Law Society of Singapore v Ahmad Khalis bin Abdul Ghani
[2006] SGHC 143

Case Number : OS 819/2006, SUM 2215/2006

Decision Date : 21 August 2006

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tan Lee Meng J

Counsel Name(s) : Gregory Vijayendran and Ameera Ashraf (Wong Partnership) for the applicant; Davinder Singh SC, Yarni Loi and Darius Bragassam (Drew & Napier LLC) for the respondent

Parties : Law Society of Singapore — Ahmad Khalis bin Abdul Ghani

Legal Profession – Show cause action – Respondent an advocate and solicitor acting for administrator of estate – Respondent failing to advise other beneficiaries of estate to seek independent legal advice and inform beneficiaries that he was acting solely for administrator of estate – Respondent falsely attesting to having witnessed execution of legal documents – Whether respondent acting for beneficiaries pursuant to implied retainer – Whether respondent's conduct amounting to grossly improper conduct – Whether respondent's conduct amounting to misconduct unbefitting an advocate and solicitor – Whether respondent only in breach of ss 83(2)(b), 83(2)(h) Legal Profession Act if retainer between himself and beneficiaries existing – Appropriate punishment – Sections 83(2)(b), 83(2)(h) Legal Profession Act (Cap 161, 2001 Rev Ed)

21 August 2006 *Judgment reserved.*

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

Introduction

1 Three preliminary – and extremely important – points ought to be made at the outset.

2 The first is that the requisite standard of professionalism an advocate and solicitor ought to display in his or her practice of the law is an objective one as determined by the court: see *Law Society of Singapore v Tham Yu Xian Rick* [1999] 4 SLR 168 at [17] (citing Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998) ("Tan") at pp 784 and 793); *Law Society of Singapore v Heng Guan Hong Geoffrey* [2000] 1 SLR 361 at [24]; and *Law Society of Singapore v Ng Chee Sing* [2000] 2 SLR 165 at [42]. It is not dependent on the subjective perspective of the advocate and solicitor concerned. The subjective views of the advocate and solicitor, if anything, constitute a mitigating circumstance (for example, to show he was not dishonest) and would, in this respect, go only to the reduction of the sanction that would otherwise be imposed upon the advocate and solicitor concerned.

3 The second is that the public interest in deterring both the individual solicitor and other like-minded solicitors from similar conduct is paramount. In the oft-cited words of Yong Pung How CJ in *Law Society of Singapore v Ravindra Samuel* [1999] 1 SLR 696 ("*Ravindra Samuel*") at [11]–[12]:

> It is not simply a question of punishing the solicitor concerned. A further consideration must be what course should the court take to protect the public and to register its disapproval of the conduct of the solicitor. In the relevant sense, the protection of the public is not confined to the protection of the public against further default by the solicitor in question. It extends also to the protection of the public against similar defaults by other solicitors through the court publicly marking the seriousness of what the instant solicitor has done. The orders made must therefore accord with the seriousness of the default and leave no doubt as to the standards to be

observed by other practitioners. In short, the orders made should not only have a punitive, but also a deterrent effect.

There are also the interests of the honourable profession to which the solicitor belongs, and those of the courts themselves, to consider. The administration of justice can only proceed on the basis that solicitors can place reliance upon the honesty of the solicitors with whom they deal. The public too must be able to repose confidence in a profession which plays so indispensable a part in the administration of justice. Similarly, the courts of this country must be able to depend on the honesty and integrity of all practitioners appearing before them and to expect that they will maintain the highest standards of personal honesty and integrity in their dealings with the courts.

4 Indeed, as I put it in *Law Society of Singapore v Ong Ying Ping* [2005] 3 SLR 583 at [63], "[t]here is, in fact, an inherent, irreducible and non-negotiable public interest in the administration of justice in its multifarious forms".

5 The *legitimacy* of the administration of justice in the eyes of the public cannot be gainsaid. Respect for the law as viewed through the lenses of the public is an indispensable element in the fabric of the system of justice. Indeed, the public constitutes the ultimate body of individuals for whose benefit the law and the legal system exist. To this end, anything which undermines public confidence in the competence and/or professionalism of lawyers must not – indeed, cannot – be permitted. As we shall elaborate upon below, the focus should be the precise opposite – to enhance the standing and (more importantly) accessibility of the legal profession in the eyes of the public.

6 Thirdly, however, it must also be borne in mind that in order for charges to be preferred successfully against an advocate and solicitor, the standard of proof that must be met is high – the criminal standard of proof beyond a reasonable doubt: see *Re an Advocate and Solicitor* [1978–1979] SLR 240 at 249, [12] and *Law Society of Singapore v Lim Cheong Peng* [2006] SGHC 145 at [12]. This is only right as such charges impact adversely on the reputation as well as livelihood of the advocate and solicitor concerned.

The present case

7 The present case involves charges against the respondent pursuant to ss 83(2)(*b*) and 83(2)(*h*) of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the Act"). Four charges were preferred against the respondent. However, only the first three charges were ultimately proceeded with. The charges, as formulated by the Law Society of Singapore ("Law Society"), read as follows:

First Charge:

That the Respondent is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of s.83(2)(b) of the Legal Profession Act (Cap.161, 2001 Rev Ed) and/or of conduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession within the meaning of s.83(2)(h) of the Legal Profession Act (Cap.161, 2001 Rev Ed) in that, on or about 8 August 2001, whilst acting on behalf of Rasid in obtaining letters of administration for the Estate, he failed to advise the remaining beneficiaries of the Estate that they were to seek independent legal advice on the appointment of Rasid as sole administrator of the Estate.

Second Charge:

That the Respondent is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of s.83(2)(b) of the Legal Profession Act (Cap.161, 2001 Rev Ed) and/or of conduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession within the meaning of s.83(2)(h) of the Legal Profession Act (Cap.161, 2001 Rev Ed) in that on or about 6 December 2001, acting as an advocate and solicitor, he did falsely declare and acknowledge in the attestation clause of a document titled "Consent for an Order that Sureties be Dispensed With" dated 6 December 2001 (the "Consent"), that the signatories thereto (save for Muner bin Ali) did personally appear before him and voluntarily execute the Consent when in fact they did not so personally appear before him.

Third Charge:

That the Respondent is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of s.83(2)(b) of the Legal Profession Act (Cap.161, 2001 Rev Ed) and/or of conduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession within the meaning of s.83(2)(h) of the Legal Profession Act (Cap.161, 2001 Rev Ed) and failed to discharge his duties as solicitor for the Estate to the Beneficiaries and/or failed to safeguard the interests of the Beneficiaries, in that he subordinated the interests of the Beneficiaries to the interests of Rasid.

Fourth Charge:

That the Respondent is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of s.83(2)(b) of the Legal Profession Act (Cap.161, 2001 Rev Ed) and/or of conduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession within the meaning of s.83(2)(h) of the Legal Profession Act (Cap.161, 2001 Rev Ed) in that, in or about May 2002, he failed to discharge his duties as solicitor for the Bank and/or failed to safeguard the interests of the Bank by failing to advise them that Rasid held the Property sought to be mortgaged only as an administrator and/or trustee and/or that the housing loan that Rasid sought was unrelated to the administration of the estate and/or that the money disbursed under the housing loan would be utilized for purposes unrelated to the administration of the estate.

8 Section 83 itself reads as follows (it is set out in full not only to give the full context of the provision but also to emphasise the general nature of ss 83(2)(*b*) and 83(2)(*h*), which is elaborated upon later (at [75]–[82] below):

Power to strike off roll or suspend or censure

83. —(1) All advocates and solicitors shall be subject to the control of the Supreme Court and shall be liable on due cause shown to be struck off the roll or suspended from practice for any period not exceeding 5 years or censured.

(2) Such due cause may be shown by proof that an advocate and solicitor —

(*a*) has been convicted of a criminal offence, implying a defect of character which makes him unfit for his profession;

(b) has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or guilty of such a breach of any usage or rule of conduct made by the Council under the provisions of this Act as amounts to improper conduct or practice as an

advocate and solicitor;

(*c*) has been adjudicated bankrupt and has been guilty of any of the acts or omissions mentioned in section 124 (5) (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*h*), (*i*), (*k*), (*l*) or (*m*) of the Bankruptcy Act (Cap. 20);

(*d*) has tendered or given or consented to retention, out of any fee payable to him for his services, of any gratification for having procured the employment in any legal business of himself or any other advocate and solicitor;

(*e*) has, directly or indirectly, procured or attempted to procure the employment of himself or any advocate and solicitor through or by the instruction of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given;

(*f*) has accepted employment in any legal business through a person who has been proclaimed a tout under any written law relating thereto;

(*g*) allows any clerk or other unauthorised person to undertake or carry on legal business in his name, that other person not being under such direct and immediate control of his principal as to ensure that he does not act without proper supervision;

(h) has been guilty of such misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession;

(*i*) carries on by himself or any person in his employment any trade, business or calling that detracts from the profession of law or is in any way incompatible with it, or is employed in any such trade, business or calling;

(*j*) has contravened any of the provisions of this Act in relation thereto if such contravention warrants disciplinary action; or

(*k*) has been disbarred, struck off, suspended or censured in his capacity as a legal practitioner by whatever name called in any other country.

(3) Pupils shall, with the necessary modifications, be subject to the same jurisdiction as can be exercised over advocates and solicitors under this Part; but in lieu of an order striking him off the roll or suspending him, an order may be made prohibiting the pupil from applying to the court for admission until after a date specified in the order.

(4) The jurisdiction given by subsection (3) shall be exercised by a single Judge.

(5) In any proceedings under this Part, the court may in addition to the facts of the case take into account the past conduct of the person concerned in order to determine what order should be made.

(6) In any proceedings instituted under this Part against an advocate and solicitor consequent upon his conviction for a criminal offence, an Inquiry Committee, a Disciplinary Committee and a court of 3 Judges of the Supreme Court referred to in section 98 shall accept his conviction as final and conclusive.

[emphasis added]

9 The Disciplinary Committee of the Law Society ("DC") found that cause of sufficient gravity existed for disciplinary action to be taken against the respondent pursuant to s 83 of the Act (reproduced above at [8]), albeit only with respect to the second and third charges. It did not in fact proceed with the fourth charge and, at the conclusion of its deliberations, dismissed the first charge. Hence, the present application was taken out by the Law Society under s 98(5) of the Act against the respondent to make absolute an order to show cause.

10 The factual background leading to these proceedings is as follows. The respondent is an advocate and solicitor of the Supreme Court of Singapore of some 20 years' standing.

11 On 1 May 1995, Mr Ali bin Baker ("the deceased") died intestate. The principal asset of the estate of the deceased was a property at 84G Lorong Melayu ("the property"). The beneficiaries of the estate were 12 in number, comprising five sons, five daughters, the deceased's wife and the deceased's mother's estate.

12 The principal individuals involved in the present proceedings comprised the deceased's eldest son, Abdul Razak bin Ali ("Razak") and daughter, Nazihah binte Ali ("Nazihah") as well as the second oldest son, Abdul Rasid bin Ali ("Rasid").

13 The respondent stated that he was instructed by Rasid to file a petition for letters of administration ("the petition") on the basis that he (Rasid) was to be the sole administrator of the estate of the deceased ("the estate").

14 The respondent first met eight of the 11 surviving members of the family (including Rasid) on 8 August 2001 at the property, although what precisely transpired at that meeting is in dispute. However, we note that the respondent, in his counsel's submissions to this court, acknowledged that some of the beneficiaries had asked whether they could appoint a co-administrator. It was further acknowledged that these same beneficiaries had expressed certain misgivings about Rasid becoming the sole administrator of the estate. The respondent also stated that he had informed the beneficiaries at that meeting that there would be additional costs involved and that it would take more time, and that he had also told them that they did not have to sign a document renouncing their claim to be co-administrators ("the renunciation document"). As it turned out, they did in fact sign the renunciation document.

15 The petition was filed some 20 days later (on 28 August 2001) and letters of administration were granted to Rasid on 29 August 2001. Rasid became the sole administrator of the estate.

16 On 6 December 2001, Rasid informed Nazihah to bring her sisters to the respondent's office. There, they were attended to by one Kasmin, the respondent's clerk. At this meeting, the family members signed a document consenting to dispense with sureties to the administration bond ("the consent document"). There is some dispute as to whether Kasmin properly explained the nature of the consent document to the beneficiaries. It was contended by the respondent that he did, in fact, wait for the beneficiaries to arrive in order to personally explain the document to them. However, they arrived later than he had expected. Therefore, he instructed Kasmin to explain the document.

17 Some eight months later, on or about 17 April 2002, the respondent prepared and filed the "Transmission Application" and Rasid became *the sole registered proprietor* of the property. The "Transmission Upon Death" was registered on 19 April 2002.

18 Shortly thereafter, Rasid applied for (and obtained) a loan for $200,000 from the Standard

Chartered Bank ("the bank"). Rasid instructed the respondent to act for him in the mortgage of the property in order to secure the said loan from the bank. The respondent also acted for the bank in this mortgage transaction.

19 The mortgage was lodged on 3 July 2002. However, Rasid utilised the loan for his own purposes.

20 The remaining beneficiaries stated that they were unaware of the fact that Rasid had become the sole registered proprietor of the property and of the subsequent mortgage to the bank.

21 Rasid subsequently fell behind in his payments and the bank foreclosed, seeking possession of the property around July 2003. The beneficiaries stated that that was approximately the time when they had first learnt of the mortgage.

22 The family attempted to resist the foreclosure proceedings initiated by the bank and managed to intervene successfully. It also transpired that the respondent, in acting for the bank, had overlooked the fact that the mortgage, having been entered into more than six years after the death of the intestate, required court approval pursuant to s 35(2) of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed). Such approval had not in fact been obtained and the mortgage was therefore invalid.

23 The respondent's professional insurers settled the claim by the bank for the respondent's negligence on 24 August 2004, less the deductible. The bank, in return, executed a "Total Discharge" of its mortgage within one month of 24 August 2004 and delivered the document and the certificate of title of the property to the solicitors then acting for the other beneficiaries.

24 Rasid was made bankrupt. The legal title to the property remains in his name and he remains an undischarged bankrupt. However, there are no mortgages registered against the property. The certificate of title for the property does not indicate that Rasid, as the registered proprietor, holds the property "on trust". Rasid appears, instead, as "the registered proprietor of the estate and land".

25 On 12 April 2003, Nazihah and Razak, representing the other beneficiaries, lodged a complaint against the respondent to the Law Society. An Inquiry Committee was duly constituted and recommended that the matter be referred to the DC for a formal investigation.

26 The hearing before the DC lasted four days, during which time Nazihah and Razak were called as witnesses. The respondent gave evidence, but did not call any other witnesses.

27 Nazihah and Razak did in fact withdraw the complaint during the course of the hearing before the DC, albeit after they had given evidence. However, the DC had a duty to continue with the hearing and duly did so. None of the parties dispute that this was a proper course of action for the DC to adopt. Counsel for the Law Society, Mr Gregory Vijayendran, pointed out (in his written submissions to this court) that the letter of withdrawal from Nazihah and Razak did not suggest in any way that the evidence they had both given was either incorrect or false in any material particular, or that the complaint had been trumped up. Mr Vijayendran also pointed out that after the withdrawal of the complaint, the respondent was given the opportunity to recall Nazihah and Razak as witnesses, but elected not to do so.

28 The DC arrived at certain findings. In particular, it is stated, in para 42 of the report of the DC ("the Report"), thus:

We therefore find:-

(a) the Respondent did not at any time during the meeting say or make it clear to the other beneficiaries that he was only acting for Rasid and not for the other beneficiaries;

(b) the Respondent did not advise the other beneficiaries at any time that they could or should seek independent advice;

(c) the Respondent knew the other beneficiaries had specific misgivings over Rasid being the sole administrator;

(d) the other beneficiaries' specific fear, which was articulated at the meeting, was the ability of Rasid, once he was sole administrator, to sell or mortgage or deal with the Property without their knowledge or consent;

(e) the Respondent, on the contrary, answered their questions and gave advice to the other beneficiaries and in so doing:-

(i) threw cold water on the suggestion that there be more than one administrator; and

(ii) gave various assurances to the other beneficiaries on their misgivings including the limited power of the sole administrator to sell or mortgage or deal with the Property without the consent of the other beneficiaries;

(f) it is not denied that the Respondent was introduced to the other beneficiaries as a friend of Rasid, who was a lawyer and he was there to "..help.." the family "..regarding the house.."; and

(g) on the Respondent's own evidence, he accepted that he was not only acting for Rasid, but also ".. for the estate.." in petitioning for Letters of Administration.

29 The DC held that, in the circumstances, the Law Society had made out its case against the respondent and that the respondent was guilty as charged beyond a reasonable doubt under the second and third charges of grossly improper conduct in the discharge of his professional duty within the meaning of s 83(2)(*b*) of the Act and conduct unbefitting of an advocate and solicitor and as an officer of the Supreme Court and as a member of an honourable profession under s 83(2)(*h*) of the Act (see the Report at para 96). Although the DC dismissed the first charge against the respondent, it did express the view that if it had been relevant or necessary, it would have found that the Law Society had made out its case against the respondent on the first charge as well (see *id* at para 97).

30 The following conclusions arrived at by the DC are also relevant and which, because of their importance, are reproduced as follows (see the Report at paras 80–90):

80. Having heard the evidence and the Respondent's answers, we repeat our findings set out in paragraph 42 above. We have come to the unanimous conclusion that even if the Respondent was initially instructed by Rasid, when he attended the meeting with the other beneficiaries on 8 August 2001, he did not say he was only acting or going to act for Rasid and no one else. We find that his conduct in explaining the documents in detail, as he claims, to the other beneficiaries, answering their questions, discussing various issues surrounding the Petition and giving them assurances on various points, including the rights of and what a sole

administrator could or could not do and for items like raising the issue of higher fees for a co-administrator, he behaved as if and led the other beneficiaries to believe he was their lawyer as well.

81. Even if the Respondent was correct in his assertion, which we do not accept, insofar as he explained the documents in detail, the procedures involved, fielding their queries and listening to their misgivings and then giving assurances in these circumstances, there is a duty on an advocate and solicitor to:-

(a) make clear, beyond doubt to the persons present at the meeting, given their level of sophistication, facility in language and level of understanding, that he was only acting for one of the beneficiaries;

(b) he was only going to take instructions from that beneficiary; and

(c) clearly advise the other beneficiaries to seek independent legal advice.

We find that he did none of this.

82. The Respondent did not attend to the beneficiaries when they called at his office on 6 December 2001 to sign the Consent to Dispense with Sureties but allowed Kasmin to attend to them. We find that Kasmin did not explain the nature of and contents of the documents to those beneficiaries who were signing the same. The Respondent then wrongfully witnessed their signatures as having been made before him and voluntarily.

83. Although the Respondent tried to contend that he only acted for Rasid, he was driven to admitting that he was acting for "the estate" but maintained that he was only receiving instructions from Rasid. As noted above, the facts and his conduct showed otherwise.

84. When this is coupled with three other factors:-

(a) first, the fact that the other beneficiaries had misgivings about Rasid being the sole administrator and his ability thereby to sell or mortgage the Property, the Respondent then gave assurances that he could not do so;

(b) secondly, the only reason why Rasid could not do so was because he would be "..wrong in law..", i.e., a euphemism for committing a breach of trust; this was clearly a false assurance; when the Property was registered in Rasid's name as the sole proprietor he could then proceed to deal with the Property as absolute owner; and

(c) thirdly, despite this the Respondent proceeded to act for Rasid in the mortgage of the Property to secure a loan to Rasid;

the Respondent cannot excuse his role in what was clearly a breach of trust on the part of Rasid nor to be heard to say that he honestly did not realise the importance of what was happening.

85. Today, the Respondent turns to this Disciplinary Committee and says honestly he did not realise any of these things at that time. The law on this point is clear:

> … it was no answer to a charge of misconduct that the solicitor thought it was not misconduct or if he failed to appreciate the unsatisfactory or objectionable nature of his conduct.

See *Law Society of Singapore v. Kushvinder Singh Chopra* [1999] 4 S.L.R. 775 at 792 to 793; subsequently approved in *Law Society of Singapore v. Ganesan Krishnan* [2003] 2 S.L.R. 251 at 260, para.28.

86. The Respondent's counsel also brought the duty of client confidentiality to Rasid. In our view, this cannot be any excuse. The Respondent took it upon himself to field questions from the other beneficiaries, give them advice and answers and gave them assurances to assuage their misgivings. In so doing, on his own evidence, he was at least acting for "… the estate …"

> A solicitor may have a duty to one side and a duty on the other, namely a duty to his client on the one side and a duty to his beneficiaries on the matter; … The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosures or say – which would be much better - "I cannot accept this business."
>
> see: *Moody v. Cox and Hatt* [1917] 2 Ch. 71, per Lord Cozens Hardy, M.R. at 81; approved in *Law Society of Singapore v. Subbiah Pillai* [2004] SGHC 75.

We also do not find the time span between the 8 August 2001 Meeting, the filing of the Petition for Letters of Administration, the mortgage to the Bank and drawdown to be too long a stretch of time to de-link the Respondent's role in the Petition for Letters of Administration, the extraction of the Letters of Administration and acting in the mortgage of the Property for Rasid and the Bank. The Respondent's alleged letters to Rasid, set in paragraphs 71 to 73 above, show that such a submission is wholly untenable on the facts of this case.

87. It was submitted that the Respondent did not stand to make any personal or financial gain from these transactions. However, this submission ignores the fees the Respondent was paid for obtaining the Petition for Letters of Administration and in acting for the mortgagor and mortgagee in the subsequent mortgage. The fact that the fees were not large or very significant misses the point.

88. We also accept that the Respondent did not in any way, other than in respect of his professional fees, gain from or share or otherwise participate in the spoils of the breach of trust. There was also no evidence of dishonesty or dishonestly conspiring with Rasid to 'do in' the other beneficiaries. Again this misses the point. The Respondent fell woefully short of conduct which was expected of him as a member of an honourable profession and as prescribed under the Legal Profession Act.

89. The Respondent is first and foremost an officer of the Court. His primary duty is to the Courts and upholding the administration of justice. It must go beyond just taking instructions from a client or clients and acting thereon without regard to surrounding circumstances. That there must be limits is clear. Hence a lawyer cannot put forward a defence of alibi when his client told him he committed the offence with which he is charged. That would amount to misleading the Court. Similarly suppression of relevant and cogent evidence also amounts to misconduct: see cases like *Meek v. Fleming*, [1961] 2 Q.B. 366 at 379-380; *Vernon v. Bosley (No.2),* [1997] 1 All E.R. 614. Whilst there may be times when the line is very fine, this is certainly not one of those cases.

90. We cannot agree with Mr. Sreenivasan that by finding this Respondent guilty we will be

setting impossibly high standards for the profession which cannot be complied with. Although the judgment of Lord Reid in *Rondel v. Worsley* [1969] 1 A.C. 191 related to the duty of counsel, the judgment on the standard to be applied is apt:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. ***But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.*** Counsel must not mislead the court, …
> (emphasis added)

The second charge

31 The situation with respect to the second charge (reproduced above at [7]) is more straightforward. Indeed, the respondent himself *admitted* that he had not witnessed the signatures. However, counsel for the respondent, Mr Davinder Singh SC, argued that not only did the respondent concede that he was guilty under this particular charge, but that he (the respondent) had also done so at the first available opportunity. In the circumstances, therefore, Mr Davinder Singh argued that the respondent would have been reprimanded or fined at that particular stage. With respect, such an argument would only succeed absent any finding of guilt on the third charge. Further, the second charge related to improper conduct that was not merely technical in nature. Nevertheless, all these (as well as other) factors are relevant, in the main, to the sanction that ought to be imposed on the respondent – an issue to which we shall return at the conclusion of this judgment.

32 We also note that the respondent claims to have told his then clerk, Kasmin, to explain the consent document to the beneficiaries. The complainants, however, testified that no such explanation was given. In this regard, it must be observed that the respondent chose not to call Kasmin to testify as to the veracity of the respondent's assertion. We therefore agree with the DC's holding to the effect that Kasmin ought to have been called to rebut the evidence of the complainants and that, in the circumstances, an adverse inference ought to be drawn against the respondent (see the Report at para 51). In any event, even if we accept the respondent's version of this episode, it does not advance his case very far because the gravamen of the charge is that the respondent had falsely attested to having personally witnessed the execution of the consent document by the beneficiaries. The fact that he delegated this responsibility (and then falsely declared otherwise subsequently) does not, in any way, negate the charge against him.

33 We turn now to the main issue in the present proceedings, centring on the third charge (reproduced above at [7]).

The third charge

Introduction

34 This issue was the focus of arguments on the part of counsel for both parties. In the circumstances, it would be appropriate, in our view, to state what was not in dispute before proceeding to decide on what was indeed in dispute.

35 Firstly, it was not disputed that the respondent was not guilty of any dishonest conduct.

36 Secondly, it soon became clear that the nub of the disagreement between the parties

centred on the issue as to whether the respondent had acted as solicitor for the other beneficiaries as well as for Rasid or whether he acted for Rasid alone. In particular, the related issue was raised as to whether the respondent had entered into an implied retainer with these other beneficiaries.

37 At this particular juncture, it might be appropriate to comment on the positive aspects that emerged from the otherwise unfortunate disagreement between the parties. We have in mind, in particular, the manner in which both Mr Davinder Singh and counsel for the applicant, Mr Gregory Vijayendran, aided in crystallising the issues before this court – especially those mentioned in the preceding paragraph.

38 When, for example, Mr Davinder Singh was asked whether or not a fiduciary duty could arise on the specific facts of a given case, notwithstanding the absence of a solicitor-client relationship, he promptly pointed to the Supreme Court of New South Wales decision of *Global Funds Management (NSW) Ltd v Rooney* (1994) 15 ASCR 368, where it was held, *inter alia* (at 379), that:

> While it may be possible for the unrepresented party to have some redress against the solicitor on the basis that the solicitor was a fiduciary in the sense that he or she was a person who was held out as acting on behalf of another person and in that person's interest, the solicitor will not be liable in the same way as if he or she were the unrepresented party's solicitor.

Notwithstanding the caveat contained in this quotation, it was nevertheless clear that a fiduciary duty could possibly arise in an appropriate situation.

39 On the other hand, Mr Vijayendran did not attempt to argue that it was the Law Society's case that a fiduciary duty had arisen *apart from* an implied retainer between the respondent and the beneficiaries. He focused solely on the issue of the implied retainer, although, as we shall see, the third charge (in particular, the second limb thereof) was phrased in a manner that did admit of a somewhat broader construction than that adopted by Mr Vijayendran. But this only serves to underscore the meticulous professionalism with which he had conducted his case before us.

40 It is perhaps ironic that we find that, given the very circumstances and context of the present proceedings, counsel for both parties demonstrated what it is (and ought to be) like to practise the law in its best (indeed, its highest) traditions. This is heartening because one major ideal underlying the practice of the law is that, even (or, perhaps, especially) under an adversarial system, counsel concerned can join in "legal combat" and still display the nobility of the law. Indeed, as Whyatt CJ also put it in the Singapore High Court decision of *Shaw & Shaw Ltd v Lim Hock Kim (No 2)* [1958] MLJ 129 at 130–131:

> The Court appreciates fully the difficulties which confront counsel from time to time in the discharge of their dual duty to their clients and to the Court, and it may be of assistance to them in the solution of such difficulties when they arise, to recall the guiding principles laid down in this matter by Judges of great learning and wisdom. Of the duty of an advocate to his client, it will suffice to quote the eloquent language of Chief Justice Cockburn cited by McCardie J. in an address delivered in the Middle Temple:-
>
> > My noble and learned friend Lord Brougham, ... said that an advocate should be fearless in carrying out the interests of his client, but I couple that with this qualification and this restriction, that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his clients ***per fas*** and not ***per nefas***. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is incumbent upon him to discharge with the eternal and

immutable interests of truth and justice.

And in *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] 2 SLR 509, I also had occasion to observe thus (at [64]):

> Although we operate within an adversarial system which, by its very nature, mandates counsel on each side advocating, as persuasively and as fearlessly as possible, their arguments on behalf of their respective clients, this can – indeed, ought – to be achieved within a framework of what, for want of a better term, I would classify as professional courtesy and common decency. Put in simpler terms, one can disagree and yet not be disagreeable. The clash of arguments that is supposed to result in the emergence of the light of truth must not degenerate so that more heat than light issues. Looked at in a practical light, where there is the (hopefully, merely occasional) descent into a less than agreeable situation, not only is the legal system in general sullied by such unseemly conduct but the court is also hindered in ascertaining what the true facts are and, hence, in arriving at a fair and just decision. I am therefore pleased to note that counsel in the present case conducted themselves in a manner that was both exemplary as well as helpful to the court.

41 I am encouraged to be able to echo those words once again in the context of the present proceedings and commend both Mr Davinder Singh and Mr Vijayendran not only for their prodigious efforts but also for the exemplary manner in which they conducted their respective clients' cases in the best traditions of the Bar.

The Law Society's arguments

42 Turning to the issue as to whether or not the respondent had in fact acted for the beneficiaries pursuant to an implied retainer in general and the Law Society's arguments in particular, Mr Vijayendran pointed to several indicia which, taken together, constituted such a retainer. In particular, he pointed to the following facts.

43 First, it was clear from the respondent's own evidence that he was cognisant of the fact that the beneficiaries were uncomfortable and unhappy with Rasid being appointed the sole administrator, and that at least one or two had clearly voiced these views in no uncertain terms. Indeed, the respondent himself admitted that the beneficiaries were worried about Rasid dealing with the property himself – a fear that was later proved, as it turned out, to be correct.

44 Second, the respondent had taken it upon himself to address the beneficiaries' misgivings and had in fact reassured them that Rasid, as the sole administrator, could not deal with the property without their authorisation.

45 Third, the respondent had in effect poured cold water on the suggestion that a co-administrator be appointed. He referred to the additional costs and administrative trouble involved and that he (the respondent) would have to take instructions from more than one person and that that would entail his having to attend court a number of times.

46 Fourth, the respondent admitted that Rasid had in fact introduced him to the other beneficiaries as a friend and a lawyer who was there to assist them with regard to the property.

47 Fifth, the respondent admitted that he had spent the better part of an hour explaining to the other beneficiaries the documents he had prepared for their signature. Indeed, he claimed to have explained the full contents of the documents concerned word by word in English and Malay.

48 Sixth, the respondent admitted that he had answered the questions from the other beneficiaries without qualifying the answers or telling them that they should seek independent legal advice. He did not say or make it clear to the other beneficiaries that he was acting for Rasid only, and not for them.

49 Seventh, the respondent admitted that he had acted for the estate in petitioning for the letters of administration.

50 Eighth, all the above factors had to be viewed in the context of the respondent's own experience as an experienced practitioner who would, in the nature of things, have been aware of the possible pitfalls that might arise in circumstances such as the present – particularly where multiple beneficiaries were involved and there had been no consensus amongst them.

51 Ninth, the respondent ought to have appreciated that he had given the beneficiaries the objective impression that he was acting for them.

The respondent's arguments

52 Mr Davinder Singh raised several arguments on behalf of the respondent in so far as the third charge was concerned.

53 He argued, first, that there had been a serious error with respect to the third charge. This consisted of a serious error of law inasmuch as the Law Society and DC had fudged the question of who the client was. Mr Davinder Singh argued, in particular, that only Rasid was the respondent's client. In the circumstances, therefore, the respondent owed a duty to Rasid only, and not to the beneficiaries. Mr Davinder Singh then proceeded to argue that there had been neither an express nor an implied retainer between the respondent and the other beneficiaries. The finding by the DC that there had in fact been an implied retainer was merely an afterthought as it was expressly raised for the first time only in the applicant's reply submissions. Further, there had been no distinction drawn by the Law Society as to what happened before and what happened after the grant of the letters of administration – bearing in mind that the respondent had in fact met, as well as spoken, with the beneficiaries (on 8 August 2001) prior to such grant.

54 Mr Davinder Singh also referred to the relevant case law with regard to implied retainers. In particular, he cited the English Court of Appeal decision of *Dean v Allin & Watts* [2001] 2 Lloyd's Rep 249 ("*Dean*"), which we will have occasion to comment upon later.

55 Mr Davinder Singh argued, in particular, that what transpired between the respondent and the beneficiaries was merely a preparatory step to explaining the renunciation document that they ultimately signed.

Our decision

56 As we have already mentioned, the key issue here turns on whether or not there was a retainer between the respondent and the beneficiaries. We do not think – nor has it been seriously contended by Mr Vijayendran – that there has been an express retainer. If at all, there was an *implied* retainer between the respondent and the beneficiaries.

57 Before proceeding to consider whether there was indeed an implied retainer between the respondent and the beneficiaries, we should first deal with Mr Davinder Singh's argument that the third charge was itself vague and unclear. It is not merely textbook law but also just and fair that

before persons such as the respondent can be asked to meet a charge preferred against them, the charge must itself be clear and unambiguous. As Yong Pung How CJ held in the Singapore High Court decision of *Viswanathan Ramachandran v PP* [2003] 3 SLR 435 at [24], citing the following words of Norris R in *Lim Beh v Opium Farmer* (1842) 3 Ky 10 at 12:

> [I]f there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as he best may.

58 The crux of the third charge is that the respondent had "failed to discharge his duties as solicitor for the Estate to the Beneficiaries and/or failed to safeguard the interests of the Beneficiaries, in that he subordinated the interests of the Beneficiaries to the interests of Rasid".

59 Mr Davinder Singh argued that this charge against the respondent was bad in law. In particular, he exercised his energies towards showing that the DC had failed to appreciate the distinction between acting for the estate and acting for the beneficiaries. In other words, the third charge, in stating that the respondent had acted as "solicitor for the estate", meant nothing more than that the respondent was "solicitor for the administrator/trustee". In the circumstances, therefore, the respondent only owed duties to Rasid, who was the administrator/trustee of the estate – and to no one else (including the beneficiaries). Hence, so the argument went, it was not possible for the respondent to subordinate the interests of the beneficiaries to the interests of Rasid as they (the beneficiaries) were not his clients in the first instance.

60 We pause here to note that despite the apparent attractiveness of Mr Davinder Singh's argument, the fact remains that, in the end, even if we agreed that "acting for the estate" meant acting solely for Rasid, this in no way addresses the more critical issue in this appeal. That issue is that even if it could be argued that "acting for the estate" is on the basis of the respondent acting solely for Rasid, there is a *second* limb to the third charge, which is that the respondent "failed to safeguard the interests of the Beneficiaries".

6 1 Indeed, we are cognisant of the fact that the respondent did raise the issue of the charge being bad in law before the DC but that it was rejected: see paras 27 and 94 of the Report. This is only correct in the circumstances. The literal language of the third charge is clear and it is that the respondent had "failed to discharge his duties as solicitor for the Estate *to the Beneficiaries* and/or failed to safeguard *the interests of the Beneficiaries*, in that he *subordinated the interests of the Beneficiaries* to the interests of Rasid" [emphasis added]. Even if it could be argued that the phrase "solicitor for the Estate to the Beneficiaries" could be read as meaning that the respondent had acted as "solicitor for the estate" *simpliciter*, the focus of the second limb of the charge was clearly on the duties allegedly owed to *the beneficiaries*, and not merely to Rasid. Indeed, it would have been illogical for the Law Society to have preferred charges only on the basis of duties owed by the respondent to Rasid when the complainants were two of the beneficiaries. In any event, as we have just seen, the language of the charge itself does not support the respondent's argument in this particular regard. Furthermore, the first charge preferred was clearly on the basis of the respondent acting solely for Rasid; therefore, again, the third charge would be rendered otiose if its basis were that the respondent acted only for Rasid.

62 In addition, even if the charge was not as precise as it could have been, the respondent was able to put forward his case with clarity and, as Mr Davinder Singh has done, with much force. Therefore, there is no question in our minds that the respondent was not misled or prejudiced by the allegedly faulty charges. In *Chew Seow Leng v PP* [2005] SGCA 11, the Singapore Court of Appeal held

(at [24]) that:

> In any event, there was nothing to suggest that the appellant was misled by the amalgamation of the original charges, or that a failure of justice was occasioned as a result. The appellant was represented by counsel at his trial, and neither he nor his counsel raised any objections to the amalgamation. In these circumstances, it was insufficient for the appellant to submit on appeal that he had been misled because he was a layman ignorant of the law.

These words apply with equal force to the facts of this case. We do emphasise, however, that this does not give licence to the Law Society to prefer charges that are both in substance and in form vague, embarrassing, bad in law and ambiguous (see [57] above). However, we find no occasion in these proceedings to hold that the charges preferred against the respondent are of such a character.

63 We therefore reject the argument that the third charge only refers to the respondent as having acted only as solicitor for Rasid as administrator or trustee of the estate. We turn, therefore, to consider whether or not the respondent had in fact acted as solicitor for the beneficiaries pursuant to an implied retainer.

64 On a general level, whether or not a retainer between a lawyer and a client comes into being in the first instance is dependent very much on the precise factual matrix concerned. However, what is clear is that no legal formalities (such as writing) are required in order for such a retainer to exist, although if there is a specific agreement as to the lawyer's fees, this will have to be in writing (see generally Tan ([1] *supra*) at p 231 as well as ss 109 and 111 of the Act).

65 What, then, do the facts tell us in so far as the present proceedings are concerned? In our view, there is clear evidence of an implied retainer entered into between the respondent on the one hand and the beneficiaries on the other. Indeed, an excellent summary of the factors leading to such a conclusion can be found in the indicia referred to by Mr Vijayendran above (see generally [42]–[51] above).

66 Mr Davinder Singh referred repeatedly to the respondent's perspective. Whilst we acknowledge the need to take into account that particular perspective, it is by no means conclusive for a number of reasons. First, the respondent's perspective must be consistent with the objective facts. A purely subjective perspective is unworkable from a legal point of view. Secondly, and more importantly, one must also take into account the *beneficiaries'* perspective – again, adopting an objective approach. In other words, the question is whether it was reasonable for the respondent or the beneficiaries to have arrived at the conclusions that they did in respect of their characterisation of their relationship *inter se*. The objective stance enables the court to maintain a fair and balanced perspective in order to enable it to arrive at a just and fair result. In fact, this objective test was exactly the standard applied in the textbooks and cases cited by Mr Davinder Singh. As a sampling, in *Cordery on Solicitors* (Anthony Holland gen ed) (LexisNexis UK, 9th Ed, 1995, 2004 release), the learned author stated at para E 425:

> A retainer may be implied where, on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to all the parties. The implication would have to be so clear that the solicitor ought to have appreciated it. Circumstances to be taken into account might include, where appropriate, who is paying the [solicitor's] fees, who is providing instructions and whether a contractual relationship has existed between the parties in the past.

And in *Dean* ([54] *supra*), the English Court of Appeal held (at [22]):

> [A]n implied retainer could only arise where on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties.

67 Based on an objective analysis of the facts and evidence before us, it was clear from the indicia Mr Vijayendran referred to that the respondent was acting for the beneficiaries and that it ought to have dawned on the respondent as such (indeed, we find that he was acutely aware that he was entering into a retainer with the beneficiaries). He had given his express advice on the renunciation document and they had taken it. Indeed, his advice was neither perfunctory nor non-committal. He had gone so far as to inform the beneficiaries as to the additional costs as well as the delay in having a co-administrator. He had sought to allay their fears with regard to Rasid. These indicia take the present case outside *Dean*, where there was a finding that the solicitor in that case did not give any express advice to the alleged client and, indeed, did not intend to communicate with him at all: [54] *supra* at [23]. The advice given in the present proceedings did not constitute merely preparatory steps to explaining the renunciation document which was ultimately signed by the beneficiaries, as the respondent contends (see [55] above). Nor could it be seriously argued that what the respondent was doing was merely "processing matters" between the beneficiaries and Rasid: see *Dean* at [24]. He had gone much further than that. Even apart from the meeting on 8 August 2001, the respondent himself claimed that on 6 December 2001, he waited to explain the consent document to the beneficiaries. However, when they arrived later than he had expected (and he was therefore unable to meet them), he instructed Kasmin (his clerk) to explain the document to the beneficiaries. Again, from an objective viewpoint, the respondent must have regarded the beneficiaries as his clients as well. In addition, the conduct of the respondent was in a situation where there was no other solicitor acting for the beneficiaries. Although this is by no means conclusive, it is a relevant factor which we can (and do) take into account (see also Tan ([1] *supra*) at p 232). All of these indicia are objective. It ought to have been obvious to the respondent that he was entering into an implied retainer with the complainants. In this regard, it is necessary to emphasise that we do not rely simply on the fact that the respondents may have been unschooled in the law; nor do we rely solely or even primarily on the complainants' subjective perspective. At best, the respondent might have been unclear as to whether or not he was *officially* their lawyer, although we do *not* think that even this was the case, having regard to the objective facts before us. In our view, the respondent must have, at the very least, strongly suspected what the situation was but deliberately shut his eyes to what he would have clearly and unambiguously discovered had he, for instance, clarified the situation with the beneficiaries themselves. Indeed, the respondent had sent three letters to Rasid urging him to seek the assent of his family before mortgaging the property: see paras 71, 73 and 74 of the Report. These letters demonstrate two things. The first is that he knew that Rasid's instructions were opposed to the interests of the beneficiaries. This is most clearly demonstrated by the letter dated 8 April 2002 wherein the respondent wrote:

> Some time ago, your mother and siblings informed us that they want all their "names stated in the Grant of Letter of Administrations". This contradicts your instructions, and all that wee [*sic*] have done.
>
> To avoid further confusion, please clarify the position.

The second implication from these letters is that the respondent must have considered himself responsible to the other beneficiaries in some way. It may be said that these letters are merely gratuitous; but, in the circumstances, they demonstrate that he felt obliged to the beneficiaries and was worried about what Rasid was doing. The fact that, as Mr Davinder Singh points out, a lawyer should not question his client's instructions (bar certain exceptions) and the fact that the respondent *did* fully support our view that he knew that the beneficiaries were relying on him as their solicitor and

that, in fact, he owed a reciprocal duty *as their solicitor*. And yet, the respondent went no further to insist on Rasid obtaining their consent, or to inform the beneficiaries that Rasid was mortgaging the property or to discharge himself as Rasid's solicitor if he felt he was not in a position to do either of the above. Instead, he relied on Rasid's bald assertion that what he was doing was in the interests of the beneficiaries. Under such circumstances of "Nelsonian blindness", the respondent can be taken as having had, in law, *actual* knowledge (see also *Law Society of Singapore v Ong Ying Ping* ([4] *supra* at [56]).

68 While it may not be of critical relevance in analysing whether the respondent was in an implied retainership with the beneficiaries, we do note that the beneficiaries were generally unschooled in the law and therefore relied upon the respondent for legal advice. More than that, it is clear to us that they trusted the respondent. A more general – and extremely significant – point arises from this. It is that the public rely upon lawyers for wise and effective counsel. This is especially the case when clients are particularly vulnerable. This could be due to a number or variety of reasons – or, indeed, a combination thereof. These include impecuniousness, a lack of schooling and/or language and (invariably, with the exception of legally-trained persons) a lack of legal knowledge. In this last-mentioned regard, it is not merely an absence of legal knowledge. To many laypersons (even highly educated ones), the law constitutes a morass of technical – even arcane – rules. Many even fear the law when the precise opposite should be the case. The law is meant to achieve justice and fairness for all. It is the objective bulwark against tyranny and oppression, anarchy and disorder. It is supposed to facilitate transactions of all kinds in a reasoned and accessible manner. Laypersons ought therefore to embrace the law, or at least not be uncomfortable with seeking legal advice or redress. Even as there have been laudatory moves in a variety of forms towards making the law more accessible to the layperson, we must guard against anything which retards or hinders this process zealously. The present proceedings illustrate all the dangers that must be assiduously avoided. Lawyers must convey what the precise legal situation is with limpid clarity, taking into consideration the fact that their clients may not always share the same language, intellectual or legal facility as them. The legitimacy of the law in general and of legal personnel in particular depends on this. Still less must laypersons be lulled into a false sense of security and/or into a situation of misinformation. Whenever in doubt, lawyers should clarify. They must begin from the assumption that laypersons are more likely to rely upon them than not – if only because they are professionals schooled in the law and whose calling is therefore to advise on the law in all its various aspects. They must, wherever applicable, advise laypersons to seek independent legal advice if they are unable to assist – for example, because of a possible conflict of interests. In the present proceedings, although the DC found that "Nazihah is a graduate and was more articulate than her eldest brother, Razak, but even then as can be seen from the transcript, their use of English was loose and colloquial" (see the Report at para 29). It was clear that the beneficiaries needed to be advised clearly, and that the respondent had failed to discharge his duty in this particular regard.

69 An excellent illustration of how the complainants had been lost in translation, as it were, may be found in how the respondent explained the concept of administration to the complainants. During cross-examination by Mr Vijayendran during the DC proceedings, the respondent testified as such:

> Q. … Did you know what was the underlying concern that prompted them to want to appoint a co-administrator?
>
> A. Sir, during the discussion, Sir, they did ask the question as to whether the property could be mortgaged or sold by the administrator at his sole discretion. I could only surmise that that could be a possible reason.
>
> …

Q. What was your response to that concern?

A. I told them that the administrator could not do so, i.e. deal with the property at his sole discretion without the authorisation or on behalf of the beneficiaries because if he does so, he would be wrong at law. In other words, he might be in – he might have done something wrong but if he does so on behalf of the beneficiaries for the benefit of the beneficiaries, then it would have been a different thing.[note: 1]

On the other hand, the complainants were consistent in how they interpreted what the respondent had said. Nazihah testified:

> Ahmad Khalis has assured us that we are going to choose a leader who is representing the family and our understanding from his explanation is that the leader is just a legal representative and all our names will go down together with the name, like Rasid's name is at the top and all of our names will be below … So when he explained to us that choosing one administrator is not absolute power, it's just the person who is going to be at the top of the names, that's why we saw the inheritance cert so I said okay.[note: 2]

Razak, too, stated in similar terms:

> Because at that time, we felt like we trust our brother to be the administrator, because he's only like becoming the *ketua*, you know, he's the head, whereas all of us will be – our names, all of our names will be inside the – what do you call this, the transfer, so we believed that he cannot do anything. That was the explanation given to us. [note: 3]

This episode highlights the urgent point that a solicitor must not be cavalier in the manner in which he discharges advice. What may appear obvious to the solicitor may not be so for his client; and it is the responsibility of the solicitor to advise his client in a manner that the latter is able to appreciate and understand. There is no point in seeking legal counsel if, in the final analysis, one goes away with the wrong idea.

70 Having ourselves perused with a fine-tooth comb the notes of evidence of the complainants and of the respondent, the irresistible inference that we draw is that the respondent's evidence as to his (subjective) view of what happened is without substance. In this regard, we accept the conclusions that the DC reached in so far as the credibility of the witnesses was concerned; and we respectfully endorse what the DC had to say about the testimony of Nazihah and Razak (see the Report at para 28):

> Having heard the witnesses, we accept the evidence given by Nazihah and Razak. They gave their evidence in a very forthright and straightforward manner. Their evidence was not shaken in spite of searching cross-examination. They were simple and trusting people who did not know the law and had only the most vague and confused notions of what various legal terms and procedures meant.

71 As for the respondent, we also find that the DC was justified in their finding that (see the Report at para 30):

> The Respondent on the other hand, gave some answers that were very difficult to accept. Some of the reasons he gave as to why he did something or did not do something were astonishing for a lawyer with 18 years' experience.

72 Indeed, the DC proceeded to quote extended extracts from the notes of evidence which, in our view, clearly bore out the view stated in the preceding paragraph.

73 Whether or not there was an implied retainer between the respondent and the beneficiaries turned, undoubtedly and necessarily, on what in fact transpired between the parties – especially at the meeting of 8 August 2001. Looked at in this light, the credibility of the respective witnesses' testimony is a very significant factor and, as we have seen, comes down heavily against the respondent's version of events. If, indeed, the beneficiaries' version of events is to be believed (as we think they must), it is clear that there was an implied retainer entered into between the respondent and the beneficiaries.

74 Given our finding that there was an implied retainer between the respondent and the beneficiaries, it was incumbent on the respondent to keep the beneficiaries informed of all material developments and to explain the effect of all relevant documents (and see Tan ([1] *supra*) at pp 316–317; as well as r 17 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) ("the Professional Conduct Rules")). More importantly, it was also incumbent on the respondent not to place himself in, and still less create, a situation where there was a conflict of interests where he had to choose between obeying Rasid's instructions and betraying the trust of the other beneficiaries. Indeed, r 25 of the Professional Conduct Rules prohibits a solicitor putting himself or herself in a situation where there is a conflict of interests. Solicitors owe this unflinching loyalty to their clients, which is both fair and commonsensical. And if they are unable to satisfy all their clients in a particular transaction because of a diversity of opposing interests, such solicitors must either seek the informed consent of the parties or else extricate themselves from the conflict by declining to act for some or all of them. If the solicitor continues to act for some of the parties, he must simultaneously ensure that the other parties are not labouring under the assumption that he continues to act on their behalf. We find that the respondent had not only failed to extricate himself from the conflict of interests that he had found himself in but had also gone even further by failing to keep the beneficiaries informed, particularly of Rasid's intention to mortgage the property. In so doing, he had clearly subordinated the interests of the beneficiaries to the interests of Rasid. The third charge against the respondent has, in the circumstances, been clearly made out beyond a reasonable doubt.

75 We are further of the view that *even if* we found no implied retainer between the respondent and the beneficiaries, this would not necessarily mean that the respondent was not guilty of the third charge. However, because Mr Vijayendran, in the spirit of fairplay, did not press this particular point, we do not base our decision on it. Indeed, there is no need to do so because we have found that there was an implied retainer between the respondent and the beneficiaries in the first instance. Nevertheless, we express our views on this particular issue simply because, as we shall elaborate upon below, it is of the first importance that the focus be on the maintenance of the highest standards of professional and ethical conduct.

76 It is not a prerequisite to the existence of a breach of ss 83(2)(*b*) and/or 83(2)(*h*) of the Act (reproduced at [8] above) that there must first be demonstrated that a retainer (whether express or implied) exists between the solicitor concerned and the complainant(s). Let us elaborate by turning to the provisions themselves.

77 In so far as s 83(2)(*b*) is concerned, Wee Chong Jin CJ, delivering the judgment of the court in *Re Marshall David* [1972–1974] SLR 132 observed thus in the following oft-cited words (at 138, [23]):

> The test of what constitutes 'grossly improper conduct in the discharge of his professional duties'

in s 84 has been laid down in many cases as meaning conduct which is dishonourable to him as a man and dishonourable in his profession.

78 It will be seen that the criterion as embodied in the above quotation is very wide and is certainly not confined to situations where a retainer exists (see the decision of this court in *Re Gopalan Nair* [1993] 1 SLR 375 at 383, [20]). The focus is really on the *conduct* of the lawyer concerned and, more importantly, whether such conduct "is dishonourable to him as a man and dishonourable in his profession".

79 Turning, now, to s 83(2)(*h*), it will be seen that this particular provision is even broader than s 83(2)(*b*). As was pointed out by this court in *Law Society of Singapore v Ng Chee Sing* [2000] 2 SLR 165 at [40]:

> Section 83(2)(h) of the Legal Profession Act is a catch-all provision which can be invoked when the conduct does not fall within any of the other enumerated grounds but is nevertheless considered unacceptable. It was stated in *Law Society of Singapore v Khushvinder Singh Chopra* [[1999] 4 SLR 775] that unlike 'grossly improper conduct' in s 83(2)(b), 'conduct unbefitting an advocate and solicitor' is not confined to misconduct in the solicitor's professional capacity but also extends to misconduct in the solicitor's personal capacity. It follows that the standard of unbefitting conduct is less strict and, as stated in *Re Weare* [1893] 2 QB 439, a solicitor need only be shown to have been guilty of 'such conduct as would render him unfit to remain as a member of an honourable profession'.

Reference may also be made, in this regard, to *Law Society of Singapore v Arjan Chotrani Bisham* [2001] 1 SLR 684 at [35].

80 Indeed, as we have just seen, the focus of ss 83(2)(*b*) and 83(2)(*h*) is on the conduct of the solicitor – in particular, to ensure that the conduct of the solicitor concerned meets the high levels of professionalism expected of practising lawyers.

81 In this regard, and looking closely at the third charge, whilst it is clear that the first limb of the charge does appear to presuppose an existing retainer between the respondent and the beneficiaries, this is not the case with regard to the second (and alternative) limb, which refers to the respondent having "failed to safeguard the interests of the Beneficiaries, in that he subordinated the interests of the Beneficiaries to the interests of Rasid". It is true that, on one interpretation, it could be argued that this second limb takes its context from the first, and that there is therefore a need to demonstrate an existing retainer between the respondent and the beneficiaries. If so, then, as elaborated upon above, we have in fact found such a retainer on the facts of the present proceedings. However, we prefer the view to the effect that the second limb of the third charge is *general* in nature. It is premised as an alternative and is not (unlike the first limb) premised on an express failure by the respondent to discharge his duties *qua* solicitor. Indeed, the second limb would be otiose or redundant if it were premised on the demonstration of an existing retainer (although, as we have just seen, there *was* an implied retainer in any event). In other words, it would merely repeat what was already inherent within the first limb. The first limb is clear: it encompasses all the duties the respondent has to fulfil *qua* solicitor. But does the legal profession deal only with the lowest common denominator? Put simply, is a solicitor's *professionalism* owed *only* to those who have entered into a retainer with him or her? Is the legal profession a place where only economic pragmatism holds sway? This surely cannot be the case. The profession is a noble one – one that exists to serve the ends of justice and fairness. The cynicism that exists *vis-à-vis* the legal profession (unfortunately, across jurisdictions) is due precisely to the gap between ideal and actuality, especially in the eyes of the public. If the conduct of the "black sheep" in the profession results in the failure to

attain the ideal of justice and fairness and, on the contrary, results in the precise opposite, this does not demonstrate the elusiveness of the ideal, still less that it is unattainable. In so far as the practice of the law is concerned, the ideal (of justice and fairness) is the actuality – and *vice versa*. There ought to be no dichotomy or schism between the two. There will always be a gap between ideal and actuality in the real world caused by those who do not hold fast to the highest standards of professional conduct required of them. But the numbers of such errant lawyers must be kept to the barest minimum possible. In this regard, we are heartened to note that there are lawyers who are to be found on the other end of the spectrum. They demonstrate that the ideal is not only attainable, but (in some instances) actually go beyond it. For example, they extend help to their clients beyond the boundaries of their respective retainers. Some go further: They engage in *pro bono* legal work, helping those who would otherwise (for one reason or another) fall between the legal cracks. Such lawyers epitomise what is best and noblest in the profession. It is our hope that an ever-increasing proportion of the profession will be identified along these lines. In this regard, legal ethics starts, as it were, at home. Hence, we hope that the local law schools will inculcate, within their students, not only a passion for legal learning and its application, but also a deep and abiding sense of legal ethics. In this, the mission must be all-encompassing. We have in mind, in particular, not only the institutions which train lawyers for practice but all educational institutions that teach the law. This includes the training of para-legals as well. All these institutions constitute "law schools", looked at from this broader perspective. A *culture* of ethics and service must be developed. It is not an optional extra; it goes to the very heart of the law and of its practice.

82 We are therefore of the view that, in the present proceedings in general and in so far as the third charge is concerned in particular, the second limb of this particular charge ought to be read as encompassing a broader, *ethical*, approach towards clients and non-clients alike. In this regard, we agree with Mr Vijayendran that this case was not merely about the legal rules; it was also about legal *ethics*, although, as we have already noted, Mr Vijayendran, in the spirit of fairplay, did not actually crystallise this argument into a substantive one (resting his argument, instead, on the existence of an implied retainer). Indeed, r 2 of the Professional Conduct Rules suggests clearly that one should not adopt a mean-spirited or cramped view of professional conduct rules. Instead, the interpretation of those rules must be guided by the four major aims of the Rules, which are:

(a) to maintain the Rule of Law and assist in the administration of justice;

(b) to maintain the independence and integrity of the profession;

(c) to act in the best interests of his client and to charge fairly for work done; and

(d) to facilitate access to justice by members of the public.

If, however, the argument had in fact been crystallised, we would have found in favour of the Law Society. In particular, even if the respondent had not, strictly speaking, entered into a retainer with the beneficiaries, he had not conducted himself with the requisite propriety and circumspection. In fairness, the court ought not to impose duties on lawyers towards non-clients, without more; nor must our judgment be taken in any way to be even hinting that this ought to be the case. However, the situation we are concerned with in the present proceedings was not an innocuous situation where the lawyer concerned was making casual or "one-off" statements by the way, so to speak. At the very least, the beneficiaries were led by the respondent to believe that he was looking after their interests as well. They looked to him as one who was also the *de facto* guardian of their legal interests. They made known their discomfort with Rasid and trusted that he would ensure that Rasid did not betray their trust and subordinate their interests to his. Unfortunately, the respondent failed to live up to their expectations. Instead, he embarked on a course of action that enabled Rasid to

betray their trust. Would such conduct be considered, in substance, to have fallen below the minimum standards required of a practising lawyer, having regard to the criteria set out in the case law with respect to ss 83(2)(*b*) and 83(2)(*h*) , *regardless* of whether or not there was an implied retainer (*notwithstanding* the fact that we have found, above, that there *was* in fact such a retainer)? We think, that on any objective view, it would. There was, in our view, sufficient evidence of a breach, by the respondent, of ss 83(2)(*b*) and 83(2)(*h*) of the Act. To reiterate, lawyers in situations such as the present have a positive duty to make clear whom they are acting for and whom they are advising. They could not, as the respondent did in the present proceedings, be allowed to claim after the event that they did not act for those to whom they had in fact given legal advice in a situation where it was reasonable for the persons concerned (here, the beneficiaries) to believe that they were representing their interests, having done nothing to disabuse them of their actual role. In such specific situations, lawyers ought not to be allowed, without more, to resile from such a position after trouble has arisen.

83 Indeed, given the fact that ss 83(2)(*b*) and 83(2)(*h*) are intended to encompass breaches of legal standards and ethics that go beyond the existence of a retainer, it might be best to have separate charges which distinguish between a duty owed under a retainer and conduct which goes beyond a retainer. Although the two limbs of the third charge in the present proceedings were, in our view, sufficiently clear, it might have been made even clearer by being embodied as two separate charges. In the context of proceedings such as these, an approach which is, in a sense, *ex abundanti cautela* is not inappropriate. As it turned out, however, the Law Society did not seek to premise its case against the respondent on conduct that went beyond a retainer, although (as we have mentioned) it could have.

84 In all this, we should point out that Mr Davinder Singh himself owed a duty to the respondent to act to the fullest measure on his behalf. He discharged this duty admirably, eloquently and courteously. It was not an easy case for him to argue on behalf of the respondent. But we are pleased to note that, in zealously seeking to safeguard his client's interests, Mr Davinder Singh simultaneously fulfilled the duties owed not only to this court but to the other party as well. In disagreeing with the arguments he proffered on behalf of the respondent, it would be churlish of us not to acknowledge the skill and (above all) professionalism that Mr Davinder Singh displayed throughout the present proceedings.

Conclusion

85 In the circumstances, we find the respondent guilty of the second and third charges. We turn, therefore, to consider the appropriate sanction that should be imposed on the respondent.

86 Both Mr Davinder Singh and Mr Vijayendran acknowledged the numerous (and significant) contributions by the respondent in the public arena, and which were outside the law as such. These contributions are especially relevant in the light of the fact that they have enhanced the public well-being and do therefore correspondingly mitigate any harm that might result to the public interest as a result of the respondent's conviction under the two charges referred to above. We also note the glowing testimonials tendered on behalf of the respondent by his peers.

87 In addition, we also acknowledge that the respondent had pleaded guilty to the second charge at the first reasonable opportunity, and that by all accounts, we accept that the respondent has, indeed, been contrite. This, of course, is a mitigating factor that we take into account.

88 We also bear in mind that there has clearly been no dishonesty on the part of the respondent and that this is the first blemish on the respondent's record in an otherwise lengthy period of practice

at the Singapore Bar. However, the absence of dishonesty does not necessarily mean that there has been an absence of professional misconduct: *Re Han Ngiap Juan* [1993] 2 SLR 81 at 87–89, [26]–[29] and *Re Lim Kiap Khee* [2001] 3 SLR 616 at [19] (applying *Rajasooria v Disciplinary Committee* [1955] 1 WLR 405). Indeed, professional misconduct infused with dishonesty would attract the harshest sanctions the court could impose – including striking the errant lawyer off the roll of advocates and solicitors: see *Ravindra Samuel* ([3] *supra* at [14]–[15]); *Law Society of Singapore v Heng Guan Hong Geoffrey* ([2] *supra* at [28]); *Law Society of Singapore v Arjan Chotrani Bisham* ([79] *supra* at [38]); and *Law Society of Singapore v Ong Ying Ping* ([4] *supra* at [78]) (adopting the English decision of *Bolton v Law Society* [1994] 1 WLR 512 at 518, *per* Sir Thomas Bingham MR).

89 It is clear that the mitigating factors just referred to can – and ought to be – taken into account. As I observed in *Law Society of Singapore v Ong Ying Ping* ([4] *supra* at [70]–[71]):

> However, consistent with the mission and purpose of justice generally, we also considered whether, despite the extremely weighty elements of public interest referred to above, there might be any mitigating circumstances that we could legitimately take into account in the respondent's favour, bearing in mind however that "considerations which usually weigh in mitigation of punishment have less effect on the exercise of the disciplinary jurisdiction than on sentences imposed in criminal cases as show cause proceedings are primarily civil and not punitive in nature" (see *Law Society of Singapore v Ganesan Krishnan* [2003] 2 SLR 251 at [46]; see also *Bolton v Law Society* [1994] 1 WLR 512 at 519; *Law Society of Singapore v Tham Yu Xian Rick* [1999] 4 SLR 168 at [22]; and *Law Society of Singapore v Wee Wei Fen* [2001] 1 SLR 234 at [39]).
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> In addition to the qualification expressed in the preceding paragraph, this court, under s 83(5) of the LPA (also reproduced at [2] above), "may in addition to the facts of the case take into account the past conduct of the person concerned in order to determine what order should be made". Prof Tan Yock Lin, in *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998) at p 906, observes that while "[t]he wording seems to comprehend taking into account past misconduct; yet why should past good conduct by way of mitigation be excluded by an excessively narrow construction of conduct as meaning misconduct". There is much merit in this view. However, be that as it may, the issue of mitigation generally is nevertheless relevant and ought therefore to be considered wherever appropriate.

90 We note, however, that, despite the very weighty mitigating circumstances in favour of the respondent, he has also been convicted of charges which are not merely technical in nature although they also do not tend towards the extremely serious end of the spectrum of professional misconduct.

91 It was also submitted that the respondent is a husband and father to four children. Whilst our sympathies go out to the respondent, we also bear in mind the following words of Sir Thomas Bingham MR in the English decision of *Bolton v Law Society* ([88] *supra*) at 519, which adopt a balanced approach:

> [I]t can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.
>
> …

> At the end of a period of suspension a solicitor is able to seek employment, or seek to re-establish himself in partnership, perhaps subject to such conditions as the Law Society see fit to attach to his practising certificate. But that puts him in quite a different position from a solicitor who has been struck off, who cannot practise at all as a solicitor unless or until he is restored to the Roll.

92 The existing precedents are of course but guidelines, for each case must be considered on its own facts. In this regard, Mr Vijayendran helpfully drew this court's attention to a number of precedents.

93 These included, first, the decision of this court in *Law Society of Singapore v Subbiah Pillai* [2004] 2 SLR 447, which involved an advocate and solicitor of 18 years' standing acting for the complainants and his sister in a conveyancing transaction and failing to advise the complainants that a conflict of interest arose in his so acting. He had also failed to advise the complainants to seek independent legal advice or to ensure that they had had a reasonable opportunity to do so. The charge was brought under s 83(2)(*h*) of the Act. The advocate and solicitor was suspended from practice for a period of three years.

94 A second case cited, *Law Society of Singapore v Ganesan Krishnan* [2003] 2 SLR 251, involved an advocate and solicitor who had failed to advise the complainants, the donors of a power of attorney, to seek independent legal advice on the purport and implication of the instrument which was prepared on the instructions of his client and which potentially infringed ss 8(1)(*b*) and/or 8(1)(*c*) of the Moneylenders Act (Cap 188, 1985 Rev Ed). The advocate and solicitor in this case pleaded guilty to the charge (brought under s 83(2)(*h*) of the Legal Profession Act (Cap 161, 2000 Rev Ed), based on an agreed statement of facts. The court found that there were no mitigating factors present and that, in any event, mitigating factors have less effect in disciplinary proceedings as opposed to criminal cases. In the circumstances, the advocate and solicitor was suspended from practice for a period of three years.

95 A third case cited, *Law Society of Singapore v Devadas Naidu* [2001] 2 SLR 112, concerned an advocate and solicitor who had borrowed money from his client (the complainant) in the course of handling the client's divorce proceedings without advising the client to seek independent legal advice (contrary to r 33(*a*) of the Legal Profession (Professional Conduct) Rules 1998 (GN No S 156/1998)). The advocate and solicitor in fact failed to repay the loan within the stipulated time despite numerous attempts by the client to contact him. The client engaged another firm of solicitors to take over the conduct of his divorce matter and to commence an action against the advocate and solicitor for the return of the loan. The client ultimately obtained judgment and the advocate and solicitor eventually made payment of the judgment sum, together with interest and costs. The advocate and solicitor was found guilty of the charge (brought under s 83(2)(*j*) of the Legal Profession Act (Cap 161, 1997 Rev Ed)), and was suspended from practice for a period of two years.

96 Mr Vijayendran also referred, with specific reference to the second charge, to the decision of the Disciplinary Committee in *Law Society of Singapore v Gurdaib Singh* [1988] SGDSC 5 ("*Gurdaib Singh*"). This particular case was in fact relied upon by the respondent. In this case, the advocate and solicitor concerned declared and acknowledged in the attestation clause of an indenture of mortgage that he had witnessed the signatures of the mortgaged property's owners when he had, instead, allowed one of his clients (the other of whom was in fact the mortgagors' son) to take this document away in order to obtain the mortgagors' signatures (on the pretext that they were ill and were therefore unable to come personally to sign the document). The advocate and solicitor allowed the document to be taken away for signature as he knew and trusted the mortgagors' son and also knew the mortgagors personally. The advocate and solicitor, in the honest belief that the mortgagors

had in fact signed the mortgage, declared and acknowledged in the attestation clause that the mortgagors had personally appeared before him and voluntarily executed the mortgage at Singapore when in fact they had not. The advocate and solicitor was found guilty of a charge preferred against him under s 80(2)(*b*) of the Legal Profession Act (Cap 161, 1985 Rev Ed) and was reprimanded. Mr Davinder Singh argued that a similar sanction should apply in the instant proceedings. We do not, however, find this decision particularly useful. In the first instance, we have found the respondent to be guilty not only of the second charge but also the third charge. Secondly, we agree with Mr Vijayendran that the circumstances in that case were vastly different from that in the present proceedings. In that case, the advocate and solicitor was, at the material time, a very junior lawyer of less than two and a half years' standing and had little or hardly any experience in conveyancing work. The respondent in the present proceedings is, in contrast, a lawyer of some 20 years' standing and has had much experience in conveyancing work. We are aware that, in fact, *Gurdaib Singh* relied on an English Court of Appeal case, *In re A Solicitor* (1976) SJ 353, where the Court of Appeal reduced a suspension of two years to a fine on facts similar to the present proceedings. While the solicitor in that case did not appear to be very junior (as in *Gurdaib Singh*), the facts of that case are only briefly mentioned and it is not known what the standing of the solicitor in question was, nor are we aware if there had been other mitigating factors in play. In any event, we are not bound by the English Court of Appeal, and we see no reason why a solicitor who had falsely attested to having witnessed the execution of a document also should not be liable to a suspension, given the appropriate circumstances.

97 In the circumstances, and taking all the relevant factors into account, we order that the respondent be suspended from practice for a period of two years and that he bear the costs of the present proceedings.

[note: 1]Notes of Evidence ("NE") at p 329, line 17 to p 330, line 5.

[note: 2]NE at p 40, lines 21–29.

[note: 3]NE at p 196, lines 11–15.