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21. LEGAL PROFESSION

Khelvin **XU**
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Partner, Rajah & Tann Singapore LLP.

I. Introduction

21.1 Apart from disciplinary cases involving dishonesty, shortfalls in the handling of client money, and insufficient diligence (and, regrettably, such cases arise every year), 2019 was notable for cases involving more uncommon facts and issues of law.

II. Legal privilege in relation to in-house legal counsel

21.2 In *Asplenium Land Pte Ltd v Lam Chye Shing*,[1] the High Court substantively considered, for the first time, the Evidence Act[2] ("EA") provisions which extend legal professional privilege to communications with in-house counsel. In HC/S 37/2015, the plaintiff ("CKR") obtained discovery orders against the defendants ("the RLB Defendants"), who filed a supplementary list of documents. Asplenium then filed an originating summons to restrain CKR and the RLB Defendants from disclosing, receiving, and/or using some documents listed in the supplementary list of documents. Asplenium claimed that it was entitled to assert, over some of the documents, legal advice privilege under s 128A(1) of the EA because they were communications between its in-house legal counsel ("Hwang") and its project manager ("Sia") in relation to a particular project ("the Item 3 Documents").

21.3 The High Court held that Hwang was a "legal counsel" within the meaning of s 128A of the EA. Hwang was previously practicing law, his designation was "Director, Legal and Business Development" and his role in relation to Asplenium was of a purely legal nature. Further, there was no requirement under s 3(7)(*a*) of the EA for Hwang to be employed *exclusively* to provide legal advice. The Item 3 Documents were sent to Hwang in his capacity as an in-house legal counsel to seek his advice, input, and opinion where necessary.

1 [2019] 5 SLR 130.
2 Cap 97, 1997 Rev Ed.

21.4 Next, the High Court considered whether Hwang was a legal counsel of Tuan Sing, which was a related corporation to Asplenium under the Companies Act[3] ("CA"). If so, he would also be regarded as legal counsel of Asplenium under s 128A(4) of the EA read with s 6 of the CA. The issue was complicated by the fact that Hwang was formally employed by Nuri (another company) but was also performing legal work for Tuan Sing, which paid to Nuri roughly half of Hwang's salary under a cost-sharing arrangement.

21.5 The High Court held that the dispute turned on whether Hwang was "employed" by Tuan Sing, that is, whether there was a master-servant or employer-employee relationship between them. The High Court went into an in-depth exploration of the working arrangements between Hwang and Tuan Sing, and the various factors relevant to the identification of an employment relationship, and concluded that an employment relationship existed between Hwang and Tuan Sing.

21.6 CKR then argued that the Item 3 Documents were not privileged because Sia (the project manager) was (a) an employee of Tuan Sing and not Asplenium; and/or (b) not authorised to deal with Asplenium's lawyers. However, the High Court held that privilege could be sustained whether Sia was employed by Asplenium or Tuan Sing, and that Sia, as the project manager in charge of the project, was implicitly authorised to seek and receive legal advice from Hwang.

21.7 Finally, CKR argued that Asplenium could not assert privilege because (a) it had waived privilege by copying the Item 3 Documents to the quantity surveyor for the project ("Lam"), who was not an employee of Asplenium; and (b) it was Lam, not Asplenium, who was being asked to disclose the documents. The High Court held that there was no waiver, whether express or implied, arising merely from the Item 3 Documents being copied to Lam. While it was Lam (and not Asplenium or its employees) who was being asked to disclose the documents, the High Court granted an injunction to prevent the unauthorised use in court proceedings of information contained in privileged material, which would in most instances be of a *confidential nature*.

21.8 CKR's appeal was dismissed by the Court of Appeal with no written grounds of decision rendered. This case is interesting, because while CKR raised several technical arguments to support its proposition that the Item 3 Documents did not fall within the ambit of s 128A of the EA, the High Court took a more broad-brush approach that took into account the commercial reality – that companies often rely on in-house

3 Cap 50, 2006 Rev Ed.

counsel who may not be formally employed by the company itself or a related company (as defined under the CA), but who nevertheless operate within the company's structure. The High Court was also prepared to uphold privilege notwithstanding that the Item 3 Documents had been copied to a person who was not, strictly speaking, within the structure of the company itself.

III. Misconduct complaints against legal service officers

21.9 In *Re Salwant Singh s/o Amer Singh*,[4] the applicant had been sentenced (upon appeal) to 20 years' preventive detention in 2003. In 2019, the applicant sought leave for an investigation into his complaint of misconduct against three legal service officers, who were the deputy public prosecutors ("DPPs") who had been involved in prosecuting him. The applicant claimed that the DPPs carried out "premediated [*sic*] and malicious prosecution" by charging him for offences that they knew he had not committed.

21.10 Under s 82A of the Legal Profession Act[5] ("LPA"), leave must be granted by the Chief Justice before commencing investigation into misconduct complaints against legal service officers. This inquiry involves a two-stage process:

(a) First stage: The Chief Justice must be satisfied that there is a *prima facie* case for an investigation into the complaint.

(b) Second stage: The Chief Justice needs to consider if there are any relevant factors that might influence his/her decision on whether leave should be granted.

21.11 As regards the first stage, the Chief Justice held that there was no *prima facie* case for an investigation because:

(a) The applicant's veracity was questionable because of his significant delay in raising the issues, and the grounds he relied upon evolved over time.

(b) Even if the Chief Justice accepted the applicant's case that he did not commit the 188 offences in question (purportedly because of a discrepancy in the dates), these offences had not been proceeded against him, but had been taken into consideration. There would still have been 572 charges (out of a total of 760 charges) taken into consideration which justified

4 [2019] 5 SLR 1037.
5 Cap 161, 2009 Rev Ed.

the sentence he received. Further, the Court of Appeal had imposed 20 years' preventive detention on the applicant for the protection of the public, and not because of the precise number of charges taken into consideration. The alleged wrong charges therefore did not affect the applicant's conviction and sentence, and undermined his suggestion that the DPPs had deliberately fabricated the charges in order to secure his conviction and/or a harsher sentence.

(c) There was no evidence that the DPPs were aware of the alleged inconsistency in the dates of the charges that the applicant was complaining of.

21.12 While it was unnecessary for the Chief Justice to proceed to the second stage, the Chief Justice nevertheless held that the application would have failed at the second stage given the inordinate delay in the applicant bringing the complaint. The significant delay would lead to substantial prejudice to the DPPs because it would likely affect their recollection of the case and access to relevant records. Further, given the inherent weakness of the complaint, there was no overriding interest in directing a further investigation. There was also no prejudice suffered by the applicant because even if his allegations were accepted, they did not affect the foundation of his conviction or sentence.

IV. Professional conduct rules – deceiving or misleading the court by making false and inaccurate statements

21.13 *The Law Society of Singapore v Koh Tien Hua*[6] was the latest in series of decisions involving a client's complaint against his lawyer in matrimonial proceedings. On 12 May 2016, the complainant client had lodged a complaint with the Law Society. The inquiry committee recommended that a formal investigation by a disciplinary tribunal ("DT") was not necessary, save that the respondent lawyer should pay a $2,500 penalty in respect of one of the heads of complaint. Council of the Law Society accepted the recommendations. Dissatisfied, the complainant filed an originating summons asking that the High Court direct the Law Society to apply to the Chief Justice for the appointment of a DT pursuant to s 96(4)(*b*) of the LPA. The High Court granted the application partially (in *Loh Der Ming Andrew v Law Society of Singapore*[7]). This case set out the DT's findings.

6 [2019] SGDT 9.
7 [2018] 3 SLR 837.

21.14 The charges before the DT were grouped into three broad categories of allegations:

(a) Group 1: that the respondent breached r 56 of the Legal Profession (Professional Conduct) Rules 2010[8] in deceiving or misleading the court by making false and inaccurate statements;

(b) Group 2: that the respondent agreed to consent orders without the complainant's consent, culminating in the filing of a notice of appeal; and

(c) Group 3: that the respondent failed to provide sufficient legal advice on (i) appealing various orders; and (ii) how consent orders would impact the possibility for an appeal.

21.15 In relation to various Group 1 charges, the DT found that the complainant had not proven beyond reasonable doubt that the respondent had *knowingly* misled the court, and that there was an equally strong case that the respondent had merely been careless. However, in relation to two charges under Group 1:

(a) On 27 July 2015, the respondent had stated to the court that he was "unable to get [his] client's confirmation" in relation to a settlement. However, the respondent had not communicated with the complainant between 7 July 2015 (on which they had last met) and 27 July 2015, and as such, the phrase was misleading.

(b) The respondent had also stated to the court that he had "[n]o instructions to agree", in response to the court's query as to whether he intended to contest the other party's application to strike out parts of the complainant's pleadings. However, in an e-mail of 14 July 2015, the complainant had agreed to allow eight out of the 61 challenges to the pleadings. While the DT found that it was not established beyond reasonable doubt that the respondent acted with an intention to deceive or mislead the court, the statement was untrue and plainly contrary to the complainant's instructions.

21.16 However, the threshold of "grossly improper conduct" was not met. While the respondent had carelessly made inaccurate statements, there was no dishonesty or intention to mislead. That being said, the respondent's conduct still fell within the ambit of s 83(2)(*h*) of the LPA (misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession), and the DT found him guilty of these two charges.

8 Cap 161, R 1, 2010 Rev Ed.

21.17 In relation to Group 2 charges, an advocate and solicitor must be mindful of the broader interests in a matrimonial dispute, including those of the complainant's children. It was reasonable of the respondent to understand that he had been granted some latitude in determining the best outcome for the complainant, given that:

(a) In the e-mail of 14 July 2015, the complainant had stated that he "would defer to [the respondent's] counsel on the final list".

(b) In the same e-mail, the complainant had referred to his instructions as him "providing [his] suggestions, a proposal".

(c) In an e-mail of 26 July 2015, the complainant had stated that he had followed the respondent's advice to "focus 100% on my children, and to leave the matter in your hands …".

21.18 The DT therefore did not conclude that the respondent had agreed to the consent orders without the complainant's consent. The complainant did not prove that the respondent had intentionally deceived or misled the complainant on the effect of the consent orders, and the notice of appeal was ultimately filed on time. The Group 2 charges were not made out.

21.19 In relation to the Group 3 charges, the DT's remit (as encompassed in the High Court's decision in *Loh Der Ming Andrew v Law Society of Singapore*)[9] did not extend to this set of charges. In any event, the charges were not proven beyond reasonable doubt as the respondent had sufficiently advised the complainant on appealing the orders made.

21.20 Finally, the DT also made observations as to whether the respondent could be charged under ss 83(2)(*b*) and 83(2)(*h*) of the LPA for the same offence. While the respondent argued that this would be a breach of the doctrine of *autrefois convict* (a person cannot be tried for a crime for which he has previously been acquitted or convicted), this did not apply to the present case as the respondent had not faced prior proceedings or been convicted.

21.21 The respondent also argued that charging him *concurrently* under ss 83(2)(*b*) and 83(2)(*h*) of the LPA amounted to an abuse of process. While the majority of DT decisions involve charges framed *in the alternative* (where multiple charges brought on the same set of facts), the DT noted that there did not appear to be any bar against framing the charges concurrently.

9 See para 21.13 above.

21.22 As to the appropriate sanction to be imposed (given that the DT had found the respondent guilty of two charges under Group 1), the DT held that the respondent's conduct fell under s 93(1)(*b*) of the LPA, and determined that the respondent should pay a penalty of $10,000. The DT also ordered the respondent to bear 25% of the complainant's costs.

21.23 The reader might well feel some sympathy for the respondent. The engagement lasted just over a month, from 7 July 2015 to 11 August 2015, and the respondent had waived all legal fees to prevent the issue of fees from causing more bad blood. The respondent's statements to the court were also made after he had rushed to court because he had thought that the hearing was fixed for that afternoon (and not the morning). But sympathies aside, this case illustrates the high standards that lawyers are held to as regards their communications with the court, and the importance of refreshing one's memory (before court attendances) as to what instructions had been given (or not given) by clients.

V. Cost consequences of disproportionate litigation

21.24 *Singapore Shooting Association v Singapore Rifle Association*[10] concerned an appeal against the High Court's decision in disputes between the national sport association for shooting ("SSA"), and one of its founder members ("SRA"). Putting aside the legal merits of the decision, the case is striking for the Court of Appeal's finding that SRA's disproportionate manner of litigation could lead to cost ramifications for SRA and *its counsel as well*.

21.25 SRA brought, *inter alia*, a claim for conspiracy against various individuals who were SSA's council members, and SSA brought a counterclaim against SRA for the cost of demolishing a shooting range which SRA had allegedly built illegally. As a charity, SRA was required to obtain the authorisation of the Commissioner of Charities (under s 31(2) of the Charities Act)[11] in order to take out charity proceedings in the High Court.

21.26 While SRA did obtain such authorisation, the scope of authorisation did not extend to its claim for conspiracy. The Court of Appeal held that SRA's conspiracy claim ought not to have been mounted in the High Court, and that:

> (a) It was difficult to see what benefit SSA, as a charity, would have gained from having the conspiracy claim litigated in

10 [2020] 1 SLR 395.
11 Cap 37, 2007 Rev Ed.

the High Court, since its conspiracy claim against the individuals had no real connection to the administration of SSA as a charity (and SRA was not even seeking their removal from SSA).

(b) The costs incurred in relation to the conspiracy claim must have been significant (especially since it was litigated in the High Court).

21.27 The Court of Appeal held that SRA conducted the litigation disproportionately because:

(a) The conspiracy claim ought not to have been part of the High Court proceedings. Even if the conspiracy claim (which took 11 hearing days and involved five lawyers in the High Court and six lawyers in the Court of Appeal) had succeeded, SRA stood to recover, at best, an amount far below the High Court threshold. Even if SRA wanted to secure the proper governance of SSA, it should have considered whether the expense of High Court litigation was appropriate, bearing in mind that SRA's assets would be diverted towards litigation. Further, even if SRA had brought the case on the principle of not allowing SSA to bully SRA, it had to ask whether this principle had to be defended at any price, especially given the low quantum of loss claimed. Even if SRA was prepared to go to court and incur costs, SRA's counsel, as an officer of the court, owed a higher duty to the court to assess whether it was in the interests of the administration of justice (given the judicial time and resources needed) to pursue the conspiracy claim.

(b) SRA failed to pursue more cost-efficient alternatives, such as seeking an injunction against SSA.

(c) Although SRA succeeded in defending SSA's counterclaim, the reasons given by the Court of Appeal were quite different from those SRA relied upon. SRA had made lengthy submissions when a simpler analysis was available, and counsel was to conduct cases in a manner which maintained the efficiency of court proceedings.

21.28 As for SSA (which is also a charity), it was also required to obtain the authorisation of the Commissioner of Charities (under s 31(2) of the Charities Act) in order to bring its counterclaim, but it did not do so. The value of its counterclaim was also small and far below the High Court monetary threshold. In addition, SSA and the council members who were parties to the suit had behaved deplorably.

21.29 In light of SSA's conduct, and the way SRA conducted the litigation, the Court of Appeal ordered parties to bear their own costs.

However, the Court of Appeal was minded to order one of SSA's council members to personally indemnify SSA in respect of its legal costs, and allowed him the opportunity to make submissions against such an order.

21.30 More pertinently to the legal profession, in respect of SRA's counsel, the Court of Appeal was also minded to disallow or limit the recovery of their costs from SRA pursuant to O 59 r 8(1)(*a*) of the Rules of Court, because of the "grossly disproportionate and ill-advised manner" in which litigation was conducted before the Court of Appeal and below. SRA's counsel was given the opportunity to make submissions in response.

21.31 This author would venture to make a few observations. First, could it be that the Court of Appeal was not inclined to allow SRA's counsel's costs partly because SRA was a *charity*? While SRA's decision-makers could have believed that it was necessary for SRA to incur legal costs to vindicate SRA's position, it is unknown whether all of SRA's members, past and present (who would have contributed towards SRA's assets) shared the same view. Perhaps the Court of Appeal was disinclined to penalise SRA's members for the actions wrongfully taken by a small group of decision-makers.

21.32 Second, this case reinforces the need for counsel to consider, not just from a client-centric but also from a court-centric perspective, whether certain heads of claim should be brought. While the Court of Appeal did not identify the factors that it would consider in SRA's counsel's show cause submissions, the Court of Appeal did refer to SRA's litigation as "ill-advised". This author wonders whether the Court of Appeal would be more sympathetic to SRA's counsel if they had advised *against* conducting litigation in this fashion, but were nevertheless instructed to proceed. But even if this was what had happened, it does not address the Court of Appeal's observations about counsel's higher duty to the court. Taking the Court of Appeal's observations to their logical conclusion, one wonders whether in such a situation, counsel would have no choice but to discharge themselves from acting further.[12]

12 For a more focused analysis on the possible conclusions to be drawn from this case, see Jeffrey Pinsler, "Lawyer's Responsibility Not to Pursue a Claim or Application or Appeal Favoured by the Client Where the Interest of the Administration of Justice Will Be Compromised" *Singapore Academy of Law Journal* (published on e-First 6 April 2020).

VI. Lawyers affirming affidavits in proceedings

21.33 This author's anecdotal experience is that it is common for counsel to affirm affidavits in support of interlocutory proceedings, especially to set out matters which are not in dispute or the procedural history. However, it is settled law that counsel should not make affidavits where the facts are in dispute.[13] One can expect the *contents* of such an affidavit to be challenged by an opponent. However, an interesting situation arose in *TWM v TWN*,[14] in which a challenge was made against counsel (who had affirmed an affidavit) *continuing to act*.

21.34 The plaintiff applied for a Judge to be recused from hearing divorce proceedings and filed an affidavit in support. The defendant's counsel affirmed and filed an affidavit in reply. The recusal application was dismissed, and the plaintiff did not appeal. The plaintiff then applied for the defendant's counsel (who had affirmed the affidavit in reply) and his firm to be enjoined from further acting for the defendant.

21.35 The plaintiff argued that by filing the affidavit, the defendant's counsel had breached r 11(3) of the Legal Profession (Professional Conduct) Rules 2015[15] ("PCR"), which provides that counsel should discharge themselves if they will be required to give evidence material to the determination of any contested issue. The plaintiff also submitted that there were special or exceptional circumstances warranting the court's intervention.

21.36 The Family Court held that the plaintiff was actually asking the court to determine that the defendant's counsel had breached r 11(3) of the PCR. However, the court was not the proper forum for such determination and investigations of PCR breaches, and the PCR did not govern injunctions to restrain law firms from acting for the opposing party.

21.37 The Family Court then considered the plaintiff's submission that there were special or exception circumstances warranting such restraint. However, the Family Court held that as a subordinate court, it did not have the inherent jurisdiction (which the High Court had) to regulate and supervise the conduct of its officers. However, even if the Family Court had such jurisdiction, the plaintiff had not shown special or exceptional circumstances.

13 See *The Evpo Agsa* [1992] 1 SLR(R) 662 at [15]–[16].
14 [2019] SGFC 117.
15 S 706/2015.

21.38 The test was whether there was an actual or reasonably perceived risk that the proper administration of justice would be prejudiced unless the lawyer in question was removed. In this case, defendant counsel's affidavit covered matters that were already in the court records. Further, nothing in the defendant's counsel's affidavit, and the affidavit it was in response to, related to *outstanding* (contested) ancillary matters. The plaintiff also claimed that the defendant's counsel had (in the affidavit) made allegations against the plaintiff, but these were actually the *defendant's* allegations. As such, the defendant's counsel did not give any evidence material to the determination of any contested issue.

21.39 In addition, when the recusal application was heard, the Family Court had informed the plaintiff's counsel that it would not refer to the defendant's counsel's affidavit. Therefore, the Family Court was not persuaded that the defendant's counsel would be a witness in the outstanding matters. The plaintiff's application was dismissed with costs.

21.40 While this decision appears, at first glance, to endorse the practice of counsel affirming affidavits setting out the procedural history of a matter, this author remains doubtful that this is the best practice. There remains the risk of counsel's affidavit straying into disputed matters. Further, there may well be a difference of opinion between parties as to what matters are disputed, and which may only become apparent *after* an affidavit has already been affirmed and filed by counsel. In this author's view, the safest course of action is still for parties themselves or their representatives (and *not* counsel) to affirm affidavits, even for interlocutory purposes, so as to avoid objections to the identity of the deponent.

VII. Taxation of solicitor-and-client bills

21.41 In *JWR Pte Ltd v Syn Kok Kay*,[16] the applicant sought to tax 35 invoices (totalling $1,151,089.80) as bills of costs, which had been issued by the applicant's previous solicitor (the respondent). The respondent dropped his claim for the 35th invoice (for an interim fee of $150,000) as he was no longer acting for the applicant. The High Court therefore considered whether to order taxation for the remaining 34 invoices.

21.42 The key issues which the High Court had to consider were:

(a) whether the 34 invoices were bills of costs under s 122 of the LPA; and

16 [2019] SGHC 253.

(b) if so, whether there were special circumstances justifying an order for taxation, notwithstanding that (i) more than 12 months had passed from the delivery of the invoices; and (ii) the applicant had made payment of the invoices ("the Twin Bars").

21.43 It was first necessary to determine whether the 34 invoices were bills of costs, because if they were not, the applicant would be able to tax them notwithstanding the Twin Bars. Under s 118(3) of the LPA, bills of costs delivered in compliance with s 118(1) of the LPA are presumed to be bills *bona fide* complying with the LPA, unless proven to the contrary. However, in this case, the presumption was rebutted because:

(a) There was no narrative in the 34 invoices to identify what the applicant was being charged for. The lack of particulars was a factor in favour of requiring taxation.

(b) The applicant did not have any information that would have enabled it to take advice on whether to go for taxation. The applicant did not know what it was being billed for, and its requests for itemisation were rebuffed by the respondent. Without the breakdown, the applicant would not be able to determine whether the charges were reasonable (for example, if there was double-billing, mistaken billing for work not done, or overcharging).

21.44 The High Court then went on to consider what a bill of costs not drawn for taxation should concern. It considered the practice in England and Wales, and in Australia, and held that the basic notion of a bill of costs was to *itemise* the solicitor's services to the client so that the client understands what it was paying for. Since the respondent refused to provide an itemised bill even when requested by the applicant, the presumption was rebutted.

21.45 On this basis alone, the application for taxation of the 34 invoices was allowed. However, the High Court also went on to consider whether there were *special circumstances* under s 122 of the LPA to warrant taxation. Under s 120 read with s 122 of the LPA, a client can obtain an order for taxation if it applies within 12 months from the date of the delivery of the bill, but if either of the Twin Bars exists, the client must prove the existence of *special circumstances* before an order of taxation will be made.

21.46 In deciding whether special circumstances exist, the court must balance the solicitor's interest in being fairly paid, against the client being given sufficient information to understand the services billed for.

The categories of special circumstances are not exhaustive and include circumstances where there has been:

(a) prolonged negotiation over fees after which the client applies for taxation;

(b) a disciplinary committee's finding that the solicitor has overcharged;

(c) an impecunious client who requires time to secure legal aid in order to apply under s 120;

(d) a bill which fails to provide sufficient information, even when supplemented by what the client knows, to enable the client to take an informed decision on whether to tax;

(e) the fact that the solicitor, without his client's knowledge or consent, appropriated funds belonging in equity to the client in order to pay the bill; and/or

(f) duress, pressure or fraud by the solicitor.

21.47 The special circumstance should explain or justify why indulgence should be granted. In the present case, there were special circumstances, given the lack of itemisation despite repeated requests:

(a) Although the applicant had paid the invoices promptly, the onus was not on the applicant to take objections, and the respondent had the duty to raise proper bills of costs which identified clearly and accurately the subsidiary matters within the same case.

(b) The applicant had made payments under protest or indicated unhappiness.

(c) The lack of itemisation was compounded by the parties' arrangement. The lack of itemisation might be less problematic if, for example, there was a written agreement for lump-sum payment with progressive billings, so that the client at least understood the big picture and the limit of the lawyers' fees. However, even for lump-sum fees, the solicitor should nevertheless provide sufficient itemisation for the client to appreciate the bill. In the present case, there was no cap on the respondent's fees, and this was unfair to the applicant which faced the possibility of open-ended ballooning of costs without itemised bills that would allow it to assess the reasonableness of the charges.

(d) While high fees are generally commensurate with large claims and *vice versa*, there was a lack of fairness from the respondent given the complete lack of itemisation and repeated requests for itemisation.

21.48 Finally, the High Court considered whether the respondent would be prejudiced by an order for taxation, since the court must be alive to the possibility of a late ambush by a client who wants to get out of paying his dues. However, this did not apply as the applicant had promptly paid the invoices. Further, as the respondent had records of the work done for the applicant, he would not be prejudiced at taxation. The only possible "prejudice" he would face would be that the Registrar might reduce the invoiced sums, but this was speculative.

21.49 Time and time again, the court has considered what is required of bills issued by counsel to clients. This author makes few observations as to the form in which bills should be issued:

> (a) The practice of issuing a lump sum bill, before providing an itemised bill only on request, is accepted in Singapore (as the High Court noted in this case). However, counsel should nevertheless be ready to provide an itemised bill if requested. A refusal to do so would give the client grounds to obtain an order for taxation – upon which counsel would need to deliver a detailed bill of costs for taxation anyway. Conversely, if an itemised bill is provided upon request and the client only applies for an order for taxation after 12 months have elapsed, the client will not be able to argue that the lack of itemisation (by itself) constitutes special circumstances justifying an order for taxation.
>
> (b) Anecdotally, it appears that some law firms are not in the habit of keeping detailed timesheets of work done. Instead, lump sum bills are issued as a matter of course. Should a client ask for an itemised bill, or it becomes necessary to prepare a bill of costs for taxation, the firm will have to review its files and reconstruct what work had been done for which the client had been billed. But such a process is unlikely to accurately capture full details of all work done and time spent, given (*inter alia*) (i) the likely passage of time; (ii) the need to estimate, based purely on the work product, the time spent to produce that work product; (iii) the difficulty of ascertaining time spent on legal research based on legal authorities filed away; and (iv) the possibility of work done which is not captured in the files (for example, if counsel communicate with clients in the form of text messages which are not filed). The question for such firms is whether they see value in investing in technology that allows more detailed timekeeping, especially in light of the on-going Tech-celerate for Law initiative (which provides funding support for qualified Singapore law practices to adopt legal technology solutions).

VIII. Divorce proceedings – whether ex-spouse can claim law practice profits notwithstanding LPA prohibition against sharing

21.50 In *UZM v UZN*,[17] which concerned (*inter alia*) the division of matrimonial assets in the context of uncontested divorce proceedings, the husband raised a creative argument against the wife's claim for a half share of the husband's earnings.

21.51 The husband was a practising lawyer who was an equity partner of a legal partnership. The wife sought a half share in the profits or earnings of the partnership. The husband argued that her claim was disentitled due to s 36G(1) of the LPA, which disallows a person who is not a regulated legal practitioner from sharing in the profits of any Singapore law practice unless the person is registered under s 36G of the LPA.

21.52 The High Court held that s 36G(1) of the LPA did not preclude the husband's earnings from the partnership from being regarded as a matrimonial asset. While s 36G(1) would disallow the wife from seeking a direct share in the partnership's profits through a profit sharing arrangement, it does not operate in the context of the division of assets under s 112 of the Women's Charter.[18] The husband's earnings and share in the partnership were matrimonial assets as they were acquired during the marriage, just as how a spouse's earnings from and share in any other commercial venture would be considered matrimonial assets.

IX. Lawyers' duty to avoid conflicts of interest

21.53 While it is not uncommon for lawyers to act for different parties in the same matter, *so long as their interests are aligned*, lawyers must constantly evaluate whether any divergent interests have arisen or come to light.

21.54 In *Law Society of Singapore v Ezekiel Peter Latimer*,[19] the respondent solicitor acted for both (a) a foreign worker; and (b) the foreign worker's employer. Both the foreign worker and the employer were charged with making a false declaration of the foreign worker's salary to the Ministry of Manpower ("MOM") in the application for a work permit ("AWP"). While the foreign worker was told that his monthly

17 [2019] SGHCF 26.
18 Cap 353, 2009 Rev Ed.
19 [2019] 4 SLR 1427.

salary would be between INR 50,000 and INR 60,000 (between $1,030 and $1,237), the AWP (which both the foreign worker and the employer had signed off) reflected a fixed salary of $1,800.

21.55 Subsequently, the MOM raided the foreign worker's workplace. Both the foreign worker and the employer engaged the respondent as counsel. At some point in time, the respondent represented both the foreign worker and the employer concurrently. The respondent then sent a letter of representation ("the Representations") to the Attorney-General's Chambers ("AGC") on the foreign worker's behalf, in which the respondent took the position that the foreign worker *knew all along* that the AWP reflected a higher amount than the amount he would receive, but the foreign worker went along with it because he thought the difference had been properly accounted for (as it took into account the employer's expenses for the foreign worker's meals, lodging and airfare).

21.56 However, the foreign worker's evidence (which the DT preferred over the respondent's evidence) was that he genuinely believed he would be paid $1,800 (and not $1,200), only found out that his salary was $1,200 after the MOM raid, and was *deceived* into signing the AWP (reflecting a fixed salary of $1,800). The DT preferred the foreign worker's evidence over the respondent's evidence.

21.57 The DT also found that the respondent was already acting for the employer before he was engaged by the foreign worker, and did not deal with the foreign worker's allegation of deceit in the Representations because it would have adversely affected the interest of the employer (whom he was already representing). As an experienced lawyer, the respondent would have realised that he was in a position of conflict of interest given the foreign worker's allegation that the employer had deceived him. The omission was material and would have given the AGC the wrong impression of the facts.

21.58 The DT found that there was misconduct which amounted to a breach of the Legal Profession (Professional Conduct) Rules 2010, namely:

> (a) rr 25(*a*) and/or 25(*b*), for not advancing the foreign worker's interest unaffected by the interest of any other person; and
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> (b) r 56 for knowingly misleading the court, or other person or body involved in or associated with court proceedings.

21.59 However, the DT was *not* satisfied that such misconduct was either "grossly improper conduct" or "misconduct unbefitting an advocate and solicitor". The DT held that while no cause of sufficient gravity for

disciplinary action existed, the respondent should be reprimanded, pay a total penalty of $3,000, and bear costs. Dissatisfied, the Law Society filed an application pursuant to s 94(3)(*b*) of the LPA.

21.60 Before the Court of Three Judges, the DT's factual findings were not challenged. The key issues for the Court of Three Judges' determination were:

> (a) whether the respondent's misconduct was *grossly improper* within the meaning of s 83(2)(*b*) of the LPA or amounted to *conduct unbefitting of an advocate and solicitor* within the meaning of s 83(2)(*h*) of the LPA, and whether there was due cause for the respondent to be subject to sanction pursuant to s 83(1) of the LPA; and if so,
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> (b) the appropriate sanction to be imposed.

21.61 Whether conduct is *grossly improper* within the meaning of s 83(2)(*b*) of the LPA depends on whether the conduct is dishonourable to the solicitor concerned as a man and dishonourable in his profession. Deceit is not necessary for a finding of grossly improper conduct: either fraudulent *or* grossly improper conduct needs to be shown. Whilst simple negligence or want of skill would not necessarily constitute grossly improper conduct, there are degrees of negligence, and the gravity of a negligent act must be viewed in context. Grossly improper conduct will also be found where a solicitor prefers his own interests to that of his client.

21.62 As for whether there has been *conduct unbefitting of an advocate and solicitor* within the meaning of s 83(2)(*h*) of the LPA, this provision is broader than s 83(2)(*b*), and will be met if a solicitor is guilty of conduct rendering him unfit to remain as a member of an honourable profession. The test is to consider whether reasonable people, on hearing what the solicitor had done, would have said without hesitation that as a solicitor he should not have done it.

21.63 Applying these principles, the Court of Three Judges held that the DT erred in finding that the respondent's conduct (a) was merely *improper conduct* under s 83(2)(*b*)(i), and not *grossly improper conduct* under s 83(2)(*b*) of the LPA; and (b) did not constitute *misconduct unbefitting an advocate and solicitor* under s 83(2)(*h*):

> (a) The respondent's misconduct could not be classified as simple negligence or want of skill. The respondent had not pursued the foreign worker's allegation of deceit because it would have affected the interests of the employer, who had first engaged the respondent. Further, the respondent had "carefully

drafted" the Representations in a way that mischaracterised the foreign worker's position so as not to undermine the employer's position, which misled the AGC to the detriment of the foreign worker.

(b) The respondent did not simply fail to advance the foreign worker's interest with diligence and zeal. Rather, he deliberately compromised the foreign worker's interests in order to prefer the interests of another client. This went against the very essence of the duty owed, which was to do one's best to advance the client's interest and not harm the client.

21.64 As for the charge that the respondent had misled the AGC in a matter that affected the Attorney-General's ("AG") constitutional discretion and control over the prosecution of pending criminal proceedings, this was also grossly improper conduct or conduct unbecoming of an advocate and solicitor.

21.65 In order for there to be due cause under s 83 of the LPA, the court must find that (a) the solicitor's conduct falls within one of the limbs under s 83(2); and (b) that on the totality of the facts and circumstances, the solicitor's conduct was sufficiently serious to warrant the imposition of sanctions under s 83(1) of the LPA. The Court of Three Judges held that due cause had been made out given the severity of the misconduct.

21.66 Turning to the sanction to be imposed, the general objectives that guide the determination of appropriate sanctions are:

(a) to uphold public confidence in the administration of justice and in the integrity of the legal profession;

(b) to protect the public who are dependent on solicitors in the administration of justice;

(c) to deter similar offences being committed by the errant solicitor, or for that matter, by other like-minded solicitors; and

(d) to punish the errant solicitor for his misconduct.

21.67 The Court of Three Judges then set out the applicable principles in cases involving conflict of interests, with a view to establishing a coherent framework for the appropriate sanction:

(a) Misconduct arising from a conflict of interest is reprehensible because it entails a grievous violation of a lawyer's duty of unflinching and undivided loyalty to a client. This duty is a foundational responsibility, which the integrity of the legal profession and the public interest in securing proper legal representation depends upon. Where the interests of a client

have been compromised, appropriate sanctions are required to uphold public confidence in the legal profession, and given the trust and confidence that a lay client reposes in his lawyer.

(b) The sanction to be imposed should reflect both the *culpability* of the errant solicitor and the *harm* caused by his misconduct.

(c) As to culpability, the relevant factors include (but are not limited to):

(i) the solicitor's motivation for the misconduct;

(ii) whether the misconduct arose from planned or spontaneous actions;

(iii) the extent to which the solicitor acted in breach of a position of trust. Of relevance are the client's characteristics and whether the client reposed a greater degree of trust and confidence in the solicitor due to his particular vulnerabilities, such that any resulting abuse of that trust was more reprehensible. The level of sophistication of the client affects the standard of care that a solicitor should be held to, and a solicitor's indifference to the interests of an unsophisticated client would ordinarily aggravate his culpability. The solicitor's culpability would also be aggravated where there has been systematic manipulation or abuse of the trust of a vulnerable client;

(iv) the extent to which the solicitor had direct control of or responsibility for the circumstances giving rise to the misconduct;

(v) the solicitor's level of experience. A solicitor's abundant experience might increase his culpability if it reveals an inexcusable lack of competence in failing to disclose or remedy a conflict of interest, but a solicitor should also not be allowed to rely upon his inexperience as a mitigating factor; and

(vi) whether the solicitor deliberately misled the regulator.

(d) As to harm, it would be relevant to assess the impact of the solicitor's misconduct upon (i) those directly or indirectly affected by the misconduct; (ii) the public; and (iii) the reputation of the legal profession. The greater the departure from the integrity, probity and trustworthiness expected, the greater the harm to the reputation of the legal profession.

21.68 The Court of Three Judges then set out the different categories of conflict of interest and the presumptive sanction for each category:

> (a) *Category 1*: where the errant solicitor prefers his own interests over that of a client. Such misconduct is presumptively more serious and deserving of a more severe sanction than other categories, because it often entails an abuse of the trust arising out of the solicitor-client relationship. Such cases presumptively fall on the high end of the harm-culpability spectrum. In such cases, striking off would be the presumptive penalty, unless there are truly exceptional circumstances which render it disproportionate.
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> (b) *Category 2*: where there is conflict of interest between multiple clients. In such cases, the solicitor has made it impossible or impracticable to fully advance the interests of each client in the expected manner, and is hampered in fulfilling his duty to act in each client's best interests. This category was further subdivided into:
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> > (i) *Category 2A*: where the errant solicitor prefers the interests of one client over the other. Such cases should typically attract a higher sanction than Category 2B cases below because they presumptively involve greater harm and culpability (given the actual subordination and undermining of a client's interests). The appropriate sanction will usually be a term of suspension, with a starting point of two years. A longer suspension ought to be imposed on solicitors who prefer the interests of a client whose interests are more closely aligned with the solicitor himself (for example, where the preferred client is a relative); and
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> > (ii) *Category 2B*: where the errant solicitor fails to advise a client of a potential conflict of interest arising out of concurrent representation. In such cases, the solicitor's concurrent representation of clients with conflicting interests gives rise to a *potential* conflict of interests but the interests of either client would not have been subordinated to the other. In contrast to Category 2A cases, the mischief is the solicitor's omission to exercise requisite caution and diligence when in a position of conflict. The misconduct often falls at the lower end of the harm-culpability spectrum, but suspension may nonetheless be appropriate where a larger public interest is harmed by the misconduct, notwithstanding the lack of harm to the client.

While Category 2 cases presumptively fall at the lower end of the harm-culpability spectrum, the court may impose a harsher sentence in appropriate cases. Where the misconduct is so severe that it reveals a character defect that renders the respondent unfit to remain an advocate and solicitor, a striking out order would be appropriate.

21.69 Turning back to the present case, which fell within Category 2A, the Court of Three Judges held that:

(a) The starting point was a term of suspension, to be calibrated according to the culpability of the respondent and the harm caused by his misconduct.

(b) There was a high degree of culpability. First, the concurrent representation of clients with diverging interests was not mere inadvertence or negligence, and the respondent knew or ought to have known that there was a conflict of interests. Second, the respondent had deliberately crafted the Representations to prefer the interests of the employer over that of the foreign worker, which was reprehensible because it involved the deliberate subordination of one client's interests to another's. Further, the Representations were a deliberate misrepresentation to the AGC of the foreign worker's defence, and prevented the AG from properly exercising his discretion in directing public prosecutions.

(c) There was also a relatively high level of harm. The case concerned criminal proceedings, with higher stakes and possible consequences on the client's livelihood or even liberty. The foreign worker was ultimately convicted of a criminal offence (which carried an additional stigma), ordered to pay a hefty fine, and was repatriated to India. The foreign worker's instructions to the respondent (which were not presented to the AGC) could have afforded him a legitimate defence. The foreign worker suffered irreparable harm due to the respondent's misconduct.

(d) Further, the respondent was a solicitor of 21 years' standing and had antecedents. The respondent ought to have had a heightened awareness of his duties. However, the respondent's antecedents were not given significant weight as these antecedent matters had not yet been concluded at the time of the respondent's actions in this case.

(e) The respondent was suspended for three years, and was also ordered to pay costs.

21.70 Given the commercial pressures of running a law practice, it may be tempting for lawyers to act for multiple parties in a single matter, and in the belief that the parties' interests are aligned. Indeed, such an approach may even lead to costs savings for clients, in so far as the same work need not be duplicated across different clients where there is an overlap in the issues of fact and law. But lawyers in such situations should be on the constant lookout for any change in circumstances – whether due to fresh instructions, or new facts coming to light – that gives rise to the possibility of a divergence in clients' interests. Should such a possibility occur, the commercially sensible move might well be for the lawyer to discharge himself from acting for one or all of the clients, instead of opening himself up to the risk of a breach of the professional conduct rules and the consequential impact on his law practice (to say nothing of the need to carry oneself as an officer of the Supreme Court and a member of an honourable profession).

X. Lawyers' duty to comply with personal costs orders / respond to correspondence

21.71 In *The Law Society of Singapore v L F Violet Netto*,[20] the respondent solicitor had previously acted for the plaintiffs in two separate originating summons. In each of the originating summonses, the court ordered costs and disbursements against the respondent personally, amounting to $3,000 and $2,514 respectively.

21.72 Between 13 April 2015 and 23 February 2018, the respondent exchanged correspondence with the State Counsel of the AGC in relation to the costs orders. The AGC agreed to the respondent's proposal for payment to be made in instalments. However, some of the final instalments went unpaid. The AGC wrote to the respondent on multiple occasions (in relation to the outstanding payments) but the respondent did not make full payment.

21.73 On 23 February 2018, the AGC sent a final letter to the respondent asking for full payment by 27 February 2018. The respondent did not reply, nor made payment. On 29 March 2018, the AG submitted a complaint. On 4 May 2018, after being made aware of the complaint, the respondent issued a cheque for the outstanding sum to the AGC. The AG nevertheless proceeded with the complaint.

21.74 The charges formulated by the Law Society included the following:

20 [2019] SGDT 6.

(a) that her *failure to comply with the personal costs orders* within a reasonable time and without any reasonable explanation was misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession within the meaning of s 83(2)(*h*) of the LPA; and

(b) that by neglecting, refusing and/or failing to respond to the 23 February 2018 letter, notwithstanding numerous prior reminders, she had *failed to treat other legal practitioners with courtesy* in breach of r 7(2) of the LPA, and that such breach amounted to improper conduct or practice as an advocate and solicitor within the meaning of s 83(2)(*b*) of the LPA.

The respondent did not dispute the facts, but instead made a mitigation plea.

21.75 The DT held that the respondent's dilatory conduct in failing to comply with the costs orders within a reasonable time and without providing any reasonable explanation went against the interest of the judicial administration of justice, and was contrary to her role as an officer of the court. She was reprimanded for the charges relating to such conduct, given that the sums involved were relatively small and that full payment was made (albeit after the complaint was filed).

21.76 As regards the respondent's failure to respond to approximately 14 letters from the AGC, the DT held that this constituted a breach of r 7(2) of the PCR, which states that "[a] legal practitioner must treat other legal practitioners with courtesy and fairness". The respondent was also reprimanded for the charge relating to such conduct. No costs order was made as the Law Society did not seek costs against the respondent.

21.77 It may come as a surprise to some readers that the respondent's failure to respond to a letter from the AGC constituted a breach of the PCR. Would this not incentivise parties in the throes of acrimonious proceedings to instruct their lawyers to send repeated letters to each other demanding responses, in the hope that some of the letters would go unanswered, and thereby serve as a springboard for a complaint to the Law Society? Perhaps not. In the present case, the queries (a) had been in respect of the respondent's personal obligations and not matters which the respondent would have to take instructions on; and (b) related to a single straightforward issue (the outstanding payments), and not a sprawling set of allegations. But the point remains that when lawyers receive correspondence from fellow lawyers, they should at least apply their minds to whether a reply is necessary, for strategic reasons *and* given the obligation to treat fellow legal practitioners with courtesy and fairness.

XI. Other professional conduct matters

21.78 While space does not permit this author to delve into the other cases reported in 2019 relating to the legal profession, listed below are a number of decisions for further reading:

(a) Lawyers' duty of diligence:

(i) *The Law Society of Singapore v Ezekiel Peter Latimer*:[21] The respondent failed to (A) provide a receipt for a deposit paid; (B) attend a hearing, which led to an adverse order against the client; and (C) make contact with the client after the hearing. The DT recommended that a penalty be imposed, and held that there was sufficient gravity for disciplinary action against the respondent under s 93(1)(*c*) of the LPA.

(ii) *The Law Society of Singapore v Raj Singh Shergill*:[22] The respondent was charged with failing to proceed with the client's claims for two road traffic accidents, such that the claims had become time-barred. However, as the complainant's evidence was unreliable, the charges were dismissed.

(iii) *The Law Society of Singapore v Govindan Balan Nair*:[23] The respondent was instructed to file a defence but did not do so, and default judgment was entered against the client. The respondent was charged with failing to discharge himself timeously, upon discovering that the client had a potential claim against him in respect of the default judgment. The DT held that the charge was not made out because no adverse interest had arisen between the client and the respondent, since both of them had the same interest in applying to set aside the default judgment, and that there was no cause of sufficient gravity for disciplinary action had been disclosed based on the charges. However, the DT reprimanded the respondent given that he had fallen short of the expected standards, and ordered him to pay costs.

(iv) *The Law Society of Singapore v Jonathan Tan See Leh*:[24] The respondent engaged and supervised

21 [2019] SGDT 4.
22 [2019] SGDT 5.
23 [2019] SGDT 8.
24 [2019] SGDT 10.

a paralegal who was previously a practising lawyer. The respondent knew that the paralegal did not have a practising certificate at that time. The paralegal went on to misrepresent himself as an advocate and solicitor (in e-mails that were copied to the respondent), and the respondent had a fee-sharing agreement with the paralegal. The respondent pleaded guilty. The DT held that there was cause of sufficient gravity for disciplinary action under s 93(1)(*c*) of the LPA and that the matter should be referred to the Court of Three Judges.

(v) *The Law Society of Singapore v Constance Margreat Paglar*:[25] The respondent was charged with failing to act with reasonable diligence, in that she had failed to keep clients informed of the progress of their traffic accident cases. While there was misconduct, there was no dishonesty or grossly improper conduct. The misconduct arose out of lapses in the respondent's management of the clients' files and no prejudice was caused to the clients. The respondent was ordered to pay a $4,000 penalty and costs.

(b) Lawyers' duties in relation to money from clients:

(i) *The Law Society of Singapore v Dhanwant Singh*:[26] The respondent acted for the vendors in a conveyancing transaction. The purchaser requested more time to exercise the option to purchase and paid $100,000 to the respondent, who deposited the sum into his firm's client account (instead of the conveyancing account). The respondent then released the sum to the vendors. The DT held that the sum was "conveyancing money" because it was to be applied towards the purchase price of the property. The DT held that there was cause of sufficient gravity for disciplinary action under s 93(1)(*c*) of the LPA and that the matter should be referred to the Court of Three Judges as (A) the respondent's breach was serious and caused substantial financial loss to a member of the public; and (B) the respondent denied, throughout the proceedings, that he had breached the relevant rules.

(ii) *Law Society of Singapore v Dhanwant Singh*:[27] the same matter then went up before the Court of Three

25 [2019] SGDT 11.
26 [2019] SGDT 1.
27 [2019] SGHC 290.

Judges, which dismissed the respondent's technical attempts to argue that the sum of $100,000 was not "conveyancing money". In particular, the respondent's argument that he had a *bona fide* belief that the sum was not "conveyancing money" was rejected. As to the appropriate sanction, the Court of Three Judges took into account (A) the respondent's lack of remorse; (B) the potential loss suffered by the purchaser and the respondent's lack of restitution; and (C) the respondent's seniority (but did not take into account the respondent's antecedent, given that it had occurred around 30 years ago). The Court of Three Judges imposed a heavy fine of $50,000 and ordered costs against the respondent.

(iii) *The Law Society of Singapore v Kang Bee Leng*:[28] The respondent was a conveyancing lawyer in an aborted property transaction. She did not file a suspicious transaction report (under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[29] ("CDSA")), despite having reasonable grounds to suspect that $5.5m paid by her client towards the property were proceeds from a Ponzi scheme. The respondent previously pled guilty to and was convicted of an offence under the CDSA, and was sentenced to a fine of $10,000. The respondent pleaded guilty to the charges laid before the DT, which reprimanded the respondent, and ordered a $5,000 penalty and costs.

(iv) *Law Society of Singapore v Yeo Siew Chye Troy*:[30] The respondent, who was the sole proprietor and director of a law firm, engaged an individual to establish a conveyancing department. The individual misappropriated a total sum of $848,335.09 from the firm's conveyancing clients. In addition, the respondent caused conveyancing money to be paid into the firm's office account, and did not keep proper accounts in respect of five client payments into the firm's office account. The Court of Three Judges suspended the respondent for a substantial period of four years and ordered him to pay costs.

28 [2019] SGDT 7.
29 Cap 65A, 2000 Rev Ed.
30 [2019] 5 SLR 358.

(c) Lawyers' duty of honesty:

(i) *Law Society of Singapore v G B Vasudeven*:[31] The respondent prepared a fictitious court document and fictitious affidavits, forged the electronic seal of the Supreme Court, and forged the signature and stamp of a Commissioner for Oaths. The Court of Three Judges ordered him to be struck off the rolls and ordered costs against him.

(ii) *Law Society of Singapore v Jaya Anil Kumar*:[32] The respondent forged academic documents. As this was misconduct involving dishonesty, the Court of Three Judges ordered her to be struck off the rolls (notwithstanding her relatively young age) and ordered costs against her.

(iii) *The Law Society of Singapore v Soraya Hafsa bte Ibrahim*:[33] The respondent made an untrue representation to her client to deceive the client into paying sums to her, and did not deposit the sums into a client account. The DT held that there was cause of sufficient gravity for disciplinary action under s 93(1)(*c*) of the LPA and that the matter should be referred to the Court of Three Judges, and ordered costs against the respondent.

31 [2019] 5 SLR 876.
32 [2019] SGHC 12.
33 [2019] SGDT 2.