IN THE COURT OF THREE SUPREME COURT JUDGES OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 318

Originating Application No 7 of 2022

Between

Law Society of Singapore

… *Applicant*

And

de Souza Christopher James

… *Respondent*

GROUNDS OF DECISION

[Legal Profession — Disciplinary proceedings]
[Legal Profession — Professional conduct — Breach]
[Legal Profession — Professional conduct — Improper conduct or practice]
[Legal Profession — Show cause action]

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Law Society of Singapore
v
de Souza Christopher James

[2023] SGHC 318

Court of Three Supreme Court Judges — Originating Application No 7 of 2022
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31 July 2023

7 November 2023

Belinda Ang Saw Ean JCA (delivering the grounds of decision of the majority consisting of Woo Bih Li JAD and herself):

Introduction

1 A disciplinary tribunal (the "**DT**") appointed by the Council of the Law Society on 19 November 2021 investigated five primary charges, each with alternative charges, preferred against Mr Christopher James de Souza ("**Mr de Souza**") under s 83(2) of the Legal Profession Act 1966 (2020 Rev Ed) (the "**LPA**"). The DT found that only one primary charge for breach of r 10(3)(*a*) of the Legal Profession (Professional Conduct) Rules 2015 (the "**PCR**") had been made out and that cause of sufficient gravity for disciplinary action existed in respect of this particular primary charge. The Law Society of Singapore (the "**Law Society**") duly commenced Originating Application No 7 of 2022 ("**OA 7**") under s 98 of the LPA on 18 November 2022 for the respondent, Mr de Souza, to be sanctioned under s 83(1) of the LPA.

2 We dismissed OA 7 after the oral hearing on 31 July 2023. We now set out our full grounds for dismissing OA 7.

3 Mr de Souza was counsel for Amber Compounding Pharmacy Pte Ltd and Amber Laboratories Pte Ltd (collectively, "**Amber**") in HC/SUM 484/2019 ("**SUM 484**"), a summons filed by Amber in HC/S 164/2018 ("**Suit 164**") for orders that documents it had obtained pursuant to two search orders dated 13 April 2018 be preserved and that it be entitled to use the said documents for the purpose of making reports to law enforcement agencies. The Law Society alleged that Mr de Souza prepared and filed an affidavit of Amber's representative, Mr Samuel Sudesh Thaddaeus ("**Mr Sudesh**") dated 29 January 2019 ("**Sudesh's 29/1/19 Affidavit**") in support of SUM 484 without exhibiting reports nor supporting documents made to certain agencies by Amber which, if exhibited in the said affidavit, would have revealed that Amber had breached its undertakings given pursuant to the search orders not to use the documents for extraneous purposes. Hence, Mr de Souza was a party to and assisted his client, Amber, in suppressing evidence in breach of r 10(3)(*a*) of the PCR. The DT found that objectively construed, Sudesh's 29/1/19 Affidavit had failed to disclose Amber's prior use of the documents in breach of its undertakings given pursuant to the search orders, and concluded that Mr de Souza's subjective belief that he had disclosed Amber's breach of its undertakings was not relevant if it was shown that objectively, the evidence in question had not been disclosed.

4 In light of the DT's decision and how the parties presented their cases, we develop our analysis in our written grounds in the following manner. We will first consider whether the DT had correctly found that the charge against Mr de Souza for breach of r 10(3)(*a*) of the PCR was made out. As to this, we begin with the question of whether intention was a necessary ingredient of the charge brought against Mr de Souza based on r 10(3)(*a*) of the PCR. If it is a

necessary ingredient of the charge as framed by the Law Society, we then consider whether the DT had erred in its analysis and conclusion that the subjective belief of Mr de Souza was irrelevant upon the DT's finding that material facts that should have been disclosed were not disclosed. Several distinct aspects – evidential and legal – arise from the DT's conclusion on the irrelevance of Mr de Souza's subjective belief. We will examine whether the DT correctly concluded that the Law Society's legal and evidential burden to prove the element of suppression of evidence under r 10(3)(*a*) of the PCR was discharged following a mere objective determination of a failure to make disclosure of material facts. In this light, and even assuming the correctness of the DT's factual finding on non-disclosure, we will examine the relevance, if any, of the nature of the material non-disclosure with particular reference to the charge that accused Mr de Souza of being a "party to and assist[ing] Amber in suppressing evidence which Mr de Souza was able to prevent…". We will address and develop the evidence on intention in the context of the charge as framed.

5 After stating our conclusions in respect of the foregoing analysis, we will consider whether Amber's prior use of information derived from the search orders was made known in Sudesh's 29/1/19 Affidavit such that the fact of Amber's prior use of information in breach of Amber's earlier undertaking to the court in connection with the search orders (see [13] below) was not, in any event, suppressed from the court.

Background of events leading to the DT's report

6 We first set out the background to OA 7. As it will be evident, this provided critical context against which we assessed the DT's findings and Mr de Souza's conduct.

7 Mr de Souza was admitted to the roll of Advocates and Solicitors of the Supreme Court of Singapore on 12 April 2006. At the material time during which the following events took place, he was practising with and a partner of Messrs Lee & Lee ("**L&L**").

Suit 164

8 Amber are companies in the specialised trade of compounding medical and pharmaceutical products. On 14 February 2018, Amber commenced Suit 164 against six defendants. These included Ms Priscilla Lim Suk Ling ("**Ms Lim**") and UrbanRX Compounding Pharmacy Pte Ltd ("**UrbanRX**"), a company in the same business as Amber. Ms Lim worked for Amber before setting up UrbanRX. Where appropriate, we refer to: (a) Ms Lim and UrbanRX collectively as "**D1 and D2**"; (b) all six defendants in Suit 164 collectively as the "**Defendants**"; and (c) Amber and D1 and D2 collectively as the "**Parties**".

9 In Suit 164, Amber essentially claimed that the Defendants misappropriated Amber's confidential information and/or trade secrets for UrbanRx's benefit. The alleged information included lists of Amber's patents, clients, prices, stocks, vendors, and standard operating procedures.

10 Amber was, at first instance, represented by Mr Alfred Dodwell ("**Mr Dodwell**") of Dodwell & Co LLC. L&L took over conduct of Suit 164 on 14 December 2018. D1 and D2 were represented by Mr George Barnabas Pereira ("**Mr Pereira**") of Pereira & Tan LLC at all material times.

HC/SUM 1291/2018 – Amber's application for search orders against D1 and D2

11 On 15 March 2018, Amber applied for *ex parte* search orders against D1 and D2 *via* HC/SUM 1291/2018. The purpose of the search orders was, as stated by Amber's Managing Director, Ms Jayne Wee, "purely and solely" for "obtaining further evidence that [was] necessary to [Amber's] case without risking [D1 and D2's] destruction of the said evidence".

12 On 3 April 2018, the High Court Judge (the "**Judge**") who heard the *ex parte* application ordered D1 and D2 to disclose to Amber all email correspondence on their email accounts, all data processing devices, and all documents relating to the trade secrets and/or confidential and/or proprietary information of Amber ("**Search Order(s)**"). The Search Orders were formally dated 13 April 2018.

13 Pertinently, in applying for the Search Orders, Amber expressly undertook not to "use any information or documents obtained as a result of the carrying out of [the] Order except for the purposes of these proceedings or to inform anyone else of these proceedings until the trial or further order" ("**Search Order Undertaking**"). The Search Order Undertaking made explicit the implied obligation not to use discovered documents or information obtained therefrom for any purpose other than pursuing the action in which the discovery was obtained. This implied obligation was acknowledged in the English case of *Riddick v Thames Board Mills Ltd* [1977] 1 QB 891 and will be referred to as the "**Riddick Undertaking**" in the present case.

14 Indeed, for this reason, the uncertainty surrounding when Mr de Souza first learnt of the Search Order Undertaking was not material in the present case; whilst Mr de Souza claimed that he was unaware of the Search Order

Undertaking when Amber first informed him of the Search Orders and only learnt of them "soon after [L&L's] engagement [in Suit 164]", he admitted to being aware of the Riddick Undertaking at all material times. Similarly, we make clear that there was no material difference *in the substance* of what L&L referred to as the Riddick Undertaking in its email correspondence with Mr Sudesh (see, *eg*, [25]–[28] below) and what we term the Search Order Undertaking in these grounds of decision.

15 The Search Orders were executed on 17 April 2018 in the presence of Ms Lim and a supervising solicitor. More than 100,000 documents were seized.

HC/SUM 2169/2018 – D1 and D2's application to set aside the Search Orders

16 On 10 May 2018, D1 and D2 filed HC/SUM 2169/2018 ("**SUM 2169**") to set aside the Search Orders. They asked for the Search Orders to be discharged and for Amber to return all seized items as well as destroy all copies of items made during the searches. D1 and D2 claimed that: (a) the solicitors who had supervised the search did not advise them of their right to refuse entry to anyone who could commercially benefit from the things that the individual might read or see on the premises; (b) Amber had not returned originals of all the seized documents within two days of their removal in breach of the Search Orders; and (c) the ambit of the orders were too wide.

17 At a Judge Pre-Trial Conference ("**JPTC**") held on 23 May 2018, the Judge fixed timelines for the filing of affidavits and submissions in relation to SUM 2169 and directed Parties to sort out the documents that clearly belonged to either Amber or the Defendants.

18 What followed was a letter from Dodwell & Co LLC to Pereira & Tan LLC dated 31 May 2018, in which Mr Dodwell agreed to hand over copies of

the original documents taken from D1 and D2's premises on the condition that Mr Pereira undertake that the documents were provided for the purpose of Suit 164 and would not be handed over to the Defendants and/or any third parties. At page 3 of this letter, Mr Pereira and Mr Dodwell exchanged signed express undertakings not to hand over the seized documents to their respective clients and/or any other third party and/or any other solicitor.

19 A further JPTC was held on 4 June 2018. On this occasion, Mr Dodwell informed the Judge that he had exchanged the solicitors' undertaking set out in the 31 May 2018 letter with Mr Pereira. In view of this, and the Parties' agreement that documents which belonged to the other party ought to be returned to their rightful owners, the Judge directed the Parties to come to a workable solution to sort out ownership of the documents.

20 The Parties returned before the Judge on 18 July 2018, whereupon the Judge ordered them to carry out a "**Listing Exercise**". This exercise first enjoined Amber to determine the ownership of the documents based on 32 search terms by 8 August 2018 and provide a list of these documents to the Defendants by 22 August 2018. Thereafter, both counsel were to agree on which documents belonged to Amber and the Defendants respectively, with disputed documents to be listed separately by 5 September 2018. Documents which undisputedly belonged to Amber or the Defendants were to be returned to their rightful owners and deleted/destroyed by the other party by 12 September 2018. Documents which were in the disputed list were to be retained by the Defendants' counsel (and were not to be kept by any party) by 17 September 2018.

21 The Listing Exercise was not completed by the stipulated dates. The Parties informed the Judge of this fact at a further JPTC held on 28 September

2018. In response, the Judge reiterated at this JPTC that Parties were to comply with her previous directions on the Listing Exercise, save that the relevant timelines were extended, and the entire exercise was now to be completed by 16 November 2018.

Background to SUM 484

22 Whilst conducting the Listing Exercise, Amber purportedly formed the view that certain documents showed that D1 and/or D2 had committed offences under the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("**EFMA**"), the Penal Code (Cap 224, 2008 Rev Ed) ("**Penal Code**"), the Prevention of Corruption Act (Cap 241, 1993 Rev Ed), and the Computer Misuse Act (Cap 50A, 2007 Rev Ed) ("**CMA**"). We shall refer to these documents collectively as the "**Documents**".

23 Spurred by the view that the Defendants had committed serious offences and allegedly out of civic-mindedness, Mr Sudesh made reports to the Ministry of Manpower ("**MOM**"), the Corrupt Practices Investigation Bureau ("**CPIB**") and the Singapore Police Force ("**SPF**") (collectively, "**Authorities**") on 31 July 2018, 20 October 2018 and 22 October 2018 respectively. We refer to these reports collectively as the "**Reports**". As it transpired later in July 2019, Mr Sudesh had used ten of the Documents to make his complaints to the Authorities. These reports were made whilst Amber was represented by Dodwell & Co LLC (see [10] above), and in breach of Amber's Search Order Undertaking.

24 Separately, on 29 November 2018, Amber instructed L&L to prepare and lodge reports with law enforcement and regulatory agencies as it believed

that its confidential information had been stolen by the Defendants. In this connection, Amber sent L&L the Reports on 30 November 2018.

25 On 3 December 2018, whilst reviewing the various documents Amber had sent L&L (which included the Reports), an Associate in the L&L team, Mr Chew Zhi Xuan ("**Mr Chew**"), suspected that Amber had disclosed the information contained in the Documents or the Documents themselves to the Authorities without leave of the court and in breach of the Riddick Undertaking. He emailed Mr de Souza to inform him of the same, and suggested "writing to court to seek leave as soon as possible, with retroactive effect if possible, to disclose the aforementioned information" to the Authorities. Mr Chew also suggested that in order for these steps to be taken, L&L would have to be formally appointed as Amber's solicitors in respect of Suit 164. In response, Mr de Souza instructed the L&L team to "halt work" *via* email on the same day, and repeated this instruction in a separate email dated 4 December 2018.

26 On 5 December 2018, the L&L team emailed Mr Sudesh and stated that it was important for them to understand "which of the evidence used for the [Reports] was obtained through the [Search Orders]". This was because the use of such Reports entailed Mr Sudesh having acted in breach of Amber's "undertaking to the Court and immediate steps should be taken to remedy" the breach. Later that same day, Mr Sudesh's position in his reply email was that there "ha[d] been no use of any [Search Order] evidence documents" and the only information reported to the Authorities were "from [his] notes on suspect conversations, suspects involved and open court documents".

27 Next, on 14 December 2018, Amber appointed L&L as its legal representative in Suit 164 (see [10] above). As a result, L&L gained access to

the online data room which stored the documents which were the subject of the Listing Exercise on 18 December 2018.

28 Two days later (*ie*, 20 December 2018), the L&L team formed the view that Amber had in fact made use of some of the Documents in making the Reports in breach of the Riddick Undertaking. Mr Chew wrote to Mr Sudesh on the same day to inform him that the firm would "make an urgent application to the court for Amber to preserve and use the search order documents for the purposes of making criminal reports". There was further correspondence between L&L and Mr Sudesh on the issue of Amber's breach of its Search Order Undertaking between 20 December 2018 and 23 January 2019. This correspondence shed critical light on Mr de Souza's intent behind drafting and filing Sudesh's 29/1/19 Affidavit, and we deal with it in detail below.

29 For present purposes, it suffices to note that the next event of significance was the Pre-Trial Conference held before a Senior Assistant Registrar on 23 January 2019 ("**23/1/19 PTC**"). This arose because the Defendants took the view that Amber had not complied with the Judge's timelines in relation to the Listing Exercise, and wanted a penal notice to be inserted at the end of a draft order for SUM 2169. The Defendants claimed that the addition of a penal notice would incentivise Amber to comply with the timelines of the Listing Exercise, and also provide Amber with notice of the Defendants' intent to enforce the Judge's order through contempt of court proceedings.

30 At the 23/1/19 PTC, Mr de Souza informed the SAR that Amber's persistent failure to comply with the Listing Exercise timelines was due to the "sheer number of documents involved". After hearing parties, the SAR held that a penal notice need not be included in the draft SUM 2169 order to be extracted,

and directed L&L to write to Pereira & Tan LLC to agree to extended timelines for the Listing Exercise, failing which Amber was to apply to the court for an extension of time to comply with the exercise by 11 February 2019. It was not disputed that L&L did not mention Amber's breach of its Search Order Undertaking during the PTC.

31 As directed at the 23/1/19 PTC, L&L wrote a letter to Pereira & Tan LLC dated 25 January 2019 ("**25/1/19 Letter**") to seek its consent for an extension of time for the Listing Exercise to be completed by 5 April 2019. It was also not disputed that this letter made no mention of the fact that various Search Order documents had been used in making the Reports without leave of court.

32 Subsequently, on 29 January 2019, Amber filed SUM 484 *ex parte*. By SUM 484, Amber applied for orders that documents it had obtained under the Search Orders be preserved and it be entitled to use the said documents to make reports to law enforcement agencies. Mr Sudesh affirmed his 29/1/19 Affidavit in support of Amber's application. It was undisputed that Mr de Souza was involved in the preparation of Sudesh's 29/1/19 Affidavit and also personally made final amendments to paragraph 24 thereof.

33 Pereira & Tan LLC replied to the 25/1/19 Letter on 31 January 2019 to agree to the extension of time sought on behalf of Amber. At the time consent was given, Pereira & Tan LLC had no inkling that SUM 484 was filed two days earlier on 29 January 2019.

34 The hearing for SUM 484 was fixed for 13 May 2019. On 1 February 2019, L&L wrote to the court to request "an urgent hearing date" in view of "the urgency of the subject matter of the Summons which involve[d] the potential

commission of criminal offences and which necessitated it being filed on an *ex-parte* basis". It separately wrote to the court on 7 February 2019 to seek its approval of the extended timelines of the Listing Exercises parties had agreed to.

35 In a response conveyed on 8 February 2019, the Judge granted Amber an extension of time to comply with the terms of the Listing Exercise in the terms sought by the parties and in view of the parties' agreement. The Judge also directed on the same day that the SUM 484 hearing date of 13 May 2019 was to stand, and Amber was to serve SUM 484 and Sudesh's 29/1/19 Affidavit on the Defendants by 13 February 2019. In other words, SUM 484 was to be heard *inter partes*.

36 Amber served the documents on the Defendants on 12 February 2019. This was when the Defendants first learnt that Amber had used and intended to use the Documents for the extraneous purpose of making criminal reports to the authorities. Consequently, D1 and D2 filed HC/SUM 1094/2019 ("**SUM 1094**") on 4 March 2019 to set aside the extension of the Listing Exercise timelines the Judge had granted parties on 28 September 2018 (see [21] above). In SUM 1094, D1 and D2 claimed that they were led to believe that Amber genuinely required more time to sort through the documents subject of the Listing Exercise when Amber was in fact stalling for time to review the documents for the purpose of reporting the Defendants to the Authorities. SUM 1094 was nevertheless eventually withdrawn by D1 and D2 on 22 March 2019 with D1 and D2 paying costs of that application to Amber.

37 Separately, Ms Lim filed a reply affidavit in SUM 484 on behalf of herself and UrbanRX on 11 March 2019. In this affidavit, Ms Lim likewise claimed that Amber had acted in bad faith as it had misrepresented to the

Defendants that it needed an extension of time to comply with the Listing Exercise because of the "sheer volume of the task" when it was in fact preoccupied with preparing its application in SUM 484 for leave to disclose the Documents to the Authorities.

38 Mr Sudesh filed a further affidavit dated 25 March 2019 ("**Sudesh's 25/3/19 Affidavit**") to respond to Ms Lim's affidavit of 11 March 2019, and Amber as well as D1 and D2 each filed written submissions on 2 April 2019.

SUM 484

39 The Judge first heard parties on SUM 484 on 8 April 2019. On this occasion, the Judge directed Amber to set out how each document it sought permission to disclose to the Authorities "relate[d] to the specific offences" allegedly committed by the Defendants, and to consider paring down the number of documents Amber "intend[ed] to use to report to the authorities". At the hearing, based on Mr Sudesh's position to L&L, Mr de Souza informed the court that in making the Reports, Amber "ha[d] only quoted certain WhatsApp messages and other information which they gleaned from the documents" and "did not hand over any of the documents to the authorities".

40 Amber filed supplementary written submissions on 29 April 2019, and parties returned for a hearing before the Judge on 24 June 2019. This time, Mr de Souza stated that he "[did not] disagree" that he had advised Amber to take out SUM 484 because it had breached its Search Order Undertaking. He also clarified that Amber was seeking "both retrospective and prospective" leave to disclose the Documents, and he had yet to identify which documents had "already been given to the authorities". The Judge directed Amber to file an

affidavit stating which documents had already been disclosed to the Authorities, and adjourned the matter for decision.

41 Mr Sudesh filed an affidavit on behalf of Amber as directed. This was dated 8 July 2019 ("**Sudesh's 8/7/19 Affidavit**"). In this affidavit, Mr Sudesh explained that he had only used excerpts of ten Search Order documents in support of the Reports he had made to the Authorities.

Judge's decision in SUM 484

42 The Judge rendered her decision in SUM 484 on 30 October 2019, and furnished her full grounds of decision on 19 November 2019. By the earlier of these dates, L&L had ceased to act for Amber as L&L had discharged itself as Amber's solicitors on 4 September 2019. In short, the Judge sanctioned the retrospective and prospective disclosure of the documents pertaining to the Defendants' possible commission of offences under the EFMA ("**EFMA Documents**") to the Authorities. She considered the potential offences under the EFMA to be serious, the materials sought to be disclosed to be cogent, and did not find SUM 484 to be motivated by an improper purpose. The Judge did not grant Amber leave to disclose documents purportedly connected to other offences ("**Other Documents**").

Proceedings before the Court of Appeal

43 Both parties appealed against the Judge's decision. L&L was no longer solicitors on record in Suit 164 and Amber was represented by Allen & Gledhill LLP. The Court of Appeal ("**CA**") dismissed Amber's appeal for leave to disclose the Other Documents, and reversed the Judge's decision to grant Amber retrospective and prospective leave to disclose the EFMA Documents to the Authorities. The CA's judgment may be found at *Lim Suk Ling Priscilla and*

another v Amber Compounding Pharmacy Pte Ltd and another and another appeal and another matter [2020] 2 SLR 912 ("***Amber (CA)***").

44 On the evidence before it, the CA was satisfied that Amber's application in SUM 484 was motivated by an improper purpose. It considered there to be no reason for Amber to have conducted a substantive review of the Search Order documents, much less disclose the Documents to the Authorities. After all, the Judge had directed parties to determine the ownership of the documents subject of the Listing Exercise using search terms. The CA further observed that there should have been no difficulty for Amber to inform the court that the circumstances made it necessary to examine the substance of the Documents before reporting to the authorities if Amber had truly been concerned about the offences allegedly committed by the Defendants. What Amber did instead was to render the disclosure to the authorities a *fait accompli* and thereafter take its chances to convince the court to grant retrospective leave. Amber had furthermore repeatedly represented to the court and the Defendants that its various delays in complying with the Listing Exercise were solely attributable to the magnitude of the exercise. The CA also considered it significant that Amber chose to file SUM 484 *ex parte* even though it was clear that the Defendants were counterparties to the action, and had also sought the Defendants' agreement for a further extension of time to complete the Listing Exercise whilst proceeding with SUM 484 on an *ex parte* basis.

45 Further accounting for the fact that the Defendants had not waived their privilege against self-incrimination, the interest of privacy, and the prejudice that would be occasioned to the Defendants if they were subjected to criminal investigations, the CA denied Amber retrospective and prospective leave to disclose any of the Documents to the Authorities.

The Deputy Registrar's letter

46 In the wake of the CA's decision, the Deputy Registrar of the Supreme Court ("**DR**") referred information touching upon the conduct of Mr de Souza to the Law Society on behalf of the CA under s 85(3)(*a*) of the Legal Profession Act (Cap 161, 2009 Rev Ed) *via* a letter dated 9 September 2020 ("**Referral Letter**").

47 In this letter, the DR informed the Law Society that Amber had obtained search orders against the Defendants in Suit 164 and subsequently breached the undertakings it provided the court to obtain said orders. Vis-à-vis Mr de Souza, the DR highlighted the CA's observations that he had made no mention of Amber's extraneous use of the Documents at the 23/1/19 PTC or in the 25/1/19 Letter but had, during this period, sought an extension of time to comply with the Listing Exercise on the basis of "the sheer number of documents involved". The DR noted that it was not clear whether this extension of time was sought for the purpose of completing the Listing Exercise or for reviewing the Defendants' documents in connection with the reports, and enclosed the CA's judgment for the Law Society's consideration.

Proceedings before the Inquiry Committee

48 An Inquiry Committee ("**IC**") was constituted on 13 January 2021. In its report dated 13 July 2021, the IC found that Mr de Souza's failure to inform the court of Amber's breach of its Search Order Undertaking at the 23/1/19 PTC was not borne of a desire to mislead the court and thus did not amount to a breach of r 9(2)(*a*)(i) of the PCR. In particular, the IC found that Mr de Souza did not disclose Amber's breach of its Search Order Undertaking at the 23/1/19 PTC because he believed that he needed Amber's permission to disclose the

said breach to the court and had yet to obtain such permission as at 23 January 2019.

49 The IC likewise found there to be no evidence that Mr de Souza knowingly misled or attempted to mislead Mr Pereira in breach of rr 9(2)(*a*)(iii) and 9(2)(*a*)(iv) of the PCR by: (a) proceeding with SUM 484 *ex parte*; or (b) by failing to inform Mr Pereira of Amber's breach of its Search Order Undertaking whilst seeking the Defendants' consent to an extension of time to complete the Listing Exercise in the 25/1/19 Letter. The IC considered the former to be unexceptional as Mr de Souza genuinely believed that proceeding with SUM 484 *ex parte* would assist Amber to preserve evidence of the Defendants' alleged crimes. In the IC's view, the latter was also unobjectionable since Amber truly required more time to complete the Listing Exercise.

50 The IC did not find r 9(3)(*b*)(i) of the PCR to be relevant. This provision enjoined a legal practitioner to disclose to the court or opposing counsel every fact, item of evidence, item of information and other matter which the legal practitioner is required by law to disclose in those proceedings to the court or opposing counsel. The IC was unaware of any specific provision of law that required Mr de Souza to inform the court or his opposing counsel of Amber's breach of its Search Order Undertaking. In any event, it accepted that Mr de Souza disclosed Amber's breach of the Search Order Undertaking "when he filed [SUM 484]".

51 Turning to r 10(3)(*a*) of the PCR, the IC did not think that Mr de Souza's failure to attach the Reports to Sudesh's 29/1/19 Affidavit he filed in SUM 484 on behalf of Amber amounted to suppression of evidence within the meaning of r 10(3)(*a*) of the PCR. This was on the basis that neither the Judge nor the Defendants requested for copies of the Reports when SUM 484 was heard.

52 Notwithstanding the above, the IC found that Mr de Souza failed to place his duty to the court above his duty to his clients because he ought, at the very least, to have informed the court at the 23/1/19 PTC that he had "advised [Amber] that an urgent leave application in relation to the seized documents was necessary", and did not do so. In the circumstances, the IC found Mr de Souza guilty of misconduct under s 83(2)(*h*) of the LPA and suggested that he be fined $2,000. The IC did not consider it necessary for a DT to be convened.

Proceedings before the DT

53 The Council of the Law Society disagreed with the IC's findings. Pursuant to s 87(2)(*b*) of the LPA, and on 5 November 2021, it sought the appointment of a disciplinary tribunal to formally investigate Mr de Souza's conduct. The DT was formally appointed on 19 November 2021.

54 In its Statement of Case filed in the proceedings before the DT, the Law Society preferred five charges, each with alternative charges, against Mr de Souza.

(a) The first charge ("**First Charge**") and the first alternative charge related to Mr de Souza knowingly misleading or attempting to mislead the court and opposing counsel at the 23/1/19 PTC by failing to inform them of Amber's breach of its Search Order Undertaking, concealing Amber's intended *ex parte* leave application to remedy the said breach, and requesting an extension of time to comply with court timelines on the basis of voluminous documents when the actual reason for the extension was to review the documents subject of the Search Orders for the purpose of making further reports to the authorities. It alleged a breach of rr 9(2)(*a*)(i) and 9(2)(*a*)(iii) of the PCR.

(b) The second charge ("**Second Charge**") and the second alternative charge pertained to Mr de Souza's failure to disclose to the court at the 23/1/19 PTC, Amber's breach of its Search Order Undertaking and its intended *ex parte* leave application. This was alleged to be in breach of r 9(3)(*b*)(i) of the PCR.

(c) The third charge ("**Third Charge**") and the third alternative charge related to Mr de Souza's failure to disclose Amber's breach of its Search Order Undertaking and its intended *ex parte* leave application to solicitor for the Defendants (*ie*, Pereira & Tan LLC) at the 23/1/19 PTC and when he sought the Defendants' consent for an extension of time for the Listing Exercise on 25 January 2019. This was said to be in breach of r 9(3)(*b*)(i) of the PCR.

(d) The fourth charge ("**Fourth Charge**") and the fourth alternative charge averred that Mr de Souza was a party to and assisted Amber in suppressing evidence in breach of r 10(3)(*a*) of the PCR because he had prepared and filed Sudesh's 29/1/19 Affidavit without exhibiting the Reports nor supporting documents made to certain agencies by Amber which, if exhibited in Sudesh's 29/1/19 Affidavit, would have revealed that Amber had breached its Search Order Undertaking.

(e) Lastly, the fifth charge ("**Fifth Charge**") and the fifth alternative charge alleged that in failing to inform the court at the 23/1/19 PTC of Amber's breach of its Search Order Undertaking and its intended *ex parte* leave application, Mr de Souza allowed his duty to Amber to supersede his duty to the court.

The DT's decision

55 The DT found Mr de Souza guilty only of the Fourth Charge. Before we elaborate on this aspect of the DT's decision, we briefly narrate its findings on the other charges.

56 The DT found that the First Charge raised no case for Mr de Souza to answer. In the DT's view, there was no evidence that Mr de Souza failed to disclose Amber's breach of its Search Order Undertaking or its intent to file the *ex parte* leave application for permission to use the Documents at the 23/1/19 PTC because he wished to buy Amber more time to identify documents which supported that the Defendants had committed criminal offences. On the contrary, upon learning of Amber's potential breach of its Riddick Undertaking on 3 December 2018, Mr de Souza instructed his associates to stop reviewing the documents (see [25] above).

57 In the DT's view, the Second Charge was also not made out. This was because Mr de Souza was not legally obliged to disclose to the court Amber's breach of its Search Order Undertaking or its intended *ex parte* leave application (*ie*, SUM 484) at the 23/1/19 PTC. Neither the terms of the Search Order Undertaking nor the scope of the *Riddick* principle demanded that Mr de Souza immediately disclose Amber's breach to the court. Furthermore, Mr Sudesh was not prepared to admit to any breach at this time.

58 In so far as the DT considered the factual averments subject of the Fifth Charge to be the same as those subject of the Second Charge, it treated the Fifth Charge and fifth alternative charge as second and third alternative charges to the Second Charge. These two charges (*ie*, what were originally the Fifth Charge and the fifth alternative charge) were predicated on a legal practitioner's

paramount duty to the court, which the DT understood as requiring a legal practitioner to make full disclosure of all material facts and circumstances to the court. The DT found there to be no breach of the paramount duty as Amber's breach of the Search Order Undertaking and intended *ex parte* leave application were not facts material to the 23/1/19 PTC. The 23/1/19 PTC largely focussed on whether a penal notice ought to be annexed to the draft order to SUM 2169 (see [29] above).

59 On the Third Charge and its alternative, the DT was "disturbed" by Mr de Souza "seeking consent [for an extension of time to comply with the Listing Exercise from Mr Pereira] while keeping [him] in the dark on a matter that would have affected the giving of consent". That said, it nonetheless held that the Law Society had not proved any requirement in law for Amber to make the relevant disclosures to Pereira & Tan LLC, and dismissed the Third Charge and its alternative on this basis.

60 Returning to the Fourth Charge, whilst the DT was cognisant that this charge concerned the suppression of evidence, it considered that "non-disclosure" would also engage the duty of full and frank ("**F&F**") disclosure (and thus r 9(3)(*b*)(i) of the PCR) as well as a legal practitioner's paramount duty to the court. This stemmed from the DT's view that that the "duty not to suppress evidence is the other side of the coin of the duty to disclose matters required by law as well as a facet of the paramount duty to disclose material facts and not to mislead the Court".

61 With this alleged overlap in the various duties in mind, the DT then treated the "key question" as whether "material facts that should have been the subject of [F&F] disclosure [were] suppressed". In this regard, the DT did not consider the subjective state of mind of a legal practitioner to be relevant. It held

that "once actual knowledge of material facts to be disclosed is proven, the question of whether there was breach of [the] duty to disclose should be considered objectively, and not based on the subjective view of the legal practitioner".

62 On the facts, the DT found that Mr de Souza was aware that Amber had breached its Riddick Undertaking as early as 5 December 2018 and must have known that Amber breached its Search Order Undertaking at or about the same time. Going further, the DT was "of the unequivocal view" that Sudesh's 29/1/19 Affidavit did not make F&F disclosure of Amber's breach of its Search Order Undertaking. Instead, Sudesh's 29/1/19 Affidavit merely sought permission from the court "to use some of the Documents in support of the reports given" and did not disclose that documents and information had already been used. The DT thus concluded that Amber had suppressed evidence in Sudesh's 29/1/19 Affidavit and by filing this affidavit, Mr de Souza was a party to and assisted in Amber's suppression in breach of r 10(3)(*a*) of the PCR. In the circumstances, the Fourth Charge was made out.

63 The DT found that Mr de Souza's breach of r 10(3)(*a*) of the PCR amounted to improper conduct and practice and constituted a breach of sufficient gravity for him to show cause before this court.

The parties' submissions in OA 7

The Law Society's submissions

64 OA 7 only concerned the Fourth Charge. Counsel for the Law Society, Mr Madan Assomull ("**Mr Assomull**"), argued that Mr de Souza had prepared and filed Sudesh's 29/1/19 Affidavit without exhibiting the Reports nor supporting documents because he had intended to assist Amber with

suppressing its breach of its Search Order Undertaking from the court. Mr Assomull accepted that intention was a necessary ingredient of this charge. He relied on: (a) the various changes made to Sudesh's 29/1/19 Affidavit before it was filed; and (b) the failure to exhibit the Reports to Mr Sudesh's affidavit as cumulative evidence of Mr de Souza's intention to assist Mr Sudesh to suppress evidence of Amber's breach of the Search Order Undertaking to bolster Amber's chances of obtaining a favourable outcome in SUM 484. Pausing here, we foreshadow the illogicality of the argument that the suppression of evidence was for the purpose of obtaining a favourable outcome in SUM 484. We will elaborate on this later.

65 In relation to point (a) above, Mr Assomull drew upon the following. First, Mr de Souza's knowledge that Amber had breached its Search Order Undertaking by the time he prepared and filed Sudesh's 29/1/19 Affidavit. Secondly, the fact that the first draft of Sudesh's 29/1/19 Affidavit had unequivocally disclosed Amber's breach of its Search Order Undertaking, but this language was watered down in the final affidavit. Thirdly, that unlike Sudesh's 8/7/19 Affidavit, Sudesh's 29/1/19 Affidavit did not clearly state that Amber had disclosed the Documents to the Authorities in breach of its Search Order Undertaking. Fourthly, that the prayers to SUM 484 made no mention of Amber's breach of its Search Order Undertaking nor Amber's alleged intent of seeking retrospective leave to disclose the Documents to the Authorities by this summons.

66 In the Law Society's view, Mr de Souza's breach of r 10(3)(*a*) of the PCR amounted to improper conduct or practice under s 83(2)(*b*) of the LPA and warranted a suspension of at least four years.

Mr de Souza's submissions

67 Mr de Souza disputed that the Fourth Charge was made out. He first argued that the Fourth Charge was defective as it had "deviated entirely from the substance of concern expressed in the Referral Letter". Mr de Souza's point on defect was that the Referral Letter was concerned that Amber had sought an extension of time to complete the Listing Exercise for an extraneous purpose and did so with the benefit of legal advice whereas the Law Society had altered the gravamen of these observations in accusing Mr de Souza of assisting Amber to suppress the fact that it had breached its Search Order Undertaking *via* Sudesh's 29/1/19 Affidavit.

68 Mr de Souza next contended that the DT's findings were, in any event, unsafe. For one, the DT erroneously conflated the suppression of evidence with a failure to make F&F disclosure. This led the DT to wrongly conclude that the question of whether a legal practitioner had assisted his client suppress evidence was to be answered objectively, without regard to the legal practitioner's subjective intent. It was Mr de Souza's case that a legal practitioner must have intended to assist his client suppress evidence before he may be found to have acted in breach of r 10(3)(*a*) of the PCR.

69 Building on the above, Mr de Souza submitted that he did not intend to assist Amber to suppress evidence in SUM 484 but conversely, intended to disclose Amber's breach of its Search Order Undertaking to the court *via* Sudesh's 29/1/19 Affidavit. This intention was borne out by the contemporaneous internal communications of the L&L team and from inference of fact in that the final version of the drafting language in Sudesh's 29/1/19 Affidavit disclosed Amber's breach of its Search Order Undertaking. Besides the drafting history to Sudesh's 29/1/19 Affidavit, there was evidence of Mr de

Souza's conduct post-filing of SUM 484. In this regard, Mr de Souza pointed to him confirming that Amber had breached its Search Order Undertaking at a PTC on 6 March 2019 and hearings on 8 April 2019 and 24 June 2019 and him disclosing Amber's breach of its Search Order Undertaking in written submissions for SUM 484 dated 2 April 2019. He argued that such conduct showed that he did not intend to assist Amber with suppressing its breach of the Search Order Undertaking in Sudesh's 29/1/19 Affidavit.

Issues to be determined

70 As we saw it, the main issues which arose for this court's determination were as follows:

(a) Whether the Fourth Charge was made out. This involved the resolution of several sub-issues, namely:

(i) Whether intention was a necessary ingredient of the Fourth Charge and if so, whether the DT erred in its analysis by treating the question of intent as irrelevant.

(ii) If intention was a crucial element of the Fourth Charge, whether Mr de Souza's alleged omissions as identified and framed in the Fourth Charge were borne of an intent to assist Amber suppress its breach of the Search Order Undertaking from the court.

(iii) Whether Sudesh's 29/1/19 Affidavit had suppressed Amber's breach of its Search Order Undertaking from the court. Related to this sub-issue is the inquiry into whether Amber's breach of its Search Order Undertaking was made known in paragraph 24 of the Sudesh's 29/1/19 Affidavit and whether it

was material to exhibit Amber's Reports to the Authorities in Sudesh's 29/1/19 Affidavit.

(b) If the Fourth Charge was made out, whether due cause was shown under s 83 of the LPA and if so, the appropriate sanction to be imposed on Mr de Souza.

71 There was also the issue of whether the Fourth Charge was defective because it had deviated from the substance of concern expressed by the DR on behalf of the CA in the Referral Letter. That issue compared to the main issues, and assessed from our overview of OA 7, is quite peripheral despite Mr de Souza's characterisation of his arguments on the alleged defective Fourth Charge as a threshold point. Suffice it to say for now that counsel for Mr de Souza, Mr Tan Chee Meng *SC* ("**Mr Tan**") relied on the Law Society's allegedly unjustified investigations into Mr de Souza's conduct that went beyond the Referral Letter in seeking costs against the Law Society in OA 7. We will address this peripheral issue after dealing with the main issues set out above.

72 We will first explain our reasons for finding that the Fourth Charge was not made out before dealing with the issue of the Referral Letter. Our conclusion that the Fourth Charge was not made out rendered the issue of due cause and sanction moot.

Whether the Fourth Charge was made out

Whether intention was a necessary ingredient of the Fourth Charge and if so, whether the DT erred in its analysis by treating the question of intent as irrelevant

73 We reproduce the Fourth Charge and r 10(3)(*a*) of the PCR, on which the Fourth Charge was based, below:

> **Fourth Charge:**
>
> 4th Charge
>
> You, CHRISTOPHER JAMES DE SOUZA, an Advocate and Solicitor of the Supreme Court are charged that you are guilty of improper conduct or practice as an advocate and solicitor within the meaning of Section 83(2)(b) of the Legal Profession Act (Cap. 161), to wit, by your breach of Rule 10(3)(*a*) of the Legal Profession (Professional Conduct) Rules 2015, in that in HC/S 164/2018 whilst acting as solicitor for the Plaintiffs namely Amber Compounding Pharmacy Pte. Ltd. and Amber Laboratories Pte. Ltd. (collectively called "Amber"), upon your advice on 20 December 2018 to Amber to file an *ex parte* leave application in HC/SUM 484/2019 dated 29 January 2019 to enable Amber to use the documents obtained by them pursuant to HC/ORC 2446/2018 and HC/ORC 2447/2018 both dated 13 April 2018 for the purpose of making reports to law enforcement agencies, you were a party to and assisted Amber in suppressing evidence which you were able to prevent in that you prepared and filed and Affidavit of Samuel Sudesh Thaddaeus affirmed on 28 January 2019 which did not exhibit reports nor its supporting documents made to the Ministry of Manpower, the Corrupt Practices Investigation Bureau and the Singapore Police Force on 31 July 2018, 20 October 2018 and 22 October 2018 respectively which reports and supporting documents if exhibited would have revealed that Amber had breached its undertakings given pursuant to HC/ORC 2446/2018 and HC/ORC 2447/2018 both dated 13 April 2018.
>
> **Rule 10(3)(*a*) of the PCR:**
>
> **Responsibility for client's conduct**
>
> …
>
> (3) To the extent that a legal practitioner is able, the legal practitioner must prevent his or her client from, must not be a party to, and must not assist the client in, doing either or both of the following:

(*a*) suppressing evidence;

…

74 It was clear to us that intention was a necessary ingredient of the Fourth Charge. Indeed, at the hearing before us, Mr Assomull conceded this point.

75 The Fourth Charge was highly specific. It accused Mr de Souza of both being a party to and assisting Amber to suppress its breach of its Search Order Undertaking from the court. A high degree of participation in Amber's suppression of evidence was alleged on Mr de Souza's part. Moreover, Mr de Souza was said to have been a party to and assisted Amber in its suppression of evidence because he had failed to exhibit the Reports and the relevant supporting documents in Sudesh's 29/1/19 Affidavit. It was the Law Society's case that Mr de Souza was aware of Amber's breach of its Search Order Undertaking by the time he prepared and filed Sudesh's 29/1/19 Affidavit and further, chose to omit the Reports and the supporting documents from Sudesh's 29/1/19 Affidavit because he wanted to bolster Amber's chances of obtaining an order in terms in SUM 484. Such alleged conduct was inherently goal-oriented and intentional.

76 We were therefore satisfied that the Law Society had to not only prove that Amber had suppressed its breach of its Search Order Undertaking from the court because it did not exhibit the Reports nor supporting documents to Sudesh's 29/1/19 Affidavit, but also that Mr de Souza omitted these documents from Sudesh's 29/1/19 Affidavit because he had intended to assist Amber suppress the breach from the court in order to obtain a favourable outcome for Amber. The latter inquiry focused on the subjective intention of Mr de Souza, as objectively ascertained.

77 In our view, the DT erred in its analysis of the Fourth Charge by treating the question of intent as irrelevant. Its analysis of the Fourth Charge was incomplete. The DT held that once a legal practitioner had actual knowledge that material facts had to be disclosed to the court and judged objectively, these facts were not disclosed, a legal practitioner acts in breach of r 10(3)(*a*) of the PCR. To the DT, there was no need to inquire into a legal practitioner's viewpoint on how to present the material facts, and it was no defence that a legal practitioner "genuinely thought that he had discharged his duty, even though objectively he ha[d] not". In our view, having found that the Reports were not exhibited, the DT concluded that Sudesh's 29/1/19 Affidavit failed to disclose Amber's breach of its Search Order Undertaking. The DT ought to have considered whether the non-disclosure of the Reports as exhibits was intentionally facilitated by Mr de Souza.

78 We found that the DT fell into this error by conflating a legal practitioner's duty not to be a party to and assist his client to suppress evidence from the court under r 10(3)(*a*) of the PCR with his duty to disclose to the court every fact, item of evidence, item of information and other matter which he is required by law to disclose in those proceedings to the court under r 9(3)(*b*)(i) of the PCR, which the DT considered had in turn embodied the common law duty to make F&F disclosure especially in *ex parte* applications. These are three distinct legal duties. Even if there were a breach of the latter two duties, it did not lead to the inevitable result that r 10(3)(*a*) of the PCR was also breached.

79 To fully appreciate the DT's error, we set out in full the crucial portions of its reasoning below:

> 80. The Fourth Charge is premised on the breach of duty not to suppress evidence, set out in Rule 10(3)(a) of the PCR. We note that the requirement of full and frank disclosure is a requirement of law and Rule 9(3)(b)(i) would also be engaged, if

> nondisclosure is made out. Given the materiality of the nature and extent of the prior breaches in an application for retrospective leave, we are of the view that a breach of the paramount duty to the Court will also be engaged, if non-disclosure is made out. We are acutely conscious that the Respondent is answering to specific charges and that we should not stray beyond the four corners of the Fourth Charge. However, we are of the view that the various rules in the PCR and common law rules elucidated by the courts from time to time in relation to the duty of disclosure are different but overlapping expressions of the same core duty. In this case, the averment in the Fourth Charge and its alternative falls with the overlapping area of all three duties. The duty not to suppress evidence is the other side of the coin of the duty to disclose matters required by law as well as a facet of the paramount duty to disclose material facts and not to mislead the Court.
>
> …
>
> 85. The key question in relation to the Fourth Charge is whether the eventual version of paragraph [24] of the supporting affidavit satisfied the requirement of full and frank disclosure. Put another way, were material facts that should have been the subject of full and frank disclosure suppressed?
>
> …
>
> 87. After full consideration of (i) the various drafts of the supporting affidavit, (ii) the final version of the supporting affidavit, (iii) the Respondent's explanation set out in [86] above, and (iv) the Respondent's Reply Submissions, we are of the unequivocal view that full and frank disclosure of the prior breaches of the implied *Riddick* undertaking and the express undertaking to the Court was not made in the supporting affidavit. The words "to use some of the Documents in support of the reports given" cannot by any stretch of imagination be taken to mean that there has been full and frank disclosure of the fact that documents and information had already been used and/or disclosed. *Full and frank disclosure would have required that the specific documents and information used be identified, and the occasion at which and the authorities to whom such documents and information was given to be specifically stated.*
>
> …
>
> 89. We have looked at [Sudesh's 29/1/19 Affidavit] (as eventually filed) very carefully and objectively and we are unable to accept the Respondent's explanation as to how and why the duty to make full and frank disclosure has been fulfilled.
>
> 90. We are of the view that the failure to make such full and frank disclosure amounted to suppression of evidence by

> Amber, and by filing the supporting affidavit, the Respondent was a party to and assisted in such suppression, contrary to Rule 10(3)(*a*) of the PCR. We are further of the view that the duty to make full and frank disclosure was a requirement of law, and that the Respondent's failure to do so was in breach of Rule 9(3)(*b*)(i). We are further of the view that, in the circumstances of this case, in particular the Respondent's clear awareness of the importance of disclosure of the prior breaches by Amber, that the failure to make disclosure is a breach of the Respondent's paramount duty to the Court to ensure that all material facts were placed before the Court.
>
> …
>
> [emphasis in original omitted; emphasis added in italics]

80 The DT started off on the wrong foot. It was wrong for it to have considered at paragraph 80 that rr 9(3)(*b*) and 10(3)(*a*) of the PCR and the common law duty of F&F disclosure were "different but overlapping expressions of the same core duty". It was equally erroneous for it to have concluded that the averment in the Fourth Charge fell within "the overlapping area of all three duties".

81 These three duties overlap only in an evidential sense. By this we mean that a breach of the duty to make F&F disclosure or a breach of r 9(3)(*b*)(i) of the PCR may make clear that material facts have not been disclosed to the court and thereby ground a finding of suppression. But it did not follow that the duties overlap in the substantive sense in that the legal consequence is that a breach of one duty necessarily entailed a breach of another.

82 On the contrary, clear water exists between the various duties. They serve different functions. The duty to make F&F disclosure is principally relevant in the context of *ex parte* civil applications. Such applications, by definition, proceed in the absence of one party and it is therefore incumbent on the party applying for relief to candidly disclose all material information to the court. Only then is the court able to properly and fairly deliberate on the merits

of the application (*Tecnomar & Associated Ptd Ltd v SBM Offshore NV* [2021] SGCA 36 at [15]). It is for this reason that the court, in adjudicating on whether there has been a breach of the duty to make F&F disclosure, is agnostic as to the reasons why a party has not made F&F disclosure of material facts. The very fact that a party has not made F&F disclosure of material facts occasions a breach of the duty. His reasons for failing to comply with the duty to make F&F disclosure (*eg*, that he was inadvertent, careless, or intended to mislead the court) are only relevant to the secondary question of whether a court should, notwithstanding the breach of his duty of F&F disclosure, nevertheless grant him the reliefs he seeks by way of the *ex parte* application (*The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("***Vasiliy Golovnin***") at [108]).

83 The function of r 10(3)(*a*) of the PCR as framed in the Fourth Charge is, however, very different. Fundamentally, the rule underscores that Mr de Souza stood in a professional and independent role in his lawyer-client relationship with Amber and thus proscribes him from conniving with Amber in the latter's misconduct. As explained at [75]–[76] above, it was inherent in this proscription that Mr de Souza must have subjectively intended to assist Amber with suppressing evidence from the court before he may be said to fallen foul of the Fourth Charge.

84 Indeed, it is because the obligation to make F&F disclosure and r 10(3)(*a*) of the PCR serve different functions and arise in different contexts that they embody different standards of proof. It suffices in the civil context and where an allegation of breach of the requirement of F&F disclosure is made for a party to show on a balance of probabilities that there has been non-disclosure of material facts. Contrastingly, in so far as disciplinary proceedings could lead to the imposition of punitive sanctions, they are quasi-criminal in nature, and the Law Society must prove each and every element of the charge beyond a

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

85 The DT began its analysis by conflating the substance of the Fourth Charge with the duty to make F&F disclosure and in so doing, erroneously concluded at paragraph 85 that the "key question in relation to the Fourth Charge is whether the eventual version of paragraph [24] [in Sudesh's 29/1/19 Affidavit] satisfied the requirement of full and frank disclosure. *Put another way, were material facts that should have been the subject of full and frank disclosure suppressed?*" [emphasis added]. We note that the DT's analysis in paragraph 85 echoed its oral exchange with Mr Tan in the proceedings below. In dealing with Mr Tan's oral submission that the charges raised no case for Mr de Souza to answer, the DT observed that the Fourth Charge concerned "an *ex parte* application with the duty of full and frank disclosure" and suggested that it was open to Mr Tan to "argue that the breach of the duty of full and frank disclosure [was nevertheless] not misconduct". As mentioned, the DT's focus as seen from paragraph 87 of its report is that the Reports were material and should have been exhibited to satisfy the duty of F&F disclosure.

86 It is evident from [77] and [81]–[84] above that whether Sudesh's 29/1/19 Affidavit had made F&F disclosure of Amber's breach of its Search Order Undertaking was not and could not be the key question in the context of the Fourth Charge for two reasons.

87 First, material facts have to be fully disclosed to the court in the context of civil applications which engage the doctrine of F&F disclosure because the applicant is, in such cases, seeking relief from the court on the strength of its word and in the absence of its opponent (see [82] above). But whether disclosure of Amber's breach of its Search Order Undertaking is full is beside the point in

the context of the Fourth Charge given the manner in which the charge was framed. The Fourth Charge alleged that Mr de Souza was a party to and assisted Amber in suppressing evidence from the court because he had failed to exhibit the Reports and supporting documents to Sudesh's 29/1/19 Affidavit and these Reports and supporting documents, if exhibited, "would have revealed that Amber had breached its [Search Order Undertaking]" (see [73] above). The focus of the Fourth Charge was whether the *fact* of Amber's breach of their Search Order Undertaking had been suppressed by Mr de Souza in breach of r 10(3)(*a*) of the PCR, and this question arose for the DT's determination in disciplinary proceedings distinct from SUM 484. SUM 484 was contextually the backdrop to but not the gravamen of the Fourth Charge, and its attendant requirement of F&F disclosure therefore should not be taken to animate the Fourth Charge. Put differently, any contention that the Fourth Charge had to be interpreted with reference to "the nature, purpose and manner of SUM 484" (see [184] below) such that it was also imperative for Mr de Souza to disclose the extent of Amber's breach of its Search Order Undertaking if he were to rebut the non-disclosure element of the Fourth Charge (see [171]–[173], [181], [187] below) is not an unassailable contention. In our view, such a wider interpretation is not borne out by the language of the Fourth Charge. In so far as the Fourth Charge concludes with the allegation that Mr de Souza had suppressed Amber's breach of its Search Order Undertaking and makes no specific reference to non-disclosure of the extent of Amber's breach, its crux must be taken to be Mr de Souza's alleged suppression of the fact of Amber's breach. We were hesitant to read or even imply from the language of the Fourth Charge the need to disclose the extent of Amber's breach of its Search Order Undertaking into the charge given the quasi-criminal nature of disciplinary proceedings. We have alluded to the different standards of proof applicable to SUM 484 and a charge brought against a solicitor for misconduct (see [84] above). All said, at the end of the

day, it was incumbent on the Law Society to frame the charge against Mr de Souza. If the Law Society wished to charge Mr de Souza with suppressing the extent of Amber's breach of its Search Order Undertaking, it behoved it to expressly say so. It, however, framed the Fourth Charge narrowly and thereby constrained us to read it in a narrow manner. In our view, if Amber's prior use of the information was revealed and this was not in any way misleading due to the economy of words used, it is difficult to see where and how the legal elements of suppression as set out in r 10(3)(*a*) of the PCR fit in. Once this threshold is crossed, the allegation of suppression as set out in the Fourth Charge is effectively rebutted.

88 Secondly, a breach of the duty to make F&F disclosure may be indicative of suppression but it does not *ipso facto* amount to it and thereby constitute misconduct under r 10(3)(*a*) of the PCR. An inadvertent or negligent failure to disclose material facts to the court amounts to a breach of the duty to make F&F disclosure, but it does not and cannot ground a breach of r 10(3)(*a*) of the PCR as it was framed in the Fourth Charge. Assuming for the moment that there was non-disclosure of Amber's breach of its Search Order Undertaking in Sudesh's 29/1/19 Affidavit when objectively construed, it was imperative for the DT to further consider why there was non-disclosure, and it did not do so at any point in its decision.

89 There was one final point that fortified our conclusion that the DT had erred in its analysis of the Fourth Charge by treating the question of intent as irrelevant. The DT did not mention the beyond reasonable doubt standard or set out the text of r 10(3)(*a*) of the PCR. We do not mean to say that a disciplinary tribunal must invariably recite the applicable standard of proof or reproduce the relevant provision of the PCR in its written grounds of decision. Nor that a failure to do so would constitute evidence that it had incorrectly apprised itself

of the material legal issues. Rather, in the context of the present case, we considered this omission as pointing to the DT having misdirected itself in law and having had primary regard to the duty to make F&F disclosure alone when adjudicating on the Fourth Charge. We came to this conclusion in light of the DT's own professed understanding of the relationship between r 10(3)(*a*), r 9(3)(*b*)(i) of the PCR and the duty to make F&F disclosure, and the fact that it had extensively dealt with r 9(3)(*b*)(i) of the PCR in dismissing the Second, Third and Fifth Charges before ruling on the Fourth Charge.

90 In the round, we were amply satisfied that the DT had erred in its analysis of the Fourth Charge. In determining if Mr de Souza was a party to and assisted Amber to suppress its breach of its Search Order Undertaking from the court, the DT ought to have, but did not consider whether any non-disclosure of the said breach was intentionally facilitated by Mr de Souza. At all times, it erroneously used a failure to make F&F disclosure as a proxy for the suppression of evidence.

Whether Mr de Souza's alleged omissions as identified and framed in the Fourth Charge were borne of an intent to assist Amber suppress its breach of the Search Order Undertaking from the court

91 Moving on, we further found there to be no evidence that Mr de Souza intended to assist Amber to suppress its breach of the Search Order Undertaking from the court by the alleged omissions identified and framed in the Fourth Charge. On the contrary, we were satisfied that Mr de Souza and the L&L team consistently intended to disclose Amber's breach of its Search Order Undertaking to the court and stuck to this intention in the face of an intransigent client.

92 In our view, the best evidence of Mr de Souza's intention behind his drafting and filing of Sudesh's 29/1/19 Affidavit was the drafting history to the affidavit. How this affidavit came into being and the contemporaneous emails exchanged within the L&L team and between the L&L team and Mr Sudesh on the wording of the affidavit evinced that Mr de Souza had consistently intended to disclose Amber's breach of its Search Order Undertaking to the court *via* Sudesh's 29/1/19 Affidavit, and believed that he had effectively done so.

93 It must be remembered that L&L took out SUM 484 and drafted Sudesh's 29/1/19 Affidavit after it had suspected Amber of using the Documents to make the Reports in breach of its Riddick Undertaking (see [25]–[28] above). Pertinently, the email correspondence within L&L and between L&L and Mr Sudesh from 3 December 2018 to 4 January 2019 showed that Mr de Souza (and the L&L team) were alive to Amber's breach of its Riddick Undertaking by the time it drafted Sudesh's 29/1/19 Affidavit and intended to make this fact known to the court through this affidavit. During this period of time, the L&L team informed Mr Sudesh that Amber required "approval from [the] court" before it could disclose Search Order documents to the Authorities and rebuffed his request for the L&L team to independently put together legal reports based on the Search Order documents as well as submit these to the Authorities.

94 Mr de Souza's intention to disclose Amber's breach of its Search Order Undertaking to the court persisted throughout the entire drafting process of Sudesh's 29/1/19 Affidavit and up to the time L&L filed this affidavit with the court. Above all, given Mr Sudesh's attitude on the matter, Mr de Souza and the L&L team could not be sure that Mr Sudesh would accept Mr de Souza's amendments made to paragraph 24 as the final version of that affidavit until Mr Sudesh affirmed his affidavit. This is a significant point in our analysis that we

will elaborate on below. We first set out this drafting history in detail below as it made clear Mr de Souza's intentions.

95 On 11 January 2019, L&L emailed Mr Sudesh the first draft of Sudesh's 29/1/19 Affidavit ("**First Draft**") which it had drafted. The First Draft included the following paragraph ("**Initial Paragraph**"):

> 36. I wish to inform that due to my ignorance of the law, I had informed the Ministry of Manpower and the CPIB of the above-mentioned potential offences by the Defendants. This was prior to receiving advice from Messrs Lee & Lee recently that in law, the Plaintiffs have an obligation not to use the Documents for purposes other than those related to the present suit unless they have obtained a court order. I therefore wish to apologise to this Honourable Court for not abiding by the obligation.

96 Mr Sudesh responded on 12 January 2019 with his comments (the "**Second Draft**"). In the Second Draft, Mr Sudesh amended the Initial Paragraph to remove the apology and the statement that he had informed MOM and CPIB of potential criminal offences committed by the Defendants which L&L had included. His version of paragraph 36 read as follows:

> 36. I am advised that in order for my solicitors to release the relevant documents from the search order to the Ministry of Manpower and the relevant authorities, a court order must be obtained.

97 On 17 January 2019, L&L circulated a revised draft (the "**Third Draft**"). L&L reinstated the Initial Paragraph as paragraph 24 in the **Third Draft**. Importantly, in reinstating the Initial Paragraph in the Third Draft, L&L left a comment at paragraph 24 which stated that, "[i]n [L&L's] view, it is important that we disclose the fact that some documents have already been disclosed to MoM and CPIB, as there is a duty to make full and frank disclosure to the court" and that L&L "strongly advise[d] that the original wording be retained".

98 Mr Sudesh responded on 18 January 2019. He took issue with the Third Draft because it led to him "apologi[s]ing to the court for what [he considered to be] a legitimate stand on the matter as far as criminal activity [is not meant] to be hidden/concealed just for Riddick". Mr Sudesh informed L&L that his stance on paragraph 24 in the Third Draft was to "remove it in entirety, to put it across with forward-looking statements … or put across [his] full argument for why [he] did what [he] did" ("**Fourth Draft**").

99 L&L responded on 22 January 2019 with a revised draft (the "**Fifth Draft**"). Paragraph 24 of the Fifth Draft read:

> 24. Aware that the Defendants had potentially committed serious offences, I felt it a matter of duty to report their conduct to the authorities – in this case the Ministry of Manpower ("**MoM**"), Corrupt Practices Investigation Bureau and the Singapore Police Force. I did so with no ulterior motive – indeed my only motivation was for the wrongs to be investigated. Now, having recently instructed Messrs Lee & Lee, I was informed and advised that it would be best – indeed, necessary – for me to seek leave of the Honourable Court to use some of the Documents in support of the reports given, or further reports to be made. I therefore make this application, which was taken out promptly upon instructing and receiving advice from Messrs Lee & Lee.
>
> **Commented [L&L1]:** In our view, it is important that we disclose the fact that some documents have already been disclosed to MoM and CPIB, as there is a duty to make full and frank disclosure to the court. As such, we strongly advise that the original wording be retained.

100 Paragraph 24 in the Fifth Draft differed from the Initial Paragraph in that it no longer contained the apology from Mr Sudesh to the court for Amber failing to abide by its obligation not to use the Documents for extraneous purposes. That said, paragraph 24 in the Fifth Draft was accompanied by the comment set out in the extract at [99] above. The Fifth Draft was sent to Mr Sudesh under cover of an email in which L&L claimed to have reworded

paragraph 24 in the Fifth Draft to make "the same point [as before] but in a different tone".

101 Mr Sudesh replied on 22 January 2019 with further amendments (the "**Sixth Draft**"). He amended paragraph 24 to state that he had made reports to the Authorities "without sharing any of the documents found in the attachments to [his] affidavit". This was because he wanted to avoid paragraphs "23/24 becoming some kind of focal point of unnecessary contention with the court" and the main point of the affidavit was "to be forward-looking". Paragraph 24 of the Sixth Draft read:

> 24. Aware that the Defendants had likely ~~potentially~~ committed serious offences, I took ~~felt~~ it as a matter of duty to report crime and criminal ~~their~~ conduct to the authorities – in this case the Ministry of Manpower ("**MoM**"), Corrupt Practices Investigation Bureau and the Singapore Police Force. I did so in confidence/privilege without sharing any of the documents found in the attachments to this affidavit, my only motivation being ~~with no ulterior motive – indeed, my only motivation~~ for crime ~~the wrongs~~ to be investigated so any instance of it would not fester, propagate or endanger. Now, having recently instructed Messrs Lee & Lee, I was informed and advised ~~that it would be best – indeed, necessary – for me~~ to seek leave of the Honourable Court to further allow law enforcement authorities access to ~~use~~ some of the Documents in support of the reports given, or further reports to be made. I therefore make this application, which was taken out promptly upon instructing and receiving advice from, Messrs Lee & Lee.

102 Whilst Mr Chew took the view that the Sixth Draft could be accepted as Mr Sudesh's amendments did "not detract from the overall message that we are trying to get across", Mr de Souza replied to Mr Chew to state that he was "not in favour of some of [Mr Sudesh's] amendments and [would] provide a revised version". On 23 January 2019, he asked the L&L team for their views on whether paragraph 24 in the Sixth Draft was accurate, and in particular because he thought that Mr Sudesh "had already disclosed to MOM/CPIB/Police some of the [documents] obtained through the search order" and Mr Sudesh's

amendments would therefore give the court "the wrong impression". Mr Basil Lee of L&L ("**Mr Lee**") informed Mr de Souza that Mr Sudesh was "insistent that none of the doc[uments] were disclosed although it is quite apparent that they were". The last two paragraphs of Mr Lee's email to Mr de Souza stated:

> In any case, even the disclosure of information contained in documents (without disclosing the documents themselves) would be a breach of the implied undertaking, so there is no point in playing around with semantics.
>
> I think we have to make clear to client that he has to be fully forthright to Court in his affidavit.

103 Significantly, Mr de Souza replied to say "Yes, agree".

104 Mr de Souza also stated that he would "make the necessary amendments", which later materialised as paragraph 24 of Sudesh's 29/1/19 Affidavit. This stated:

> 24. Aware that the Defendants had likely committed serious offences, I regarded it as a matter of duty to report possible criminal conduct to the authorities – in this case the Ministry of Manpower ("**MoM**"), Corrupt Practices Investigation Bureau and the Singapore Police Force. My motivation for doing so was to deter any further wrongdoing from being committed and reduce the chance that other innocent parties would suffer detriment. Now, having recently instructed Messrs Lee & Lee, I was informed and advised that it would be best – indeed, necessary – for me to seek leave of the Honourable Court to use some of the Documents in support of the reports given, or further reports to be made. I therefore make this application, which was taken out promptly upon instructing, and receiving advice from, Messrs Lee & Lee.

105 Therefore, based on the drafting history to Sudesh's 29/1/19 Affidavit and the comments exchanged within the L&L team and between L&L and Mr Sudesh, it was clear to us that Mr de Souza's intent when he drafted Sudesh's 29/1/19 Affidavit was to disclose Amber's breach of its Search Order Undertaking to the court.

106 The drafting history to Sudesh's 29/1/19 Affidavit was highly significant in one other aspect. It revealed that the drafting process was a team effort on L&L's end. Mr Tan Tee Jim *SC* (who formed part of the L&L team representing Amber in Suit 164) attested before the DT that "he [had] looked at the draft affidavit that was already prepared". It was also Mr Chew who had sent the finalised affidavit to Mr Sudesh *via* email (copying the other L&L team members) for his signature on 25 January 2019. Moreover, members of the L&L team attested before the DT that L&L always intended to disclose Amber's breach of its Search Order Undertaking to the court and believed that L&L had effectively made such disclosure *via* Sudesh's 29/1/19 Affidavit.

107 In these circumstances, Mr Assomull's submission that Mr de Souza intended to assist Amber suppress evidence from the court to boost Amber's chances of obtaining an order in terms in SUM 484 must have meant that either the entire L&L team was in on Amber's ploy to conceal evidence from the court or that Mr de Souza went off on a frolic of his own to assist Amber in its deception on the court. It was telling that Mr Assomull did not meaningfully answer this question when we put it to him at the oral hearing. We found that he did not do so because there was simply no evidence to support either hypothesis. On the contrary, the drafting history to Sudesh's 29/1/19 Affidavit revealed that the entire L&L team intended to disclose Amber's breach of its Search Order Undertaking to the court *via* SUM 484, never wavered in this advice to Mr Sudesh, and believed they had effectively disclosed the said breach to the court through the said affidavit.

108 Consistent with the above, Mr de Souza attested that at the time of the 23/1/19 PTC, he was not certain that Mr Sudesh would agree to the filing of SUM 484. We accepted Mr de Souza's evidence in this regard as it was borne out by the drafting history to Sudesh's 29/1/19 Affidavit, and also went

unchallenged by the Law Society. Furthermore, whilst Mr de Souza had raised this point to disprove that SUM 484 was a smokescreen to buy Amber more time to review the Search Order documents and to explain why he did not mention the prior breach of the Search Order Undertaking at the 23/1/2019 PTC, we found it to be also relevant to the question of whether he had intended to assist Amber suppress evidence in Sudesh's 29/1/19 Affidavit.

109 In support of his argument that Mr de Souza bore the requisite intent to assist Amber to suppress its breach of the Search Order Undertaking from the court, Mr Assomull relied on the CA's observations at [96] of *Amber (CA)* that "Amber did not disclose any of the [Reports]" in its various affidavits and that "[s]uch reports would have revealed what was in fact disclosed to the authorities". Mr Assomull's argument was that the very fact that the Reports were not exhibited to Sudesh's 29/1/19 Affidavit was significant, and spoke to Mr de Souza's intent to assist Amber suppress evidence from the court.

110 We found reliance on [96] of *Amber (CA)* to be misguided. In our view, the context in which the CA had made these observations had to be borne in mind. The CA was concerned that SUM 484 was a smokescreen for Amber to buy itself more time to review the documents subject of the Listing Exercise for the purpose of making reports to the Authorities. It had basis to be so concerned. Amber had not mentioned the exact date on which the Reports were made and had not disclosed the Reports to the court even when the appeal was heard. It had failed to inform Mr Pereira and the court of its breach of the Search Order Undertaking even as it sought extensions of time to complete the Listing Exercise and represented to the court that the various extensions were necessitated by the sheer number of documents. It had also elected to file SUM 484 *ex parte* at a time it was clear that the Defendants were the counterparties to Suit 164. Based on the evidence before it, the CA suspected that SUM 484

was a smokescreen in the terms described above, and this was why Amber did not exhibit the Reports in Sudesh's 29/1/19 Affidavit. That this was the CA's concern was underscored by the Referral Letter in which the DR informed the Law Society (on behalf of the CA) that it was "not clear whether the time extension was requested for the stated purpose of completing the Listing Exercise or for reviewing [the Defendants'] documents in connection with the Reports and, if it is the latter, whether Mr de Souza was privy to it".

111 If the relevant concern was that SUM 484 was Amber's ploy for more time to review the Search Order documents, the fact that no Reports were annexed to Sudesh's 29/1/19 Affidavit naturally assumed especial importance. However, the DT correctly found that SUM 484 was not taken out for this improper purpose. Indeed, the DT said that "[i]t is also not disputed that Mr de Souza had requested for an extension of time for Amber to comply with the timelines of the Listing Exercise on the basis of the sheer number of documents". Once this was appreciated, Mr de Souza's omission to annex the Reports to Sudesh's 29/1/19 Affidavit diminished in significance and was not, in itself, strong evidence that he had intended to assist Amber suppress its breach of the Search Order Undertaking from the court.

112 Indeed, none of the parties to SUM 484 treated the non-annexation of the Reports to Sudesh's 29/1/19 Affidavit as significant. The Defendants did not ask for copies of the Reports after they had learnt of Amber's breach of its Search Order Undertaking, and the Reports were also not exhibited in Sudesh's 8/7/19 Affidavit. We also accepted Mr de Souza's claim that it never crossed the L&L team's mind to exhibit the Reports to Sudesh's 29/1/19 Affidavit. Moreover, the case law has repeatedly emphasised that the place to disclose the facts, both favourable and adverse, is in the body of the affidavit and not in the exhibits (see, *eg*, *Vasiliy Golovnin* at [93]–[94]). This is bearing in mind that the

exhibits to an affidavit are often voluminous, as in this case where the exhibits to Sudesh's 29/1/19 Affidavit totalled approximately 2,029 pages. Accordingly, we were unpersuaded that Mr de Souza's failure to append the Reports to Sudesh's 29/1/19 Affidavit was in and of itself indicative that he intended to assist Amber suppress its breach of the Search Order Undertaking from the court.

113 There were two other points that arose from the Law Society's reliance on [96] of *Amber (CA)* to show that Mr de Souza intended to assist Amber suppress its breach of the Search Order Undertaking from the court.

114 One, in so far as the DT rejected the notion that SUM 484 was a ploy to buy Amber more time to review the Search Order documents, Mr Assomull could no longer rely on this argument to explain why Mr de Souza was a party to Amber's suppression of evidence, and had to instead treat SUM 484 as a genuine application. In our view, this compelled him to run the argument that Mr de Souza assisted Amber to suppress evidence from the court because he wanted to boost Amber's chances of obtaining an order in terms in SUM 484 (see [75] above).

115 This argument was unpersuasive. It was clear to us that Mr de Souza had, at the very least, alluded to Amber's breach of its Search Order Undertaking in Sudesh's 29/1/19 Affidavit. In fact, for the reasons that we set out later, we found that Mr de Souza had disclosed to the court Amber's use of the information contained in the Documents in breach of its Search Order Undertaking in this affidavit (see [133]–[139] below). This was fatal to the Law Society's case theory. If Mr de Souza's goal was to help Amber secure an order in terms in SUM 484, there would have been no reason for him to have even alluded to Amber's breach in Sudesh's 29/1/19 Affidavit whilst not making

F&F disclosure of the breach. In so doing, Mr de Souza would have furnished the court with sufficient basis to surmise that Amber had not been entirely forthcoming about its breach of its Search Order Undertaking in SUM 484, and consequently dismiss Amber's application for want of F&F disclosure. If anything, Mr de Souza's draft of Sudesh's 29/1/19 Affidavit undermined rather than bolstered Amber's chances of securing an order in terms in SUM 484. Mr Assomull's contention was plainly illogical.

116 Two, the DT ought to have been alive to the logical implications of its conclusion that SUM 484 was not a smokescreen for Amber to buy itself more time to review the documents subject of the Listing Exercise when it dealt with the Fourth Charge. Once it found that SUM 484 was a genuine application and dismissed the other four charges on this basis, the complexion of the Fourth Charge changed. With the putative smokescreen out of the picture, there was no longer any cogent reason put forth by the Law Society as to why Mr de Souza would have assisted Amber suppress its breach of the Search Order Undertaking from the court.

117 For completeness, we deal with the remaining points Mr Assomull relied on to contend that Mr de Souza intended to assist Amber with suppressing evidence in SUM 484. Mr Assomull suggested that Mr de Souza filing SUM 484 *ex parte* was redolent of dishonesty. In support of this argument, he relied upon the CA's observation at [99] of *Amber (CA)* that it was significant that Amber chose to file SUM 484 *ex parte* at a time it was clear that the Defendants were counterparties to Suit 164 (see [44] above), and the fact that O 29 r 2 of the Rules of Court (Cap 322, r 5, 2014 Rev Ed) ("**ROC 2014**") purportedly provided that an application for detention, custody or preservation of any property must be made by *inter partes* summons.

118 We found this submission to be unmeritorious. We reiterate that the CA's observations of Amber's conduct were made in a particular context and with the specific concern of SUM 484 being a smokescreen for Amber to search for incriminating documents in mind (see [110] above). Shorn of this context, the insinuation levelled at the fact that SUM 484 was initially filed as an *ex parte* application fell away. Indeed, the evidence showed that rightly or wrongly, Mr de Souza genuinely believed that filing SUM 484 *ex parte* was important to the preservation of evidence in light of the Defendants' propensity to conceal documentary evidence. It was not to assist Amber's suppress its breach of the Search Order Undertaking in Sudesh's 29/1/19 Affidavit. The Law Society did not challenge Mr de Souza's evidence that Amber did not instruct L&L to file SUM 484 *ex parte*. Mr Tan Tee Jim had also attested that it was a considered decision on the part of the L&L team to proceed in this manner as the team was concerned that the Defendants would conceal evidence if they learnt of SUM 484. As for Mr Assomull's reliance on O 29 r 2 of the ROC 2014, this rule did *not* state on terms that an application for detention, custody or preservation of any property "must be made *inter partes*". For this proposition, Mr Assomull had relied on paragraph 29/2/3 of Singapore Court Practice 2017 (LexisNexis, 2017) where Mr Pinsler *SC* commented that proceedings under O 29 r 2 of the ROC 2014 "must be *inter partes*" as "the application must be made by summons". However, we need only say that this comment is not necessarily correct.

119 Turning to Mr de Souza's conduct at the 23/1/19 PTC, we did not consider his failure to then inform the court of Amber's breach of its Search Order Undertaking to assist the Law Society's case. Again, this omission caught the CA's attention because of its concern that SUM 484 was Amber's ploy to secure itself more time to obtain more information about the criminal conduct

of the Defendants. However, as explained above, the evidence did not support the existence of such a ploy, but conversely suggested that Amber's request for an extension of time to complete the Listing Exercise at the 23/1/19 PTC was genuine and there were several other valid reasons why more time was needed by the L&L team besides the sheer number of documents subject of the exercise.

120 In the absence of the ploy, whatever insinuation aimed at Mr de Souza's failure to disclose Amber's breach of its Search Order Undertaking to the court at the 23/1/19 PTC would go away, and this failure was not probative of an intent to assist Amber suppress evidence on Mr de Souza's part. We also accepted Mr de Souza's submission that he had no duty to disclose Amber's breach of its Search Order Undertaking at the 23/1/19 PTC. The 23/1/19 PTC was concerned with the Defendants' request for a penal notice to be inserted at the end of the draft order for SUM 2169 (see [29] above), and Amber had not waived solicitor and client privilege as at 23 January 2019. In the latter regard, we emphasise that Mr de Souza owed Amber a duty of confidentiality and was, in light of Mr Sudesh's unwillingness to disclose Amber's breach of its Search Order Undertaking, not at liberty to unilaterally disclose Amber's breach to the court at the 23/1/19 PTC.

121 As an aside and following from the above, we question whether the IC was correct to conclude that Mr de Souza ought to have mentioned at the 23/1/2019 PTC that Amber was contemplating a leave application due to Amber's prior breach of the Search Order Undertaking, even though the IC suggested a fine of $2,000 only.

122 It followed from this that in the context of the Fourth Charge, there was likewise nothing to the fact that Mr de Souza had sought Mr Pereira's consent to an extension of time for the Listing Exercise *via* the 25/1/19 Letter whilst

keeping him in the dark as to Amber's breach of its Search Order Undertaking. The DT said that it was "disturbed" by Mr de Souza's conduct on 25 January 2019 because Mr Pereira would probably not have consented to an extension of time had he known of Amber's breach (see [59] above). We were not convinced that there was any basis for the DT to have been "disturbed". The material question was not whether Mr Pereira would have agreed to the extension of time Amber had sought if he had been told of Amber's prior breach of the Search Order Undertaking but whether Mr de Souza was obliged to disclose Amber's breach to Mr Pereira. Once the DT (rightly) concluded that Mr de Souza had no obligation to disclose Amber's breach of its Search Order Undertaking at the 23/1/19 PTC, it ought to have arrived at the same conclusion in respect of the 25/1/19 Letter, which was sent pursuant to directions given by the SAR at the 23/1/19 PTC.

123 We now come to Mr Assomull's argument that L&L had described Amber's breach of its Search Order Undertaking as an "alleged breach" in Sudesh's 25/3/19 Affidavit instead of being candid about the breach. Mr Assomull's point was that there was no reason for Mr de Souza to have described Amber's breach of its Search Order Undertaking in Sudesh's 25/3/19 Affidavit in this manner if he had already disclosed the fact of breach in Sudesh's 29/1/19 Affidavit. As to this, we observe that Mr de Souza had informed the SAR at the PTC on 6 March 2019 and before Sudesh's 25/3/19 Affidavit was filed that Amber had disclosed Search Order documents to the Authorities. From this perspective, the use of the phrase "alleged breach" in Sudesh's 25/3/19 Affidavit alone could not be indicative of Mr de Souza's intention to mask Amber's breach of its Search Order Undertaking.

124 In relation to Mr Assomull's claim that Amber had breached its Search Order Undertaking again in April 2019 and this was also not disclosed in

Sudesh's 8/7/19 Affidavit despite Mr de Souza having learnt of this in June 2019, this omission was neutral at best. This post-event added nothing to the determination of OA 7. For completeness, we note that Mr de Souza had sent an email to Mr Sudesh on 27 June 2019 to express his disappointment that Mr Sudesh had disclosed excerpts of an affidavit Ms Lim filed in support of SUM 2169 to the Health Sciences Authority in April 2019 notwithstanding L&L's repeated advice "that search-order documents should not be used" and to say that another application had to be made for leave of the court to address this disclosure. This admonishment was not the conduct of someone who intended to assist Amber suppress evidence from the court. Furthermore, as Mr de Souza attested, Sudesh's 8/7/19 Affidavit was filed in response to specific directions from the Judge about the nature and scope of Amber's prior breach of its Search Order Undertaking (see [40] above), and Mr Sudesh had, on 28 June 2019, refused to agree to L&L filing a fresh summons to disclose Amber's April 2019 breach of its Search Order Undertaking.

125 Finally, whilst Mr Tan urged us to look favourably upon Mr de Souza's willingness to admit to Amber's breach of its Search Order Undertaking after SUM 484 and Sudesh's 29/1/19 Affidavit were filed (see [69] above), we found this body of evidence to be neither here nor there. Mr Tan relied in particular on Mr de Souza openly admitting to the court that Amber had breached its Search Order Undertaking at a PTC on 6 March 2019, hearings on 8 April 2019 and 24 June 2019, and in written submissions dated 2 April 2019. By these dates, it was well known to all parties that Amber had breached its Search Order Undertaking (see [36] above). Hence, Mr de Souza's admissions carried limited weight.

126 For the reasons stated above, it was clear to us and we found that Mr de Souza did not intend to suppress Amber's breach of its Search Order Undertaking from the court and the Defendants in SUM 484. On the contrary,

we were satisfied that Mr de Souza and his L&L team intended to disclose the breach, and never wavered in this intention in the face of a difficult client.

Whether Sudesh's 29/1/19 Affidavit suppressed Amber's breach of its Search Order Undertaking from the court

127 We come now to the issue of whether objectively construed, Sudesh's 29/1/19 Affidavit suppressed Amber's breach of its Search Order Undertaking from the court. We did not find this to be the case.

128 In determining what was conveyed to the court by Sudesh's 29/1/19 Affidavit, it was important to bear three matters in mind. First, the scope of the Search Order Undertaking. In particular, the Search Order Undertaking prohibited the use of *both* information gathered from the Search Order documents and the dissemination of the Search Order documents (see [13] above). Hence, the mere use of the information contained in the Documents would constitute a breach of the Search Order Undertaking, and disclosure of such use amounted to disclosure of breach. Notably, the distinction described above was made in Mr Lee's email to Mr de Souza dated 23 January 2019 (see [102] above) and in our view paragraph 24 of Sudesh's 29/1/19 Affidavit was drafted with such a distinction in mind.

129 Secondly, that Mr Sudesh's consistent position was that he had not forwarded the actual Documents to the Authorities, but merely disclosed information contained therein to them. Mr Sudesh had articulated this position as early as 5 December 2018 in an email to Mr Chew (see [26] above), and maintained under cross-examination before the DT that this was at all times his belief. In line with this, Mr Lee had also emailed Mr de Souza on 23 January 2019 to state that Mr Sudesh was "insistent that none of the doc[uments] were disclosed" (see [102] above).

130 Thirdly, that the issue was whether Sudesh's 29/1/19 Affidavit had in fact disclosed Amber's breach to the court, and thereby disproved the allegation of suppression (see [87] above).

131 In this regard, whilst the Fourth Charge was directed at the fact that the Reports and the supporting documents made to the Authorities were not annexed to Sudesh's 29/1/19 Affidavit, the more important question was whether the body of Sudesh's 29/1/19 Affidavit had already revealed Amber's breach of its Search Order Undertaking arising from the use of information contained in the Documents to make the Reports (see [112] above). If it did, the omission to exhibit the Reports was not critical. If it did not, even the *inclusion* of the Reports as exhibits without explanation in a voluminous affidavit would be of little or no assistance to a court reading the affidavit as the Reports would be buried.

132 As we made clear to Mr Tan at the oral hearing, Sudesh's 29/1/19 Affidavit was no model of clear drafting. Nevertheless, we found that it sufficiently admitted that Amber had made prior use of information from the Documents in breach of its Search Order Undertaking to the court. We set out the salient paragraphs of this affidavit below:

> 15. On 17 April 2018, the Search Orders were executed at [D1 and D2's] premises. During the execution, relevant documents (including those on a hard disk, computers, thumb-drives and mobile phones) were seized. There were about 116,298 of such seized documents …
>
> …
>
> 17. The documents were imaged and/or copied and converted into viewable soft copy documents … These soft copy documents are hereinafter referred to as the "**Documents**". The original documents themselves were returned to the 1st and 2nd Defendants.

18. The Documents are now kept in the possession of a neutral party (Litigation Edge Pte Ltd) in a CaseRoom.

Preservation of the Documents

19. On 28 September 2018, the parties attended a Pre-Trial Conference before the [Judge]. The [Judge] made a number of directions, including [those set out at [19] of these Grounds of Decision above].

…

21. On 14 December 2018, the Plaintiffs appointed [L&L] to take over the case …

22. I am advised by [L&L], and verily believe, that the preservation of the Documents is necessary for two purposes:

> (1) Some of the Documents are relevant to the Suit although they do not belong to the Plaintiffs … Such documents should be preserved and used at the trial of this Suit, especially given the propensity of the Defendants to conceal evidence (elaborated below at [63]). If the Documents are not preserved, there is a risk that relevant evidence are not adduced to the court.
>
> (2) Some of the Documents disclose the potential commission of various offences by the Defendants. Again, if the Documents are not preserved, there is a risk that relevant evidence are not available to the relevant authorities. I elaborate on the potentially incriminating evidence below.

Reporting to the Relevant Authorities

23. I am advised, and verily believe, that the Documents disclose that the Defendants have potentially committed criminal offences under the Employment of Foreign Manpower Act (Cap 91A), the Penal Code (Cap 224) and the Computer Misuse Act (Cap 50A). I explain below.

24. Aware that the Defendants had likely committed serious offences, I regarded it as a matter of duty to report possible criminal conduct to the authorities – in this case the Ministry of Manpower ("**MoM**"), Corrupt Practices Investigation Bureau and the Singapore Police Force. My motivation for doing so was to deter any further wrongdoing from being committed and reduce the chance that other innocent parties would suffer detriment. Now, having recently instructed [L&L], I was informed and advised that it would be best – indeed, necessary – for me to seek leave of the Honourable Court to use some of the Documents in support of the reports given, or further reports to be made. I therefore make this application, which was

> taken out promptly upon instructing, and receiving advice from, [L&L].
>
> …
>
> [emphasis in original]

133 Beginning with paragraph 24, this paragraph stated that Mr Sudesh was seeking leave "*to use* some of the Documents in support of the *reports given*, *or* further reports to be made" [emphasis added]. Although the phrase "to use" suggests there was no prior use, this referred to the actual Documents. Furthermore, it was clear from the sentence that Mr Sudesh had already made "reports" to the Authorities. The focus is on the words "*reports given*" [emphasis added] and these words read properly in context meant that Mr Sudesh had made use of the information gathered from the Search Order documents to make the Reports and permission was now sought for Mr Sudesh "to use" some of the documents from the Search Order to either support the Reports that had already been given to the Authorities or to make further reports.

134 Mr Assomull submitted that the wording of SUM 484 as well as paragraphs 3(ii) and 64 of Sudesh's 29/1/19 Affidavit also had to be considered, and when taken into account, showed that there was no disclosure of Amber's breach of its Search Order Undertaking in Sudesh's 29/1/19 Affidavit. Prayer 2 of SUM 484 was Amber's request for an order that "[t]he Plaintiffs be entitled to use the Documents for the purpose of making reports to law enforcement agencies", paragraph 3(ii) conveyed Amber's request for it "to be entitled to use the [D]ocuments for the purpose of making reports", and paragraph 64 stated Mr Sudesh's purported belief that a court order must be obtained "in order for the Documents to be released to the Ministry of Manpower and the other relevant authorities".

135 At first blush, there appeared to be some attraction to Mr Assomull's submission. However, in light of our explanation at [132]–[133] above as well as other parts of Sudesh's 29/1/19 Affidavit, it is reasonable to conclude that Sudesh's 29/1/19 Affidavit sufficiently revealed Amber's prior use of information contained in the Documents in breach of its Search Order Undertaking. We elaborate on this point.

136 Paragraph 24 of the affidavit came on the back of paragraphs 15 to 23. These paragraphs spoke of the need to preserve the Search Order documents because they disclosed "the potential commission of various offences by the Defendants", and specifically, offences under the EFMA, the Penal Code and the CMA. They thus intimated that criminal offences had already been potentially committed by the Defendants as there would otherwise be no need to preserve the Search Order documents. Moreover, in so far as Mr Sudesh was able to allege that the Search Order documents disclosed specific violations of statute on the Defendants' part, this must have meant that he had reviewed the documents by the time he filed SUM 484. When considered alongside the fact that the alleged offences under the EFMA, Penal Code and CMA broadly fell under the purview of MOM, CPIB and SPF (*ie*, the Authorities to whom Mr Sudesh had already made reports to), the ineluctable inference was that Amber had gleaned from the Search Order documents that the Defendants had purportedly committed criminal offences. More importantly, when Amber made the Reports, it must have made use of the information from the Search Order documents to do so, whether or not the documents or extracts thereof were specifically included with or in the Reports. In our view, this amounted to disclosure of the use of information contained in the Search Order documents and consequently disclosure of Amber's breach of its Search Order Undertaking (see [128] above).

137 Paragraphs 25 to 62 of Sudesh's 29/1/19 Affidavit augmented this conclusion. This portion of the affidavit consisted of Mr Sudesh elaborating on how the Search Order documents supported that the Defendants had committed the various criminal offences. For example, Mr Sudesh stated at paragraph 27 that the "[Search Order documents] suggested that [UrbanRX] circumvented or arranged to circumvent the legal requirement that an employer must employ a minimum of 5 local employees in order to obtain an S Pass for a foreign employee" in breach of s 22(1)(*d*) of the EFMA. He similarly attested at paragraphs 42 to 45 that "[u]pon reviewing the [Search Order documents], it became apparent to [him]" that Ms Lim and an UrbanRX employee had caused staple bullets to be present in Amber's products in potential breach of s 425 of the Penal Code. To our minds, the plain wording of these paragraphs strengthened the inference that Mr Sudesh had reviewed, was prompted by, and used the information in the Search Order documents to make the Reports.

138 As an aside, we add that even as the question of whether Sudesh's 29/1/19 Affidavit had suppressed Amber's breach of its Search Order Undertaking was an issue to be determined by this court on an objective basis, Mr Pereira and Ms Lim had also both stated that they had learnt of Amber's breach of its Search Order Undertaking by reading Sudesh's 29/1/19 Affidavit and that was after they were served with the papers for SUM 484. It seemed to us that the CA also understood that Amber had disclosed its breach of the Search Order Undertaking when it filed SUM 484 and Sudesh's 29/1/19 Affidavit. After all, it found it "inexplicable that Amber failed to inform the court about the alleged offences and its disclosure to the authorities *until the leave application was taken out on 29 January 2019*" [emphasis added] (*Amber (CA)* at [98]).

139 We reiterate that the gravamen of the Fourth Charge was in assisting Amber to suppress the fact that Amber had breached its Search Order Undertaking (see [87] above). In our view, whilst Sudesh's 29/1/19 Affidavit could have been better drafted, it had adequately conveyed to the court that Amber had used the information contained in the Search Order documents in support of the Reports. In this manner, it disclosed Amber's prior breach of its Search Order Undertaking to the court such that this fact could not, in any event, have been said to have been suppressed from the court.

Whether the Fourth Charge was defective because it had deviated from the substance of concern expressed by the DR on behalf of the CA in the Referral Letter.

140 Finally, we deal with the issue concerning the Referral Letter. We were unpersuaded by Mr de Souza's submission that the Fourth Charge was defective because the Referral Letter had not raised any concerns that evidence had been suppressed in SUM 484, but only queried if Amber had sought an extension of time to complete the Listing Exercise for an extraneous purpose.

141 We accepted that the principal concern conveyed by the DR to the Law Society in the Referral Letter was that Amber had sought extensions of time to complete the Listing Exercise for an extraneous purpose with the benefit of legal advice. This was a corollary of our observations at [110] above.

142 But it did not follow from this that the scope of the Referral Letter conclusively circumscribed the nature of the charges that the Law Society could bring against Mr de Souza. *Law Society of Singapore v Wong Kai Kit* [1993] 3 SLR(R) 721 ("***Wong Kai Kit***") at [18] makes it clear that there is nothing in the LPA which restricts the subject matter of disciplinary proceedings made against the legal practitioner exclusively to the matters set out in s 86(6)(*a*) of the LPA.

Relevantly, these matters include the information a relevant judicial office holder referred to the Law Society and which touches upon the conduct of a regulated legal practitioner under s 85(3) of the LPA (see s 86(6)(*a*)(i) read with s 85(3) of the LPA).

143 We were cognisant that there were cases which, at first blush, suggested that the scope of the complaint against the legal practitioner circumscribed the subject matter of the disciplinary proceedings eventually brought against him. For example, in *Re Lim Chor Pee* [1990] 2 SLR(R) 117 ("***Lim Chor Pee***"), the Court of Three Judges held that the Law Society cannot frame a charge which was not contained in the "information" referred by the Attorney-General to the Law Society and notice of which was not given by the Inquiry Committee under what is now s 86(6) of the LPA (at [36]). Similarly, in *Re Seah Pong Tshai* [1991] 2 SLR(R) 744 ("***Seah Pong Tshai***"), the court held at [10] that where a Disciplinary Tribunal is appointed under (what is presently) s 89(1) of the LPA, the "matter" it is appointed to hear and investigate must be the application or complaint that has been received by the Law Society, that has been inquired into and reported upon by the Inquiry Committee, and on which the Council has made a determination.

144 However, in *Wong Wai Kit*, Yong CJ held that it is incorrect to interpret *Lim Chor Pee* and *Seah Pong Tshai* as suggesting that matters beyond the scope of an original complaint could never form the subject of disciplinary proceedings commenced as a result of that complaint (at [18], [27]). As Yong CJ observed, *Lim Chor Pee* was concerned with the situation where a charge was not based on information referred by the AG *and* notice of the charge was not given by the Inquiry Committee to the legal practitioner as statutorily required (at [30]–[31]), and *Seah Pong Tshai* concerned a Disciplinary Committee whose jurisdiction was bounded by the complaint because the

Inquiry Committee did not investigate matters beyond the scope of the complaint (at [33]–[34]).

145 In our view, there was nothing in the LPA that limited the allegation made against the relevant legal practitioner (and which he is asked to answer) exclusively to the matters set forth in s 86(6)(*a*) of the LPA (*Wong Kai Kit* at [18]). This is given that there are matters which in the natural course of events cannot be within the knowledge of complainants and which may nevertheless reveal misconduct on the part of a legal practitioner (*Wong Kai Kit* at [27]). Indeed, it was Mr de Souza's own position that the CA was not privy to the full extent of his dealings with Amber since L&L had ceased to act for Amber by the time of the appeal and did not appear at the appellate hearing.

146 On the contrary, s 86(8) of the LPA permits an IC to investigate matters outside the scope of the original complaint which arise in the course of its inquiry (*Wong Kai Kit* at [18], [27]). Whilst this power is subject to the requirement that the legal practitioner be informed in the manner and to the extent prescribed by s 86(6) of the LPA of the allegation he has to answer (*Wong Kai Kit* at [26]), these requirements were complied with vis-à-vis the Fourth Charge.

147 For completeness, we deal with *Law Society of Singapore v Yeo Khirn Hai Alvin and another matter* [2020] 4 SLR 858 ("***Alvin Yeo***"), which Mr de Souza had relied on in support of his position. In *Alvin Yeo*, the Law Society and the Attorney-General applied to the High Court to set aside the DT's determination that no cause of sufficient gravity existed for disciplinary action in respect of the respondent's alleged overcharging of a client (the "**Determination**"). The Determination came on the back of the CA referring a complaint against the respondent to the Council under s 85(3)(*b*) of the LPA,

and the Law Society's decision to charge the respondent for overcharging a client (*Alvin Yeo* at [21]). The AG and the Law Society broadly contended that in arriving at the Determination, the DT failed in its duty to hear and investigate the complaint as it did not consider issues relating to the respondent's client's mental capacity that had been raised in the complaint (*Alvin Yeo* at [27]–[28]).

148 The High Court set aside the Determination. It held that the CA's complaint raised issues pertaining to the respondent's client's mental capacity, and the DT's failure to consider these issues meant that it had not discharged its statutory duty to hear and investigate the complaint (*Alvin Yeo* at [33]–[36], [49], [53], [91]). In arriving at this conclusion, the High Court stated that a DT has a duty to hear and investigate the complaint and the charges, and it is expected that the charges reflect the gravamen of and fall within the scope of the complaint (*Alvin Yeo* at [59], [66], [83]).

149 *Alvin Yeo*, however, was of no assistance to Mr de Souza. *Alvin Yeo* concerned the situation where the DT failed to investigate all the matters raised in the complaint. Mr de Souza is contrastingly claiming that the DT had investigated matters that were *not* raised in the complaint. There was no basis for extrapolating *Alvin Yeo* to suggest that the DT may not investigate matters not mentioned in a complaint. Indeed, *Alvin Yeo* made no reference to ss 86(6) and 86(8) of the LPA and interpreted *Seah Pong Tshai* without referring to the gloss introduced to that case by *Wong Kai Kit*.

150 In our view, the Referral Letter was simply a starting point for the Law Society to investigate Mr de Souza's conduct. It was notice that something untoward might have taken place, and did not conclusively circumscribe the nature of the charges that the Law Society could eventually prefer against Mr de Souza. Ultimately, this issue did not have a substantial bearing on the

outcome of OA 7 as we found that the Fourth Charge had not been proved against Mr de Souza beyond reasonable doubt.

Conclusion

151 For the above reasons, we dismissed OA 7. For completeness, the fourth alternative charge, which differed from the Fourth Charge in that it accused Mr de Souza of conduct unbefitting of an advocate and solicitor as an officer of the Supreme Court under s 83(2)(*h*) of the LPA (as compared to grossly improper conduct under s 83(2)(*b*) of the LPA), was also not made out.

152 As we indicated to Mr Tan at the oral hearing, it would be unfortunate if Mr de Souza went away from these proceedings believing that Sudesh's 29/1/19 Affidavit was as crystal clear as he made it out to be. The short answer was that it was not, and Mr de Souza (as well as the L&L team) would do well to note this.

153 Equally, we reject Mr Assomull's remarks suggesting that the purport of a decision in favour of Mr de Souza would be that a legal practitioner who intentionally drafts an affidavit in the manner that Mr de Souza had done may still be able to sidestep and negate subsequent charges of professional misconduct. These remarks are fanciful. Nothing in these grounds can be taken as an endorsement of that sweeping proposition.

154 On costs, we order that: (a) the Law Society is to refund Mr de Souza the sum of $32,394.12 (comprising costs of $18,000 and disbursements of $14,394,12) he had paid the former following the conclusion of the proceedings before the DT; and (b) each party is to bear its own costs in respect of OA 7. We were unconvinced that an adverse costs order should be made against the Law Society in OA 7. In arguing for such a costs order, Mr Tan submitted that

the Law Society had prosecuted Mr de Souza in an oppressive and unjustified manner, principally because it had investigated matters "that went far and beyond the scope of the Referral Letter" [emphasis in original]. However, as we explained at [142]–[150] above, the Law Society was entitled to investigate matters beyond those expressed in the Referral Letter, and had complied with the procedural requirements in the LPA which were a prerequisite to it doing so. On the evidence before us, we were unable to conclude that the Law Society had acted in bad faith and thus order each party to bear its own costs in respect of OA 7 (see *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 at [24]; *Ang Pek San Lawrence v Singapore Medical Council* [2015] 2 SLR 1179 at [55]).

155 Finally, we have had the advantage of reading in draft the concurring decision of the Honourable Justice Kannan Ramesh (the "**Concurring Judgment**") and address some of the points raised therein:

(a) We are in full agreement with Ramesh JAD that Amber was subject to a duty to make F&F disclosure of its breach of the Search Order Undertaking in the context of SUM 484 (Concurring Judgment at [177]). Where we respectfully depart is the extent to which SUM 484 should inform the substance of the Fourth Charge. The Concurring Judgment takes the view that the gravamen of the Fourth Charge must be understood with reference "to the nature, purpose and manner of SUM 484" such that "Amber could not have been said to have revealed that it had breached the Search Order Undertaking without making F&F disclosure of its breach" (Concurring Judgment at [161], [164], [173] and [181]–[182]). With respect, we do not share this view. In our judgment, given the manner in which the Fourth Charge was framed (see [87] above), it was not apposite to consider what amounts to sufficient

disclosure for the purpose of SUM 484 and distil from this the standard of disclosure sufficient to rebut the allegation set out in the Fourth Charge. The Fourth Charge as worded focuses on Amber's breach of its Search Order Undertaking and alleges that *the fact of breach* was suppressed from the court by Mr de Souza. The charge was limited in its scope. The question which arose before the DT and for our determination was thus whether Mr de Souza had in fact assisted Amber to suppress its breach of its Search Order Undertaking, and not how he had gone about to assist Amber. In our view, SUM 484 formed the backdrop to the disciplinary proceedings instituted against Mr de Souza, but its concomitant requirement of F&F disclosure in an *ex parte* application is not the applicable test for the purposes of the Fourth Charge. Indeed, the approach of the Concurring Judgment was to link and place the standard of disclosure demanded by the Fourth Charge on the same footing as the obligation of F&F disclosure that accompanied SUM 484. We have commented on such an approach and repeat our observations at [87] above.

(b) The Concurring Judgment relies on the CA's observations at [96] of *Amber (CA)* to support the position that "revealing that Amber had breached the Search Order Undertaking in this case entailed more than just revealing a breach had occurred" (Concurring Judgment at [181], [194]). To recapitulate, the CA stated at [96] of *Amber (CA)* that "Amber did not disclose any of the reports which were made to the authorities" and "[s]uch reports would have revealed what was in fact disclosed to the authorities". From this, the Concurring Judgment gleans the importance of disclosing "to the court the material aspects of how [Amber] had breached the Search Order Undertaking, including, specifically, the fact that excerpts of the Documents had been disclosed

to the Authorities in support of the Reports" (Concurring Judgment at [194]–[195]. We reiterate our view that the CA's observations at [96] of *Amber (CA)* were expressed with the specific concern of SUM 484 being a smokescreen in the terms described at [110] above in mind. Read and understood in this context, they do not, in our view, support the notion that Mr de Souza had to disclose details of Amber's breach of its Search Order Undertaking in order to successfully rebut the Fourth Charge.

(c) In holding that the non-disclosure element subject of the Fourth Charge was wider than merely disclosing the fact of Amber's breach of its Search Order Undertaking, the Concurring Judgment draws support from Mr de Souza's claim that paragraph 24 of Sudesh's 29/1/19 Affidavit disclosed both Amber's use of information subject of the Documents and Amber's disclosure of the Documents to the Authorities (Concurring Judgment at [185], [191]–[192]). It also highlights that Mr Tan adopted the same position at the hearing before us (Concurring Judgment at [185]). In our view, these strands of evidence seen in the context of the questions asked in cross-examination at best shed light on Mr de Souza's understanding of paragraph 24 of Sudesh's 29/1/19 Affidavit only. It is pertinent that Mr de Souza was not questioned on his understanding of the Fourth Charge, and whatever he understood of paragraph 24 of Sudesh's 29/1/19 Affidavit therefore could not be taken to bear on the scope of the Fourth Charge. In any event, this court is not bound by what Mr de Souza might have thought the Fourth Charge meant. Moreover, Mr de Souza's claim as described must be set against what Mr Sudesh had informed L&L concerning Amber's use of the Search Order documents. As mentioned, Mr Sudesh's consistent position was that he had not forwarded actual Documents to the Authorities, but merely made use of information contained therein for

the Reports (see [129] above). That position was enough to fall foul of the terms of the Search Order Undertaking, independent of what Mr de Souza and the L&L team suspected or believed in the position taken by Mr Sudesh. Hence, what Mr de Souza claimed, at the DT hearing, to have understood from paragraph 24 does not impinge on the substance of the Fourth Charge. The Fourth Charge as framed focuses on the non-disclosure of Amber's breach of its Search Order Undertaking in Sudesh's 29/1/19 Affidavit, and the Search Order Undertaking proscribed the use of *both* information gathered from the search documents and the dissemination of the Search Order documents. It stands to reason that regardless of how Mr de Souza understood paragraph 24 of Sudesh's 29/1/19 Affidavit, the disclosure of Amber's use of information contained in the Documents as objectively construed suffices to rebut the non-disclosure element of the Fourth Charge (see [87], [128] above).

Belinda Ang Saw Ean
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh JAD (delivering a concurring opinion):

Introduction

156 When this matter was heard on 31 July 2023, we dismissed the application with brief grounds and indicated that we would provide our detailed

grounds in due course. While we were in full agreement that the application ought to be dismissed, I arrived at this conclusion for different reasons from those of the majority on one issue as described below. I have had the opportunity to read in draft the grounds delivered by the Honourable Justice Belinda Ang on behalf of herself and the Honourable Justice Woo Bih Li. I now provide the grounds of my decision to dismiss the application. For convenience, I adopt the same abbreviations as those used by Ang JCA in the grounds of decision of the majority.

157 I arrived at a different view from the majority on whether Mr de Souza's conduct satisfied the objective element of the Fourth Charge. While the majority was of the view that, objectively construed, there was disclosure of the breach of the Search Order Undertaking in Sudesh's 29/1/19 Affidavit (see [139] above), I respectfully came to a different view on that issue. However, as I agreed with the majority that the requisite subjective intention was not proven against Mr de Souza beyond a reasonable doubt, I agreed that the application should be dismissed.

158 I think it is imperative that I provide some remarks because, in my view, practitioners must understand the importance of placing the material facts before the court where they are required to do so. Failure to do so may, depending on the surrounding circumstances, result in the practitioner being met with a disciplinary charge under r 10(3)(*a*) of the PCR. If the element of intention is satisfied, this may in turn result in disciplinary sanctions being meted out. In Mr de Souza's case, the evidence clearly demonstrated that he subjectively intended to make disclosure of Amber's breach of the Search Order Undertaking, even if he objectively fell short. Accordingly, the Fourth Charge was not made out against him.

Issues to be determined

159 I am grateful for the majority's summary of the facts, the parties' cases and the DT's decision, which I respectfully adopt. The structure of this concurring opinion is as follows:

(a) First, I will explain the elements of suppression of evidence and of a breach of r 10(3)(*a*) of the PCR.

(b) Next, I will explain why I found the wrongful non-disclosure element of the Fourth Charge to be satisfied. This is where I differed from the majority.

(c) Finally, I will explain why I found the subjective element of the Fourth Charge not to be satisfied. I agreed with the majority on this issue.

The elements of suppression of evidence

160 Rule 10(3)(*a*) of the PCR provides as follows:

> **Responsibility for client's conduct**
>
> …
>
> (3) To the extent that a legal practitioner is able, the legal practitioner must prevent his or her client from, must not be a party to, and must not assist the client in, doing either or both of the following:
>
> (a) suppressing evidence;
>
> …

161 It is evident that the first question must be, what does "suppressing evidence" mean for the purpose of r 10(3)(*a*)? In my view, this is always contextual depending on the *nature* and *purpose* of the proceedings in which

the suppression of evidence is alleged to have taken place and the relevant law that applies to those proceedings. That informs the nature and scope of the evidence that should be disclosed. In this case, the proceeding in question was SUM 484. Two points are pertinent in this regard. First, SUM 484 was an *ex parte* application. Second, SUM 484 was brought for two purposes both of which related to the release of Amber's obligations under the Search Order Undertaking. They were: (a) retrospective validation of its prior use of the Documents in breach of the Search Order Undertaking; and (b) prospective release from the Search Order Undertaking in order to permit disclosure of the Documents. I will return to this point in the discussion on whether there was in fact wrongful non-disclosure in this case at [175]–[176] below.

162 I begin with a survey of the relevant authorities. In *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36, the appellant had made an *ex parte* application for leave to serve a writ of summons and statement of claim out of jurisdiction. The Court of Appeal held at [18] that the appellant had failed to fulfil its duty of F&F disclosure, and that this was a case of "wilful suppression of material facts" due to the "*deliberate and systematic* non-disclosure" [emphasis in original]. In *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786, which involved an *ex parte* application for an injunction, the Court of Appeal explained at [35] that where there is material non-disclosure in an *ex parte* application, there is a distinction between suppression and an innocent omission. In this regard, suppression involved some "deliberateness". In *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*"), which involved an *ex parte* application for a warrant of arrest of a vessel, the Court of Appeal noted at [147] that there was material non-disclosure by the applicant and that the facts were not disclosed "if not deliberately, then certainly because of a patent (and inexcusable) lack of

care in assessing what material facts ought to be disclosed". The Court of Appeal described such material non-disclosure as "*suppressio veri, suggestio falsi"*.

163 In my view, the above authorities establish that suppression of evidence is where a litigant at the very least deliberately (or even possibly recklessly, see *Vasiliy Golovnin* cited at [162] above and the reasoning at [168] below) omits to disclose information that he is under a duty to place before the court. There are two aspects to this. First, that there has been wrongful non-disclosure by the litigant. Second, that the wrongful non-disclosure was deliberate.

164 Wrongful non-disclosure can only occur where there is a duty or obligation on the litigant to place information before the court or provide it to the other party. Where there is no such duty, it cannot be said that there is evidence that the litigant *should have* placed before the court or provided to the other party. In other words, if there is no duty, there is no evidence or information that the litigant can be faulted for failing to disclose. The concept of suppressing evidence is intimately tied to the existence of a duty to disclose evidence to the court or the other party. Therefore, the first step in determining whether evidence has been suppressed must be identifying the relevant duty on the litigant to disclose evidence. In determining the duty on the litigant, an important consideration is the nature and purpose of the proceedings and the relevant law, as I mentioned at [161] above. Once the duty on the litigant has been identified, the court can assess, *objectively*, whether the litigant has failed to disclose evidence that falls within the scope of the duty and, *subjectively*, whether such non-disclosure was intended. The specific duty on the litigant will not just govern what information must be disclosed but also the *manner* in which that information must be disclosed.

165 It is evident from the cases summarised at [162] above that the failure to disclose facts that one is under a duty to disclose does not automatically amount to suppressing evidence. For there to be suppression of evidence, the wrongful non-disclosure must be deliberate. An innocent omission to disclose evidence that one is under a duty to disclose is still wrong, but it is not suppression. Suppression requires some form of subjective intention to prevent the court or the other party from becoming privy to the relevant information.

166 It follows that when a practitioner is charged with not preventing, being a party to, or assisting with, his client's suppression of evidence, there must be some subjective intention or deliberateness on the part of the practitioner. This is made plain by the opening words of r 10(3)(*a*) of the PCR which state "*to the extent that a legal practitioner is able*, the legal practitioner must prevent …". This clearly suggests complicity on the part of the practitioner in his client's conduct. This is reinforced by the other elements of the r 10(3)(*a*) of the PCR: assistance; and being a party to. A practitioner does not assist his client to suppress evidence by simply being involved in his client's failure to disclose evidence that he should have disclosed. A practitioner can hardly be said to be "party to" suppression if there is no equivalent or shared intention on his part. This is confirmed by the principles which guide the interpretation of r 10 of the PCR. Rule 10(1) provides:

> **10.**—(1) The following principles guide the interpretation of this rule.
>
> *Principles*
>
> (a) A legal practitioner's duty to assist in the administration of justice includes a responsibility, commensurate with the amount of control the legal practitioner has over his or her client, to prevent the client from misleading a court or tribunal in any manner and from otherwise acting improperly.

> (b) A legal practitioner must exercise professional judgment over the substance and purpose of any advice which the legal practitioner gives and any document which the legal practitioner drafts.
>
> (c) A legal practitioner must not engage in any conduct which would be unlawful, unethical or otherwise improper, whether or not such conduct would promote the cause of his or her client.

These principles are clearly focused on deliberate conduct on the part of the practitioner. Indeed, it is difficult to see how a practitioner could be said to be a party to and assist suppression of evidence which he or she was in a position and able to prevent *unintentionally or inadvertently*. This means that to determine whether a practitioner has assisted or been party to his client's suppression of evidence which he was able to prevent, further questions must be asked about how the practitioner was involved in the suppression, and the subjective intent behind that involvement.

167 In this regard, I agreed with the majority's conclusion at [77] above that the DT's analysis was erroneous. The DT concluded that once it was proven that Mr de Souza was aware of material facts, his breach of duty to disclose those facts should be considered objectively and not subjectively ([92] of the DT's Report). In other words, the DT concluded that it would not have been a defence to the Fourth Charge for Mr de Souza to prove that he genuinely believed that Amber had fulfilled its duty to disclose the material facts. This could not be the correct conclusion.

168 Purely innocent omissions to disclose and fully deliberate omissions to disclose lie on opposite ends of a spectrum of subjective intention. Along this spectrum lie other states of mind such as the sort described in *Vasilliy Golovnin* (see [162] above) which could be described as subjective recklessness. However, the question of whether these lesser states of mind suffice to ground

liability under r 10(3)(*a*) of the PCR did not arise in this application, and I do not express a view in this regard. The Fourth Charge, as framed, alleged that Mr de Souza was both a party to and assisted with Amber's suppression of evidence, which he was able to prevent. For this to be established, there had to be deliberate conduct on behalf of Mr de Souza. Indeed, Mr Assomull for the Law Society fairly conceded that intention was a necessary ingredient of the Fourth Charge (see [64] above). In fact, the Law Society's case was predicated on deliberate intention. Their allegation was that Mr de Souza had assisted Amber with its suppression of evidence in order to bolster the chances of obtaining an order in terms in SUM 484.

169 By virtue of the above, the following questions had to be addressed to determine whether the Fourth Charge was made out against Mr de Souza:

(a) Was there wrongful non-disclosure by Amber in SUM 484?

(b) If so, did Mr de Souza intend to assist Amber with suppressing evidence?

Was there wrongful non-disclosure by Amber in SUM 484?

170 The Fourth Charge provided as follows:

> **Fourth Charge:**
>
> 4th Charge
>
> You, CHRISTOPHER JAMES DE SOUZA, an Advocate and Solicitor of the Supreme Court are charged that you are guilty of improper conduct or practice as an advocate and solicitor within the meaning of Section 83(2)(b) of the Legal Profession Act (Cap. 161), to wit, by your breach of Rule 10(3)(a) of the Legal Profession (Professional Conduct) Rules 2015, in that in HC/S 164/2018 whilst acting as solicitor for the Plaintiffs namely Amber Compounding Pharmacy Pte. Ltd. and Amber Laboratories Pte. Ltd. (collectively called "Amber"), upon your

> advice on 20 December 2018 to Amber to file an *ex parte* leave application in HC/SUM 484/2019 dated 29 January 2019 to enable Amber to use the documents obtained by them pursuant to HC/ORC 2446/2018 and HC/ORC 2447/2018 both dated 13 April 2018 for the purpose of making reports to law enforcement agencies, you were a party to and assisted Amber in suppressing evidence which you were able to prevent in that you prepared and filed and Affidavit of Samuel Sudesh Thaddaeus affirmed on 28 January 2019 which did not exhibit reports nor its supporting documents made to the Ministry of Manpower, the Corrupt Practices Investigation Bureau and the Singapore Police Force on 31 July 2018, 20 October 2018 and 22 October 2018 respectively which reports and supporting documents if exhibited would have revealed that Amber had breached its undertakings given pursuant to HC/ORC 2446/2018 and HC/ORC 2447/2018 both dated 13 April 2018.

171 In the Fourth Charge, Mr de Souza was charged with being a party to, and assisting in, Amber's suppression of evidence, which he was able to prevent, by preparing and filing Sudesh's 29/1/19 Affidavit. This affidavit did not exhibit the Reports nor their supporting documents, the exhibition of which would have revealed that Amber had breached the Search Order Undertaking, namely by making the Reports with their supporting documents. It is important to understand the complaint in the Fourth Charge correctly. The complaint is that Mr de Souza assisted Amber to suppress evidence by *failing to exhibit the Reports and their supporting documents* in Sudesh's 29/1/19 Affidavit, which he prepared and filed, which if he had done, would have revealed that Amber had breached the Search Order Undertaking. Thus, while the Fourth Charge alleged that Sudesh's 29/1/19 Affidavit failed to disclose the breach of the Search Order Undertaking, it did not stop there. It contextualised that failure against the failure to disclose the Reports and their supporting documents tying the former to the latter. This is important and must be recognised when analysing the nature of the complaint in the Fourth Charge. Reading each in isolation would not in my view be assessing the Fourth Charge holistically and correctly.

172 In essence the complaint in the Fourth Charge was therefore that Amber did not make *full disclosure* of the breach of the Search Order Undertaking *which it would have done if the Reports and their supporting documents had been exhibited to Sudesh's 29/1/19 Affidavit*. This is consistent with SUM 484 (which was also referenced in the Fourth Charge) being an *ex parte* application for *retrospective* and *prospective* leave for use of documents and information subject to the Search Order Undertaking, which carried with it the duty of F&F disclosure of the breach of the Search Order Undertaking. Accordingly, the Fourth Charge specifically identified two aspects to Amber's failure to disclose breach of the Search Order Undertaking: its failure to disclose (a) that the Reports had been made; and (b) that the Reports had been made with supporting Documents. And on that basis, it asserted that disclosure of such a breach would have occurred if the Reports and their supporting documents had been exhibited to Sudesh's 29/1/2019 Affidavit. I will refer to this as the "wrongful non-disclosure" element of the Fourth Charge.

173 There were two sub-issues here. First, what was Amber required to disclose in SUM 484? As I explained at [161] and [164] above, SUM 484 had to be the starting point when determining whether there was wrongful non-disclosure by Amber which Mr de Souza assisted with or was party to. The Fourth Charge alleged that Mr de Souza had assisted or been party to Amber's suppression of evidence. Suppression of evidence is the deliberate failure to disclose evidence that one is under an obligation to disclose (see [163] above). This can be assessed only with reference to the application at hand, *ie*, SUM 484. Accordingly, it was clear to me that the analysis had to start with identifying the evidential obligations on Amber in SUM 484. As stated at [161] earlier, the answer to this question depended on the *nature* and *purpose* of SUM 484 and the relevant law. The gravamen of the Fourth Charge as described

above was also relevant as it narrowed the complaint against Mr de Souza in these disciplinary proceedings. The second question was whether Amber did in fact fail to disclose evidence that it was required to disclose in SUM 484.

What Amber was required to disclose in SUM 484?

174 I determined this question by first having reference to three things: (a) the purpose of SUM 484; (b) the nature of SUM 484 and the relevant law; and (c) the way SUM 484 was framed.

175 I start with the purpose of SUM 484. It was an application by Amber for orders that documents it had obtained pursuant to the Search Orders be preserved and that it be entitled to use the said documents to make reports to law enforcement agencies. As confirmed by Mr de Souza, SUM 484 was an application for both retrospective and prospective leave to use the Documents in that manner, though I must add that this is not readily apparent from Prayer 2 of the application nor the text of Sudesh's 29/1/19 Affidavit Indeed, the text of the affidavit suggests that the application was only for prospective disclosure which I discuss below at [200]–[205]. I should add that why the application was framed in this manner was not explored in evidence before the DT and I say no more on this. That said, it is important to note that Mr de Souza understood and accepted that Prayer 2 of SUM 484 was, *inter alia,* for retrospective leave "to use the Documents". As Mr de Souza confirmed in evidence, Amber was "asking for leave for the documents that were already given in the reports" (see the DT Report at [86]). It is axiomatic that if retrospective leave was being sought for use of the Documents, the fact that the Documents, or at least some of them, were *used or disclosed* in the Reports must have been made crystal clear in Sudesh's 29/1/19 Affidavit. It is equally axiomatic that the *extent of the*

disclosure must also have been made crystal clear in Sudesh's 29/1/19 Affidavit.

176 There was undoubtedly a duty on Amber to disclose to the court its prior breach of the Search Order Undertaking. Putting to one side the issue of privilege against self-incrimination that was addressed in *Amber (CA)*, for obvious reasons, Amber's breach of the Search Order Undertaking would have been of utmost relevance to the court's decision to grant retrospective leave. The court could not have possibly given leave retrospectively unless Amber had placed before it the full facts and circumstances relating to its past breach of the Search Order Undertaking. As noted above, if retrospective leave was being sought for use of the Documents, the fact that the Documents had been disclosed *and* the extent of such disclosure must have been made plain. Without the court being told that documents were used, what documents were used and how they were used, it is difficult to understand how the court could have properly considered the question of whether retrospective leave should be granted. Amber's past breach would also have been relevant to the court's decision to grant prospective leave. The court might have considered, as one factor, that having previously shown disregard for its obligations to the court, it would not be right to relieve Amber from those obligations moving forward. Indeed, in *Amber (CA)* at [101], the Court of Appeal declined to grant Amber prospective leave because it would "condone the grave misuse of the court's machinery". Also, the fact that the Reports and supporting documents had already been lodged with the Authorities and the contents of the Reports would have been pertinent to whether further reports were indeed warranted and permitted by the court.

177 The above analysis examines the question of what facts Amber needed to place before the court through the lens of the purpose of SUM 484. However,

the nature of the application was also significant. It is important to contexualise the analysis against the fact that SUM 484 was an *ex parte* application. First and foremost, given that what Amber had breached was an undertaking *to the court*, the court had to be made aware of this. Because SUM 484 was brought *ex parte*, Amber was subject to a duty to make F&F disclosure of all material facts. This duty extended to facts which would have had an influence on the Judge's decision in SUM 484, including facts which might have led the Judge to refuse granting the orders sought. In an *ex parte* application, litigants must make F&F disclosure of all material facts. In such an application for retrospective and prospective leave, the fact of a prior breach and the extent of that breach are material facts, and F&F disclosure must be made in respect thereof.

178 Furthermore, the manner in which the prayers of SUM 484 were framed made it imperative that Amber disclose its past breach of the Search Order Undertaking. A request for both prospective and retrospective leave was said to have been contained in prayer 2 of SUM 484 ("**Prayer 2**"), which sought an order in the following terms:

> The Plaintiffs be entitled to use the Documents for the purpose of making reports to law enforcement agencies.

As noted above, needless to say, it is difficult if not impossible to tell from Prayer 2 alone that retrospective leave was sought in SUM 484. For reasons unexplained, Prayer 2 was not split into two separate elements for retrospective and prospective leave. This was noted by the DT at [55(c)] of its report. The tense used in Prayer 2 implies that leave was sought to use the Documents in the future. If Prayer 2 did not make clear that retrospective leave was sought, and what it was sought in respect of, it was imperative that Sudesh's 29/1/19 Affidavit did. If the court granted Prayer 2 without being properly and fully

informed about the past breach, retrospective leave would have been obtained on a questionable basis.

179 As reproduced at [170] above, the wrongful non-disclosure alleged in the Fourth Charge was Amber's failure to reveal that it had breached the Search Order Undertaking. It was at this point that my views diverged from those of the majority. The majority and I had different views as to what it meant for Amber to reveal that it had breached the Search Order Undertaking.

180 At [87] of its grounds, the majority expressed the view that there could be no question of suppression once Amber crossed the threshold of disclosing *the fact* that it had breached the Search Order Undertaking, provided that the court was not misled. At [139], the majority concluded that Sudesh's 29/1/19 Affidavit adequately conveyed to the court that Amber had used the information contained in the Documents in support of the Reports, and in so doing it had revealed Amber's breach of the Search Order Undertaking. In short, the majority's view was that the disclosure of the fact of the breach was adequate. Respectfully, I do not share their view that this disclosure can be said to be adequate.

181 In my respectful view, for the reasons above, revealing that Amber had breached the Search Order Undertaking in this case entailed more than just revealing that a breach had occurred, *ie,* the fact of the breach. That is not the essence of the complaint in the Fourth Charge (see [172] above). I arrived at this conclusion because of the nature and purpose of SUM 484 and the duty of disclosure which Amber was accordingly subject to in SUM 484. As explained at [164], suppression of evidence can only be understood in the context of the operative duty on the litigant to disclose evidence to the court or the other party. In this case, the operative duty on Amber was found in the nature, purpose and

manner in which SUM 484 was framed which I have explained in detail at [174]–[178] above. Essentially, this duty required Amber to disclose that it had breached the Search Order Undertaking and elaborate on *how* it had breached it. This duty was the very reason why Amber had to reveal to the court its breach of the Search Order Undertaking and the extent of that breach. Without reference to this duty, it was not possible to explain why Amber's failure to reveal to the court the fact of its breach of the Search Order Undertaking could amount to suppression of evidence. Once one referred to this duty, it became clear that revealing the extent of breach was necessary. Thus, Amber's revelation of only the fact of breach was, in my view, insufficient.

182 The key point was that Amber was asking for retrospective leave for its past breach. It is axiomatic that Amber had to come clean with the court so that the court had the full facts and could decide whether that leave ought to be granted. At the same time, Amber was asking for prospective leave. As explained at [176] above, the Court would have to be aware of Amber's conduct in the past before deciding whether to relieve it from its obligations. Furthermore, as mentioned, Amber was subject to a duty of F&F disclosure in SUM 484. In this context, Amber could not have been said to have revealed that it had breached the Search Order Undertaking without making F&F disclosure of its breach. F&F disclosure that Amber had breached the Search Order Undertaking would have encompassed some explanation as to how, and the extent to which, it had done so.

183 At [86] of the majority's grounds, it is explained that the question of whether Sudesh's 29/1/19 Affidavit had made F&F disclosure of Amber's breach of the Search Order Undertaking was not, and could not, be the key question in the context of the Fourth Charge. At [87] of the majority's grounds, they explain that whether disclosure is full is beside the point when determining

whether Mr de Souza assisted with the suppression of evidence. In my view, however, whether Sudesh's 29/1/19 Affidavit had made F&F disclosure of Amber's breach of the Search Order Undertaking was, in fact, a key question in relation to the Fourth Charge. This is because the duty of F&F disclosure was one of the reasons why Amber had to reveal its breach. This duty was of course undergirded by the fact that the purpose of the application was to secure retrospective and indeed prospective leave. Where a practitioner deliberately assists with his client's intentional failure to give F&F disclosure in an *ex parte* application, or his client's failure to comply with any other obligations to disclose material facts, it must be said that the solicitor has assisted with his client's suppression of evidence. Whether the practitioner's client has failed to fulfil its evidential duties of disclosure is a key question in a disciplinary charge against the practitioner for assisting with the suppression of evidence.

184 I did accept that the language used in the Fourth Charge could be said to imply that the alleged wrongful non-disclosure was merely the fact of Amber's breach of the Search Order Undertaking. The Fourth Charge stated that exhibiting the Reports and their supporting documents would have "revealed *that* Amber had breached its undertakings" [emphasis added]. It did not, for example, state that exhibiting the Reports and their supporting documents would have "revealed Amber's breach of its undertakings". Focusing on this aspect of the Fourth Charge might have supported the majority's view that revealing the fact of breach, without being misleading, was sufficient. However, focusing on this aspect of the Fourth Charge led to an interpretation of the Fourth Charge that was inconsistent with a holistic reading of the Fourth Charge as I described at [171] above. If the Fourth Charge was only about the failure to disclose the fact of the breach of the Search Order Undertaking, it would have been unnecessary to specifically assert that the failure to exhibit the Reports and their

supporting documents was suppressed by *the breach*. This interpretation was also in my view inconsistent with the gravamen of the Fourth Charge, as explained above at [181], as determined by reference to the nature, purpose and manner of SUM 484.

185 There were three further reasons why I did not read the Fourth Charge so narrowly. First, it is significant Mr de Souza himself did not read or understand the Fourth Charge so narrowly. It was Mr de Souza's own case that Sudesh's 29/1/19 Affidavit disclosed both that: (a) Amber's had breached the Search Order Undertaking; and (b) that Amber had disclosed Documents to the Authorities. In Mr de Souza's defence, he stated that one of the reasons that "SUM 484 made clear to all parties involved that Amber had breached its undertakings" was that "[Sudesh's 29/1/19 Affidavit] admitted that Amber had breached its undertakings *by using various documents obtained from the [Search Order] in the [Reports]*." This went beyond disclosing the mere fact of Amber's breach and extended to disclosing that Amber had breached the Search Order Undertaking by *releasing the Documents to the Authorities*. Mr de Souza did not take the position, rightly in my view, that he did not need to disclose how Amber had breached the Search Order Undertaking. Nor did he assert that it was adequate for him to merely disclose the fact of the breach. This meant that, in essence, his position was that Amber *had disclosed* how it had breached the Search Order Undertaking, *ie*, that it had occurred through the disclosure of the Documents to the Authorities. This position was confirmed by Mr de Souza in evidence and Mr Tan in the application before us (see [192] below). It seemed to me that Mr de Souza could not take any other position given how he chose to frame Prayer 2 as explained earlier.

186 Second, as alluded to at [171] above, when the Fourth Charge referred to Amber's failure to reveal that it had breached the Search Order Undertaking,

it was asserting the consequence of the failure to exhibit the Reports and their supporting documents. It was therefore important to consider what the effect of exhibiting the Reports and their supporting documents would have been. Exhibiting the Reports and their supporting documents to Sudesh's 29/1/19 Affidavit would have told the court both that Amber had breached the Search Order Undertaking and exactly to what extent it had done so. Exhibiting the Reports and their supporting documents would have revealed the two aspects of Amber's breach as specifically identified in the Fourth Charge (see [170] above). Exhibiting the Reports and their supporting documents would have gone much further than simply revealing the fact of Amber's breach.

187 Finally, as I noted at [181] above, there was no legal rule which would require Amber to disclose that it had breached the Search Order Undertaking, but would not also require Amber to disclose how it had done so. As I have explained in detail at [174]–[178], Amber's legal obligations in SUM 484 required it to disclose that it had breached the Search Order Undertaking *and how*. Amber's legal obligations in SUM 484 were a fundamental aspect of the Fourth Charge. After all, the crux of the Fourth Charge was that Mr de Souza had allegedly assisted or been party to Amber's intentional failure to comply with these obligations to disclose evidence to the court (see [183] above).

188 Thus, I was of the view that for Amber to be considered to have disclosed that it had breached the Search Order Undertaking, Amber had to have revealed not just the fact that it had breached the Search Order Undertaking but how it had breached it. That was the gravamen of the Fourth Charge. It followed that, if Amber failed to reveal to what extent it had breached the Search Order Undertaking in Sudesh's 29/1/19 Affidavit, the "wrongful non-disclosure" element of the Fourth Charge would have been made out against Mr de Souza. Simply revealing the fact that Amber had breached the Search Order

Undertaking would *not* have disposed of the wrongful non-disclosure element of the Fourth Charge.

189 Given that it was important for Amber to disclose how it had breached the Search Order Undertaking, one has to understand the true nature of Amber's breach of the Search Order Undertaking. In this regard, Sudesh's 8/7/19 Affidavit, which was filed in accordance with directions from the Judge, was helpful. In this affidavit, Mr Sudesh listed ten documents that had been disclosed to the Authorities in the Reports. He explained that "limited parts" of these documents were disclosed to the Authorities, specifically the "relevant excerpts which evidenced the potential offences" [emphasis omitted]. It was therefore not simply the case that Amber used the Documents in the sense that it was prompted by information contained therein to make the Reports. Amber also used the Documents by actually disclosing excerpts to the Authorities *in support of* the Reports.

190 Amber's disclosure of excerpts of the Documents to the Authorities was a fundamental aspect of how Amber had breached the Search Order Undertaking, and this had to be revealed to the court. Without seeing the Reports themselves, the court would not know what information if at all was in the Reports let alone whether the Documents or parts of them were disclosed to the Authorities. Because the Reports were not exhibited to Sudesh's 29/1/19 Affidavit, the only way for the Court to have an idea of what information or Documents were contained in or exhibited to the Reports was if the text of the affidavit made the material details clear. If this was not done, the court would or could be left with the impression that there was no use of the Documents in any shape or form in the Reports. This is not to suggest that exhibiting the Reports and their supporting documents without a suitable reference in the text would suffice (see [197] below). Whether the Documents themselves, excerpts

of the Documents, information from the Documents or no specific information at all was disclosed to the Authorities was vitally relevant in SUM 484. The Judge would have had to know this to properly determine whether retrospective leave should be granted. The fact that excerpts of Documents had been disclosed to the Authorities in support of the Reports would have been revealed to the court had Amber exhibited the Reports and their supporting documents to Sudesh's 29/1/19 Affidavit with an appropriate explanatory paragraph in the body of the affidavit. Mr de Souza's defence was essentially that this non-exhibition was not material (see [196]–[197] below). For this defence to succeed, he had to show that the text in Sudesh's 29/1/19 revealed, at the very least, that excerpts of the Documents had been disclosed to the Authorities in support of the Reports.

191 In fact, Mr de Souza was acutely aware of the need to disclose this aspect of Amber's breach. Throughout the drafting process, L&L made clear to Mr Sudesh that it was important to "disclose the fact that some documents have already been disclosed to MoM and CPIB, as there [was] a duty to make full and frank disclosure to the court". When Mr Sudesh tried to introduce a misleading statement which implied that no Documents had been disclosed to the Authorities, even though this was not true, Mr de Souza pushed back and removed the statement (I return to this at [216]–[219] below).

192 It is also important to note that throughout the disciplinary proceedings, Mr de Souza's consistent position was that Sudesh's 29/1/19 Affidavit *did disclose* that the Documents had been given to the Authorities. I have already referred to his defence at [185] above where this position was set out. This specific issue was also explored by the DT with Mr de Souza in evidence (see [86] of the DT's report). Mr de Souza's evidence was that paragraphs 15 to 24 of Sudesh's 29/1/19 Affidavit disclosed antecedent use of the Documents in

support of the Reports. The following exchange between Mr Assomull and Mr de Souza during cross-examination was also apposite:

> [Mr Assomull]: And do you also agree that the affidavit, looking at it, when it was filed, does not state in clear language that there was a disclosure of the documents to the authorities?
>
> [Mr de Souza]: No, I disagree. I think the affidavit, when read in totality, shows that reports were given *and supporting documents were used,* those supporting documents arising from search order documents.
>
> [emphasis added]

In oral closing submissions before the DT, it was pointed out to Mr Tan that it was difficult to see how Sudesh's 29/1/19 Affidavit disclosed to the court that the Documents had been given to the Authorities. Mr Tan's point in response was that this fact was obvious from the fact that the Reports had already been made. Before us, Mr Tan confirmed that Mr de Souza's position was that paragraph 24 disclosed both that the Documents had been used and that they had been disclosed to the Authorities. Throughout the proceedings, Mr de Souza's consistent position was that this aspect of Amber's breach was disclosed. He did not once suggest that it did not need to be disclosed. As I explain at [199]–[203] below, however, this aspect of Amber's breach was not apparent from the text.

193 I note that the majority places importance on the fact that Mr Sudesh's consistent position was that the actual Documents had not been forwarded to the Authorities and that he had only disclosed information contained therein to them (see [129] above). While I accept that this was Mr Sudesh's consistent position, what is pertinent is that Mr de Souza and the other lawyers at L&L were clearly aware that this consistent position *was not correct*. This was clear

from the e-mail exchange described above and I explore it in more detail at [217]–[219] below. As such, whatever Mr Sudesh's consistent position was, Mr de Souza and his team were aware that excerpts of the Documents had been disclosed to the Authorities. They were very alive to the fact this had to be disclosed. This was a fact that Mr de Souza had to ensure was comprehensively disclosed in Sudesh's 29/1/19 Affidavit. If Mr Sudesh maintained his incorrect consistent position despite the reality of what had happened, Mr de Souza should not have assisted to file Sudesh's 29/1/19 Affidavit. Indeed, when asked about Mr Sudesh's suggestion that no documents had been shared with the Authorities (see [216] below), Mr de Souza said the following:

> … I was not prepared for this falsehood to stand. I was not going to perpetuate this falsehood and that's why I took the position that I did … that this must go.

194 In my view, the importance of telling the court that excerpts of Documents had been given to the Authorities was reflected in the Court of Appeal's remarks in *Amber (CA)* at [96]. The Court of Appeal noted that:

> … In its various affidavits, Amber did not disclose any of the reports which were made to the authorities. Such reports would have revealed *what was in fact disclosed to the authorities*, and whether Amber was able, at the time of the reports, to identify the offences which had allegedly been committed by the defendants. …
>
> [emphasis added]

The Court of Appeal recognised that a key reason why Amber should have exhibited the Reports to Sudesh's 29/1/19 Affidavit was that this would reveal what had been disclosed to the Authorities. The nature and extent of the information or documents that had been disclosed to the Authorities was a material aspect of Amber's breach.

195 It was therefore apparent to me that Amber had to disclose the material aspects of how it had breached the Search Order Undertaking. This included, specifically, the fact that excerpts of the Documents had been disclosed to the Authorities in support of the Reports. I then proceeded to consider whether Amber had indeed failed to disclose this fact, and thereby failed to reveal its breach, as alleged in the Fourth Charge.

Did Amber fail to disclose evidence that it was required to disclose in SUM 484?

196 According to Mr de Souza, the key paragraphs in Sudesh's 29/1/19 Affidavit made clear that Amber had used documents obtained through the Search Orders for extraneous purposes. Mr de Souza argued that paras 14 to 24 of Sudesh's 29/1/19 Affidavit would leave a reader in no doubt that Amber had used the Documents obtained from the Search Orders for the preparation of the Reports that had already been lodged. According to Mr de Souza, this was a clear admission by Amber that it had breached the Search Order Undertaking because it had used the Documents. Even the majority did not accept this position, finding that Sudesh's 29/1/19 Affidavit was no model of clear drafting (at [132] above).

197 Neither side treated the absence of the Reports and their supporting documents as exhibits to Sudesh's 29/1/19 as the critical aspect of the Fourth Charge. This was for good reason. Exhibiting the Reports and their supporting documents was neither necessary nor sufficient to discharge Amber's duty of disclosure to the court. Had Amber buried the Reports and their supporting documents in countless exhibits without making any reference to them in the body of Sudesh's 29/1/19 Affidavit, it could not be said to have revealed Amber's breach. Amber would have to make adequate reference to the exhibited

Reports in the body of Sudesh's 29/1/19 Affidavit. Conversely, had Amber fully described in detail the nature of the Reports and what was in their supporting documents in the body of Sudesh's 29/1/19 Affidavit without actually exhibiting them, that would have revealed Amber's breach to the court. It is pertinent that Mr de Souza's case was that the non-exhibition of the Reports and supporting documents was immaterial because the text of Sudesh's 29/1/19 Affidavit sufficiently revealed that Amber had breached the Search Order Undertaking.

198 I was prepared to accept that the relevant paragraphs of Sudesh's 29/1/19 Affidavit, when read together, disclosed the fact that there had been a prior breach of the Search Order Undertaking by Amber. As the majority noted at [128] above, the Search Order Undertaking prohibited Amber from merely *using* the information contained in the Documents. "Using" included reviewing the Documents and being prompted by the information contained therein to make reports to the Authorities. I agreed with the majority that paragraphs 15 to 24 of Sudesh's 29/1/19 Affidavit sufficiently disclosed that: (a) the Reports had already been made; and (b) Mr Sudesh had been prompted by information he gathered from the Documents to make the Reports (see [136] above). Sudesh's 29/1/19 Affidavit revealed these two facts and these two facts meant that a breach of the Search Order Undertaking had taken place. In that sense, *but in that sense only*, Sudesh's 29/1/19 Affidavit disclosed the fact of Amber's breach. That said, even on this point, the drafting of paragraph 24 should have been a lot clearer. This was a simple matter of drafting in a clear language to explain that there was prior breach of the Search Order Undertaking. This is not setting the bar too high.

199 However, while Sudesh's 29/1/19 Affidavit revealed the fact that Amber had breached the Search Order Undertaking, it did not reveal the true nature of

Amber's breach as described at [189]–[190] above. Crucially, no reading of Sudesh's 29/1/19 Affidavit revealed the fact that *excerpts of Documents had been disclosed to the Authorities and to what extent*. Obviously, this would have been addressed, as the Fourth Charge asserts, if the Reports and their supporting documents had been exhibited. The key paragraph here is paragraph 24 of Sudesh's 29/1/19 Affidavit, which I set out in full:

> Aware that the Defendants had likely committed serious offences, I regarded it as a matter of duty to report possible criminal conduct to the authorities – in this case the Ministry of Manpower ("**MoM**"), Corrupt Practices Investigation Bureau and the Singapore Police Force. My motivation for doing so was to deter any further wrongdoing from being committed and reduce the chance that other innocent parties would suffer detriment. *Now, having recently instructed [L&L], I was informed and advised that it would be best – indeed, necessary – for me to seek leave of the Honourable Court to use some of the Documents in support of the reports given, or further reports to be made.* I therefore make this application, which was taken out promptly upon instructing, and receiving advice from, [L&L].
>
> [emphasis added)

200 This paragraph used a confusing mix of past and present tense. First, the paragraph stated that Mr Sudesh *regarded* it as a matter of duty to report possible criminal conduct to the Authorities, and that his motivation for doing so *was* to deter any further wrongdoing. The past tense here made it reasonably clear that the Reports had already been made. Until this point in the paragraph, however, there was no reference to any use of the Documents *in* the Reports, whether by sharing the Documents themselves with the Authorities, sharing excerpts of the Documents with the Authorities or simply summarising the information from the Documents and including that information in the Reports. In other words, until this point in the paragraph, there was no suggestion that the Documents or the information contained within them had been *disclosed to* the Authorities. I did not consider that it necessarily followed from the fact that

the Reports had already been made that the Reports *contained* information or excerpts from the Documents. It is certainly plausible that the Reports were made in order to bring to the Authorities' attention the possible criminal offences, but without yet *disclosing* any information obtained from the Documents to them. It is important to bear this in mind when reading the next part of the paragraph. In any event, given the nature and purpose of the application, it was incumbent on Amber to make the position crystal clear and not leave it to the court or the other party to infer from one of several possibilities.

201 The next part of the paragraph explained Amber's request for leave. Importantly, the past tense was no longer used when describing what Amber was seeking leave in respect of. The paragraph stated that Amber was seeking leave *to use* some of the Documents in support of the reports given, or further reports to be made. The words "to use" implied that no Documents had yet been used in support of the Reports. The impression conveyed was that Amber was seeking prospective leave to supplement the Reports already made with the Documents. This was reinforced by the reference in the same sentence to further reports to be given. What I raised as a possibility at [200] above is in fact implied by this penultimate sentence of paragraph 24.

202 Reading paragraph 24 with the preceding paragraphs 15 to 23 (as the majority did at [136] above) did not change my conclusion. It is true that these other paragraphs explained how the Documents contained information that disclosed the offences later referred to in paragraph 24. However, they did not in any way suggest that this information had already been provided to the Authorities by way of excerpts of the Documents. Paragraph 22 spoke of the need to preserve the Documents because "if the Documents are not preserved, there is a risk that relevant evidence are not available to the relevant authorities".

This sentence could even be said to reinforce the impression that no excerpts of the Documents had been disclosed to the Authorities as yet. Paragraph 23 simply stated that Mr Sudesh was advised, and verily believed, that the Documents disclosed that criminal offences had potentially been committed. It was silent on what Amber had done as a result of this advice and belief. It did not suggest that Amber had disclosed the Documents to the Authorities.

203 In fact, reading paragraph 24 with paragraphs 3(ii) and 64 reinforced my conclusion. At paragraph 3(ii), Prayer 2 of SUM 484 was repeated. As already mentioned, Prayer 2 described "use" of the Documents prospectively which implied that use had not yet taken place. Paragraph 64 was in the following terms:

> I am advised, and verily believe, that in order for the Documents to be released to the Ministry of Manpower and the other relevant authorities to assist in their investigations in respect of the potential offences mentioned above, a court order must be obtained.

Again, no mention was made of the fact that some excerpts of the Documents had already been provided to the Authorities to assist in their investigations. This crucial fact was conspicuously absent.

204 Taking a step back, I also considered it important to take into account the fact that the court would be reading Sudesh's 29/1/19 Affidavit in the context of the specific prayers sought in SUM 484. Given that Prayer 2 of SUM 484 was plainly prospective, and that it implied that no use of the Documents had taken place, Sudesh's 29/1/19 Affidavit had to be crystal clear that use of the Documents had indeed taken place. Otherwise, the court would simply continue labouring under the misapprehension arising from the framing of Prayer 2. This was the point I made at [178] above. In all the circumstances,

Sudesh's 29/1/19 Affidavit can hardly be said to have met the level of clarity required of it in respect of Amber's disclosure of excerpts of the Documents to the Authorities.

205 I was therefore satisfied that even though Sudesh's 29/1/19 Affidavit revealed the fact that Amber had breached the Search Order Undertaking in that it was prompted by information from the Documents to make the Reports, it did not disclose the fact that excerpts of the Documents had been disclosed to the Authorities in the Reports. I emphasise that this latter omission was a material aspect of Amber's breach that was not in any way disclosed in Sudesh's 29/1/19 Affidavit.

Conclusion on the wrongful non-disclosure issue

206 Sudesh's 29/1/19 Affidavit, which was drafted and filed by Mr de Souza, did not sufficiently disclose to the court how Amber had breached the Search Order Undertaking. Specifically, it was silent on the fact that excerpts of the Documents had been provided to the Authorities in the Reports and the extent of such use. In fact, Sudesh's 29/1/19 Affidavit could even be said to imply that excerpts of the Documents *had not* been provided to the Authorities in the Reports. However beneficially to Amber and Mr de Souza Sudesh's 29/1/19 Affidavit is read, it does not pass muster. Because of the nature and purpose of SUM 464, an *ex parte* application for retrospective leave in respect of a breach and prospective leave to be released from undertakings, revealing that Amber had already breached the Search Order Undertaking also entailed revealing to what extent it had done so. Because Amber did not do that, the wrongful non-disclosure element of the Fourth Charge was thus satisfied.

207 While the majority described Sudesh's 29/1/19 Affidavit as "no model of clear drafting" (see [132] above), I would go further. It was lacking in a material respect and conveyed an incomplete picture to the court. That is what the Fourth Charge was about. Whether this amounted to suppression of evidence, and whether Mr de Souza could be said to have assisted in such suppression, depended on his subjective intention when preparing and filing Sudesh's 29/1/19 Affidavit. It is to that question that I now turn.

Did Mr de Souza intend to assist Amber with suppressing evidence?

208 It is clear from paragraph 92 of the DT Report that it did not find it necessary to address this question. As I explained at [167] above, this is where the DT fell into error.

209 On the evidence, I was prepared to accept that Mr de Souza believed that Amber had effectively disclosed what it had needed to disclose *via* Sudesh's 29/1/19 Affidavit. In other words, Mr de Souza did not intend to assist with, or be party to, the wrongful non-disclosure by Amber that I identified at [205] above. The majority has set out in detail its reasons for concluding that Mr de Souza did not intend to assist Amber with suppressing evidence at [92]–[126] above. I am in full agreement with these reasons, but I will set out my own reasons which are specific to the point of wrongful non-disclosure that I identified: the non-disclosure of the fact that excerpts of the Documents were disclosed to the Authorities in the Reports.

210 It is useful to start with the Third Draft which Mr Chew sent to Mr Sudesh on 17 January 2019. The Third Draft contained the following paragraph 24 and the accompanying Comment, which I set out in full:

> 24. I wish to inform that due to my ignorance of the law, I had informed the Ministry of Manpower and the CPIB of the above-mentioned potential offences by the Defendants. This was prior to receiving advice from Messrs Lee & Lee recently that in law, the Plaintiffs have an obligation not to use the Documents for purposes other than those related to the present suit unless they have obtained a court order. I therefore wish to apologise to this Honourable Court for not abiding by the obligation.
>
> Commented [L&L1]: In our view, it is important that we disclose the fact that some documents have already been disclosed to MoM and CPIB, as there is a duty to make full and frank disclosure to the court. As such, we strongly advise that the original wording be retained.

211 Three points can be made here. First, L&L understood that it was important to disclose to the court the fact that some Documents had already been disclosed to the Authorities. This was expressed explicitly in the Comment. The Comment did not indicate that L&L thought it sufficient to disclose only that the Reports had been made. Second, L&L thought that this version of paragraph 24 adequately conveyed the fact that some of the Documents had been disclosed to the Authorities. L&L justified the reinsertion of this paragraph with the need to disclose that fact; this justification would only make sense if L&L considered that this version *did* disclose that fact. Finally, this version of paragraph 24 did not give rise to the difficulties discussed at [200]–[201] above that arose with the final version of paragraph 24. There was no mix of past and future tense, and consequently no implication that some events had occurred in the past while some had yet to occur. There was just one reference to an "obligation not to use the Documents", and an apology for not abiding by this obligation. While this might not have been crystal clear, it would have been sufficient in my view to disclose that excerpts of some of the Documents had already been given to the Authorities.

212 This version of paragraph 24 did not make it into the final draft because Mr Sudesh did not agree with its inclusion. The DT described this as "some sort

of compromise" on Mr de Souza's part at paragraph 59(e) of its report. This observation may be read as suggesting that Mr de Souza was attempting to assist, in part, Amber's effort to not make full disclosure. That would not be a fair characterisation of Mr de Souza's efforts and intention as explained below.

213 In his e-mail dated 18 January 2019, Mr Sudesh explained that paragraph 24 should be: (a) removed it in its entirety, (b) amended such so as to "put it across with forward-looking statements"; or (c) reworked so as to "put across [Mr Sudesh's] full argument for why [he] did what [he] did". Mr Sudesh was adamant that there was nothing to apologise to the court for. He was aware of the *Riddick* principle but considered that the principle did not extend to requiring him to hide or conceal crime in the face of obligations to report such crime.

214 It was these concerns that L&L sought to address in the Fifth Draft. The Fifth Draft contained the following paragraph 24:

> Aware that the Defendants had potentially committed serious offences, I felt it a matter of duty to report their conduct to the authorities in this case the Ministry of Manpower ("**MoM**"), Corrupt Practices Investigations Bureau and the Singapore Police Force. I did so with no ulterior motive indeed, my only motivation was for the wrongs to be investigated. Now, having recently instructed Messrs Lee & Lee, I was informed and advised that it would be best - indeed, necessary - for me to seek leave of the Honourable Court to use some of the Documents in support of the reports given, or further reports to be made. I therefore make this application, which was taken out promptly upon instructing and receiving advice from Messrs Lee & Lee.

215 This is important because it is where the phrase "use of the Documents in support of the reports given" was introduced and the confusion I described at [200]–[201] above first arose. These amendments to paragraph 24 by L&L came in response to Mr Sudesh's comments at [212] above and it can be reasonably

inferred that L&L's intent behind making these amendments was to address those comments. Mr Sudesh's main concern was that there should be no apology in paragraph 24, and that there should be instead an explanation as to why he did the right thing when he made the Reports. This version of paragraph 24 addressed both those points. The problem, however, was that the amendments also had the effect of making it ambiguous as to whether the Documents had been disclosed to the Authorities in the Reports. That said, it does not appear that the L&L and Mr De Souza was aware that the amendments to paragraph 24 had this effect. When Mr Chew sent the Fourth Draft to Mr Sudesh, he explained that it made the same point as the Third Draft's paragraph 24 but in a different tone. Mr Chew was wrong in this regard. However, there was nothing to suggest that L&L intended to change the point conveyed by paragraph 24 between the Third Draft and the Fifth Draft. Nor was there anything to suggest that L&L was aware that it had unintentionally done so. When Mr Sudesh responded to the Third Draft, he did not draw a distinction between using the Documents to make the Reports and using the Documents *in* the Reports. He felt he was entitled to do both. Thus, there would have been no reason for L&L to craft paragraph 24 such that it revealed only the former but not the latter. This would not have been acceptable to Mr Sudesh. Accordingly, it did not appear to me that the problematic wording in Sudesh's 29/1/19 Affidavit was introduced in the Fifth Draft by L&L in order to obscure the fact that excerpts of some of the Documents had already been disclosed to the Authorities.

216 Mr Sudesh responded to the Fifth Draft with some amendments of his own as found in the Fifth Draft he circulated on 22 January 2019. Of particular note was his introduction of the following phrase in paragraph 24 of the Fifth Draft: "I [reported crime and criminal conduct to the Authorities] in confidence/privilege without sharing any of the documents found in the

attachments to this affidavit". This sentence clearly conveyed the false impression that none of the Documents had been shared with the Authorities. Mr Sudesh explained that he made his amendments to avoid paragraph 24 "becoming some kind of focal point of unnecessary contention with the court" and because "the main [point] to the affidavit remains simply to be forward-looking to get the court validation for legitimate use in stopping crime".

217 Mr de Souza's response to this proposed amendment by Mr Sudesh was key. When Mr Chew informed Mr de Souza and the L&L team on 22 January 2019 that "the amendments made by [Mr Sudesh] [did] not detract from the overall message" and could be accepted, Mr de Souza promptly responded 25 minutes later that he was not in favour of some of Mr Sudesh's amendments and would provide a revised version in due course. He then clarified with Mr Chew whether Mr Sudesh's assertion that no documents had been shared with the Authorities was accurate. He noted that even if it was true that none of the documents attached to Sudesh's 29/1/19 Affidavit had been shared with the Authorities, Mr Sudesh's amendment would convey the wrong impression – the impression that *none* of the Documents had been shared with the Authorities. Mr Lee then responded to Mr de Souza's query, informing him that Mr Sudesh was quite insistent that none of the Documents were disclosed although it was quite apparent that they were. It is evident that, by this point, L&L and Mr de Souza were clearly aware that the Documents had been disclosed to the Authorities in extract form. Mr Lee's words were:

> Sudesh is quite insistent that none of the [Documents] were disclosed although it is quite apparent that they were – see e.g. attached email and the attachment therein, index to bundle of supplementary documents. That bundle contains very clear extracts of WhatsApp conversations. Sudesh's claim is that these are just "notes" of the WhatsApp logs but it is very clear that they are not notes but extracts.

> In any case, even the disclosure of information contained in documents (without disclosing the documents themselves) would be a breach of the implied undertaking, so there is no point playing around with semantics.

218 Mr Lee advised that L&L should make clear to Mr Sudesh that he had to be fully forthright to the court in his affidavit.

219 Mr de Souza agreed with Mr Lee and said that he would make the necessary amendments. Having been advised that, despite what Mr Sudesh insisted, it was apparent that some Documents had been shared with the Authorities, Mr de Souza removed the phrase "I did so in confidence/privilege without sharing any of the documents found in the attachments to this affidavit" from the Fifth Draft as amended by Mr Sudesh. This resulted in the final version of paragraph 24 as found in Sudesh's 29/1/19 Affidavit.

220 From the above, it was clear that Mr de Souza did not intend to obscure the fact that the excerpts of some Documents had been disclosed to the Authorities. He was aware that this was something that had to be disclosed by Amber. He resisted an attempt by Mr Sudesh to introduce a line that would convey the wrong impression in this regard. My conclusion at [207] above that the final version of Sudesh's 29/1/19 Affidavit did not give the court the full picture arose in a large part due to a phrase that was introduced by the L&L team *before* Mr Sudesh attempted to obscure the fact that Documents had been disclosed in the Reports. Mr de Souza failed to realise that it was not just Mr Sudesh's amendments that conveyed the wrong impression but also L&L's own version of paragraph 24 as contained in the Fifth Draft. This was an oversight, and a serious one. However, there was far from sufficient evidence to show beyond reasonable doubt that Mr de Souza *knew* that the final version of Sudesh's 29/1/19 Affidavit conveyed the wrong impression as regards the use of the Documents in the Reports, and that he filed Sudesh's 29/1/19

Affidavit despite this knowledge. Without this, it could not be said that Mr de Souza intended to assist or be party to Amber's suppression of evidence, which he was able to prevent.

Conclusion

221 In my opinion, Amber did not disclose information that it was required to disclose. It was required to provide F&F disclosure of its breach of the Search Order Undertaking because of the nature and purpose of SUM 484 – that it was an *ex parte* application that sought retrospective and prospective leave. Its past breach of the Search Order Undertaking would have been highly relevant to the Judge in determining whether to grant the orders sought for retrospective and prospective leave. What would have been relevant to the Judge was not just the fact that Amber had breached the Search Order Undertaking, but *to what extent* Amber had breached the Search Order Undertaking. Sudesh's 29/1/19 Affidavit did not disclose that Amber had breached the Search Order Undertaking by conveying excerpts of the Documents to the Authorities in the Reports. In fact, it could be said that Sudesh's 29/1/19 Affidavit implied the contrary; it implied that, while the Reports had been made, no information or Documents had been given to the Authorities. At best, Sudesh's 29/1/19 Affidavit disclosed that Amber had been prompted by information in the Documents to lodge the Reports with the Authorities. In the circumstances of the case, this could not be said to constitute revealing Amber's breach to the Court.

222 Had Mr de Souza filed Sudesh's 29/1/19 Affidavit despite being aware that it was deficient in this regard, he would have breached r 10(3)(*a*) of the PCR by being a party to, and assisting with, Amber's suppression of evidence. However, like the majority, I was not satisfied that it had been shown beyond reasonable doubt that Mr de Souza was so aware. It appeared from the evidence

that he genuinely believed that he had effectively disclosed Amber's breach of the Search Order Undertaking to the court in Sudesh's 29/1/19 Affidavit, including the fact that some information from the Documents had already been conveyed to the Authorities. For this reason, Mr de Souza could not be said to have been party to, or have assisted with, any suppression of evidence, which he was in a position to prevent.

223 It was on this basis that I agreed with the majority that OA 7 ought to be dismissed. I also agreed with the majority's decision on costs as set out at [154] above.

Kannan Ramesh
Judge of the Appellate Division

Madan Assomull (Assomull & Partners) for the applicant;
Tan Chee Meng *SC* and Calvin Ong Yik Lin (WongPartnership LLP)
for the respondent.
