Then Khek Khoon and another *v* Arjun Permanand Samtani and another [2012] SGHC 17

Case Number : Suit No 1084 of 2009 (Summons No 5469 of 2011/F)

Decision Date : 14 February 2012

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Mr Philip Jeyaretnam, SC, (Rodyk & Davidson), as counsel, instructed by Edde Ng, Cheryl Koh and Ho Xin Ling (Tan Kok Quan Partnership) for the plaintiff; N Sreenivasan and Shankar A S (Straits Law) for the first defendant; Subramanian Pillai, Luo Ling Ling and Edwin Chia (Colin Ng & Partners) for the second defendant.

Parties : Then Khek Khoon and another — Arjun Permanand Samtani and another

Legal Profession – Professional Conduct – Breach

Civil Procedure – Injunctions

Civil Procedue – Jurisdiction – Inherent

Equity – Remedies – Equitable Compensation

14 February 2012 Judgment reserved.

Quentin Loh J :

Introduction

1 The 2nd defendant, Mr Tan Kah Ghee, ("Mr Tan"), seeks an injunction to restrain the plaintiff's solicitors, Messrs Tan Kok Quan Partnership ("TKQP") from acting as solicitors for the plaintiffs and/or giving legal advice in all court matters arising out of these present proceedings. [note: 1]

2 These proceedings, (the main action, Suit No 1084 of 2009, consolidated with Suit No 1085 of 2009/M and Suit No 1086 of 2009/R ("S 1084/2009")), flow from the protracted Horizon Towers litigation which culminated in the Court of Appeal judgment setting aside the order of the Horizon Board for the collective sale of the property ("Horizon Towers litigation") on 2 April 2009: see *Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR(R) 109 ("the CA Judgment").

3 In the Horizon Towers litigation, the plaintiffs were part of a group of subsidiary proprietors who opposed the collective sale. They were unsuccessful before the Strata Titles Board ("STB") and the High Court, but as noted, succeeded before the Court of Appeal. The plaintiffs were represented by TKQP before the STB, the High Court in relation to orders made by the STB and in the judicial review application in the High Court before Choo Han Teck J ("STB matters"). TKQP did not represent the plaintiffs in the Court of Appeal.

4 The 1st defendant to S 1084/2009, Mr Arjun Samtani ("Mr Samtani") was the chairman of the management council of Horizon Towers at the time the collective sale was first mooted. He was later

appointed as the chairman of the original sales committee ("the original SC"). Mr Tan was also a member of the original SC. It should be noted at the outset that Mr Samtani is neither applicant nor respondent to Mr Tan's application to restrain TKQP from participating in any capacity in S 1084/2009. Mr Samtani adopts a neutral stand, neither supporting nor opposing Mr Tan's application for an injunction.

5 In S 1084/2009, the plaintiffs found their claim on the defendants' breach of fiduciary duties which the Court of Appeal found to be owed by the defendants to the plaintiffs, due to a possible conflict of interest which the defendants should have disclosed to the subsidiary proprietors:

(a) At the time of initiation of the collective sale process, unknown to other members of the original SC, the defendants took steps to purchase additional units in Horizon Towers. [note: 2] These purchases were only discovered during the CA hearing and during the discovery process in S 1084/2009. [note: 3]

(b) As members of the original SC, the defendants breached duties owed to the plaintiffs *qua* agent, fiduciary and trustee which resulted in the plaintiffs' loss and damage.

(c) Specifically, at [38.1] of their Statement of Particulars, the plaintiffs claim they suffered loss and damage as a result of the breach in the form of the solicitor and client costs incurred in the sum of $264, 771.71 for the proceedings leading up to the setting aside of the collective sale. [note: 4] In the consolidated suit, S 1084/2009 the plaintiffs claim $752,665.15 in total solicitor and client costs from the defendants.

It is noteworthy that the only pleaded loss and damage sought by the plaintiffs is the solicitor and client costs paid by the plaintiffs to TKQP in the STB matters. The plaintiffs also state that they will give credit for any costs they recover in the Horizon Towers litigation; those bills, I have been told by counsel, have yet to be taxed.

6 Mr Tan's answer to the plaintiff's claim in so far as it is relevant to this application is as follows: [note: 5]

(a) The quantum of damages claimed by the plaintiff is "unreasonable and/or manifestly excessive" or unreasonably incurred.

(b) The invoices listed at [38.1] of the Statement of Particulars are not sufficiently particularised: the number of solicitors, their seniority, their time costs incurred and their respective charge out rates.

(c) There was "substantial duplicity" of the work in representation of the plaintiffs in the three suits which have been consolidated under S 1084/2009.

(d) There was "gross overcharging" in relation to the matters to which the invoices relate.

7 Because Mr Tan challenges the quantum of loss and damage suffered by the plaintiffs, and therefore the *reasonableness* of TKQP's invoices to the plaintiffs (which were paid by the plaintiffs), Mr Tan contends that TKQP should be prevented from representing the plaintiffs due to the professional duties and obligations imposed on them under Rules 25 and 64 of the Legal Profession (Professional Conduct) Rules (Cap 61, R1, 2010 Rev Ed) ("LPPCR"). Rules 25 and 64 of the LPPCR read as follows:

Conflict of interest

25. During the course of a retainer, an advocate and solicitor shall advance the client's interest unaffected by:

(a) any interest of the advocate and solicitor;

(aa) where the advocate and solicitor is a partner or an employee of a limited liability law partnership any interest of the limited liability law partnership;

(b) any interest of any other person; or

(c) the advocate and solicitor's perception of the public interest except where accepting the instructions may make it difficult for him to maintain his professional independence or would make it incompatible with the best interests of the administration of justice.

Solicitor not to act if he is a witness

64 (1) An advocate and solicitor shall not accept instructions in a case in which the advocate and solicitor has reason to believe that he is likely to be a witness on a material question of fact.

(2) An advocate and solicitor shall discharge himself from representing a client if it becomes apparent to the advocate and solicitor that he is likely to be a witness on a material question of fact.

(3) In discharging himself, the advocate and solicitor shall take all reasonable steps to ensure that his client's interest is not in any way jeopardised.

Urgency

8 The matter has assumed some urgency because the consolidated action is fixed for hearing from 6 to 17 February 2012. This application was filed just before the court vacation on 30 November 2011, fixed for hearing on 21 December 2011 but adjourned as counsel was not available due to the holiday season and came before me on 10 January 2012. In view of the urgency, I gave my decision with brief grounds on 27 January 2012 and told the parties that my written grounds will follow.

9 It appears that Mr Tan, inadvertently or otherwise, has contributed to the protraction of the main action by multiple changes of solicitors. Initially Mr Tan was represented by TSMP Law Corporation and then by Mr Glenn Knight on or around 29 July 2011, after which Mr Tan was a litigant in person. On 8 Nov 2011, Collin Ng Partners ("CNP") were instructed and currently represent Mr Tan. [note: 6] Mr Samtani has maintained the same representation throughout these proceedings.

10 Mr Tan introduced the defence relating to the propriety of TKQP's invoices rather belatedly on 18 November 2011 by way of amendment to paragraphs 30-31 of his defence (above at [6]). This was no doubt due to CNP's coming on board and their assessment of the matter. While the plaintiffs objected to a large number of the other amendments proposed, the position taken on paragraphs 30-31 was that reply submissions would be filed followed by an application for further discovery. [note: 7] Mr Tan's submission that the plaintiffs are estopped from arguing against the merits of the defence raised in paragraphs 30-31 is without substance. In light of the seriousness of the remedy sought by Mr Tan, the merits of the defence are a paramount consideration in the present application. Further, it can be said that the plaintiffs reserved their position by clearly stating their intention to file a reply.

11 On the other hand, the plaintiffs have taken out an application for preliminary determination, in which they seek to establish that:

(a) The defendants' defences amount to a collateral attack on the CA judgement.

(b) In the alternative, the defences are unsustainable at law. In particular the dispute relating to the invoices (forming the subject matter of dispute) does not arise as damages for breaches of fiduciary duties are awarded based on principles of restitution or equitable compensation.

The Issues

12 This application and the submissions have raised the following issues:

(a) *Issue 1*: Does the Court have the inherent jurisdiction to hear an application based on breaches of the LPPCR?

(i) If so, when should it exercise its discretion;

(ii) Is the Court the proper forum to determine a breach of the LPPCR;

(iii) If so, can Mr Tan, an adverse party, make the application;

(b) *Issue 2*: What is the nature and extent of the alleged breaches of rr. 25 and 64 of the LPPCR and what facts support the present application;

(c) *Issue 3*: Whether the scope of r 64 could extend beyond the testifying solicitor to restrain all the solicitors at TKQP from acting for the plaintiffs;

(d) *Issue 4*: Whether the reasonableness of the invoices rendered to the plaintiffs by their solicitors is a material fact in issue where the claim is for equitable compensation for breach of fiduciary claim; and

(e) *Issue 5*: If the Court takes the view that this is the proper forum, is the evidence in support of the allegation of overcharging upon which the breach of r 64 is premised, sufficient to trigger the court's exercise of its inherent jurisdiction?

Issue 1: Inherent jurisdiction of the Court

13 The inherent jurisdiction of the court is very widely expressed in O 92 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"). It is exercisable to prevent "injustice" or an "abuse of process":

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to **prevent injustice or to prevent an abuse of process of the Court.**
>
> [emphasis added]

It has long been settled that O 92 r 4 of the Rules includes the jurisdiction to regulate and supervise the conduct of Advocates and Solicitors as Officers of this Court. That much is common ground. Further under paragraph 1 of Schedule 1 of the Supreme Court Judicature Act, (Cap 322 Rev Ed 2007)

the High Court also has a very wide power to issue to "...*any person or authority any direction, order or writ for the enforcement of any right conferred by any written law or for any other purpose...*"

14 However, cases have laid down that the court's inherent jurisdiction under O 92 r 4 of the Rules should only be exercised where there is a clear need and where the justice of the case so demands. In *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 ("*Wee Soon Kim*") the Court of Appeal said that whilst its inherent jurisdiction under O 92 r 4 or under the common law should not be restricted by rigid tests or criteria, that jurisdiction should be exercised judiciously. An essential touchstone identified was the "need" for its invocation. In addition to the question of prejudice to either party, the court held that there must be "reasonably strong or compelling reasons showing why that jurisdiction should be invoked": see *Wee Soon Kim* at [30]. Similarly in *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 at [16] and [17], the CA emphasized that inherent jurisdiction should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands. In the words of Chao Hick Tin JA, the "circumstances must be special".

15 Accordingly, the issue is whether there are strong or compelling reasons for the court's inherent jurisdiction to be invoked and whether there is a need to do so. For the reasons set out below, this is not a case where the court should exercise its inherent jurisdiction to intervene.

Proper forum for the present application

16 This application is based on alleged breaches of the LPPCR. A question arises: whether the Mr Tan's complaint should more properly be dealt with by the Law Society rather than the Court. The concern is that the court's inquiry and findings would effectively usurp the Law Society's jurisdiction in hearing the issue first instance; it subverts the proper inquiry and due process laid down in the Legal Profession Act (Cap 161, Rev Ed 2009) ("LPA") and denies TKQP its rights thereunder.

17 This view that the Law Society is the proper forum for a determination of breaches of the LPPCR is not new. In *Ong Jane Rebecca v Lim Lie Hoa and others* [2002] 1 SLR(R) 798 ("*Ong Jane Rebecca*"), Choo J took the view that a declaration of propriety by measure of the LPPCR could only be made by the Law Society after a full enquiry. He stated that it was not for the court to usurp the jurisdiction of the Disciplinary Committee ("DC"). In *Ong Jane Rebecca*, ironically, TKQP sought an order to cease acting for their client due to the possible breaches of rr. 29 and 31 of the LPPCR if they continued with their representation. The court took the position that it was for the solicitor to decide if there was a conflict or breach of the LPPCR and the propriety of his/her decision would be determined by a DC upon full inquiry. Similarly, prior to the DC's determination in *The Law Society of Singapore v Tan Chun Chuen Malcolm* [2006] SGDSC 11 (at [13]) ("*LSS v Malcolm*"), when the issue of a possible breach of an LPPCR rule was raised in the main action before the High Court, V K Rajah JC, as he then was, informed the parties that any possible breach of the LPPCR was a matter between the Law Society and the respondent. Similar to the present case, the facts of *LSS v Malcolm* also involved a possible breach of r 64 of the LPPCR.

18 Apart from some New Zealand and Australian cases, which are dealt with below, the cases where the court has exercised its jurisdiction and intervened for breaches of the LPPCR also involved the protection of or possible misuse of confidential information acquired by a solicitor at Common Law. For example in *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1994] 3 SLR 1 at 25 ("*Alrich Development*"), Chao Hick Tin J, as he then was, discussed the issue of a possible conflict of interest due to a law firm's employment of a solicitor who had been an employee of the firm acting for the opposing party. The mischief the court was concerned with was the classic situation of a conflict of interest arising from the possible misuse of confidential information. While the court did not find that

there was a conflict of interest on the facts, the issue of proper forum was not raised or discussed. In *Vorobiev Nikolay v Lush John Frederick Peters and others* [2011] 1 SLR 663 *("Vorobiev Nikolay")*, Lee Seiu Kin J granted an injunction to restrain solicitors (all solicitors in the firm rather than a specific advocate) from acting for the client on account of breach of r 31(1) LPPCR. The party who sought the injunction successfully claimed that their reason for objecting was that the solicitors they sought to restrain acted for them in a related matter. Again the issue of proper forum was not ventilated by the court. However, at [24], the learned judge quoted from *The Law Society of Singapore v Seah Li Ming Edwin* and another [2007] 3 SLR(R) 401, also at [24], where the Court of Three Judges observed that behind r 31(1) was a larger public interest, *viz*, the trust between lawyer and client should not be compromised as the legitimacy of the law in general and the confidence of clients in their lawyers are of fundamental importance and should not be undermined. Agreeing, Lee J underscored the larger public interest beyond the need to protect against disclosure of confidential information under r 31 *per se* which was the solicitor-client relationship of trust and ensuring public confidence in the integrity of the legal profession.

19 The difference between *Ong Jane Rebecca* and *LSS v Malcolm* on the one hand and *Alrich Development* and *Vorobiev Nikolay* on the other, is that in the latter two cases, the court was not dealing with breaches of the LPPCR *per se*, but also the common law protection of confidential information, the possible breach of legal professional privilege and the wider public interest. This gave rise to legal obligations upon which the court could have exercised its jurisdiction to restrain the solicitors from the possible misuse of such confidential information. In such cases, the complainant was often the client on the other side. This was something quite independent of the purported breaches of the LPPCR.

20 This was the precise distinction which the English court made in *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* and others [1991] Ch 259 ("*David Lee*") which opined that the Law Society was the right forum to determine breaches of professional rules of conduct. The court recognised that professional rules tended to impose a higher duty on the members of the profession than the law itself. Further, the decision to restrain the solicitors was made on the basis of legal obligations owed to the client and "*not the obligations imposed by professional rules of conduct laid down by the Law Society*". Similar reasoning was applied in *In Re a Firm of Solicitors* [1992] 1 QB 959 ("*In Re a Firm of Solicitors"*) where the court limited itself to the common law and only applied rules from the conduct rules which were within the boundaries of existing obligations owed at law.

21 In *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, at 234-235, the then House of Lords emphasized the limited situations in which an injunction will be granted to restrain solicitors from acting, *viz*, where (i) if the solicitor acted against a present client, this is based on a solicitor's duty of loyalty to his client, just as a fiduciary cannot act for and against a client at the same time, and (ii) where there is a potential or possible misuse of confidential information obtained by a solicitor from a former client, this was based on a continuing duty to preserve the confidentiality of information imparted during the solicitor-client relationship. Also, *In Re a Firm of Solicitors* [1997] 1 Ch 1 at 9, the court emphasized that the basis of intervention was not a possible perception of impropriety, but the protection of confidential information.

22 When read in light of these principles, the decisions in *Alrich Development* and *Vorobiev Nikolay* are not inconsistent with *LSS v Malcolm* and *Ong Jane Rebecca*. It therefore seems to me that where one is concerned only with breaches of the LPPCR, which do not trigger any concurrent breach of legal obligations owed by the counsel to the court or the client at Common Law, the proper forum for investigation and determination of the breach is the Law Society rather than the Court. I should not be taken to say that this is an immutable rule. There may be special or exceptional circumstances where the nature of the complaint is such that on an objective view, a reasonable, fair minded

observer would think that a fair trial would not be possible without the Court's intervention and restraint of the advocate or solicitor from continuing to act. Where matters impinge on the proper administration of justice, due process and wider public interest issues, the Court should intervene, either on its own initiative or pursuant to a complaint by the other party. The Court must not allow confidence in the administration of justice to be undermined.

23 Mr Subramaniam Pillai ("Mr Pillai"), counsel for Mr Tan, submitted that I should follow certain New Zealand and Australian cases which show a liberal invocation of the court's inherent jurisdiction to intervene in exercise of its supervisory powers over the conduct of counsel.

24 In *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587, ("*Kooky Garments*"), in the course of an appeal from the District Court, Thomas J said that it was not appropriate for a partner or solicitor in the law firm which acted for a tenant, to represent that tenant in a subsequent dispute where the crucial question was whether a letter written by another solicitor in that firm, the material terms of which appeared to be different from their instructions, was an acceptance of an offer of a lease from the landlord's letting agent. Thomas J observed that where the possible acts or omissions of a law firm, including situations where the actions of the client are based on the advice given by solicitors, are at the heart of the question in issue, that firm is, in a real sense, defending its advice and/or its actions. In such circumstances there was a danger that the client will not be represented with the objectivity and independence which the client is entitled to and which the court will demand. I entirely agree with this principle. As set out in the judgement, such a client is entitled to independent advice untrammelled by considerations of possible personal liability of the solicitors. The reported decision in *Kooky Garments* was limited to this aspect and it appears that it was the judge who raised this issue. In dismissing the appeal, he accordingly ordered that the party and party costs below and the appeal were to be borne by the solicitors personally. This case illustrates the principle referred to above, *viz*, the integrity of the judicial process is undermined if solicitors or counsel do not possess the objectivity and independence which their professional responsibility and obligations to the court require of them. The court intervened because no one had raised the point and the court could not let it pass without intervention. However in the present case, the complaint by Mr Tan relates to professional fees rendered to and paid by the opposing party to its own solicitor in what appears to be, normal circumstances. It does not relate to any advice or 'potential' liability of TKQP or advice or action lying at the heart of the matter in the other proceedings. In *Kooky Garments*, Thomas J also said, at [50], the principle enunciated by him does not apply where the advice given is unrelated to the liability or the question in dispute. This case is thus of no assistance to Mr Tan.

25 The decision of *Brogue Tableau Pty Ltd v Tottle Partners (a firm)* [2006] WASC 273, ("*Brogue Tableau*"), is slightly different. The factual situation was analogous to the present case. Solicitors successfully represented their client, Binningup, in the removal of a caveat lodged against its land. The court ordered, *inter alia*, the removal of the caveat and awarded costs of the action to be taxed to Binningup. These costs were later agreed at $17,000 and duly paid. Binningup then commenced an action to assess compensation under s 140 of the Transfer of Land Act 1893 (Western Australia) and claimed $34,582.15 and counsel fees of $8,700 which were paid by it, over and above the compromised costs of $17,000, to their solicitors for the removal of the caveat action ("s 140 proceedings"). The opposing party applied to court to restrain Binningup's solicitors from representing Binningup in the s 140 proceedings. It is interesting to note that the court rejected all but one of the opposing party's arguments. On the basis that what was claimed was compensation, not damages, the court held that there was no substance in the submission that Binningup's solicitors had an interest in the proceedings in that, if the level of fees they charged was inappropriate, they would perhaps have to refund moneys already paid. The court said it was not infrequently that solicitors have an interest in an aspect of a case which affects their fees, examples include, a solicitor who applied for costs after a successful application or who attends a party and party taxation. The court

took the view that it could not be said that the solicitors have so direct an interest in the proceedings that they should not represent their clients whether or not their clients complained. The court issued the injunction against the solicitors only on the basis that there was a difference in what Binningup had *agreed to accept* as its costs and the costs it was claiming over and above that as compensation and it was open to the opposing party to argue that even if what Binningup was entitled to was compensation and not damages, the amount of costs claimed as compensation was unethical. If the ethics of the solicitor became an issue, then the solicitor's interest would be different to that of the client. The rest of the judgement goes against Mr Tan's arguments. That case is certainly distinguishable from the present proceedings, where the facts are very different.

26 I was also referred to *Bowen v Stott* [2004] WASC 94. At first blush, this Western Australian case appears similar to *Brogue Tableau* in that the applicant to restrain the solicitor was an opposing party but, upon closer examination, its facts are more akin to *Kooky Garments* in that the very fact in issue, whether there was a settlement which included an apology by way of a retraction of certain words allegedly said, depended on the lawyers who were the ones negotiating the settlement, their client not being present, and there was potential liability in settling the matter if they failed to obtain the apology their client required before she was prepared to settle her case. *Bowen v Stott* therefore does not assist Mr Tan either.

27 There were other cases cited but I do not find it necessary to go into them because there is a more fundamental reason why the practice adopted in these cases should not be followed here. Where we have our own CA judgments setting out the boundaries of this Court's exercise of its inherent jurisdiction, laying down certain principles and guidelines for their application, which are directly applicable to the case in hand, we should approach the prevailing practices of other jurisdictions with much circumspection. First, these other jurisdictions may well have their own reasons to adopt their differing approaches, including differences in the wording of their professional conduct or ethical rules. Secondly, and most importantly, our CA decisions are binding on me unless the CA itself decides to vary, refine or depart from its earlier decisions.

Where the application to restrain is by the opposing party

28 Where the application is made by an opposing party to restrain lawyers a court will look carefully into the grounds for doing so and if necessary carry out a balancing exercise, *a fortiori* if the application is made at a late stage. In the Australian decision of *Tricontinental Corporation Ltd v Holding Redlick* (VSC, Mandie J, 22 December 1994) at 5 ("*Tricontinental*") the court held that "[i]t is a serious matter to prevent a party from retaining the legal representative of its choice, particularly upon the application not of a former client but of an adverse party". In *Kalenik v Apostolidis* [2005] VSC 27 the reasoning of the court in *Tricontinental* was followed. It is noteworthy that both these cases involved possible misuse of confidential information and not pure breaches of professional conduct rules. Many American Bar Associations have an exception that the lawyer-witness rule may not be invoked where such disqualification would work substantial hardship on a client. A court will therefore have to balance the mischief that is to be prevented against the right of a party to be represented by a lawyer of his choice. This involves a balancing of all the facts and circumstances including the alleged breach, the *bona fides* of the opposing-party-applicant, the time at and circumstances under which the application is made and the mischief the rule is intended to prevent. In the present case, the plaintiffs did not complain over their solicitor's bills and have, in fact, paid them sometime ago and it is the opposing party who now complains that those bills are manifestly excessive or constitute gross overcharging. Mr Tan contends that, for that reason, the plaintiffs' lawyers should be disqualified from acting. I cannot agree. The circumstances surrounding this application are dealt with below, see [31], [32] and [50].

Issue 2: Breach of rr. 25 and 64

Issue 2: Breach of rr. 25 and 64

29 I now turn to Mr Tan's bases of his application, *viz*, TKQP's continued representation of the plaintiffs would be in breach of rr. 25(a) and 64 of the LPPCR.

Rule 25 of the LPPCR

30 Rule 25(a) of the LPPCR lays down the principle that an advocate and solicitor should not allow a conflict of interest between the client's interest and that of the advocate and solicitor. It is alleged that TKQP has a personal interest in maintaining that their fees rendered to the plaintiffs in the Horizon Towers litigation are reasonable and neither manifestly excessive nor a gross overcharging for the work done. Mr Tan's defence is that he is not liable for the fees borne by the plaintiffs because TKQP's charges are unreasonable, manifestly excessive or amount to a gross overcharging of the plaintiffs.

31 As pointed out by the plaintiffs, and accepted by Mr Tan, [note: 8] TKQP's invoices were rendered for work done over a period of time in 2007 and the invoices have been paid. The bulk of the payments were made in 2007 and some instalments were paid in 2008. This was well before the appeal on 3 February 2009 and the CA judgment on 2 April 2009. It is significant to note that at the time TKQP's bills were rendered, the plaintiffs had failed in all their attempts to halt the collective sale. The plaintiffs were represented by another set of solicitors in the CA and it is only before the CA that the plaintiffs prevailed. TKQP's bills did not appear to be to be rendered in a state of euphoria that follows upon a victory in court nor rendered at sanguine (let alone inflated) levels in anticipation of partial recovery from party-and-party costs from the other side. They were rendered and paid well before any finding of breaches of fiduciary duty were made by the CA.

32 Nor is this a case where payment of TKQP's fees is in some way contingent upon recovery from the plaintiffs. TKQP's interest is in fact aligned with that of their client in establishing the 'reasonableness' of the invoices. There is no evidence at all that the plaintiffs are unhappy about the level of fees charged or that they have been overcharged or that the fees are unreasonable, let alone manifestly excessive or at a level reaching gross overcharging. There are no allegations or even hints of fraud or collusion on the part of TKQP and the plaintiffs, in fabricating invoices with higher amounts in order to enhance recovery from the plaintiffs. I therefore do not see any conflict of interest on the evidence before me. Insofar as Mr Pillai urges me to read *Brogue Tableau* in the way that he submits, with respect, I cannot agree that I can restrain TKQP from acting because there is a *possibility* that TKQP's fees might be held to be unreasonable, manifestly excessive, unreasonably incurred or the result of gross overcharging. The compensation claimed by the plaintiffs are the fees rendered and paid some time ago. Further, the plaintiffs have undertaken to give credit for any taxed party-and-party costs recovered. On the facts as they stand now and the circumstances in which the bills were rendered, that is, in the words of the judgement in *Brogue Tableau*, at [13] and [14], Mr Tan is not only "jumping at shadows" but also making "effectively a pre-emptive strike" to disrupt the plaintiff's representation by solicitors of their choice at this late stage. It is also noteworthy that the plaintiffs have chosen TKQP for this recovery action and not the solicitors who succeeded before the CA. There are obvious advantages to the plaintiffs for TKQP to represent them in this recovery action as TKQP are already well acquainted with the facts of the case.

33 In *The Law Society of Singapore v Koh Lee Kheng Florence* [2005] SGDSC 7 ("*LSS v Florence*"), in the discussion relating to r 25(a), the DC stated that the purpose of the rule is:

> **[T]he protection of the client**. It follows that the **client must be the aggrieved party when his solicitor breaches that rule.** That rule is not meant for ex-partners or solicitors representing

the opposite side to use to vent their frustrations, however justified they may feel.

[emphasis added]

The DC commented that if all the Law Society needed to prove to establish a breach of r 25 was the solicitor's pecuniary interests (which is a given in the case of his bill) and the client's loss in his payment of costs to the successful party, then such a solicitor and most of the legal profession would have breached r 25(a). The DC took the view that so long as the interest of the client and solicitor was aligned, no issue of conflict arose. A finding of a breach of r 25 of the LPPCR requires something more.

34 There may be cases where an uninformed or disadvantaged client may not realise that he has been grossly overcharged by his lawyer. In such cases, the independent quality of the advice his lawyer will be able to provide on the reasonableness of the lawyer's invoices to the plaintiffs will be in issue. In Andrew Boon and Jennifer Levin's *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 1999) at 281, the authors discussed the proper procedure to be followed in the event of such a personal conflict of interest:

> In these cases the solicitor must reveal the interests to the client with "complete frankness" and the client must receive independent advice from another solicitor or other appropriate advisor such as a surveyor. Only if the client gets such advice can the solicitor continue to act in relation to the transaction.

35 While Mr Tan may argue that the plaintiffs will not get independent advice from TKQP on whether the invoices rendered by them are reasonable or a case of gross overcharging, this conflict is for the client to remedy. Whether TKQP have advised their clients (i.e. the plaintiffs) to seek independent advice on the level of their fees is a matter between TKQP and the plaintiffs, not the defendants.

36 There is no suggestion that the plaintiffs are ignorant or disadvantaged clients and I can see no issues of injustice arising on this score. In the circumstances, I take the view that a possible breach of r 25 on the issue of the independence of TKQP's advice on its invoices is a matter between the client, TKQP and if it comes to it, the Law Society, but not the defendants. Furthermore, in light of the facts as they stand, I found this application to be without any basis.

Rule 64 of the LPPCR

37 The rationale behind r 64, known as the advocate-witness rule, can be found in Lord Ried's speech in *Rondell v Worsley* [1969] 1 AC 191 at 224 on the duty of counsel to court. As it should be graven on the heart of any advocate worth his salt, it bears repeating:

> 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 wishes. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.

38 It is readily apparent that r 64 also overlaps with r 25. An advocate's independence and objectivity are two key attributes required in the discharge of his duty to the court. Breaches of r 64 will usually also concern the public interest issue of confidence in the proper administration of justice and therefore falls within the inherent jurisdiction of the court. But whether the court intervenes depends on *inter alia*, the presence of compelling reasons or special or exceptional circumstances and the necessity of doing so.

39 There can be no doubt that courts depend on an advocate's integrity, independence, objectivity and impartiality to assist them in dispensing justice. This ability to be independent, objective and impartial is seriously in doubt when an advocate is asked to remove his robe and move from the bar table to the witness stand to give evidence which is neither formal or undisputed. There may well be a subconscious shaping of the evidence or the case to negate a potential professional negligence claim. To preserve the integrity of the proper administration of justice, such a situation should be avoided.

40 There are therefore clear authorities on the point that when a solicitor is to testify to a material fact in his client's claim he should discharge himself. In *LSS v Florence*, the material fact in dispute was the cost arrangement entered into for which the solicitor was likely to be called as a witness. The DC stated that the origin of r 64 was that an advocate and solicitor had a paramount duty to the court to testify to the truth and it was the conflict between the interest of the client and the duty of the court which r 64 sought to avoid. Along the same vein, in *Commissioner for Corporate Affairs v P W Harvey* [1980] VR 669 the court found that an advocate must be able to promise the court, singularity of interest. The purity of interest in advocates before the court was identified as central to the utility and credence of the system. In fact in *LSS v Malcolm* the DC took the absolute position that once a solicitor had reason to believe he was likely to be a witness on a material question of fact, he should not continue to act for the client in any capacity.

Issue 3: Scope of r 64 LPPCR's application

41 Does r 64 also apply where it is not the advocate who is giving evidence but his partner or another solicitor in his firm? Mr Tan's application seeks to disqualify *all* solicitors of TKQP from representing the plaintiffs notwithstanding the degree of their involvement with the invoices in question. Mr Tan contends that notwithstanding Mr Kannan Ramesh's (*i.e.* the solicitor who rendered the invoices in dispute) removal from the case, he continues to instruct the solicitors and/or they are working under his supervision. [note: 9] Mr Tan submitted that passing on the plaintiff's file to another litigation partner not involved in the disputed invoices would still be in breach of r 64(2) of the LPPCR and relied heavily on *Ho Kon Kim v Betsy Lim Gek Kim & Ors* [2001] SGHC 75 ("*Betsy Lim*"). In *Betsy Lim*, the court held that r 64(2) of the LPPCR would still be breached where the advocate-witness passed the file to another partner in the firm, not involved in the matter in issue, to handle the litigation. The learned judge held that the solicitors for Mdm Ho Hon Kim ("Mdm Ho") were in serious dereliction of their duty in advising their client to pursue a claim against the 2nd defendant, a law firm, and the 3rd defendant, a bank. Pursuant to O 59 r 8 of the Rules, the learned judge ordered that the solicitors should personally bear the costs that Mdm Ho had to pay these two parties. In the course of her judgment, the learned trial judge also ruled that the solicitors had breached no less than 5 of the professional conduct rules, including rr. 25 and 64, and took a very dim view of the solicitors alleging dishonesty and fraud against another solicitor without any evidence to substantiate their allegations.

42 When that decision was urged upon me, counsel for Mr Samtani, Mr Sreenivasan, interjected, despite his client's neutral stand in the application, to point out that *Betsy Lim* was reversed on

appeal. This, if I may say so, was a very good example of the principle referred to above, that the courts depend on the integrity, independence, objectivity and impartiality of counsel to assist them in carrying out their function in dispensing justice.

43 The CA in *Betsy Lim* allowed the appeal and reversed the personal cost order that had been made against Mdm Ho's solicitors under O 59 r 8 of the Rules. The CA held that the other solicitor who was alleged to have acted dishonestly was potentially liable for having been involved as an accessory to, or having assisted the buyer in disposing of Mdm Ho's property in breach of trust. Mdm Ho's solicitors therefore acted reasonably in making the claims that they did and against the parties named as defendants. The CA did not express a conclusive view on the reach of r 64(2) LPPCR but did say the following at [62] and [63]:

> 62 ... The mere failure of Mr Ponniah [the litigation partner] and Mr Wong [the conveyancing partner, both of whom were in the firm which acted for Mdm Ho] to advise Mdm Ho to seek independent legal advice or to discharge themselves could not be said to have caused Mdm Ho to have incur the costs of the action against WLAW and RHB, as it cannot be said with reasonable certainty that any other independent or prudent or reasonable lawyer would not have given the same advice.
>
> 63 It may be that for obviously good reasons Mr Ponniah and Mr Wong should not have acted for her in these proceedings. First, they knew fully well that Mr Wong himself would be a material witness in the proceedings to be taken against Ms Lim, and second that they had a personal interest in the case as it was their firm which had acted for Mdm Ho in the sale of the property and mortgage to OCBC. ***Without expressing any view on this matter, we would just mention that it may be said that*** **prima facie** ***the problem that had arisen could be said to have been caused by the way in which Mr Wong handled the transaction for Mdm Ho. Both Mr Wong and Mr Ponniah should have discharged themselves from acting for Mdm Ho and should have advised her to seek independent legal advice.*** ...
>
> [emphasis added]

44 Rule 64 is worded as applying to the advocate and solicitor himself. This is unlike the equivalent English version of the advocate-witness rule which is expressly wider in its scope; the relevant English Rule 21.12 reads as follows:

> A solicitor must not accept instructions to act as advocate for a client if it is clear that he or she **or a member of the firm** will be called as a witness on behalf of the client, unless the evidence is purely formal.
>
> [emphasis added]

This distinction was recognised and highlighted in *LSS v Malcolm*. It is thus not surprising that in an Opinion of the Ethics Committee of the Law Society of Singapore, published in the Singapore Law Gazette on 29 January 2009, r 64(2) was interpreted to only require the particular advocate who is likely to be a witness to discharge himself. The Ethics Committee specifically stated that other members of the firm could continue to conduct the suit. [note: 10]

45 Mr Pillai cited the old English decision of *Davies v Clough* (1837) 8 Sim 262 where a solicitor acted against a former client using personal information gained in the original matter. The court found that as the firm was conceived under the traditional partnership model, any act of one partner was that of another. The court took the view that if one partner was restrained, it would follow that all

partners should be restrained notwithstanding their involvement. Mr Pillai submits, that this principle should also be applied here.

46 The difficulty is that r 64 makes perfect sense when applied to a split profession with barristers and solicitors. In the old English context, one would not expect a barrister or his junior to take off their robes and enter the witness stand to give evidence on a material point. They were all sole practitioners and had no partners or professional employees. The applicability of that simple self evident rule was on less secure contextual footing when solicitors were also allowed to act as counsel in court as they had partners and employee solicitors. This is now complicated by law firms today comprising a few hundred lawyers, the mobility of groups of lawyers crossing from one firm to another and to law firms practising in more than one jurisdiction and possibly subject to different professional conduct rules. If law firms A and B have an overseas practice and law firm A's overseas branch acquires a group of solicitors from law firm B's overseas branch, how does r 64 work? Does r 64 still bite in A and B's home jurisdiction? I would venture that it becomes conceptually more muddled when one considers the concept of a limited liability partnership or solicitors in a limited liability corporation. In a limited liability partnership, if partner X's file gives rise to a potential negligence claim, partner X's liability is quite different from partner Y, who had nothing to do with X's files. When this is compared to a traditional partnership, it may be difficult to take the same simplistic view.

47 However, in my view, while the wording of r 64(2) of the LPPCR is expressly limited to the advocate and solicitor and in certain situations should be restrictively applied, we should go back to basics and ask: what is the real mischief targeted? As rightly pointed out by Jeffrey Pinsler SC in *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) at 156, it is the danger of the subconscious shaping of the evidence to suit the solicitor's interest as against that of his client and the duty to the court. This particular concern, depending on the interest and evidence in question could easily impact the firm collectively. It is incontrovertible that the LPPCR should be interpreted with proper appreciation of the mischief to be averted rather than in a strict textual fashion. In *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477, at [100] and [120], the court held as follows:

> 100 It is also axiomatic that it is the spirit and intent, rather than just the plain letter, of the professional ethical rules that breathe life and legitimacy into the standards that are relevant in assessing whether a lawyer has discharged his professional obligations.
>
> ...
>
> 120 Ethical codes, practices and standards must be religiously observed and adhered to, as an unequivocal affirmation of and testament to the legal profession's undivided commitment to probity, competence and diligence in the practice of the law. However, it must also be stressed that a rigid and formalistic adherence to the codes of practice without a proper appreciation of their spirit, purport and intent may from time to time lead to ethical blindness.

48 Whether r 64(2) would extend to all other solicitors in the firm therefore depends on the facts and circumstances of each case. No rigid rules or criteria should be laid down. So long as the sub-conscious shaping of evidence is of genuine concern and the issues envelop the entire firm, it seems to me that r 64(2) of the LPPCR can be interpreted to extend accordingly. However, a wider interpretation should be adopted only when the mischief intended has a real possibility of occurring. Two significant guideposts include, first, the mischief that r 64 is meant to avoid and secondly, whether the heart of the client's case touches upon the correctness or otherwise of an act or document generated or soundness of advice given by the advocate's partner or other member of his firm. The degree of his loss of objectivity, the degree to which it impacts or can potentially affect his

practice, (be it a traditional partnership, or limited liability partnership or limited liability corporation), and therefore the fulfilment of his duty to the court, is the true question to be answered. I would venture to say that even in the context of a limited liability partnership, there *may* be direct pecuniary interest in the outcome of the client's case since any significant payment of a negligence claim by the professional indemnity insurer will inevitably be visited with higher premium payments in the following years for all solicitors in that limited liability partnership. There can also be an indirect pecuniary loss, depending on the circumstances of the case, where reputational damage is incurred which will affect the limited liability partnership's ability to attract work. It will all depend on the particular facts of each case.

49 I conclude this issue by contrasting the American Bar Association ("ABA") Code of Conduct which deals with the advocate-witness rule in a slightly different fashion ("ABA rules"). Similar to r 64 of the LPPCR, the equivalent ABA rule is expressly limited to the advocate-witness in question.

> *Advocate*
>
> Rule 3.7 Lawyer As Witness
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) **the testimony relates to the nature and value of legal services rendered in the case**; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) **A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9** [rule on conflicts of interest].
>
> [emphasis added]

The ABA's position, which is clear from the commentary to this rule, is that the tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving both as advocate and witness. The emphasis placed is on the possibility of the tribunal being misled rather than the subconscious shaping of evidence. This focus is rooted in their jury system. Interestingly, r 3.7(a)(2) expressly recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. In such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversarial process to test the credibility of the testimony. Furthermore, apart from these two exceptions, r 3.7(a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Despite the risk of prejudice to either party or a real risk of the compromise of the evidence given to the court, due regard must be given to the effect of disqualification on the lawyer's client in determining whether the lawyer should be disqualified. It should be noted that r 3.7(b) expressly allows another lawyer from the testifying lawyer's firm to continue to act for the client on the basis that the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness. The exception is in situations involving a conflict of interest.

50 On the facts of this case, I do not see any breach of r 64. In addition to the facts recited above, there is the fact that the amount of work done is something that is readily ascertainable as the main litigation has ended. Whether there was urgency or not, the issues involved and the stakes in the event of success or failure are all matters that can be easily established and weighed. Disbursements incurred, such as the solicitors' airfare, can also be objectively ascertained. I now turn to whether the allegations are a "material fact in issue" (as required by r 64 of the LPPCR).

Issue 4: Is the 'reasonableness' of the invoices a material fact in issue?

Basis of computation of loss for breach of fiduciary duty claim

51 Mr Jeyaretnam SC, counsel for the plaintiffs, submits that there is a more fundamental flaw in Mr Tan's application. He takes the view that the level of fees TKQP charged the plaintiffs is not a material issue because his clients' claim is for equitable compensation for breach of fiduciary duty, as distinct from a claim in contract or tort, which effectively amounts to an indemnity. On his submission, the only defence open to such a claim is for the fiduciary to show that the loss would have happened independent of his breach.

52 Mr Jeyaretnam SC cites Andrew Ang J's judgment in *Firstlink Energy Pte Ltd v Creanovate Pte Ltd and another action* [2007] 1 SLR(R) 1050 ("*Firstlink Energy v Creanovate*"), which in turn cited the earlier CA decision of *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049 ("*Kumagai-Zenecon*"). Andrew Ang J held that for a breach of fiduciary claim, full restitution and compensation was the entitlement of the wronged party to whom the fiduciary obligation was owed. Further, the principles of causation, foreseeability and remoteness are not readily applicable to a restitutionary claim and the only defence available to the party is to show that the loss would have happened even if there was no breach. *John While Springs (S) Pte Ltd and Another v Goh Sai Chuah Justin and others* [2004] 3 SLR 596 ("*John While Springs*"), was also cited by Mr Jeyaretnam: there the court held that for the errant fiduciary to avoid making restitution, he must be able to show that the wronged party would have incurred those losses even if there was no breach of duty. The court stated that once liability is proved, the errant fiduciary must compensate the wronged party for such loss as was occasioned by the breach. In the leading English decision on this issue, *Target Holdings Ltd v Redferns and another* [1996] 1 A.C. 421 ("*Target Holdings*"), which was followed by the Supreme Court of Queensland in *Mantonella P/L v Thompson* [2009] QCA 80, the House of Lords held that even if the immediate cause of the loss was the dishonesty or failure of a third party, the trustee would be liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred. The court took the view that the test of causation was satisfied so long as the loss would not have occurred but for the breach.

53 Mr Jeyaretnam SC submits that but for the breach of duties by the defendants, the plaintiffs would not have sought legal advice and representation from TKQP which resulted in the stated loss in the form of their solicitor and client costs payable. Therefore, on these authorities, the reasonableness of TKQP's bills are irrelevant as a full indemnity is payable.

54 I am not sure the law is, with respect, in the black-and-white tones as painted by Mr Jeyaretnam SC's submission. The very *raison d'etre* for equity *is* the need to mitigate the black-and-white rigidity of the law and the need to cater for the many shades of grey thrown up by the myriad diversity of human activity and interaction. I do not think a simplistic "but-for" test fits all cases in assessing the amount of equitable compensation.

55 An uncontroversial starting point is Viscount Haldane L.C's judgment in *Nocton v Lord Ashburton* [1914] AC 932 in which he confirmed that in its exercise of its exclusive equitable jurisdiction over

fiduciaries, the court had the jurisdiction to make an award of equitable compensation for a breach of fiduciary duty. Echoing a similar view, in the Australian decision of *Markwell Bros Pty Ltd v CPN Diesels Pty Ltd* (1982) 7 ACLR at 437, Thomas J opined:

> [T]he origin of the power to award equitable compensation ... is part of the long established power of a court of equity to award compensation for breach of trust, and a manifestation of the court's power over a fiduciary

Nevertheless, while the remedy the plaintiffs seek is uncontroversial and settled law, the extent of the compensation is another matter.

56 As noted above, in *Firstlink Energy v Creanovate*, Andrew Ang J, citing *Kumagai-Zenecon*, took the view that any loss that was caused by the breach of fiduciary duty alleged was claimable as equitable compensation so long as it *would not have been caused but for the alleged breach*. The following principles, taken from *Kumagai-Zenecon*, were articulated in support:

> (i) If a breach of fiduciary obligation has been committed then the fiduciary is liable to make restitution – that is restore the wronged person in the same position as he would have been if no breach had been committed. ***Consideration of causation, foreseeability and remoteness do not readily enter into the matter.***
>
> (ii) The test of liability is whether the loss would have been [suffered] if there had been no breach. In other words, the fiduciary can escape liability only if he can demonstrate that the loss or suffering would have happened even if there [had] been no breach.
>
> (iii) The right to restitution and compensation of a beneficiary or sufferer which the Court of Equity [has] imposed on an errant fiduciary is more of an absolute nature than the common law obligation to pay damages for tort or breach of contract.
>
> (iv) The *beneficiary or sufferer under the concept of restitution or equitable compensation is entitled to a full indemnity* and equity will award such interest as may be necessary to create full restitution and compensation.
>
> [emphasis added]

57 In stating the principles above, G P Selvam J in *Kumagai-Zenecon* relied heavily on *Re Dawson (deceased*) [1966] 2 NSWR 211 at 216 ("*Re Dawson*") where Street J gave the following reasons in support of distinguishing damages claimed in a breach of fiduciary action from one in contract or tort:

> Moreover the distinction between common law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account: the effect of such increases would, at common law, be excluded from the computation of damages; but in equity, a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime.

58 These cases do not directly answer the question: even though the loss flowed from the breach of fiduciary duty, which satisfies the "but-for" test, what happens where there is also third party conduct which has caused a large increase in the loss claimed, or contributory responsibility, (I prefer

not to use the term contributory negligence as that connotes different rules of causation at law), or unreasonable conduct on the part of the plaintiff which has the same effect of increasing the loss suffered? Should the court ignore the reasonableness of the solicitor's bills in determining the extent of equitable compensation awarded? What did the Court in *Kumagai-Zenecon* really mean in saying that "[c]onsideration of causation, foreseeability and remoteness do not readily enter into the matter"?

59 Cases from Australia, New Zealand, Canada and the United Kingdom suggest that the application and construction of principles of causation in a claim for equitable compensation is by no means uniform or settled as one would think at first blush.

60 The high water mark was the Privy Council decision of *Brickenden v London Loan and Savings Co. et al.* [1934] 2 D.L.R 465 at 499 ("*Brickenden* rule"), where Lord Thankerton took a very strict view in relation to the applicable rules of causation in relation to the loss claimable as a result of the breach of fiduciary duties owed by a solicitor to his client in failing to disclose a material fact and to reveal a conflict of interest in relation to the transaction in issue:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure would have taken is not relevant.

As noted by Peter Birks and Francis Rose in *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000) at 239 ("Birks on Equitable Compensation"), commenting on the *Brickenden* rule: "This somewhat vague and punitive rule, ascribing full liability to merely material causes, has attracted a degree of comment and criticism." In response to the criticism spoken of, subsequent decisions all over the Commonwealth interpreting the *Brickenden* rule softened its contours.

61 In *Maguire v Makaronis* (1997) 188 CLR 490, 490-492 ("*Maguire v Makaronis*"), Kirby J stated courts in the Commonwealth had developed three approaches to "mollify the absoluteness of the *Brickenden* rule":

> (a) The first was to reverse the onus of proof such that once a fiduciary breach is established the fiduciary must prove that adverse results were not liable consequences of the breach. This approach was considered by the High Court decision of *John While Springs* where Choo J held that the burden was on the claiming party to prove that they had suffered losses and that these losses were caused by or linked to the defendants' breaches of fiduciary duties. The burden then shifted to the fiduciary to show that the claiming party would have incurred those losses even if there had been no breach by the fiduciary ("the modified *Brickenden* rule"). This position has also been adopted by the United Kingdom in the leading decision of *Target Holdings*.
>
> (b) The second was to apply the "but-for" causal test which was adopted by our Courts in *Kumagai-Zenecon* in adopting the line taken by Street J in *Re-Dawson* instead of the "material cause" test as articulated in the *Brickenden* rule. "[T]he inquiry in each instance would appear to be whether the loss would have happened if there had been no breach" (see *Maguire v Makaronis at 4*91).

(c) The third was to confine the stringent "material cause" or "but-for" tests to cases of fiduciary breach involving actual dishonesty or conscious wrongdoing. The court stated that this distinction was founded upon a suggested difference between "breaches of fiduciary obligations" and "honest but careless dealings". This approach has found some approval in the decision of *Bristol and West Building Society v Mothew* [1996] 4 All ER 698 at 710 – 713.

62 As helpfully summarised by Birks on Equitable Compensation at 244:

> The "but for" causal test promoted in Canada, New Zealand and Australia thus amounts to a policy decision: that breach of fiduciary obligations ought to be treated with especial severity in order to pursue a policy of deterrence, that is the prophylactic defence of guarded relationships. The chief difference seems to be that Canadian and New Zealand Courts have developed causation rules and defences, akin to those applied to common law obligations, in order to control the reach and extent of equitable compensation. By contrast, the Australian authorities, so far as they have decided, eschew use of contributory negligence, *novus actus*, and other apportionment defences, and rely instead on manipulation of the but-for test.

The courts all over the Commonwealth have developed nuanced approaches in order to cope with harsh consequences or unjust results of a strict application of the modified *Brickenden* rule. One must keep in mind that in exercising its equitable jurisdiction, the courts have never taken a formulaic or rigid approach as suggested by the plaintiffs. For example, in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4^{th}) 129 ("*Canson Enterprises*"), in the Supreme Court of Canada, McLachlin J stated:

> Compensation is an equitable monetary remedy which... attempts to restore to the plaintiff what has been lost as a result of the breach, ie, the plaintiff's lost opportunity... Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. *The plaintiff will not be required to mitigate ... but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour and not from the breach.*
>
> [emphasis added]

Similarly in *Maguire v Makaronis*, the High Court of Australia took the following view at 496:

> The purpose of equity's relief is not punishment. So far as possible, it is to restore the status quo ante. For this reason, the remedies will be fashioned according to the exigencies of the particular case so as to do what is "practically just" as between the parties. *The fiduciary must not be "robbed"; nor must the beneficiary be unjustly enriched*.
>
> [emphasis added]

63 Another layer affecting the application of the principles of causation or the relevance of intervening or concurrent causes relates to the nature and context of fiduciary duty owed. As helpfully summarised by Malcolm Cope in *Equitable Obligations: Duties, Defences and Remedies* (Lawbook Co, 2007) at 337, in discussing the relevant Australian jurisprudence:

> It has also been accepted by some judges that one uniform approach may not be applicable to all circumstances involving a breach of fiduciary duty. This would enable a variety of approaches to be adopted in relation to causation in equity depending upon the particular purpose of the rule that is being applied. It has therefore been suggested that various tests may apply. In the case of a traditional trust, the trustee may be responsible for any loss to the trust property even if

there is an intervening or concurrent cause. This test would be confined to a non-commercial trust whereas a narrower "but-for" test would apply where the breach merely facilitates the actual loss which occurs.

64 I have no doubt that the decisions of *Kumagai-Zenecon* and *Firstlink Energy* were correct on their facts. It lies ill in the mouth of a company director who flagrantly breaches his fiduciary duties for personal gain to say that the damage suffered by the wronged party should be reduced because of principles of law relating to causation or remoteness or that the innocent party was contributorily responsible. In *Kumagai-Zenecon*, the CA gave short shrift to the attempts by the fiduciary director to argue that the action by provisional liquidators in selling off certain shares en bloc inflated the loss as they should have sold off only that amount of shares necessary to pay the bank. The CA held that the action of the provisional liquidators was reasonable in the circumstances then prevailing and a subsequent rise in the market was unforeseen and unforeseeable. The CA also said that bad faith or unreasonableness was not established even though the provisional liquidator had not made inquiries with stockbrokers or investment bankers before effecting the en bloc sale of the shares. The CA was clearly not prepared to place too heavy a burden on the actions of the party who was wronged or its provisional liquidator.

65 But there are situations like *Canson Enterprises*, where application of the *Brickenden* rule would cause an unjust result. The facts of *Canson Enterprises* were as follows. A purchased land for development. Unknown to A, who thought it was purchasing the land from an original vendor, the seller was an intermediary who had purchased the land from the original vendor and on-sold the land to A at a substantially higher sum than what it paid for the land. A's solicitor, who acted for A and the intermediary, failed to disclose this fact to A. A proceeded to develop the land and suffered substantial losses when the piles supporting the constructed warehouse began to sink. A sued the soils engineer and the pile-driving company, but was left with a substantial shortfall as these tortfeasors were unable to pay the full loss and damage. A then sued its solicitors for the shortfall. It was agreed that A would not have entered into the contract had it known that the vendor was an intermediate buyer-seller. The trial judge found the solicitor liable for breach of fiduciary duty but held that the purchasers were entitled to direct damages of the secret profit, as well as consequential damages of the expenses incurred on the warehouse project prior to the wrongful acts of the engineers and pile-drivers. The Court of Appeal dismissed the appeal holding that the shortfall was not recoverable because such damages did not flow from the breach of the fiduciary obligation but were the unrelated fault of the engineers and pile-drivers. The Supreme Court of Canada dismissed A's appeal. The loss and damage which arose from actions of the third party engineers and pile-drivers could not be said to flow from the breach of the fiduciary obligation. (See the judgment of McLachlin J quoted above at [63]). This has been characterised as the 'restorative remedial approach' by Malcolm Cope in his work cited above.

66 In *Swindle v Harrison* [1997] 4 All ER 705, the English Court of Appeal stated that the restitutionary obligation imposed on those who owed fiduciary duties is more stringent than the common law obligations to pay damages for breach of contract or negligence and although foreseeability and remoteness of damages are not relevant, it was still necessary to show that the loss suffered has been caused by the relevant breach of the fiduciary duty.

67 *Kumagai Zenecon* and *Firstlink Energy* are correct on their facts and generally, but they do not lay down an absolute rule that all loss and damage, no matter how it is caused, lie at the doorstep of a party in breach of its fiduciary obligations. In the latter case, this is what Andrew Ang J meant when he said that causation, foreseeability and remoteness "...do not *readily* enter into the matter..." (emphasis added). There may be circumstances, as in *Canson Enterprises* where there are limits to the applicability of such an absolute rule. It is best not to lay down any hard and fast rules. There are

a significant number of cases on equitable compensation in the other common law jurisdictions from which guidance can be obtained. Strict rules and rigid criteria are not the inherent nature of equity nor should it be for equitable compensation which is but a part of the whole.

68 I say no more as this application is at an interlocutory stage. At this juncture, the principles referred to above are sufficient to dispose of this interlocutory application. None of these interesting points on remoteness, foreseeability or causation arise on the facts as they now stand before me.

Issue 5: The evidence before the Court relating to the invoices

69 Finally I now turn to the test that must be satisfied by the evidence. In *Alrich Development*, Chao Hick Tin J, as he then was, cited *Rakusen v Ellis, Munday and Clarke* [1912] 1 CH 831 with approval and stated:

> In my opinion the public interest in the administration of justice is sufficiently safeguarded on the test of 'reasonable anticipation of mischief' or in other words 'reasonable likelihood of mischief'. One should look at the real situation in its totality and not just the form.

The current English position as stated in *In Re a Firm of Solicitors* is also to consider whether a reasonable man informed of the facts might reasonably anticipate such danger. In *Dana-West Hotels Ltd v Royal Bank of Canada* (1984) 37 SASK R. 81, an application by defendant to restrain counsel for acting for plaintiff was dismissed as the court was not satisfied that the mischief would probably result if counsel was allowed to continue to represent his client. On the facts of this case the testimony of a partner was important to establish what transpired in the agreement between parties which the plaintiff was seeking to set aside by reason of duress. Arguably the facts of that case reached a far higher threshold than the case before me but the court still did not allow the injunction application. The court recognised that an order to restrain counsel was rarely made and most decisions stopped short of enforcing criticism of counsel acting at trials where associates are witnesses (at [12]). On a similar cautionary note, in *In re A Solicitor* (1987) 131 S J 1063 Hoffman J, as he then was, said that the threshold required to be met to restrain counsel from continuing to act was intentionally high as:

> [I]t is not desirable that the right of a client to have the services of the solicitor of his choice should be unnecessarily restricted. It is not desirable that the litigation, or as in this case the proceedings... should be delayed because of a compulsory change of solicitors on grounds which do not involve any real possibility of injustice.

70 In *Emperor v Dadu Rama Surde* AIR 1939 BOM 150 the court found that the inherent jurisdiction of the court should be invoked in a r 64 scenario ***only*** when the party applying for solicitor to be discharged establishes that the trial will be materially embarrassed if the advocate continued to appear. Similarly, the court in *Pearnbran Pty Ltd v Win Mezz* (QLD SC unreported) found that the mere circumstance that a solicitor was to be a material witness, even on a controversial matter, in of itself did not justify restraining a solicitor from continuing to act (at [24]). The line was crossed only when the solicitor had a personal stake in the outcome of the proceedings or their conduct, beyond the recovery of proper fees for acting. The court noted that the relevant stake may not necessarily be financial but could involve the personal or reputational interest of the solicitor. It is this concern that forms the nub of this application.

71 For the reasons set out above, especially at [31], [32] and [50], I do not see the need for the court to intervene and the mischief rr. 25 and 64 are designed to avoid is absent on the facts and circumstances of this case. I therefore dismissed Mr Tan's application.

Issue 6: Costs

72 Having heard the parties on 27 January 2012 on costs, I have fixed costs payable by Mr Tan to the plaintiffs at $12,000, inclusive of disbursements. There is no order as against Mr Samtani.

[note: 1] 2nd Defendants submissions dated 9 January 2012 at [1] ("2nd Def Subs").

[note: 2] Plaintiffs bundle of Cause Papers at p 2, Statement of claim at [6]-[7].

[note: 3] Plaintiffs bundle of Cause Papers at p 3, Statement of claim at [9].

[note: 4] Plaintiffs bundle of Cause Papers at p 17, Statement of claim at [38.1].

[note: 5] Plaintiffs bundle of Cause Papers at Tab 3.

[note: 6] Plaintiffs submissions dated 10 January 2012 at [39].

[note: 7] Minutes before AR Feng Qian dated 18 November 2011.

[note: 8] 2nd Defendant Submissions at [10] and [11].

[note: 9] 2nd Def Subs at [74].

[note: 10] Plaintiff's Bundle of Authorities at Tab 15.