

JUDICIAL DEVELOPMENTS IN ETHICAL LAWYERING IN SINGAPORE

Over the past nine years, the Singapore courts have issued a number of significant decisions relating to the ethics of lawyering in areas such as conflicts of interest, remuneration and the administration of justice. This article discusses and evaluates the significant themes underlying recent judicial developments in professional ethics, in particular judicial expectations of how solicitors should interpret ethical rules, personal and professional conflicts of interest, the duty to the administration of justice and redressing imbalances in fee arrangements.

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I. Introduction

1 Beginning with the landmark conflicts of interest decision of *Lie Hendri Rusli v Wong Tan & Molly Lim* (“*Lie Hendri Rusli*”)¹ in September 2004, the Singapore courts have over the last nine years issued a number of significant decisions relating to the ethics of lawyering. These cases have dealt with a wide variety of ethical issues, including conflicts of interest, remuneration, administration of justice, referral fees and management of clients’ monies.

2 This article discusses several important themes underlying judicial developments in ethical lawyering between September 2004 and April 2013 (“review period”), in particular judicial expectations of how solicitors should interpret ethical rules (Part II), personal and professional conflicts of interest (Part III), the duty of the Singapore solicitor to the administration of justice (Part IV) and redressing imbalances in fee arrangements (Part V). Each Part begins with a summary of the key judicial developments in the particular area of

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1 [2004] 4 SLR(R) 594.

professional ethics followed by an evaluation of the critical themes arising from these developments.

II. Judicial expectations for interpreting ethical rules

A. Summary of key developments

3 The ethical obligations which Singapore solicitors must observe are found not only in the code of conduct known as the Legal Profession (Professional Conduct) Rules (“LP(PC)R”)² which were enacted as subsidiary legislation in 1998, but also in practice directions issued by the Law Society of Singapore and in judicial decisions. In this regard, the High Court had observed in *Public Trustee v By Products Traders Pte Ltd* (“*By Products Traders*”)³ that the statutory obligations in the LP(PC)R are not exhaustive and that:⁴

[a] solicitor’s duty to act in his client’s interests must therefore take into account prevailing standards of conduct prescribed by the [LP(PC)R], ethical rules and practices prescribed by the Law Society as well as general professional and ethical conventions and practices established through the effluxion of time.

4 During the review period, the Singapore courts have, in a series of cases, provided guidance and clarification on the scope of the ethical rules and duties relating to a solicitor’s professional conduct, especially the basic principles underlying the interpretation of the LP(PC)R.

5 The first case to highlight the Singapore courts’ approach was *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani*.⁵ In that case, the respondent solicitor had acted for a sole administrator of the estate (its sole asset being a private property) to file a petition for letters of administration on his behalf. The respondent solicitor subsequently met a number of the surviving beneficiaries together with his client. At that meeting, the beneficiaries had asked the respondent solicitor whether they could appoint a co-administrator and also expressed certain misgivings about the respondent solicitor’s client being the sole administrator. The respondent solicitor informed the beneficiaries that additional costs and time would be incurred and that they did not have to sign a document renouncing their claim to be co-administrators. However, as it turned out, the beneficiaries did sign this document as well as a document consenting to dispense with sureties to the administration bond after the respondent solicitor’s client became the

2 Cap 161, R 1, 2010 Rev Ed.

3 [2005] 3 SLR(R) 449.

4 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR(R) 449 at [34]–[35].

5 [2006] 4 SLR(R) 308.

sole administrator of the estate. The latter document was apparently explained by the respondent solicitor's clerk to the beneficiaries, but it was unclear whether this was properly done.

6 The respondent, as solicitor for the estate, was charged, *inter alia*, with failing to discharge his duties ("first limb") and/or failing to safeguard the interests of the beneficiaries, in that he subordinated the beneficiaries' interests to his client's interests ("second limb"). An issue arose whether the charge was premised on an existing retainer between the respondent and the beneficiaries. The High Court held that although the first limb of the charge did seem to presuppose an existing retainer, the second limb of the charge "ought to be read as encompassing a broader, *ethical* approach towards clients and non-clients alike" [emphasis in original].⁶

7 The High Court held that r 2 of the LP(PC)R "suggests clearly that one should not adopt a mean-spirited or cramped view of professional conduct rules".⁷ Instead, ethical rules must be interpreted in light of the "four major aims of the [LP(PC)R], which are:⁸

- (a) to maintain the Rule of Law and assist in the administration of justice;
- (b) to maintain the independence and integrity of the profession;
- (c) to act in the best interests of his client and to charge fairly for work done; and
- (d) to facilitate access to justice by members of the public.

8 The High Court observed that the respondent solicitor could have been held liable for breaching his duty to the beneficiaries to safeguard their interests under an implied retainer even though he had not entered into an express retainer with the beneficiaries. This was because the respondent solicitor did not make a "casual or 'one-off'" statement to the beneficiaries but they were "led by [him] to believe that he was looking after their interests as well".⁹ However, the High Court did not pursue this argument further as the Law Society did not seek to premise the charge on conduct that went beyond a retainer.

9 The contextual approach to interpreting ethical rules was further developed a year later in *Law Society of Singapore v Tan Phuay*

6 *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [82].

7 *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [82].

8 *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [82].

9 *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [82].

Khiang (“*Tan Phuay Khiang*”).¹⁰ In that case, the respondent solicitor had acted for both his clients (husband and wife), who had a basic primary education, in the sale of a flat. The clients also engaged a housing agent, who arranged for them to take a loan from a moneylender in order to make a cash payment to purchase a new flat. The respondent solicitor’s role in the loan arrangement was to prepare a power of attorney appointing an attorney (who was unknown to the clients) in the proposed sale and subletting of the flat.

10 The flat was eventually sold and the clients received a cheque for the sale proceeds in the sum of \$86,461 not from the respondent solicitor, but from the housing agent. The respondent solicitor also requested his clients to execute a statutory declaration authorising his law firm to make payments to, *inter alia*, various persons including another property agent and the moneylender. Unknown to the clients, an “intricate web of relationships” existed amongst the persons named in the statutory declaration, as well as between them and the respondent solicitor.¹¹ Subsequently, the cheque was dishonoured and the clients realised that they might have been defrauded and lodged a complaint with the Law Society.

11 The High Court held that although the respondent solicitor did not breach any of the conflict of interest rules under the LP(PC)R, he had failed to “adequately highlight the grave risks that [his clients] took in executing the power of attorney”.¹² The High Court held that because his clients were unsophisticated and vulnerable, the respondent solicitor had a positive duty to explain to his clients the purpose of executing a power of attorney which was not merely ministerial in nature.¹³ Similarly, the respondent solicitor was obliged to advise his clients on the intent and purport of the statutory declaration.

12 In this regard, the High Court observed that “[i]t is also axiomatic that it is the spirit and intent, rather than just the plain letter, of the professional ethical rules that breathe life and legitimacy into the standards that are relevant in assessing whether a lawyer has discharged his professional obligations.”¹⁴ While “[e]thical codes, practices and standards must be religiously observed and adhered to”, “a rigid and formalistic adherence to the codes of practice without a proper appreciation of their spirit, purport and intent may from time to time lead to ethical blindness”.¹⁵ Hence, a solicitor may be held liable for

10 [2007] 3 SLR(R) 477.

11 *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [13].

12 *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [96].

13 *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [95] and [99].

14 *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [100].

15 *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [120].

breach of his professional duties if he only took “cursory steps to explain the nature of the documents” to his client.¹⁶

13 Five years later, the High Court’s observations in *Tan Phuay Kiang* were emphatically endorsed by the High Court in *Then Khek Khoon v Arjun Permanand Samtani* (“*Then Khek Khoon*”),¹⁷ a case concerned with r 64 of the LP(PC)R, which prohibited a solicitor from acting for a client in a situation where he was likely to be a witness on a material question of fact. In that case, the High Court considered it “incontrovertible that the [LP(PC)R] should be interpreted with proper appreciation of the mischief to be averted rather than in a strict textual fashion.”¹⁸ Accordingly, in considering the proper ambit of r 64, the High Court suggested that it was necessary to “go back to basics and ask: what is the real mischief targeted?”¹⁹

14 The final case decided during the review period concerned solicitors accepting significant gifts from clients. In *Law Society of Singapore v Wan Hui Hong James* (“*Wan Hui Hong James*”),²⁰ the High Court observed that “[i]t is only through close adherence to both the letter and spirit of the stipulated ethical constraints that legitimate concerns relating to the receipt of significant gifts may be dissolved.”²¹

B. Evaluation of critical themes

15 Two critical questions emerge from the preceding summary. Firstly, given the considerable weight placed by Singapore courts on the rationale of the ethical rule, how should solicitors decipher the “spirit and intent” of the rule or the mischief that is the target of the rule? The cases suggest that solicitors should use judgment and insight in interpreting ethical rules and in discerning the underlying rationale of the rule and the mischief or problem that it is addressing.

16 To provide guidance to solicitors in interpreting ethical rules, the courts have, in some cases, turned to the equivalent rules in foreign jurisdictions. For example, in *Vorobiev Nikolay v Lush John Frederick Peters* (“*Vorobiev Nikolay*”),²² the High Court referred to conflict of interest rules in the UK Solicitors’ Code of Conduct 2007 and the ABA Model Rules of Professional Conduct to formulate the meaning of the

16 *Law Society of Singapore v Tan Phuay Kiang* [2007] 3 SLR(R) 477 at [100]. See also *Law Society of Singapore v Vardan Vasantha Lakshmi* [2007] 1 SLR(R) 240.

17 [2012] 2 SLR 451.

18 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [47].

19 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [47].

20 [2013] 3 SLR 221.

21 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [84].

22 [2011] 1 SLR 663.

word “related” in r 31 of the LP(PC)R.²³ Foreign ethical rules may also be referred to for comparative purposes, as in *Wan Hui Hong James*, where the High Court referred to the equivalent UK and Australian ethical rules “for the points of divergence, rather than the convergence that exists between them and r 46 of the [LP(PC)R]”²⁴.

17 However, the “spirit and intent” approach to interpreting an ethical rule should not be extended to rewriting the ethical rule. For example, in *Law Society of Singapore v K Jayakumar Naidu*,²⁵ the respondent solicitor had been charged, *inter alia*, with failing to explain to his client the nature, purport and consequence of a letter of authority directing that the sale proceeds of his flat be paid into a specified bank account. Subsequently, the sale proceeds deposited into the account were misappropriated by the client’s brother. The High Court held that the respondent solicitor had breached neither r 21 nor r 25(b) of the LP(PC)R, as stated in the charge. Under r 21 of the LP(PC)R, a solicitor has a duty to “explain in a clear manner, proposals of settlement, other offers or positions taken by other parties which affect the client”. The High Court held that r 21 only applied to “communications from other parties”²⁶ and could not be extended to include a letter of authority which was signed by the respondent solicitor’s client to authorise the release of the proceeds of the sale of a flat.

18 Similarly, although the respondent solicitor had been warned by third parties about the client’s brother, who had primarily instructed the respondent solicitor to release the sale proceeds, the High Court held that the respondent solicitor had not breached r 25(b). That rule required a solicitor to advance his client’s interest, during the course of a retainer, unaffected by any interest of any other person. However, the respondent solicitor had “not so much been affected by the interest of another person as he has failed to safeguard his client’s own [interest]” because he had failed to check with his client on his conflicting instructions and the allegations made against the client’s brother.²⁷ Thus, the fact that a solicitor complies with the instructions of a third party in a transaction to his client’s detriment may not always connote a conflict of interest.

19 The second critical question is that assuming the mischief that is the target of a particular ethical rule is ascertained, what are the specific duties of the solicitor arising? For example, in *Then Khek Khoon*, the High Court considered whether another solicitor in the same firm

23 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [23].

24 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [4]–[6].

25 [2012] 4 SLR 1232.

26 *Law Society of Singapore v K Jayakumar Naidu* [2012] 4 SLR 1232 at [73].

27 *Law Society of Singapore v K Jayakumar Naidu* [2012] 4 SLR 1232 at [73].

could act where a member of the firm is disqualified from representing the client under r 64. Although r 64(2) was silent on this issue, the High Court held that that the rule should extend to all other solicitors in the firm if “the subconscious shaping is of genuine concern and the issues envelop the entire firm” as the mischief targeted by r 64 of the LP(PC)R was “the danger of the subconscious shaping of the evidence to suit the solicitor’s interest as against that of his client and the duty to the court”²⁸.

20 However, the High Court cautioned that this “wider interpretation should be adopted only when the mischief intended has a *real possibility of occurring*” [emphasis added].²⁹ In this regard, two significant factors had to be considered: (a) “the mischief that r 64 is meant to avoid”; and (b) “whether the heart of the client’s case touches upon the correctness or otherwise of an act or document generated or soundness of advice given by the [solicitor’s] partner or other member of his firm”.³⁰

21 *Then Khek Khoon* therefore suggests that even if the mischief that is the target of a particular ethical rule has been ascertained, it is not necessarily conclusive of the precise scope of the solicitor’s ethical obligation. The solicitor should not be automatically prohibited from acting further in a matter based on a theoretical or fanciful risk, unless there is a real possibility that the mischief targeted will occur. It remains to be seen whether and how the courts will develop the “real possibility” test to set the appropriate standard to distinguish between theoretical and real risks.

22 In summary, as noted by a learned commentator, the virtue of “the disposition to interpret rules correctly” is “crucial to responsible professional conduct”.³¹ Judicial developments during the review period have shown that the Singapore courts expect solicitors to develop the appropriate interpretative strategy in construing their ethical obligations. In this regard, solicitors need to identify the correct “spirit and intent” of, or the mischief targeted by, the ethical rule, and not merely rely on the plain letter of the rule. However, the full extent of this interpretative strategy has yet to be worked out and it may well be prudent for solicitors to seek the court’s intervention if in doubt on the specific ambit of a particular ethical rule.

28 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [47]–[48].

29 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [47]–[48].

30 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [47]–[48].

31 Michael Davis, “Professional Responsibility: Just Following the Rules?” in *Ethics Across the Professions: A Reader for Professional Ethics* (Clancy Martin, Wayne Vaught & Robert C Solomon eds) (Oxford University Press, 2009) ch 1, at p 18.

III. Personal and professional conflicts of interest

A. Summary of key developments

23 The rules governing personal and professional conflicts of interest are found in rr 25–34 and 45–46 of the LP(PC)R. Conflicts of interest arising between solicitor and client, known as personal conflicts of interest, are generally proscribed by r 25(a), with specific prohibited scenarios set out in rr 26, 27, 32–34 and 45–46. Conflicts of interest may also arise where a solicitor simultaneously represents two or more clients whose interests may conflict (see, for example, rr 25(b), 28–30) or where a solicitor acts against one of the parties who is his former client (see, for example, r 31). Such conflicts may also be termed as professional conflicts of interest. In this Part, the judicial developments in personal and professional conflicts of interest will be discussed in turn.

(1) Personal conflicts

24 A personal conflict of interest arises from “any personal interest which would compromise [the solicitor’s] position as a fiduciary of the client, his independent standing as a professional and ultimately the relationship between him and his client.”³² A solicitor must therefore avoid “any financial or personal arrangements with his client or related persons which would adversely affect his duty to act in the best interests of his client”.³³ Given the broad nature of the proscription, can a solicitor’s pecuniary interest in his fees give rise to a personal conflict?

25 This question was considered in two recent Singapore decisions during the review period. In the first case, *Law Society of Singapore v Low Yong Sen*,³⁴ the respondent solicitor had engaged a freelance conveyancing secretary “to ... undertake title searches and legal requisitions in relation to conveyancing matters”.³⁵ Also, the respondent solicitor was assisted in his practice by his brother, who was the beneficial owner of a business called “High Business Services” (“High Business”) that provided “services relating to the incorporation of companies and accounting”.³⁶

26 The disciplinary case against the respondent solicitor arose from his representation of the clients (husband and wife) in the

32 Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) at p 293.

33 Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) at p 293.

34 [2009] 1 SLR(R) 802.

35 *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [4].

36 *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [2].

purchase of a terrace house. In this transaction, the freelance conveyancing secretary and the respondent solicitor's brother had arranged to use High Business as a vehicle to bill for the respondent's services rendered. However, the respondent solicitor did not disclose his brother's interest in the High Business to his clients. Subsequently, the clients took the position that the respondent solicitor had overcharged them for the disbursements incurred in the purchase and lodged a complaint with the Law Society. The respondent solicitor was charged, *inter alia*, with breaching r 26(a) of the LP(PC)R which provided that where any member of a solicitor's family had an interest in any matter entrusted to the solicitor by a client, the solicitor must make full and frank disclosure of such interest to the client or otherwise withdraw from representing the client.

27 The High Court held that the respondent solicitor was not guilty of this charge notwithstanding that the Disciplinary Committee had found that the respondent solicitor's brother had a financial interest in the fees charged by High Business. This was because r 26(a) referred to a solicitor having "an interest in any matter entrusted to him by a client", which was different from "an interest in the fees charged".³⁷ Otherwise, "all solicitors would be required to disclose what must be evident to every client – that they have an interest in the fees to be paid by the client ...".³⁸

28 The High Court clarified that the word "matter" in the rule referred to the substantive matter which the client had entrusted the solicitor to handle, as the object of the rule was "to ensure that there is no conflict between the personal interest of the solicitor (including that of his family and any company or partnership in which the solicitor has an interest) and that of the client".³⁹ Moreover, the High Court found that "outsourcing of certain services to third parties *per se* (even related ones) does not automatically result in a conflict of interest", unless the client's interest was thereby compromised.⁴⁰

29 In the second case, *Then Khek Khoon*,⁴¹ a firm of solicitors ("firm") had represented a group of subsidiary proprietors ("plaintiffs") in proceedings opposing a collective sale before the Strata Titles Board and in the High Court. The firm, however, did not represent the plaintiffs in the Court of Appeal for this matter. The Court of Appeal set aside an order for the collective sale and found that the defendants, who were members of the sales committee, had breached their fiduciary

37 *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [31].

38 *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [31].

39 *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [31].

40 *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [32].

41 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451.

duties to the plaintiffs. The plaintiffs proceeded to claim that they had suffered loss and damage as a result of the breach in the form of solicitor and client costs incurred in the sum of \$752,665.15, which they had paid to the firm.

30 However, the second defendant challenged the quantum of loss and damage suffered by the plaintiffs and contended that the firm had breached r 25(a) as it had a personal interest in maintaining that their fees rendered to the plaintiffs were reasonable and neither manifestly excessive nor a gross overcharging for the work done.

31 The High Court rejected the second defendant's contention as it found, *inter alia*, that the firm's invoices had been "rendered and paid well before any finding of breaches of fiduciary duties were made by the CA".⁴² In addition, the High Court observed that the purpose of r 25(a) was to protect the client and a breach of the rule required something more than the solicitor's pecuniary interests which was a given in the case of his bill.⁴³ Whether the firm had advised the plaintiffs to seek independent advice on the level of their fees was a matter between the firm and the plaintiffs, and not the defendants.⁴⁴ The plaintiffs were also not ignorant or disadvantaged clients who required additional protection.⁴⁵

32 The other significant development in personal conflicts occurred in *Wan Hui Hong James*,⁴⁶ where the respondent solicitor had accepted a gift of \$460,000 from his client, an elderly lady, for acting for her in the sale of her property but failed to advise her to seek independent advice *vis-à-vis* the gift. The respondent solicitor pleaded guilty to a breach of r 46 of the LP(PC)R, which provided that where a client intended to make a significant gift to a solicitor acting for him, the solicitor must not act for the client and must advise the client to be independently advised in respect of the gift.

33 The High Court observed that "it will always be preferable for ... solicitors to decline to accept gifts from clients, unless the value of the gift is insignificant both in absolute terms and relative to the client's means."⁴⁷ This was because the solicitor was subject to two fiduciary obligations, first, not to put himself in a position where his personal interests conflict with his duty to act in the interest of his client; and, second, not to exercise undue influence over his client, whether actively or passively.⁴⁸

42 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [31].

43 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [33].

44 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [35].

45 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [36].

46 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221.

47 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [26].

48 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [8].

34 Moreover, the solicitor, being in “a position of ascendancy and influence over his client who then relies on and trusts him”, was “deemed to be in a position of conflict because of the presumption that his client is making the gift under his undue influence”.⁴⁹ The solicitor therefore had an ethical duty to “remove ... any vestiges of influence he might have over his client” by refusing to act for the client and advising the client to be independently advised.⁵⁰

35 The High Court also provided detailed guidance on, *inter alia*, the scope of a solicitor’s obligation to advise his client to be independently advised *vis-à-vis* the gift. In particular, the High Court suggested that “the person giving independent advice must be another advocate and solicitor, no matter how uncomplicated the legal issues involved” and must be completely independent.⁵¹ If the client continued to decline to seek independent advice upon further advice by the solicitor, the solicitor should not accept the gift.⁵²

(2) *Professional conflicts*

36 The two principal cases during the review period on conflict of interest resulting from the representation of two or more clients whose interests may conflict are *Lie Hendri Rusli*⁵³ and *Law Society of Singapore v Uthayasurian Sidambaram* (“*Uthayasurian Sidambaram*”).⁵⁴ In *Lie Hendri Rusli*, a firm of solicitors (“firm”) had acted for the principal director and shareholder of an Indonesian distributor of electronic goods (“client”) in the mortgage of his apartment to a bank to relieve his business’s financial difficulties. The mortgage was intended for the benefit of one of the client’s largest suppliers of goods, which the client was indebted to (“creditors”). By mortgaging the client’s apartment, the client’s business would be entitled to obtain a higher credit limit using the creditors’ letter of credit arrangements and the creditors would also deal with the client’s business debts benignly. The client was aware that the firm acted concurrently for the creditors in the mortgage and the firm prepared mortgage documents which included an “all moneys clause” making the client personally liable for all facilities extended by the bank to the creditors.

37 Subsequently, the creditors met with serious financial difficulties and the client sought to redeem the apartment from the bank. The apartment was then discharged by way of a partial discharge

49 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [8].

50 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [9].

51 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [18].

52 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [18].

53 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594.

54 [2009] 4 SLR(R) 674.

of mortgage, but the client's personal covenant in the mortgage documents subsisted. The bank sued the client, amongst others, who settled the claim for \$500,000. The client thereafter sued the firm for negligence in failing to explain to him and/or advise him on the consequences that could arise from the signing of the mortgage documents.

38 The High Court dismissed the client's claim as the client, "a shrewd and canny businessman",⁵⁵ was aware that the proposed mortgage was intended to secure all credit facilities extended by the bank to the creditors.⁵⁶ Moreover, the firm had, contrary to the client's assertions, explained to the client in some detail the intent and purport of the mortgage documents.⁵⁷

39 The High Court also took the opportunity to make a number of important observations on a solicitor's ethical duties when acting for multiple parties. In particular, it held that although multiple representations were not absolutely prohibited, "it would be prudent to advise clients to seek independent representation" where "terms are required to be negotiated or a situation of potential conflict is anticipated or encountered".⁵⁸ A solicitor should "candidly disclose at the outset to all their clients precisely whom they are acting for" and seek the informed consent of all the parties to the arrangement.⁵⁹

40 Solicitors who act for multiple parties face an "intractable catch-22 conundrum" and are often "caught between the devil and the deep blue sea".⁶⁰ As noted in *Uthayasurian Sidambaram*, "while a solicitor may act for several clients, he must draw this to the attention of each client and yet render no preferential advice to any single client".⁶¹ Concurrently, the solicitor "must tread floorboards carefully by continuing to observe the duties of confidentiality owed to each client".⁶²

41 The factual matrix of *Uthayasurian Sidambaram* arose from the proposed development of a property that was owned by the Royal Brunei Government ("RBG"). In 2001, the respondent solicitor had been approached by a third party, an undischarged bankrupt, who claimed to be a close associate of a representative of the RBG's interests in Singapore. The third party persuaded the respondent solicitor that

55 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [40].

56 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [24].

57 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [28]–[30].

58 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [54].

59 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [59].

60 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [35]–[36].

61 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [35].

62 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [35].

the RBG was keen to work with an investor who could build good-class bungalows on the property. The respondent solicitor then agreed to be the representative's legal advisor for the project and to take instructions from the third party and his son.

42 After a futile search for a suitable joint developer for the property, the third party met a developer ("client") and entered into discussions on investing in the project. The client eventually agreed to invest \$1m into the project and appointed the respondent solicitor to act for him in the project. The \$1m was then deposited into the respondent solicitor's client account. Eventually, various sums were released from the \$1m deposited in the client account based on written instructions given by the third party to the respondent solicitor. However, the respondent solicitor failed to consult the client on the payments and issued these payments on uncrossed cheques. It was only after the client had approached the respondent solicitor for an account of the money that he had deposited with him that the client was informed of the payments made and that only \$50,000 of the \$1m remained. Subsequently, the third party promised to return the \$1m to the client shortly but failed to do so. The client then lodged a complaint with the Law Society.

43 The High Court found that "far from having common interests, the parties while all participating in the *same* transaction had in reality plainly diverse (indeed conflicting) interests and objectives" [emphasis in original].⁶³ It was held that the respondent solicitor "improperly compromised the interests of the [client], by acting for multiple clients in the ... transaction even though there was patent conflict of interests" and "never paused to advise the [client] ... to seek independent legal advice".⁶⁴ The respondent solicitor had in fact admitted that "he did not at *any time* advise each client of the potential conflict of interests that could arise" [emphasis in original], even though his role in the project "went beyond the essentially perfunctory role of preparing a document and witnessing its execution".⁶⁵ Even if it was true that the client had given the third party a blanket authority to disburse the \$1m as he thought fit, the respondent solicitor failed to advise the client of the attendant risks and consequences in giving the third party such a blanket authority.⁶⁶

44 As a matter of general principle, the High Court held that in cases of multiple representations where no common interests existed between the parties, a solicitor "should advise the clients of the risks and

63 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [46].

64 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [47].

65 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [50].

66 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [51].

consequences involved in having him act for multiple clients with diverse interests and objectives as well as draw their attention to the *actual or potential* conflicts of interest that could arise” [emphasis in original].⁶⁷ If the solicitor sought the informed consent of the clients to act, “the disclosure of potential risks must be conscientious, comprehensive and made with complete candour” and he “should also advise that the clients seek independent legal advice”.⁶⁸

45 Former client conflicts of interest also raise thorny issues. Rule 31(1) of the LP(PC)R absolutely prohibits a solicitor from acting against his former client in the same or related matter. This prohibition extends to all the other members of the firm, whether they personally handled the former client’s matter or not (r 31(2)), and to situations where the solicitor moves to another law firm (r 31(3)). The only exception is found in r 31(4), which allows the firm to act against the former client provided that the disqualified solicitor is not involved in the matter at all and does not otherwise disclose any confidential information to any other member of the law firm. In this regard, the firm would likely have to erect a “Chinese wall” to prevent “seepage of confidential information” and to avoid compromising the client’s interest “in any other way”.⁶⁹

46 In particular, the scope of “related” matters under r 31 was discussed by the High Court in *Vorobiev Nikolay*.⁷⁰ In that case, a firm of solicitors (“firm”) had previously acted for three persons (“defendants”) in matters concerning the purchase of shares held in a company (“company”), including a shareholders’ dispute and negotiations of the terms of the purchase. Subsequently, the plaintiff, who had been involved in the same share purchase transaction, engaged the firm to sue the defendants on the basis that they had “made, or conspired to make, fraudulent misrepresentations to him to induce him into entering into an agreement for the purchase of 20% of the shares in [the company]”.⁷¹ The defendants then applied to the court to restrain the firm from acting for the plaintiff in the suit.

47 The High Court held that the firm was prohibited from continuing to represent the plaintiff in the action, even though no confidential information was at risk.⁷² The High Court noted that r 31 had changed the common law position and did not limit “any related

67 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [52].

68 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [52].

69 Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) at para 16-039.

70 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663. See also *Richard Hoare v Norhayati bte Abdul Jali* [2011] SGDC 58.

71 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [2].

72 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [25].

matter” to a matter where relevant confidential information had been passed.⁷³ Thus, for two matters to be related, it was not necessary that the solicitor had received confidential information relevant to the subsequent suit.⁷⁴ Matters could be “related” if they involved the same asset, liability, transaction or legal dispute.⁷⁵ As the subject matter of the previous retainers, namely the shareholders loan and the price of the shares, was the same as the matters in dispute in the plaintiff’s suit, the previous retainers and the plaintiff’s suit were held to be “related” matters.⁷⁶

48 This interpretation of r 31 was held to be consistent with the “larger public interest beyond the need to protect against the disclosure of confidential information, and that is the solicitor-client relationship of trust and public confidence in the integrity of the legal profession”.⁷⁷

B. Evaluation of critical themes

49 A central theme that arises from the above-mentioned cases on both personal and professional conflicts of interest is the extent to which a solicitor can manage conflicts of interest through appropriate disclosure, advising the client to seek independent legal advice and the client’s informed consent. Two observations are made in this regard.

50 Firstly, it appears from the LP(PC)R that all three methods of managing conflicts of interest need not apply in every case of conflict. For personal conflicts, r 25(a) does not provide for any method to resolve the conflict, r 26 only requires full disclosure and r 27 requires the client’s informed consent after advising the client to seek independent legal advice. The rule on borrowing from clients under rr 32–34 requires full disclosure and advising the client to seek independent legal advice, while purchases and gifts from clients under rr 45–46 require the solicitor to obtain an independent valuation or to advise the client to seek independent legal advice. For professional conflicts, r 28 requires some degree of disclosure, while r 29 and r 31 do not provide for any method for the solicitor to resolve the conflict. For r 30, the solicitor is required to advise the client to seek independent legal advice.

51 As a matter of principle, it is difficult to reconcile the different methods of managing conflicts of interest for each conflict scenario. This is also not helped by judicial suggestions on how such conflicts may

73 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [19]–[21].

74 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [23].

75 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [23].

76 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [25].

77 *Vorobiev Nikolay v Lush John Frederick Peters* [2011] 1 SLR 663 at [24]. See also *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [24].

be managed, in the absence of express provision in the relevant rule. For example, the High Court in *Then Khek Khoon* appeared to suggest that to avoid a breach of r 25(a), the firm would need to advise their clients to seek independent advice on the level of their fees although no such elixir is prescribed in the rule.⁷⁸

52 Secondly, the extent to which a solicitor can manage conflicts of interest depends on the content of the requirements of appropriate disclosure, advising the client to seek independent legal advice and the client's informed consent. Generally, full and frank disclosure of interests, risks or representation is required because a solicitor has a duty to act in the client's best interests and to disclose all material facts.⁷⁹

53 As for advising the client to seek independent legal advice, while comprehensive guidance was given in *Wan Hui Hong James*,⁸⁰ the High Court did not clarify whether the solicitor providing independent legal advice could be from the same law firm as the solicitor who the client intends to make a significant gift to. The Law Society of Singapore had previously taken the position that independent advice cannot come from the same law firm, but the High Court did not expressly endorse this.⁸¹

54 Also, it may well be that the guidelines formulated in *Wan Hui Hong James* can be transposed to other conflict of interest rules, whether personal or professional, with necessary modifications. However, this may not be possible for every case as the specific context of each conflict scenario should be taken into account. For example, in *Wan Hui Hong James*, the High Court noted that although the phrase "independent advice" was defined in r 32, that definition only applied to rr 33–34 and did not elaborate on the content of such advice.⁸²

78 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [35].

79 See, for example, *Law Society of Singapore v Low Yong Sen* [2009] 1 SLR(R) 802 at [31], where the High Court observed that the requirement of full and frank disclosure under r 26 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) was "to ensure that the client will have the chance to assess whether he should allow the matter to remain in the hands of that solicitor or appoint a new solicitor" because of the implicit "imperative norm that a solicitor should always, in any matter entrusted to act, act in the interest of the client"; *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [59], where the High Court observed that disclosure of multiple representations was required because "it is implicit in every retainer that there is a duty to act in the client's best interests and to disclose all material facts".

80 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221.

81 See Alvin Chen, *Guide to Professional Conduct for Advocates and Solicitors* (Law Society of Singapore, 2011) at p 28.

82 *Law Society of Singapore v Wan Hui Hong James* [2013] 3 SLR 221 at [13].

55 Similarly, it is not entirely clear to what extent the doctrine of informed consent, as formulated in cases of professional conflicts, applies to personal conflicts. In *Lie Hendri Rusli*, the High Court regarded informed consent as:⁸³

consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other.

56 It would therefore appear that for professional conflicts, informed consent is inextricably intertwined with the requirement of full and frank disclosure. The same principle should apply to personal conflicts, even when the conflict of interest rule in question only requires full and frank disclosure of the solicitor's interest. What is less clear is whether the duty to advise the client to seek independent legal advice is implicit in the requirement to obtain the client's informed consent. It is submitted that such a duty to advise the client should be implicit, because a pure disclosure elixir "lacks distance from the conflict", given the tendency of clients to defer to their solicitors' "superior legal knowledge" and the likelihood of bias in solicitors' disclosure.⁸⁴

IV. Duty to the administration of justice

A. Summary of key developments

57 The solicitor's duty to the administration of justice is commonly associated with the solicitor's duty to the court, but the scope of the former duty extends beyond court proceedings to taking responsibility for the client's conduct in all matters. As noted in *Uthayasurian Sidambaram*:⁸⁵

A solicitor should not regard himself as merely a *conduit, post-box or puppet* through which information and correspondence is unthinkingly communicated between the various clients or who blindly executes the instructions of every client. He has responsibilities as an advisor through the duration of the retainer. He must remain steadfast in upholding the integrity of the legal profession, as he is first and foremost an officer of the court. [emphasis in original]

83 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [58].

84 Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th Ed, 2012) at para 6.30.

85 *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [52].

58 The solicitor's overarching duty to the administration of justice is therefore based on his position and function as an officer of the court, regardless of the area of practice which he chooses to engage in. The observations of the Singapore courts in cases involving a solicitor's ethical duties in court proceedings should therefore not be viewed narrowly, but should, by analogy, apply to areas of practice other than litigation.

59 The Singapore courts have established that a solicitor's duty to the court prevails over his duty to his client whenever the two are in conflict.⁸⁶ In particular, the solicitor has a duty of truthfulness and candour to the court.⁸⁷ In *By Products Traders*,⁸⁸ certain beneficiaries were entitled to a share of a large estate that was administered by the Public Trustee. In the course of administration, the Public Trustee had sold the properties comprising the estate and paid the sale proceeds into court as they were the subject of competing claims ("the first proceedings"). In separate proceedings, a third party sued two of the beneficiaries for the purported breach of an agreement to sell the properties to it ("the second proceedings"). The third party's solicitors then obtained payment out of the moneys paid into court through the second proceedings, without any notice to the other interested parties in the first proceedings and without informing the assistant registrar about the other interested parties.

60 The High Court held that the third party's solicitors had wilfully suppressed material facts and information, and perpetrated a fraud on the court by applying for the payment out.⁸⁹ The High Court observed that a solicitor, while expected to make all plausible honest endeavours to further his client's cause, should not mislead the court on either the facts or the law. Misleading or deceptive conduct can be passive or active or a combination of both. Without misleading the court he is entitled to present his client's cause in a manner which is most favourable or advantageous to the client.⁹⁰

86 *Law Society of Singapore v Nor'ain Abu Bakar* [2009] 1 SLR(R) 753. See also r 64 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) and *Then Khok Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 discussed in Parts II and III above.

87 Drafting false affidavits or court documents is not excusable even if effected out of fear and trepidation (*Law Society of Singapore v Chung Ting Fai* [2006] 4 SLR(R) 587) or to placate a third party (*Law Society of Singapore v Ng Bock Hoh Dixon* [2010] 2 SLR 1000).

88 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR(R) 449.

89 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR(R) 449 at [45].

90 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR(R) 449 at [29]–[30].

61 As noted in the subsequent case of *Bachoo Mohan Singh v Public Prosecutor*,⁹¹ the duty of candour to the court does not, however, require the solicitor concerned to verify the truthfulness or factual accuracy of his client's instructions in every case unless there are compelling reasons or circumstances, for example, where it is clear that the client is attempting to put forward false evidence to the court.⁹² Even if "opposing parties (or parties allied to them) dispute the veracity of [the solicitor's] client's instructions, [it] is not a reason for a solicitor to disbelieve or refuse to act on those instructions, and a solicitor should not be faulted if there are no reasonable means of objectively assessing the veracity of those instructions."⁹³

62 In many cases, a solicitor's duty to the client in court proceedings is in fact likely to coincide with his duty to the court. For example, in *Zhou Tong v Public Prosecutor*,⁹⁴ the High Court held that all solicitors had an ethical duty to "carefully assess the merits of their clients' cases before engaging in court proceedings"⁹⁵ Such a duty was derived not only from the solicitor's duty to his client, but also from his duty to the court because "solicitors who pursue appeals without adequately considering the merits of their clients' cases would be misusing the court's time, as they would not be able to constructively assist the court in evaluating the merits of the matter."⁹⁶

63 The duty of a solicitor to evaluate the merits of a client's case was also highlighted in the earlier decision of *Lock Han Chng Jonathan v Goh Jessiline*.⁹⁷ In that case, a dispute between solicitors over disbursements of a "paltry sum of about \$60" in the settlement of a minor road traffic accident went all the way to the Court of Appeal. The Court of Appeal observed that "[t]he role of counsel in pursuing their clients' interests in a court of law where paltry monetary claims are involved" was to exercise "the degree of responsibility expected of an officer of the court" and advise their clients "to settle the dispute with minimum fuss and, therefore, minimum cost".⁹⁸

64 The Court of Appeal further observed that although a solicitor had "a duty to pursue his client's interest vigorously, he should only do so with the informed consent of the client, especially when pursuing the client's interest is counter-productive or results in an overall loss to the

91 [2010] 4 SLR 137.

92 *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at [119].

93 *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 at [137]; see also *Win-Win Aluminium Systems Pte Ltd v Law Society of Singapore* [2012] SGHC 123.

94 [2010] 4 SLR 534.

95 *Zhou Tong v Public Prosecutor* [2010] 4 SLR 534 at [19].

96 *Zhou Tong v Public Prosecutor* [2010] 4 SLR 534 at [19].

97 [2008] 2 SLR(R) 455.

98 *Lock Han Chng Jonathan v Goh Jessiline* [2008] 2 SLR(R) 455 at [45].

client”⁹⁹ In this regard, solicitors should observe their ethical obligation under r 40 of the LP(PC)R to evaluate with their clients “whether the consequence of a matter justifies the expense or the risk involved in going to court”¹⁰⁰.

65 In the same vein, the Singapore courts have commented on other aspects of a solicitor’s conduct of litigation which did not assist the court. For example, legal submissions which were unnecessarily prolix¹⁰¹ or of a “cut-and-paste” variety have been criticised.¹⁰² Also, a solicitor should not rely on judicial *dicta* without appreciating its context. For example, in a pre-review period case, the High Court commented, in *Sutanto Henny v Suriani Tani*, that it had been remiss of the solicitor concerned to have failed to inform the judge at the hearing that the *dictum* cited in an English case had in fact been disapproved in a later decision.¹⁰³

66 This principle was reiterated forcefully by the Court of Appeal in a subsequent decision during the review period:¹⁰⁴

Neither counsel nor a court should rely on judicial *dicta* without perusing and considering the context in which such judicial views have been made. This is especially so if it involves a point that takes centre stage in the proceedings. One can never be sure whether there may have been peculiar considerations, legal or otherwise, that influenced the *dicta*, or whether those observations were made purely in the context of the peculiar issue or type of facts before that court. Alternatively, the weight placed on that authority may turn out to be misplaced if the court has merely made those remarks *casually* or without proper deliberation or reference to authority. [emphasis in original]

67 It is also not uncommon for ethical issues concerning relationships between solicitors to arise in an adversarial context. In *Tung Hui Mannequin Industries v Tenet Insurance Co Ltd*,¹⁰⁵ the High Court held that a solicitor was entitled to ask to inspect another solicitor’s warrant to act. Such a request should not be viewed as “[casting] aspersions on [the former solicitor’s] professionalism and integrity”, although the High Court accepted that there should be good reasons for making such a request, such as a suspicion that a written

99 *Lock Han Chng Jonathan v Goh Jessiline* [2008] 2 SLR(R) 455 at [46].

100 *Lock Han Chng Jonathan v Goh Jessiline* [2008] 2 SLR(R) 455 at [46].

101 See, for example, *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 and *Main-Line Corporate Holdings Ltd v DBS Bank Ltd* [2012] 4 SLR 147.

102 See, for example, *TTJ Design and Engineering Pte Ltd v Chip Eng Seng Contractors (1988) Pte Ltd* [2011] SGHC 12.

103 *Sutanto Henny v Suriani Tani* [2004] SGHC 7 at [19]–[20].

104 *Bachoo Mohan Singh v Public Prosecutor* [2010] 1 SLR 966 at [81].

105 [2005] 3 SLR 184.

representation that a solicitor was authorised to act for a particular client was falsely made.¹⁰⁶

68 Likewise, where allegations of pressure or of lack of due diligence are made against a previous solicitor who had conduct of the matter, the Singapore courts have observed the spirit of LP(PC)R, r 71, which requires the previous solicitor to be given a fair opportunity to answer the intended allegations. In *Thong Sing Hock v Public Prosecutor*,¹⁰⁷ the appellant had, in appealing against sentence, taken the position that his plea of guilt had been induced by his previous counsel. In the interests of justice, the hearing was adjourned for the Prosecution to invite the appellant's previous counsel to respond, by way of affidavit, to the assertions made by the appellant. The appellant was also accorded an opportunity to file a response.

69 The High Court also provided guidance on the appropriate procedure which an appellate court might observe in such cases.¹⁰⁸ In particular, the High Court observed that the previous solicitor should be given "every reasonable opportunity to respond to any allegations of pressure or lack of due diligence" by an accused person who was unrepresented or did not file an affidavit, even though r 71 would not be triggered and the previous counsel would not have any strict legal right to answer the allegations made against him.¹⁰⁹ This principle was subsequently extended to a civil case, where the litigant in person filed an affidavit which touched on the conduct of her case by her previous counsel, but failed to give her previous counsel an opportunity to respond to her allegations.¹¹⁰

B. Evaluation of critical themes

70 Where the solicitor's duty to the client ends and where his duty to the administration of justice begins is not always clear. The disclosure of adverse facts to the court is a particularly difficult issue because a solicitor also has a duty to his client to maintain confidences. As observed in *By Products Traders*, "in the absence of any legitimate issues relating to solicitor-client privilege", the duty of candour requires a

106 *Tung Hui Mannequin Industries v Tenet Insurance Co Ltd* [2005] 3 SLR 184 at [44]. See also *Tan & Au LLP v Goh Teh Lee* [2012] 4 SLR 1, where the client claimed that he did not instruct and authorise a firm of solicitors to act for him in the conduct of proceedings before the Strata Titles Board. The High Court rejected the client's contention as "[s]olicitors are in practice to do business and do not, in general, undertake to provide their services on a voluntary basis to persons who have no connection with them and are engaged in property disputes".

107 [2009] 3 SLR(R) 47.

108 This procedure was followed in *Gao Hua v Public Prosecutor* [2009] 3 SLR(R) 800.

109 *Thong Sing Hock v Public Prosecutor* [2009] 3 SLR(R) 47 at [33].

110 *Ong Jane Rebecca v PricewaterhouseCoopers* [2012] 3 SLR 606.

solicitor to draw to the court's attention all material facts that may have a bearing on the court's determination of a matter if there is reason to believe that the court has not already been apprised of them.¹¹¹

71 However, *By Products Traders* did not explain how a solicitor's duty to the administration of justice was reconciled with the somewhat narrower disclosure requirement provided in certain ethical rules on the conduct of criminal proceedings. For example, r 78 of the LP(PC)R states that a solicitor has no duty to disclose his client's previous convictions if the Prosecution fails to put any record, or puts only part of the record or an erroneous record, before the court, and such disclosure would be to his client's detriment. Also, r 74 provides that where the client has made a clear confession of guilt to him during the proceedings, the solicitor must continue to act but must "not set up an affirmative case inconsistent with the confession by, for example, asserting or suggesting that some other person committed the offence charged or calling evidence in support of an alibi". Whether such ethical conduct amounts to passively misleading the court is debatable and it would be good for the Singapore courts to clarify this issue in a future case.

72 Another important theme that was first developed in *By Products Traders* is the judicial conception of the solicitor's duty as an officer of the court. In that case, the High Court held that "[t]he reputable badge of an officer of the court should never be compromised on the pretext that one is acting in the client's best interests" and that "[a]ll solicitors *qua* officers of court have an absolute and overriding duty first and foremost to the court to serve public interest by ensuring that there is proper and efficient administration of justice".¹¹²

73 These principles were subsequently affirmed in *Law Society of Singapore v Nor'ain Abu Bakar*,¹¹³ which also observed that solicitors "should be held to a higher standard of conduct than others who had not been accorded the privileges that [solicitors] had under the law and their professional ethos required them to act honestly and with utmost integrity in their vocation, especially as counsel before the court".¹¹⁴ Subsequently, in *Law Society of Singapore v Ng Bock Hoh Dixon*,¹¹⁵ the High Court noted that a solicitor's declaration at the time of admission to the Supreme Court that he "will truly and honestly conduct [himself] in the practice of an advocate and solicitor" signified "a duty not merely

111 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR(R) 449 at [53].

112 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR(R) 449 at [31] and [35].

113 [2009] 1 SLR(R) 753.

114 *Law Society of Singapore v Nor'ain Abu Bakar* [2009] 1 SLR(R) 753 at [46].

115 [2010] 2 SLR 1000.

to oneself and one's client, but also to the court and to the attainment of justice and fairness generally".¹¹⁶

74 Finally, in the context of r 64 of the LP(PC)R, the High Court observed in *Then Khek Khoon* that "[t]here can be no doubt that courts depend on an advocate's integrity, independence, objectivity and impartiality to assist them in dispensing justice".¹¹⁷ The High Court emphasised that an advocate "must be able to promise the court" "singularity of interest", as this was "central to the utility and credence of the system".¹¹⁸

75 Given the court-centric focus of the above principles, the challenge for the legal profession is to extend and apply these general principles to other areas of practice, such as transactional work, by identifying the relevant types of conduct which contribute to the administration of justice and those which do not. This will assist to provide a comprehensive conception of the solicitor's duty as an officer of the court. It may well be that a code of practice for transactional work will be a good starting point to develop awareness of a solicitor's duty to the administration of justice outside of the courtroom.

V. Redressing imbalances in fee arrangements

A. Summary of key developments

76 The final significant area in which the law of professional responsibility has developed during the review period is that of redressing imbalances in solicitor-client fee arrangements.

77 Generally, a solicitor has a duty to charge fairly¹¹⁹ and not to overcharge.¹²⁰ Rules 35 and 36 of the LP(PC)R list a number of ethical duties for a solicitor to advise his client on fee arrangements. Fee agreements, which need not be in writing, must be fair and reasonable, taking into account various factors set out in the Rules of Court¹²¹ (for contentious matters) and the Legal Profession (Solicitors' Remuneration) Order¹²² (for non-contentious matters). All fee agreements come under

116 *Law Society of Singapore v Ng Bock Hoh Dixon* [2010] 2 SLR 1000 at [27]–[28].

117 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [39].

118 *Then Khek Khoon v Arjun Permanand Samtani* [2012] 2 SLR 451 at [40].

119 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) r 2(2)(c).

120 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) r 38.

121 Cap 322, R 5, 2006 Rev Ed.

122 Cap 161, O 1, 2010 Rev Ed.

the broad supervisory jurisdiction of the courts.¹²³ The Legal Profession Act (“LPA”)¹²⁴ provides for the client’s recourse *vis-à-vis* written fee agreements which are unfair or unreasonable.¹²⁵

78 During the review period, the Singapore courts had elaborated on the scope and extent of fee agreements in contentious and non-contentious matters. Two recent significant cases in this regard will be discussed. Firstly, the existence of an oral fee agreement in a contentious matter was the subject of dispute in *Law Society of Singapore v Tay Choon Leng John*.¹²⁶ In that case, the respondent solicitor had been engaged to act for the husband in ancillary and maintenance matters arising from divorce proceedings. The respondent solicitor had informed the husband initially that there would be an “upfront initial fee or advanced payment of \$3,000” for handling the divorce ancillaries as well as a “contingency fee of \$3,000 in the event that the ancillary matters were transferred to the High Court”.

79 Subsequently, at a meeting which lasted for only five minutes as the respondent solicitor “was in a hurry to attend court on another client’s matter”,¹²⁷ the husband placed \$2,000 cash with the respondent solicitor, who treated this sum as part payment for handling the divorce ancillaries. The husband also gave the respondent solicitor a cheque for \$3,000, which the latter treated as the upfront fee for handling the maintenance summons. The High Court noted, however, that the receipt issued by the respondent solicitor’s firm for the \$2,000 cash payment had erroneously stated that it was for initial payment for the maintenance summons.¹²⁸

80 Several months later, the husband terminated the respondent solicitor’s retainer for both matters and asked for a refund of the \$3,000 which he had paid as the contingency fee. No agreement was reached on the refund and the husband then lodged a complaint against the respondent solicitor with the Law Society. The critical issue was whether an agreed fee had arisen between the husband and the respondent solicitor.

81 The High Court held that there was no evidence of an agreed fee given the extremely short meeting between the husband and the respondent solicitor, and the fact that the respondent solicitor had made “a crucial mistake” on the receipt.¹²⁹ In coming to this conclusion, the

123 *Wong Foong Chai v Lin Kuo Hao* [2005] 3 SLR(R) 74; *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052.

124 Cap 161, 2009 Rev Ed.

125 See ss 109–113 of the Legal Profession Act (Cap 161, 2009 Rev Ed).

126 [2012] 3 SLR 150.

127 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [7].

128 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [7] and [43].

129 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [43]–[44].

High Court considered whether an agreed fee must be in writing, and whether it must be for the entirety of the transaction.

82 On the first issue, the High Court held it was not necessary for an agreed fee to be in writing. This was because s 111(1) of the LPA was “couched in *permissive*, rather than *mandatory*, terms” and only empowered or enabled a solicitor to make a written fee agreement in a contentious matter.¹³⁰ The High Court clarified that “the client is not deprived of protection simply because there is an oral fee agreement” because all fee agreements were reviewable by the courts.¹³¹ However, “clear proof of the client’s agreement must be established” for payment of the fees into the firm’s account.¹³²

83 As far as written fee agreements were concerned, the High Court held that it was clear from s 111(2) of the LPA that “Parliament intended to draw a distinction between validity and enforceability and sought to accord greater protection to the client”.¹³³ Hence, “a client could enforce an agreement not signed by the solicitor”.¹³⁴ In addition, “the solicitor would be precluded from making any further claims for costs beyond the terms of the agreement” and “the agreement could be declared to be unreasonable and void by the court”.¹³⁵

84 On the second issue, the High Court held that “an agreed fee in writing could be made in respect of the costs of part of the work to be undertaken by the solicitor, or up to a certain stage of the proceeding”. It was also possible for “an oral fee agreement touching on part of the work to be undertaken by the solicitor”, but this might give rise to evidential difficulties on what was exactly agreed. The High Court also observed that solicitors were obliged to make “abundantly clear” to the client “which specific part (or up to which specific stage) of the transaction is covered by the agreed fees” and were not “allowed to vary [their] agreed fees upwards at [their] will”.¹³⁶

85 Secondly, for fee agreements in non-contentious matters, the High Court similarly clarified in *Law Society of Singapore v Ang Chin Peng*¹³⁷ that an oral fee agreement was not invalid because “the absence of formalities (*viz* in writing and signature) goes towards enforceability,

130 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [23].

131 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [33]. See also *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [25]–[26].

132 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [34].

133 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [29].

134 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [29].

135 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [28].

136 *Law Society of Singapore v Tay Choon Leng John* [2012] 3 SLR 150 at [35]–[36].

137 [2013] 1 SLR 946.

rather than validity”¹³⁸. In that case, the respondent solicitors had acted for the executors and trustees of the husband’s estate in obtaining a grant of probate. An oral agreement existed between the respondent solicitors and the executors and trustees of the husband’s estate which fixed the fees for legal services at 5% of the gross value of the husband’s estate as at the date of the realisation of the assets.

86 Subsequently, the respondent solicitors were also engaged to handle the wife’s estate and it was orally agreed that their fees would only be 3% of the gross value of the wife’s estate as at the date of the realisation of the assets. However, a dispute arose over the invoices issued by the respondent solicitors for work done on both estates in the total sum of about \$640,000. The critical question was whether the purported oral fee agreements provided the respondent solicitors with a defence against the charges brought against them for gross overcharging.

87 The High Court held that gross overcharging was established on the facts notwithstanding the existence of the oral fee agreements which was only one factor to be considered.¹³⁹ Of particular interest was the High Court’s clarification that it was not wrong for a solicitor to enter into an agreement on fees for a non-contentious matter based on a percentage of the estate as s 109(3) of the LPA expressly contemplated such a fee arrangement.¹⁴⁰

88 The High Court noted, however, that this did not “mean that so long as the client agrees, a solicitor can charge for any amount or at whatever percentage of the subject matter and that fee arrangement will still be in order”.¹⁴¹ Section 109(3) of the LPA, read with s 109(1), was “purely facilitative” and “should not be read as sanctioning overcharging”.¹⁴² In other words, a fee based on a percentage was still required to be fair and reasonable.

89 The High Court also held that the object of s 109(4) of the LPA was “not only to ensure clarity but certainty in” signed written agreements, “in order to safeguard the interests of the client”.¹⁴³ As such, the High Court rejected the respondent solicitors’ argument that the formalities in s 109(4) were satisfied merely because the clients had signed cheques and had received letters and bills referring to the fee arrangement.

138 *Law Society of Singapore v Ang Chin Peng* [2013] 1 SLR 946 at [29].

139 *Law Society of Singapore v Ang Chin Peng* [2013] 1 SLR 946 at [48].

140 *Law Society of Singapore v Ang Chin Peng* [2013] 1 SLR 946 at [31].

141 *Law Society of Singapore v Ang Chin Peng* [2013] 1 SLR 946 at [32].

142 *Law Society of Singapore v Ang Chin Peng* [2013] 1 SLR 946 at [32].

143 *Law Society of Singapore v Ang Chin Peng* [2013] 1 SLR 946 at [28].

90 Another significant development during the review period was the requirement for a solicitor to advise his client of his right to have the solicitor's bill of costs taxed. In *Law Society of Singapore v Andre Ravindran Saravanapavan Arul*,¹⁴⁴ the respondent solicitor accepted that he had grossly overcharged his client, a management corporation, and had failed to propose to his client to have his bills taxed.

91 The High Court held that a solicitor who fails to advise his client of his right to have the solicitor's bill of costs taxed does so at his peril. This was because "[a] solicitor who offers to have his bill of costs taxed is ... unlikely to have the frame of mind or intention to overcharge his client."¹⁴⁵

92 The High Court further observed that "[e]ven where a bill rendered by a solicitor is *prima facie* excessive, any potentiality of the solicitor's conduct in rendering that bill being regarded as professional misconduct in the form of overcharging can usually be remedied or ameliorated by an offer to have the bill taxed (if it is taxable) under the Rules of Court ...".¹⁴⁶ Taxation "provide[d] the best means for an aggrieved client to determine what the proper fee is for the actual work done by his lawyer, and for the lawyer to avoid having to face a disciplinary charge for overcharging."¹⁴⁷

93 Indeed, the respondent solicitors' failure to raise the option of taxation to the clients was a factor in establishing grossly improper conduct in *Ang Chin Peng*.¹⁴⁸ In that case, the High Court found that the respondent solicitors "never once raised the option of taxation to the clients" and had adamantly maintained that the issue of taxation of legal costs did not arise in view of the prior agreement on legal costs.¹⁴⁹

B. Evaluation of critical themes

94 To what extent should the courts redress imbalances in fee arrangements between solicitor and client? On the one hand, the additional ethical duties imposed by the Singapore courts on solicitors to advise their clients on the nature of the fee arrangements and their rights arising under these arrangements serve to protect the interests of

144 [2011] 4 SLR 1184.

145 *Law Society of Singapore v Andre Ravindran Saravanapavan Arul* [2011] 4 SLR 1184 at [33].

146 *Law Society of Singapore v Andre Ravindran Saravanapavan Arul* [2011] 4 SLR 1184 at [32].

147 *Law Society of Singapore v Andre Ravindran Saravanapavan Arul* [2011] 4 SLR 1184 at [32].

148 [2013] 1 SLR 946.

149 *Law Society of Singapore v Ang Chin Peng* [2013] 1 SLR 946 at [58].

vulnerable clients and to bridge the “expectation gap”¹⁵⁰ between lawyer and client.

95 On the other hand, the Singapore courts have not indicated whether such additional ethical duties will be tailored according to the nature of the client. For example, sophisticated clients such as financial institutions may well not require such protection. As noted in a recent disciplinary case, “where a multi-national corporation negotiates an agreed fee structure with a law firm, or where a law firm is appointed after a client has sourced two or more fee quotes, it would obviously be much more difficult to impugn the fee agreement”¹⁵¹.

96 In the context of determining the scope of a solicitor’s duty of care to his client, the nature of the client has been an important consideration. As noted in *Lie Hendri Rusli*, a solicitor “ought to use his discretion, in every case, on the degree of detail, wealth of explanation and extent of advice required to bring home the ramifications of the legal documentation”¹⁵². The High Court elaborated as follows:¹⁵³

There is obviously an appreciable difference between the level of explanation and circumspection required in dealing with a sophisticated or shrewd businessman as compared with the proverbial layman. It might be said that an impoverished explanation to a client with an impoverished knowledge about worldly matters may in itself be evidence of negligence. This is to be contrasted with the situation of the sophisticated or shrewd businessman who can usually be assumed to have a measure of knowledge pertaining to the purport of legal documentation coupled with an innate ability to quickly size up and grasp the gist of his responsibilities.

97 In principle, there is no reason why the nature of the client should not be taken into account in delineating the scope of a solicitor’s cost disclosure obligations. In the Australian context, a learned commentator has noted that “[t]he nature and scope of the explanation [of a costs agreement] required rests on the client’s knowledge, experience and position”¹⁵⁴. Thus, “[a] client of limited experience or sophistication requires a greater explanation than one who is experienced in business and is likely to understand the effects of a costs agreement from a very brief explanation”¹⁵⁵. It remains to be seen whether the

150 Gino Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 5th Ed, 2012) at para 14.85.

151 *The Law Society of Singapore v Low Yong Sen* [2010] SGGT 2 at [27].

152 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [55].

153 *Lie Hendri Rusli v Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 at [55].

154 Gino Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 5th Ed, 2012) at para 14.205.

155 Gino Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 5th Ed, 2012) at para 14.205.

Singapore courts would take a similarly nuanced approach towards the costs disclosure obligations of solicitors.

VI. Conclusion

98 The great strides made by the Singapore courts in developing the jurisprudence of ethical lawyering during the review period have been an invaluable asset to the legal profession. Solicitors are now in a much better position to understand and apply judicial expectations of their roles in interpreting ethical rules, managing conflicts of interest, upholding the administration of justice and making costs disclosures.

99 It may be too early to tell whether the judicial developments highlighted in this article represent the apotheosis of ethical lawyering, given that, as noted above, there are still important questions to be addressed. Nevertheless, there is much cause for optimism for the development of higher professional standards as the Singapore courts have established a core of foundational principles of ethical lawyering on which the legal profession and other stakeholders in the legal landscape can build on. If there is one key take-away from the review period, it is perhaps best encapsulated in the following quote from *By Products Traders*:¹⁵⁶

Solicitors must exercise practical and deliberative wisdom and restraint in striking a prudent and pragmatic balance between ethics and expediency. Ethical rules and conventions can never exhaustively prescribe or proscribe standards of professional conduct. Using established standards as basic guides, solicitors must draw on their own internalised moral compasses to guide them through the myriad of conflicting priorities they have to regularly address and make in practice.

156 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR(R) 449 at [55].