Tan Ng Kuang and another *v* Law Society of Singapore
[2020] SGHC 127

Case Number : Originating Summons No 263 of 2020

Decision Date : 19 June 2020

Tribunal/Court : High Court

Coram : Valerie Thean J

Counsel Name(s) : Tan Chuan Thye SC, Chew Xiang and James Kwong (Rajah & Tann Singapore LLP) for the first and second applicants; Siraj Omar SC and Teng Po Yew (Drew & Napier LLC) for the respondent.

Parties : Tan Ng Kuang — Lim Siew Soo — Law Society of Singapore

Legal Profession – Disciplinary proceedings

Legal Profession – Professional conduct

19 June 2020

Valerie Thean J (delivering the judgment of the court *ex tempore*):

1 I grant this application under s 96 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") for an order that the Law Society of Singapore ("Law Society") be directed to apply to the Chief Justice for the appointment of Disciplinary Tribunals ("DTs") to investigate the alleged misconduct of Mr Lee Teck Leng Robson ("Mr Lee") and Mr Jai Swarup Pathak ("Mr Pathak") of Gibson Dunn & Crutcher LLP ("Gibson Dunn") (collectively, "the Solicitors").

The Applicants' contention of ethical impropriety

2 At the material time, the Solicitors were acting on behalf of Punj Lloyd Ltd ("PLL"). The applicants in this case are Mr Tan Ng Kuang ("Mr Tan") and Ms Lim Siew Soo ("Ms Lim"), insolvency practitioners with nTan Corporate Advisory Pte Ltd ("nTan") (collectively, "the Applicants"). The dispute arose from the circumstances surrounding the Applicants' appointment as judicial managers ("JMs") of Punj Lloyd Pte Ltd ("PLPL") and Sembawang Engineers and Constructors Pte Ltd ("SEC"). PLL was the parent company of PLPL, which in turn was the parent company of SEC. Mr Atul Punj ("Mr Punj") is the chairman of PLL.

3 The Applicants' contention in the present case is that they had agreed with PLL to be appointed as JMs for PLPL and SEC on condition that PLL deposit S$2 million either with nTan or with Gibson Dunn in escrow. This was to aid the success of the judicial management, by showing PLPL's and SEC's creditors that PLL was serious about the restructuring and to ensure that the JMs' fees would not eat into PLPL's and SEC's assets. The Applicants' fees, billed at an hourly rate, would be paid out of this sum, and Gibson Dunn received and held $500,000 as deposit for their fees. Contrary to that agreement, Mr Lee informed them on 22 September 2016 that Gibson Dunn was not holding any money for that purpose.

History of the complaint

4 The Applicants on 26 April 2018 made complaints to the Law Society about the Solicitors,

which were then summarised by the Review Committee ("RC") as follows:

(a) that the Solicitors knowingly deceived the Applicants and/or knowingly aided and abetted their client PLL, being the parent company of PLPL and SEC, in deceiving the Applicants with regards to the terms of their remuneration; and

(b) that the Solicitors aided and abetted their client in not paying to the Applicants a substantial amount of monies that their client had placed with them for the express purposes of providing a deposit for the JMs' fees.

5 The RC appointed to review the matter dismissed both complaints. On review in Originating Summons No 1505 of 2018, Chua Lee Ming J upheld the RC's decision to dismiss the first complaint, but directed the RC to refer the second complaint to the Chairman of the Inquiry Panel under s 85(8)(*b*) of the LPA.

6 Two Inquiry Committees ("ICs") were then constituted, one in relation to Mr Lee and one in relation to Mr Pathak. The ICs were of the view that no formal investigation by DTs was required and recommended that the complaint be dismissed under s 86(7)(*b*)(v) of the LPA. After seeking further reports from the ICs, the Council of the Law Society determined that formal investigations were not necessary. The Applicants sought therefore to invoke the appellate jurisdiction of this court under s 96 of the LPA to direct the Law Society to apply for DTs to be appointed.

What is the role of the IC?

7 The role of the IC is informal and inquisitorial, and under the LPA, the IC may take one of three courses of action after its inquiry. First, it may eliminate frivolous complaints. If there is no *prima facie* case of any misconduct, or if the allegations, taken at their highest, do not disclose any sufficiently serious breach that would warrant formal investigation, the IC will recommend dismissal of the complaint: *Loh Der Ming Andrew v Law Society of Singapore* [2018] 3 SLR 837 ("*Andrew Loh*") at [67]–[69]; s 86(7)(*b*)(v) of the LPA. Second, where it concludes there has been minor misconduct, it may recommend the imposition of less serious penalties or remedial measures: s 86(7)(*b*)(i)–(iv) of the LPA. Third, it should channel the matter to a DT wherever a *prima facie* case of ethical breach which ought to be heard formally and determined by the DT has been established: see *Subbiah Pillai v Wong Meng Meng and others* [2001] 2 SLR(R) 556 ("*Subbiah Pillai*") at [32].

8 Here the Applicants contend there is a *prima facie* case. In *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 at [27]–[29], in relation to s 82A(6) of the LPA, the analogous section in relation to legal service officers and non-practising solicitors, Chan Sek Keong CJ applied the standard used in criminal law, which is to ask "whether there is some evidence (not inherently incredible) which, if [a judge] were to accept it as accurate, would establish each essential element in the alleged offence" (*Haw Tua Tau and others v Public Prosecutor* [1981-1982] SLR(R) 133 at [17]).

9 It follows therefore, from the scheme of the LPA, that where there is evidence, not inherently incredible, on each of the elements of an ethical breach, the role of the IC is to channel the investigation to a DT.

The ICs' decision

10 I come then to the ICs' decision. In the present case, a factual dispute lay at the heart of the complaint. The Applicants contend that there was an express oral agreement, when they were approached by the Solicitors on behalf of PLL to act as JMs for PLPL and SEC, that they would act as

JMs on condition that PLL place a sum of S$2 million deposit in escrow with nTan or Gibson Dunn, to "change the narrative". The JMs' remuneration and expenses were also to be paid out of that deposit. When the Applicants sent chasers to follow-up on the S$2 million deposit, the Solicitors confirmed that S$250,000 was deposited (and PLL later confirmed a second tranche of S$250,000 was deposited). Yet, on 22 September 2016, Mr Lee stated that they were not holding onto any funds for the JMs' fees. In contrast, the Solicitors maintained that there was no such agreement. Therefore, as they explained to the ICs, the monies transferred by PLL to them were still PLL's monies held in their client account, and they were entitled to follow their client's instructions regarding their use, and thereafter to inform the Applicants on 22 September that there was no money on deposit with them.

11 The ICs accepted the Solicitors' version of events. They considered that for the complaint of "aiding and abetting" to be made out, there had to be wrongdoing on PLL's part. The Applicants had not proved such wrongdoing. The evidence was that the agreement on the JMs' fees was not yet concluded. If there was no agreement, there would be no breach by PLL in not paying the sums. The S$500,000 deposit was made "in good faith only" and negotiations on the JMs' fees were not yet concluded. The money had been paid into Gibson Dunn's client account and the money belonged only to PLL and could not be disbursed except by instruction and authorisation of PLL. There was no evidence that Mr Lee and Mr Pathak knew that PLL had no intention to pay the JMs' fees. It was their duty to take instructions from their client. They concluded that there was "no contemporaneous objective evidence" of the agreement alleged by the Applicants.

Was there a prima facie case?

12 In my view, the Applicants have established a *prima facie* case, for the following three reasons.

13 First, the conduct of the Applicants was consistent with their explanation as to an agreement having been entered into. They had provided their consents to act on 17 June 2016 "[o]n the basis that an agreement can be reached on the terms of our appointment". The email dated 23 June 2016 then expressly set out the deposit of S$2 million, to be placed by PLL either in escrow with nTan or with Gibson Dunn, and for the monthly invoices for time costs to be paid out of that deposit. On a plain reading, it is clear that the S$2 million deposit was distinct from the issue of the quantum of remuneration or fees. Next, the email dated 24 June 2016 only acknowledged the possibility of modifying *how* the deposit was to be paid (in tranches) rather than *whether* the deposit was to be paid for JMs' fees. On 27 June 2016, the Applicants were then appointed as JMs for PLPL and SEC, on the basis of the consents provided on 17 June 2016, which is *prima facie* evidence of some agreement to their terms, especially as communicated on 23 and 24 June 2016. Otherwise, it would appear that their consents to act were presented to court without authorisation. Further, the Applicants' account was averred to in three affidavits filed by Ms Lim in the judicial management proceedings for PLPL and SEC on 14 September, and 6 and 12 October 2016. These assertions on oath constitute evidence, not inherently incredible, that ought to be tested in cross-examination before being dismissed.

14 Second, the correspondence is consistent with the Applicants' narrative. On 30 June 2016, following the Applicants' appointment as JMs, Ms Lim asked the solicitors whether the deposit had been provided, not, it must be noted, whether an agreement had been reached yet on the deposit. The deposit was referred to consistently by the Applicants and at no point around June and July 2016 was it suggested that there was no such arrangement for a deposit (see emails dated 7, 14, 27 July, 9, 11 and 17 August). Instead, on 7 July 2016, Mr Pathak indicated in unqualified terms that Mr Punj "will render the appropriate authorization" for the "JM fee deposit" when he gets into the office. On 14 July, Mr Pathak confirmed that S$500,000 will be placed with Gibson Dunn "*towards payment* of JM fees" [emphasis added]. When Ms Lim replied seeking a clarification, Mr Pathak then provided

confirmation by way of an email dated 27 July 2016. In the second paragraph of that email onwards, Mr Pathak (1) described the S$2 million as a "trust deposit", (2) at no point suggested that this was not part of the agreement, (3) stated that the S$500,000 was going to be part of this trust deposit, and (4), confirmed that Mr Punj was mindful of "the necessity of the deposit of the JM fees" to serve to "change the narrative" for PLPL and SEC. On 5 August 2016, Ms Lim replied and pointed out the unsatisfactory elements of that email, reiterating that it had been agreed that a cash deposit of S$2 million would be held in escrow with nTan or with Gibson Dunn, whereas only S$500,000 had been confirmed. On 8 August, Ms Lim sent a chaser seeking confirmation of receipt of S$250,000. On 17 August, Mr Pathak confirmed receipt: "The funds were received and have been placed in *our trust fund for the JM fees*" [emphasis added]. This correspondence calls into question the Solicitors' explanation to the ICs that there was no agreement, and any explanation the Solicitors have ought to be tested in cross-examination.

15 Third, while the Solicitors' explanation to the ICs was that any money held were client monies, they were not queried why, given the overarching discussion that the funds would be held in escrow (as put forward by the Applicants in their emails dated 23 June and 5 August), they did not clarify the situation or disabuse the Applicants of that notion. Instead, throughout, the Solicitors made reference to the money being in a "trust deposit" (in the 27 July email) and a "trust fund" (in the 17 August email). In the context, these phrases suggested that the funds were held for the purpose of the judicial management, rather than simply referring to them being client monies.

16 The Law Society emphasised that there was no obligation to pay the Applicants. I disagree with that characterisation of the case. The fact of the matter is that if the monies were held by Gibson Dunn for a specific purpose, the monies could not otherwise be used or removed at the behest of PLL. Conversely, the arrangement, if denuded of the obligation to maintain the funds for the stated purpose such that the monies could simply be withdrawn at any point, would fail to serve any real commercial or practical purpose for the JMs nor "change the narrative" for the creditors of PLPL and SEC.

17 In my judgment, in assessing whether there was a *prima facie* case, the ICs ought to have confined themselves to considering if there was evidence, not inherently incredible, that would satisfy the elements of the alleged misconduct. The ICs ought not to have gone further to conclude that there was no agreement once such *prima facie* evidence was presented. The scheme of the LPA is not to have substantial issues of fact dealt with in the informal and inquisitorial setting of an IC where the evidence discloses sufficiently serious misconduct. Returning to the allegation made by the Applicants, this is a serious allegation that the Solicitors held the money for an express purpose which they then ignored. The Applicants' and the Solicitors' versions should be tested in a proper hearing by DTs, which are the fact-finding bodies in the scheme of the LPA. I therefore direct the Law Society to apply to the Chief Justice for the appointment of DTs under s 96(4)(*b*) of the LPA.

Complaint to be investigated

18 In directing DTs to be appointed, I make clear that aiding and abetting any wrongful action on the part of PLL is not the threshold question, as assumed by the ICs and as advanced by the Law Society. The threshold question is whether there was an oral agreement on the issue of the deposit as alleged by the Applicants. If there was such an oral agreement between PLL and the Applicants, the Solicitors should explain why they paid out the money to PLL despite the specific purpose. Any "aiding and abetting" of PLL follows from this context, and the emphasis in the complaint as formulated is on the Solicitors' failure to pay the funds. The second complaint is distinct from the first complaint that was dismissed by the RC and which dismissal was upheld by Chua J. The primary charge should be framed with this distinction in mind in order to avoid some confusion that was seen

in the arguments before the ICs.

19 An alternative charge may also be framed, arising out of the same complaint, such that in the event the DTs are of the view, after testing the evidence, that there was no such agreement, it may consider whether there was any ethical breach in the manner in which the Solicitors communicated with the Applicants up to 17 August. In the event that there was a misunderstanding on the part of the Applicants, that misunderstanding was clear from the correspondence emanating from them. No clarification was made by the Solicitors who, to the contrary, used language such as "trust deposit" or "trust fund"; in such a context the issue arises whether the confusing responses reveal any misconduct. This potential misconduct arises from the same complaint on an alternative finding as to the existence of the express oral agreement.

20 For completeness, I note that the DTs are not bound by my analysis of the evidence and should consider any issue of fact *de novo* as part of its investigations: *Subbiah Pillai* ([7] *supra* at [46]); *Andrew Loh* ([7] *supra* at [174]). For this reason I do not deal with the argument on legal professional privilege in respect of documents the Applicants sought to place before the IC, which is not necessary to my decision, and should be considered, if at all, by the DTs.

21 In conclusion, I grant prayer 1 of OS 263/2020.