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22. LEGAL PROFESSION

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I. Introduction

22.1 This review covers:

(a) cases relating to ethics and professional responsibility;[2] and

(b) cases relating to the disciplinary framework, procedural matters, and admissions to the Bar.[3]

II. Duties owed by lawyers to third parties

22.2 *Law Society of Singapore v Lee Teck Leng Robson*,[4] *Law Society of Singapore v Jai Swarup Pathak*[5] and *Tan Ng Kuang v Jai Swarup Pathak*[6] arose out of complaints by two insolvency practitioners ("the JMs") against the respondent lawyers ("RL" and "JP" respectively). In June 2016, the JMs were approached by RL and JP, who were lawyers for Punj Lloyd Limited ("PLL"). PLL owned and controlled two companies, SEC and PLPL ("the Companies"), and wanted the JMs to act as judicial managers of the Companies.

22.3 The JMs agreed, provided that PLL would deposit $2m with RL and JP's firm ("GDC") towards the expenses of the judicial management ("Deposit Agreement"). On 27 June 2016, the High Court appointed the JMs as the judicial managers of the Companies.

22.4 In July 2016, JP sent various e-mails to the JMs to confirm that PLL would place a deposit of $500,000 with GBC "towards payment

1 The author wishes to thank Shaun Ou and Brendan Tan for their assistance. All errors and omissions remain the author's own. Due to the number of cases in 2021, this review will not address the cases which the author considers to be more run-of-the-mill.
2 See paras 22.2–22.49 below.
3 See paras 22.50–22.98 below.
4 [2021] SGDT 1.
5 [2021] SGDT 2.
6 [2022] 3 SLR 788.

of the JM fees"[7] and referred to the agreed fee of $2m for the JMs. On 17 August 2016, JP e-mailed the JMs to confirm that the first tranche of $250,000 had been received by GDC "and [had] been placed in [GDC's] trust fund for the JM fees", and that the second tranche of $250,000 was to be expected.

22.5 On 2 September 2016, the JMs' then-lawyers issued a letter of demand to GDC setting out, *inter alia*, the terms of the Deposit Agreement and requesting payment of the first tranche of $250,000. In response, JP instructed RL to send an e-mail disputing the contents of the letter of demand, stating that GDC was "not a party to any alleged fee arrangement with [the JMs]"[8] and would cease to be involved in the fee discussion between the JMs and GDC.

22.6 On 22 September 2016, the JMs' then-lawyers issued another letter of demand for the full sum of $500,000 that GDC had received from PLL. On or around the same day, JP was verbally instructed by PLL that PLL would pay the JMs' fees directly. RL then e-mailed the JMs stating, *inter alia*, that GDC was "not holding any fee deposit for [the JMs]".[9]

22.7 The JMs complained to the Law Society of Singapore ("the Law Society"), who referred the complaint to two review committees ("RCs"). The RCs summarised the complaint as follows:

> (a) JP and RL had knowingly deceived the JMs and/or knowingly aided and abetted PLL in deceiving the JMs with regard to the terms of remuneration of their appointment ("the First Complaint").
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> (b) JP and RL had aided and abetted PLL in not paying to the JMs a substantial amount of moneys that PLL had placed with them for the express purpose of providing a deposit for the JMs' fees ("the Second Complaint").

22.8 The RCs dismissed both complaints. The JMs filed for a review of the RCs' decisions. The High Court upheld the RCs' decision to dismiss the First Complaint but quashed the RCs' decision to dismiss the Second Complaint. Two inquiry committees ("ICs") were constituted, both of which were of the view that no formal investigation by disciplinary tribunals ("DTs") was required and recommended the dismissal of the Second Complaint. The Law Society accepted the ICs' recommendations.

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7 *Tan Ng Kuang v Jai Swarup Pathak* [2022] 3 SLR 788 at [14].
8 *Tan Ng Kuang v Jai Swarup Pathak* [2022] 3 SLR 788 at [18].
9 *Tan Ng Kuang v Jai Swarup Pathak* [2022] 3 SLR 788 at [21].

22.9 The JMs then filed for a review of the ICs' decisions. The High Court found that the JMs had established a *prima facie* case and ordered the Law Society to apply to the Chief Justice for the appointment of DTs to investigate JP and RL's alleged misconduct. In the DT proceedings, JP and RL were accused of having "assisted or permitted PLL" in a dishonest manner.[10]

22.10 The DTs made several findings. In particular, the DTs found that there was no breach of r 10(6) of the Legal Profession (Professional Conduct) Rules 2015 ("PCR"), which provides that practitioners must not knowingly assist or permit their clients (a) to mislead a court of tribunal; or (b) to do any other thing which the practitioner considers to be dishonest:

> (i) In respect of RL, the DT departed from a previous DT's decision and found that the rule only applied in the context of court/tribunal proceedings. The charges therefore were dismissed as the present scenario did not involve RL representing PLL in such a context.
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> (ii) In respect of JP, the DT dismissed the charges as this rule was applicable only to foreign lawyers registered under s 36P of the Legal Profession Act[11] ("LPA"), but JP was a foreign lawyer registered under s 36C of the LPA.

22.11 The next charge related to whether RL and JP had assisted or permitted PLL in a manner which they considered dishonest or ought to have considered dishonest by not paying to the JMs the deposit received. This gave rise to four issues:

> (a) whether there was a Deposit Agreement made between the JMs and PLL (through RL and JP who were representing PLL) that PLL would provide the deposit of $2m towards the costs of managing the Companies under judicial management;
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> (b) if so, whether RL and JP knew of the Deposit Agreement.
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> (c) whether RL and JP had received either or both tranches of $250,000 from PLL between 17 August and 8 September 2016 as part of the Deposit Agreement; and
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> (d) whether RL and JP had assisted or permitted PLL in a manner which RL and JP considered dishonest or ought to have considered dishonest in not paying the two tranches to the

10 *Tan Ng Kuang v Jai Swarup Pathak* [2022] 3 SLR 788 at [27].
11 Cap 161, 2009 Rev Ed.

JMs when the JMs had demanded payment through their then-solicitors' letters.

22.12 On the first three issues, the DT found that:

(a) there was a Deposit Agreement;

(b) RL and JP knew or should have known that a Deposit Agreement had been agreed; and

(c) RL and JP knew that GDC had received funds to be held for the JMs' fees.

22.13 On the fourth issue, the DT diverged as between RL and JP. In RL's case, his role was limited to sending various e-mails to the JMs' lawyers, in which he conveyed that (i) GDC would cease to be involved in the fee discussions between the JMs and PLL; (ii) GDC no longer represented PLL in respect of any fee discussion with the JMs; and (iii) GDC was not holding any fee deposit for the JMs.

22.14 During this time, RL was facing a severe problem involving his child and was therefore unable to focus on his work; thus, the contents of the e-mails would have substantially come from JP. There was no evidence that RL knew that (a) the funds received were to be used for payment of GDC's invoices; or (b) PLL did not intend to make payment directly to the JMs. As such, it was not established beyond reasonable doubt that RL had assisted or permitted PLL in a manner which RL considered dishonest or ought to have considered dishonest in not paying the $500,000 for the JMs' fees.

22.15 Turning to JP, the DT reached a different conclusion on the fourth issue:

(a) JP was well aware that the $500,000 placed with GDC was for the specific purpose of the JMs' fees.

(b) JP had given instructions for the $500,000 to be appropriated for GDC's outstanding invoices. However, he should not have assisted or permitted PLL to not pay the $500,000, or used the sum to pay down PLL's outstanding liabilities owing to GDC for other work done.

(c) JP had played a part in misleading the JMs as to the true state of affairs. He did not tell the JMs that GDC was no longer holding the $500,000 as a deposit for the JMs' fees, and did not correct an untrue statement made by PLL's representative that PLL had placed such a deposit. There was a need for JP to inform the JMs about the change in the situation.

(d) To aggravate matters, the funds were used to pay GDC's invoices. PLL was insolvent at this point, and JP played a role in extracting these funds for the JMs' fees by issuing sham invoices. In the end, PLL did not pay the JMs anything.

22.16 The DT therefore held that JP was guilty of misconduct unbefitting a regulated foreign lawyer as a member of an honourable profession under s 83A(2)(*g*) of the LPA, in so far that his word should have been his bond, and other professionals like the JMs should be able to rely on his word that GDC would hold the money received for the JMs' fees. The DT determined, pursuant to s 93(1)(*c*) of the LPA, that a cause of sufficient gravity for disciplinary action existed under s 83A of the LPA.

22.17 The JMs then applied to the Court of Three Judges for disciplinary action against JP. The Court of Three Judges affirmed the DT's finding on the first three issues. However, in a twist, the Court of Three Judges held that JP had *not* been dishonest and set aside the DT's finding that JP was guilty of such misconduct.

22.18 In considering the issue of dishonesty, the Court of Three Judges considered whether JP had "assisted or permitted" PLL to act in a manner he considered dishonest or "ought to have considered dishonest" by not paying the sum of $500,000 to the JMs:

(a) The JMs' case was that even if the decision to use the $500,000 sum for PLL's outstanding invoices with GDC had emanated from PLL, JP should have informed the JMs that the $500,000 sum was no longer designated for the original purpose of the Deposit Agreement. However, this would require JP to flout his duty of confidentiality to his client, PLL.

(b) The question was whether JP owed any duties to the JMs in the first place. Under r 8 of the PCR, JP owed some duties to the JMs, such as the duties of honesty, courtesy and fairness. However, apart from these duties, JP did not owe any legal or ethical duty to serve the JMs' interests.

(c) In contrast, JP owed the duties of confidentiality and loyalty to his client, PLL. If PLL had instructed JP that it intended to breach the Deposit Agreement and to use the $500,000 sum to pay its outstanding invoices with GDC, JP had a duty to maintain the confidentiality of this instruction, which was not overridden by his duties to the JMs.

(d) The charge against JP was that he was dishonest in not paying the sum of $500,000 to the JMs and *not* that he was dishonest in failing to inform the JMs that the $500,000 sum was

no longer deposited for their fees. JP was not dishonest because in the first place, he had no obligation or duty to pay the sum of $500,000 to the JMs.

22.19 The Court of Three Judges also disagreed with a number of the DT's other findings:

(a) As regards the DT's finding that JP should not have used the funds to pay GDC's outstanding invoices to the detriment of the JMs and the Companies' creditors, JP owed no obligations to them. If PLL had instructed JP that the $500,000 could be used to pay GDC's outstanding invoices as PLL would deal with and pay the JMs directly, then there was no dishonesty in JP doing so.

(b) As to the role that JP played in the misleading correspondence with the JMs that failed to correct the JMs' belief that GDC continued to hold PLL's funds as part of the Deposit Agreement, this was beside the point because that was not the impugned act in the charge, and the evidence did not show beyond a reasonable doubt that JP had deliberately misled the JMs.

(c) As to JP's failure to correct a false statement made by PLL's representative to one of the JMs, JP did not receive the e-mail from one of the JMs that confirmed the statement made by PLL's representative. When the e-mail was forwarded to JP, he responded to PLL to correct the error. This was reasonable and he was under no obligation to "whistle-blow" on PLL to the JMs.

22.20 The Court of Three Judges nevertheless held that it was "troubling"[12] that JP had attempted to resile from the clear terms of his own e-mails and run a contrary case in his defence, and that this was inconsistent with his standing as a senior lawyer who was a member of an honourable profession. The Court of Three Judges also ordered each party to bear their own costs (instead of having costs follow the event).

22.21 Finally, the Court of Three Judges made some observations as to what a lawyer's duties are when their client wishes to breach a contract or some other private obligation, bearing in mind the lawyer's overarching duty to serve the administration of justice and fairness:

(a) Absent criminal behaviour or any conduct that gives rise to a civil claim against the lawyer himself (for example, dishonest assistance of a breach of trust or the tort of inducement to breach a contract), a lawyer can comply with his client's instructions to

12 *Tan Ng Kuang v Jai Swarup Pathak* [2022] 3 SLR 788 at [45].

breach a contract (or other private obligation), given his duty of loyalty to the client.

(b) The lawyer is not obliged to "whistle-blow" on his client to the opposing party, given his duties of confidentiality and loyalty to his own client.

(c) However, the lawyer should advise his client that what the client intends to do would amount to a breach of the obligation, and advise against committing such a breach.

(d) Generally, the lawyer should not be the party to suggest to his client or initiate the idea to breach the client's obligation.

(e) The lawyer should not actively assist or abet the client's breach of the obligation.

(f) If the client insists on the lawyer acting in a manner that is dishonest or unbefitting of a member of an honourable profession, the lawyer should cease acting for that client.

22.22 Some concluding remarks:

(a) Lawyers should be exceedingly careful not to enter into obligations that might derogate from their obligations to their clients. In the present case, the sum held was not subject to an escrow or stakeholding agreement. There was therefore no obligation on JP's part to transfer the sum of $500,000 to the JMs and no dishonesty on his part. However, in a situation where lawyers find themselves owing contradictory obligations to their clients and third parties, they might well find themselves on the horns of a dilemma.

(b) The Court of Three Judges has made clear that where a client wishes to breach a private obligation, the lawyer is not to slavishly or blindly execute the client's instructions, but must fulfil other obligations in light of his overriding duty as an officer of the court.

III. Conflicts of interest

22.23 In *Law Society of Singapore v Mahtani Bhagwandas*,[13] the Court of Three Judges suspended the respondent solicitor ("MB") for 24 months because he failed to disclose to a prospective client that he was acting for an adverse party and received confidential information as a result of his non-disclosure.

13 [2021] 5 SLR 1250.

22.24 The complainant ("Tan") was married to one Spencer Tuppani until his death. MB had acted for Tuppani in various matters. Tuppani was killed by his father-in-law on 10 July 2017 in a public and widely reported stabbing at a Telok Ayer coffee shop. At the time of Tuppani's death, he was cohabiting with one Joan Yeo, whom MB spoke with at Tuppani's wake.

22.25 Subsequently, MB met with Tan on 24 July 2017. MB's position was that he had told Tan that he intended to act for Yeo against Tuppani's estate. Tan's position was that MB gave no indication that he intended to act for Yeo against Tuppani's estate. On 8 August 2017, Yeo formally appointed MB as her lawyer.

22.26 MB subsequently met with Tan, who gave MB information about Tuppani's assets, and asked MB if he could act in respect of Tuppani's estate. MB answered in the affirmative. There were further communications between MB on the one hand, and Tan and her lawyer on the other. It was only on 24 November 2017 that MB indicated that he was acting for Yeo, in respect of a claim that Tuppani's estate was bringing against Yeo.

22.27 On 25 February 2019, Yeo commenced a claim against Tuppani's estate. The complaint arose from MB's representation of Yeo in this claim. The DT eventually determined that there was cause of sufficient gravity for disciplinary action, in so far that:

> (a) by acting for Yeo against Tuppani's estate, MB had breached r 21(2) of the PCR. Yeo's interests were adverse to those of Tuppani's estate. Over the course of his prior engagements by Tuppani, MB had acquired confidential information relating to Tuppani's assets. This confidential information was material to the question of whether Tuppani's estate could satisfy any judgment made against it and the viability of a claim against Tuppani's estate, and was therefore material to MB representing Yeo; and
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> (b) MB had misconducted himself under r 83(2)(*h*) of the LPA by failing to make a timely disclosure to Tan that he was acting for or intended to act for Yeo, and Tan was thereby misled into disclosing confidential information. Although MB claimed that he had made the necessary disclosure to Tan, the DT found, on the weight of the evidence, that he had not done so.

22.28 The Court of Three Judges agreed with the DT's findings. As to the appropriate sanction, although the Law Society sought a suspension of 12 months, on the basis that this was a case where the errant solicitor failed to advise a client of a potential conflict of interest arising out

of concurrent representation, the Court of Three Judges imposed a suspension of 24 months instead, on the basis that:

> (a) MB's misconduct, which led to Tan being misled into disclosing confidential information, was egregious;
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> (b) MB was a solicitor of 27 years' standing, and his abundant experience increased his culpability because it revealed an inexcusable lack of competence in failing to take necessary steps to address a conflict of interest;
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> (c) it was well within MB's ability to avoid placing himself in a position of conflict, particularly by making full and frank disclosure. There was no justification for his non-disclosure, and the misconduct was sustained over a period of time and did not appear to be a one-off or spontaneous instance of non-disclosure;
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> (d) MB made positive representations suggesting that he would act for Tuppani's estate. It was not the case that he had merely failed to clarify that he would not be able to act for Tuppani's estate. This was all the more egregious given the trust and confidence that Tan placed in MB;
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> (e) MB had sought to persuade Tan to settle or compromise Yeo's claims, after he had already been engaged by Yeo but before he informed Tan that he had been engaged as such; and
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> (f) MB sought to defend himself in the DT proceedings by falsifying the facts; this was not just an aggravating factor but also illustrated MB's suspect professional integrity.

22.29 It should be recalled that while the acts of misconduct took place in 2017, a complaint was only made against MB in 2019, after he had commenced Yeo's claim against Tuppani's estate. It was probably unwise of MB to accept instructions to commence this claim, which may well have been the main cause of the spotlight being cast over his past acts.

IV. Counsel's personal liability for costs when acting improperly, unreasonably or negligently

22.30 There were at least two reported decisions in which the Court of Appeal reminded counsel, yet again, of the possibility of personal costs consequences when acting improperly, unreasonably or negligently, in *both* civil and criminal matters.[14] This is not the first time that counsel

14 *Munshi Rasal v Enlighten Furniture Decoration Co Pte Ltd* [2021] 1 SLR 1277; *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 ("*Syed Suhail*"). *Syed Suhail* *(cont'd on the next page)*

have been reminded of such potential consequences arising from ill-advised litigation.[15]

22.31 In *Munshi Rasal v Enlighten Furniture Decoration Co Pte Ltd*,[16] the appellant, a Bangladeshi worker, brought a claim against his employer in respect of a workplace accident. He originally commenced proceedings in the High Court, but the case was transferred to the District Court, ostensibly because the value of his claim was less than $250,000. His claim was dismissed. The appellant appealed to the High Court, but the appeal was dismissed.

22.32 The appellant then appealed to the Court of Appeal. Leave to appeal was required since the amount in dispute did not exceed $250,000, and the appellant's claim was for $180,000. However, he did not seek such leave.

22.33 The Court of Appeal was also "troubled" by the appellant's counsel's ("SP") conduct of the appeal:

(a) It was "shocking" that the leave requirement could have escaped him as this was a rudimentary point of law that any reasonably competent lawyer should be aware of even without prompting from the court.

(b) The leave requirement was specifically and repeatedly drawn to SP's attention at case management conferences, but he chose to insist on the appellant's purportedly unqualified right of appeal without any proper legal basis.

(c) SP aggravated matters by attempting to assert that the appellant's claim was more than $250,000 even though a lower sum was pleaded in the statement of claim.

(d) The appellant was a vulnerable client and wholly dependent on SP to ensure compliance with procedure. It was incumbent upon SP to avoid wasting time and costs on a hopeless appeal, but he wrongly caused the appellant to have false expectations that there was a legitimate basis for appeal.

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was also cited with approval in *Iskandar bin Rahmat v Public Prosecutor* [2021] 2 SLR 1151, in which the Court of Appeal repeated the same reminder.

15 See, *eg*, *Singapore Shooting Association v Singapore Rifle Association* [2020] 1 SLR 395, discussed in (2019) 20 SAL Ann Rev 587 at 593–595, paras 21.24–21.32; and Jeffrey Pinsler, "Lawyer's Responsibility Not to Pursue a Claim or Application or Appeal Favoured by the Client Where the Interest of the Administration of Justice Will Be Compromised" (2020) 32 SAcLJ 1219.

16 [2021] 1 SLR 1277.

22.34 The Court of Appeal therefore considered whether SP should bear personal liability for the costs incurred in the appeal. Order 59 r 8(1) of the Rules of Court[17] empowers the court to order costs against counsel personally where costs have been incurred "unreasonably or improperly" in any proceedings or have been "wasted by failure to conduct proceedings with reasonable competence and expedition". The test is as follows:

> (a) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
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> (b) If so, did such conduct cause the applicant to incur unnecessary costs?
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> (c) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

22.35 On the first limb, there were at least two types of situations in which counsel might be regarded as having acted improperly, unreasonably or negligently so as to warrant a personal costs order:

> (i) where counsel advances a wholly disingenuous case or files utterly ill-conceived applications even though the solicitor ought to have known better and advised his client against such a course of action; or
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> (ii) where counsel engages in thoughtless and undiscerning preparation of documents in respect of court proceedings.

22.36 The Court of Appeal held that there was "no question" that SP had acted improperly and unreasonably and thereby caused the appellant to incur unnecessary costs. He was therefore ordered to bear all costs incurred in the appeal personally, and was ordered not to charge the appellant for any fees or disbursements in respect of the appeal.

22.37 In *Syed Suhail bin Syed Zin v Public Prosecutor*,[18] the applicant was convicted of drug trafficking and sentenced to the mandatory death penalty. His appeal was dismissed, and the President of the Republic of Singapore ordered the sentence to be carried into effect on 18 September 2020. On 17 September 2020, the applicant applied for leave to make a review application, which was granted. However, the review application was dismissed.[19]

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17 2014 Rev Ed.

18 [2021] 2 SLR 377. This case was also cited with approval in *Iskandar bin Rahmat v Public Prosecutor* [2021] 2 SLR 1151, and in which the Court of Appeal repeated the same reminder.

19 See *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 1 SLR 159.

22.38 The Prosecution then sought a personal costs order against the applicant's counsel ("MR"), on the basis that his conduct was "plainly unreasonable and improper".[20] There was no dispute that the court hearing criminal cases had the power to order that defence counsel pay costs directly to the Prosecution. The Court of Appeal held that the principles developed in the context of civil cases applied and adopted the same three-step test applied in *Munshi Rasal v Enlighten Furniture Decoration Co Pte Ltd*.[21]

22.39 Turning to the first limb of the test, the Court of Appeal held that MR had acted improperly in the manner in which he commenced and conducted the review application, and that the review application was brought in abuse of process:

> (a) One of the grounds of review was that it had not been sufficiently canvassed, at the trial or appeal, whether the applicant suffered from an "abnormality of mind". However, trial counsel had had expressly confirmed twice that the applicant was not alleging that he suffered an "abnormality of mind". MR alleged that the trial and appellate counsel failed to pursue the inquiry. However, there was no basis for this allegation: the applicant had been given the opportunity to make such an argument but failed to take the chance to do so. In any event, it would have been clear from the outset that the "abnormality of mind" ground was without merit as the argument could have been made with reasonable diligence at trial or on appeal, and the medical evidence did not support the allegations of "abnormality of mind". Further, MR did not appreciate that, for the purposes of the review, it was not enough to show an "abnormality of mind". The applicant would also need to show that he was a "courier", and this argument was without merit. As such, the review application was fatally flawed from the outset.
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> (b) Another of the grounds of review was that the applicant's trial counsel did not make the necessary inquiries to adduce evidence that the applicant's uncle had given him a $20,000 advance, which would allegedly have shown that the applicant had the financial means to sustain his alleged level of drug consumption (to support his case that the drugs found in his possession were for personal consumption and not for trafficking). However, MR had, in his affidavit, misrepresented that appellate counsel did not address this inquiry. MR's attempt to cast blame on previous counsel was without basis,

20 *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 at [10].
21 See para 22.31 above.

contradicted by the record, lacked candour, and amounted to a misrepresentation of the facts. In addition, it ought to have been clear from the outset that this ground of review would have failed, since the applicant had been given the opportunity to adduce the necessary evidence. In making this argument without reasonable basis, MR had acted in abuse of the process of court.

(c) MR had made baseless allegations against the applicant's trial and appellate counsel, and had failed to abide by his professional duty to give counsel an opportunity to respond under r 29 of the PCR. His failure to do so was particularly egregious since (i) the making of unsubstantiated allegations was a significant factor in the commencement of an unmeritorious case and gave rise to arguments based on false premises; and (ii) counsel's explanation for their conduct in prior proceedings would have been essential to assessing the truth of MR's account, who had failed to take reasonable care to ensure that he presented the truth to the court.

(d) MR's attempts to relitigate what had already been conceded or determined in prior proceedings was contrary to the principle of finality and was brought in abuse of process.

22.40 MR raised several counterarguments which were dismissed by the Court of Appeal:

(a) MR argued that he was instructed only after the warrant of execution was issued and he had limited time to assess the applicant's case. However, the Court of Appeal held that the problems with the case did not concern issues that required a significant amount of time to assess, and would have been apparent from a plain reading of the statute, the record and the psychiatric reports;

(b) The fact that this was a capital case did not warrant a relaxation in the standards expected of counsel. A review application is not an appeal and not every accused person should take out such an application. If counsel considers the case for review to lack merit, no review application should be brought even if the applicant would face imminent execution. A personal costs order would be all the more appropriate where counsel chooses to bring such an application despite its lack of merit in an attempt to stave off execution or on the off chance that it might somehow succeed. While adverse costs orders will generally not be visited upon counsel who make errors of judgment which do not amount to improper or negligent conduct, counsel are expected to exercise self-discipline, and to act with reason and not just on the basis of emotions.

(c) MR argued that he had a good faith belief that the review application was not bound to fail because leave was granted. However, the grant of leave should not have significantly affected his assessment of the merits, and leave was granted only because the statutory regime was relatively new and there was benefit in having a full *coram* set out the stringent nature of the criteria for such applications. Further, even if MR believed in good faith that the review application had merits, this would not preclude a personal costs order; otherwise, entirely negligent solicitors who genuinely believe their own faulty arguments would always escape consequences.

22.41 On the second limb of the test, since the review application should never have been brought, it followed that MR's improper conduct led to the incurring of unnecessary costs by the Prosecution. The Court of Appeal rejected MR's argument that costs would have been lower if leave had not been granted, as it was MR's position all along that the review application should go on for a full hearing, and he could not now turn around to argue that leave should not have been granted. Further, this was an attempt to foist on the court his responsibility to assess his client's case.

22.42 On the third limb of the test, the Court of Appeal found that it was just to make a personal costs order against MR:

(a) The unmeritorious application was a *review application*, for which there are strict requirements which reflect the principle of finality. Review applications are exceptional, the threshold for review is high, and defence counsel are expected to play their part in the administration of justice by ensuring that unmeritorious applications are not brought. Where counsel brings a patently unmeritorious application in the face of these principle, the case for a personal costs order is particularly strong.

(b) A personal costs order would be a reminder to defence counsel of their responsibility to advise clients properly. Accused persons sentenced to the death penalty should be protected from having their hopes unnecessarily raised then dashed because of inaccurate or incompetent legal advice.

(c) The improper conduct in this case was particularly egregious. Much of MR's conduct was grandstanding, there was a complete absence of merit in the application, and MR did not abide by his professional duties in relation to allegations against prior counsel. This was not just a weak case on the merits (which counsel cannot generally be faulted for trying to pursue) but also

> a case that was completely misconceived from the outset and improperly conducted.

22.43 The Court of Appeal therefore ordered MR to be personally liable for costs of $5,000 to the Prosecution.

22.44 These cases are not the first (and are unlikely to be the last) in which counsel has been ordered to be personally liable for costs. They do underscore a key consideration for litigators: while there is no wrong in pursuing a weak case on the merits, and counsel should not be dissuaded from doing so, counsel must beware of crossing the line into advancing an *unmeritorious* case. As for *how* counsel can tell whether their intended case is unmeritorious, counsel could do worse than to cultivate a sense of professional humility and be quicker to seek the views of fellow professionals when in doubt.

V. Letters of engagement

22.45 In *Marisol Llenos Foley v Harry Elias Partnership LLP*,[22] the High Court held that a client was entitled to have her bills taxed, notwithstanding that she had already paid the said bills, primarily due to shortcomings in her lawyers' letter of engagement.

22.46 The client had engaged her previous lawyers to act for her in divorce proceedings. She was issued seven invoices in total and paid six of the invoices. She subsequently sought an order for taxation for four of these invoices. Section 122 of the LPA provides that no order for taxation can be made on a bill that has already been paid unless there are "special circumstances". The client argued that there were "special circumstances" primarily because she did not know of her right of taxation.

22.47 The High Court considered the letter of engagement which the client had signed. Although the letter of engagement stated that the client might "be able to apply to tax"[23] their bills:

> (a) the word "tax", which is legalese, was not explained in plain English;
>
> (b) the letter of engagement stated that any disputes on bills "shall be resolved by referring such disputes to the Law Society of Singapore for mediation/arbitration under Cost Dispute

22 [2022] 3 SLR 585.

23 *Marisol Llenos Foley v Harry Elias Partnership LLP* [2022] 3 SLR 585 at [34].

Resolve".[24] The High Court held that a law firm should not, at the time of engagement, seek to replace the client's right to taxation of bills with an alternative process for dispute resolution;

(c) the letter of engagement did not inform the client that it was possible to pay a bill and reserve the right to have it taxed; and

(d) an engagement letter that fulfils the spirit of the PCR should include a meaningful estimate of fees, the basis on which fees will be charged and a clear explanation of a client's right to tax bills.

22.48 The High Court accepted that the client did not know about her right to tax her bills, and that this gave rise to a "special circumstance". In addition, there were three other special circumstances:

(a) The letter of engagement did not comply with r 17(5) of the PCR, which obliges the legal practitioner to inform the client of their right to have the bill taxed.

(b) The client was in an anxious state of mind and, being concerned about being left in the lurch by her lawyers should she not pay the bills within the stipulated period of 14 days, paid them in haste.

(c) The bills, taken together with their accompanying cover letters, were lacking in particulars, both in terms of the work done to date and in how each bill related to the anticipated overall bill, whether by reference to an original estimate or a revised estimate.

22.49 This case serves as a timely reminder for practitioners in private practice to consider and update their letters of engagement for compliance with the PCR.

VI. High Court's powers when reviewing disciplinary tribunal decisions

22.50 *Loh Der Ming Andrew v Koh Tien Hua*[25] was the latest chapter[26] in a long-running saga involving a matrimonial lawyer and his disgruntled ex-client. Unfortunately for the lawyer, the saga continues.

24 *Marisol Llenos Foley v Harry Elias Partnership LLP* [2022] 3 SLR 585 at [34].
25 [2021] 2 SLR 1013.
26 For a previous discussion of this matter, see (2019) 20 SAL Ann Rev 587 at 590–593, paras 21.13–21.23.

22.51 The facts and procedural history, in summary, are as follows:

(a) The respondent solicitor ("KTH") was engaged by the appellant/complainant ("AL") to represent him in divorce proceedings. AL was the plaintiff in the divorce proceedings, the defendant was his wife, and the co-defendant was accused of being in an adulterous relationship with AL's wife.

(b) The co-defendant applied to strike out certain parts of AL's statement of particulars ("SOP"). At the hearing, KTH consented to various parts of the SOP being struck out. It was disputed whether KTH had been authorised to give such consent in exercise of his professional judgment.

(c) When AL learnt that the particulars had been struck out, he insisted that an appeal be filed. KTH did not, at that stage, inform AL that the particulars had been struck out by consent or that a consent order cannot ordinarily be appealed. KTH eventually filed the appeal with much reluctance, after considerable delay, and purely because of AL's insistence.

(d) AL subsequently discovered what had transpired at the hearing. AL then lodged a complaint against KTH to the Law Society.

(e) An IC was constituted. It found that one of the heads of complaint was made out, but that no formal investigation by a DT was needed and that KTH should be ordered to pay a penalty of $2,500. The Law Society accepted the IC's findings and recommendations.

(f) AL was dissatisfied and applied to court for an order directing the Law Society to apply to the Chief Justice for the appointment of a DT. The court granted AL's application and directed the Law Society to apply to the Chief Justice for the appointment of a DT to investigate two heads of complaint.

(g) A DT was constituted. The DT found KTH guilty of two charges but acquitted him of other charges. For the two charges that KTH was found guilty of, the DT found that KTH's misconduct did not constitute cause of sufficient gravity for disciplinary action, did not recommend that the matter be advanced to the Court of Three Judges, and recommended a penalty of $10,000 or such sum to be determined.

(h) AL then applied to the High Court for a review of the DT's determination. The High Court judge found that KTH was guilty of two additional charges. The judge held that there was no need to remit the matter to the DT because her conclusions were based on matters that had been dealt with during the DT

hearing and that the misconduct was not sufficiently grave to warrant referral to the Court of Three Judges. The High Court judge increased the recommended penalty to be paid by KTH.

(i) AL then filed the present appeal. KTH applied to strike out the notice of appeal on the basis that the Court of Appeal did not have jurisdiction to hear an appeal from a High Court judge's review of a DT's determination. KTH's striking-out application was dismissed.[27]

(j) AL's substantive appeal was then heard, which concerned the High Court judge's decision (i) to increase the recommended penalty; and (ii) not to advance the matter to the Court of Three Judges.

22.52 The Court of Appeal allowed AL's appeal on various grounds.

22.53 First, the Court of Appeal held that by ordering an increased penalty, the High Court judge had exceeded her powers under s 97 of the LPA. The judge had the power to assess the substantive merits of the findings and determinations of the DT. If she decided that the DT had made an incorrect decision, the judge could set it aside and remit the matter to the same DT or another DT, or advance the matter to the Court of Three Judges. However, the judge was *not* empowered to substitute the penalties recommended by the DT with either a recommended or imposed penalty. As such, her order to increase the penalty was set aside.

22.54 Second, the Court of Appeal held that several charges had been made out against KTH. Charges relating to misconduct unbefitting an advocate and solicitor were made out:

(a) The DT wrongly held that KTH did not enter into a consent order against AL's instructions. The question was whether KTH had been authorised by AL to enter into a consent order. However, the DT did not consider that various e-mails showed that AL did not authorise to KTH consent to particulars being struck out, or vest KTH with the discretion to decide. In particular, AL (i) wanted to be apprised of the contents of the submissions; (ii) wanted to be kept updated of any developments as to the amendment of the pleadings; and (iii) expressly instructed KTH that he wanted his pleadings to remain and

27 KTH filed the striking-out application before the Court of Appeal issued its decision in *Iskandar bin Rahmat v Law Society of Singapore* [2021] 1 SLR 874, in which the Court of Appeal overturned a previous decision and held that it did have the jurisdiction to hear such an appeal. See (2020) 21 SAL Ann Rev 688 at 705–709, paras 22.62–22.66.

asked KTH to call him during the court hearing if any issues came up which required his instructions. KTH also admitted, in the DT proceedings, that AL had instructed him that AL wanted all his pleadings to remain.

(b) Upon receiving such instructions, KTH could have informed AL that he was not prepared to undertake the engagement on these terms or would only be prepared to act for AL if he retained the discretion to make such concessions as he felt obliged to as an officer of the court. However, he did not do so and did not reply to AL's e-mail containing the express instructions.

(c) KTH had entered into the consent order contrary to AL's instructions. This constituted misconduct unbefitting an advocate and solicitor, as any reasonable person would have said without hesitation that a solicitor should not act contrary to his client's express instructions as KTH had done. However, KTH's conduct did not amount to fraudulent or grossly improper conduct, as there was no dishonesty to the court, KTH had not compromised AL's interests, and KTH had acted appropriately in his conduct before the court.

22.55 Further, charges relating to grossly improper conduct were made out:

(a) KTH had intentionally concealed from AL that he had entered into a consent order, and the DT was wrong to have found otherwise. The DT had taken into account various irrelevant considerations. KTH had never told AL what he had done during the hearing because KTH had acted against AL's instructions and did not want to be found out.

(b) In particular, AL had asked, multiple times, for the notes of argument of the hearing but these requests were ignored. This led to the inference that KTH did not want AL to obtain them since they would reveal what had transpired. Further, AL had repeatedly instructed KTH to appeal the striking-out order, but KTH side-stepped the issue multiple times before an appeal was eventually filed. KTH was reluctant to file an appeal because he had consented to the orders he was being asked to appeal against, and he therefore did his best to ignore or avoid the issue. Throughout these exchanges, KTH never informed AL that the orders had been made by consent and that this was a major obstacle standing in the way of an appeal.

(c) KTH's intentional concealment of his entry into a consent order amounted to grossly improper conduct because

the essence of such concealment was to deceive and mislead AL, his client, as to what had transpired in the conduct of his own matter in court.

22.56 In light of its findings, the Court of Appeal ordered AL to apply for the matter to be advanced to the Court of Three Judges. There was cause of sufficient gravity for disciplinary action to be taken against KTH:

(a) KTH did not commit a one-off error but had committed multiple misdeeds resulting in multiple charges. He was seeking to mislead his client as to what had transpired in the conduct of his client's matter before the court, and this was grave as it went to the heart of the solicitor–client relationship.

(b) A fine is not generally appropriate where the solicitor's conduct goes beyond mere inadvertence. In this case, there was intentional misconduct.

(c) KTH was a senior member of the Bar. The more senior the offending solicitor, the greater the damage to the standing of the legal profession, and the greater the gravity.

22.57 While the Court of Appeal was sympathetic to the fact that KTH faced challenges because of AL's conduct, and that AL's stance was not in the best interests of himself or his children, this did not justify KTH's conduct. If a client insists on a course of action that a solicitor is unwilling to take up, the solicitor should discharge himself. The solicitor cannot go ahead and conduct the case in a manner that is contrary to his client's instructions.

22.58 For completeness, as of the date of publication, the matter has been heard by the Court of Three Judges, which ordered KTH to be suspended for three years.[28] As this judgment was handed down in 2022, it will be addressed in a subsequent review.

22.59 Things may well have turned out differently for KTH if he had, prior to the hearing, written to AL to expressly state that he would only be prepared to represent AL if he was given the full discretion to make the necessary judgment calls at the hearing. If AL could not be swayed, KTH could have, at the very least, sought an adjournment of the hearing while the issue was sorted out. Perhaps KTH thought he knew better and was doing AL a favour. With the benefit of hindsight, perhaps not.

28 *Loh Der Ming Andrew v Koh Tien Hua* [2022] SGHC 84.

VII. High Court's powers when reviewing Council's decision not to refer complaint to chairman of inquiry panel (for review committee to be constituted)

22.60 In *CBB v Law Society of Singapore*,[29] the respondent solicitor assisted the complainant's mother in, *inter alia*, establishing a trust. The Council of the Law Society ("the Council") was required to seek leave of court before it acted on the complaint (under s 85(4C)(*a*) read with s 85(4A) of the LPA), because aspects of the complaint pertained to matters arising more than six years before the complaint. The Council decided that it would *not* seek such leave. The complainant applied to set aside the Council's decision, and for an order directing the Council to apply for leave.

22.61 The High Court judge held that the Council had acted irrationally and quashed the Council's decision.[30] However, the judge did not order the Council to apply for leave, but instead ordered the Council to reconsider its decision. The judge made no order as to costs.[31]

22.62 The complainant appealed. He sought a mandatory order for the Council to apply for leave and appealed against the costs order. The Court of Appeal allowed the appeal in respect of the mandatory order but dismissed the appeal in respect of costs.

22.63 The Court of Appeal held that where a court finds that a decision was reached via a defective process (under grounds of judicial review), it will not generally mandate the performance of the duty in a particular manner. Generally, the courts review the decision-making process and not the merits of the decision, and do not give directions as to how the administrators are to perform their duties.

22.64 However, in rare and unusual occasions where all the circumstances point towards exercising a power in a certain manner, the administrator may be under a specific duty, such as where the following factors apply:

> (a) availability in the public domain of objective evidence particularly relevant to the merits of the decision. A court will be more inclined to compel a decision-maker to take certain steps where the evidence relevant to the merits of the decision has already been determined. In the present case, the complaint arose out of Court of Appeal proceedings, and there was ample

29 [2021] 1 SLR 977.
30 *CBB v Law Society of Singapore* [2021] 3 SLR 487.
31 *CBB v Law Society of Singapore* [2021] 3 SLR 513.

basis for assessing the potential gravity of the practitioner's conduct. This weighed in favour of a mandatory order;

(b) whether, given the policy content of the decision, the court should defer to another branch of government possessing the appropriate institutional competence. While the court has a duty to consider matters of justice and legality, it is not best equipped to scrutinise decisions laden with policy or security issues, or political considerations. In the present case, the policy content of the Council's decision, being the discipline of lawyers, was a matter within the expertise of the Court of Appeal, and there was no real issue of deference to executive discretion. This weighed in favour of a mandatory order;

(c) the decision-maker's conduct. The court would be more disposed to mandate a specific action where the decision-maker expressly manifests an intention not to reconsider its decision. Undue delay is a factor. However, if a decision-maker voluntarily reconsiders its decision and provides reasons before the final determination of the remedy, this would often obviate the application for a mandatory order. In the present case, almost 11 months had passed but the Council still had not reconsidered the complaint or acted upon the judge's order, which weighed in favour of a mandatory order;

(d) any other reasons against the grant of a mandatory order, including (i) the need for constant supervision; (ii) public inconvenience by such an order; (iii) impossibility of carrying out the duty; (iv) limited public resources available to discharge the duty; (v) no practical effect in granting such a remedy; or (iv) the absence of prejudice. A mandatory order is always discretionary. No such reasons were put to the Court of Appeal in the present case; and

(e) the absence of alternative ways of carrying out the duty. The court determines, by statutory interpretation, the relevant considerations for the administrator's decision. Then, the court ascertains whether the administrator can carry out its duty in alternative ways. If there are no alternative means for the administrator to carry out its public duty, this is a factor in favour of a mandatory order. In the present case, the Court of Appeal could not identify any alternative way, apart from applying for leave, in which the Council might carry out its duty. When deciding whether to apply for leave, the Council should consider (i) the length of delay; (ii) the prejudice occasioned by the delay; (iii) the explanation for the delay; and (iv) the prospects of the complaint. These factors, when considered, weighed in favour of an application for leave.

22.65 Finally, as regards costs, the court does not generally make adverse costs orders against public bodies performing a public regulatory function except where the public body has demonstrated "bad faith or … gross dereliction".[32] While the Council had erred in its decision, its conduct did not amount to such. The Court of Appeal therefore did not disturb the judge's exercise of discretion. As to the costs of the appeal, costs were ordered against the Law Society as the Council was wrong to not have acted at all, and which necessitated the appeal.

22.66 The key takeaways from this case are that:

(a) where the Council is faced with a complaint which relates to matters taking place more than six years before the complaint, the Council should consider the factors above in order to come to a decision as to whether to apply for leave of court to refer the complaint to the chairman of the inquiry panel. It cannot simply dismiss the complaint on the basis that it has been made out of time; and

(b) where the Council has been ordered to reconsider its decision, it should do so timeously or run the risk of an appeal that would lead to costs being incurred by the Law Society.

VIII. Management of concurrent disciplinary and criminal proceedings

22.67 In *Seow Theng Beng Samuel v Law Society of Singapore*,[33] the Court of Three Judges considered whether disciplinary proceedings should continue to be held in abeyance pending the conclusion of criminal proceedings.

22.68 The Law Society had brought eight principal and eight alternative charges against the applicant for physically and verbally abusing three of his employees in March and April 2018. The procedural chronology was as follows:

(a) 2 May 2019: The Law Society filed charges for professional misconduct against the applicant.

(b) 7 June 2019: Criminal charges were filed against the applicant, arising from broadly the same set of facts.

(c) 14 August 2019; 19 November 2019: The applicant pleaded guilty to the professional misconduct charges.

32 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [38].
33 [2022] 3 SLR 830.

(d) 10 March 2020: The DT issued its report.

(e) 7 April 2020: The Law Society applied for an order that the applicant be sanctioned ("OS 4").

(f) 27 July 2020: The applicant pleaded guilty to the criminal charges.

22.69 The applicant had tendered psychiatric reports to support his argument that he was suffering from adjustment disorder and that this had a bearing on his culpability. The Prosecution disputed the psychiatric evidence and sought to adduce its own expert evidence. As a result, the District Court held a Newton hearing, which was still ongoing.

22.70 OS 4 was initially fixed for hearing in September 2020. However, on the understanding that the Newton hearing would conclude by September 2020, the applicant proposed, and the Law Society agreed, that OS 4 be held in abeyance pending the conclusion of the Newton hearing. However, as the Newton hearing had yet to conclude more than a year later, the Law Society wanted to proceed with OS 4. The applicant then filed an application for the hearing of OS 4 to continue to be held in abeyance pending the completion of the Newton hearing.

22.71 The mere fact that there are concurrent criminal and disciplinary proceedings does not necessarily mean that either set of proceedings should be stayed. The following guidelines apply in determining whether a stay should be granted:

(a) Where there are concurrent proceedings before the courts, the courts may grant a stay of one of the concurrent proceedings where there is a real risk of serious prejudice which may lead to injustice in either the civil or disciplinary proceedings or both.

(b) However, the courts will only exercise their discretion to stay one of two concurrent sets of proceedings sparingly and with great care.

(c) If the court is satisfied that, absent a stay, there is a real risk of serious prejudice, then the court must balance that risk against the countervailing considerations such as the protection of the public interest in ensuring that the disciplinary process is not impeded.

22.72 The Court of Three Judges dismissed the application on the following grounds:

(a) The applicant failed to establish a real risk of serious prejudice that might lead to injustice in OS 4 and/or the criminal

proceedings. The risk of inconsistent findings did not meet this threshold as sentencing considerations in the criminal context differ from those in the legal disciplinary context. Unlike criminal punishment, the principal purpose of disciplinary sanctions is not to punish the errant solicitor but to protect the public and uphold confidence in the integrity of the legal profession, which explains why mitigating factors carry less weight in disciplinary than in criminal proceedings. As such, even if the District Court accepted the applicant's adjustment disorder as a mitigating factor, his adjustment disorder would likely be of less consequence in OS 4.

(b) There would be a risk of inconsistent findings regardless of the sequence of the disciplinary and criminal proceedings as the court's findings in OS 4 would not be binding or determinative of the issues in the Newton hearing. The risk of inconsistent findings therefore did not justify a stay of OS 4.

(c) The applicant was content to plead guilty before the DT prior to the Newton hearing, and notwithstanding the purported risk of inconsistent findings by the DT and the District Court. The applicant could not explain how OS 4 differed in any material aspect from the DT proceedings, such that the hearing of OS 4, but not the DT proceedings, should be impeded by the ongoing Newton hearing. Further, the applicant was not prejudiced by the fact that the DT proceedings and the criminal proceedings took place concurrently.

(d) Since there was no real risk of serious prejudice leading to injustice in either or both sets of proceedings, there was no need to carry out the balancing exercise.[34] In any event, if OS 4 was stayed, the delay in its conduct and conclusion would undermine the overriding objectives of legal disciplinary proceedings, being the protection of the public, and the maintenance of public confidence in the integrity of the legal profession.

22.73 For completeness, as of the date of publication, the matter has been heard by the Court of Three Judges, which ordered the applicant to be struck off the roll of advocates and solicitors.[35] This judgment will be addressed in a subsequent review as it was only handed down in 2022.

22.74 In this case, the applicant's position was significantly undermined by his willingness to plead guilty before the DT, even before the

34 Set out at para 22.71(c) above.

35 *Law Society of Singapore v Seow Theng Beng Samuel* [2022] SGHC 112.

conclusion of the Newton hearing. Parties facing concurrent disciplinary and criminal proceedings would do well to consider the implications that a plea of guilt would have on all existing proceedings – and not just the instant proceedings in which the plea of guilt is entered – in deciding whether and when to plead guilty.

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

22.75 In *Law Society of Singapore v Shanmugam Manohar*,[36] the Court of Three Judges overturned the High Court's decision allowing the disclosure of statements recorded by the Commercial Affairs Department ("CAD") to the Law Society for disciplinary purposes.

22.76 The facts were as follows. The police were investigating a motor insurance fraud scheme and recorded various statements. Some of the statements ("the Contested Statements") suggested that the respondent solicitor ("SM") had paid referral fees to a third party in exchange for client referrals. The statements were forwarded to the Attorney-General's Chambers, which subsequently made a complaint about SM to the Law Society.

22.77 Prior to the DT hearing, SM applied to the High Court for (a) declarations that the Contested Statements were recorded improperly, should not have been disclosed to the Law Society, and could only be used in criminal proceedings and not for other purposes such as evidence in disciplinary proceedings ("the High Court Application");[37] and (b) an order that the disciplinary proceedings be stayed pending the resolution of the High Court Application. Both applications were dismissed and SM did not go through with an appeal.

22.78 The DT hearing then took place, and the DT found that (a) the Contested Statements were admissible; and (b) the charges against SM were proven and there was cause of sufficient gravity for disciplinary action.[38] The Law Society then applied to the Court of Three Judges for an order that SM be sanctioned.

22.79 Before the Court of Three Judges, SM argued that the Contested Statements were inadmissible in evidence and that the DT had incorrectly

36 [2022] 3 SLR 731.

37 *Shanmugam Manohar v Attorney-General* [2021] 3 SLR 600, discussed in (2020) 21 SAL Ann Rev 688 at 714–717, paras 22.85–22.97.

38 *The Law Society of Singapore v Shanmugam Manohar* [2020] SGDT 9.

relied on them in finding that the charges were made out. The Court of Three Judges therefore had to decide:

> (a) whether the Contested Statements were admissible in the disciplinary proceedings;
>
> (b) if admissible, whether the charges were proven beyond a reasonable doubt, and if so, the appropriate sanction;
>
> (c) if not admissible, whether the charges were still proven beyond a reasonable doubt after excluding the Contested Statements, and if not, whether the Court of Three Judges should acquit SM or send the matter back to the same DT or a new DT.

22.80 As to the admissibility of the Contested Statements, SM raised three arguments:

> (i) The CAD had acted *ultra vires* in purporting to exercise its power under s 22 of the Criminal Procedure Code[39] ("CPC") to record the Contested Statements. The CAD officer had acted with the improper purpose of investigating professional misconduct, instead of the statutorily permitted purpose of investigating criminal offences, and the Contested Statements were therefore a "nullity" and "void *ab initio*" ("the *Ultra Vires* Argument").
>
> (ii) The Contested Statements were confidential and should not have been disclosed to the Law Society ("the Confidentiality Argument").
>
> (iii) The Contested Statements were inadmissible in the disciplinary proceedings as they had been recorded under s 22 of the CPC and did not fall under any of the exceptions under s 259 of the CPC which allowed their admission into the evidence ("the CPC Argument").

22.81 However, SM was precluded by issue estoppel from raising the *Ultra Vires* Argument and the Confidentiality Argument before the Court of Three Judges. The High Court had already dismissed both arguments in the course of the High Court Application, and SM could not justify the exclusion of the doctrine of issue estoppel. The Court of Three Judges also held that even if SM had not been barred by the doctrine of issue estoppel, these two arguments would still have failed on their merits.

22.82 Turning to the CPC Argument, SM was entitled to raise this argument as it was not raised in the High Court Application. The Court of Three Judges then went on to analyse s 259 of the CPC and held that:

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39 Cap 68, 2012 Rev Ed.

(a) Section 259(1) of the CPC lays down a general rule that any police statement given by "a person other than the accused" (meaning a witness) in the course of investigations is "inadmissible in evidence" unless it falls within certain specified exceptions. Such evidence is inadmissible in *all* proceedings, including civil and/or disciplinary proceedings, unless it falls within the exceptions.

(b) It is only when the evidence falls within any of the exceptions in s 259 of the CPC that the provisions of the Evidence Act[40] become relevant. When the evidence is sought to be admitted in criminal or disciplinary proceedings, the court retains a residual discretion to exclude the evidence where its prejudicial effect exceeds its probative value.

(c) The Contested Statements were inadmissible and none of the exceptions in s 259 of the CPC applied to render them admissible. The DT should not have admitted the Contested Statements into the evidence.

22.83 Without the Contested Statements, there was insufficient evidence to make out the charges. The Court of Three Judges therefore went on to consider whether SM should be acquitted, or whether the matter should be sent for a fresh hearing, and applied the following principles:[41]

(a) At one extreme are cases where 'the evidence adduced at the original trial was insufficient to justify a conviction' ('category one' cases). In such cases, save in circumstances so exceptional that they cannot be readily envisaged, an acquittal and not a retrial should be granted.

(b) At the other extreme are cases where 'the evidence against the appellant at the original trial was so strong that a conviction would have resulted' ('category two' cases). In such cases, *prima facie*, the more appropriate course is to dismiss the appeal and affirm the conviction.

(c) Cases that fall between the two extremes ('category three' cases) include the following situations: where critical exculpatory evidence is no longer available; where the fairness of the trial below is compromised by the trial judge's conduct; or where the length of time before the putative retrial is disproportionate to the appellant's sentence and/or ongoing period of incarceration. The following non-exhaustive factors are relevant to deciding whether a retrial or acquittal should be ordered in such circumstances:

40 Cap 97, 1997 Rev Ed.

41 *Law Society of Singapore v Shanmugam Manohar* [2022] 3 SLR 731 at [133].

(i) the seriousness and prevalence of the offence;

(ii) the expense and the length of time needed for a fresh hearing to be held;

(iii) the consideration that an appellant ought not to be condemned to undergo a trial for the second time through no fault of his own unless the interests of justice require that he should do so;

(iv) the length of time that will have elapsed between the offence and the new trial if one is to be ordered;

(v) whether there was evidence which tended to support the appellant at the original trial which would no longer be available at the new trial; and

(vi) the relative strengths of the case presented by the Prosecution and appellant at the original trial.

(d) Ultimately, the question as to whether a retrial or an acquittal ought to be ordered is a matter which calls for the exercise of 'the collective sense of justice and common sense' of the court.

22.84 The Court of Three Judges held that this was *not* a category one case because such cases do not include the situation where the available trial evidence (on which the impugned guilty verdict was originally obtained) had been wrongly admitted in the first place or was incomplete because evidence was wrongly excluded by the trial judge. Instead, this was a category three case. Considering the factors, the interests of justice warranted a fresh hearing:

(a) The alleged professional misconduct was serious and constituted serious dereliction of duty and blatant disregard for the interests of referred clients.

(b) SM failed to proffer any alternative version of events but relied on technical arguments on the admissibility of evidence without putting forth any substantive defence. There was a strong public interest in having a fresh hearing so that SM's alleged misconduct could be properly investigated, so as to uphold standards of the legal profession and retain public confidence.

(c) The expense and time required to conduct a fresh hearing should not be significant, and SM would not suffer any undue prejudice if a fresh hearing was ordered.

The Court of Three Judges therefore ordered a new DT to be appointed (so as to avoid any perception of prejudgment by the original DT).

22.85 While SM successfully argued that the original DT should not have relied on the Contested Statements to find that the charges had been

made out, it remains to be seen what evidence will be placed before the new DT, and whether the charges will be made out or dismissed on the strength of the admissible evidence.

X. Admissions to the Bar

22.86 While reported decisions involving the admission of advocates and solicitors are rare, there were not one but two such reported decisions this year, which appears to be a first in the history of Singapore.

22.87 *Re Kuoh Hao Teng*[42] was fairly straightforward on the law, but not on the facts. The applicant to the bar ("KHT") was accepted as his supervising solicitor's ("TJY") trainee. On the final day of his training, KHT presented TJY with various documents (which were required for his application) for endorsement. When KHT subsequently reviewed the documents, he found that one of the requisite documents was, in his view, not checked properly.

22.88 KHT prepared an amended document which he felt was accurate, sent the amended document to TJY with his reasons for the changes, asked TJY if he had any thoughts on the changes, and stated that he would submit the amended document if TJY had no comments. As no comments were received from TJY, KHT submitted the documents to the Singapore Institute of Legal Education.

22.89 About two weeks later, TJY filed and served a notice of objection. TJY claimed that KHT was playing computer games and watching movies during office hours, did not complete the work given to him, had not followed up on cases assigned to him, and had misled and harried him into signing the relevant forms. The police eventually got involved, and administered a stern warning to KHT for an offence of forgery.

22.90 The next year, KHT started and completed a fresh stint as a practice trainee under another supervising solicitor from another firm. He then filed a fresh application for admission to the Bar. However, as his previous application for admission was still pending, KHT applied to withdraw his previous application, upon which TJY indicated that he would still be opposing any application by KHT for admission to the Bar.

22.91 The High Court judge who was hearing both applications directed parties to file several rounds of affidavits and submissions. Finally, after

42 [2021] SGHC 79.

several months, TJY withdrew his objections to KHT's application, and KHT was admitted to the Bar.

22.92 KHT then asked for costs against TJY. It transpired that TJY did not have the prerequisite qualifications to take on practice trainees at that time. Supervising solicitors are required to hold a practicing certificate for at least five out of the seven years preceding the supervision period, but TJY had held a practicing certificate for less than three years in the seven years that preceded his supervision of KHT. As such, even if TJY had not objected to KHT's previous application for admission, KHT could not have been admitted under that application.

22.93 Further, it transpired that KHT may not have been TJY's only practice trainee at the material time. Any such other trainees might have been admitted to the Bar when they had not received supervision from a qualified person, and the High Court judge indicated that inquiries might need to be conducted urgently by the relevant authorities.

22.94 TJY's lack of qualifications might never have come to light if he had not objected to KHT's application. This brings to mind the well-known adage: "Let him who is without sin among you be the first to throw a stone."[43]

22.95 In contrast, *Re Vikram Kumar Tiwary*[44] was fairly straightforward on the facts but not on the law. The applicant to the Bar ("VKT") passed all the requirements for admission and completed his practice training. He then filed his application for admission. However, nine days before his application was heard, he passed away suddenly.

22.96 Counsel moving VKT's call asked that his application be heard, and VKT be admitted to the Bar posthumously. As there was no precedent for such an application, the High Court judge adjourned proceedings for counsel to satisfy the court that there were no legal impediments against granting the application.

22.97 The High Court eventually held that the application could be granted:

> (a) VKT's cause of action survived his passing, as provided for in the Civil Law Act.[45]

43 *The Holy Bible* John 8:7 (English Standard Version).
44 [2021] SGHC 216.
45 Cap 43, 1999 Rev Ed.

(b) VKT's inability to take the oath and make the declaration as an advocate and solicitor was not an impediment, as the declaration would only need to be made after the applicant's admission and was not a prerequisite for admission.

(c) The court could invoke its inherent jurisdiction to prevent injustice or abuse of the process of the court. In this case, justice would be served if VKT's application was allowed. He had fulfilled all the necessary requirements for admission, had registered himself with various legal aid schemes, and had received multiple testimonies of good character from prominent lawyers who supported the application.

22.98 Had VKT made his application in person on 9 June 2021, his application would no doubt have been granted. What ought to have been done, equity treats as done, and VKT was admitted to the Bar.
