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Comment

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

The court system is not a marketplace which entitles a lawyer to pick and choose a product for his client regardless of adverse consequences to the latter and the administration of justice. The courts have repeatedly emphasised that the initiation of claims, applications and appeals must be justified by the potential benefit to be gained in the light of proportionate expenditure and the proper use of the court's resources.

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I. Introduction

1 The recent judgment of the Court of Appeal in *Singapore Shooting Association v Singapore Rifle Association*[1] ("*SSA v SRA*") has again raised the responsibility of the lawyer to the administration of justice when conducting litigation. The adversarial culture in most common law countries can foment the belief that a client's desire to proceed with a claim, application or an appeal regardless of a potentially adverse or disproportionate outcome is sacrosanct leaving the lawyer with no say in the matter. This is a misconception that has been repeatedly exposed by the Singapore Court of Appeal in a series of cases.[2] Furthermore, as will be shown, the rules of ethics clearly require the lawyer to exercise his own professional judgment in conducting a case in court in the light of his duty to uphold the interests of the administration of justice.

1 [2019] SGCA 83.
2 See Jeffrey Pinsler SC, "Litigation and the Client's Right to Make an Informed Choice" (2008) 20 SAcLJ 21.

II. Impact of recent cases

2 *SSA v SRA* concerned a dispute over a resolution passed by the Singapore Shooting Association's ("SSA's") Council purporting to suspend the Singapore Rifle Association's ("SRA's") privileges at the National Shooting Centre. The SRA sought declarations relating to the validity of the resolution and brought a claim against the second to fourth appellants ("the individual defendants") for conspiring to cause it damage by procuring the passage of that resolution. The Court of Appeal concluded that "the conspiracy claim ought not to have been part of the proceedings in the High Court".[3] Several reasons underlay this finding: the SRA was not authorised to bring the conspiracy claim pursuant to s 31(2) of the Charities Act;[4] the claim was "ultimately ill-founded for lack of actionable loss or damage";[5] and, furthermore, "[m]ost strikingly, even if SRA had succeeded in the conspiracy claim, the most it stood to recover, on its best case, was a sum of $63,200, far below the threshold for a claim to be mounted in the High Court".[6] The Court of Appeal also observed that the conspiracy claim took up 11 days of hearing, involved five lawyers in the High Court and six lawyers in the Court of Appeal.[7]

3 In the circumstances, the Court of Appeal declared that the litigation was disproportionately conducted by the SRA.[8] It reiterated its observations in *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang*[9] ("*Lam Hwa*") concerning the ethical duty of lawyers to undertake a proper risk-benefit evaluation at each stage of the proceedings pursuant to r 17(2)(*e*)(i) of the Legal Profession (Professional Conduct) Rules 2015[10] ("LP(PC)R 2015"). This provision states that a legal practitioner "must, in an appropriate case, together with his or her client … evaluate whether any consequence of a matter involving the client justifies the expense of, or the risk involved in, pursuing the matter".[11] Counsel for the

3 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [176].
4 Cap 32, 2007 Rev Ed. See *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [165].
5 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [176].
6 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [176].
7 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [165] and [176].
8 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [176].
9 [2014] 2 SLR 191 at [36].
10 S 706/2015.
11 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [175].

SRA had argued that the claim was justified because there was a concern about the proper governance of a charity and that the case "had to be brought on the principle of not allowing SSA to bully SRA".[12]

4 Apart from the principle of proportionality, the Court of Appeal reiterated the point made in *Lam Hwa* that the lawyer must decide whether to conduct litigation if such litigation (in the case of *Lam Hwa*, whether a case ought to be appealed) would compromise the interest of the administration of justice:[13]

> [I]t should not be forgotten that even if his client were prepared to take the matter to court and bear the expense of litigation, [counsel for SRA], as an officer of the court, nevertheless owed a higher duty to the court to assess whether it would be in the interests of the administration of justice to pursue the conspiracy claim: see *Lam Hwa* at [37]–[38]. It was not simply his client's money that was at stake; precious judicial time and resources also had to be expended on the claim, even though it was manifestly of insufficient value to be litigated in the High Court.

5 In *Lam Hwa*, the Court of Appeal stated concerning the decision to take a case on appeal:[14]

> Even on the basis that [counsel] had undertaken the necessary evaluation with his client, he should have been alive to the fact that taking the matter further was likely to be incompatible with his higher duty to the court as an officer entrusted to assist it in the administration of justice.

6 These statements by the Court of Appeal in *SSA v SRA* and *Lam Hwa* leave no doubt that a lawyer must, as an officer of the court, not accede to his client's wishes to make a claim or application or pursue an appeal which cannot be justified in any real sense. Access to justice does not mean the untrammelled right to sue or to mount an appeal regardless of the merits of one's position but the right, reasonably based, to seek judicial relief. Indeed, access to justice is compromised when the legal system is unjustifiably used (for meritless claims and/or for the purpose of oppressing the opposing party or other ulterior purposes) because such an attitude deprives other litigants and would-be litigants of access to the court's resources.

7 A "reasonably based" claim, application or appeal might be defined as involving a case which has the potential of succeeding on the law and

12 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [177].

13 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [178].

14 *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2014] 2 SLR 191 at [37].

facts. In this context, r 9(2)(*h*)(ii) of the LP(PC)R 2015 bars a lawyer from drafting "any originating process, pleading, affidavit, witness statement or notice or grounds of appeal containing any … contention which the legal practitioner does not consider to be reasonably and properly arguable". In determining whether the lawyer has breached this rule, the court would apply the objective test of whether a reasonable lawyer in the actual lawyer's position would have considered the contention(s) to be reasonably and properly arguable. In certain circumstances, the lawyer would have to show compelling grounds to establish a reasonably and properly arguable case, as when the court below has provided a reasoned judgment and the appeal would be disproportionately costly. As the Court of Appeal put it in *Lam Hwa*: "it would have been incumbent on any solicitor contemplating a further appeal to examine the issue afresh and be reasonably and objectively satisfied that there were very strong grounds for an appeal and thus that the decision being appealed was clearly wrong so as to warrant proceeding further".[15]

8 Moreover, the lawyer must always consider other litigation routes which may be more efficacious and less costly. In *SSA v SRA*, the Court of Appeal pointed out that the SRA could have applied for an injunction to restrain the SSA from acting on the resolution and interfering with the SRA's privileges: "This, it seems to us, would have been a far more cost-efficient approach than bringing what was ultimately a defective application to the High Court for declaratory relief."[16] Again, while the SRA made "lengthy submissions" in the High Court and the Court of Appeal concerning an implied term and its breach, "a far simpler alternative was available to SRA" on the terms of a particular clause of the agreement.[17] The Court of Appeal went on to propound the essential principles of efficiency and economy in court proceedings:[18]

> Although it is not for the courts to say how parties should run their cases, we think it only right to point out that where parties have the option of choosing between a shorter, simpler argument and a more convoluted and circuitous one, they ought to pursue the former instead of the latter. After all, one of the principles expressed in r 9 of the LPPCR is that a legal practitioner must conduct his case in a manner which maintains the efficiency of court proceedings. Thus, in *Lam Hwa*, we criticised counsel for having filed extensive submissions and multiple bundles for an extremely straightforward matter, and observed that doing so when the merits of the case did not require it would not only lead to

15 *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2014] 2 SLR 191 at [37].
16 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [179].
17 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [134]–[139] and [180].
18 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [180].

unnecessary costs for the client, but also amount to a breach of a solicitor's duty to the court.

III. Ethics rules in Singapore and Australia governing the lawyer's independent and professional judgment in conducting cases

A. Singapore

9 In Singapore, the lawyer's duty to exercise independent, professional judgment in the conduct of his case, which entails not pursuing meritless litigation, is clearly encompassed by the principles in rr 4(*a*)–4(*c*), 9(1)(*a*)–9(1)(*b*) and 10(1)(*b*)–10(1)(*c*), and the rule in r 9(2)(*h*)(ii) of the LP(PC)R 2015:

(a) "A legal practitioner has a paramount duty to the court, which takes precedence over the legal practitioner's duty to the legal practitioner's client" (r 4(*a*)).

(b) "A legal practitioner's duty to the legal practitioner's client is subject only to the legal practitioner's duty to the court, and must at all times be fulfilled in a manner that upholds the standing and integrity of the Singapore legal system and the legal profession in Singapore" (r 4(*b*)).

(c) "A legal practitioner has a duty to discharge honourably and with integrity all of the legal practitioner's responsibilities to any tribunal before which the legal practitioner appears, the legal practitioner's clients, the public and other members of the legal profession" (r 4(*c*)).

(d) "A legal practitioner has a duty to assist in the administration of justice, and must act honourably in the interests of the administration of justice" (r 9(1)(*a*)).

(e) "A legal practitioner has an obligation to ensure that any work done by the legal practitioner, whether preparatory or otherwise, relating to proceedings before any court or tribunal, will uphold the integrity of the court or tribunal and will contribute to the attainment of justice" (r 9(1)(*b*)).

(f) "A legal practitioner must exercise professional judgment over the substance and purpose of any advice which the legal practitioner gives and any document which the legal practitioner drafts" (r 10(1)(*b*)).

(g) "A legal practitioner must not engage in any conduct which would be unlawful, unethical or otherwise improper,

whether or not such conduct would promote the cause of his or her client" (r 10(1)(*c*)).

(h) "A legal practitioner must not … draft any originating process, pleading, affidavit, witness statement or notice or grounds of appeal containing any … contention which the legal practitioner does not consider to be reasonably and properly arguable" (r 9(2)(*h*)(ii)).

10 Rule 9(2)(*h*)(ii) of the LP(PC)R 2015[19] is particularly apposite as it prohibits the lawyer from drafting contentions that do not raise a reasonable and properly arguable case.[20] Rule 10(1)(*b*) echoes this responsibility by emphasising the lawyer's professional judgment. These provisions and the principles referred to in the preceding paragraphs clearly require the lawyer to exercise his own judgment in deciding how to act in a manner that is consistent with the interest of the administration of justice. As Andrew Phang Boon Leong JA stated in *BOI v BOJ*,[21] "counsel are not the mere mouthpieces of their clients. They are not mere automatons, executing every instruction of the client".[22] This principle that the lawyer is not a "mouthpiece" of his client in the presentation of a case is also applicable to the responsibility of the lawyer in ensuring that it is appropriate to make a claim, application or to take a case on appeal. In *Law Society of Singapore v Nor'ain bte Abu Bakar*[23] ("*Nor'ain*"), the Court of Appeal reiterated[24] the English Court of Appeal's comments in *R v Ulcay*[25] ("*Ulcay*"):

> The correct meaning of the phrase 'acting on instructions', as it applies to the professional responsibility of the advocate in any criminal court, is sometimes misunderstood, even by counsel. Neither the client nor, if the advocate is a barrister, his instructing solicitor, is entitled to direct counsel how the case should be conducted. The advocate is not a tinkling echo, or mouthpiece, spouting whatever his client 'instructs' him to say. …

11 Although *Ulcay* concerned criminal proceedings, the Court of Appeal in *Nor'ain* put it beyond doubt that this principle applies to civil proceedings as well: "[T]he above observations by the English Court of Appeal very neatly sum up the advocate and solicitor's ultimate responsibility to the court. He may not hide behind the shield that is his client's instructions if such instructions are contrary to his overriding

19 This rule is considered in para 7 above.
20 See para 7 above.
21 [2018] 2 SLR 1156.
22 *BOI v BOJ* [2018] 2 SLR 1156 at [3] (also see [139]).
23 [2009] 1 SLR(R) 753.
24 *Law Society of Singapore v Nor'ain bte Abu Bakar* [2009] 1 SLR(R) 753 at [91].
25 [2008] 1 WLR 1209 at [27].

duty to the court."[26] Hence, in *Prometheus Marine Pte Ltd v King, Ann Rita*[27] ("*Prometheus*"), a case that involved an arbitration, the Court of Appeal was "dismayed" and "deeply concerned" by the approach of the appellant's lawyer in filing two summonses before the Court of Appeal despite existing appeals and, additionally, in making groundless allegations:[28]

> … we were dismayed by [counsel's] repeated tendency to say that he was maintaining untenable positions on his client's instructions. We reiterated that an advocate and solicitor owes his first duty to the court and if a position, in good conscience, is untenable, the advocate is duty-bound to decline to put it forward. On the other hand, if the advocate considers that the point can fairly be put, it is simply unsatisfactory for him, under questioning from the court, to suggest he is holding on to that position on the instructions of his client. That conveys the unhappy and unacceptable position that the advocate sees himself as the client's unwitting or unthinking mouthpiece.
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> … we were deeply concerned by [counsel's] willingness to mount allegations of fraud and corruption against the Arbitrator and allegations of bias against the Arbitrator and the Judge without any basis. … there has to be an evidentiary basis for arguments in originating summonses relating to the setting aside of arbitral awards, and in our view, given the serious allegations made by the Appellant, [counsel], as an officer of the court, had a duty to ensure compliance with the procedural requirements. In addition, in the circumstances of this case, as an officer of the court, he also owed the court a duty to consider the evidence and ensure that there was reasonably credible material before mounting his arguments, in particular serious ones regarding fraud or apparent bias on the part of the Arbitrator and/or the Judge. …

12 Although *Prometheus* involved exceptional circumstances, the principle that a lawyer must not make inappropriate claims or initiate unjustifiable applications or appeals simply because of his client's instructions applies generally in litigation. It bears repeating that the lawyer is not a "tinkling echo" or "mouthpiece" and must exercise his own professional judgment in deciding how to conduct the case. In *Lam Hua* the Court of Appeal referred to rr 55(*b*) and 55(*c*) of the former Legal Profession (Professional Conduct) Rules,[29] which required the lawyer, *inter alia*, to "use his best endeavours to avoid unnecessary adjournments, *expense and waste of the Court's time*" and "assist the Court in ensuring a *speedy and efficient trial* and in arriving at a just decision" [emphasis

26 *Law Society of Singapore v Nor'ain bte Abu Bakar* [2009] 1 SLR(R) 753 at [91].
27 [2018] 1 SLR 1.
28 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [70] and [71].
29 S 156/1998.

added by the Court of Appeal].[30] Sundaresh Menon CJ applied these rules to the facts:[31]

> We were aware that the appellant had been granted leave by the respective lower courts to appeal at each stage. This did little, in our judgment, to mitigate the solicitor's conduct in this case. The grant of leave to appeal by a lower court merely provides the opportunity to pursue a matter further. It does not displace the solicitor's duty to undertake a proper assessment as to proportionality under r 40 of the PCR …. Neither does it displace counsel's duty to the administration of justice to see if it would really be in the overall interests of justice to proceed further …. [emphasis in original omitted]

13 Rule 40 (referred to in the above extract) was replaced by r 17(2)(*e*)(i) of the LP(PC)R 2015, which was considered earlier in this article.[32]

B. Australia

14 Rules 17.1 and 17.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 encapsulate the lawyer's responsibilities as follows:

> 17.1 A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.
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> 17.2 A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing solicitor's instructions, simply by choosing, contrary to those instructions, to exercise the forensic judgments called for during the case so as to:
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> > 17.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;
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> > 17.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or
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> > 17.2.3 inform the court of any persuasive authority against the client's case.

15 Paragraph 2 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014[33] expressly forbids lawyers (in relation to both

30 *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2014] 2 SLR 191 at [39].
31 *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2014] 2 SLR 191 at [40].
32 See para 3 above.
33 Act 16 of 2014.

proceedings at first instance and appeals)[34] from bringing unreasonable claims and raising unreasonable defences:

> (1) A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
>
> (2) A fact is provable only if the associate reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
>
> (3) This Schedule applies despite any obligation that a law practice or a legal practitioner associate of the practice may have to act in accordance with the instructions or wishes of the client.
>
> (4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.
>
> (5) Provision of legal services in contravention of this clause constitutes for the purposes of this Schedule the provision of legal services without reasonable prospects of success.

16 Paragraph 4(1) of Schedule 2 states that while the provision of legal services without a reasonable prospect of success does not constitute an offence, such conduct "is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice". Indeed, law practices and lawyers are prohibited from filing documents in court relating to a claim or defence unless certification is provided to the effect that there are "reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success".[35]

34 Legal Profession Uniform Law Application Act 2014 (NSW) Schedule 2, para 1(1).
35 Legal Profession Uniform Law Application Act 2014 (NSW) Schedule 2, para 4(2).

IV. Future impact of the "Ideals" in the proposed Rules of Court on the role of the lawyer in presenting claims and pursuing appeals[36]

17 The effect of the "Ideals" in the proposed Rules of Court,[37] which are expected to be introduced in due course, is that a lawyer who pursues a claim or an appeal that cannot be reasonably argued on provable facts would be contravening each of those Ideals by: preventing other litigants and potential litigants from accessing justice;[38] causing unnecessary delay;[39] not performing cost-effective work that is proportionate to the amount or value of the claim;[40] using the court's resources inefficiently;[41] and preventing fair and practical results suited to the needs of the parties.[42] As the court is required to achieve the Ideals in all its orders and directions,[43] it, in this author's submission, would be entitled to terminate a party's case or a claim or a defence which defies any of these Ideals even in the absence of an application for this purpose.

18 Moreover, as parties have "the duty to assist the Court and to conduct their cases in a manner which will help to achieve the Ideals",[44] the lawyer has an ethical duty to advise his client of the latter's responsibilities. Rule 10(2) of the LP(PC)R states that the lawyer acting for a party in litigation "must inform the client of the client's responsibilities to the court or tribunal … including the client's duties … to comply with every legal requirement concerning the conduct and presentation of the client's case". It is not only incumbent on the lawyer to advise the client that a baseless or disproportionate claim, application or an appeal would offend the Ideals; the lawyer must also decline to put forward a claim, make an application or take a matter on appeal if it offends those Ideals.[45]

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36 The Ideals are examined in another article: Jeffrey Pinsler SC, "The Ideals in the Proposed Rules of Court" (2019) 31 SAcLJ 987.

37 The proposed Rules of Court are contained in the paper entitled "Public Consultation on Civil Justice Reforms," which contains the recommendations of the Civil Justice Review Committee and the Civil Justice Commission concerning the proposed Rules of Court (hereinafter "the proposed RoC"). The paper was issued on 26 October 2018.

38 This would be in breach of chapter 1 r 3(1)(*a*) of the proposed RoC. Concerning access to justice, see para 6 above.

39 This would be in breach of chapter 1 r 3(1)(*b*) of the proposed RoC.

40 This would be in breach of chapter 1 r 3(1)(*c*)(iii) of the proposed RoC.

41 This would be in breach of chapter 1 r 3(1)(*d*) of the proposed RoC.

42 This would be in breach of chapter 1 r 3(1)(*e*) of the proposed RoC.

43 See chapter 1 r 3(3) of the proposed RoC.

44 See chapter 1 r 3(4) of the proposed RoC.

45 By virtue of rr 4(*a*)–4(*c*), 9(1)(*a*)–9(1)(*b*), 9(2)(*h*)(ii), 10(1)(*b*) and 10(1)(*c*) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015).

V. Consequences for lawyers who initiate unjustified claims, applications and appeals

19 Lawyers who initiate unjustified claims, applications and appeals face procedural sanctions and the possibility of disciplinary action. Order 59 r 8(1) of the Rules of Court[46] states: "where it appears to the Court that 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 court may disallow costs between the lawyer and his client, direct the lawyer to reimburse his client for any costs paid by the latter to any party, and require the lawyer to indemnify other parties against costs payable by them.[47] Such an order is normally only made after the lawyer is given the opportunity to "show cause" (to explain why the order should not be made),[48] the procedure followed in *SSA v SRA*[49] and *Prometheus*.[50] Furthermore, the Attorney-General may be directed or authorised to attend and participate in this hearing.[51] Apart from cost sanctions, the court or the Attorney-General would be entitled to refer the matter to the Law Society for disciplinary action pursuant to the breach of a relevant rule of the LP(PC)R 2015.

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46 Cap 322, R 5, 2014 Rev Ed.

47 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 59 r 8(1)(*c*).

48 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 59 r 8(2). Exceptions are indicated in r 8(2).

49 *Singapore Shooting Association v Singapore Rifle Association* [2019] SGCA 83 at [186].

50 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [75]. In *Lam Hua Engineering & Trading Pte Ltd v Yang Qiang* [2014] 2 SLR 191 at [42], it is recorded that the lawyer concerned volunteered to pay the indemnity costs of the respondent.

51 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 59 r 8(4).