Case Note

SHOW CAUSE PROCEEDINGS BEFORE THE COURT OF THREE JUDGES: SOME PROCEDURAL QUESTIONS

The Law Society of Singapore v Bay Puay Joo Lilian
[2008] 2 SLR 316

This note examines two procedural questions flowing from the Court of Three Judges' recent decision in *The Law Society of Singapore v Bay Puay Joo Lilian* [2007] SGHC 209. While the decision will almost certainly be remembered for its guidance on the admissibility of evidence obtained by way of entrapment, two further issues arise for consideration: (a) the relationship between ss 94(3)(b) and 97(1)(b) of the Legal Profession Act (Cap 161, 2001 Rev Ed), and (b) the relationship between the expressions "cause of sufficient gravity" and "due cause" as found in s 83 of the same Act.

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I. Introduction

1 The Court of Three Judges recently delivered three decisions concerning three lawyers who were found guilty of touting for conveyancing work.[1] The novel point of law argued across all three cases was whether evidence obtained by way of entrapment could be admitted to prove the respective cases against the lawyers concerned. While the court gave its answer to this issue by providing detailed grounds for its decision (which form fertile ground for a discussion on another occasion), there were two novel *procedural* points which perhaps warranted closer elaboration in one of the cases, *viz*, *The Law Society of Singapore v Bay Puay Joo Lilian* ("*Lilian Bay*").[2]

1 The two decisions not forming the main focus of this comment are *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR 239 and *Law Society of Singapore v Liew Boon Kwee James* [2008] 2 SLR 336.

2 [2008] 2 SLR 316.

II. The facts in *Lilian Bay*

2 *Lilian Bay* was a show cause proceeding resulting from the application by the Law Society of Singapore ("the Law Society"), pursuant to s 94(1) read with s 98(1) of the Legal Profession Act ("LPA"),[3] for Ms Bay Puay Joo Lilian ("the respondent") *to show cause* why she should not be dealt with under s 83 of the LPA.

3 The facts in *Lilian Bay* were not complicated. Sometime in February 2004, Jenny Lee Pei Chuan ("Jenny") was engaged by a private investigation agency to investigate if certain law firms were touting for conveyancing work. Pursuant to her engagement, Jenny telephoned the respondent on 17 March 2004 claiming to be a real estate agent who needed to engage a lawyer. She followed up her telephone call with a face-to-face meeting with the respondent the next day at about 3.20pm at the premises of the respondent's firm ("the firm"). During the meeting, Jenny asked the respondent whether she would pay a referral fee for Jenny to refer a conveyancing case to the firm. The respondent wrote "10%" on a piece of paper, and later explained that "10%" referred to 10% of the professional fees that the firm would receive for the transaction. Subsequently, Jenny mentioned the possibility of referring HDB transactions to the respondent and asked the respondent what fee she would receive if she referred such a transaction. The respondent replied that she would pay a flat referral fee of $100 per case and wrote down "$100" on a piece of paper.

4 Before the disciplinary committee ("the DC") appointed by the Law Society, the respondent was charged with an amended charge of contravening s 83(2)(e) and/or s 83(2)(h) of the LPA. The DC found the respondent guilty as charged but concluded that the respondent's misconduct was not of sufficient gravity for disciplinary action under s 83 of the LPA, but was instead a matter for which a penalty should be imposed under s 93(b) and so imposed a penalty of $7,000. The Law Society disagreed with the DC's conclusion on the gravity of the respondent's misconduct and filed the application in the present proceedings for the respondent to show cause why she should not be dealt with under the LPA.

III. The procedure issues outlined

5 As mentioned above, *Lilian Bay* raises interesting procedural issues in relation to disciplinary proceedings pursuant to the LPA. The novel point in this case is that the DC, while finding the respondent *guilty* of a charge formulated under s 83(2)(e) and/or s 83(2)(h) of the

3 (Cap 161, 2001 Rev Ed).

LPA, *nonetheless* determined that there was *no cause of sufficient gravity* to refer the case to the Court of Three Judges. However, the Council of the Law Society ("the Council") disagreed with the DC's determination and, pursuant to s 94(3)(b) of the LPA, applied under s 98 for the show cause proceedings in which it is *the respondent* who is to show cause why she should not be dealt with under s 83, *even though* the DC below found that there was *no cause of sufficient gravity* in the first place.

6 At this stage, it suffices to note that there are two main procedural issues of interest. First, how justified is the Council in taking out an application under s 94(3)(b) of the LPA should it disagree with the determination of the DC? This issue arises because s 97(1)(b) of the LPA similarly gives the Council the power to apply to review the determination of the DC. The question must be whether s 94(3)(b) and s 97(1)(b) can be adequately reconciled given that each provision involves a different method of review of the DC's determination. Within this statutory reconciliation issue is the further question of the reversal of the burden of proof. If the DC, as in this case, had found that there was *no cause of sufficient gravity* for the respondent to appear before the Court of Three Judges, should the Council be allowed to make an application under s 94(3)(b) and s 98 of the LPA for the respondent to *show cause* why she should not be subject to disciplinary action?[4] Should there not be an interim step in the process whereby the Law Society still has to prove that there was cause of sufficient gravity (or "due cause", as it were) *before* the respondent is called upon to *show cause* why she should not be dealt with under s 83 of the LPA?

7 In a similar vein, the second procedural issue which this case brings up is the question of whether the DC, upon finding that a charge formulated under s 83(2) of the LPA is made out, can nonetheless determine that there was "no cause of sufficient gravity" to refer the case to the Court of Three Judges. This involves a consideration of the relationship between two undefined and rather troublesome expressions in the LPA, *viz*, "due cause" (under s 83) and "no cause of sufficient gravity" (under s 97). This issue is not merely academic for its resolution determines the stage at which mitigating factors can be considered by the tribunal in passing the appropriate sanction, *ie*, the Court of Three Judges or the DC.[5]

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4 The terms of s 98(1) of the LPA clearly provide that the order applied under the section is one "calling upon the solicitor *to show cause*" (emphasis added). Further, typical orders made pursuant to the Council's application under s 94(3)(b) read with s 98 usually state that it is *for the respondent* to "show cause why she should not be dealt with under the [relevant provisions of the LPA]".

5 If, upon a proper construction, the DC *must* determine there is "cause of sufficient gravity" in such cases, it would then be for the Court of Three Judges to consider the effect of the mitigating factors. In other words, the DC cannot usurp the powers of the Court of Three Judges and take into account the mitigating factors

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IV. The first procedural question: The Law Society's power to review the DC's determination

A. Circumstances in which this particular procedural question arises

8 As already pointed out above, the show cause proceedings in *Lilian Bay* were a result of the application by the Council for a show cause order pursuant to s 94(3)(b) of the LPA. The relevant procedural question is thus whether this was the correct section under which the Council should have proceeded. The basis of this question is that there is a substantial overlap between ss 94(3)(b) and 97(1)(b) of the LPA. To facilitate the discussion, the relevant sections, as they are presently enacted, will first be set out:

> Society to apply to court if cause of sufficient gravity exists
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> 94(3).–If the determination of the Disciplinary Committee under section 93 is that, while no cause of sufficient gravity for disciplinary action exists under section 83, the advocate and solicitor should be reprimanded or ordered to pay a penalty, *the Council* shall –
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> …
>
> (*b*) if it disagrees with the determination, *without further direction or directions proceed to make an application in accordance with section 98*.
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> Procedure for complainant dissatisfied with the Disciplinary Committee's decision
>
> 97. –(1) Where a Disciplinary Committee has determined –
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> …
>
> (*b*) that while no cause of sufficient gravity for disciplinary action exists under [s 83] the advocate and solicitor should be reprimanded or ordered to pay a penalty,
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> and the person who made the complaint, the advocate and solicitor *or the Council* is dissatisfied with the determination, that person, advocate and solicitor *or the Council* may, within 14 days of being notified of the Disciplinary Committee's decision, *apply to a Judge under this section*.
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> [emphasis added]

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pleaded *and then* determine that there was no cause of sufficient gravity. On the other hand, if it is within the power of the DC to determine that there was *no* cause of sufficient gravity despite finding the solicitor *guilty* of a charge containing the ingredients of a "due cause" under s 83(2), then it would be well within its province to consider mitigating factors in deciding whether or not to refer the case to the Court of Three Judges.

9 As will be observed, both ss 94(3)(b) and 97(1)(b) of the LPA allow the Council, should it be dissatisfied with the DC's determination that "while no cause of sufficient gravity for disciplinary action exists under section 83, the advocate and solicitor should be reprimanded or ordered to pay a penalty", to commence proceedings to review the DC's determination. However, while s 94(3)(b) allows the DC, *without further direction or directions*, to apply under s 98 for an order to show cause, s 97(1)(b) directs that a Judge is to hear the Council's application under the section, *after which* the Judge can, pursuant to s 97(3), either (a) confirm the DC's report; (b) *direct the Council to make an application under s 98*; or (c) direct the advocate and solicitor concerned to show cause under s 98(1).

10 Accordingly, the brief citation of ss 94(3)(b) and 97(1)(b) of the LPA above provides a glimpse of the problem: s 97(1)(b) appears to envisage an *additional layer of review* by a Judge *before*, amongst other things, an application for a show cause order can be made. However, s 94(3)(b) bypasses this layer of review by allowing the Council to make an application for a show cause order *without further directions*. On this note, it is acknowledged that s 97(3)(c) allows the Judge to order the advocate and solicitor to show cause, hence replicating the function under s 94(3)(b) read with s 98. However, this remains *one of three* options open to the Judge under s 97, whereas s 94(3)(*b*) allows the Council to bypass a possible additional layer of review under s 97(1)(b) read with s 97(3)(b). The question must be whether Parliament intended to vest in the Council the discretion to dispense with an additional layer of review of the DC's determination. It is submitted that a consideration of this procedural question may clarify some perceived uncertainty in this area of the law, especially since the relationship between ss 94(3)(b) and 97(1)(b) of the LPA has never been addressed by the Court of Three Judges, save for one instance in which a *very brief obiter* comment was made that the two sections "overlapped in substantial terms".[6] Even in that case, the Court of Three Judges applied s 97(1)(b) of the LPA on the basis that s 94(3)(b) was not yet in force at the material time and hence inapplicable. In other words, the Court of Three Judges then *did not* have to consider the relationship between ss 94(3)(b) and 97(1)(b) of the LPA in the event that they were *both* applicable, as is the case in *Lilian Bay*.

B. The relationship between ss 94(3)(b) and 97(1)(b) of the LPA

11 In order to determine the relationship between ss 94(3)(b) and 97(1)(b) of the LPA, it would be helpful to first consider the distinctions

6 *The Law Society of Singapore v Khushvinder Singh Chopra* ("*Khushvinder Singh*") [1999] 4 SLR 775 at [61].

between the sections and then the legislative intent behind their enactment.

(1) Distinction between ss 94(3)(b) and 97(1)(b)

12 The first point really is that the distinction between the two sections is by no means academic: s 97(1)(b) of the LPA places a Judge between the DC's determination and the application for a show cause order under s 98. Put another way, an application under s 94(3)(b) enables the Council to bypass the review of the Judge and proceed directly to the application for a show cause order under s 98.[7] This distinction is given another level by the fact that the Judge under s 97 apparently performs a more detailed review of the DC's determination than under s 98 (pursuant to s 94(3)(b)). For instance, in *The Law Society of Singapore v Disciplinary Committee*,[8] Lim Teong Qwee JC reviewed the merits of the case extensively before dismissing the Council's application under s 97(1)(b).

13 As such, the question must be whether Parliament intended for the Council to decide, *on its own initiative*, the tribunal or tribunals to review the DC's determination, given that the level of scrutiny under each section is different. The answer to this question must be sought from legislative intent and case law interpreting the two sections.

(2) The legislative intent in amending ss 97(1)(b) and 94(3)(b) of the LPA

14 It is clear that Parliament intended for the LPA to provide the Council with the power to seek a review of the DC's determination that there is no cause of sufficient gravity for a formal investigation if it is dissatisfied with the said determination. However, it is unclear whether Parliament had considered the relationship between ss 94(3)(b) and 97(1)(b). In this respect, the original governing provision was s 97(1)(b) of the LPA,[9] prior to the Legal Profession (Amendment) Act 1986.[10] This section, insofar as material to this discussion, provided as follows:

> 97.–(1) Where a Disciplinary Committee has determined –
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> …

7 That the procedures under ss 94(3)(b) and 97(1)(b) are different is further supported by the direction given in s 97(3) that the Judge hearing the Council's application under s 97(1)(*b*) can, *inter alia*, direct the Council to make an *application* under s 98. Section 94(3)(b) bypasses this step and enables the Council to make an application under s 98 *directly*.

8 [2000] 4 SLR 413.

9 (Cap 214, 1970 Rev Ed).

10 (No 30 of 1986).

> (*b*) that while no cause of sufficient gravity for disciplinary action exists under [s 84] the advocate and solicitor should be reprimanded,
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> *and the person who made the written application or complaint* is dissatisfied with the determination he may within 14 days of being notified of the Disciplinary Committee's decision apply to a judge under this section.
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> …
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> (3) Upon the hearing of the application the judge, after hearing the applicant and the Disciplinary Committee and, if it desires to be heard, the Society, may make an order –
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> …
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> (*b*) directing the applicant to make an application under s 98 of this Act; or
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> (*c*) directing the advocate and solicitor concerned under s 98(1) of this Act to show cause …
>
> [emphasis added]

15 As can be seen, the then s 97(1)(b) did not contain the words "or the Council" when it provided for the list of entities who can apply for a review of the DC's determination. This section was amended by the Legal Profession (Amendment) Act 1986 to include the words "or the Council" in the relevant places. As Professor Jeffrey Pinsler SC has noted,[11] s 97 was amended so as to allow the Council to make an application to review the DC's determination. This amendment was prompted by the case of *James Chia Shih Ching v Law Society of Singapore* ("*James Chia*"),[12] in which the Privy Council held that the words "the person who made the written application or complaint" in s 97 could only encompass an application or complaint made by a person under s 86(1) and *not the Council*. As Professor S Jayakumar, then the Second Minister for Law, explained at the Second Reading of the Legal Amendment Bill:[13]

> Finally, Sir, the Government has also taken this opportunity to introduce amendments to the Act to put right certain provisions of the Act which have been subjected to an overly restrictive interpretation by the Privy Council in the case of *James Chia v The Law Society of Singapore*. If I may explain, Sir. That decision now prevents the Attorney-General *as well as the Law Society* from taking steps to have a finding of a Disciplinary Committee reviewed, although the person

11 Jeffrey Pinsler, "Legislative Comments: Legal Profession (Amendment) Act 1986" 29 Mal LR 81 at 87.

12 [1985] 2 MLJ 169.

13 *Singapore Parliamentary Debates*, *Official Report* (22 September 1986) vol 48 at col 675.

> who made the complaint may bring about such a review. It is considered that, for the future, *it should be open also for either the Law Society* or the Attorney-General, to apply for a review of the finding. [emphasis added]

16 Indeed, the Explanatory Statement in the Bill provides at cl (g) that one of the purposes of the Bill is to "enable The Council of the Law Society to apply for review of a decision of a Disciplinary Committee in the light of the decision of the Privy Council in *James Chia Shih Ching v Law Society of Singapore*".[14] In addition, the then Attorney-General, Mr Tan Boon Teik, also testified that:[15]

> Under the present Legal Profession Act, a person who made a written application of complaint can apply to the High Court for a review of a decision of the Inquiry Committee or Disciplinary Committee dismissing his complaint. … *Council will also, under this amendment, be given a similar right*. In *James Chia's* case, the Privy Council had held that even the Council of the Law Society had no such power to apply for a review. This will all be set right now. Clause 10 of the Bill is the Bill that would amend the law, setting right this decision. [emphasis added]

17 Section 97 was further amended twice in 1993 and 2001 but these were only to take into account the DC's new power to order the advocate and solicitor concerned to pay a penalty.

18 The power of the Council to review the DC's determination was further enlarged by the enactment of s 94(3) in 1993. Prior to this amendment, there was no s 94(3) in the LPA.[16] As already noted above, s 94(3) now provides as follows:

> 94(3) –If the determination of the Disciplinary Committee under section 93 is that, while no cause of sufficient gravity for disciplinary action exists under section 83, the advocate and solicitor should be reprimanded or ordered to pay a penalty, the Council shall –
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> …
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> > (*b*) if it disagrees with the determination, without further direction or directions proceed to make an application in accordance with section 98.

14 Report of the Select Committee on the Legal Profession (Amendment) Bill (Bill No 20/86) at A32, available at: <http://www.parliament.gov.sg/reports/private/bills/19861016/19861016_BIL_FULL.pdf (accessed on 21 March 2007).

15 Report of the Select Committee on the Legal Profession (Amendment) Bill (Bill No 20/86) at A32, available at: <http://www.parliament.gov.sg/reports/private/bills/19861016/19861016_BIL_FULL.pdf (accessed on 21 March 2007).

16 (Cap 161, 1990 Rev Ed).

19 The legislative intent behind this particular enactment is not immediately clear from a perusal of the parliamentary debates. The only possible explanation is provided by Professor S Jayakumar at the Second Reading of the Legal Profession (Amendment) Bill 1993:[17]

> The remaining clauses also relate to the function of the Law Society and the Council in relation to appointing of Disciplinary Committee to hear complaints against practising lawyers. For example, if the Disciplinary Committee (DC) recommends against a formal investigation and only recommends a reprimand, *the Council, if it disagrees, can apply to the High Court in a show cause action*. [emphasis added]

20 Accordingly, there was no express explanation by Parliament as to the relationship between ss 94(3)(b) and 97(1)(b) of the LPA. Section 94(3)(b) appears to have been added with no consideration of the effect it has on s 97(1)(b), although it must be said that Parliament did consider that s 94(3)(b) would allow the Council the power to apply for a show cause order (under s 98) should it be dissatisfied with the DC's determination.

(3) Relevant case law

21 The question of the relationship between ss 94(3)(b) and 97(1)(b) is made all the more difficult by the dearth of case law addressing the issue. Indeed, so far as s 97(1)(b) is concerned, *The Straits Times* has reported that there have ever been only two such applications before.[18] A search of *Lawnet* has confirmed this report. One of these cases was apparently the subject of the article, which was heard and dismissed in chambers on 21 March 2007.[19] The other case is apparently *The Law Society of Singapore v Disciplinary Committee*.[20] In this latter case, Lim JC dismissed the Council's application under s 97(1)(b) for an order to show cause under s 98(1) or alternatively directing the Council to make an application under s 98.

22 As for s 94(3)(b), *Lilian Bay* appears to be the first case in which the Council has proceeded under this section to apply for a show cause order under s 98 of the LPA. There was one other attempt in *Khushvinder Singh*, but that was unsuccessful since the Court of Three Judges ruled that s 94(3) was not yet in force at the material time.

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17 *Singapore Parliamentary Debates, Official Report* (12 November 1993) vol 48 at col 1165.

18 K C Vijayan, "Law Society fights decision to clear lawyer" The Straits Times (20 March 2007).

19 K C Vijayan "Law Society fails in bid to penalise lawyer" The Straits Times (23 March 2007).

20 [2000] 4 SLR 413.

C. Did Parliament intend for the Law Society to decide whether to use s 94(3)(b) or s 97(1)(b)?

23 From this brief consideration of the legislative history of ss 94(3)(b) and 97(1)(b) of the LPA, and the relevant case law, it is apparent that the Council has, on the express wording of the statutory provisions, a discretion to decide which section to proceed under should it be dissatisfied with the determination of the DC. The issue which remains to be considered is whether this discretion as embodied in the express wording of the LPA was actually intended by Parliament.

(1) Statutory interpretation

24 Because the legislative intent is unclear from the parliamentary debates, the next solution is to refer to established principles of statutory interpretation in order to give effect to the purpose of the statute. There are two conflicting principles present here, *viz*, the need to maintain internal consistency within the same statute and the principle against doubtful penalisation.

(a) Internal consistency

25 In this respect, it has been noted by Francis Bennion in *Statutory Interpretation*[21] that where two enactments within an Act or other instrument appear to conflict, it may be necessary to treat one as modifying the other. Such adjustment of the words must be effected as will make them maintainable by one and the same proponent in one and the same discourse. Lord Herschell LC in *Institute of Patent Agents v Lockwood*[22] said that where there is a conflict between two sections in the same Act:

> You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other.

26 If, however, no other method of reconciliation seems possible, then as noted in *Maxwell on the Interpretation of Statutes*,[23] the known rule is that the last must prevail.[24] However, Nicholls LJ in *Re Marr (bankrupts)*[25] said that this rule from *Wood v Riley* may be obsolete since it is "out of step with the modern, purposive, approach to the

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21 Francis Bennion, *Statutory Interpretation* (Butterworths LexisNexis, 4th Ed, 2002) at p 997.

22 [1894] AC 347 at 360.

23 *Maxwell on the Interpretation of Statutes* (N M Tripathi Pte Ltd, 12th Ed, 1969) at p 187.

24 Referring in turn to *Wood v Riley* (1867) LR 3 CP 26 at 27 *per* Keating J.

25 [1990] 2 All ER 880 at 886.

interpretation of statutes and documents". As the learned author of *Statutory Interpretation* notes,[26] this view may have overlooked the possibility that there may be in rare cases no means of deciding between conflicting provisions. The correct principle, as noted in *Maxwell on the Interpretation of Statutes*,[27] is that the court will endeavour to construe the language of the legislature in such a way as to avoid having to apply the rule in *Wood v Riley* on the general principle that an author must be supposed not to have intended to contradict himself.

27 With these principles in mind, one must now consider ss 94(3)(b) and 97(1)(b) of the LPA. The main problem is that s 94(3)(b) expressly provides that the Council, if it disagrees with the DC's determination, *shall*, *without further direction or directions*, proceed to make an application for a show cause order under s 98 of the LPA. The use of the mandatory word "shall" *and* the expression "without further direction or directions" appears to imply that the Council, if it is dissatisfied with the determination of the DC, *must* henceforth apply *via* the procedure set out in s 94(3)(b) of the LPA.

28 This is directly in conflict with s 97(1)(b), which provides that the Council *may* (as opposed to *shall*) within 14 days of being notified of the DC's decision, apply to a Judge under this section should it be dissatisfied with the DC's determination. Under the principles of statutory construction considered above, it is submitted that s 94(3)(b) must take precedence over s 97(1)(b), the former having been enacted later in time.

(b) Principle against doubtful penalisation

29 As against the presumption of internal consistency, there is the principle against doubtful penalisation. As stated in *Statutory Interpretation*,[28] one aspect of the principle against doubtful penalisation is that by the exercise of state power the rights of a person in relation to law and legal proceedings should not be removed or impaired, *except under clear authority of law*. In this case, as alluded to earlier, the effect of s 97(1)(b) is to provide an additional layer of review by a Judge between the DC's determination and the eventual show cause proceeding before the Court of Three Judges. As the cases have somewhat demonstrated, the Judge acting under s 97(1)(b) performs a

26 Francis Bennion, *Statutory Interpretation* (Butterworths LexisNexis, 4th Ed, 2002) at p 998.

27 *Maxwell on the Interpretation of Statutes* (N M Tripathi Pte Ltd, 12th Ed, 1969) at p 187.

28 Francis Bennion, *Statutory Interpretation* (Butterworths LexisNexis, 4th Ed, 2002) at p 729.

greater review of the case in an *appellate capacity*,[29] as opposed to a Judge acting under s 94(3)(*b*) read with s 98, who apparently only performs a rudimentary inspection of whether a *prima facie* case exists for show cause proceedings. An application under s 94(3)(b) thus deprives the solicitor concerned an addition layer of review by a Judge before show cause proceedings are commenced against him.

30 Apart from this, an application under s 94(3)(b) also has the effect of reversing the burden of proof. This is most aptly demonstrated by the proceedings in *Lilian Bay*. In *Lilian Bay*, despite the DC finding below that there was "no cause of sufficient gravity", the Council could simply negate this determination by taking an application under s 94(3)(b) to avoid the additional layer of review by a Judge under s 97(1)(b), with the effect that it is now *the respondent* who has to show cause why she should not be dealt with under s 98, notwithstanding what the DC below had found. This is because s 98, which s 94(3)(b) enjoins the Council to proceed under, provides that it is for the solicitor "to show cause" once the show cause order is granted.[30] In fact, in *The Law Society of Singapore v Edmund Nathan*,[31] the Court of Three Judges explained that it would be for the solicitor to show, on the basis of the findings of fact by the DC, grounds why *he should not be dealt with under s 83 of the LPA*. Specifically, the Court of Three Judges held:[32]

> *The burden is on the advocate and solicitor*, the respondent, to show cause why he should not be struck off the roll, suspended or censured. This he must do on the basis of the findings of fact made by the disciplinary committee except when the show cause proceedings have been initiated under s 94A of the Act. [emphasis added]

31 On the other hand, under s 97(1)(b), the burden would not be on the respondent. This is because the application under this particular section is *by the Council being the applicant*. That being so, the burden is squarely on the Council to *convince* the Judge hearing the application why the matter should be referred to the Court of Three Judges *notwithstanding* the DC's finding to the contrary. While the same could conceivably be said about s 94(3)(b) read with s 98 in so far as that is also an *application*, one important distinction remains: the application under s 94(3)(b) read with s 98 is an *ex parte* application, whereas s 97(3) enjoins the Judge hearing the application to hear *the DC* (*ie*, it is *inter partes*), presumably so that the substantive merits of the case can

29 See also, *Wee Soon Kim Anthony v The Law Society of Singapore* [1988] SLR 510 at [16], where the same was said in respect of a similar provision.

30 This reference to "show cause" presumably means that it is for the solicitor to show cause *why* he should not be dealt with under s 83(1) of the LPA.

31 [1998] 3 SLR 414.

32 [1998] 3 SLR 414 at [19].

be considered. The function (and hence burden) of provisions are clearly different.

32 The Judge granting the show cause order under s 94(3)(b) read with s 98 does not act in an appellate function and does not decide that the DC's determination was *wrong*. This means that at the show cause proceedings before the Court of Three Judges, the Law Society still *has not* shown that there was "due cause" (or "cause of sufficient gravity", in the light of the DC's determination), and yet the burden is on the *respondent* to show cause why she should not be disciplined. It is suggested that this state of affairs is entirely unsatisfactory, especially in the context of *Lilian Bay*, when the DC had found that there was *no* cause of sufficient gravity.

33 If these problems correctly exist, the question must be asked whether Parliament intended for (a) the additional layer of review by a Judge to be taken away; and (b) effectively the reversal of burden of proof on the solicitor. It is submitted that the use of the mandatory word "*shall*" and the expression "*without further direction or directions*" in s 94(3)(b) imply that Parliament did intend for these consequences. Put another way, Parliament, through unequivocal statutory language, envisaged a situation wherein the Council can bypass the additional review under s 97(1)(b) by applying directly under s 94(3)(b).

(c) Summary of conclusion

34 In the event, it seems that the proper course of action the Council should take when challenging the DC's determination is by s 94(3)(b), *not* s 97(1)(b), *notwithstanding* its effect of depriving the solicitor an additional layer of review by a Judge *and* the reversal of the burden of proof. It is clear that the principles of statutory interpretation provide for such a conclusion. First, the need to maintain internal consistency demands that the later enactment, *ie*, s 94(3)(b), take precedence over the earlier enactment, *ie*, s 97(1)(b). Secondly, although s 97(1)(b) envisages an additional layer of review and the reversal of burden of proof, Parliament has through clear statutory language in s 94(3)(b) taken these away.

35 This conclusion is further supported by the headings to ss 94(3)(b) and 97(1)(b), which respectively read "*Society* to apply to court if cause of sufficient gravity exists" and "Procedure for *complainant* dissatisfied with Disciplinary Committee's decision" (emphasis added). It is clear from the headings that s 97(1)(b) was always intended to provide the procedure for individual *complainants* to seek a review of the DC's determination. The words "or the Council" were added to s 97(1)(b) in 1986 only because of the Privy Council's decision in *James Chia*. On the other hand, the heading to s 94(3)(b)

shows that the legislative intent behind that section was to provide the procedure for the *Law Society* (through its Council) to seek a review of the DC's determination. The enactment of s 94(3)(b) in 1993 under this heading implies that Parliament intended for that to be the procedure which the Council should use in seeking a review of the DC's determination.

36 Accordingly, it is submitted that, given the next opportunity (since this chance was bypassed in *Lilian Bay*, although, it must be said, for good reason given the focus on the issue of entrapment), the Court of Three Judges could interpret ss 94(3)(b) and 97(1)(b) in such a manner so as to make s 94(3)(b) the *only* way in which the Council can seek a review of the DC's determination. It would be wholly arbitrary to allow the Council free reign in determining whether to deprive the advocate and solicitor the benefit of an additional layer of review by a Judge, or indeed to reverse the burden of proof on the solicitor. This would also bring some conceptual consistency to the statutory provisions in this regard which, it has to be said, do not stand for a picture of clarity.

V. Whether the DC can determine that there is "no cause of sufficient gravity" despite finding the respondent guilty of all the ingredients of a "due cause" under s 83(2) of the LPA

37 The second procedural question is the correctness of the DC's approach in *Lilian Bay* to find that there was "no cause of sufficient gravity" despite being convinced that the respondent was guilty of a "due cause" under s 83(2) of the LPA. As for the first procedural question, the first step in the discussion must be to the relationship between the key phrases in this issue.

A. The relationship between "cause of sufficient gravity" and "due cause"

38 First, s 83(1) of the LPA provides, "all advocates and solicitors… *shall* be liable on due cause shown to be struck off the roll or suspended from practice for any period not exceeding 5 years or censured" (emphasis added). In turn, s 83(2) then goes on to list when such "due cause" can be shown. Specifically, in the context of *Lilian Bay*, s 83(2)(e) provides that "[s]uch due cause may be shown by proof that an advocate and solicitor … has, directly or indirectly, procured or attempted to procure the employment of himself or any advocate and solicitor through or by the instruction of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given". In this connection, it will be observed that the charge against the respondent was formulated to contain *all the*

ingredients of a "due cause" under s 83(2)(e), *viz*, (a) attempt to procure employment of herself; (b) through Jenny Lee, to whom the respondent offered to pay remuneration for obtaining such employment.

39 As will be recalled, the DC in *Lilian Bay*, *while finding the respondent guilty of the charge preferred against her*, nonetheless found that there was no cause of sufficient gravity for disciplinary action under s 83. At first glance, this is an anomalous result. How can it be that the DC, upon finding that *all the ingredients of s 83(2)(*e*)* are made out, go on to find that there was "no cause of sufficient gravity" for disciplinary action *under s 83* when "due cause" is exhaustively defined under s 83 to include s 83(2)(e)?

(1) The statutory framework of the LPA

40 The issue here is whether there is a difference between the expressions "no cause of sufficient gravity" and "due cause", such that while the solicitor concerned is found to be guilty of all the ingredients of a "due cause" under s 83, he nonetheless can escape the disciplinary powers of the Court of Three Judges should the DC decide that there was "no cause of sufficient gravity". The distinction is further borne out by provisions such as ss 93(1)(b) and 94(3), which appear to distinguish the meanings between "due cause" and "no cause of sufficient gravity". Put another way, these sections seem to suggest that while there may well be a "cause", this can either be "not of sufficient gravity" or "of sufficient gravity", in which case it is a "due cause". The question must then be asked: Is this a conceptually sustainable distinction bearing in mind the framework (quite apart from the *literal* sense) of the statute?

41 *Prima facie*, it is submitted that this interpretation (*ie*, the distinction outlined) *cannot* be conceptually supported. In the first place, s 83(1) of the LPA states expressly that all advocates and solicitors "*shall be subject to the control of the Supreme Court*". It does not say that all advocates and solicitors are subject to the self-regulatory disciplinary framework of their peers, *ie*, the DC. By not referring an advocate and solicitor who has been found guilty of a charge formulated pursuant to s 83(2) of the LPA, the DC is in effect *usurping* the disciplinary powers of the Court of Three Judges. Taken to its logical conclusion, a solicitor guilty of a grievous "due cause" (for which the Court of Three Judges will surely impose a heavy sentence) can escape the consequences of his actions if the DC nonetheless decides that "no cause of sufficient gravity" exists. This cannot be the case since the purpose of the Court of Three Judges is to "vest ultimate control of the discipline of advocates

and solicitors in the court in order to provide a measure of independence and impartiality".[33]

(2) Case law

42 Case law has also interpreted the expression "no cause of sufficient gravity" in s 93 to be linked and limited by s 83. In *Hilborne v Law Society of Singapore*,[34] the Privy Council held that there is an "express link and limitation to the content of s 84 (now s 83) in cases of formal investigation by a Disciplinary Committee".[35] However, it must be said that this was strictly *obiter* since the proper issue before the Privy Council was whether a matter outside of s 84 (now s 83) could indeed attract the imposition of a fee under s 85 (now s 88).

43 The case of *Re Tang King Kai*[36] is more direct authority for the proposition that a finding of guilt on a charge formulated pursuant to s 83 by the DC must necessarily mean that there was cause of sufficient gravity. In this case, in response to a charge of improper conduct under s 80(2)(b) of the LPA (now s 83(2)(b)), the DC found that the solicitor's negligence amounted to "*grossly improper conduct* in the discharge of his profession and duty within the meaning of s 80(2)(b)" (emphasis added). With respect to another charge of improper conduct, the DC similarly found that the solicitor's "conduct came within s 80(2)(b) of the LPA [now s 83(2)(b)] and he should be dealt with accordingly". As will be appreciated, the DC in that case found the solicitor *guilty* of the two charges of improper conduct under s 80(2)(b) (now s 83(2)(b)) brought against him by the Law Society. However, as the DC had not recorded that there was "cause of sufficient gravity" for disciplinary action under s 80 (now s 83) of the LPA, the solicitor argued that it was necessary for there to be an express reference in the report in terms of the wording in s 90(1)(c) (now s 93(1)(c)) before a matter could be proceeded further under s 80 (now s 83) of the LPA.

44 Chao Hick Tin J held that the DC could make a determination under s 90(1) (now s 93(1)) of the LPA even if the specific words spelt out in s 90(1) (now s 93(1)) were not used, so long as the meaning of the DC's determination was clear. In relation to the second charge, Chao J held that the fact that the DC found the solicitor *guilty of improper conduct within the meaning of s 80(2)(c) (now s 83(2)(c))* necessarily meant that the matter was grave enough to warrant being struck off the roll or suspension from practice or censure under s 80(1)

33 See, Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths, 2nd Ed, 1998) at p 898.
34 [1978] 1 MLJ 229.
35 [1978] 1 MLJ 229 at [25].
36 [1991] SLR 527.

(now s 83(1)). Chao J held that it was clear that the DC intended that the complaint be of sufficient gravity to proceed under s 80 (now s 83) and that a reprimand would not do. Chao J also noted that it would defy "logic and good sense" to say otherwise.[37] More importantly, Chao J placed much emphasis on the fact that the DC had found the solicitor guilty of *grossly* improper conduct, thus mirroring the exact phrasing used in s 80(2)(b) (now s 83(2)(b)). His Honour said:[38]

> With respect, I think it defies logic and good sense to say that notwithstanding what it has held, the Committee could have intended that the complaint is not of sufficient gravity to proceed under s 80 and that a reprimand would do. It would have been different if the Committee had merely held that TKK was guilty of improper conduct and said nothing more. *It seems to me clear that proof of each of the act or misconduct set out in s 80(2)(a)(i) and (k) is ipso facto cause of sufficient gravity for disciplinary action to be taken under the same section.* Secondly, if the Committee had intended (*notwithstanding the illogicality pointed out above*) to hold that the grossly improper conduct was not of sufficient gravity to proceed under s 80 and that the solicitor should only be reprimanded, it would have so pronounced, as it did in relation to the first and the fourth charges. [emphasis added]

45 In view of the above, it is submitted that the DC, upon finding that the respondent is guilty of the charge against her, which encompasses *all the ingredients* of a "due cause" under s 83(2)(e), should have proceeded to refer the case to the Court of Three Judges, without more. In other words, the words "no cause of sufficient gravity" only apply to cases where there is no "due cause", and this when the objective ingredients of the specified due causes under s 83(2) are not made out. There is no middle ground wherein the DC can find that there is a "due cause" (or rather, that the ingredients of a "due cause" are made out) but yet, in its *subjective* determination, decide that this is "not of sufficient gravity". It is further submitted that the DC should not determine that there was "no cause of sufficient gravity" when "due cause" was clearly shown to exist under s 83(2)(e), bearing in mind that it is the Court of Three Judges in which ultimate disciplinary powers are emplaced. If anything, it is for the Court of Three Judges to decide whether the respondent's conduct, *while falling within one of the "due causes"*, merits lesser punishment. The residual powers for the DC to award lesser punishment under provisions such as ss 93(1)(b) and 94(3), it is submitted, apply only when there is no "due cause" and yet the DC is of the opinion that the respondent's conduct is nonetheless reprehensible and is deserving of some sanction.

37 [1991] SLR 527 at [16].
38 [1991] SLR 527 at [16].

B. Practice of the DC

46 Having said this, a search of the DC reports on *Lawnet* reveals that there is a prevalent practice by the DC of determining that there is no cause of sufficient gravity for show cause proceedings before the Court of Three Judges *even though* it has found the solicitor concerned *guilty* of a charge which bears the exact ingredients of "due cause" specified in s 83(2) of the LPA.[39] This is made all the more difficult because the DC has in cases where the charge against the solicitor was not made out determined that there was "no cause of sufficient gravity" for disciplinary proceedings before the Court of Three Judges: see, for example, *The Law Society of Singapore v Low Yong Sen Vincent*[40] where the DC concluded that the charge of gross misconduct was not made out and there was hence no sufficient cause. However, the corollary of this is apparently not true, in that if the charge is made out, the DC apparently still retains the discretion to determine that there was "no cause of sufficient gravity".

47 The problem, it seems, is that certain DCs have taken the view that although the elements of a charge formulated under instances of "due cause" in s 83(2) are fulfilled, they nonetheless have the power to take into account mitigating factors so as to find that "no cause of sufficient gravity" existed. With respect, this may not be correct. Surely it is the Court of Three Judges which determines how those mitigating factors come into play? The task of the DC, when it has found that a charge under s 83(2) is made out, and hence "due cause" shown, must surely be to defer to the Court of Three Judges to decide on the proper sanction to be meted out on the errant solicitor. It should not take it upon its own hands and take the matter out of the hands of the Court of Three Judges. It is therefore submitted that the Court of Three Judges should clarify the position in this regard in due time.

VI. Conclusion

48 Thus, while *Lilian Bay* contains valuable guidance on the admissibility of evidence obtained by way of entrapment, perhaps

39 See, for example, *The Law Society of Singapore v S Kunalen D Samuel* [1988] SGDSC 3, *The Law Society of Singapore v Gurdaib Singh* [1988] SGDSC 5, *The Law Society of Singapore v Ng Ho Teow Tony* [1991] SGDSC 8, *The Law Society of Singapore v Nadarajan Theresa* [1994] SGDSC 9, *The Law Society of Singapore v Quek Kai Kok* [1994] SGDSC 12, *The Law Society of Singapore v Lim Kiap Khee* [1996] SGDSC 11, *The Law Society of Singapore v Tey Way Yeow Nicholas* [1999] SGDSC 7, *The Law Society of Singapore v Chung Kok Soon* [2005] SGDSC 10, *The Law Society of Singapore v Tan Chun Chuen Malcolm* [2006] SGDSC 11, *The Law Society of Singapore v Yap Kok Kiong* [2006] SGDSC 14, and *The Law Society of Singapore v Peter Pang Xiang Zhong* [2006] SGDSC 21.

40 [2006] SGDSC 3.

another important facet of the case is the highlighting of the two procedural issues discussed in this case comment. These two procedural questions, it is submitted, deserve some clarification from either the Court of Three Judges or a legislative amendment. This is especially with regards to the proper course which the Council should take in challenging the DC's determination which is s 94(3)(b) and not s 97(1)(b). The discrepancy therein is arbitrary and cannot be explained with reference to the legislative intent and ought to, it is submitted, be clarified.