

THE COURT'S SUPERVISORY POWER TO RESTRAIN LAWYERS FROM CONDUCTING PROCEEDINGS IN THE INTERESTS OF THE ADMINISTRATION OF JUSTICE

[2019] SAL Prac 17

Until recently, the supervisory role of the court over lawyers engaged in litigation before it has not fomented vibrant jurisprudence. Two cases of the Singapore High Court decided in 2012 and 2018 have changed this position. Apart from these developments, the author will consider the distinction between the court's supervisory power and its substantive power to grant an injunction as well as the responsibility of a lawyer (as an officer of the court) to notify the court of any circumstances that could potentially jeopardise the interests of the administration of justice.

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I Introduction

1 The court has supervisory power (which emanates from its inherent powers)¹ to regulate the conduct of lawyers who, being officers of the court,² are subject to the court's authority. To put this supervisory power in its proper context, a distinction must be made between (a) that power, (b) the court's substantive power to make a coercive order pursuant to a cause of action (such as an injunction restraining the lawyer from

1 See paras 3–5 below.

2 Section 82(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) states: "Any person duly admitted as an advocate and solicitor and any Legal Service Officer shall be an officer of the Supreme Court."

acting in breach of confidence), (c) the court's procedural power to make orders to ensure proper conduct of proceedings and to sanction lawyers including the power to order the lawyer to personally bear costs,³ and (d) the Law Society's autonomous power to initiate and oversee disciplinary proceedings for ethical misconduct.

II Court's supervisory power to regulate conduct of lawyers

2 The court's supervisory power over lawyers was acknowledged centuries ago. In *Davies v Clough*, Sir Lancelot Shadwell expressed the position as follows:⁴

The cases ... appear to afford this general principle, namely, that all courts may *exercise an authority over their own officers as to the propriety of their behaviour*; for applications have been repeatedly made to restrain solicitors who had acted on one side from acting on the other, and those applications have failed or succeeded upon their own particular grounds, but never because the Court had no jurisdiction.

3 In *Then Khek Khoon v Arjun Permanand Samtani*⁵ ("*Then Khek Khoon*"), Quentin Loh J considered it well established that the court does have inherent power "to regulate and supervise the conduct of advocates and solicitors as officers of this court". The learned judge elaborated:⁶

3 Primarily, under O 59 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The court also has an inherent power to sanction lawyers for procedural error (see *Zhou Tong v Public Prosecutor* [2010] 4 SLR 534 at [33]–[34]). Also see the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 356–358, which enable cost orders to be made against defence counsel and the Prosecution. The court may hold a lawyer liable for contempt in more serious cases.

4 *Davies v Clough* (1837) 8 Sim 262 at 267. Also see *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 at 835 and 841, where Cozens-Hardy MR and Fletcher Moulton LJ, respectively, acknowledged the power to control the conduct of lawyers.

5 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [13].

6 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [22].

There may be special or exceptional circumstances where the nature of the complaint is such that on an objective view, a reasonable, fair minded observer would think that a fair trial would not be possible without the court's intervention and restraint of the advocate or solicitor from continuing to act. Where matters impinge on the proper administration of justice, due process and wider public interest issues, the court should intervene, either on its own initiative or pursuant to a complaint by the other party. The Court must not allow confidence in the administration of justice to be undermined.

4 This power to intervene in such circumstances was confirmed by Valerie Thean J in *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani*⁷ (“*Harsha*”), where Her Honour stated:

The central idea behind this jurisdiction is the court's overriding duty to ensure the proper administration of justice, to protect the integrity of the legal process and to maintain public confidence in the rule of law. Within the justice system, lawyers play a critical role as officers of the court and as fiduciaries of their clients. For this reason, the proper discharge of their role is governed by the highest professional and ethical standards, embodied in the PCR, by which they may be held to account through disciplinary proceedings. Exceptionally, however, the conduct of a lawyer in a particular case may pose an immediate actual or perceived risk to the proper administration of justice, whether in the particular case at hand or, even more exceptionally, at large. In such circumstances, it cannot be doubted that the court has the duty, and correspondingly, the power, to purge that risk directly by restraining the lawyer from continuing to act.

5 Endorsing Loh J's observations, Thean J expressed the principle underlying the court's inherent power to intervene⁸ as “whether there is an actual or reasonably perceived risk that the proper administration of justice would be prejudiced unless the

7 [2018] 5 SLR 894 at [77].

8 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [88].

lawyer in question is removed”.⁹ The question of whether the alleged risk is reasonably perceived “must be assessed objectively through the eyes of the fair-minded observer”.¹⁰ Her Honour cautioned that “the types of risk that the proper administration of justice would be prejudiced constitute a narrow and exceptional category”¹¹ and that “[g]reat care must be taken not to adopt an expansive view of this supervisory jurisdiction”.¹² Several important reasons underlie this concern. In the first place, applications to remove an opposing party’s lawyer “can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings”.¹³ Secondly, “there is an interest in respecting the freedom of lawyers to obtain instructions from any member of the public and the freedom of all members of the public to instruct lawyers of their choice”.¹⁴ Consequently, there must be a convincing reason for removing the client’s and lawyer’s free election; namely, “an actual or reasonably perceived risk to the proper administration of justice”.¹⁵

III Distinction between court’s supervisory power over lawyers and its substantive power to grant an injunction

6 There is a clear separation between the court’s supervisory power to regulate the conduct of its officers and its

9 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [81].

10 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [81].

11 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [81].

12 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [82].

13 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [82], citing *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [43].

14 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [82], citing Lightman J’s observation in *In re A Firm of Solicitors* [1997] Ch 1 at 9.

15 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [82].

substantive power to grant an injunction in response to an application for this remedy. This distinction was not clearly addressed by the courts in Singapore until *Then Khek Khoon*, where Loh J identified the court's inherent power as a distinct source of law that enabled the court to intervene to protect the interests of the administration of justice.¹⁶ This was confirmed by Thean J in *Harsha*, where Her Honour clearly distinguished between the court's injunctive powers and its supervisory powers:¹⁷

Two sets of differences are worth pointing out. The first is this. On the one hand, it would appear that the purpose of the court's supervisory jurisdiction over its officers is to ensure that its officers adhere to a minimum standard of propriety in conduct. On the other, the purpose of the court's jurisdiction in the substantive law on breach of confidence is to ensure that confidential information is not unjustifiably disclosed. If this is accepted, the second difference is that while the court's jurisdiction to protect confidence will often be invoked to prevent entire law firms from acting in consideration of the risk of disclosure of confidential information within the firm, the court's supervisory jurisdiction might often be more appropriately exercised against individual lawyers whose individual conduct is regarded as inappropriate. Hence, there seems to be a different overall scope and purpose to each jurisdiction.

7 The principles governing the exercise of the court's supervisory powers have been considered.¹⁸ With regard to the court's substantive power to grant an injunction to restrain a lawyer from acting because of his access to confidential information from a former client, Thean J (in *Harsha*) noted the principles articulated by the House of Lords in *Prince Jefri Bolkiah v KPMG*¹⁹ ("Bolkiah") had yet to be applied in Singapore.²⁰ *Bolkiah*

16 *Then Khek Khoon v Arjun Permand Samtani* [2012] 2 SLR 451 at [22]–[27].

17 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [75].

18 See para 5 above.

19 [1999] 2 AC 222.

20 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [35].

was a case in which the plaintiff sought an injunction for breach of confidence against KPMG who was initially engaged by the plaintiff and later engaged by the government of Brunei. The House of Lords reinstated the injunction against the agency on the basis of certain principles (“the *Bolkiah* test”) which may be summarised as follows: first, the applicant must show that the opposing law practice has possession of his confidential information; second, the information is or may be relevant in the current proceedings in which the interest of the other client is or may be adverse to the applicants;²¹ and third, if the applicant establishes these facts, the evidential burden shifts to the law firm to show that even so, there is “no risk” that the information will come into the possession of those now acting for the defendant.²²

8 Having ruled that that the *Bolkiah* test “should govern a former client’s application to restrain a law firm from acting on the grounds of protecting his confidentiality”,²³ Thean J observed that a distinction must be made between confidential information obtained from a former client and a former *prospective* client. In the case of a former client, there is a contract of retainer by which the law practice has undertaken an equitable duty of confidentiality. No such contract exists in a situation of a former *prospective* client because he has not engaged the law practice. The absence of a contract does not mean that an equitable duty of confidentiality is not owed to him. Equity imposes such a duty on the law firm because the circumstances justify the protection of confidential information provided by him to the law practice.²⁴ However, in the absence of a contract between the law practice and the former *prospective*

21 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 235D–E.

22 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 at 237F–G. See *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [31].

23 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [36].

24 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [41]–[42].

client, the confidential information is not “conveyed under a relationship that is worthy of special protection”.²⁵

9 The third element of the *Bolkiah* test – the evidential burden shifts to the law firm to show that even so, there is “no risk” that the information will come into the possession of those now acting for the defendant²⁶ – is intended to apply in the context of the fiduciary obligation imposed on a law practice by reason of its contractual relationship with the former client.²⁷ This strict approach towards the law practice is necessary because it has tacitly accepted the fiduciary obligation of loyalty to the former client.²⁸ As this consideration is absent in the relationship between the law practice and the former *prospective* client, the latter is not entitled to benefit from this evidential imposition on the law practice.²⁹ Therefore, in these circumstances, the *Bolkiah* test applies without the evidential rule. As Thean J put it:³⁰

The applicable rule, therefore, is that where a former prospective client seeks to restrain a law firm from acting on the ground of protecting confidential information belonging to him, he must establish that (a) the law firm are in possession of information which is confidential to him and to the disclosure of which he has not consented; (b) the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own; and (c) *there is a risk that the information will come into the possession of those now acting for the new client.* [emphasis added]

25 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [45].

26 See para 7 above.

27 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 89 at [43]–[44].

28 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [43].

29 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [47].

30 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [47].

10 Element (c) of this test is the distinguishing factor between the relationship of law practice and former client and law practice and former *prospective* client.³¹ And even if the former *prospective* client satisfies elements (a) to (c), the court has the discretion to restrain the use of confidential information rather than restrain the law practice from conducting the case on behalf of the party. Thean J explained: “The reason for this is that in practice, information that may fall or has fallen into the hands of lawyers who have not acted for the plaintiff tends to be limited in scope, such that simply restricting the use of that information is generally an adequate remedy for any prejudice that the plaintiff might suffer as a result of its misuse.”³² This is not a fixed rule as the nature and scope of the injunction must address the danger of injustice that might arise in the circumstances of each case.³³

11 In *Harsha*, Thean J also pointed out that a party who seeks an injunction to restrain the opposing lawyer from acting should initiate separate proceedings by originating summons or writ based on the law of confidence. An application for an injunction cannot simply be made by summons (which was the procedure engaged in *Harsha*) as if the underlying cause of action is irrelevant: “The right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant [*sic*] on the enforcement of a substantive right.”³⁴ Thean J stated that if an originating process had been used, “the jurisdictional basis for the injunction sought, whether it be breach of confidence, the supervisory jurisdiction of the court, or some other source of

31 Compare this to the test governing the law practice and a former client at para 7 above.

32 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [48].

33 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [48].

34 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 362C, citing *Siskina v Distos Compania Naviera SA* [1979] AC 210 (see especially 254). These cases were cited in *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [85].

substantive or procedural law, would have been clearer”.³⁵ It is assumed that this pronouncement is not intended to mean that fresh proceedings must be brought to invoke the supervisory powers of the court. Such powers, which are part of the inherent powers of the court,³⁶ are not dependent on the existence of any cause of action and may be independently exercised by the court whenever it is necessary to protect the interests of the administration of justice.

IV Distinction between court’s supervisory power over lawyers and Law Society’s power to respond to breaches of rules of ethics

12 It is well established that it is for the Law Society to decide whether disciplinary proceedings should be initiated for determining whether a rule of professional conduct has been breached and that the court must not usurp this role.³⁷ Although the courts do not enforce ethics rules, those rules have significance where a breach or potential breach could undermine the interests of the administration of justice. For example, where the lawyer is in possession of confidential information obtained from a former client or former prospective client who is now the opposing party,³⁸ or where the lawyer could be called to give or produce evidence in the case,³⁹ or where he has an interest in the proceedings that is adverse to the client’s interest so that a fair

35 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [87].

36 See paras 3–5 above.

37 See *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [24]; *Then Khok Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [16]–[19]; *Ong Jane Rebecca v Lim Lie Hoa* [2002] 1 SLR(R) 798; *The Law Society of Singapore v Tan Chun Chuen Malcolm* [2006] SGDSC 11 at [13] (where a reference is made to the observation of Rajah JC concerning the Law Society’s role with regard to breaches of the rules of professional conduct).

38 See r 21 of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015).

39 See r 11(3) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015).

trial could be jeopardised.⁴⁰ Any of these circumstances could result in ethical breaches and, at the same time, compromise the interests of the administration of justice.⁴¹

13 Hence, in *Then Khek Khoon*, Loh J acknowledged that a breach of an ethical rule that does not affect any legal obligation on the part of the lawyer or client *vis-à-vis* the administration of justice is a matter for the Law Society rather than the court. However, as the learned judge pointed out, the court is entitled to intervene if the wrong “is such that on an objective view, a reasonable, fair minded observer would think that a fair trial would not be possible without the court’s intervention and restraint of the advocate or solicitor from continuing to act”. That is, “[w]here matters impinge on the proper administration of justice, due process and wider public interest issues, the court should intervene, either on its own initiative or pursuant to a complaint by the other party. The Court must not allow confidence in the administration of justice to be undermined”.⁴²

14 In *Harsha*, Thean J agreed with this assessment.⁴³ In Her Honour’s view, whether an ethical rule is breached or is at risk of being breached, this would serve as an “analytical tool” for determining whether the supervisory jurisdiction should be invoked.⁴⁴

The rules in the PCR are ethical standards to which lawyers in this jurisdiction must hold themselves. Therefore, whether the lawyer in question appears to be in breach of a given rule in the PCR must be of some relevance to determining whether, in the eyes of a fair-minded observer, restraining him from acting is necessary to ensure the proper administration of justice. However, in applying the PCR this way, it is imperative for the

40 See r 22(3)(a) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015).

41 See *Gevevan Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at 39.

42 See para 3 above.

43 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [83].

44 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [83].

court not to express any final opinion on whether any particular rule has been breached, as the proper forum for such a determination is the Law Society.

15 Therefore, if the interests of the administration of justice are affected by an ethical rule that is breached or is at risk of being breached, the court is not concerned with the law governing ethics (which is solely concerned with the responsibility and liability of lawyers) but with the integrity and fairness of the trial. As mentioned earlier,⁴⁵ the court is to consider whether intervention is clearly necessary to avoid an actual or reasonably perceived risk that the proper administration of justice would be compromised. For this purpose, as mentioned in *Harsha*, the rules of ethics may serve as an “analytical tool”.⁴⁶ The question of whether the alleged risk is reasonably perceived “must be assessed objectively through the eyes of the fair-minded observer”.⁴⁷ In both *Harsha* and *Then Khek Khoon*, these grounds were not established.⁴⁸ The point should also be made that while the court does not pronounce on ethical liability, it may state that the lawyer has acted improperly or is in breach of his obligation as an officer of the court in the context of the interests of the administration of justice. Whether such circumstances constitute an ethical breach for the purpose of disciplinary proceedings would then be a separate matter for the Law Society.

V Lawyer’s responsibility to notify court and other party of concerns arising from his personal position that could compromise a fair hearing or trial

16 Exceptionally, even if an ethical rule is not breached or at risk of being breached, the lawyer’s personal circumstances may

45 See para 5 above.

46 See para 14 above.

47 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [81].

48 *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [84] and *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [15].

need to be assessed by the court in ensuring a fair hearing or trial. If there is an actual or reasonably perceived risk that the proper administration of justice would be compromised “through the eyes of the fair-minded observer”,⁴⁹ the court may exercise its supervisory power to restrain the lawyer from acting. Although the lawyer’s responsibility to notify the court in such circumstances has yet to be directly addressed by the Singapore courts in any reported case, it is submitted that the lawyer, as an officer of the court, must notify the court and other party of his personal circumstances if they raise an actual or perceived risk. Such notification would enable the court to address the matter early in the proceedings to avoid injustice and the nullification of any eventual judgment or order.

17 For example, the lawyer is not prohibited from acting if he has a significant interest in the outcome of the case and that interest is aligned to his client’s interest. Assume that the client and lawyer have apartments in a new property. If the client succeeds in his action against the developer, all the property owners (including the lawyer) would benefit substantially. Rule 22(3)(a) of the Legal Profession (Professional Conduct) Rules 2015⁵⁰ (“LP(PC)R”) does not operate because it prevents the lawyer from acting if his interest is *adverse* to the client’s interest and the exceptions to this rule do not apply. Rule 22(3)(b) of the LP(PC)R, which concerns situations in which the lawyer has an interest which is not adverse to the interest of the client, provides that the lawyer may act if the lawyer makes full and frank disclosure of the interest to the client and the client gives his informed consent in writing to the lawyer to act on the client’s behalf. The purpose of this rule is to protect the client.⁵¹ It does not protect the administration of justice. There is

49 See paras 8–11 above.

50 S 706/2015.

51 See *The Law Society of Singapore v Koh Lee Kheng Florence* [2005] SGDSC 7 at [69] for the court’s observations on r 25(a) of the former Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) (cited by the High Court in *Then Khok Khoo v Arjun Permanand Samtani* [2012] 2 SLR 451 at [33]).

a risk that the lawyer may compromise his role as an officer of the court if his personal interest in the outcome compromises his responsibilities to the court (this is a primary reason for the prohibition of contingency fee arrangements).⁵² At the very least, the lawyer should notify the court and the opposing party of his interest to obviate a reasonably perceived risk that the proper administration of justice would be compromised (applying the test propounded in *Harsha*).⁵³

18 Another situation in which a lawyer may act ethically but nevertheless ought to give notice of his personal circumstances to the court and the opposing party is a close personal or financial relationship with a witness which would raise a reasonably perceived risk of bias in favour of the client. Rule 11(2)(a) of the LP(PC)R prohibits a lawyer from conducting a case in court if it would be difficult for him to maintain his professional independence in the face of “any commercial, family, personal or other relationship” between him and his client. Rule 11(2)(a) also bars the lawyer from acting if “the impartial administration of justice might or might appear to be prejudiced by reason of the legal practitioner’s relationship with the court or tribunal or any member of the court or tribunal”. Neither these rules nor any other rule in the LP(PC)R (including r 12, which concerns “[c]ommunications and dealings with witnesses”) address the lawyer’s personal relationship with a witness. However, the core ethical principles in r 4(a)–4(c) of the LP(PC)R leave no doubt about the lawyer’s sacrosanct responsibilities to the administration of justice.

19 In *Geveran Trading Co Ltd v Skjevesland*, Arden LJ, in delivering the judgment of the Court of Appeal, stated:⁵⁴

... if the advocate knows that a personal factor exists which might be regarded as affecting the conduct of the case but has concluded that he is not prevented by his own professional rules from acting, he should disclose the matter to the other side or

52 See s 107 of the Legal Profession Act (Cap 161, 2009 Rev Ed).

53 See paras 8–11 above.

54 *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [46].

the court. An advocate who is affected by a personal factor which there are reasonable grounds for concluding would prejudice the administration of justice in an individual case or result in a procedural irregularity, such as would lead to the order made at trial being set aside on appeal, should not act even if he has formed the view that he is not professionally embarrassed. This follows from his duty to the Court.

20 According to Arden LJ, even if the lawyer believes he can act, he must disclose the circumstances if they can be “reasonably be regarded as open to objection”, unless the opposing party is aware of and has accepted the situation. The disclosure should occur at the commencement of the proceedings so that the court may make the necessary determination.⁵⁵ Her Ladyship referred to several cases in which the courts have had to determine whether lawyers should be restrained from acting because of their personal circumstances.⁵⁶

VI. Conclusion

21 It has been shown that the court may exercise its supervisory powers to control the conduct of lawyers in court⁵⁷ and these powers are not circumscribed by the rules of ethics.⁵⁸ It is possible that conduct which constitutes a breach of an ethical rule has no adverse impact on the administration of justice (although, if it concerns the lawyer's responsibilities to

55 *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [46].

56 See *R v Smith (Winston)* (1975) 61 Cr App R 128 (conviction set aside because a pupil barrister who had earlier discussed the case with the accused (but did not obtain confidential information from him) was subsequently in the prosecution team); *R v Batt* [1996] Crim LR 910 (concerning spouses/cohabiting partners who are opposing counsel) and *In re L (Minors) (Care Proceedings: Solicitors)* [2001] 1 WLR 100 (concerning an intimate relationship between counsel for a party and the local authority in care proceedings). These cases are referred to in *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [18], [39] and [40]. Also see *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 at [80], where most of the above cases are referred to.

57 See paras 2–10 above.

58 See paras 12–15 above.

the court or the client, it usually will).⁵⁹ It is also possible that conduct which does not constitute a breach of an ethical rule may adversely affect the administration of justice (although this would be in exceptional cases).⁶⁰ The principles underlying these supervisory powers (which are concerned with the protection of the administration of justice) must be distinguished from the principles governing the court's substantive power to grant an injunction (which must be premised on a cause of action).⁶¹ The lawyer also has the responsibility to notify the court and other party of circumstances that may raise an actual or reasonably perceived risk that the proper administration of justice would be compromised "through the eyes of the fair-minded observer".⁶² Such information enables the court to be aware of the situation and, if necessary, to intervene by restraining the lawyer from acting or making some other appropriate order.

59 See paras 12–15 above.

60 See paras 12–15 above.

61 See paras 6–11 above.

62 See paras 16–20 above.