IN THE COURT OF THREE JUDGES OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 232

Originating Summons No 2 of 2021

Between

(1) Tan Ng Kuang
(2) Lim Siew Soo

… *Applicants*

And

Jai Swarup Pathak

… *Respondent*

JUDGMENT

[Legal Profession] — [Disciplinary proceedings]

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Tan Ng Kuang and another
v
Jai Swarup Pathak

[2021] SGHC 232

Court of Three Judges — Originating Summons No 2 of 2021
Andrew Phang Boon Leong JCA, Steven Chong JCA and Woo Bih Li JAD
5 August 2021

14 October 2021 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 This is an application made by Mr Nicky Tan Ng Kuang ("Mr Nicky Tan") and Ms Lim Siew Soo ("Ms Lim") (collectively, the "applicants"), the judicial managers of two companies, Punj Lloyd Pte Ltd ("PLPL") and Sembawang Engineers and Constructors Pte Ltd ("SEC") (collectively, the "Companies"), for disciplinary action against the respondent, Mr Jai Swarup Pathak ("Mr Pathak"), a regulated foreign lawyer who has been the Partner-in-Charge of Gibson, Dunn & Crutcher LLP's ("Gibson Dunn") Singapore office and the Pacific Asia region since 2008.

2 Mr Pathak was convicted by Disciplinary Tribunal No 4A of 2020 ("DT4A"), consisting of Ms Molly Lim SC and Ms Peng Pheng Lim, of one charge of misconduct unbefitting a regulated foreign lawyer as a member of an

honourable profession under s 83A(2)(*g*) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") for his role in assisting or permitting his client, Punj Lloyd Limited ("PLL"), to act in a manner he considered dishonest or ought to have considered dishonest. The charge stipulates that this was so because Mr Pathak failed to pay the applicants two tranches of S$250,000 deposited by PLL with Gibson Dunn when the applicants made written demands on 2 September 2016 for payment of the first tranche of S$250,000 and on 22 September 2016 for payment of the total sum of S$500,000. The DT4A determined that a cause of sufficient gravity for disciplinary action exists, and the applicants brought this application for an order that a penalty of between S$50,000 and S$100,000, the maximum financial penalty permitted under s 83A of the LPA, be imposed on Mr Pathak.

3 The present proceedings raise the important issue as to when a lawyer's duty to his or her client is superseded by an overriding as well as countervailing duty that is owed to a third party. Much would depend on the precise facts and circumstances of the case. In the context of the present case, one significant issue that arises is whether the lawyer's client owed legal obligations to that third party to begin with – absent which, that is the end of the matter.

4 Assuming that the issue just stated is answered in the affirmative, a closely related issue that arises relates to the circumstances under which the lawyer would be held to have been dishonest in withholding information from a third party of a contemplated breach by the lawyer's client of the latter's legal obligations *vis-à-vis* the third party (in this case, a contemplated breach of contract). In this last-mentioned regard, there are at least two sub-issues that would need to be considered.

5 The first relates to the precise scope of the legal obligations that have arisen between the lawyer's client on the one hand and the third party on the other.

6 The second – and closely related – sub-issue is whether the charge proffered against the lawyer encompasses these obligations and, even if they do, whether, in withholding information of a possible breach of such obligations, the lawyer is guilty (beyond a reasonable doubt) of the offence charged based on the evidence of what the lawyer actually did. It bears reiterating that the precise facts and circumstances are therefore of the first importance. It should also be noted that, whilst the findings of fact of the Disciplinary Tribunal will not be departed from easily, this presupposes that such findings of fact are relevant to the elements of the charge themselves – a point to which we shall return below. It is also axiomatic that such findings of fact can also be departed from if they are against the weight of the evidence.

7 With these preliminary observations, let us now turn to the background to the present proceedings and the issues that arise for decision therefrom.

Facts and procedural history

8 We will first set out a brief overview of the factual background, and will set out our detailed analysis of the relevant written record later in the judgment.

The parties

9 The applicants are insolvency practitioners with nTan Corporate Advisory Pte Ltd. The respondent, Mr Pathak, is a regulated foreign lawyer registered under s 36C of the LPA. According to Mr Pathak's affidavit of evidence-in-chief ("AEIC") in the disciplinary proceedings, he has been in legal

practice for over 35 years, and he has acted for, *inter alia*, governments, financial institutions and multinational companies in cross-border corporate work in various jurisdictions such as the United States, Europe and China.

10 The present proceedings arise out of the applicants' complaints filed in April 2018 relating to their fees as judicial managers of the Companies. The applicants had acted as the judicial managers of the Companies from 27 June 2016 to 7 August 2017 when the Companies were wound up. At the material time from June 2016 to November 2016, Mr Pathak and Mr Robson Lee ("Mr Lee") from Gibson Dunn acted for PLL. PLL is a company listed in India and the sole shareholder of PLPL, which in turn was the sole shareholder of SEC. PLL's chairman was one Mr Atul Punj ("Mr Punj").

27 June 2016 judicial management applications and meeting

11 On 16 February 2016, the Companies filed applications to be placed under judicial management ("JM Applications"). The applicants claim that, on 16 June 2016, they verbally conveyed that PLL would have to provide S$2 million to fund the costs of managing the Companies whilst under judicial management ("JM") and to enable the judicial managers to "change the narrative" in respect of PLL and Mr Punj ("Deposit Agreement"). The applicants then provided Gibson Dunn with their Consent to Act as judicial managers of the Companies on 17 June 2016.

12 The hearing of the JM Applications was conducted on 27 June 2016 ("27 June Hearing"), and the applicants were appointed as the judicial managers of the Companies by the High Court on that day. After the 27 June Hearing, there was another meeting in the afternoon of 27 June 2016 among Mr Pathak,

Mr Lee from Gibson Dunn, the applicants and Mr Punj ("27 June afternoon meeting").

13 It is the applicants' pleaded case that, during the 27 June afternoon meeting, the applicants "met with Mr Punj, Mr Pathak and Mr Lee, and Mr Punj verbally agreed to put the S$2 million towards the costs of managing the Companies whilst under judicial management and to help change the narrative in respect of PLL and Mr Punj". Specifically, the applicants clarified in their further and better particulars that this so-called verbal agreement was concluded "by conduct" during the 27 June Hearing *and* confirmed verbally by Mr Punj at the 27 June afternoon meeting held in Gibson Dunn's office.

Emails leading up to letters of demand

14 On 14 July 2016, Mr Pathak emailed the applicants to confirm that "[PLL] will be placing SGD 500k with us [*ie*, Gibson Dunn] towards payment of the JM fees". Ms Lim then replied on 15 July 2016 to note that the terms to fund the deposit for the judicial managers' remuneration, which had been agreed prior to the acceptance of such an appointment, were not reflected in the 14 July 2016 email from Mr Pathak. The applicants, Mr Punj and Mr Pathak then met on 19 July 2016 at Four Seasons Hotel, where the applicants allegedly informed Mr Punj that they needed "a representation from him regarding our fee arrangements", and Mr Punj allegedly "agreed to do so by 21 July 2016".

15 Then, on 27 July 2016, Mr Pathak emailed the applicants. The first paragraph of the email referred to an agreed fee of S$2 million for the judicial managers and a success fee of S$1 million to be paid in kind in the form of SEC shares. The second paragraph of the email stated that, "[w]ith respect to the issue of the trust deposit of the SGD Two Million with us, I confirm that the

initial SGD 250k has been invoiced by us to PLL and we expect to receive these funds this month", and that an additional S$250,000 would be received in August.

16 On 17 August 2016, Mr Pathak emailed the applicants to confirm that the first tranche of S$250,000 had been received by Gibson Dunn "and [had] been placed in our trust fund for the JM fees", and that the next tranche of S$250,000 was to be expected.

2 and 22 September 2016 letters of demand

17 On 2 September 2016, the applicants' then-lawyers from Tan Kok Quan Partnership ("TKQP") issued a letter to Gibson Dunn. This letter had set out the purported terms of the Deposit Agreement and stated that, in light of PLL's possible inability to honour the Deposit Agreement, the applicants were intending to file a costs application in court to determine their remuneration and expenses. The letter appended a draft affidavit for the costs application to give Mr Pathak "an opportunity to comment and respond to these paragraphs of the affidavit". In the meantime, the letter requested Gibson Dunn to pay the first tranche of S$250,000 which it had received from PLL to TKQP's clients' account.

18 In response to this letter, Mr Pathak instructed Mr Lee to send an email on the same day ("2 September Email") stating that Gibson Dunn disputed the contents of TKQP's letter and the draft affidavit, and that Gibson Dunn was "not a party to any alleged fee arrangement with [the applicants]". The 2 September Email also stated that PLL had instructed that Gibson Dunn "shall cease to be involved in any communications or have any role as regards any fee discussion or arrangement between [the applicants] and PLL" and that "[the

applicants] or [TKQP] should henceforth write directly to [PLL] in respect of any fee matter. [Gibson Dunn] shall no longer be involved in this matter of fee discussion or arrangement".

19 TKQP responded on 2 September 2016 to state that they had taken note of Gibson Dunn's comments and had amended the draft affidavit, and further sought PLL's comments. In response, Mr Lee sent an email on 5 September 2016 reiterating that Gibson Dunn no longer represented PLL in respect of any fee discussions with the applicants. On 5 September 2016, Mr Punj, writing as director of the Companies, also wrote to the applicants to state that there had never been any agreement between PLL and the applicants.

20 On 22 September 2016, TKQP issued another letter seeking payment of the full sum of the S$500,000 that Gibson Dunn had received from PLL. On or around the same day, Mr Pathak was verbally instructed by PLL that PLL would pay the applicants' fees directly. In line with this, Mr Pathak emailed Mr Lee on 22 September 2016 at 4.18pm, informing him that they did not need to make any payment to the applicants as PLL had "confirmed that they will pay the JM funds directly".

21 Mr Lee then sent an email dated 22 September 2016 at 6.01pm stating that Gibson Dunn no longer represented PLL in respect of any fee discussions with the applicants and that, "[f]or the avoidance of doubt, please note that we are not holding any fee deposit for [the applicants]".

The complaints

22 The applicants made their complaint against Mr Pathak and Mr Lee to the Law Society of Singapore via a letter dated 26 April 2018. The complaint

was referred to two Review Committees (the "RCs"), one for each of the solicitors. The RCs summarised the complaint as follows:

> (a) Mr Pathak and Mr Lee had knowingly deceived the applicants and/or knowingly aided and abetted their client, PLL, in deceiving the applicants with regard to the terms of remuneration of their appointment (the "First Complaint"); and
>
> (b) Mr Pathak and Mr Lee had aided and abetted their client in not paying to the applicants a substantial amount of monies that their client had placed with them for the express purpose of providing a deposit for the judicial managers' fees (the "Second Complaint").

23 The RCs dismissed both the First Complaint and the Second Complaint.

HC/OS 1505/2018

24 The applicants filed HC/OS 1505/2018 for a review of the RCs' decision ("OS 1505"). OS 1505 was heard before Chua Lee Ming J on 27 March 2019. On 1 April 2019, Chua J delivered his decision in respect of OS 1505 where he:

> (a) upheld the RCs' decision to dismiss the First Complaint; and
>
> (b) quashed the RCs' decision to dismiss the Second Complaint and directed the RCs to refer the Second Complaint to the Chairman of the Law Society's Inquiry Panel under s 85(8)(*b*) of the LPA.

25 Following Chua J's decision, on or about 6 May 2019, the Inquiry Panel of the Law Society constituted two Inquiry Committees (the "ICs"). The ICs issued their initial reports on 1 November 2019 and further reports on

14 January 2020. The ICs were of the view that no formal investigation by disciplinary tribunals was required and recommended that the Second Complaint be dismissed under s 86(7)(*b*)(v) of the LPA. The Law Society accepted the ICs' recommendations.

HC/OS 263/2020

26 On 3 March 2020, the applicants filed HC/OS 263/2020 pursuant to s 96(1) of the LPA to review the ICs' decisions ("OS 263"). OS 263 was heard before Valerie Thean J. Thean J's judgment in OS 263 was issued in *Tan Ng Kuang and another v Law Society of Singapore* [2020] SGHC 127 ("*Tan Ng Kuang (HC)*"). Thean J found that the applicants had established a *prima facie* case and thus granted the application in OS 263 and ordered the Law Society to apply to the Chief Justice for the appointment of disciplinary tribunals to investigate the alleged misconduct of Mr Pathak and Mr Lee. Following Thean J's decision, pursuant to s 5(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and s 90 of the LPA, DT4A and Disciplinary Tribunal No 4 of 2020 ("DT4") were appointed on 24 July 2020.

The disciplinary proceedings and the DT's decision

27 The applicants had initially formulated four charges against Mr Pathak in DT4A, namely, Charges 1, 1A, 2 and 2A. Similar charges were formulated against Mr Lee in DT4. In the course of the disciplinary proceedings, the four charges were re-formulated and two were added. Ultimately a total of six charges were made against Mr Pathak, namely, Charges 1, 1A, 2A, 2B, 2AA and 2BB (the "Six Charges"). The charges against Mr Lee were similarly re-formulated. In all the Six Charges, Mr Pathak was accused of having "assisted or permitted" PLL to act in a manner he considered dishonest or ought to have considered dishonest.

(a) Charges 1 and 1A: Knowing that PLL had agreed to deposit the S$2 million towards the costs of managing the Companies whilst under judicial management and, having received two tranches of S$250,000 as part of that deposit, Mr Pathak "assisted or permitted" PLL in a manner which he considered dishonest or ought to have considered dishonest by "not paying each of the tranches to the [applicants] when [they] made a written demand for them" through their solicitors for the same.

(b) Charges 2A and 2AA: Alternatively, Mr Pathak had permitted or assisted PLL to mislead the applicants in a manner which he knew or ought to have known was dishonest when he, knowing that the applicants believed that PLL had agreed prior to their appointment to deposit the S$2 million, caused the applicants to continue to believe that PLL had agreed to deposit the S$2 million towards the costs of managing the Companies whilst under judicial management by sending emails on 7, 14 and 27 July 2016 and 9, 11 and 17 August 2016 that confirmed that such deposit had been made in part.

(c) Charges 2B and 2BB: Alternatively, Mr Pathak assisted or permitted PLL to mislead the applicants in a manner he knew or ought to have known was dishonest when he, knowing that the applicants believed that PLL had agreed prior to their appointment to deposit the S$2 million, did not, while acting for PLL, clarify PLL's position that it had not agreed to so fund the judicial management.

28 Charges 1, 2A and 2B allege that Mr Pathak was, pursuant to the particulars of those respective charges, guilty of a breach of r 10(6)(*b*) of the Legal Profession (Professional Conduct) Rules 2015 (Cap 161, S 706/2015) ("PCR") amounting to fraudulent or grossly improper conduct within the

meaning of s 83A(2)(*b*) of the LPA. On the other hand, Charges 1A, 2AA and 2BB allege that Mr Pathak was, pursuant to the particulars of those respective charges, guilty of such misconduct unbefitting a regulated foreign lawyer as a member of an honourable profession under s 83A(2)(*g*) of the LPA.

29 The DT4A identified the following four issues as being relevant (see DT4A Report at [57]):

(a) whether there was a Deposit Agreement made between the applicants and PLL (through Mr Pathak and Mr Lee who were representing PLL) that PLL would provide the deposit of S$2 million towards the costs of managing the Companies under judicial management;

(b) if so, whether Mr Pathak knew of the Deposit Agreement;

(c) whether Mr Pathak had received either or both tranches of S$250,000 from PLL between 17 August and 8 September 2016 as part of the Deposit Agreement; and

(d) whether Mr Pathak had assisted or permitted PLL in a manner which Mr Pathak considered dishonest or ought to have considered dishonest in not paying the two tranches to the applicants when they had demanded for payment of the same through their then-solicitors' letters.

30 The DT4A answered all four of the foregoing questions in the affirmative and found Mr Pathak guilty of Charge 1A and that, pursuant to s 93(1)(*c*) of the LPA, cause of sufficient gravity for disciplinary action exists under s 83A of the LPA. As Charges 2AA and 2BB were alternative charges to Charge 1A on the basis that there was no Deposit Agreement, the DT4A

reasoned that, in light of the DT4A's finding that there was a Deposit Agreement, it was unnecessary for the DT4A to deal with Charges 2AA and 2BB. On the other hand, Charges 1, 2A and 2B could not be maintained against Mr Pathak and were dismissed because these charges involved an alleged breach of r 10(6)(*b*) of the PCR, which was not applicable to Mr Pathak. This was because that provision applies only to foreign lawyers registered under s 36P of the LPA whereas Mr Pathak was registered under s 36C of the LPA (see r 3(2)(*c*) of the PCR; DT4A Report at [50] to [51] and [146(b)]).

Parties' submissions

31 The applicants defend the DT4A's decision and submit that a significant fine of at least S$50,000 should be imposed on Mr Pathak because he, as a senior and influential member of the Bar, carefully and deliberately orchestrated the events to mislead unrepresented laypersons and dishonestly benefit himself and his firm at the expense of the Companies' secured and unsecured creditors.

32 On the other hand, Mr Pathak challenges the DT4A's finding that he is guilty of Charge 1A. Mr Pathak disputes that there was a Deposit Agreement. Mr Pathak's case is that he genuinely believed that there was no Deposit Agreement. Mr Pathak's understanding was that the applicants' request for a S$2 million deposit was part of the broader fee arrangements that were still being negotiated between the applicants and PLL, and that were never concluded.

33 Instead, Mr Pathak repeatedly tried to bring PLL and the applicants together so that they could reach an agreement on the fees. To Mr Pathak's mind, all that PLL was prepared to provide was a "good faith deposit" of S$500,000 (split into two tranches of $250,000) with Gibson Dunn to show their

"sincerity" in reaching an agreement on fees with the applicants. In line with this understanding, Mr Pathak made arrangements such that these funds would be available to be paid out upon PLL's instructions.

34 Mr Pathak attested that he had never received authorisation from PLL to pay any monies to the applicants. The following occurred instead.

(a) On or around 25 or 26 August 2016, Mr Pathak was verbally instructed by PLL that Gibson Dunn was to cease dealing with the applicants on behalf of PLL in relation to the ongoing discussion on fees, as PLL would deal with the applicants directly on this issue. Therefore, Gibson Dunn was to stop representing PLL in relation to the JM's fees, but Gibson Dunn was not completely discharged as PLL's counsel.

(b) On or around 2 September 2016, Mr Pathak was verbally instructed by PLL that the S$500,000 sum deposited by PLL with Gibson Dunn was not to be used to pay the applicants' fees. This was after the invoice from Gibson Dunn for the second tranche of S$250,000 had been issued to PLL. After he received those instructions from PLL, Mr Pathak informed Ms Joanne Lum ("Ms Lum"), Gibson Dunn's accounting and finance manager, that they would keep the S$250,000 received from PLL and the additional S$250,000 that they were expecting to receive from PLL for their outstanding invoices.

35 Thus, according to Mr Pathak, only S$500,000 (and not the requested amount of S$2 million) was transferred by PLL to Gibson Dunn and was placed in Gibson Dunn's clients' bank account. Being client monies, Gibson Dunn was not authorised to transfer the S$500,000 sum to the applicants (or any other third party) without PLL's express instructions. As there was no agreement yet on the

fee arrangement, the S$500,000 was merely a "good faith deposit" with Gibson Dunn by which PLL sought to demonstrate their sincerity in the midst of the ongoing negotiations with the applicants over their fee arrangement. Mr Pathak subsequently received instructions from PLL to use the monies for other purposes. He followed those instructions. Mr Pathak also emphasises that neither Gibson Dunn nor Mr Pathak had given any solicitors' undertaking to hold the funds for a specific purpose. Nor was there an escrow arrangement in place. That being the case, when Mr Pathak received instructions from PLL as to the use of their funds in the client account, he had "no choice but to comply".

Applicable law and issues to be determined

36 Pursuant to s 98(8) of the LPA, the Court of Three Judges:

> (*a*) shall have *full power to determine any question necessary to be determined for the purpose of doing justice in the case*, including any question as to the correctness, legality or propriety of the determination of the Disciplinary Tribunal, or as to the regularity of any proceedings of the Disciplinary Tribunal;
>
> (*b*) may make an order setting aside the determination of the Disciplinary Tribunal and directing —
>
> > (i) the Disciplinary Tribunal to rehear and reinvestigate the complaint or matter; or
> >
> > (ii) the Society to apply to the Chief Justice for the appointment of another Disciplinary Tribunal to hear and investigate the complaint or matter; and
>
> (*c*) in the case of a regulated foreign lawyer, may direct the Registrar to inform either or both of the following of the decision of the court of 3 Judges:
>
> > (i) the foreign authority having the function conferred by law of authorising or registering persons to practise law in the state or territory in which the regulated foreign lawyer is duly authorised or registered to practise law;
> >
> > (ii) any relevant professional disciplinary body of the state or territory in which the regulated foreign lawyer is duly authorised or registered to practise law.

[emphasis added]

37 Charge 1A was framed under s 83A(2)(*g*) of the LPA. Section 83A of the LPA provides as follows:

> **Power to discipline regulated foreign lawyers**
>
> **83A**.—(1) Every regulated foreign lawyer shall be subject to the control of the Supreme Court and shall be liable on *due cause* shown —
>
> (*a*) to have his registration under section 36B, 36C or 36D cancelled or suspended (for such period as the court may think fit), to have his registration under section 36P (if any) cancelled or suspended (for such period as the court may think fit), or to have his approval under section 176(1) cancelled or suspended (for such period, not exceeding 5 years, as the court may think fit), as the case may be;
>
> (*b*) to pay a penalty of not more than $100,000;
>
> (*c*) to be censured; or
>
> (*d*) to suffer the punishment referred to in paragraph (b) in addition to the punishment referred to in paragraph (a) or (c).
>
> (2) Subject to subsection (7), such due cause may be shown by proof that the regulated foreign lawyer —
>
> …
>
> (g) *has been guilty of such misconduct unbefitting a regulated foreign lawyer as a member of an honourable profession*;
>
> [emphasis added]

38 It is trite that an appellate court does not lightly interfere with findings of fact by a lower court or a disciplinary committee unless their conclusions are clearly against the weight of evidence (see, for example, *Law Society of Singapore v Lim Cheong Peng* [2006] 4 SLR(R) 360 at [13] and *Law Society of Singapore v Manjit Singh s/o Kirpal Singh and another* [2015] 3 SLR 829 at [5]). Nevertheless, it is also important to bear in mind that it is for the Court of

Three Judges to decide on whether or not "due cause" has been proven in the first instance; in other words, the mere reference of a case to the Court of Three Judges is not a *fait accompli* in so far as the liability of the advocate and solicitor is concerned (see *Law Society of Singapore v Jasmine Gowrimani d/o Daniel* [2010] 3 SLR 390 at [25]).

39 In this application, the first broad issue to determine is whether the DT4A was right to find Mr Pathak guilty of Charge 1A. This, in turn, requires a determination of whether the DT4A's findings on the four issues outlined at [29] above are clearly against the weight of evidence. If DT4A was correct to find that Mr Pathak is guilty of Charge 1A beyond a reasonable doubt, the next question is what the appropriate sanction ought to be.

40 In our judgment, as we shall explain below, the first three issues are clearly established beyond a reasonable doubt – *ie*, there was an agreement for PLL to deposit S$2 million with Gibson Dunn for the applicants' fees as judicial managers and Mr Pathak knew this, and Gibson Dunn had received S$500,000 pursuant to this agreement. The key difficulty in this case arises from the fourth issue of dishonesty in Charge 1A. As such, we shall only address the first three issues in brief before we consider the fourth issue of dishonesty.

Was there a Deposit Agreement?

41 To determine the dispute as to whether an agreement had come into existence, it is, as alluded to in the introduction at [6] above, uncontroversial that the utmost attention has to be paid to the facts and, in particular, the contemporaneous documentary evidence, as this would be more reliable than a witness's subjective oral testimony given after the fact (though credible oral testimony can be helpful to clarify the written record) (see the decision of the

Court of Appeal in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 at [41] and *China Coal Solution (Singapore) Pte Ltd v Avra Commodities Pte Ltd* [2020] 2 SLR 984 at [2]). As such, we will analyse the evidence with an emphasis on the objective written record.

42 Having carefully considered the evidence, we are unable to accept Mr Pathak's submission that there was no concluded Deposit Agreement and that the S$500,000 sum received by Gibson Dunn was instead merely a "good faith deposit" by PLL. The contemporaneous objective record shows that Mr Pathak had *unequivocally* confirmed that there was an agreement by PLL to deposit S$2 million with Gibson Dunn for the judicial managers' fees. In this regard, we note that the DT4A's finding is that the S$2 million sum was for the "costs of the Companies under judicial management, which costs would include the [judicial managers'] fees" (see DT4A Report at [66]). Charge 1A also particularises the agreement as an agreement to deposit S$2 million for the "costs of the judicial management". However, the contemporaneous objective record shows that the *specific* agreement is not that the S$2 million deposit would be used for the costs of the judicial management, but that it would be used for the *judicial managers' fees* instead.

(a) Ms Lim's 24 June 2016 email: Prior to the 27 June Hearing, on 24 June 2016, Ms Lim emailed Mr Pathak and Mr Lee. This email spells out very clearly that, prior to the 27 June Hearing, the applicants and Mr Pathak and Mr Lee already had an understanding that the applicants wanted S$2 million as a deposit for their fees as judicial managers, but that, as PLL required time to raise the full quantum of S$2 million deposit, the applicants were prepared to allow PLL to place a partial "deposit" first before paying the remaining sum after the applicants' appointment:

> Dear Robson,
>
> *We refer to our telephone conversations with you last night and today concerning the **fee** arrangements.*
>
> As discussed, *we would be grateful if you can get your clients to put us in funds for S$2 million.*
>
> *We understand that your clients require some time to raise the full quantum of S$2 million.* In this respect, we are prepared to consider that your clients *place a deposit for S$1 million* as soon as possible prior to the start of our appointment and for the remaining deposit of S$1 million to be placed within a month after the start of our appointment.
>
> As judicial managers are appointed by the Court, please assure your clients that we will adhere to the court rules in respect of disclosure of the judicial managers' remuneration and we would like to avoid the need to inform all stakeholders that we are unable to continue to work due to lack of funds.
>
> [emphasis added in italics and bold italics]

(b) Ms Lim's 30 June 2016 email: The JM Applications were heard and decided on 27 June 2016, and the Deposit Agreement was purportedly confirmed at the 27 June afternoon meeting after the hearing (see [13] above). Then, on 30 June 2016, just three days after the 27 June Hearing and the 27 June afternoon meeting when the Deposit Agreement was allegedly verbally confirmed by Mr Punj to the applicants in Mr Pathak's presence, Ms Lim emailed Mr Pathak and Mr Lee to "confirm if your clients have provided the deposit to your firm". This email also made express reference to the 27 June afternoon meeting. This clearly corroborates the applicants' case that the Deposit Agreement was concluded and confirmed at that 27 June afternoon meeting. The 30 June 2016 email reads as follows:

> Dear Jai and Robson
>
> We refer to the meeting with Mr Punj and yourselves on Monday afternoon [*ie*, the afternoon of 27 June 2016 after the hearing for the JM Applications].
>
> *Could you please confirm if your clients have provided the deposit to your firm*? *Please also advise us as soon as possible on the* ***fee*** *arrangements* that were discussed during the meeting as we are required to inform and seek the approval of the Singapore Court in respect of the Judicial Managers' remuneration.
>
> …
>
> [emphasis added in italics and bold italics]

(c) Mr Pathak's 7 July 2016 email: In the foregoing 30 June email (at (b) above), Ms Lim asks Mr Pathak and Mr Lee to "advise us as soon as possible on the fee arrangements that were discussed during the meeting". In response, on 7 July 2016, Mr Pathak duly emailed Mr Nicky Tan and Ms Lim to state that, "[a]s to the JM ***fee*** *deposit with us at Gibson Dunn*, I understand that Mr Punj (Chairman of PLL) is only back in his office next Monday *when he will render the appropriate authorization for this*" [emphasis added in italics and in bold italics]. This is an unequivocal statement demonstrating Mr Pathak's confirmation that the Deposit Agreement has been agreed to, and that, instead of providing the full S$2 million upfront, PLL would provide a partial deposit first, and that this would be authorised by Mr Punj once he was back at the office.

(d) Mr Pathak's 14 July 2016 email: On 14 July 2016, Mr Pathak emailed the applicants again to confirm that the partial deposit "towards payment of the JM fees" would be S$500,000:

> Dear Nicky/Siew Soo:
>
> Further to my discussions with Nicky earlier today, *this is to confirm that the Punj Lloyd Group will be placing*

> *SGD 500k with us towards payment of the JM **fees**.* The initial SGD 250k will be placed during the course of this month, with another 250k to follow in August.
>
> …
>
> [emphasis added in italics and in bold italics]

(e) Mr Pathak's 27 July 2016 email: The existence of the Deposit Agreement is clearest from an email sent by Mr Pathak to the applicants on 27 July 2016. As mentioned at [15] above, in this email, Mr Pathak informed the applicants that, "[w]ith respect to the issue of the *trust deposit of the SGD Two Million* with us, I confirm that the *initial SGD 250k* has been invoiced by us to PLL and we expect to receive these funds this month" [emphasis added], and that an additional S$250,000 would be received in August:

> Dear Nicky/Siew Soo:
>
> Further to the recent meetings and discussions with Atul Punj … and Nicky Tan, *this is to confirm that the **fees for the Judicial Manager** of [the Companies] are agreed as SGD Two Million.* Nicky Tan and Siew Soo have been appointed as Judicial Managers for PLPL and SEC by the relevant Court orders. It is also confirmed that in the event the Judicial Managers succeed in procuring schemes of arrangement for each of PLPL and SEC and turning around the two companies, *the Judicial Managers will be entitled to an additional SGD One Million to be offered in the form of shares in SEC equivalent to the value of that amount.*
>
> *With respect to the issue of the trust deposit of the SGD Two Million with us, I confirm that the initial SGD 250k has been invoiced by us to PLL and we expect to receive these funds this month.* Equally, we expect to receive an additional SGD 250k in August, which will add up to an aggregate amount of SGD 500k in trust deposit with us. Based on the above-referenced discussions between Atul Punj and Nicky Tan, I also confirm that *Atul Punj is mindful of the necessity of the deposit of the JM **fees** in order to enable and assist Nicky Tan to change the narrative* with respect to PLPL and

> SEC with the relevant authorities and interested third parties.
>
> …
>
> [emphasis added in italics and in bold italics]

Critically, Mr Pathak concludes in the email that "Atul Punj is mindful of the necessity of the *deposit of the JM fees* in order to enable and assist Nicky Tan to change the narrative with respect to PLPL and SEC" [emphasis added]. This spells out unequivocally that the "trust deposit" of S$2 million is as the applicants claim: to assist the applicants to "change the narrative" with respect to the Companies, and that, instead of depositing the full quantum of S$2 million at one go, an initial partial deposit of S$500,000 – to be paid in two tranches of S$250,000 each – would be made first. There is no qualification in Mr Pathak's 27 July 2016 email that these terms were subject to contract or remained to be confirmed.

(f) Ms Lim's 5 August 2016 email: Ms Lim emailed a lengthy reply on 5 August 2016 stating *inter alia* that "[the applicants] did not agree to fix [their] fees at S$2 million" or to "take SEC shares in the value of S$1 million". Instead, Ms Lim claimed that the applicants "agreed to act as Judicial Managers of PLPL and SEC on the basis that your clients place a cash deposit of S$2 million to be held in escrow with us or with your firm". Ms Lim also asked Mr Pathak to "confirm that we can expect the balance deposit [of S$1.5 million] to be provided by the end of August 2016".

(g) Mr Pathak's 5 August 2016 email: Mr Pathak replied on the same day, *ie*, on 5 August 2016, to inform Ms Lim that he has "read [her] email, and will forward it to [his] client. [He] will revert with their

response". Mr Pathak did not deny or dispute the existence and terms of the Deposit Agreement as alleged by Ms Lim in her 5 August 2016 email. Mr Pathak also did not make any attempt to qualify the terms of the agreement in any way.

(h) Mr Pathak's 11 and 17 August 2016 emails: Subsequently, on 11 August 2016, Mr Pathak emailed the applicants to say that the first S$250,000 had been transmitted by the client and he was awaiting receipt of the same. On 17 August 2016, he sent them another email to confirm that the first S$250,000 had been received by Gibson Dunn "and have been placed *in our trust fund for the JM* ***fees***" [emphasis added in italics and in bold italics], and that the next tranche of S$250,000 was to be expected. This further confirms the existence of the Deposit Agreement for the purpose of the judicial managers' fees.

43 In these circumstances, the contemporaneous objective evidence clearly shows that there was an agreement that PLL would deposit S$2 million with Gibson Dunn for the applicants' fees as judicial managers. This was confirmed by Mr Pathak repeatedly in his own emails as set out above. The only source of disagreement pertained to whether the applicants' fees should exceed that amount of S$2 million (for example, whether it was "fixed" at S$2 million, and whether any additional fees should be paid in equity). This explains why even Mr Pathak *himself* used unequivocal terms to this effect in his emails, such as "trust fund for the JM fees" (see [42(h)] above); "confirm that the fees for the Judicial Manager of [the Companies] are agreed as SGD Two Million" (see [42(e)] above); "trust deposit of the SGD Two Million" (see [42(e)] above); and "necessity of the deposit of the JM fees" (see [42(e)] above). Mr Pathak never qualified these statements by asserting, for instance, that these were "pending agreement" or "subject to contract".

44 At this juncture, we observe that, despite Mr Pathak's extensive usage of the term "trust" to describe the money deposited with Gibson Dunn by PLL, a review of the applicants' pleadings, submissions and even the cross-examination of Mr Pathak shows that it is curiously *not* the applicants' case against Mr Pathak that the S$500,000 sum was held on trust for the applicants. If it were so, then the considerations that ought to apply would certainly be very different. At the hearing before us, counsel for Mr Pathak, Mr Cavinder Bull SC ("Mr Bull"), also accepted this point. This is because Mr Pathak would have been acting as *trustee* and *fiduciary* of the S$500,000 sum for the applicants, and would thus have been subject to trustee and fiduciary duties *to the applicants* in respect of the S$500,000 sum. If that were so, then Mr Pathak would have committed a breach of trust and a custodial breach of fiduciary duty (including the duty to act for the principal with undivided loyalty and the duty not to place the fiduciary in a position of conflict of interest) by misapplying the S$500,000 sum to pay PLL's outstanding invoices with Gibson Dunn without the applicants' permission.

45 While it was not the applicants' case that the S$500,000 sum was held on trust, it is nevertheless troubling that Mr Pathak has attempted to resile from the clear terms of *his own emails* and run a case in these disciplinary proceedings that the S$500,000 sum was merely a "good faith" deposit. That characterisation of the S$500,000 sum is clearly unsustainable in light of Mr Pathak's own clear description of the deposit as a "trust" fund or deposit. Mr Pathak, as a senior lawyer who professes to have practised in multiple common law jurisdictions around the world, simply cannot deny that he must have understood the gravity and implications of the term "trust" when he stated it in his emails. It is also unsatisfactory because, if it is indeed Mr Pathak's case that PLL did not agree to provide the S$500,000 sum to be held on trust for the applicants, then

Mr Pathak would *also* potentially have breached his own duty to his client, PLL, to act with competence under r 5(2)(*c*) of the PCR by informing the applicants to the contrary. We are also unable to accept Mr Bull's submission before us that Mr Pathak was referring to a "client trust account" when he used the term "trust" in his emails. If that were so, Mr Pathak's emails would have clearly stated so. Yet, the word "trust" was used to describe not merely the "trust *fund for the JM fees*" (see [42(h)] above) but also the "trust *deposit of the SGD Two Million*" (see [42(e)] above) [emphasis added]. This was clearly not a reference to Gibson Dunn's client account but to the *specific* deposit of S$2 million.

46 While it is Mr Pathak's prerogative to run his case in whatever manner he chooses, it is inconsistent with Mr Pathak's standing as a *senior* lawyer who is a member of an *honourable* profession, and does not bolster public confidence in the administration of justice, that he has sought to resile from the position that he himself had clearly stated in his emails. Nevertheless, since it is *not* the applicants' case that the S$500,000 sum was held by Mr Pathak on *trust* for the applicants, we shall say no more on this matter.

Knowledge and receipt

47 We now turn to the two issues of whether Mr Pathak knew of the Deposit Agreement ("knowledge issue") and whether Gibson Dunn had received either or both tranches of S$250,000 from PLL as part of the Deposit Agreement ("receipt issue"). The DT4A found beyond a reasonable doubt that Mr Pathak knew of the Deposit Agreement and rejected Mr Pathak's claims to the contrary (see DT4A Report at [93] to [104]). The DT4A also found that "the total sum of $500,000 received by [Mr Pathak was] meant to be deposits for payment of the JMs' fees" (see DT4A Report at [106]). Mr Pathak submits that,

as the alleged Deposit Agreement was never concluded, the S$500,000 was not received as part of this alleged agreement, but simply "in anticipation of such an agreement being concluded".

48 As for the knowledge issue, it is clear from Mr Pathak's emails outlined at [42(c)] to [42(e)] and at [42(g)] to [42(h)] above that Mr Pathak knew of the Deposit Agreement, as he had repeatedly used explicit terms to "confirm" that the "trust" deposit of S$2 million had been placed with Gibson Dunn by PLL for the "JM fees" (as also summarised at [43] and [45] above).

49 In so far as the receipt issue is concerned, the focus is not on the mere *receipt* of the S$500,000 sum (as this is undisputed), but on the *purpose* of the receipt – put simply, why did Gibson Dunn receive the S$500,000 sum? We note as a preliminary point that the DT4A was, with respect, loose in its description of the party that had received the S$500,000 sum, as the DT4A referred to both Gibson Dunn and Mr Pathak interchangeably in this respect (see, for example, DT4A Report at [57(c)] ("… whether *the Respondent* had received …" [emphasis added]); DT4A Report at p 49 ("Issue III: Receipt *by Gibson Dunn* of funds …" [emphasis added]); and DT4A Report at [106] ("… the total sum of $500,000 received by *the Respondent* …" [emphasis added])). The question, however, is not whether *Mr Pathak* personally received the S$500,000 sum (for example, in his own bank account), but whether *Gibson Dunn* received it from PLL.

50 We agree with the DT4A that the clear terms of Mr Pathak's own emails prior to 2 September 2016 demonstrate that the two tranches of S$250,000 had been received by Gibson Dunn for the "JM fees".

(a) Mr Pathak's 14 July 2016 email to the applicants explicitly "confirm[ed] that the Punj Lloyd Group will be placing SGD 500k with us *towards payment of the JM fees*" [emphasis added]. This is an unequivocal statement that Mr Pathak knew that the S$500,000 payment was for the "JM fees".

(b) Mr Pathak's 11 and 17 August 2016 emails to the applicants confirmed that the first tranche of S$250,000 had been received by Gibson Dunn "and have been placed in *our trust fund for the JM fees*" [emphasis added], and that the next tranche of S$250,000 is to be expected.

(c) Then, on 1 September 2016 at 7.10am, Mr Pathak emailed Ms Lum, accounting and finance manager of Gibson Dunn, to "bill S.$250k [*sic*] to PLL at their Abu Dhabi address given below. *This is also for the JM fees*" [emphasis added] (see also [99(a)] below).

51 Subsequently, it is evident that the S$500,000 had been received by Gibson Dunn as part of the Deposit Agreement for the judicial managers' fees. In the circumstances, we find no basis to disturb the DT4A's findings on the knowledge and receipt issues.

Dishonesty

52 We now turn to the heart of the issue with Charge 1A – the question of whether Mr Pathak had, as alleged in the charge, "assisted or permitted" PLL to act in a manner he considered *dishonest* or "ought to have considered dishonest" *by not paying* the two tranches of S$250,000 to the applicants when they demanded for it on 2 and 22 September 2016. Given the importance of Charge 1A, we reproduce it as follows:

> You, Jai Swarup Pathak, a Regulated Foreign Lawyer under section 36C of the Legal Profession Act (Cap. 161), are charged that in the period between June 2016 and September 2016 (both months inclusive), while you and Lee Teck Leng Robson were acting for Punj Lloyd Limited ('**PLL**'), knowing that PLL had agreed to deposit S$2 million towards the costs of managing Punj Lloyd Pte Ltd and Sembawang Engineers and Constructors Pte Ltd (the '**Companies**') whilst under judicial management, and having received two tranches of S$250,000 on or between 17 August 2016 and 8 September 2016 as part of that deposit, ~~then acted towards the Judicial Managers in a way that was contrary to your position as a member of an honourable profession in not paying to the Judicial Managers the sums so received as deposits towards the costs of managing the Companies whilst under judicial management;~~ assisted or permitted PLL, in a manner you considered dishonest or ought to have considered dishonest, to wit: in not paying each of the tranches to the Judicial Managers when the Judicial Managers made a written demand for them through solicitors on 2 September 2016 for S$250,000, and again on 22 September 2016 for S$500,000 after you indicated that you had ceased to act for PLL in its dealings with the Judicial Managers; and are therefore guilty of such misconduct unbefitting a regulated foreign lawyer as a member of an honourable profession under Section 83A(2)(g) of the Legal Profession Act (Cap. 161.).
>
> [text in red and underlined text in original; deletion marks and bold text in original]

53 The DT4A found beyond a reasonable doubt that the element of dishonesty was satisfied. In their written submissions, the applicants defend the DT4A's decision and submit that the relevant test is "objective dishonesty" in that no honest solicitor in Mr Pathak's shoes would have drafted communications with such lack of clarity and vagueness. This, according to the applicants, is a "lower level of culpability than a case of 'clear dishonesty'". Thus, the applicants submit that Mr Pathak would be guilty, whether or not he subjectively knew he was being dishonest, if he ought to have known he was being dishonest (*ie*, because no honest solicitor with his state of mind could have acted in the same way with honest intentions). At the hearing before us, counsel for the applicants, Mr Tan Chuan Thye SC ("Mr Tan"), further submitted that, even if the decision to use the S$500,000 sum for PLL's

outstanding invoices with Gibson Dunn had emanated from PLL, Mr Pathak should have informed the applicants that the S$500,000 sum was no longer designated for the original purpose of the Deposit Agreement. It was "objectively dishonest" for Mr Pathak not to have done so.

54 In our judgment, the applicants' position on this issue raises fundamental difficulties. The applicants' submissions would clearly require Mr Pathak to have flouted his legal and ethical duty of confidentiality to *his client*, PLL. Absent a countervailing and *overriding* consideration to justify such a serious breach, that cannot be the correct position and outcome. The question, as alluded to in the introduction at [3] above, thus arises as to whether Mr Pathak owed any duties to the applicants in the first place. We shall therefore first consider this issue before we turn to Mr Pathak's duties towards his client, PLL.

A lawyer's duty to third parties

55 It is clear even under the existing law that a lawyer is not a mere "legal mercenary" or a "hired gun" (see *Narindar Singh Kang v Law Society of Singapore* [2007] 4 SLR(R) 641 ("*Narindar Singh*") at [51]). The declaration which a lawyer makes when admitted as advocate and solicitor of the Supreme Court of Singapore requires a lawyer to act "truly and honestly", which "signifies a duty *not merely to oneself and to one's client*, but also to the court and *to the attainment of justice and fairness generally*" [emphasis added] (see *Narinder Singh* at [50]). Thus, the practice of law is "a *noble calling* that, in the final analysis, *serves the public*" [emphasis added], and the "legitimacy, therefore, of the profession in the eyes of the public is of the first importance" (see *Narindar Singh* at [50], citing *Law Society of Singapore v Tan Buck Chye Dave* [2007] 1 SLR(R) 581 at [14]–[16]).

56 Rule 8 of the PCR governs a lawyer's conduct *vis-à-vis* a third party.

(a) First, a lawyer must comply with r 8(3) of the PCR and "not take unfair advantage of any person" or act towards any person "in a way which is fraudulent, deceitful or otherwise contrary to the legal practitioner's position as a member of an honourable profession".

(b) Second, if the opposing party is unrepresented, then the lawyer must also take special care to comply with r 8(2) of the PCR, which states that a lawyer "must decline to give to the person any legal advice (other than advice to obtain independent legal advice), if [the lawyer] knows or ought reasonably to know that the interests of the person are adverse, or potentially adverse, to the interests of [the lawyer's] client", and the lawyer "must take reasonable steps to ensure that the unrepresented person is not under the impression that the person's interests are protected by [the lawyer]".

(c) All of the foregoing obligations must be read consistently with the principles in r 8(1) of the PCR that a legal practitioner must (a) "be *honest and courteous*, and behave in a manner *befitting the legal practitioner's professional standing*"; (b) "behave in a manner *consistent with the public interest*"; and (c) "treat with *fairness* any person who is not represented by another legal practitioner" [emphasis added].

57 Rule 8 of the PCR applies to Mr Pathak as a regulated foreign lawyer (see r 3(1)(*c*), PCR). As such, it is clear that Mr Pathak owed *some* duties to the applicants under the PCR. If Mr Pathak had deliberately made any misleading statements to the unrepresented applicants, it would arguably be a potential breach of r 8(3) of the PCR that states that the lawyer is not to "take unfair

advantage of any person". In this case, it was never the applicants' case that Mr Pathak had breached r 8 of the PCR. Despite Mr Pathak's use of the word "trust" in his emails to the applicants, the applicants do not seem to have understood that there was a trust in favour of them, as it is not their case in these proceedings that that was so (see [45] above). Once Mr Punj had instructed Mr Pathak on 2 September 2016 that PLL would deal with the applicants directly on the issue of the judicial managers' fees, and Gibson Dunn had received the first written letter of demand from TKQP that same day for payment of the first tranche of S$250,000 to the applicants, Mr Pathak immediately instructed Mr Lee to inform TKQP of PLL's instructions (see [18] above). Consequently, there is no basis to find that Mr Pathak had breached any of the foregoing duties under r 8 of the PCR in this case.

A lawyer's duty of confidentiality to his client

58 We now turn to Mr Pathak's duties to his client, PLL. It bears highlighting that Mr Pathak was *not* the applicants' counsel. Beyond the duties of honesty, courtesy and fairness that we have just outlined at [56] above, Mr Pathak did not owe any legal or ethical duty to serve the applicants' interests. On the other hand, there were at least two critical duties that Mr Pathak owed to his client, PLL, which are relevant to this application: the duty of confidentiality and the duty of loyalty.

59 A lawyer's ethical duty of confidentiality flows from r 6 of the PCR (see also Colin Liew, *Legal Professional Privilege* (Academy Publishing, 2020) ("*Colin Liew*") at para 3.132).

(a) Rule 6(2) of the PCR states that a lawyer must not, subject to certain exceptions, knowingly disclose any information which:

> (*a*) is *confidential* to his or her client; and
>
> (*b*) is acquired by the legal practitioner (whether from the client or from any other person) in the course of the legal practitioner's engagement.
>
> [emphasis added]

(b) Rule 6(2) must be read together with the principle in r 6(1), which states that:

> A legal practitioner's duty to act in the best interests of the legal practitioner's client *includes a responsibility to maintain the confidentiality* of any information which the legal practitioner acquires in the course of the legal practitioner's professional work. [emphasis added]

(c) The Law Society of Singapore's Practice Direction 9.1.3 (dated 31 January 2019), formerly the Practice Directions and Rulings 2013 para 34, similarly reinforces the point that "[a]ll oral or written communications are privileged" and that:

> The privilege is not the legal practitioner's but the client's and accordingly the client can restrain the legal practitioner from making disclosure or he/she can waive the privilege. *Until the client has waived the privilege, it is the legal practitioner's duty, if he/she is requested to make disclosure, to claim the privilege*. The duration of the privilege is *forever*. [emphasis added]

60 Rule 6(1) of the PCR at [59(b)] above is consistent with the position at law, as a lawyer's legal duty to maintain confidentiality of his client's communications has been described as a "fiduciary duty" in the High Court decision of *Lie Hendri Rusli v Wong Tan & Molly Lim (a firm)* [2004] 4 SLR(R) 594 at [50]. This fiduciary duty to maintain the confidentiality of the lawyer's client's communications must necessarily follow from a lawyer's fiduciary duty to act with undivided loyalty to his client, which is the core foundation of all fiduciary duties (see the Court of Appeal decision of *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [135]).

61 Furthermore, a lawyer's legal duty of confidentiality flows from his duty to protect his client's legal professional privilege ("LPP") (see, for example, the decision of the House of Lords in *R v Central Criminal Court, ex parte Francis & Francis* [1989] 1 AC 346 at 383 *per* Lord Griffiths ("it is the duty of the solicitor to protect his client's privilege unless the client waives it"); see also *Colin Liew* at para 2.27). LPP is found in two principal forms: legal advice privilege and litigation privilege, respectively. Legal advice privilege seeks to prevent the unauthorised disclosure of confidential communications between a legal professional and his client made for the purpose of seeking legal advice. Litigation privilege, on the other hand, is concerned with protecting information and materials, confidential or otherwise, created and collected for the dominant purpose of litigation and at a time when there was a reasonable prospect of litigation, including communications between third parties and the legal professional and/or his client (see the decision of the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("*Skandinaviska*") at [23], [32]–[35], [43]–[46], and [69]–[74]).

62 Legal advice privilege is statutorily enacted in ss 128 and 131 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") (see *Skandinaviska* at [27]). Litigation privilege exists in Singapore by virtue of the common law because it is also "envisaged" by s 131 of the EA (see *Skandinaviska* at [67] and the decision of the High Court of *Ravi s/o Madasamy v Attorney-General* [2021] 4 SLR 956 at [16]). The text of both provisions clearly show that LPP belongs to the lawyer's client such that, absent waiver by the client, the lawyer has no authority to disclose privileged communications passing between him and his client for his own benefit, even if to defend proceedings brought by a non-client (s 128 states that "[n]o advocate or solicitor shall at any time be permitted,

unless with *his client's* express consent, to disclose any communication" protected by legal advice privilege [emphasis added]; s 131 provides that "[n]o one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser *unless he offers himself* as a witness" [emphasis added]). Thus, we agree with Mr Bull that lawyers are not obliged to "whistle-blow" to an opposing party on their clients' intention (here, to breach a contract).

63 With respect, therefore, we are unable to accept the applicants' submission outlined at [53] above. Mr Pathak had a fundamental duty to maintain and protect the confidentiality of PLL's instructions and intended course of action. If PLL had instructed Mr Pathak that it intended to breach the Deposit Agreement and to use the S$500,000 sum to pay its outstanding invoices with Gibson Dunn instead, Mr Pathak had a duty to maintain the confidentiality of this instruction. Mr Pathak's duties owed to the applicants, as outlined at [56] above, do not override his fundamental duty of confidentiality to his client, PLL.

A lawyer's duty of loyalty to the client

64 It is also trite law that a lawyer acts as a fiduciary to his client. Therefore, a lawyer owes a duty of "unflinching loyalty" to his client. The fiduciary obligation "requires a solicitor to place his client's interests *above* those of his own *as well as those of third parties*", and the lawyer must avoid not only actual but also "perceived or ostensible" conflicts of interest [emphasis added] (see *Law Society of Singapore v Ezekiel Peter Latimer* [2019] 4 SLR 1427 at [48], affirming *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [62]).

65 The lawyer's fiduciary duty to act for his client with undivided loyalty buttresses the point at [63] above that it cannot be right that Mr Pathak had a duty to inform the applicants that the S$500,000 sum was no longer being deposited with Gibson Dunn for the purpose of the Deposit Agreement. We agree with Mr Bull that this would clearly constitute a breach of Mr Pathak's duty of confidentiality *and* loyalty to his client, PLL.

Is Charge 1A made out?

66 We now turn to focus on the element of dishonesty as it is particularised in Charge 1A itself (reproduced above at [52]). The DT4A's analysis on the fourth issue of dishonesty was, compared with the first three issues, relatively brief. The *sole* basis for the DT4A's conclusion that Mr Pathak "should not have assisted or permitted PLL to not pay the $500,000" was Thean J's decision in *Tan Ng Kuang (HC)* at [16] that "the monies were held by Gibson Dunn for a specific purpose [to] 'change the narrative' for the creditors of PLPL and SEC" (see DT4A Report at [108] to [109]).

67 This reasoning is, with respect, circular. The DT4A failed to appreciate the fact that Thean J was faced with a very different question from the one that had confronted it. Thean J was *not* considering whether all the elements of Charge 1A had been *proven beyond a reasonable doubt*. Rather, Thean J was considering whether there was a *prima facie* case of the alleged misconduct, and, as Thean J stressed in her judgment, "whether there was an *oral agreement* on the issue of the deposit as alleged by the [a]pplicants" [emphasis added] (see *Tan Ng Kuang (HC)* at [18]). In other words, Thean J did not substantively consider the issue of dishonesty in *Tan Ng Kuang (HC)*. Consequently, the DT4A erred when it relied on Thean J's decision in *Tan Ng Kuang (HC)* to

determine if the element of dishonesty in Charge 1A had been proven beyond a reasonable doubt.

68 When considering if Charge 1A has been proven beyond a reasonable doubt, it is vital to pay close attention to the alleged acts *as particularised in the text of the charge itself*. Despite the applicants' focus on the so-called "objective dishonesty" by Mr Pathak's failure to communicate to the applicants that the S$500,000 sum was no longer deposited for the applicants' fees, it should be noted that this was not, in fact, the alleged act of dishonesty as stated in Charge 1A. The impugned act in Charge 1A is the act of "*not paying* each of the tranches [of S$250,000] to the [applicants] when [they] made a written demand for them" through TKQP (see [27(a)] and [52] above [emphasis added]). As such, the applicants' submissions on Mr Pathak's so-called "objective dishonesty" constitute a non-starter, because they are not even relevant to Charge 1A to begin with.

69 There can be no dishonesty on Mr Pathak's part in not paying the S$500,000 sum to the applicants if he had no duty to do so in the first place. In our judgment, that was clearly the situation in this case. It is undisputed that the sum of S$500,000 was not subject to an escrow or stakeholding agreement. It is also not the applicants' case that the S$500,000 sum was held on trust for the applicants, despite some of the language in Mr Pathak's emails suggesting so, as highlighted at [43] above. There was also no solicitor's undertaking by Mr Pathak to hold the S$500,000 sum for the applicants. Therefore, we agree with Mr Pathak's written submission that there was *no obligation* on his part in September 2016 to *transfer* the S$500,000 sum to the applicants. Mr Pathak's obligation in September 2016, pursuant to the Deposit Agreement, was to *hold* the S$500,000 sum as a deposit for the judicial managers' fees, and to only pay the sum to the applicants when their fees as judicial managers had been raised

for payment. In this last-mentioned regard, there is no evidence to show that the applicants issued any invoices to Gibson Dunn or PLL for the costs of the JM or even the judicial managers' fees when the written demands for the two tranches of S$250,000 were made on 2 and 22 September 2016. Mr Bull confirmed this fact at the hearing before us, and Mr Tan did not dispute this. As Mr Bull put it, the applicants were not asking for payment of the S$500,000 to satisfy invoices for the JMs. Rather, the applicants essentially wanted to be *the ones* holding the S$500,000 sum. The Deposit Agreement as alleged by the applicants did not impose this obligation on Mr Pathak. Therefore, Charge 1A is clearly unsustainable and must be set aside.

70 For completeness, we note that the applicants' submission on "objective dishonesty" is not only misconceived but also entirely irrelevant to the issue at hand. The distinction drawn by the applicants between "objective dishonesty" and "clear dishonesty" is, in our judgment, artificial and apt to confuse (see [53] above). By "objective dishonesty", the applicants refer to the fact that Mr Pathak need not have acted "dishonestly", but only if he had acted in a manner which he "ought to have considered dishonest". The applicants cited only one case, *Law Society of Singapore v Ng Chee Sing* [2000] 1 SLR(R) 466 ("*Ng Chee Sing*") at [42], to support their case on "objective dishonesty".

71 However, *Ng Chee Sing* at [42] dealt with the principle that, when considering if a solicitor's conduct amounts to "conduct unbefitting an advocate and solicitor", the standard of judgment to be applied is fixed by the court and not by his peers. That does not support the applicants' misconceived submissions on "objective dishonesty".

72 In our judgment, in order for a party to have acted in a manner which he "ought to have considered dishonest", the specific act committed by the party

must be a *dishonest* act to begin with. To take a simple hypothetical example, it is uncontroversial that a person who steals another person's property would have committed a dishonest act. It does not suffice for the thief to submit that he was not *subjectively* dishonest in his mind (for example, because he is uneducated or has no knowledge of the law); the act of taking another's property without permission for the thief's own benefit is "objectively" dishonest in the sense that any reasonable person in the thief's shoes would have considered it *dishonest*. Therefore, the thief *ought* to have considered that act of theft as dishonest. This is the extent to which the tool of so-called "objective dishonesty" – *ie*, the test that one "ought to have considered" his act dishonest – might assist the applicants. But it does not detract from the fundamental requirement that the impugned act must be a *dishonest act to begin with* (for example, the act of theft in the hypothetical example above). There is no "lower" threshold of "dishonesty" by the introduction of the element of so-called "objective dishonesty".

73 Therefore, the fact that Charge 1A refers to two limbs of dishonesty – a subjective limb ("which he considered dishonest") and an "objective" limb ("which he … ought to have considered dishonest") – does not mean that the threshold for dishonesty under Charge 1A is "lower", as the applicants submit. The crucial question concerning liability under Charge 1A, as it is framed, is whether the impugned act of not paying the two tranches of S$250,000 to the applicants when demanded by them to do so on 2 and 22 September 2016 was a *dishonest* act such that Mr Pathak either considered it dishonest or ought to have considered it dishonest. For the reasons highlighted at [68] to [69] above, that cannot be the case because, at the time of 2 and 22 September 2016, Mr Pathak's obligation was, at most, to ***hold*** the S$500,000 sum for the

applicants, and ***not*** to *transfer* it to the applicants or their solicitors. There can thus be no dishonesty in *not paying* the S$500,000 sum to the applicants.

74 We now turn to consider the other points considered by the DT4A. In our judgment, the DT4A, with respect, also erred in its analysis of these other points.

75 First, the DT4A found that Mr Pathak should not have used the funds to pay Gibson Dunn's outstanding invoices to PLL for other work done to the detriment of the applicants and the Companies' creditors (see DT4A Report at [109] to [113] and [137]). However, the DT4A failed to consider that Mr Pathak owed *no obligations* to the applicants or the Companies; Mr Pathak was not the applicants' or the Companies' solicitor. PLL was Mr Pathak's client, and Mr Pathak owed legal and ethical duties of loyalty to act in accordance with PLL's interests and directions. If PLL had instructed Mr Pathak that it could use the S$500,000 sum to pay its outstanding invoices with Gibson Dunn, as PLL would deal with *and pay* the applicants *directly*, then there is no dishonesty in Mr Pathak doing so. This was not only Mr Pathak's evidence (see [34] above), but can also be seen in the contemporaneous objective record, when Mr Pathak emailed Mr Lee on 22 September 2016, immediately after the applicants had sent the written demand for the second tranche of S$500,000, that "*[t]he client has confirmed that they will pay the JM funds directly*" (see [20] above). Crucially, *even the DT4A itself had accepted Mr Pathak's evidence on this* (see DT4A Report at [118(b)] and [122]). There was thus simply no basis for the DT4A to find Mr Pathak to have acted dishonestly when he used the S$500,000 to pay PLL's outstanding invoices with Gibson Dunn, when it had *accepted* Mr Pathak's evidence that he was *acting under PLL's instructions* to do so.

76 Second, the DT4A also noted the central role played by Mr Pathak in the deliberately vague and misleading correspondence with the applicants that had failed to correct the applicants' belief that Gibson Dunn continued to hold PLL's funds as part of the Deposit Agreement (see DT4A Report at [116] to [119]). With respect, this is completely beside the point because, as we have held at [68] above, that is *not* the impugned act in Charge 1A. In any event, we note that the evidence does not support a finding beyond a reasonable doubt that Mr Pathak had *deliberately* misled the applicants. Once Mr Punj had told Mr Pathak on or about 25 or 26 August 2016 that Gibson Dunn should no longer act for PLL in relation to the applicants' fees, and on 2 September 2016 that the S$500,000 sum could be used to pay PLL's outstanding invoices with Gibson Dunn (which the DT4A itself accepts, as noted at [75] above), and immediately after the applicants had sent a letter of demand on 2 September 2016 to Gibson Dunn for payment of the first tranche of the S$250,000, Mr Lee, *on Mr Pathak's instructions*, immediately emailed TKQP on 2 September 2016 at 6.28pm that (a) PLL had instructed that Gibson Dunn no longer represented PLL in relation to the fees; and (b) PLL had instructed that the applicants should write directly to PLL (see [18] above).

77 Following this, the applicants then communicated with PLL directly regarding the Deposit Agreement. Whenever the applicants or the applicants' counsel then emailed Mr Pathak or Mr Lee again, the latter would always clarify and reiterate that the applicants should deal directly with PLL instead.

(a) TKQP replied to Mr Lee's 2 September 2016 email extracted at [76] above on the same day at 9.35pm. Mr Lee then responded (copying Mr Pathak) on 5 September 2016 at 3.21pm as follows:

> …
>
> Kindly note that we no longer represent Punj Lloyd Limited ('PLL') in respect of any fee discussion with your clients. We are also no longer involved in any form of fee arrangement between PLL and your clients, in any respect whatsoever.
>
> We have since forwarded your email of 2 Sep 2016 and the proposed revised draft affidavit of your client to PLL. PLL will respond directly to your clients.
>
> …

(b) Subsequently, on 6 September 2016 at 3.03pm, TKQP sent another email to Mr Pathak. Mr Pathak responded on the same day at 3.21pm that:

> …
>
> As you know, we are not engaged nor do we act for our client, Punj Lloyd Limited ('PLL') in relation to the JM fee discussions or fee arrangements.
>
> As requested by you, I will forward your email to our client.
>
> …

(c) On 22 September 2016, after TKQP sent the letter of demand asking for payment of the sum of S$500,000, Mr Pathak immediately instructed Mr Lee, as the DT4A accepted (see DT4A Report at [115]), to email TKQP on that same day at 6.01pm as follows:

> Dear Sirs
>
> We refer to your letter of 22 Sep 2016.
>
> We have informed you that Gibson Dunn is no longer involved in any fee discussion or in any form of fee arrangements between Punj Lloyd Limited ('PLL'), whose reps are copied in this email, and your clients.
>
> For the avoidance of doubt, please note that we are not holding any fee deposits for your clients.

> Kindly ensure that the facts are properly reflected in any court application that your clients may wish to make in relation to their fees.
>
> Your clients should discuss all fee arrangements directly with PLL.
>
> All our rights are reserved.

78 Thus, we agree with Mr Bull that Mr Pathak (and Mr Lee) did seek to clarify matters in a timely manner. In any event, as we have emphasised, Charge 1A is not about any purported failure by Mr Pathak to clarify matters.

79 Third, the DT4A found that Mr Pathak had failed to correct the false statement made by PLL's Mr Hardik Hundia ("Hardik") to Ms Lim at a meeting on 8 September 2016 that PLL had placed S$500,000 with Gibson Dunn for the Deposit Agreement, even though Mr Pathak was aware or ought to have been aware of Hardik's lie (see DT4A Report at [124]). After the meeting that same day, Ms Lim emailed Hardik and Rahul Maheshwari ("Rahul") of PLL at 7.15pm to "[t]hank [him] for confirming that PLL has placed $500,000 with [Gibson Dunn] as a deposit for [the applicants'] remuneration".

80 In our judgment, this finding by the DT4A, with respect, cannot stand.

(a) The first important point to note is that this email by Ms Lim *was not sent or copied to Mr Pathak or Mr Lee.*

(b) Second, after Hardik forwarded this email by Ms Lim to Mr Pathak at 7.20pm on 8 September 2016, Mr Pathak responded to Hardik on 15 September 2016 at 5.19am to clarify that, per their previous discussions, PLL *should pay the applicants directly*. This contemporaneous statement by Mr Pathak buttresses his evidence that

PLL had indeed instructed Mr Pathak that it would deal with and pay the applicants directly:

> …
>
> As for as the deposit/escrow of fees and holding it in a trust, *as discussed previously with you, we cannot do this for the JM. PLL/the two JM companies should pay the JM directly*.
>
> As I proceed with my discussions with Paul Seah, I will look to further instructions from you from time to time.
>
> Best. Jai
>
> [emphasis added]

(c) In response, Hardik emailed Mr Pathak on 15 September 2016 at 12.29pm "Sure pls". This would have given Mr Pathak the impression that Hardik would duly inform the applicants that they would be paying the applicants directly, and that the S$500,000 was no longer being deposited with Gibson Dunn for the applicants' Deposit Agreement with PLL.

(d) Therefore, bearing in mind that (i) Mr Pathak was not copied in Ms Lim's 8 September 2016 email highlighted at [79] above, (ii) Mr Pathak also did not attend the meeting between Ms Lim and Hardik on 8 September 2016, (iii) PLL itself had already said that it would deal with the applicants directly regarding the fees, and (iv) that Mr Pathak was *not* representing the applicants, it was reasonable, in our judgment, for Mr Pathak to communicate not with the applicants but with Hardik to inform Hardik of his error, so that Hardik could speak to Ms Lim and correct any misimpression that had been formed by the 8 September 2016 meeting. Lawyers are, as we have highlighted at [62] above, not legally or ethically obliged to "whistle-blow" on their clients to the opposing party. Quite the contrary, doing so would expose the

> lawyer to ethical complaints *and* potentially even legal claims from the lawyer's own client for breach of the ethical and legal duties of confidentiality and loyalty.

81 Fourth, the DT4A found that Mr Pathak's appropriation of the funds to pay Gibson Dunn's own invoices was an "aggravat[ing]" factor, noting that PLL was then insolvent and under a restructuring process (see DT4A Report at [130]). However, this reasoning is based on the incorrect premise that he was wrong not to have paid the funds over to the applicants in the first place and that he had instead applied the funds to pay Gibson Dunn's invoices.

82 For the reasons set out above, we find that the DT4A's decision on the element of dishonesty in Charge 1A cannot be sustained. The DT4A's decision that Mr Pathak is guilty of Charge 1A must accordingly be set aside.

83 An allegation of dishonesty against a lawyer is a grave one, and, if proven, results in severe consequences for the lawyer concerned. The well-established position is that, where an advocate and solicitor of the Supreme Court of Singapore has been guilty of dishonest conduct, the court will almost invariably order that he be *struck off* the roll of solicitors, no matter how strong the mitigating factors advanced by the advocate and solicitor (see, for example, *Law Society of Singapore v Choy Chee Yean* [2010] 3 SLR 560 at [44] and *Law Society of Singapore v Amdad Hussein Lawrence* [2000] 3 SLR(R) 23 at [11]). There is no reason why this does not apply equally to dishonest conduct committed by regulated foreign lawyers such that a regulated foreign lawyer who has acted dishonestly should almost invariably have his registration cancelled or, at the very least, suspended. Thus, it is curious and telling that the applicants are only seeking the imposition of a high fine in this application, even though Charge 1A alleges *dishonesty* on Mr Pathak's part. While the

punishment being sought by the applicants is not dispositive of whether the element of dishonesty in Charge 1A has been made out, it indicates that *even* the applicants themselves did not think that Mr Pathak's actions were as egregious as what an allegation of dishonesty would necessarily entail.

84 As such, in our judgment, Charge 1A is clearly unsustainable and has not been proven beyond a reasonable doubt. On this basis, we set aside DT4A's conviction of Mr Pathak of Charge 1A. It also follows that the present application should be dismissed.

A lawyer's duty when a client wishes to breach his contract

85 For completeness, it is apposite for us to make a few observations about the important question as to what a lawyer's duties are when his client wishes to breach a contract or some other private obligation, although this issue was not addressed by the DT4A's decision or the submissions by the parties. It is clear that a lawyer has a duty to act in his client's best interests. This is not merely an ethical duty (under r 5(2)(*j*) of the PCR) but also a legal fiduciary duty. In the same vein, a lawyer must protect his client's LPP and the confidentiality of the client's communications, as outlined at [58] to [63] above.

86 However, as highlighted at [55] above, a lawyer is not merely, to put it simply, a "hired gun". The overarching duty of a lawyer is to serve not merely his client but also the administration of justice and fairness generally (including, of course, a duty, in appropriate circumstances, to the court). Thus, even in a civil context, while a lawyer has a duty to serve his client's interests, including complying with a client's instructions to breach a contract, that is subject to three important caveats.

87 First, absent criminal behaviour or any conduct that gives rise to a civil claim against the lawyer himself (for example, dishonest assistance of a breach of trust or the tort of inducement to breach a contract), a lawyer can comply with his client's instructions to breach a contract (or other private obligation). However, before doing so, the lawyer should duly advise his client that what he intends to do *would* amount to a breach of the contract, *and* the lawyer should advise the client *against* committing such a breach. We recognise that, absent any criminal behaviour, it is a person's prerogative to decide whether he wishes to breach a private obligation, and there are even legal scholars who have propounded the theory of "efficient breach" of contract (which, in a nutshell, argues that damages are preferable to contractual performance when the latter provides less utility than the former (see, for example, Gregory Klass, "Efficient Breach" in *The Philosophical Foundations Of Contract Law* (Gregory Klass, George Letsas and Prince Saprai eds) (Oxford University Press, 2014) at pp 362–387)).

88 Nevertheless, while that may be the lawyer's *client's* prerogative, the lawyer, as a member of an honourable profession, must himself act in accordance with his legal and ethical obligations. In this regard, r 5(2)(*j*) of the PCR states that a lawyer can only "use all *legal* means to advance the client's interests, to the extent that the legal practitioner may reasonably be expected to do so" [emphasis added]. Rule 5(2)(*b*) of the PCR additionally requires a lawyer, "when advising the client, [to] inform the client of *all information* known to the legal practitioner that may reasonably affect the interests of the client in the matter" [emphasis added]. The combined effect of these two rules is that the lawyer must advise his client of all information that would involve the use of only *legal* means to advance the client's interests. Such advice must necessarily entail notice to the client that what he intends to do would amount

to a breach of his private obligation, and that such a breach would not be in accordance with his *legal* obligation. Mr Bull rightly accepted this at the hearing before us.

89 Second, generally, the lawyer should not be the party to *suggest* to his client or initiate the idea to breach the client's contract (or other private obligation). This also flows from the duty under r 5(2)(*j*) of the PCR to use "*legal* means to advance the client's interests, to the extent that the legal practitioner *may reasonably be expected to do so*" [emphasis added].

90 Third, it also follows from r 5(2)(*j*) of the PCR that, generally, the lawyer *should not actively assist or abet* the client's breach of the contract or other private obligation. This conclusion is also bolstered by r 8(3) of the PCR highlighted at [56(a)] above, as a lawyer cannot act towards any person "in a way which is fraudulent, deceitful or otherwise contrary to the legal practitioner's position as a member of an honourable profession". Thus, for instance, if a lawyer's client wishes to make a fraudulent misrepresentation to a potential buyer, and the lawyer is aware that the representation would be a fraudulent misrepresentation, the lawyer should not be communicating such a fraudulent misrepresentation to the potential buyer, even if this would further the client's interests or if the client instructs the lawyer to do so. The lawyer cannot inform the opposing party of this fraudulent misrepresentation, in accordance with his duties of confidentiality and loyalty to his client, but the lawyer should advise his client *not* to make such a fraudulent misrepresentation and, if the client insists, *avoid assisting* the client in making the representation and, if necessary, cease acting for that client as explained at [93] below.

91 This is consistent with Professor Jeffrey Pinsler SC's observations in Jeffrey Pinsler, *Legal Profession (Professional Conduct) Rules 2015: A*

Commentary (Academy Publishing, 2016)). When citing an example of "improper conduct towards a party and a non-involved person", Prof Pinsler explained that a lawyer:

> … is not entitled to advance his client's position if, in doing so, *he would unethically compromise another party's case or another person's interests*. Such circumstances may occur when a lawyer seeks to promote his client's or his own interest *by committing an impropriety or an illegal act against the party or person*. For example, L, a legal practitioner, is informed by his client that he wishes to purchase a property from X, who is the sole owner of it. X does not intend to sell his property unless his estranged son (who lives abroad) writes a letter that he wants no part of it. Although X's son has no legal or equitable interests in the property, X has always wanted to give him a share of it. L approaches X's son directly and deceives him into signing a letter stating that he does not wish to have any part of the property. The letter is then shown to X and he subsequently sells the property to L's client. L has deceived the other party to the transaction (X) and a non-involved third party (X's son). [emphasis added]

92 Similarly, in *Law Society of Singapore v Chong Fook Choon @ Ronnie Chong* [1998] SGDSC 1, the respondent was charged with misrepresenting certain facts to the agent of a purchaser in respect of the potential sale of a property. The Disciplinary Committee determined that the misrepresentations were made to gain leverage in the negotiations. The respondent was reprimanded and ordered to pay the costs of the Law Society.

93 If the lawyer is faced with unreasonable instructions and expectations from his client such that the client's directions would require the lawyer to breach a legal or ethical duty, the lawyer should discharge himself as counsel for the client. As explained by the Court of Appeal recently in *Loh Der Ming Andrew v Koh Tien Hua* [2021] SGCA 81 at [80]:

> … Although DT1 was right to say that a solicitor is not obliged to comply with every one of his client's unreasonable instructions, where a client instructs the solicitor to take a position that the solicitor considers to be untenable or that he

> is unwilling to take for good reason, *the course open to the solicitor is to make his position known to the client with an explanation of why he takes that position*. If, despite this, the client insists on that course, *the solicitor should discharge himself* … [emphasis added]

94 As such, the principles on a lawyer's duties when his client wishes to breach a contract or some other private obligation can be summarised as follows.

(a) Absent criminal behaviour or any conduct that gives rise to a civil claim against the lawyer himself (for example, dishonest assistance of a breach of trust or the tort of inducement to breach a contract), a lawyer does not act "dishonestly" or in a manner that is "unbefitting" a lawyer if that lawyer is complying with the client's instructions to facilitate a breach of contract or other private obligation, as a lawyer has a duty to his client to act with undivided loyalty (see [87] above).

(b) A lawyer is also not ethically obliged to "whistle-blow" on his client to an opposing party (for example, by informing the opposing party that the lawyer's client is intending to breach a private obligation *vis-à-vis* the opposing party), as this would contravene the lawyer's own legal and ethical obligations of confidentiality and loyalty to his own client (see [58] to [65] above).

(c) The foregoing principles are subject to the important caveat that, when a lawyer's client wishes to breach a private obligation, the lawyer should seek to properly advise and dissuade the client from committing such a breach (see [87] to [88] above).

(d) Generally, the lawyer should also *not* be the party to *suggest* to the client to commit the breach of the client's contractual or other private obligation (see [89] above).

(e) Generally, the lawyer should *not* be involved in *assisting or committing* the client's breach of the latter's private obligation (see [90] to [92] above).

(f) If a lawyer's client insists on committing any acts which would require the lawyer to act in a manner that is dishonest or unbefitting a member of an honourable profession, the lawyer should apply to discharge himself as counsel for the client (see [93] above).

95 Thus, in this case, it would have been a *very different* situation if the idea to change the purpose of the S$500,000 deposit had come *from Mr Pathak himself*. Indeed, at the hearing before us, Mr Bull rightly accepted the point that, had Mr Pathak been the one to suggest to PLL to use the S$500,000 sum to pay its outstanding invoices with Gibson Dunn rather than to hold it for the Deposit Agreement, Mr Pathak would indeed have been acting improperly.

96 However, that was *not how the case was run against Mr Pathak before the DT4A*. Mr Tan, correctly in our view, accepted this at the hearing before us. The present case is not straightforward because it is apparent that PLL itself had intended to either breach or negotiate a variation of the Deposit Agreement, and it is Mr Pathak's evidence that it was Mr Punj who instructed him not to use the S$500,000 sum to pay the applicants, but, rather, pay their outstanding invoices with Gibson Dunn instead (as alluded to at [34(b)] above). As explained by Mr Pathak under cross-examination:

> Q: My point is this, if you knew on 26 August, at 8 or so, by your account, that you were not involved in the JM

> fees arrangement anymore and your conversation with Hardik is on 2 September, why are you issuing an invoice dated 1 September for JM fees?
>
> A: Sir, could I take you to my evidence-in-chief and this is what I have been trying to explain to you. *On the 25th, 26th, or whatever that date is, Atul Punj told me back off discussing fee discussions with the JM.* … He did not say don't hold the fees that are already in deposit in the client account for the JM. This is -- and I've been trying to get to this. This is a critical, critical piece of information. *The fact that we are not supposed to hold any funds in our client account, your Honours, for the JM happens on 2 September.* Okay? This is very important, sir. There is one conversation from the chairman saying, 'You guys are too soft. Back off.' Okay? But that doesn't say you don't hold any fees. Okay? That comes on the 2nd. That comes on the 2nd, the TKQP letter comes on the 2nd, my partner replies to the TKQP letter based on this. I'm sorry to make it so painful but we have got to get the chronology right and it is very important that we slice the onion somewhat more thinly than we would normally do. *There are two separate instructions. One is an instruction verbally instructed by Atul Punj to cease dealing with the complainants JM on behalf, in relation to the fee arrangement. The next one is 2 September*, which are all these emails, okay, which say 'Please disregard' – that's not important. *Keep the funds for our outstanding invoices. That's on the 2nd.* This is very important, sir, and I'm sorry to -- please don't take it ill. … Atul Punj is flying around the world, I don't know, maybe he's in, as Nicky Tan said, in his private jet and calling me and saying, 'Back off, Jai, you're too soft on the JM.' Those were his exact words, 'You're too soft on the JM', because I was chasing them to get a job done which was, 'Come on and agree to this. I don't want to deal with this anymore.' Okay? Anyway, sorry, and his view was just back off and that was it, I mean, we don't have a long conversation, just back off, but he didn't tell me what to do with the 250 that was already in or another 250 that was to come. That happens on 2 September, sir.
>
> [emphasis added]

97 Therefore, it was Mr Pathak's explanation before the DT4A that the ideas (a) that Gibson Dunn should stop representing PLL in the negotiations with the applicants on the judicial managers' fees and (b) that the S$500,000

sum should be used to pay PLL's outstanding invoices with Gibson Dunn rather than the applicants' fees *came from Mr Punj*, not Mr Pathak, on about 25 or 26 August 2016 and 2 September 2016, respectively.

98 It is not unbelievable that Mr Punj would want to negotiate directly with the applicants instead of through Gibson Dunn regarding the fees. This is because it is also evident from the contemporaneous written record that Mr Punj and Hardik were not pleased with the applicants' insistence on the S$2 million deposit. On 30 July 2016 at 12.58pm, Hardik emailed Mr Punj that "Get a feeling that *we are being forced into committing this 2 Mn with no reciprocity from JM's end*. Not sure what exactly will be achieved at the end of this 2 Mn payout" [emphasis added]. On 30 July 2016 at 4.09pm, Mr Punj agreed in response.

99 Nevertheless, we have some doubts about the credibility of Mr Pathak's testimony in this regard, as it does not appear to be entirely consistent with the contemporaneous objective evidence.

(a) On 1 September 2016 at 7.10am, Mr Pathak emailed Ms Lum, accounting and finance manager of Gibson Dunn, concerning the second tranche of S$250,000:

> Please bill S.$250k [*sic*] to PLL at their Abu Dhabi address given below. This is also for the JM fees.
>
> It should go to the attention of Hardik Hundia at that address.

(b) However, critically, on 1 September 2016 at 9.10am, Ms Lum emailed Mr Pathak to ask if PLL could pay the applicants directly. This appears to be *first* time on the objective record that such an idea came about:

> Hi Jai,
>
> *Can we ask Punj Lloyd to pay JM directly?*
>
> I am afraid that Management will ask me to hold JM payment again *and apply this to our outstanding invoice?*
>
> Thank you
>
> [emphasis added]

(c) Then, on the same day on 1 September 2016 at 2.50pm, Ms Lum emailed Mr Pathak to "[p]lease review the attached bill and let me know if there are any changes needed before I send to Hardik and his teams".

(d) On 1 September 2016 at 5.16pm, Ms Lim emailed Mr Pathak (copying Mr Lee and Mr Nicky Tan) that:

> We understand from your email of 17 August 2016 and our meetings at your office on 19 August 2016 and 23 August 2016 that PLL was in the process of remitting the second tranche of S$250,000 in deposit (expected within August 2016) to your firm. Kindly confirm by today if your firm has received this S$250,000 deposit for August 2016.

(e) On that same night, on 2 September 2016 at 1.20am, Mr Pathak then emailed Hardik to state that "Hardik: Please do not transmit these funds to our account. *We need to discuss this matter*. Thanks" [emphasis added]. This seems to suggest that it was Mr Pathak who had first initiated a discussion with Hardik about the change of the purpose with regard to the S$500,000 deposit.

(f) At 8.32am on the same day on 2 September 2016, Ms Lum then emailed Hardik and Rahul of PLL to "[p]lease see attached bill as per request and do let us know if you have any queries or require any further assistance".

(g) Then, on 2 September 2016 at 4.26pm, Mr Pathak emailed Ms Lum to state: "Please disregard [the email at [99(e)] above not to transmit the second tranche of S$250,000 to Gibson Dunn] based on our discussions *right now*. *We will keep the funds for our outstanding invoices*. Many thanks. Jai" [emphasis added]. The fact that the discussions were "right now" at about 4.26pm, more than half a day after Mr Pathak's email to Hardik at 1.20am at [99(e)] above, reinforces the inference that Mr Pathak's suggestion to "discuss this matter" preceded any discussion he had with Hardik or Mr Punj regarding the change in use of the S$500,000 deposit.

100 Ms Lum's and Mr Pathak's emails on 1 and 2 September, respectively, at [99(b)] and [99(e)] above appear to indicate that it was *Mr Pathak* who first told Hardik not to transmit the second tranche of S$250,000 and that they had to "discuss the matter". Presumably after the discussion, Mr Pathak informed Ms Lum that PLL would transfer the second tranche of S$250,000 to Gibson Dunn after all, but that the S$500,000 sum would be used to pay PLL's outstanding invoices with Gibson Dunn. This chain of events supports a possible inference that it was Mr Pathak, rather than Hardik or Mr Punj, who had initiated the change in purpose with regard to the S$500,000 sum. If this were so, then it would flout the ethical duties outlined at [89] above that a lawyer should not be the party to initiate or suggest to his client to commit a breach of contract, *even if* the client agrees to this suggestion and subsequently instructs the lawyer to do so. What makes this potentially even more egregious in the present case is that Mr Pathak was in a position of conflict of interest, as the change in the purpose of the S$500,000 – to pay PLL's outstanding invoices with Gibson Dunn – was to his firm's financial benefit. It would be misconduct

unbefitting a member of an honourable profession for a lawyer to abet his client to breach the latter's contract so that the lawyer could indirectly benefit from it.

101 Nevertheless, as noted at [96] above, this was *not* how the applicants ran their case against Mr Pathak at the disciplinary proceedings before the DT4A or in this application. Thus, not only did the DT4A not address the important emails by Ms Lum and Mr Pathak highlighted at [99(b)] and [99(e)] above, the DT4A even accepted as fact that Mr Punj had instructed Mr Pathak to apply the S$500,000 sum to PLL's outstanding invoices with Gibson Dunn (see DT4A Report at [118(b)] and [122]), as alluded to at [75] above). While these emails were produced by Mr Pathak pursuant to a subpoena for the hearing before the DT4A, the applicants did not develop the point and put to Mr Pathak that these emails supported an inference that it was Mr Pathak, rather than PLL, who had initiated the idea to breach the Deposit Agreement to use the S$500,000 sum for PLL's outstanding invoices with Gibson Dunn. There is thus no evidence from Mr Pathak on his response to this issue which, in fairness to Mr Pathak, might have clarified the situation, particularly in respect of the emails referred to at the outset of the preceding paragraph.

102 Furthermore, we accept Mr Bull's submission that the foregoing emails are not unequivocal, and Mr Tan also conceded before us that there is no conclusive evidence to show that Mr Pathak was the party who suggested to PLL to breach the Deposit Agreement. Therefore, we will not pursue this issue further, save to state that, had the case been run against Mr Pathak on this ground and, assuming *arguendo* that this point had been fully developed *and* proven beyond a reasonable doubt via cross-examination of Mr Pathak, then Mr Pathak would, at least, have been guilty of a breach of r 5(2)(*j*) of the PCR and misconduct unbefitting a regulated foreign lawyer under s 83A(2)(*g*) of the LPA.

Are Charges 2AA and 2BB made out?

103 Finally, while the parties did not address this Court on Charges 2AA and 2BB, for completeness, we observe that those charges might not be made out as well. It follows from our analysis above that, based on the case as it was run against Mr Pathak in the proceedings before the DT4A, Mr Pathak had not committed an act that was "dishonest" or that he "ought to have considered dishonest". This is because the DT4A itself accepted as a fact that Mr Pathak was acting under the instructions of PLL to apply the S$500,000 sum to pay its outstanding invoices with Gibson Dunn (see DT4A Report at [118(b)] and [122]). Mr Pathak also did not have any obligation in September 2016 to pay the S$500,000 sum to the applicants, so there was no duty on him to do so when the applicants demanded for the same.

104 The alleged act of dishonesty under Charge 2AA is that Mr Pathak had permitted or assisted PLL to mislead the applicants in a manner which he considered dishonest or ought to have considered dishonest by causing the applicants to continue to believe that PLL had agreed to deposit the S$2 million towards the costs of managing the Companies whilst under judicial management by sending emails on 7, 14 and 27 July 2016 and 9, 11 and 17 August 2016 that confirmed that such deposit had been made in part.

105 In our judgment, the alleged act of dishonesty in Charge 2AA is clearly not made out. According to Mr Pathak's evidence, PLL's instructions that it would deal directly with the applicants regarding the fees came on 25 or 26 August 2016 (see [34] above). This was not challenged by the applicants and was, crucially, *also accepted by DT4A* (see DT4A Report at [118(b)]). Mr Pathak also testified that PLL's instructions not to pay the S$500,000 sum to the applicants but to use it for its outstanding invoices with Gibson Dunn

instead came on 2 September 2016 (see [34] above). This was also not challenged by the applicants. Accordingly, no dishonesty can be inferred from Mr Pathak's emails between 7 July and 17 August 2016.

106 As for Charge 2BB, the alleged act of dishonesty is that Mr Pathak assisted or permitted PLL to mislead the applicants in a manner he knew or ought to have known was dishonest by not clarifying PLL's position that it had not agreed to fund the judicial management with S$2 million. This charge, again, is not made out. PLL's instructions, according to Mr Pathak, was that it would deal directly with the applicants, and Mr Pathak duly communicated the same to the applicants. PLL had not informed Mr Pathak that it no longer wished to fund S$2 million for the JM. Furthermore, *even if* PLL had indeed informed Mr Pathak that it wished to breach the Deposit Agreement, it was not for Mr Pathak to inform the applicants of this until PLL instructed Mr Pathak to do so, as Mr Pathak had a fundamental duty to protect such a confidential piece of information, as explained at [58] to [63] above.

Conclusion

107 In conclusion, for the reasons set out above, we set aside the DT4A's decision finding Mr Pathak guilty of Charge 1A. Accordingly, we find that due cause has not been shown and the application is therefore dismissed.

108 Having regard to all the circumstances, we order each party to bear their own costs of the hearing before us.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Tan Chuan Thye SC, Chew Xiang and Ou Wai Hung Shaun (Rajah & Tann Singapore LLP) for the applicants;
Cavinder Bull SC, Kong Man Er, Sam Yi Ting (Drew & Napier LLC) (instructed), Thio Shen Yi SC, Chua Han Yuan Kenneth and Hannah Alysha binte Mohamed Ashiq (TSMP Law Corporation) for the respondent.