if an IC had been convened to investigate the issue. However, the High Court held that the AG's decision to disclose the statements was reasonable because of the Interviewees' refusal to be contacted by the LS. It was only after the refusal, and the LS's indication that they needed the evidence in the statements, that the CAD and the AG decided to disclose the statements to the LS. Public interest would not be served by convening an additional IC when cogent evidence was available that ought to be considered directly by a DT.

22.96 The AG also relied on ss 85(3) and 106 of the LPA to argue that the AG and the CAD were legally entitled to disclose the statements to the LS. The High Court held that in the present case, the AG's reliance on s 85(3) of the LPA (to refer "any information touching upon the conduct of a regulated legal practitioner") was correctly exercised because of the public interest exception. As regards s 106 (which provides that "[n]o action or proceeding shall lie against the [AG] … unless it is proved to the court that the act or thing was done in bad faith or with malice"), the High Court held that this provision did not immunise the AG against

judicial review on the grounds of illegality, but on the facts, no illegality was shown.

22.97 In the present case, LS had first requested documents and information from the AG, and the AGC had (through the CAD) first tried to obtain the Interviewees' consent to be contacted by the LS. Since they refused, AGC sent the statements to LS (upon confirming that CAD had no objection). In light of the High Court's decision that the CAD may disclose such statements to the LS for disciplinary purposes, it may not be necessary for the LS (in future cases) to attempt to contact the relevant persons before directly approaching the AG and CAD to obtain statements. However, in the present case, the High Court did emphasise the severity of the alleged breach of the PCR and a link to criminal activity. It remains to be seen how the High Court will apply these principles in future cases where the alleged breaches of the PCR are less severe, or have no connection to criminal activity.

IX. Duty of confidence to past adversary

22.98 In the unusual case of *LVM Law Chambers LLC v Wan Hoe Keet*,[59] the respondents sought to restrain the appellant law firm from acting for the plaintiff in an ongoing suit ("Suit 806"). In an earlier suit ("Suit 315"), the firm had acted for a different plaintiff but against the same respondents. The firm participated in settlement negotiations and Suit 315 was settled on the first day of trial, with a settlement agreement ("the Settlement Agreement") signed on the same day.

22.99 An injunction was sought on the grounds that the appellant owed the respondents obligations of confidence, and that there was a real risk that the firm would misuse or disclose confidential information if not restrained from acting. The Settlement Agreement, to which the appellant was not expressly made a party, included a confidentiality clause. At first instance, the High Court judge granted the injunction and found that there was an equitable duty of confidence imposed on the law firm, and that there was a sufficient threat of misuse to justify the grant of an injunction. The law firm appealed.

22.100 In allowing the appeal and discharging the injunction, the Court of Appeal held that a law firm can be precluded from acting against the same counterparty in previous proceedings if:

59 [2020] 1 SLR 1083.

(a) the information concerned has the necessary quality of confidence about it. A duty of confidence cannot arise if the information is common or public knowledge;

(b) that information was received by the lawyer (or law firm) concerned in circumstances importing an obligation of confidence. Much would depend upon the precise facts and circumstances of the previous proceedings:

(i) where the client is itself bound by a confidentiality obligation under a settlement agreement from prior proceedings, any information obtained by the lawyer on the *terms* of the confidentiality agreement would be impressed with an obligation of confidence. In such a situation, the lawyer cannot even request that the client grant permission to use that information (as to the *terms*) as the client cannot do so without being in breach of its confidentiality obligations, and any disclosure thereof would constitute a breach of the lawyer's obligation of confidence; and

(ii) as to whether the lawyer owes a duty of confidence as to *other details* in the settlement context (such as knowledge of the process in arriving at those terms, and the stance taken in negotiations), it would depend on the terms of the settlement agreement and may be inferred from the surrounding context. However, the burden of proof would be on the party seeking relief to show that the lawyer is subject to the obligation of confidence; and

(c) there is a real and sensible possibility of the information being misused in the subsequent proceedings. This test is to be applied on an objective basis, from the perspective of "a fair-minded reasonably informed member of the public". Two non-exhaustive factors ought to be taken into account: (i) the degree of similarity between the previous set of proceedings which were settled and the subsequent proceedings, such as by having similar issues and/or evidence. Each case turns on its own facts; and (ii) whether the client in the subsequent proceedings deliberately retained the lawyer due to his involvement in the previous set of proceedings. No one factor alone is determinative.

22.101 In the present case, the Court of Appeal agreed that the law firm was bound to keep the terms of the Settlement Agreement confidential. However, it was not satisfied that the respondents had discharged their burden of proving that any other matters relating to the settlement negotiations in Suit 315 were confidential. While the respondents

argued that the appellant could gain a tactical advantage by applying knowledge gleaned from the *settlement negotiations*, the Court of Appeal was not persuaded that this information was subject to an obligation of confidence. In the circumstances, the Court of Appeal allowed the appeal but ordered that the law firm refrain from disclosing the terms of the Settlement Agreement.

22.102 The Court of Appeal concluded with the suggestion that a counterparty to a settlement could obtain a contractual undertaking of confidentiality from the lawyer and/or law firm concerned to obviate potential difficulties such as those in the present case.

22.103 Some practical difficulties may arise from this decision:

(a) The effect of the Court of Appeal's decision is that the negotiations leading up to a settlement agreement may not be confidential. However, where the lawyer has been involved in those negotiations, information on the negotiations would have been acquired in the course of work for that client, and such information should therefore be confidential. The decision (that the respondents had not proven that the previous negotiations were confidential) does not seem to gel with the confidence that should automatically attach to such information.

(b) The Court of Appeal did not seem to address the issue of whether the law firm's knowledge of the *terms* of the Settlement Agreement could be misused. The Court of Appeal highlighted this issue, but then went on to address whether the law firm's knowledge of the *negotiations* could lead to a tactical advantage.[60] Given the Court of Appeal's express finding that the *terms* of the Settlement Agreement were confidential, some guidance would have been welcome on whether (i) the lawyers knew of the terms of the Settlement Agreement; and (ii) if so, whether such knowledge would justify the grant of an injunction.

(c) The decision was silent on whether the individual lawyer(s) acting in Suit 315 were the same as, or overlapped with, the individual lawyer(s) acting in Suit 806. If completely different lawyers (but within the same law firm) were involved, this might reconcile the difficulty: the lawyer acting for the previous client possesses confidential information, but the lawyer acting for the current client does not possess the same confidential information, and there is therefore no "real and sensible possibility" of confidential information being used to

60 *LVM Law Chambers LLC v Wan Hoe Keet* [2020] 1 SLR 1083 at [30].

the advantage of the current client. But if this was the situation, there would have been no need for the Court of Appeal to hold that the negotiations were *not* subject to confidence.

(d) Given the difficulties highlighted above, in a situation where (i) a lawyer is approached to act against a party that they had previously acted against; (ii) the circumstances are similar to the previous matter; and (iii) the lawyer had previously obtained confidential information in the course of negotiations or a settlement agreement being entered into, there may be value in having different lawyers take conduct of the matter. It remains to be seen whether there will be similar cases in the future which would provide more guidance.

X. Discharge, or vacation, on doorstep of trial

22.104 In *Omae Capital Management Pte Ltd v Tetsuya Motomura*,[61] the plaintiff was a company who sued the defendant, its former executive director and chief investment officer, for damages. The defendant counterclaimed. Each party sought to call one witness of fact and one expert witness. The plaintiff's expert's affidavit of evidence-in-chief ("AEIC") was filed late, less than three weeks before the commencement of trial. There were allegedly logistical difficulties getting her AEIC notarised as she was "way out in Suffolk".[62]

22.105 The plaintiff then missed the deadline for setting down. It informed the court that it was unable to reach its expert, and required additional time to do so or to find a replacement expert. At a pre-trial conference ("PTC") less than one week before trial, the plaintiff's counsel sought a vacation of the trial dates on the basis that he needed two to three weeks to ascertain what was going on. The defendant's counsel objected strongly. The plaintiff's counsel then added that he was not able to prepare for trial without the expert, and if it was not vacated he would be placed in a situation where he would have to discharge himself. If he were to discharge himself, the plaintiff would need to find another lawyer, as the plaintiff was a body corporate who could not act without a lawyer. The assistant registrar then fixed a PTC before the judge the next day ("the JPTC"), four days before the trial was scheduled to proceed, and also indicated to the plaintiff's counsel that if the plaintiff's intention was to vacate the trial, the standard practice was for a summons for vacation of trial dates to be filed.

61 [2020] SGHC 126.

62 *Omae Capital Management Pte Ltd v Tetsuya Motomura* [2020] SGHC 126 at [8].

22.106 At the JPTC, the plaintiff's counsel turned up instead with a summons for discharge of solicitor, together with an affidavit from the plaintiff's chief executive officer ("CEO") stating that the plaintiff had been unable to pay the plaintiff's counsel's fees and related charges, and had revoked the plaintiff's counsel's warrant to act. The plaintiff's counsel also argued, *inter alia*, that:

> (a) the plaintiff faced difficulties because of the plaintiff's expert's disappearance. However, the judge was prepared to hear factual witnesses first, and for expert witnesses to be heard in a further tranche;
>
> (b) there was a huge overlap between the plaintiff's factual witness and expert witness' evidence, and it would be highly prejudicial for the factual witness to take the stand in such circumstances. The judge could not understand this submission, as the factual witness could not change his evidence depending on the identity of the expert;
>
> (c) trial bundles had not been prepared. The judge pointed out that one bundle should be ready, and that he was prepared to go to trial using only electronic copies for another bundle; and
>
> (d) the plaintiff was impecunious and the court could not force the plaintiff's counsel to act for free. To safeguard the plaintiff's right to counsel, the court should grant the adjournment in order to give the plaintiff the opportunity to raise funds to re-engage the plaintiff's counsel to continue acting. The judge was not prepared to accede to this on the eve of trial, as concerns over funding should have been settled well in advance.

22.107 The judge dismissed the discharge application and ordered that unless the plaintiff set the action down for trial by the eve of trial, the plaintiff's claim would be struck out and judgment would be entered for the defendant's counterclaim. The plaintiff complied.

22.108 On the first day of trial, the plaintiff's CEO asked for the trial dates to be vacated on the basis that the plaintiff no longer had a lawyer and the plaintiff's witness had disappeared at the last minute. The judge stood the matter down for the plaintiff's CEO to consider the risk of the plaintiff being ordered to pay costs thrown away. The plaintiff's CEO then informed the court that he was not representing the plaintiff and that the court should "speak to the plaintiff directly" through "formal writing".[63] The plaintiff's CEO declined to make an application for the vacation of

63 *Omae Capital Management Pte Ltd v Tetsuya Motomura* [2020] SGHC 126 at [28].

trial dates and the judge ordered trial to proceed, as there was no formal application for a vacation of trial dates.

22.109 The plaintiff's CEO declined to take the stand and walked out of court. The judge proceeded to hear the defendant's evidence and eventually dismissed the plaintiff's claim pursuant to O 35 r 1(2) of the Rules of Court and gave judgment for part of the defendant's claim on the merits. Costs were awarded to the defendant for the action and counterclaim.

22.110 The judge also made, *inter alia*, the following observations:

(a) Had the plaintiff's counsel explained that he would be hampered in the cross-examination of the defendant without the plaintiff's expert sitting behind him in court to advise him, that would have sounded more reasonable. But this was not the submission made. In any event, even if that had been the submission, it would afford no answer to why the trial could not proceed, at the minimum, with the plaintiff's CEO's evidence first.

(b) There was no affidavit evidence to support the vacation of trial dates. When plaintiff's counsel turned up at the JPTC with a summons for discharge of solicitor instead, the opportunity to place evidence favouring vacation of the trial was foregone.

(c) In light of what the plaintiff's counsel told the assistant registrar at the PTC, the filing of the discharge application was seen as a cynical attempt to obtain, through the backdoor, what the plaintiff did not believe it could obtain by an application for vacation of trial dates – a manoeuvre which the court should not condone.

22.111 The author ventures some practical observations for practitioners who find themselves unable to proceed with trial when at its doorstep:

(a) The standard practice is for a summons for vacation of trial dates to be filed.

(b) In the supporting affidavit for the summons for vacation, counsel should include *all* evidence which may favour vacation of the trial. If some witnesses are missing in action, counsel should address why the trial cannot proceed with the other witnesses taking the stand first.

(c) Counsel should also alert the client to the likelihood of having to pay the other party costs thrown away if trial is vacated.

(d) Discharging oneself, especially when representing a company, may be construed as an attempt to force a vacation, which the court will frown upon.

(e) Even if the client has not paid its bills, counsel cannot take it for granted that the court will allow a discharge at the doorstep of trial. Until a discharge has been ordered, it would be prudent for counsel to continue preparing for the trial.

(f) Where a plaintiff fails to participate in the trial, the defendant who has a counterclaim may proceed to prove such counterclaim and obtain judgment on the merits. However, the court has the discretion to grant judgment in default of appearance at the trial if the evidence before it is incomplete.
