IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 107

Civil Appeal No 9 of 2020

Between

Iskandar bin Rahmat

… *Appellant*

And

Law Society of Singapore

… *Respondent*

In the matter of Originating Summons No 716 of 2019

Between

Iskandar bin Rahmat

… *Applicant*

And

Law Society of Singapore

… *Respondent*

GROUNDS OF DECISION

[Legal Profession] — [Disciplinary proceedings]

Version No 1: 24 Nov 2021 (14:27 hrs)

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Iskandar bin Rahmat
v
Law Society of Singapore

[2021] SGCA 107

Court of Appeal — Civil Appeal No 9 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Quentin Loh JAD
5 July 2021

23 November 2021

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 This case arose from a complaint of professional misconduct made to the Law Society of Singapore (the "Law Society") in respect of six lawyers who represented the appellant, Iskandar bin Rahmat (the "Appellant"), when he was on trial on charges of committing a double murder.

2 The Appellant was tried in the High Court on two counts of murder under s 300(*a*) of the Penal Code (Cap 224, 2008 Rev Ed). At the end of the trial, he was convicted on both counts and sentenced accordingly to the mandatory death penalty: *Public Prosecutor v Iskandar bin Rahmat* [2015] SGHC 310 ("*Iskandar HC*"). The Appellant then appealed against his convictions to this court. That appeal was dismissed on 3 February 2017 for the

reasons given in *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 ("*Iskandar CA*").

3 Following his unsuccessful appeal, the Appellant filed a complaint (the "Complaint") with the Law Society against the team of lawyers who had represented him during the High Court trial (the "Defence Team"). An Inquiry Committee (the "IC") was appointed under the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") to consider the Complaint. After considering the allegations made by the Appellant and the responses of the Defence Team, the IC issued a report recommending that the Complaint be dismissed (the "IC Report"). The IC Report was considered by the Council of the Law Society (the "Council"), who then determined that no formal investigation by a Disciplinary Tribunal ("DT") was necessary. The Complaint was dismissed accordingly.

4 Dissatisfied with the outcome, the Appellant applied to the High Court seeking a review of the Council's determination. He also sought an order directing the Law Society to apply to the Chief Justice for a DT to be convened. This application was dismissed by the High Court Judge (the "Judge") on 28 February 2020 for reasons given in *Iskandar bin Rahmat v Law Society of Singapore* [2020] SGHC 40 (the "Judgment").

5 The Appellant filed an appeal against the Judgment. At this point, the matter took a detour when the Law Society took out an application to strike out the appeal. The ground of the striking out application was that this court did not have the jurisdiction to hear an appeal against a decision of a judge in disciplinary proceedings under the LPA. A five-judge *coram* disagreed with the Law Society, holding in *Iskandar bin Rahmat v Law Society of Singapore*

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[2021] 1 SLR 874 ("*Iskandar Jurisdiction*") that this court was vested with the requisite jurisdiction to hear the appeal.

6 That decision then resulted in the present substantive appeal being brought before us. Having heard the parties' submissions on 5 July 2021, we dismissed the appeal and affirmed the Judge's decision.

7 These are our full reasons for dismissing the Appellant's appeal against the Judgment.

Background

8 To properly understand the Appellant's complaints against the Defence Team, it is necessary to return to the background facts leading up to the Appellant's conviction for murder. These facts were covered comprehensively in *Iskandar HC* at [3]–[18], and we only set out those that are necessary for an understanding of the allegations in the Complaint.

9 The Appellant was employed by the Singapore Police Force from March 1999 and rose to the rank of senior staff sergeant. In July 2013, the Appellant was in financial difficulties being indebted to the Oversea-Chinese Banking Corporation ("OCBC bank") in the sum of $61,599.66. OCBC bank had taken out bankruptcy proceedings against him and served the application on the Appellant at his workplace. The Appellant offered an out-of-court settlement of full payment of $50,000, which the bank accepted; at the time, however, the Appellant had less than $400. These financial troubles had also spilled over to his work: he had been charged for being "financially embarrassed", which carried the potential consequence of dismissal.

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10 This state of affairs led the Appellant to devise a plan to rob the first victim, Mr Tan Boon Sin ("D1"). D1 was a businessman who had lodged police reports about missing cash and gold coins from his safe deposit box. The Appellant was initially the duty investigation officer for the case, and he learnt that there was still a substantial amount of cash in the box. The Appellant came up with an elaborate plan to steal from D1 so as to be able to pay off his debts.

11 On 10 July 2013, the Appellant met D1 near the location of the safe deposit box. D1 entered the premises and opened the box. He put a dummy camera supplied by the Appellant into the safe deposit box thinking it would help identify the thief. D1 removed the remaining cash from the box and placed it in an orange bag that the Appellant had brought with him. On the pretext of escorting D1 safely home, the Appellant accompanied D1 home in D1's car.

12 According to the Appellant, when D1's car arrived outside the house, the Appellant observed that he had opened the outer gates using a remote control at the driver's seat. The car entered and parked at the porch. D1 then carried the orange bag into the house and placed it near the staircase leading up to the second level. When D1 attempted to close the gates, the Appellant requested that the gates be kept open as his "partner" (a fictitious character) would be arriving.

13 A large portion of the remainder of what happened in D1's house was a matter of contention between the parties, both at trial and on appeal. What was not disputed, however, was that in the span of roughly 30 minutes, the Appellant inflicted a total of 23 stab and incised knife wounds on D1 in vulnerable areas such as the head, neck and chest. He also attacked Mr Tan Chee Hong ("D2"), the son of D1, who returned home as the Appellant was lowering D1's body to the floor. On D2, the Appellant inflicted a total of 17 stab and incised wounds

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to his neck, face and scalp. Subsequently, D2 was dragged under D1's car as the Appellant drove it out of the gates in order to make his getaway.

14 The Appellant did not deny these acts of killing D1 and D2. What he denied was having the intention to do so. In particular, he relied on two exceptions under s 300 of the Penal Code, namely, the right of private defence and sudden fight: *Iskandar HC* at [44]. In essence, he maintained that his plan had been to rob, not to kill, and he had inflicted those injuries upon D1 and D2 only because they had attempted to assault him. If the Appellant had succeeded in either of those defences, the charges of murder would have been rebutted and he would, instead, have been convicted of culpable homicide under s 299 of the Penal Code, an offence which does not carry the death penalty.

15 In relation to D1, the Appellant's version of events was that, after pretending to communicate on his fake "walkie-talkie", he had informed D1 that someone had opened the safe deposit box and that they had to return to CISCO with the orange bag. D1 then walked to the kitchen and used the corded telephone there. After doing so, D1 emerged from the kitchen, telling the Appellant that the camera in the box did not contain batteries and accusing the Appellant of cheating him. D1 then assaulted the Appellant with a knife.

16 This explanation was rejected by both the trial court and this court. In particular, it was held that there was no reasonable explanation as to how D1 could have discovered the Appellant's ruse or that the dummy camera was a fake. In fact, the "*only* reasonable inference" from the events summarised above at [11] was that D1 had trusted the Appellant: *Iskandar CA* at [35] and [37]. Similarly, there was no explanation as to why D1 would turn violent and attack the Appellant with a knife. In this court's view, it was "simply unbelievable" that D1 would have become so enraged as to attack the Appellant; D1 was also

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a 67-year-old man with a chronic knee problem, and it would have been a simple matter to have waited for his son or called the police. This court also referred to the evidence of D1's wife, Mdm Ong Ah Tang, who testified that D1 was not a violent person: *Iskandar CA* at [43]. With no alternative case put forward by the Appellant, and since he had admitted that he intended to and did cause the injuries to D1, it was held that the Appellant had had the requisite intention to cause death: *Iskandar CA* at [45]. He had also failed to establish a case in relation to the defences of sudden fight and private defence under s 300 of the Penal Code.

17 In relation to D2, the Appellant averred that as he was lowering D1's body on to the floor, D2 appeared in the doorway of the house. D2 then shouted "Pa!" and charged at the Appellant with clenched fists, swinging his right fist, which the Appellant blocked. The Appellant intended to retaliate by punching D2 with his right hand but, failing to realise that the knife was still in his hand, ended up stabbing D2. As D2 continued to punch and pull at the Appellant, the latter ended up stabbing D2 further due to his wild swings. The Appellant's overall claim was that all he wanted to do was to get D2 away from him so that he could escape.

18 This claim that the Appellant did not realise the knife was in his hand was found to be an "incredible" one by the trial court. Even if that were so, he should have realised after the first stabbing that he was holding the knife, but he proceeded to stab D2 in the neck several more times. Moreover, the congregation of the stab wounds on the vulnerable parts of D2's body showed that they were targeted attacks, and with the sheer number, that they were intended to cause death. It was similarly held that the viciousness of the attacks prevented any finding in relation to the defences of private defence and sudden fight: *Iskandar HC* at [87]. The Appellant was therefore found guilty on both

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counts of murder. As stated, his appeal against conviction was dismissed. It should be noted that for the appeal the Appellant was represented by new counsel who had not formed part of the Defence Team.

The complaint

Complaint to the Law Society

19 The Appellant's appeal against conviction was dismissed in February 2017. A year later the Appellant lodged his first complaint against his Defence Team. The Defence Team comprised six advocates and solicitors of the Supreme Court, who had been appointed as his defence counsel pursuant to the Legal Assistance Scheme for Capital Offences. They were:

(a) Mr Shashi Nathan, Ms Tania Chin and Mr Jeremy Pereira of KhattarWong LLP;

(b) Mr A P M Ferlin Jayatissa and Ms N Sudha Nair of LexCompass LLC; and

(c) Mr Rajan Supramaniam of Hilborne Law LLC.

20 The first complaint dated 14 February 2018 alleged that in conducting the Appellant's defence the Defence Team had failed to comply with his instructions. This initial complaint was followed by two letters, dated 5 April 2018 and 7 May 2018. The term "Complaint" used in this judgment refers collectively to all three documents submitted by the Appellant to the Law Society. All in all, the Appellant averred that the Defence Team had failed in numerous aspects in the conduct of his defence. The IC noted that the Appellant had levelled nine allegations against the Defence Team and dealt with these points individually. When the Appellant applied to the High Court, the Judge

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sorted the individual allegations into three categories. The Appellant adopted this grouping for the purpose of this appeal. The categories were as follows:

(a) Exhibits:

(i) Failure to provide full set of photographs of the crime scene after the committal hearing.

(ii) Failure to study the photographs properly to verify the amount of cash recovered from a bag placed in the store-room.

(iii) Failure to raise the issue of a baton found in D1's car.

(b) Witnesses:

(i) Failure to follow the agreed plan stated in the Case for the Defence an in particular, failure to call the Appellant's family members as Defence witnesses at trial.

(ii) Dispensation of various witnesses from attendance at trial.

(iii) Failure to appoint a defence psychiatrist.

(iv) Failure to appoint a defence pathologist.

(c) Instructions:

(i) Failure to carry out instructions which the Appellant had written in a bundle used for committal proceedings.

(ii) Failure to make amendments to the Opening Address for the Defence.

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When the individual allegations are considered as a whole, it can be seen that the Appellant was asserting that his defence had not been properly conducted by the Defence Team and that he had been prejudiced thereby. The Law Society put it higher: it submitted that the Complaint, if true, went far beyond negligence. The Appellant's case was that the Defence Team acted improperly, incompetently, deliberately and dishonestly and thereby compromised his defence, disobeyed his instructions, kept him in the dark, with disastrous consequences resulting in his conviction and death sentence. That was the most serious allegation which, if true, could cast doubt on the correctness of his conviction.

21 The Chairman of the Inquiry Panel appointed the IC on 3 August 2018 to look into the Complaint. In the course of its investigations, the IC obtained written explanations addressing the allegations from the Defence Team on two separate occasions and spoke with the four most senior members subsequently. The IC also visited the Changi Prison Complex twice in order to interview the Appellant.

22 The IC issued its report on 7 February 2019. All four members agreed that it was not necessary to have a formal investigation into the Complaint by a DT, and that the Complaint should be dismissed. The Council dismissed the Complaint thereafter, and the Appellant was informed of its decision by a letter dated 20 March 2019.

Application to the High Court

23 On 7 June 2019, pursuant to s 96 of the LPA, the Appellant filed an application in the High Court seeking a review of the Council's determination and consequently, an order directing the Law Society to apply to the Chief

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Justice for the appointment of a DT. In this application, the Appellant contended that the IC's report had been tendered late, that there had been breaches of the rules of natural justice by the IC, and also that the IC had come to the wrong conclusion in respect of each of the nine specific allegations that he had made: the Judgment at [10].

24 The Judge dismissed the application. The grounds canvassed by the Judge will be covered in greater detail below, but the reasons are summarised as follows:

> *Concluding observations on Mr Iskandar's nine assertions*
>
> …
>
> 81 The evidence indicated that at each point, the [Defence Team] had rendered advice, and sought and obtained the relevant instructions. It is also clear, from the analysis above, that the various exhibits, witnesses, and evidence, now emphasised by Mr Iskandar, were not relevant to his defence at trial. Mr Iskandar's true discontentment, it seemed, was that the [Defence Team] had not prolonged his trial by use of all means imagined. As the IC noted in its Report at paragraph 79, Mr Iskandar's dissatisfaction appears to have arisen primarily because the second tranche of the trial dates was vacated in the light of the conclusion of the trial in the first tranche. …
>
> …
>
> 82 Looking at the matter as a whole, there was no *prima facie* case of ethical breach or other misconduct by the six-member [Defence Team] that warranted formal investigation and consideration by a DT. To the contrary, both the prosecution and [Defence Team] were praised for "their highly professional attitude and their full cooperation with the process of justice" by the trial judge: *Iskandar (HC)* at [102]. Such professionalism is indispensable to the sound administration of justice; without it, the legal profession will be unable to play its part in upholding the rule of law.

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The inquiry process and the recourse to court

25 In the *Iskandar Jurisdiction* judgment at [20]–[22], this Court set out the disciplinary framework for regulated legal practitioners (a category that all members of the Defence Team fall into) as set out in the LPA. It is not necessary to repeat that in detail here. In summary, the disciplinary process which takes place under the LPA is a three-staged one. First, there is the inquiry stage. Then, if cause of sufficient gravity is found by the IC, the formal investigation stage by a DT is initiated. Finally, there is the hearing before the Court of Three Judges which decides whether and, if so, how an erring solicitor should be disciplined (see also *Subbiah Pillai v Wong Meng Meng and others* [2001] 2 SLR(R) 556 ("*Subbiah Pillai*") at [18]). The IC is part of the first stage. It is constituted to inquire into complaints which have been submitted to the Law Society and which are not obviously frivolous, vexatious, misconceived or lacking in substance (*Iskandar Jurisdiction* at [21]).

26 In the case *of Loh Der Ming Andrew v Law Society of Singapore* [2018] 3 SLR 837 ("*Loh HC*"), Woo Bih Li J (as he then was) noted at [44] that the role of the IC is inquisitorial and informal. As such, the investigative burden borne by the IC is not an onerous one. As the Judge observed, "it only needs to determine if there is a *prima facie* case of ethical breach or other misconduct by a lawyer that warrants formal investigation and consideration by a DT" (the Judgment at [82]). This view appears to have been derived from the discussion in *Whitehouse Holdings Pte Ltd v Law Society of Singapore* [1994] 2 SLR(R) 485 ("*Whitehouse Holdings*") where this court said at [38]:

> … The role of the Inquiry Committee is merely to investigate the complaint. It does not have to make any conclusions on misconduct or whether an offence was committed but simply to consider whether or not there is a *prima facie* case for a formal investigation.

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27 *Loh HC* also drew important principles regarding this process from *Subbiah Pillai*. As stated in *Loh HC* at [68] and [69]:

> 68 It should further be noted that [*Subbiah Pillai*] also supports the proposition that the Inquiry Committee may sieve out and decline to refer to the DT any complaint that, even if taken at face value, would not raise sufficiently grave concerns as to warrant formal investigation. This would be consistent with ss 86(7)(*b*)(i) and s 86(7)(*b*)(ii) of the LPA, which permit the Inquiry Committee to order a penalty to be paid by the lawyer concerned, reprimand him, or give him a warning, if the Inquiry Committee takes the view that formal investigation by a DT is not required … As the Court of Appeal explained in [*Subbiah Pillai*] (at [62]), these provisions reflect the legislative sentiment that it would be expedient to deal with minor infractions in a summary manner instead of subjecting it*(sic)* to a formal investigation … A threshold test of gravity would also allow the Inquiry Committee to better give effect to the concerns of proportionality and practicality within the disciplinary framework, as highlighted in [*Subbiah Pillai*] (at [59]) … Therefore, in addition to the *prima facie* evidential threshold, there is a threshold of gravity which the Inquiry Committee should address.
>
> 69 In the circumstances, in evaluating a complaint, the Inquiry Committee should address its mind as to whether the complaint and the evidence evince a *prima facie* case of ethical breach or other misconduct that is of sufficient gravity as to warrant a formal investigation and consideration by the DT. If the evidential basis for the complaint cannot even meet the *prima facie* threshold, or if the breach or misconduct alleged is relatively minor even if taken at face value, the Inquiry Committee may decline to recommend a formal investigation of the complaint, and accordingly dismiss the complaint or recommend alternative sanctions to be imposed.

28 It would appear from the above, which we respectfully agree with, that the IC is a fact-finding organ intended to sieve out cases of insufficient gravity to be sent onto the second stage. Where the lawyer's explanation seems to accord with the known facts and the common-sense view of things, the IC may accept that explanation. But where there are disputed facts on which no light can be shed, the IC ought not to make a decision believing or disbelieving the lawyer. Rather the IC should properly recommend that the case be referred to

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the DT. However, the IC should only make this recommendation if the complaints, taken at face value, are of sufficient gravity.

29 Whilst the role of the IC is inquisitorial rather than adversarial or adjudicative, this does not mean that principles of natural justice do not apply to its proceedings. They do but in a way that is suitable to the nature of the proceedings. While fairness is always required, the rigorous regime appropriate to the conduct of trials does not have to be carried over to informal investigations like those carried out by the IC. As this court observed in *Subbiah Pillai* at [57] and [58]:

> 57 In the light of the authorities above, it is clear that a body, whose function is only to inquire into the facts to determine if the complaint/matter under inquiry should proceed further, stands apart from those whose function is to determine whether misconduct has been committed and/or to determine the punishment. We also recognise that the exact task of a body within each category may also differ, depending on the applicable rules or regulations. But what is clear is that the requirements of natural justice in relation to a body which falls under the first category are certainly less stringent than the second. Here, we would reiterate what Tucker LJ said in *Russell v Duke of Norfolk* ([30] *supra*).
>
> 58 The procedure adopted in a court of law or arbitral tribunal undoubtedly is of the highest standard in as far as the requirements of natural justice are concerned because at the end of that process the parties' rights will be determined or affected. Such a procedure, with perhaps slight modification, has been applied to formal disciplinary tribunals and it is often set out in the applicable statutory or domestic rules. It is always tempting to argue that such a standard should be applied universally to all bodies, whether their function is merely to inquire or otherwise, as that would ensure that justice is done at every stage, whatever is involved at that stage. ***But as the cases indicate, what must be observed at every stage is fairness. And what is fair must depend on what is the object of the process at that stage. If it is for the purpose of sifting frivolous complaints and only to determine whether a complaint has any merit to go forth then we do not think fairness demands that the vigorous regime applicable to trials should apply. It should not be an elaborate process like a trial. It should be informal.***

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> Otherwise, it would unduly burden a process which would not be warranted. It would be a waste of human and financial resources to have two full-blown hearings. It is a question of proportionality and practicality. Unless there are specific grounds to allege bias, there is no reason why an inquiry body cannot carry out its task fairly and objectively, without subjecting it to a formal regime applicable to a trial. Accordingly, we do not think fairness is undermined when an IC interviews a witness, including the complainant, in the absence of the person under inquiry. Nor is such a procedure unjust, bearing in mind it is purely inquisitorial.
>
> [emphasis in original in italics; emphasis added in bold italics]

30 When the IC completes its investigation, there are a number of courses that it might take depending on the conclusion that it has come to. First, under s 86(5) of the LPA, where it is satisfied that there are no grounds for disciplinary action, it has to report to the Council accordingly and state its reasons for its decision. On the other hand, if it is of the opinion that the solicitor complained against should be called upon to answer any allegation made against him, the IC must take a number of steps under s 86(6) to give him a chance to give his explanation before it makes its report. According to s 86(7), the report of the IC must deal with the question of the necessity or otherwise of a formal investigation by the DT. If a formal investigation is deemed necessary, the IC has to recommend to the Council the charges to be preferred against the lawyer; but if is of the view that no formal investigation is required, then the IC must recommend lower sanctions or that the complaint be dismissed.

31 In this case, of course, the recommendation was that the Complaint be dismissed. The Council accepted the recommendation but that did not close the door for the Appellant because s 96(1) of the LPA allows a complainant who is dissatisfied with such a result to apply to a Judge to review the dismissal.

32 The powers of the Judge hearing such an application are stated in s 96(4) of the LPA as follows:

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> (4) At the hearing of the application, the Judge may make an order –
>
> (*a*) affirming the determination of the Council; or
>
> (*b*) directing the Society to apply to the Chief Justice for the appointment of a Disciplinary Tribunal,
>
> and such order for the payment of costs as may be just.

33 How the judge should proceed when deciding which of the orders permitted under s 96(4) should be made in the case before him has been considered in case law. In *Wong Juan Swee v Law Society of Singapore* [1993] 1 SLR(R) 429 (at [14]), the High Court noted:

> The court here is exercising its appellate jurisdiction over the defendants as an administrative tribunal (see decision of Chan Sek Keong JC (as he then was) in *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455). Therefore, the court should be slow to disturb or interfere with the findings of fact by the Inquiry Committee unless it can be shown that supporting evidence was lacking or there was some misunderstanding of the evidence or there are other exceptional circumstances justifying the court to do so. …

34 Whilst the High Court's expression of the law as cited above was approved in *Whitehouse Holdings* (at [44]), we would caution that it should be remembered that, strictly speaking, the IC does not make any findings of fact or law. Nor is it acting as an adjudicative body. It is therefore not quite correct to describe the application to a Judge under s 96 of the LPA as an appeal. The Judge's role is to review the determination. In doing so the Judge takes cognisance that any determination made by the IC is only as to whether there is, on the face of the matter being investigated, material supporting charges for possible misconduct which will have to be formally investigated. It is correct, however, that that decision must be based on the evidence provided to the IC. Therefore, the Judge should not disturb the decision of the IC unless the court is satisfied that the evidence before the IC did not support the conclusion it reached or that the IC misunderstood the evidence or that there was some

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exceptional circumstance justifying disagreeing with the IC's conclusion and the Council's acceptance of the same. While it is not possible at this stage to delineate the limits of what may qualify as an exceptional circumstance, we would observe that one such circumstance would be if it appeared from the IC's report that it considered there was no cause for formal investigation because it wrongly categorised the conduct complained about as not capable of constituting misconduct attracting a sanction.

35 Similarly, if the matter goes up on appeal after the judge has made his or her decision, as was the case here, the role of this court is to undertake the same type of analysis into the decisions of the IC and the judge as was taken by the judge in the High Court. It is not this court's role to make findings but rather it has to consider whether the material presented before the IC justified the conclusions that it and the judge reached.

36 Of course, the whole exercise, starting with the investigation of the IC and ending with the analysis of this court, is not done in a vacuum. Each of the bodies considering the matter must do so with an understanding of what type of conduct on the part of a regulated legal practitioner would call for disciplinary action. It might therefore be helpful for us to summarise the position in this regard so far as pertains to conduct of the nature comprised in the Complaint.

Conduct deserving of sanction

37 Section 83(2) of the LPA sets out in sub-paras (*a*) to (*k*) the various types of conduct that the LPA proscribes. A solicitor found to be guilty of any conduct falling within those sub-paragraphs will be liable to one or more of the sanctions set out in s 83(1). For present purposes, the relevant portions of ss 83(1) and (2) are as follows:

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> **Power to strike off roll, etc.**
>
> **83.**—(1) All advocates and solicitors shall be subject to the control of the Supreme Court and shall be liable on due cause shown —
>
> (*a*) to be struck off the roll;
>
> (*b*) to be suspended from practice for a period not exceeding 5 years;
>
> (*c*) to pay a penalty of not more than $100,000;
>
> (*d*) to be censured; or
>
> (*e*) to suffer the punishment referred to in paragraph (*c*) in addition to the punishment referred to in paragraph (*b*) or (*d*).
>
> (2) Subject to subsection (7), such due cause may be shown by proof that an advocate and solicitor —
>
> …
>
> (*b*) has been guilty of *fraudulent* or *grossly improper conduct* in the discharge of his professional duty or guilty of such a breach of any of the following as amounts to *improper conduct or practice* as an advocate and solicitor:
>
> (i) any usage or rule of conduct made by the Professional Conduct Council under section 71 or by the Council under the provisions of this Act;
>
> …
>
> (*h*) has been guilty of such *misconduct unbefitting an advocate and solicitor* as an officer of the Supreme Court or as a member of an honourable profession …
>
> [emphasis added]

38 The sub-paragraphs of s 83(2) that we have highlighted above are the ones that could potentially be applicable to the Complaint in the present case. These sub-paragraphs describe more than one type of conduct and we therefore break them down further to focus on the individual categories that bear most connection to the conduct complained about here. Thus, for present purposes we would emphasise that between them, sub-paras (*b*) and (*h*) cover:

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(a) fraud;

(b) grossly improper conduct;

(c) a breach of professional rules that amounts to improper conduct or practice as an advocate or solicitor; and

(d) misconduct unbefitting an advocate and solicitor.

In our judgment, the third and fourth grounds above overlap to a considerable extent. We refer to these two grounds cumulatively as "misconduct". The key inquiry for both grounds is whether a lawyer, by virtue of his conduct, is *unfit* to act as an advocate and solicitor. This, of course, is an extremely broad inquiry that encompasses a variety of situations. We elaborate below on what the various grounds cover.

Fraud

39 We begin with the first, and most straightforward, category: that of fraud. Here, the test in *Derry v Peek* (1889) 14 App Cas 337 is applied; that is, fraud is proved when a false representation has been made (a) knowingly; (b) without belief in its truth; or (c) recklessly, without caring whether it is true or false: *Law Society of Singapore v Udeh Kumar s/o Sethuraju and another matter* [2017] 4 SLR 1369 at [34]–[36]; *Bachoo Mohan Singh v Public Prosecutor and another matter* [2010] 4 SLR 137 at [114].

Grossly improper conduct

40 Fraud is then to be distinguished from the second category within sub-para (*b*), that is grossly improper conduct. In Re *Lim Kiap Khee*; *Law Society of Singapore v Lim Kiap Khee* [2001] 2 SLR(R) 398 ("*Lim Kiap Khee*") at [19]

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the Court of Three Judges held that deceit or an intention to deceive would not be necessary for a finding of grossly improper conduct. Instead, the inquiry is whether the conduct is "dishonourable to the solicitor concerned as a man and dishonourable to his profession": See also *Law Society of Singapore v Ezekiel Peter Latimer* [2019] 4 SLR 1427 ("*Ezekiel Peter Latimer*") at [37]; Re *Marshall David; Law Society of Singapore v Marshall David Saul* [1971–1973] SLR(R) 554 ("Re *Marshall David*") at [23].

41 An example of such grossly improper conduct is where a solicitor prefers his own interests to that of his client: *Law Society of Singapore v Ng Chee Sing* [2000] 1 SLR(R) 466 ("*Ng Chee Sing*") at [36]. In *Lim Kiap Khee* the solicitor concerned had deliberately breached an undertaking to pay over certain sales proceeds to his client and had only paid up after a bankruptcy order was made against him. In *Law Society of Singapore v Khushvinder Singh Chopra* [1998] 3 SLR(R) 490 ("*Khushvinder Singh Chopra*"), after acting for his clients in an unsuccessful re-mortgage and sale of a property, the lawyer attempted to buy the property from them on terms less favourable to them than the aborted sale. The Court of Three Judges found that the lawyer had "precipitated, without any justifiable excuse, a conflict of interest between the interest of the vendors, his clients, and his own interest, as the property's intended purchaser": at [45]. Further, the Court observed that the lawyer had prioritised his personal interest over that of his clients and noted at [67]:

> 67 … ***He knowingly placed himself in a position of aggravated conflict of interest and would have gained an advantage at the expense of the vendors, who had reposed in him both trust and confidence, but for the intervention of the Court of Appeal.*** He single-mindedly pursued and preferred his own interest over those of his clients. But he had not only offended the equitable rules governing fiduciaries *simpliciter*. He was both a fiduciary and an advocate and solicitor. As an advocate and solicitor, he was also an officer of the court. His status immediately brought into question the

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> considerations of public interest generally, and the interest of the administration of justice in particular. He enjoyed the privileged position of being held out by the judiciary not only as a competent professional lawyer but also as a man who would conduct himself with probity.
>
> [emphasis in original in italics; emphasis added in bold italics]

42 In *Law Society of Singapore v Wong Sin Yee* [2018] 5 SLR 1261 ("*Wong Sin Yee*"), the court found (at [45]) that by posing questions in cross-examination of a victim of alleged molest that were "indecent, scandalous and calculated to insult or annoy", the respondent solicitor's conduct was "disgraceful and a clear abuse of the privileges of cross-examination that are entrusted to an advocate". He had therefore "cross[ed] the line and reached the level of egregiousness" under s 83(2)(*b*) of the LPA.

Misconduct unbefitting an advocate and solicitor

43 Misconduct under the LPA is a broader "catch-all" provision where the conduct is deemed *unacceptable* but does not fall within any of the other enumerated grounds: *Wong Sin Yee* at [24]; *Ng Chee Sing* at [40]; *Law Society of Singapore v Arjan Chotrani Bisham* [2001] 1 SLR(R) 231 at [35]. Such misconduct can be founded upon the solicitor's professional *and/or* personal conduct: *Ng Chee Sing* at [40], citing *Khushvinder Singh Chopra*.

44 The standard applied here is therefore less strict as compared to the other two grounds, and it only need be shown that a solicitor is guilty of "such conduct as would render him unfit to remain as a member of an honourable profession": *Ng Chee Sing* at [40], relying on *In re Weare, a Solicitor; In re The Solicitors Act, 1888* [1893] 2 QB 439. The practical guide is 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: *Wong Sin Yee* at [24]. This standard, however, is fixed by the court and not by peer judgment: *Ng Chee Sing* at [42].

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45 It bears mention that, where a solicitor is found liable for misconduct under s 83(2)(*b*) of the LPA, liability under s 83(2)(*h*) usually also follows on the basis of the logic that the greater encompasses the lesser. Such was the case, for instance, in *Ezekiel Peter Latimer*, *Ng Chee Sing*, *Wong Sin Yee and Law Society of Singapore v Chiong Chin May Selena* [2013] SGHC 5 ("*Selena Chiong*"). Indeed, as the Court of Three Judges observed in *Lim Kiap Khee* at [21]:

> … We need hardly explain that once a misconduct constitutes grossly improper conduct, that act would, *ipso facto*, be an act unbefitting an advocate and solicitor under s 83(2)(*h*) …

46 The present case involves two broad examples of situations that could be classified as misconduct, namely: (1) negligence or want of skill; and (2) acting without the requisite authority. While each of these is determined by independent inquiries and principles, it must be emphasised that sanctions will only be imposed where the conduct *rises to the level* of misconduct unbefitting of an advocate and solicitor.

Acts of negligence or want of skill

47 Turning first to the situation where a solicitor acts negligently, it should come as no surprise that simple negligence or want of skill *per se* is insufficient to amount to due cause under s 83 of the LPA. This is consistent with the observations made by Lord Esher in *In re G. Mayor Cooke* (1889) 5 TLR 407 ("*In re G. Mayor Cooke*") (cited also in *Lim Kiap Khee* at [15]):

> … But in order that the Court should exercise its penal jurisdiction over a solicitor *it was not sufficient to show that his conduct had been such as would support an action for negligence or want of skill.* It must be shown that the solicitor had done something which was dishonourable to him as a man and

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> dishonourable in his profession.
>
> [emphasis added]

In re G. Mayor Cooke is also significant as the latter portion of the quote above is the origin for the test for "grossly improper conduct".

48 This test was affirmed in Singapore in *Ezekiel Peter Latimer*. In that case, the respondent solicitor was engaged to represent both an Indian national ("Sunil") and Sunil's employer ("Dipti"). Sunil was charged with making a false declaration in his application for work permit (the "AWP"), and Dipti had countersigned the AWP resulting in her being charged as well. Sunil had instructed the respondent that he was unaware at the time he signed the AWP that the salary declared was false and that he was deceived by Dipti into believing that his salary was as stated in the AWP. The respondent opted not to convey Sunil's instructions in his representation to the Attorney-General's Chambers. Instead, he indicated that Sunil had asked Dipti about the discrepancy and had accepted Dipti's explanation. The following portions of the findings of the Court of Three Judges are highly relevant:

> 39 Applying these principles, which are well established and uncontroversial, we were amply satisfied that the DT erred in finding that the respondent's conduct was merely improper conduct under s 83(2)(*b*)(i), and not *grossly* improper conduct under s 83(2)(*b*) of the LPA. The DT also erred in finding that the respondent's conduct did not constitute misconduct unbefitting an advocate and solicitor under s 83(2)(*h*). We were satisfied that the DT's findings of fact clearly showed that the respondent's conduct was both grossly improper and unbefitting an advocate and solicitor.
>
> 40 ***It was clear from the findings of the DT that the respondent's misconduct could not be classified as simple negligence or want of skill***. The findings of the DT, as stated at [18] above, were that the respondent had not pursued Sunil's allegation of deceit *because* it would have affected the interests of Dipti, by whom the respondent had first been engaged. Of particular significance was the unchallenged finding that the respondent had "carefully drafted" the Representations in a way

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> that mischaracterised Sunil's position so as not to undermine Dipti's position, the effect of which was to mislead the AGC, to the detriment of Sunil (see [19] above).
>
> 41 In other words, ***this was not a case where the respondent simply failed to advance Sunil's interest with the utmost diligence and zeal that one would expect from an honourable solicitor, but rather one where the respondent deliberately compromised Sunil's interests in order to prefer the interests of another client***. This went against the very essence of the duty owed by an advocate and solicitor to a client, which duty was to do one's best to advance the client's interest and which, on no conceivable basis, could countenance harming a client. The respondent's conduct thus amounted to grossly improper conduct in the discharge of his professional duties as an advocate and solicitor within the meaning of s 83(2)(*b*) of the LPA and conduct unbefitting an advocate and solicitor under s 83(2)(*h*).
>
> [emphasis in original in italics; emphasis added in bold italics]

49 Observations to that effect were also made by the same court in *Law Society of Singapore v Tan See Leh Jonathan* [2020] 5 SLR 418 ("*Jonathan Tan*"). In that case, the respondent solicitor employed a paralegal to work for him, one Mr Colin Craig Lowell Phan Siang Loong ("Colin Phan"). Colin Phan informed the respondent that he had been unable to renew his practising certificate and hence was an unauthorised person under s 32(2) of the LPA. Despite this, the respondent allowed Colin Phan to send five e-mails representing himself to be an advocate and solicitor. The respondent and Colin Phan also entered into an agreement to share approximately 50% of the respondent's fees for legal work performed. The court found that his conduct fell within ss 83(2)(*b*) and 83(2)(*h*) of the LPA, warranting sanction, and observed at [11] as follows:

> In our judgment, the blatant nature of the respondent's misconduct warrants a period of suspension. The respondent *knew*, a month before hiring Colin Phan, that he had not renewed his practising certificate and was an unauthorised person under s 32(2) of the Act. Nevertheless, the respondent proceeded to hire Colin Phan as his paralegal, and entered into an arrangement with Colin Phan to take over and clear some of

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> Colin Phan's files as the latter had failed to renew his practising certificate. This arrangement involved the sharing of legal fees. The respondent also knew, or ought to have known, at the relevant time, that Colin Phan represented himself to be an advocate and solicitor to three other individuals but he did nothing. In fact, the respondent *facilitated* Colin Phan's misconduct through their arrangement by effectively allowing Colin Phan to function as an advocate and solicitor, contrary to what he knew was permitted under the Act and without regard to the interests of the clients affected by this arrangement. ***The respondent's misconduct is not a simple case of negligence, but a blatant disregard of the professional and ethical standards that are meant to preserve the dignity of the legal profession and to protect the public***.
>
> [emphasis in original in italics; emphasis added in bold italics]

50 Thus, the case law makes it clear that simple negligence or want of skill would *not be sufficient* to amount to due cause (see also the related observations in *Law Society of Singapore v Quan Chee Seng Michael* [2003] SGHC 140 ("*Michael Quan*") at [24].

51 What *does* amount to due cause when a lawyer has been negligent or has not applied the requisite degree of skill, however, is less clear. To begin with, the general proposition that negligence may constitute misconduct is found in *Lim Kiap Khee* at [19]–[20]:

> … On the other hand, while simple negligence or want of skill would not, as pointed out by Lord Esher, constitute grossly improper conduct, ***it must also be recognised that there are degrees of negligence. Further, the gravity of a negligent act must be viewed in the context of the matter, taking into account all the circumstances of the case.***
>
> We noted that how negligence on the part of a solicitor was regarded was not uniform in various jurisdictions. On the one hand, in the Canadian case, *In re A Solicitor* [1936] 1 DLR 368, even gross negligence were held not to amount to professional misconduct. However, in New Zealand, in *Re M* [1930] NZLR 285, it was said that the failure of the solicitor to have his trust accounts audited amounts to professional misconduct. The New Zealand Court of Appeal held that neglect amounted to professional misconduct. In *In re A Solicitor* [1972] 2 All ER 811, where a solicitor was in breach of the accounts rules, Lord

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> Denning said that "negligence in a solicitor may amount to professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession". In our judgment, ***it is in the public interest to adopt a standard which would encourage members of the profession to maintain a high degree of professionalism and diligence at all times. It is not possible to generalise how an individual act of neglect is to be regarded except in its context***.
>
> [emphasis in original in italics; emphasis added in bold italics]

52 Examples of negligence or want of skill amounting to due cause for sanction can be found in several cases. First, in *Selena Chiong*, the respondent solicitor represented one Heng Siew Lee ("Heng") in the latter's proposed divorce proceedings. Heng subsequently lodged a complaint against the respondent, alleging that the respondent had not diligently handled the matter on her behalf. The particular complaints were that the respondent had: (1) not duly updated Heng about the case's progress; (2) not duly explained all letters and notices received; (3) not given appropriate advice; and (4) acted without authority. The Law Society argued, as an alternative, that the respondent's conduct was negligent to the extent that it was "inexcusable" and "such as to be regarded as deplorable by [her] professional colleagues". Relying on *Lim Kiap Khee*, the Law Society argued that Chiong was unfit to remain as a member of an honourable profession under s 83(2)(*h*) of the LPA. As the Court of Three Judges noted at [18]:

> The Law Society contended that Chiong's conduct satisfied the threshold of negligence which amounted to professional misconduct because an essential duty of an advocate and solicitor was to advance and protect the interests of the client, and if, through neglect or omission, the advocate and solicitor failed to do so, it must follow that the neglect or omission would constitute professional misconduct. In the present case, Chiong was clearly in dereliction of that duty. For example, Chiong failed to inform Heng of the letters from her husband's solicitor suggesting the resolution of the divorce proceeding by way of mediation so as to save costs and speed up the divorce process.

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53 The Court found that the Law Society had not established the fourth charge in that case. In relation to the first three charges, however, the Court agreed with that the Disciplinary Tribunal's finding of guilt, but varied the findings, such that the first and second charges fell within s 83(2)(*h*) instead of s 83(2)(*b*) of the LPA. The reasons for this are worth setting out in full, as follows:

> 24 After carefully reviewing the evidence, we are satisfied that on the basis of the incontrovertible documentary evidence before us, the DT was justified in concluding that the matters complained of at [36] of the Report (except in relation to the allegation at para 36(l) concerning the failure to promptly return Heng's documents following the termination of Chiong's services: see [40] below) were established. It will be noted that in her written submissions (see [21] above), Chiong did not really answer the first three main charges (or the alternative first three charges). She said that she did not cheat Heng. But, that is not the substance of the ***first three charges, which concern her neglect in handling the divorce matter entrusted by Heng to her***. We agree with the DT that while some of the matters complained of were relatively mild in themselves, "***[c]umulatively, there was a pattern of chronic irresponsibility and very poor handling of [Heng]'s matter"*** *(see the Report at [38]) on Chiong's part.* ***She took a rather lackadaisical attitude to her responsibility as a solicitor, even to the extent of creating a false excuse for her inaction*** (*ie*, alleging that she was waiting for HDB's response when HDB had already responded).
>
> 25 In Re *Marshall David; Law Society of Singapore v Marshall David Saul* [1971–1973] SLR(R) 554, this court declared at [23] that "grossly improper conduct" was "conduct which [was] dishonourable to [the respondent solicitor] as a man and dishonourable in his profession". In *Lim Kiap Khee*, this court held (at [19]) that an intention to deceive need not be present to constitute "grossly improper conduct" under s 83(2)(*b*) of the then equivalent of the LPA. In our view, there was ample evidence to support the allegations made under the first three charges. ***The only question on which we hesitated was whether the misconduct alleged in the first three charges necessarily constituted "grossly improper conduct". While we have no problems in so classifying the misconduct which is the subject matter of the third charge (where there was deliberate misrepresentation*** **vis-à-vis** ***HDB's response), we do have some difficulties in relation***

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> ***to the misconduct complained of in the first and second charges, which misconduct smacks more of incompetence, disorganisation or lack of care on the part of Chiong rather than any deliberate act on her part to mislead Heng or mishandle the latter's divorce matter.*** The following observations of Professor Tan Yock Lin in *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998) at p 811 are apposite:
>
> > … [C]onduct unbefitting an advocate and solicitor differs from grossly improper conduct in two respects. First, it does not have to arise in the course of professional duty, though it may do so. Second, if that is put to one side, it differs in degree from grossly improper conduct, not in kind. So a solicitor who delays without reasonable excuse to carry out his instructions but conceals the true facts from his client may be guilt[y] of conduct unbefitting a solicitor, although his misconduct may not be disgraceful or dishonourable.
> >
> > At some point, which will vary from case to case, the line between conduct which is merely discreditable and conduct which is disgraceful will be crossed. In that sense, the difference is one of degree. …
>
> [emphasis in original in italics; emphasis added in bold italics]

54 While the submissions of the Law Society took the position that the respondent had been negligent, the Court did not adopt that language. However, the Court described the conduct impugned in the first and second charges as "neglect in handling the divorce" and as smacking more of "incompetence, disorganisation or lack of care". It concluded that this conduct was appropriately regarded as misconduct within the meaning of s 83(2)(*h*) (at [26]), and thereby gave a clear example of how neglecting a matter could rise to the level of a want of skill that justified sanction.

55 Secondly, in *Law Society of Singapore v K Jayakumar Naidu* [2012] 4 SLR 1232 ("*Naidu*"), the respondent was approached by one Hay Boo Seng ("HBS") to prepare a power of attorney authorising him to act in the sale of a flat for his brother Hay Choo Soon ("HCS"), as the latter was bedridden.

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Thereafter, HBS sold the flat and took a loan secured on the sale proceeds of the flat, purportedly for HCS' medical bills. The respondent was warned that HCS did not know about the sale of the flat or the loan and had not understood the implications of the power of attorney. A deed of revocation of the power of attorney and a letter of authority providing for the sale proceeds of the flat to be paid to another lawyer for safekeeping were subsequently executed by HCS. The respondent did not comply with the documents. Through pressure exerted by HBS and arrangements made involving HCS, the sale proceeds were eventually misappropriated by HBS. The fourth charge against the respondent was to the effect that he had acted "deliberately, *negligently*, or otherwise" [emphasis added], and was to be liable under ss 83(2)(*b*) or 83(2)(*h*) of the LPA. On this fourth charge, the Court of Three Judges found that respondent guilty of misconduct within the meaning of s 83(2)(*h*) of the LPA: at [77].

56 More generally in *Naidu*, however, the Court consistently referred to a standard of what a "reasonably competent lawyer" would have done in the circumstances as the "central inquiry" in the case: at [16], [39], [43], [51] and [72]. In its analysis on due cause, the Court observed as follows:

> 79 It will be noted that the respondent has been measured against the standard of the reasonably competent solicitor in the analysis above. Such language invites comparison with professional negligence. However, it should not be assumed that every case of negligence by a solicitor will result in a finding of due cause for sanction under the Act. In assessing whether a given instance of negligence supports a finding of due cause, the factual backdrop and the precise actions and state of mind of the solicitor are of paramount importance. In other words, no single factor is determinative. An episode of innocent bungling to the client's detriment may call for compensation but not censure. The professional lapse must be grave if it is to attract disciplinary sanction. … Plainly, several serious lapses in the course of a professional engagement would invite serious

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consequences, including disciplinary sanction(s).

57 Thirdly, the observations in *Law Society of Singapore v Yap Bock Heng Christopher* [2014] 4 SLR 877 ("*Christopher Yap*") are also worth pointing out. In that case, the respondent solicitor improperly obtained a loan from his client. When the loan was due, he tried to avoid contact and threatened to claim legal fees for prior work done. For the two charges against him, the court suspended him for two years and three years respectively. In determining whether a monetary penalty would have been appropriate, the Court observed as follows:

> 26 We did not think, however, that the decision in *Andre Ravindran* should be read as intending to exhaustively stipulate the circumstances in which a fine or suspension would be appropriate. In *John Tay* the court observed that gross negligence may or may not be sufficient to warrant the imposition of suspension, depending on the overall circumstances (at [59]). Subsequently in *Law Society of Singapore v Chiong Chin May Selena* [2013] SGHC 5, the Court of Three Judges referred to their earlier decision in *John Tay* and stated that monetary penalties were not necessarily sufficient; and that much would depend on the overall circumstances (at [44]). …
>
> …
>
> 32 The entire object of the SA Rules for solicitors is to ensure that clients' money is properly recorded and accounted for. When a solicitor's accounts are not in order, it cannot be known if clients' money has been misplaced, or used for inappropriate purposes. ***As we indicated above, at one end of the spectrum, a solicitor may commit a one-off trivial or technical breach of the SA Rules due to inadvertence or negligence which has since been resolved.*** If the solicitor has by and large adhered to the SA Rules, save for that one technical breach, a fine should suffice. ***At the other end of the spectrum, a solicitor may have systematically and deliberately flouted the SA Rules in an effort to obfuscate the systematic diversion of clients' moneys for personal use.*** In such a case, the solicitor should be struck off the roll.
>
> [emphasis in original in italics; emphasis added in bold italics]

58 Drawing the threads together, two points bear clarification. First, that a *high degree* of negligence or incompetence or want of skill would suffice to

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show due cause requiring sanctions to be imposed. The appropriate standard to be applied is that laid down in the case of *In re A Solicitor* [1972] 2 All ER 811, as cited in *Law Society of Singapore v Chiong Chin May Selena* [2005] 4 SLR(R) 320 as follows:

> 21 It is settled law that failure to maintain the requisite financial and/or accounting records inevitably results in a finding of professional misconduct. It is immaterial that the inadvertence was not inspired by improper motives. In the case of *In re A solicitor* [1972] 1 WLR 869, Lord Denning MR observed, at 873, that negligence "may amount to a professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession".

This standard of conduct that is "inexcusable and is such as to be regarded as deplorable by the fellows in the profession" was also relied upon in *Lim Kiap Khee* at [20] and in Re *Cashin Howard* [1989] 2 SLR(R) 82 at [34].

59 Secondly, such negligence or want of skill can be founded on a *cumulative* account of matters, taking into account the entire factual backdrop. This follows, in particular, from *Selena Chiong* at [24] and *Naidu* at [79]. Most recently, Valerie Thean J stated in *Lee Wei Ling and another v Law Society of Singapore* [2021] SGHC 87 as follows:

> 92 A further point is that on the issue of negligence, the standard of professionalism expected in the particular circumstances, in the light of the specific queries posed and then repeated, must also be established by a [Disciplinary Tribunal]. Negligence could, in appropriate circumstances, amount to an ethical breach, and the factual backdrop is of paramount importance in this assessment.

60 Any discussion of whether a particular action was negligent or displayed a culpable want of skill will of course be shaped by the context in which it occurred. In this connection it is highly relevant that the allegations in the Complaint related to the conduct of a trial. It has long been recognised that due to the dynamic nature of a trial where decisions have often to be taken in a

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short space of time and may be prompted by the court, a charge of negligence can be hard to maintain. As observed in *Ridehalgh v Horsefield* [1994] Ch 205 at p 326:

> … Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.

61 Similarly, in the House of Lords decision of *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615 at 682 (*per* Lord Steyn):

> … it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome.

Acting without authority

62 On acting without authority, the case referred to is again *Selena Chiong*. In that case, because of the framing of the charge, the Court of Three Judges found that the elements that needed to be proven were that: (1) the client, Heng, had unequivocally revoked her instructions for the respondent or the respondent's firm to act on her behalf; (2) the respondent was aware of the unequivocal revocation of her authority; and (3) the respondent continued to act despite such knowledge of the revocation of her authority to act. The Court

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found that the evidence did not support a finding that the respondent was conscious that Heng had revoked the authority to act on her behalf.

63 A more specific instance of a solicitor acting outside the scope of authority granted is found in *Michael Quan*. In that case, the respondent solicitor was charged with making cash payments from a client's account without the necessary authority, in contravention of rr 7(1) and 8 of the Legal Profession (Solicitors' Accounts) Rules (1999 Rev Ed). The Court of Three Judges found that it was unlikely that the client had authorised such withdrawals and the solicitor was thus in breach of the rules.

64 These cases are more straightforward, as the focus is on determining what the scope of authority granted to the lawyer was, and then whether the lawyer had acted beyond the scope of such authority. There is, however, an alternative way in which the various situations could be approached. *Selena Chiong*, *Michael Quan* and *Fong Maun Yee* concerned the situation where the authority to make certain decisions lay within the remit or control *of the client*. The Appellant's case here raises a more nuanced question of whether the lawyers *should* have acted in a certain manner. On this view, a lawyer can be said to have acted without authority in deciding not to make an argument requested by the client.

65 In such cases, however, it is also clear that the authority to make the decision does not lie *solely* with the client. It is also incumbent on the lawyer to exercise his/her own judgment in evaluating the case. Going back to *In re G. Mayor Cooke*, Lord Esher also observed as follows:

> … [A lawyer] was bound to use his utmost skill for his client, but neither a solicitor nor a barrister was bound to degrade himself for the purpose of winning his client's case. Neither of them ought to fight unfairly, though both were bound to use

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> every effort to bring their client's case to a successful issue. *Neither had any right to set himself up as a judge of his client's case. They had no right to forsake their client on any mere suspicion of their own or on any view that they might take as to the client's chances of ultimate success.* … He had, however, a duty to the Court, and it was part of that duty that he should not keep back from the Court any information which ought to be before it, and that he should in no way mislead the Court by stating facts which were untrue. … *If a client came to a solicitor with a case which was such that the solicitor must know that it was absolutely and certainly hopeless, and if the client nevertheless insisted on the solicitor going on with the case, although there could be absolutely no doubt as to the result and although the solicitor knew this, then, if the solicitor were to go on with the case in consequence of these mad instructions in order to make costs for himself, he would be betraying his duty to his client and would be guilty of a dishonourable act.* But *if the solicitor could not come to the certain and absolute opinion that the case was hopeless, it was his duty to inform his client of the risk he was running, and, having told him that and having advised him most strongly not to go on, if the client still insisted in going on the solicitor would be doing nothing dishonourable in taking his instructions. …*
>
> [emphasis added]

66 The passage by Lord Esher demonstrates the tensions that are faced by a lawyer. Indeed, while one is not to sit as judge of a client's case, where an argument is simply untenable in the light of the evidence a lawyer would be in breach of duty in insisting on running the argument, nevertheless. This duty is owed not only to the client, but also to the court. It is therefore incumbent on the lawyer to continually assess the merits of the case and not to run frivolous arguments. This principle has been relied on frequently in the case law (see for example *Zhou Tong and others v Public Prosecutor* [2010] 4 SLR 534 at [19]–[21] and *Lock Han Chng Jonathan (Jonathan Luo Han Cheng) v Goh Jessiline* [2008] 2 SLR(R) 455 at [45]–[46]).

67 On either approach taken to acting without authority, we emphasise that it is only in *egregious* situations that a lawyer should face sanctions. Further,

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as a matter of conceptual placement, acting without authority could fall within *both* ss 83(2)(*b*) (*eg*, in *Ezekiel Peter Latimer*) and 83(2)(*h*) of the LPA.

The arguments before this Court

Broad observations

68 Before us, the Appellant essentially sought to resurrect the same nine allegations against the Defence Team as he did before the IC and before the Judge. Some attempt was made at an overarching case, with the Appellant further categorising his grounds of appeal as follows:

(a) There was a breach of the fair hearing rule, as the IC had employed reasoning not relied upon by the Defence Team, in effect denying the Appellant the opportunity to refute or address those reasons.

(b) The IC and the Judge had adopted a "hindsight approach", namely that the findings implicitly imported a requirement of causation into the assessment of liability for professional misconduct.

(c) The IC and the Judge had "plainly erred" in the appreciation of evidence before them, in particular, as the objective evidence corroborated the Appellant's account and not the Defence Team's.

69 That approach, however, suffered from one *fundamental* defect: that the Appellant quite simply failed to particularise the duty that the Defence Team was said to have breached, save for oblique references to s 83 of the LPA. The submissions were also bereft of what the *content* of such duty would have been in a case like the Appellant's. This lack was understandable when the Complaint was laid by the Appellant, a layman, to the Law Society. It was less excusable when he was represented by counsel as counsel should well know the duties that

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solicitors in the position of the Defence Team were supposed to discharge. The consequence of this lack was that this court was asked to assess whether the Defence Team had acted in a manner that was consistent with their duties, *without* any reference point. We had therefore to rely on general principles as enunciated at [37]–[67] above in order to make sense of the case.

70 We should also state that the arguments that there had been breaches of natural justice by the IC were misplaced. We reiterate the discussion at [29] above on the application of natural justice to the investigations carried out by the IC. These are informal and not adversarial. The IC must consider the particulars of any complaint submitted to it and, if it thinks there may be a possibility of misconduct, it has to ask the solicitor complained against to respond to the complaint. Thereafter, how the IC proceeds is up to it – it can ask for a further comment from the complainant, but it is not obliged to do so. Further if the IC considers the complaint to be baseless, for whatever reason, it does not need to give the complainant that reason and ask for a response before coming to a determination. It is sufficient for the IC to report to the Council as required by the LPA. If the complainant is dissatisfied with the reasoning of the IC or the Council, the remedy is to be found in s 96 of the LPA as we have stated previously. We thus found no merit in the Appellant's assertions that there had been a breach of natural justice affecting his case.

71 Judging by the nature of the allegations before the IC, the Judge, and now us, they fell under the general rubric of misconduct as discussed above. No dishonesty or deceit was alleged by the Appellant, so fraud was out of the picture. While the IC did not enunciate what categories of wrongful conduct it was considering in relation to the individual allegations, three of its members are solicitors themselves and therefore could be expected to be aware of the kinds of conduct that could potentially fall under ss 83(2)(*b*) and *(h*). From the

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IC Report, it is evident that the IC's approach was to consider the credibility of the allegations and whether it was reasonable in the circumstances for the Defence Team to have acted as it did. The IC concentrated on establishing the facts and since it considered that the facts did not substantiate, or were not capable of substantiating, any serious shortcoming, it rejected the Complaint in its totality. If it had considered that a *prima facie* case had been made out on one or more of the Appellant's allegations it would have had to then consider the implications of that decision, *ie*, for example, whether any mishandling of the defence or any negligence established amounted to misconduct or whether any failure to carry out the Appellant's instructions was of sufficient gravity to be referred to a DT.

72 In [20] above, we set out the allegations in the Complaint in the categories assigned to them by the Judge. In our view, they should be reclassified by reference to their legal implications by which we mean which type of breach of duty they were actually directed at establishing. As we have discussed above, the appropriate breach categories in this case are (a) negligence or want of skill, and (b) acting beyond the scope of authority. Using these categories, we would reclassify the allegations as follows:

(a) Negligence or want of skill

(i) Failing to provide the full set of photographs;

(ii) Not studying the photographs;

(iii) Failing to study the Appellant's notes; and

(iv) Failing to amend the Opening Statement.

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(b) Acting beyond the scope of authority

(i) Failing to raise the issue of the baton;

(ii) Failing to call the members of the Appellant's family as witnesses:

(iii) Agreeing to dispense with a large number of witnesses;

(iv) Failing to appoint a psychiatrist; and

(v) Failing to call an expert pathologist.

73 We will take these categories in turn and explain why we agreed with the IC and the Judge that none of the allegations made showed, even on a *prima facie* basis, that the Defence Team had misconducted itself when defending the Appellant.

Category 1: Negligence or want of skill

(1) Failure to provide all the photographs

74 The Appellant's first allegation here was that the Defence Team had failed to provide him with *all* the photographs of the crime scene after the committal hearing and that, when he complained, a member of the Defence Team had informed him that there were too many photographs to be provided.

75 The Defence Team conceded that they had not shown the Appellant the full set of photographs but denied telling him that they could not furnish the photographs. They asserted that the relevant photographs (out of a full set of 700) had been included in the Agreed Bundle that was given to the Appellant, and that they had discussed these with the Appellant. The Defence Team furnished the IC with copies of the photographs from the Agreed Bundle. The

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Appellant's rejoinder was that he had been given the Agreed Bundle, but without photographs. Subsequently he said that only a limited number of photographs (from pages 796 to 804 of the Agreed Bundle) had been supplied to him.

(A) THE VIEWS OF THE IC AND THE JUDGE

76 The IC did not accept the Appellant's allegation. It did not make sense that he would have been given only some but not all of the photographs in the Agreed Bundle. It noted that what happened at the scene was the crux of the criminal trial and therefore it would have been odd for the photographs of the scene not to have been available to the Appellant when he gave his instructions to the Defence Team.

77 Before the Judge, the Appellant argued that the IC had erred in its appreciation of the facts. He claimed he had not received the photographs in the Agreed Bundle, save for pages 796 to 804. The page numbers given by the Defence Team were incorrect as he had checked the pages in the Record of Proceedings ("ROP"). Further, it was unacceptable that only "relevant" photographs were shown to the trial court as all had to be shown. Additionally, even if relevant photographs had been provided to the court, the Defence Team had breached their duties to provide him with all documents, as legal practitioners are a client's agent (citing *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [42]): the Judgment at [29].

78 The Judge held that the IC's determination was justified, and the Appellant's assertion wholly lacked substantiation. There was no evidence that the photographs had been *wilfully* withheld from the Appellant, nor any evidence of a request on his part to see the entire set of photographs. Instead,

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the Defence Team had taken a practical decision in view of the sheer number of photographs, and included only the relevant ones, as is common in criminal trials. It was also observed that the Appellant's argument that the page numbers did not match his ROP was not cogent as the page numbering of the ROP used on appeal would differ from that used at trial.

(B) THE APPEAL AND OUR DECISION

79 Before us, the Appellant argued that the Judge had erred in her findings because:

(a) The Defence Team had clearly acknowledged that the Appellant had requested to see the entire set of photographs, as seen from their written explanation to the IC dated 10 September 2018.

(b) The Defence Team had no evidence to show that they had provided the Appellant with the "relevant" photographs as no attendance notes or acknowledgment receipts from the prison to that effect were presented.

(c) The Judge had failed to address the point that the relevant photographs did not contain those of the baton, the cash and valuables, and the sketch of footprints at the exterior of the house. Without these, the Appellant had been deprived of the opportunity to make informed decisions that he might be able to pursue at his trial.

80 On the Appellant's contention that the Judge had erred in thinking that there was no evidence of a request to see the entire set of 700 photographs, the evidence is unclear in this regard. In the Defence Team's letter of 10 September 2018 that the Appellant pointed to, the team had stated that:

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> We understand that Mr. Iskandar requested for these photos from Mr Jayatissa after the Committal Proceedings. Mr Jayatissa informed Mr. Iskandar that the Prosecution had only provided him with one set of photographs and that he was unable to procure an extra set for Mr Iskandar at the time. … What Mr Jayatissa informed him was that the relevant photos were included in the Agreed Bundle, a copy of which was in Mr Iskandar's possession. …

81 From this *alone*, it did appear that the Appellant *may have* asked to see the entire set of 700 photographs. That, however, was not entirely clear from the evidence. In the Appellant's own submissions before the Judge, he had stated as follows:

> After my committal hearing, I requested from Mr Jayatissa the documents related to my case. When these were handed to me, I found that the scene photos were not included, when asked, Mr Jayatissa claimed that there were too many photos hence he was unable to provide them to me.

82 The Appellant's claim was therefore that the scene photographs had not been provided to him at the time. It was not the case that he had made a specific request to see all the photographs. This substantiated the Judge's point that "nor is there any evidence of a request his part to see the entire set of 700 photographs": the Judgment at [30].

83 Even going on the assumption that the Appellant had asked to see all the photographs, there was no evidence that the Defence Team's failure to do so was unprofessional or wilful. We agreed with the Judge's broader reasoning here being that the Defence Team *had* shown the Appellant the *relevant* photographs; this was found to be sufficient, as a matter of practicality, due to the sheer number of photographs.

84 The Appellant's contention, that the Defence Team had no evidence to show that they provided him with the relevant photographs, must similarly be

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rejected. The Defence Team's explanation was that the relevant photographs were in the Agreed Bundle, to which the Appellant had access. The Defence Team had forwarded the pages of the Agreed Bundle containing the photographs with their Further Written explanations to the IC dated 20 November 2018. Both the IC and the Judge accepted that the Agreed Bundle furnished to the Appellant must have contained all the relevant photographs. We agreed as well that this was the only logical conclusion that could be drawn from the facts: the Judgment at [30]. The Agreed Bundle which the Appellant received could not have contained only some of the relevant photographs.

85 The Appellant also contended that the Judge had failed to address the point of prejudice that arose from the absence of specific photographs of the baton, the cash and valuables, and the sketch of footprints at the exterior of the house. We did not accept this argument. The simple point was that the Judge did not have to address each and every point as she had found that the relevant photographs had been provided and that the Appellant's "assertion wholly lacked substantiation" in this regard. Addressing the underlying issue head-on, however, several points should be noted. First, the sketch of footprints at the exterior of the house was indeed present in the Agreed Bundle. Secondly, there was no evidence that the Appellant would have adopted a different strategy at trial had he been provided with these additional photographs. In fact, the Appellant was aware that a baton had been seized from the driver's seat in the car and had informed the Defence Team to raise the issue. Thirdly, the IC made the point that scene reconstruction was the crux of the criminal trial and that it would have been "extremely odd" for the scene photos to not have been made available to the Appellant. This point spoke for itself. Further, at no point in the trial had the Appellant raised the issue that the photographs had not been provided to him.

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(2) Failure to conscientiously study the photographs

86 The second allegation in relation to the photographs was that the Defence Team did not conscientiously study the photographs to ascertain the amount of money that was contained in the orange bag. That was an allegation of want of care and skill. The Appellant claimed that there was approximately $700,000 in cash in the bag and that the prospect of loss of this substantial sum would have so enraged D1 that he had attacked the Appellant to save the money: the Judgment at [31]. The Appellant also claimed in his submissions before the IC that alongside the $700,000 in cash, there was an assortment of "bars, coins, necklaces, bracelets and rings, etc", that would raise the value of items to close to $1m. This point, however, was not raised in subsequent proceedings.

(A) THE VIEWS OF THE IC AND THE JUDGE

87 The IC concluded that it was clear at a glance from the photographs that a large sum was involved, and the Defence Team could not be criticised for not counting each note in the photographs. Furthermore, when the matter went to the Court of Appeal, the court was informed that the sum was more than $600,000: the Judgment at [33].

88 Before the Judge, the Appellant contended that: (1) the Defence Team had failed to discharge its duties conscientiously and did not know the case well enough; (2) the Defence Team should not be allowed to speculate as to the possible weight of the argument raised that the sum would have led D1 to attack him; (3) the Defence Team had been dishonest in its explanation that the argument would not have been material when it stated that there was no fact to suggest that D1 had uncovered the Appellant's ruse; and (4) there were no attendance notes to show that the photographs had been discussed with him: the Judgment at [34].

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89 The Judge rejected the Appellant's arguments, holding that exactly how much money had been in the orange bag was of no relevance to the decisions in *Iskandar HC* and *Iskandar CA*, and hence there had been no need to count the notes. It had been accepted in both courts that there was a large sum of money in the bag. Even then, the Appellant's version that he had been attacked by D1 was rejected on the basis of factors *other than* the sum of money involved: the Judgment at [35].

(B) THE APPEAL AND OUR DECISION

90 In the appeal, the Appellant reiterated that he was questioning the Defence Team's competence, and ability to study the evidence, and added further grounds to his original argument as follows. First, if the Appellant had known about the exact amount of cash, he would have instructed the Defence Team to raise the argument that D1 would turn highly aggressive and violent in order to protect such a huge sum of money. Secondly, the Defence Team had used the phrase "we are unable to ascertain how", which reflected their inability to understand the case and evidence at hand. Thirdly, the Defence Team's explanation to the IC that it was highly speculative to suggest that one would act aggressively to protect the amount of money should not be accepted. It was not up to them to speculate if an argument would pass muster in court. Fourthly, there was no objective evidence in the form of attendance notes that showed that they had discussed the photographs of the cash with him.

91 According to the Appellant, the Judge had also erred, as she appeared to be suggesting that the Defence Team had not been guilty of professional misconduct because it would not have made a difference to the Appellant's case on appeal. This was reminiscent of a "but-for" test in assessing whether causation had been established.

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92 The Law Society's point was a simple one. It argued that it was never in dispute that the amount of cash was substantial as this court had repeatedly noted in *Iskandar CA*. The actual amount was never specified at trial or on appeal. Further, there was no need for this to be done because it was not in any way relevant to the actual defences run at trial, as the IC and the Judge found. Additionally, there was no credible explanation as to why D1 would only become violent in order to protect $700,000 but would have not been equally violent in respect of an amount that was over $600,000.

93 At the outset, we broadly agree with the point made by the Appellant – that an IC or a judge, in assessing a lawyer's conduct of a case, should not do so *solely* by reference to the eventual success or failure of the case. The assessment of the correctness of the litigation decision has to be made with regard to circumstances *at the time* that that decision was made. In this case, however, the attack mounted on the Judge's reasoning was unwarranted. It is clear, in our view, that the Judge had not relied solely on the fact that the Appellant's case eventually failed in court. Instead, the Judge was broadly affirming the IC's decision. On this point, the IC found that they could not "say that [the Defence Team] had not acted conscientiously, for not having counted, one by one, each and every currency note in the photographs" and it was "obvious from these photographs that a large sum of money was involved, without having to count every note in the photographs". In reaching this conclusion the IC took into consideration the Defence Team's explanation that "even if such a sum existed, it would be highly speculative … and there was no other fact to suggest that [D1] had realised that he was being duped by [the Appellant]". The Judge had agreed with the IC's decision on this, and the core of her reasoning was (the Judgment at [35]):

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> There was no need to have counted the notes in the photograph. In the context of the defences that were run at trial and on appeal, the exact value of the money involved was not in issue.

94 The other reasons, namely (1) that the Court of Appeal had rejected the argument that D1 had attacked the Appellant; and (2) the reasoning of the Court of Appeal had turned on factors *other than* the sum of money involved, were then used to *buttress* the Judge's conclusion.

95 In any case, however, we agreed with the Judge's (and the IC's) reasoning here. It would have been a futile exercise for the Defence Team to have gone through the photographs to count each and every note in question. It was obvious that both the trial and appeal courts had been cognisant of the large sum of money involved, having been informed that it was "in excess of $600,000" or that it was "an enormous sum of money in excess of $600,000": *Iskandar CA* at [5] and [7]. That determination put paid to the remainder of the Appellant's arguments here. It was not logical for him to claim that D1 would have only attacked him if the amount involved was nearly $700,000 and would have not done so if the amount involved was only something in excess of $600,000. There was no basis for such a claim. In any event, the fact remained that the Defence Team *had* raised the argument that D1 had attempted to violently assault the Appellant.

(3) Failure to carry out the instructions given in the notes

96 The background to this allegation was that the Appellant had handed the Defence Team a sheaf of papers on 20 October 2015, that constituted his notes on the bundle used for his committal proceedings. He referred to the bundle as the "P1 Bundle". The bundle contained written notes on 52 witnesses, notes on the case theories of the Prosecution and Defence, documentary evidence, general observations and remarks. We refer to these notes collectively as

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"the Defence Notes". The Appellant's complaint was that the Defence Team had failed to carry out the instructions in the Defence Notes: the Judgment at [70]. He also informed the IC that he was never told that the points he penned were being abandoned and why they were being abandoned.

97 The Defence Team's position was that the Defence Notes were not firm instructions but were points that they were being asked to consider for possible incorporation into the case. The notes were also prepared before the agreement to dispense with the evidence of a significant number of witnesses had been arrived at. Hence, after that agreement, the Defence Notes no longer had any relevance in relation to the excluded evidence. The other points were considered and incorporated, where relevant, into their cross-examination of various witnesses and into their arguments.

(A) THE VIEWS OF THE IC AND THE JUDGE

98 The IC found the Defence Team's explanation persuasive and credible. In particular, the Defence Notes included questions such as "use this to our advantage?" and "report is very vague but he can refute my statements?" and could not have contained firm instructions.

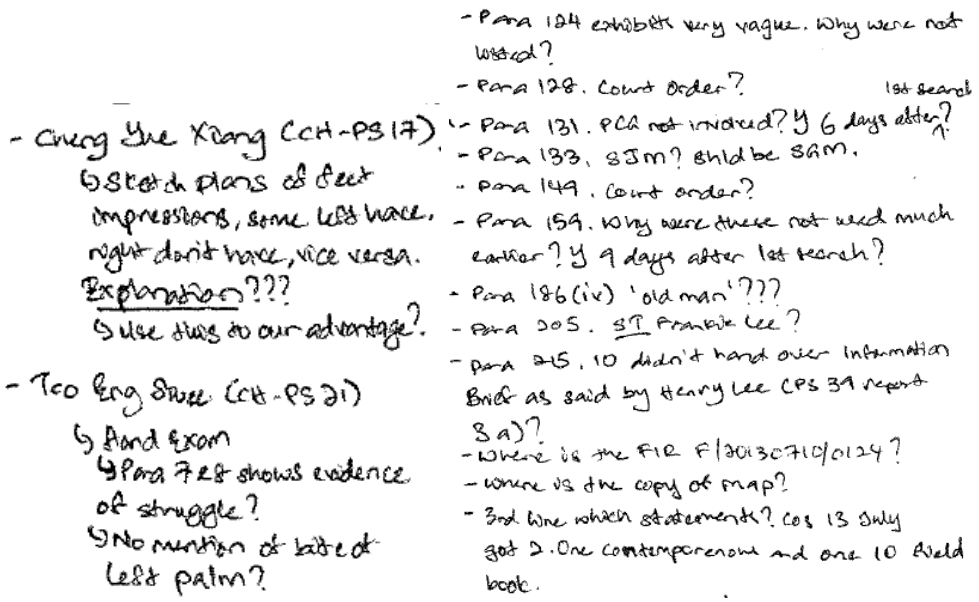
99 The Judge found no basis to depart from the IC's position. The Defence Notes would have been given at a very early stage of the process and it was the responsibility of counsel to update their client and initiate further discussion. Many of the Defence Notes were framed as points that the Appellant was inviting the Defence Team to consider, or potential issues that could be raised in the course of trial. They would have been superseded by events and new instructions would have arisen: the Judgment at [73]. Further, a perusal of the Defence Notes showed that the Defence Team had taken on board many of the

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points and acted consistently with the points raised. For example, the Appellant's account of how he had been attacked was written in the Defence Notes and came across in his evidence and was considered by the High Court and the Court of Appeal: the Judgment at [73].

(B) THE APPEAL AND OUR DECISION

100 The arguments raised before the Judge were replicated in this appeal. We agreed with the Judge that the Defence Team had not acted negligently in relation to the Defence Notes. Broadly, it was in our view, accurate to characterise the notes as *suggestions* that he wanted the team to *consider*, rather than firm instructions. This was evident from the fact that more often than not, the Appellant simply raised questions in the Defence Notes. Some examples are reproduced as follows:



101 Additionally, we agreed with the Judge's observation that the Defence Notes were made by the Appellant at an early stage in the proceedings. The

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subsequent developments in the case being run, including the narrowing down of the issues, simply would not have been *considered* by the Appellant at the time that he wrote them.

(4) Failure to amend the Opening Statement

102 The Appellant argued that the Defence Team did not comply with his instructions to amend the Opening Address for the Defence. He had told them that the Opening Address focussed too much on obtaining a reduction of the charges from s 300(*a*) of the Penal Code to s 300(*c*) thereof, and insufficiently on bringing the facts within s 299 of the Penal Code instead: the Judgment at [74]. Ultimately, however, it was the unamended version of the Opening Statement that was used in court, and he only received a copy of the amended version later.

103 The Defence Team's explanation was that the various versions of the Opening Address did not differ in substance, only in form. The position taken consistently was that the primary defences were under s 300 of the Penal Code, and, in the alternative, that the appropriate charge was under s 300(*c*) of the Penal Code. It was admitted that the Appellant had not been happy with the original version of the Opening Statement and that the amended version was not tendered to the trial court. Mr Nathan did, however, clarify the Defence position orally in court: the Judgment at [75].

(A) THE VIEWS OF THE IC AND THE JUDGE

104 The IC analysed the Opening Address as filed and noted that it made reference to Exceptions 2 and 4, which if successfully established, would have brought the offences under s 299 of the Penal Code. There was also reference to s 300(*c*). The Opening Address was worded in a confusing manner, but any

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confusion that resulted was resolved in the oral exchanges in open court when Mr Nathan confirmed that the defences of sudden fight and the right of private defence were being relied on. This position was repeated in two documents produced later, the Supplementary Case for the Defence filed in court on 16 October 2016 and a letter to the Prosecution of the same date. That the Appellant's case was clear to the trial judge was also evident from *Iskandar HC*.

105 The Judge held that the IC was entitled to come to the conclusion it had arrived at on this issue. It was clear that all parties were aware that Exceptions 2 and 4 would involve a reduction of the charges and that the reference to s 300(c) of the Penal Code was an alternative: the Judgment at [78].

(B) THE APPEAL AND OUR DECISION

106 The strongest argument raised by the Appellant of conduct that can properly be classified as negligence relates to the Defence Team's failure to amend the written Opening Address but, in our view, what happened at the time showed decisively that this failure did not amount to gross negligence deserving of sanction. The filed version of the Opening Address was not one that the Appellant had ultimately desired – this was a point that the Defence Team conceded before the IC and the Judge. The crux of the Appellant's complaint, however, was that there was *insufficient focus* on the reduction to s 299 of the Penal Code in the version of the Opening Address eventually relied on. In our view that point had no substance. In the Notes of Arguments dated 19 October 2015, private defence and sudden fight were recorded as matters relied on *before* the reduction to s 300(*c*) of the Penal Code was mentioned. This understanding is also borne out in the following exchange from the transcript from 30 October 2015, between the Court, Mr Lau Wing Yam on behalf of the Prosecution, and Mr Nathan:

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> Lau: Your Honour, if I'm just raise a point of clarification. Because the defences raised by the defence are one of as the case for defence say --- yes, paragraph 9 where it says that in --- Iskandar's primary defences to the charges of committing murder are that for that he reacted in such a manner firstly in the exercise of his right of private defence, and secondly, sudden fight. The question is, is he --- for the first one, is it the right of private defence or the right ---
>
> …
>
> Court: I see nothing to clarify really.
>
> Lau: All right, yes, yes.
>
> Court: He's just saying "I exercise my private defence. If I have exceeded, it becomes the 300(c) case", that's all.
>
> Lau: All right.
>
> Nathan: Yes, that's exactly my point
>
> Lau: Under the exception---
>
> Nathan: Thank you, yes.
>
> Lau: ---to three hundred---under the exception.
>
> Court: Yes.
>
> Nathan: All right, Your Honour.

107 In our view, the above amply demonstrated that all present at the time were aware of the order in which the arguments were being run; it was clear from the outset that those dealing with the reduction to s 300(*c*) of the Penal Code would follow after the submissions on the exceptions to s 300 of the Penal Code (which, if successful, would have reduced the Appellant's offence to one under s 299). It was also apparent from the record that although the Opening Statement that was submitted to the trial court was the unamended version, counsel in his oral opening had alerted the court to the amended position. No one, including the trial judge, would have been in doubt thereafter that the primary stand taken by the defence was that the exceptions of private defence

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and sudden fight were applicable and that the argument in relation to s 300(*c*) was an alternative.

Category 2: Acting beyond the scope of authority

108 The remainder of the issues then fell into the broad question whether the Defence Team had acted beyond the scope of authority by failing to run the case as the Appellant wished. In our view, none of these five issues pointed towards any misconduct whatsoever. We discuss them in turn.

(1) Failure to raise the baton issue

109 Police investigations revealed that a baton had been placed under the driver's seat in D1's car. The Appellant alleged that he had instructed the Defence Team to raise the issue of the baton, but this was not done: the Judgment at [36]. He considered that the presence of the baton would help prove that D1 was a violent man.

110 The Defence Team's explanation to the IC was that the Appellant had brought the issue up with Mr Jayatissa at one of the breaks during the trial although there was no attendance note of this. Mr Jayatissa then discussed the issue with Mr Nathan and they took the view that the mere fact of a baton having been found was insufficient to show that D1 was a violent person nor proof that he would use the weapon in a fight. Both counsel spoke to the Appellant in the dock and conveyed their views to him. The Appellant acknowledged those views and did not bring up the issue again.

111 The Appellant disputed this in his oral address to the IC and referred to his notes to the Defence Team where he had written "… baton under seat of SGM143. Proof that TBS (the 1st deceased) can be violent?"

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(A) THE VIEWS OF THE IC AND THE JUDGE

112 The IC accepted the Defence Team's explanation, finding that there was "consonance" between the explanation and the documentary evidence. The Defence Notes were handed to the Defence Team on the first day of trial and were matters for them to consider and take a position on, which they had done.

113 Before the Judge, the Appellant argued that the IC had erred in placing so much weight on the question mark in the Defence Notes after his mention of the baton because that was not the only instance when he had communicated this point to the Defence Team. He had also done so at interviews before the trial and in discussions during the trial.

114 The Judge found no reason to disturb the IC's conclusion. The primary ground for the IC's conclusion was that the Defence Team's explanation was to be preferred, and it was reasonable to conclude that they had explained the matter to the Appellant who accepted their advice. The question mark supported the fact that there had been discussion between the Appellant and the Defence Team.

(B) THE APPEAL AND OUR DECISION

115 On appeal, the Appellant argued that there was a breach of the fair hearing rule in this instance as the IC had dismissed this head of complaint based on its interpretation of the question mark in his notes on the matter (see [100] above). In so doing, it employed a head of reasoning not articulated by the Defence Team and which had not been raised with the Appellant during the interviews. The rules of natural justice dictated that the Appellant should be given the opportunity to refute or address the points relied on by the IC. The Appellant's instructions were, in any case, not merely speculative as a baton

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was an offensive weapon under the Corrosive and Explosive Substances and Offensive Weapons Act (Cap 65, 2013 Rev Ed), which D1 did not have lawful authority to possess.

116 We could not accept this argument. As we stated at [26], the IC was carrying out an informal investigation, it was not performing an adjudicatory function. It did not have to go back to the Appellant for his views on its ruminations before coming to a concluded view on whether it was likely or not that the Defence Team had dropped the Appellant's point without his consent. In our view, the IC was entitled to accept the Defence Team's explanation that the matter had been discussed with the Appellant. The question mark in his notes on this matter (as reproduced above at [100]) was probative of the fact that the matter was being raised for discussion and for a position to be taken. The IC was also entitled to accept that on discussion the Appellant had agreed that the point was speculative especially in view of D1's knee ailment. This was a credible explanation for the point not being taken any further in the trial court.

(2) Failure to call family members as witnesses

117 The Appellant claimed that the Defence Team failed to execute the plan that was stated in the Case for the Defence ("CFD") dated 28 October 2015. The CFD included calling his family members to testify that he was not a violent person and would not have intended to kill.

118 The Defence Team's explanation to the IC was that while that had been the initial plan, the Appellant's instructions had changed as he did not want to put his family through the experience of testifying in court, especially as the evidence was unlikely to assist him. The Defence Team also produced an attendance note dated 10 October 2015, where the Appellant's instructions were

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recorded as "Request for Parents to be dispensed with but sister is ok". The Defence Team explained that they had informed the Appellant that he could still include his family members in the list of witnesses should he change his mind later. Subsequently, when the close of the prosecution's case was approaching, the Appellant confirmed from the dock that he did not want to call his relatives as witnesses.

(A) THE VIEWS OF THE IC AND THE JUDGE

119 The IC considered that it was not at all uncommon for witnesses to be initially included but subsequently not called. This would be for a variety of reasons. The Defence Team's explanation was accepted, with the IC taking the view that the evidence of the Appellant's family members would have been unlikely to have had any material influence on the issues. The IC also added that if the Appellant had expected these witnesses to be called, it was surprising that he had not uttered a word of protest in court even though he had the opportunity to do so.

120 Before the Judge, the Appellant raised four arguments (the Judgment at [44]). First, the Notes of Argument from 19 and 26 October 2015 showed that the team had known of his intent to call his family members as witnesses. The 19 October 2015 Notes of Arguments showed Mr Nathan informing the trial judge, Tay J (as he then was), in Chambers that the Defence witnesses would include the Appellant's mother and sister. The 26 October 2015 Notes of Argument showed that Mr Nathan asked for the Appellant's family members to give evidence after the Appellant himself had done so. Secondly, it was illogical for him to have refused to call witnesses regardless of their usefulness in the face of the capital charges against him. Thirdly, as family members they would have been willing to testify for him. Finally, the Defence Team had lied as to

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the date of the CFD because 28 October 2015 was the next time that they could secure a prison visit.

121 The Judge rejected the Appellant's submissions, holding that the IC's conclusions were supported by evidence (the Judgment at [45]). The Notes of Argument cited were consistent with the Defence Team's account. Up until 26 October 2015, it remained the Appellant's instruction that his family members should be called. It was incredible that the Defence Team had decided to disobey his instructions to call them. There was no reason why the Defence Team would simply not call the witnesses, having listed them in the CFD, and having informed the court twice that some of them would be called. There was no incentive for them not to call these witnesses, nor any difficulty for them to put the witnesses on the stand.

122 Further, the Defence Team's reason for the Appellant's change in instructions were cogent. Such evidence would have been marginal, as the Prosecution's case centred not on the Appellant's general conduct but on his specific acts and intention to kill the two victims on the day in question. The reference to 28 October 2015 was a typographical error as the trial would have started by then. A check on the e-Litigation system showed that the CFD was filed on 28 September 2015 when the Appellant was visited in prison. In any case, there was no dispute that the CFD listed family witnesses, but the question was whether the Appellant had consented to them not being called.

(B) THE APPEAL AND OUR DECISION

123 The Appellant largely reiterated the points previously made before the IC and the Judge. In relation to the attendance note of 10 October 2015, he stated that it pre-dated the subject matter of this head of complaint and the indications

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to court on 19 and 26 October 2015. It was also asserted again that it was highly illogical for him not to have sought assistance from his family members who would have helped in any way they could in the face of such serious charges. The Appellant could not have taken the view that the evidence was unlikely to help his defence as he would not be able to formulate legal advice by himself. Moreover, if the Appellant genuinely changed his mind about calling his witnesses, he would not be "drip-feeding" his instructions to counsel. The Judge had also erred in considering that the evidence of his relatives would have been marginal. The trial judge had made a finding that D1 was not a violent person based on the testimony of D1's wife.

124 The Law Society rehashed the sequence of events and the findings made by the IC, highlighting that the IC and the Judge accepted that: (1) it was unsurprising that only material witnesses would be called due to the narrowing of the focus of the trial; (2) the Defence Team had discussed this with the Appellant and obtained his consent; and (3) the Appellant had separately agreed that his family would not give material evidence and there was no need for them to testify.

125 We agreed with the Judge that the allegation was not credible as there was no logical or other reason for the Defence Team to have gone against the wishes of the Appellant and deliberately omitted to put any of his family members on the stand. As with every trial, the calling of the witnesses would have been an *evolving* situation. The explanation given to the IC by the Defence Team was believable and consistent with what could happen in a trial and experienced counsel such as the Defence Team were in the best position to assess the potential value of any evidence to be given and to advise the Appellant on whether it would be worthwhile to subject his relatives to the stress of giving testimony. Bearing in mind the number and depth of the stab wounds

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the Appellant had inflicted on the two victims, whatever evidence his relatives could have given as to his generally non-violent disposition may quite reasonably have been assessed by the Defence Team as being of little probative value.

(3) Dispensation of witnesses

126 Of the 102 Prosecution witnesses whose statements were tendered to the trial court in evidence, in the end only 17 were called to the stand and cross-examined by the Defence Team. The Appellant alleged that he was not informed by the Defence Team that such a large number of witnesses would be dispensed with and was under the impression that the non-critical witnesses for the Prosecution would be called in the first tranche of the hearing and the critical witnesses for the Prosecution and the Defence witnesses would take the stand in the second tranche. In particular, the Appellant complained of the fact that one Mr Vernon Voon ("Mr Voon") had not been called. According to his account, on the first day of trial, a member of the Defence Team had informed him, after seeing the judge in chambers, that most of the Prosecution witnesses would be dispensed with. When he claimed it was unfair, counsel said these were the judge's instructions, and the team had agreed to the dispensation without obtaining his consent: the Judgment at [46]. The Defence Team had also, of their own accord, called for one "SSI2 Nurussufiyan bin Ali" ("SSI2 Nurussufiyan") to be cross-examined.

127 The Defence Team clarified the sequence of events with respect to the list of witnesses. They stated that the parties had seen the trial judge in chambers on 19 October 2015 for a pre-trial conference. At the conference Tay J had indicated that the focus of the trial should be on the events that had taken place in D1's house because what happened there formed the central dispute. The next

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day, the first day of trial, Mr Nathan and Mr Jayatissa had explained this to the Appellant *prior* to the commencement of proceedings. They had explained the issues that were not being contested and which witnesses could be dispensed with, following which the Appellant agreed and gave his consent to proceed on that basis. The Defence Team also alleged that the Appellant had specifically requested that one "DSP Borhan bin Said" and SSI2 Nurussufiyan be cross-examined: the Judgment at [47].

(A) THE VIEWS OF THE IC AND THE JUDGE

128 The IC concluded that the Defence Team had discharged its duty and rejected the Appellant's claims. The IC also did not accept the Appellant's claim in relation to SSI2 Nurussufiyan, as the latter had not been a material witness and would only have been called on the Appellant's instructions. In relation to Mr Voon, the IC reasoned that his evidence would not have been material to the Appellant's defences of sudden fight and private defence. Mr Voon was a manager at OCBC bank and could have given evidence on the Appellant's financial state. It was never in dispute, however, that at the material time the Appellant was in dire financial straits. Cross-examining Mr Voon thus would not have been critical for his case.

129 The IC also found it odd that, given the many alleged departures from his instructions, the Appellant had not once sought to draw the trial court's attention to these departures while the trial was in progress. The IC also referred to Tay J's notes of 20 October 2015 that recorded Mr Nathan as stating:

> Accused is quite educated. He has prepared instructions and questions for us. He may not be comfortable with so few witnesses.

In the IC's view this showed that the Defence Team was aware of the potential

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problem and was unlikely to have run the risk of dispensing with witnesses without the Appellant's consent: the Judgment at [48].

130 The Judge accepted the IC's finding that the dispensation of witnesses had been discussed with the Appellant and his approval obtained. It was good practice that the initial list of witnesses contained more witnesses than the eventual list and it was only at the pre-trial conference that both sides would re-assess their respective cases and determine which issues were in dispute: the Judgment at [49].

131 Specifically on Mr Voon, the Judge found no basis to conclude that the Appellant had not agreed to dispense with Mr Voon's attendance at trial. It was not disputed that the Appellant was heavily in debt, that OCBC bank was a major creditor and that the entire plan was set in motion because he faced bankruptcy. The Judge accepted the Defence Team's explanation that they had exercised their professional judgment and advised the Appellant that Mr Voon would not contribute anything material.

(B) THE APPEAL AND OUR DECISION

132 The Appellant reiterated the points that he made before the IC and the Judge as follows:

(a) He was under the impression that the first tranche of the trial was meant for lay witnesses and the second tranche of trial was for critical and defence witnesses.

(b) He had prepared notes on witnesses that he thought were crucial to his defence, which he handed to Ms Nair on the first day of trial. He was then informed that the Defence Team and the Prosecution had been

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called to the trial judge's chambers the day before and that the issue of dispensation of witnesses had been discussed at that time.

(c) On the first day of trial, counsel were called to the trial judge's chambers again. When they returned, the Appellant was informed that they had agreed to dispense with most of the witnesses.

(d) The Defence Team's explanations as to why each witness was dispensed with were afterthoughts and had not been raised with him. There was no objective evidence corroborating their account.

(e) The prison booking slips, and attendance notes did not make any reference to discussions with the Appellant. Even though the Defence Team had asserted that, as early as 28 September 2015, the Appellant had insisted on calling SSI2 Nurussufiyan, this was not recorded in any attendance note.

(f) The Defence Team's account was internally contradictory, for they had stated that the exact number of witnesses had not been decided on the first day of trial, but they also claimed that they had already decided that morning to call a total of 17 witnesses.

133 The Law Society highlighted that the IC accepted that the Defence Team informed the Appellant and obtained his agreement to Tay J's suggestions on dispensation of witnesses. In particular, the Appellant had accepted that the formal witnesses and witnesses who could not speak to the scene of the crime be dispensed with since the dispute revolved around what had happened at the scene of the crime. He had also accepted that the focus should be on what happened at the scene of the crime and that the second trial of trial should be

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vacated.

134 In our view, the Defence Team had provided a cogent and an in-depth explanation as to why each and every witness had not been called. A detailed timeline of the events that had occurred was also provided, which the Appellant was unable to dispute. The Appellant's allegation in this connection was not credible. He was familiar with court processes and, as the Defence Team informed the trial judge in chambers, he was educated and would not be comfortable with so few witnesses. The Appellant agreed that the Defence Team had subsequently explained the court's position to him but denied he had accepted it. That denial was hard to credit as the Defence Team, being fully aware that the Appellant might be resistant to the reduction in witness numbers and having notified the court of his likely reaction, would in that case have gone back to the court and notified the Judge instead of proceeding in the face of the Appellant's opposition. That the Defence Team took no steps to put the Appellant's alleged position to the trial judge strongly suggests that the Appellant had indeed agreed to the reduction. Further, the Appellant stayed silent throughout the proceedings and did not complain to the court that his team of lawyers was going against his wishes and dispensing with critical witnesses. In any event, the witnesses who were dispensed with were formal witnesses. They could not contribute to the trial court's determination of the facts in dispute. We agreed with the analyses of the IC and the Judge on the lack of substance in this allegation.

(4) Failure to appoint a defence psychiatrist

135 The Appellant contended that it was part of the original defence plan to call a psychiatrist for the Defence. The argument was based on the Notes of Argument dated 19 October 2015 where Mr Nathan was recorded as saying that

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the defence of diminished responsibility was a possibility and that Dr Tommy Tan ("Dr Tan") had been contacted to give an expert psychiatric opinion but he had not yet seen the Appellant. On 26 October 2015, however, Mr Nathan was recorded as saying that the Defence was not relying on diminished responsibility. The Appellant argued that this decision was made without consulting him: the Judgment at [52].

136 The Defence Team's explanation was that the Appellant had not himself raised the issue of a possible psychiatric condition or that he was relying on diminished responsibility. Instead, it was Mr Nathan's suggestion that Dr Tan be appointed to review the psychiatric report furnished by the Prosecution as the Defence Team's initial impression was that there was sufficient time for Dr Tan to do so. When the issues at trial were narrowed, Dr Tan was asked to review the documents urgently. At that time, his view was that he was unlikely to find evidence of any disorder. This was explained to the Appellant who did not indicate that he still wanted to rely on the defence of diminished responsibility or ask for a second opinion: the Judgment at [53].

137 The documents that the Defence Team put before the IC were as follows:

(a) An attendance note dated 1 November 2013, where it was recorded that the Defence Team and the Appellant "had to make a decision" on whether to seek a psychiatric report but it was "[c]learly not for diminished responsibility".

(b) An attendance note dated 23 September 2014 for a pre-trial conference where Mr Jayatissa was recorded as informing the Assistant Registrar that the "[i]nitial psychiatric report doesn't suggest he needs to go for further psychiatric test". It was also stated that there were no

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instructions from the Appellant to send him for examination to obtain such a report.

(c) An attendance note dated 18 June 2015, of a meeting with the Appellant in prison. No reference was made to the defence of diminished responsibility or any psychiatric evidence even though the possible defences were discussed.

(d) A set of e-mails dated 21 to 22 September 2015 between Ms Chin and Mr Jayatissa where the latter informed the Defence Team of the discussion with Dr Tan.

(e) A set of e-mails dated 7 October 2015 between the Defence Team and Dr Tan, where Mr Jayatissa requested Dr Tan to review the necessary documents and provide his input on those documents. It was stated that Dr Tan would be engaged if he found that a further psychiatric assessment would be useful to the Appellant's case.

(f) The Notes of Argument dated 19 October 2015, where Mr Nathan informed the court that the defence of diminished responsibility was only a *possibility*.

(g) The Notes of Argument dated 22 October 2015, where Mr Nathan informed the court that Dr Tan was not able to examine the Appellant until November of that year and Tay J's instructions that Dr Tan was to interview the Appellant over the next few days.

(h) The Notes of Argument dated 26 October 2015, where Mr Nathan confirmed to the court that the defence of diminished responsibility would not be relied upon and that Dr Tan would not be called.

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(A) THE VIEWS OF THE IC AND THE JUDGE

138 The IC concluded that the Appellant's claim, that a defence psychiatrist would be engaged from the outset, was contradicted by the attendance notes. The e-mails and the Notes of Argument supported the Defence Team's timelines and explanations: the Judgment at [56].

139 Before the Judge, the Appellant argued that he was not informed of Dr Tan's opinion and the developments concerning the psychiatric evidence. If Dr Tan's opinion was not favourable, the team was obliged to engage another psychiatrist who would help; the appeal lawyers were subsequently able to engage Dr John Bosco Lee ("Dr Lee") to provide a psychiatric report that they adduced on appeal. He had not been adequately advised by the Defence Team and their failure to adduce psychiatric evidence also resulted in the Court of Appeal's decision to give little weight to Dr Lee's report: the Judgment at [57].

140 The Judge rejected these arguments, agreeing with the IC that the documentary evidence confirmed the Defence Team's account. The Court of Appeal's assessment and treatment of Dr Lee's report in fact supported the Defence Team's decision and Dr Tan's view: the Judgment at [58]–[59]. The Judge also observed that the Appellant's arguments were premised on a mistaken understanding of a lawyer's role in assisting an accused person with his defences. Defence counsel had to take instructions and consider which defences were reasonable and supported by facts. The Appellant's instructions had not revealed facts giving rise to a defence of diminished responsibility; it was sufficient for the Defence Team to pursue the line of inquiry by engaging Dr Tan and then accepting his professional advice: the Judgment at [60].

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141 The Judge also observed that the Appellant's account of his criticisms of the Opening Address supported her conclusion that he had indeed authorised the decision not to call his family members, a psychiatrist or a pathologist (see below). It would have been plain from the various versions of the Opening Address that these particular witnesses were not being relied upon: the Judgment at [79]. This was a very valid point which we agreed cast serious doubt on other allegations the Appellant had made.

(B) THE APPEAL AND OUR DECISION

142 The Appellant made a series of points in relation to the evidence as follows:

(a) The attendance notes on 1 November 2013 show that one of the case strategies discussed was that a defence psychiatrist would be required at trial.

(b) The events that took place between the Defence Team and Tay J, as recorded in the Notes of Argument dated 22 October 2015, were never brought to the Appellant's attention.

(c) The Defence Team had acted of their own accord in informing the court that they would not be relying on diminished responsibility and in agreeing not to call Dr Tan as their witness.

(d) The Defence Team could not explain the fact that on 22 October 2015, they still had the intention of engaging Dr Tan even though he had provisionally opined that he was unlikely to come to a different conclusion from Dr Goh, the Prosecution's psychiatrist.

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(e) It was improper for the Defence Team to have come to any definitive conclusion on the viability of the defence of diminished responsibility without any report from Dr Tan. They should have informed the Appellant about the favourability (of the argument) such that he might source for another defence psychiatrist.

(f) No attendance notes corroborate the Defence Team's claims about having communicated Dr Tan's views to the Appellant.

143 The Judge also erred by stating that Tay J would have come to a same conclusion if the defence psychiatrist's report was adduced at trial. This was similarly a causation requirement for the liability of misconduct that should not be imposed.

144 The Law Society responded that Dr Tan did not think that he could meaningfully assist as he was not confident that a full examination of the Appellant's mental state at the time could be conducted two and a half years after the incident; in contrast, the Prosecution's psychiatrist had examined the Appellant soon after his arrest. Dr Tan's schedule also did not permit him to assess the Appellant. These points were discussed with the Appellant and it was agreed that the defence of diminished responsibility would not be raised. It was also fanciful to suggest that the Defence Team was obliged to locate another psychiatrist to give positive evidence. The appeal counsel were also only permitted to tender fresh evidence over the Prosecution's objections. In fact, Dr Tan's reluctance was shown to be justified when the Court of Appeal preferred the Prosecution's psychiatric report because it was contemporaneous, thorough and consistent with the Appellant's own statements.

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145 We agreed with the Judge that there was no basis for the allegation that the Defence Team had gone against the Appellant's wishes and failed to appoint a defence psychiatrist. Contrary to the Appellant's submissions, the attendance note of 1 November 2013 clearly stated that during the initial discussion on whether to engage a defence psychiatrist, parties were already of the opinion that such engagement was *not* for diminished responsibility. The Defence Team's account was corroborated by the documentary evidence; and we agreed that it would not be reasonable to impose an obligation on the team to constantly search for an alternative psychiatrist given the facts available to them. While counsel must consider the instructions given to them carefully to assess whether the same would assist in making out their client's case, they are not obliged to put forward to the court propositions espoused by the client that have no factual substratum. Indeed, to do so would be a breach of counsel's duty to the court to conduct the case expeditiously, efficiently and in line with the available facts. Where a client wants to put forward a case that cannot be substantiated, counsel's duty would be to explain the difficulty to the client and suggest the point be dropped. In an extreme case counsel may need to discharge from further acting for the client if the client insists on pursuing his misguided course.

(5) Failure to appoint a defence pathologist

146 The Appellant similarly contended that it had been agreed between himself and the Defence Team that a defence pathologist would be called. He was not consulted when the team decided not to call Dr Porntip Rojanasuran ("Dr Rojanasuran") as the pathologist for the defence, nor when it decided to rely on the pathologist report adduced before the Court of Appeal. The Appellant also argued that Dr Rojanasuran would have testified about the length of the blade and would have dealt with the autopsy report of Dr Gilbert Lau.

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147 The Defence Team's explanation was that it was Mr Jayatissa's idea to engage a pathologist to address the Prosecution's scene reconstruction by Dr Henry Lee. When the Prosecution decided not to call Dr Henry Lee on 26 October 2015, there was no longer a need for the Defence to deal with that reconstruction. This was explained to the Appellant on 29 and 30 October 2015. Further, the Appellant had never raised any issue about the calling of a defence pathologist. The Defence Team also took the position that the length of the blade was immaterial to the defences of sudden fight and private defence or to whether the Appellant possessed the requisite intention: the Judgment at [63].

(A) THE VIEWS OF THE IC AND THE JUDGE

148 The IC accepted the Defence Team's explanation, finding it odd that the Appellant had not raised the issue when the trial court was informed that the Appellant himself was the only witness for the Defence. The Appellant had failed to raise this complaint on 30 October 2015, when the case was adjourned, or on 9 November 2015 when he returned to the court to be cross-examined. He also remained silent at the close of the evidence for the Defence's case. The IC also observed that the Appellant was not a meek or reticent person, and that if things did not go according to what he had expected, he would have raised the matter then and there at the trial.

149 Before the Judge, it was argued that Dr Rojanasuran would have been called even if Dr Henry Lee was not called. The Appellant relied on the attendance notes from 1 November 2013 and 23 September 2014 that indicated the importance of forensic evidence, especially scene reconstruction, to the Defence's case. The 20 October 2015 Notes of Arguments were also referred to where Mr Nathan was recorded as saying that Dr Rojanasuran might need to be called even for Dr Gilbert Lau's autopsy report, but "definitely" would be called

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if Dr Henry Lee was called. The Appellant also argued that the evidence on the knife was material to his case: the Judgment at [65].

150 The Judge dismissed these arguments, finding they were not substantiated by the documents: the Judgment at [66]–[69].

(a) The attendance notes did cite the importance of forensic evidence, but contained no firm intention to call a pathologist. Instead, they buttressed the Defence Team's claim that the focus was on the scene reconstruction, which was entirely consistent with not requiring Dr Rojanasuran if Dr Henry Lee was not called.

(b) The Notes of Argument from 20 October 2015 did not support the Appellant. The reference to Dr Gilbert Lau's autopsy report was tentative, at highest. The emphasis was on Dr Henry Lee's report. Further, Tay J had queried the Prosecution the day before as to whether Dr Henry Lee's evidence was required, indicating that the Prosecution had not confirmed that matter and not that the Defence was planning to call Dr Rojanasuran *regardless* of the Prosecution's case.

(c) The arguments concerning the knife were misplaced for they appeared to be directed at re-opening the issue of whether the length and provenance of the knife were material to the Defence. The Court of Appeal had already concluded that these were not material facts. This cohered with the explanation that Dr Rojanasuran was only required to respond to Dr Henry Lee's report.

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(B) THE APPEAL AND OUR DECISION

151 The Appellant again relied on the attendance note of 1 November 2013 and the Notes of Argument from 20 October 2015 to make the point that a pathologist should have been called. In relation to the knife, the Appellant argued that the IC and the Judge had relied on a similar "hindsight approach" to determine whether there was professional misconduct on the part of the Defence Team. In any event, the failure to call a pathologist rendered the team unprepared during the cross-examination of the Prosecution's expert. For instance, Dr Ong Beng Beng's pathology report adduced for the Appellant's appeal provided a valid explanation to account for the discrepancy between the sketch of the knife (which was 9 cm) and the deepest wound (which was 13 cm).

152 It was also not correct to say that the Appellant had remained silent throughout. The Appellant had raised those issues to the Defence Team but had been led to believe that the failure to call a defence pathologist was the result of instructions from the trial judge in chambers and nothing could be done to challenge those instructions. The Appellant also had no right to address the court unless he was spoken to.

153 The Law Society submitted that the Defence Team had a defence pathologist in mind solely for the purpose of rebutting the Prosecution's scene reconstruction expert. This intended evidence became unnecessary when the evidence of the Prosecution's expert was dispensed with. Again, while the Appellant's appeal counsel was permitted by the Court of Appeal to tender fresh evidence on the knife, the Court of Appeal ultimately considered the same to be immaterial.. This was because the Appellant had already admitted to inflicting the stab wounds, such that the evidence relating to the knife was not relevant to the defences of sudden fight and private defence. There was nothing to the point

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that admission of fresh evidence on appeal would be inferior to that adduced at trial. The Court of Appeal could have easily remitted the issues to Tay J had it considered that the new evidence might possibly have a bearing on the conviction of the Appellant. In relation to the defence pathologist, there is *nothing* in the note of 1 November 2013 or the Notes of Argument from 20 October 2015 to support the Appellant's contention that the Defence Team *should* have called for a pathologist.

154 We noted that the relevant parts in the Notes of Argument from 19 October 2015 and 20 October 2015 are as follows:

> (19 October 2015)
>
> Court: …
> (3) Consider if Henry Lee report adds anything of substance to the case. Try to agree on primary facts and leave for submissions.
>
> (20 October 2015)
>
> [DPP] Lau: … Assoc Professor Gilbert Lau – in Afro-Asian trial.
>
> S Nathan: (1) May need [Dr Rojanasuran] – will see her in November at earliest.
>
> Even for Gilbert Lau's autopsy report.
>
> If Henry Lee is called, we definitely will call [Dr Rojanasuran].

155 These records support the Defence Team's explanation that the primary purpose of Dr Rojanasuran's evidence was to rebut the evidence of Dr Henry Lee on the scene reconstruction. This was what the IC and Judge considered had been the circumstances in which there was a need for testimony from Dr Rojanasuran, and nothing suggests they had done so incorrectly. With Dr Henry Lee not called to testify, there was no need for Dr Rojanasuran's evidence.

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156 While calling Dr Rojanasuran to testify on Dr Gilbert Lau's report might have been a secondary reason for his evidence, it appears that the team made the call to dispense with Dr Rojanasuran's evidence even then. Given the Appellant's prior admissions that he had inflicted the stab wounds, this judgment call by the team was one that they were well-entitled to make. While the Appellant is correct that the *eventual materiality* of the evidence, as decided by the Court of Appeal, could not be *determinative* of the issue, that decision buttressed the accuracy of the Defence Team's judgment on this issue.

157 As to the point on the Appellant being silent, the IC had specifically pointed to an instance where he addressed them directly, as follows:

> From what we saw of the complainant, he was not a meek or reticent person. For instance, at our interview of the 10 December 2018, at one juncture, he informed the committee that he would like to stop the interview then, because his family was there to visit him and he wanted to see his family. We stopped that interview at the juncture. We feel that this episode fortifies our view that if things were indeed not going according to what he had expected, he would have raised the matter with the respondents or even brought this to the attention of the court – then and there, at the trial – and not remained silent. This is especially when so much more was at stake for him at his trial, compared to what was at stake during our interview.

158 Having had personal contact with the Appellant on two occasions, the members of the IC were well placed to assess his ability to voice any concerns he might have had in relation to his own interests. There was no basis for us to disagree with the view of the IC that, contrary to his case, the Appellant would not have just sat on the side lines, particularly if the apparent discrepancy between the length of the knife and the depth of the wounds he had inflicted was such a crucial issue in his view.

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Conclusion

159 For the reasons given above, we agreed with the IC and the Judge that the Appellant had not made out a *prima facie* case of misconduct against the Defence Team which merited investigation by a DT. We therefore dismissed the appeal.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Ravi s/o Madasamy (K K Cheng Law LLC) for the appellant;
P Padman (KSCGP Juris LLP) for the respondent.

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