Ling Uk Choon and Another v Public Accountants Board
[2004] SGHC 127

Case Number : OM 32/2003

Decision Date : 28 June 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Quek Mong Hua and Mervyn Foo (Lee and Lee) for appellants; Devinder K Rai (Acies Law Corporation) for respondent

Parties : Ling Uk Choon; Ling Ing Hea Grace — Public Accountants Board

Administrative Law – Disciplinary board – Certified public accountants censured and fined for improper conduct – Appeal in High Court against decision of Public Accountants Board – Whether High Court limited to considering whether rules of natural justice observed and whether decision of Board honestly reached

Professions – Accountants – Professional conduct – Refusal to return client's documents under mistaken but genuine belief that they were under duty of disclosure – Whether amounting to improper conduct – Section 34(1)(c) Accountants Act (Cap 2, 2001 Rev Ed)

Professions – Accountants – Professional conduct – Whether separate requirement in disciplinary proceedings to show alleged improper conduct would bring profession into disrepute – Section 34(1)(c) Accountants Act (Cap 2, 2001 Rev Ed)

28 June 2004 *Judgment reserved.*

Woo Bih Li J:

Introduction

1 The appellants, Ling Uk Choon and Ling Ing Hea Grace, are a father and a daughter. They are certified public accountants and were and are practising under the name of Ling Uk Choon & Co ("the Firm"). Mr Ling served for not less than 29 and a half years with the then Singapore Income Tax Department (now known as the Inland Revenue Authority of Singapore or IRAS). He retired as a Senior Assessment Officer I in December 1983 and practised as a public accountant from December 1988. Ms Ling says that she has been a qualified practitioner for not less than seven and a half years (presumably from the date of their first joint affidavit of 22 December 2003). Arising from what was perceived to be a complaint by their client Ryoma Steel Enterprise (S) Pte Ltd ("Ryoma") to the Public Accountants Board ("the Board") about the appellants' refusal to return Ryoma's documents to Ryoma, an inquiry committee ("the IC") was constituted. Eventually, the IC concluded that the appellants were guilty of improper conduct which brought the profession of public accountancy into disrepute under s 34(1)(c) of the Accountants Act (Cap 2, 2001 Rev Ed) ("the Act"), and the IC reported accordingly to the Board. The Board accepted this conclusion and subsequently censured each of the appellants and ordered each of them to pay to the Board a sum of $6,281 being the costs and expenses incidental to the hearing held by the IC.

2 The appellants, being dissatisfied with the Board's decision, have appealed to the High Court pursuant to s 36 of the Act.

Background

3 On 22 December 1997, Ryoma appointed the Firm as its auditors and Singapore tax agents.

4 However, it was only on 28 May 1999 that Ryoma furnished its set of accounts and related documents (collectively referred to as "the documents") for the period 31 October 1997 to 31 December 1998.

5 On 25 June 1999, after the appellants had started work, Ryoma requested the return of the documents for a goods and services tax inspection. This was done and the documents were collected by Ryoma in early July 1999.

6 Subsequently Ryoma returned a set of documents to the Firm. In the process of carrying out their work, the appellants were surprised to note that the returned set of accounts were very different from the initial set received. The appellants asked Ryoma to clarify the differences. The appellants also listed out irregularities for Ryoma's explanation. It is not clear from the appellants' first joint affidavit whether the irregularities were the same as the differences they had mentioned or in addition to them, and it is also not clear to me as to when the list was provided to Ryoma. I will assume that the differences and irregularities referred to are the same. As for the list of irregularities, it was probably provided to Ryoma in 1999 or early 2000.

7 The appellants say that on or about 5 April 2000, one Grace Chong, an employee of Ryoma, called them to discuss the irregularities. In the course of the discussion, she requested the appellants to close their eyes to the irregularities but they did not agree.

8 On or about 19 May 2000, Ryoma requested the appellants to assist it in making voluntary disclosures to the relevant authorities in view of the irregularities. At the same time, Ryoma also engaged Luck Management Services ("Luck Management") to help to reconstruct its accounts. Luck Management shares the same office address as the Firm.

9 The appellants say that even after they were asked to help in making the voluntary disclosures and the services of Luck Management had been engaged, Ryoma was still not forthcoming in its explanation. The appellants also say that they repeatedly stressed to Ryoma that if it persisted in not explaining the irregularities, they would have no choice but to disclose the same to the relevant authorities. The result was that Ryoma's accounts could not be constructed and the appellants could not complete their work.

10 By a letter dated 9 March 2001, Ryoma's solicitors, M/s Moey & Yuen, wrote to the Firm. The letter stated:

> 1. We act for Ryoma Steel Enterprise (S) Pte Ltd.
>
> 2. We are instructed that you were instructed by our clients to prepare their audited accounts from 31 October 1997 but you have yet to produce the same inspite of the many reminders from our clients.
>
> 3. Your delay has caused our clients to be charged in Court for failure to submit their income tax returns.
>
> 4. TAKE NOTICE that our clients demand the return of all their documents from you and will be collecting the same at your office on Tuesday, 13 March 2001 at 3.00pm.
>
> 5. We reserve our clients' rights in any event.

11 While it may be that this letter was unfair to the appellants because they were waiting for Ryoma's explanation on the irregularities, there could be no denying that Ryoma wanted all their documents to be returned on 13 March 2001. I would add that a letter, also dated 9 March 2001 and in the same vein, was sent by Moey & Yuen to Luck Management.

12 However, the appellants refused to release the documents on 13 March 2001 as a result of which Moey & Yuen wrote another letter on that day addressed to both the Firm and Luck Management stating, *inter alia*:

> 1. We refer to the meeting at your office on 13 March 2001 where your Mr Ling and Grace Ling and our Michael Moey together with our clients, Ken Liew and Iris were present.
>
> 2. …
>
> 3. We further note that you have refused to release our clients' documents to us or to our clients without giving us any reasons. Your explanation that "Your clients know why I cannot release the documents" is totally unacceptable.
>
> 4. Our clients had said that they have no knowledge of the reasons and yet you repeated that our clients knew.
>
> 5. In the circumstances, our clients have no alternative but to commence proceedings to recover the documents from you. Please let us know which firm of solicitors you are instructing to act for you within the next 3 days, that is, by close of business, Friday, 16 March 2001 failing which we will be serving the documents on you directly.
>
> 6. Our clients reserve all their rights against you.

13 Notwithstanding this letter of 13 March 2001, the appellants still refused to release the documents to Ryoma.

14 On 16 May 2001, Moey & Yuen apparently sent a letter to the Firm to terminate the Firm as Ryoma's auditors. It appears that another letter dated 28 May 2001 was sent to the Firm to terminate the Firm's appointment as Ryoma's tax agent with immediate effect. A similar letter dated 28 May 2001 was also sent to terminate the services of Luck Management with immediate effect. According to the appellants, the two letters dated 28 May 2001 were found in an envelope addressed to the Firm bearing the postmark of 22 June 2001.

15 On 13 July 2001, Moey & Yuen sent yet another letter to the Firm noting that their services had been terminated with effect from 16 May 2001 and requiring the release of Ryoma's documents on 16 July 2001. A similar letter was sent to Luck Management.

16 However, the appellants still refused to release the documents as a result of which Moey & Yuen wrote to the Board on 20 July 2001. In that letter, Moey & Yuen listed their correspondence to the Firm and said that Ryoma was facing summonses from the Registry of Companies and the IRAS for failing to file its annual and tax returns. They sought the assistance of the Board but the heading of their letter was "Complaint against Ling Uk Choon & Co/Luck Management Services". The Board appears to have treated this letter as a complaint.

17 The Registrar of the Board then wrote to the appellants about the complaint and the appellants replied on 24 August 2001 with a long discourse setting out, *inter alia*, the irregularities in

the accounts they had been faced with and mentioning their suspicion that Ryoma wanted a computer back to remove, destroy or alter evidence. The last few paragraphs of the reply stated that because of time constraints, the appellants were not in a position to give more information and emphasised that Ryoma's complaints were not true.

18 The appellants say in their first joint affidavit before me that when they sent the reply dated 24 August 2001 to the Board, they had sought the Board's guidance. Before that, the avenues available to them to seek guidance in their dilemma was sorely limited. The appellants also alleged that the Board did not see fit to offer any solution, and could have but did not tell the appellants to return all the documents to Ryoma. The Board was quite content to let them handle the dilemma themselves and, when it came to the crunch, the Board found the appellants' conduct improper.

19 I am of the view that it is not open to the appellants to say that the avenues available to them to seek guidance were sorely limited. They could have and should have sought legal advice immediately, especially when Ryoma was using the services of Moey & Yuen to deal with the appellants' refusal to release the documents. It is no excuse to suggest that they could not afford or wanted to save the cost of seeking such advice,[1] especially since they had apparently not attempted to find out how much such advice would cost at that time on that particular issue, which was not a complex issue.

20 Moreover, the terms of the appellants' reply dated 24 August 2001 did not seek the Board's guidance. I also doubt if it is the role of the Board to give such guidance in the face of a complaint. The appellants should have sought advice from solicitors immediately, as I have mentioned. Accordingly, the appellants' remarks about the Board's omission to give guidance and being content to let the appellants handle the dilemma themselves are unwarranted.

21 On 13 November 2001, Ryoma filed a writ of summons against the appellants in District Court Suit No 4465 of 2001 seeking, *inter alia*, the return of its documents. The appellants say they had no alternative but to file their defence and counterclaim. It is not clear whether by then the appellants had engaged solicitors, but by 26 February 2002 they had apparently done so because they say that on 26 February 2002, the solicitors for the respective parties attended a court dispute resolution session. According to the appellants, a settlement judge then directed the appellants to give Ryoma a chance to explain the irregularities, failing which the appellants should report the irregularities to the relevant authorities.

22 On 19 March 2002, the appellants' solicitors, M/s Lee & Lee, wrote to Moey & Yuen to enclose the appellants' list of questions and appendices and seeking Ryoma's answers in the following three weeks. The appellants say that Ryoma was unable or unwilling to shed light on the irregularities and, on 11 July 2002, they wrote to the Commercial Affairs Department ("CAD") setting out some irregularities. The letter was written pursuant to s 39 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ("the CDT Act"). The last paragraph of the letter to CAD stated that there was an application in court to compel the appellants to return all accounting records, hardware and software and, if the CAD did not require the appellants to hand over the same for investigation within the next seven days, the appellants would have no alternative but to return the same. Similar letters were written to the Criminal Investigation Department, the Registrar of Companies & Businesses and the Comptroller of Income Tax.

23 The appellants then received responses from CAD and IRAS requiring them to hand over all relevant documents for investigation, which presumably they did. Subsequently, CAD informed the appellants that two directors of Ryoma and another person had been charged with offences under s 477A of the Penal Code (Cap 224, 1985 Rev Ed) for falsification of accounts. The charges against

these directors were eventually reduced to one charge under s 199 of the Companies Act (Cap 50, 1994 Rev Ed) (leaving aside one other charge which is irrelevant). On 21 November 2003, the two directors pleaded guilty and were fined. The District Court ordered the Prosecution to return all exhibits to the owner and CAD returned all documents and computer systems it had received to the directors of Ryoma.

24 IRAS was still investigating the matter at the time of the hearing.

25 In the meantime, the appellants were informed on 14 April 2003 that an IC was constituted to look into the complaint by Ryoma. The appellants provided a written explanation. They also appeared before the IC on 28 July 2003 and offered as additional explanation a letter of the same date. The IC advised the appellants to obtain a legal opinion as to whether they were entitled to retain all the documents of Ryoma. This opinion was obtained from Lee & Lee. It was dated 27 August 2003.

26 Eventually, the IC reached a conclusion and the Board made its decision, both of which I have mentioned above.

The court's role in the appeal

27 The Board's counsel Mr Devinder Rai, initially argued that the court's role in the appeal was limited to considering whether the rules of natural justice had been observed and whether the decision of the Board had been honestly reached. A few cases were cited for this proposition. However, as the appellants' counsel, Mr Quek Mong Hua, rightly pointed out, those cases involved applications seeking judicial review where there was no statutory right of appeal. Here, s 36 of the Act provides the appellants with a right to appeal to the High Court. Order 55 r 1 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) provides that the Order shall apply to every appeal which under any written law lies to the High Court from any court, tribunal or person. Order 55 r 2 provides that such an appeal "shall be by way of rehearing".

28 Mr Quek relied on L P Thean J's judgment in *Chew Kia Ngee v Singapore Society of Accountants* [1988] SLR 999 where Thean J said, at 1003, [8]:

> Against that decision this appeal is now brought. Under s 34(2) of the Act, the procedure governing such an appeal is the same as that for appeals to the High Court from the decisions of District Courts in civil matters. Like an appeal from the District Courts, this appeal is in the nature of a re-hearing and the same principles apply as are applicable to an appeal to the High Court against the decision of the District Court.

29 Using the analogy of appeals from the district courts, Mr Quek then further cited a passage from Singapore *Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) in respect of O 55D r 2 on the question of rehearing. The passage cited was inaccurately set out in his further submissions and I set it out below:

> **55D/3/1 "By way of rehearing"** — This provision does not mean that the High Court hears the witnesses afresh. The High Court reviews the whole of the evidence (so far as is relevant to the appeal) in the court below and the course of the trial. The general practice is essentially a "rehearing on documents" in that the court sits to review the official transcript of the evidence, the judge's notes and the grounds of his decision. The court rehears counsel on the issues of fact or law or both which form the substance of the appeal. The court is not confined to the issues raised by the parties on appeal and is not limited to making an order which should have been made by the court below but may consider any relevant facts which have occurred since

> the trial and may make such further or other orders as it deems fit according to the state of things at the time of the hearing of the appeal. …

30 It should be noted that the statute being considered in *Chew Kia Ngee* was the Accountants Act (Cap 2, 1985 Rev Ed) and s 34(2) thereof states that the procedure governing appeals to the High Court "shall be the same as for appeals to the High Court from decisions of District Courts in civil matters". On the other hand, s 36(1) of the Act does not mention appeals from the district courts. Accordingly, one must be careful when citing Thean J's judgment on this point. Fortunately, the end result is the same because, although s 36(1) of the Act does not mention appeals from the district courts, O 55 rr 1 and 2 do provide that an appeal under any written law to the High Court shall be by way of rehearing, as I have mentioned.

31 However, one should also be careful about citing the above passage from the Singapore *Civil Procedure 2003* in respect of O 55D r 2 because O 55D pertains to appeals from the subordinate courts and not appeals under any written law. There is a separate order for the latter, *ie*, O 55. Order 55 r 5(3) states that, "Except with the leave of the Court hearing any such appeal, no grounds other than those stated in the notice of motion … may be relied upon by the appellant …". So for the purpose of O 55, it would be inaccurate to say that the court is not confined to the issues raised by the parties on appeal.

32 Nevertheless, I accept that because the appeal before me is by way of rehearing, I am not confined to considering whether the rules of natural justice have been observed and whether the decision of the Board had been honestly reached.

33 Indeed, in further submissions, Mr Rai no longer submitted that the court's role in a statutory appeal was as limited as originally suggested. He pointed out that in *Fox v General Medical Council* [1960] 1 WLR 1017, Lord Radcliffe said at 1022:

> Their Lordships think, therefore, that it would be an undue limitation of their duty and powers in dealing with the statutory appeal to require no more for the upholding of a determination than observance of what are known as the rules of natural justice.

However, Mr Rai submitted that the decision of the tribunal below should be given some measure of precedence. For this proposition, he cited the following from Lord Radcliffe's judgment in *Fox* at 1020:

> The appeal in this case lies as of right and by statute – see section 36 of the Medical Act, 1956. The terms of the statute that confers the right do not limit or qualify the appeal in any way, so that an appellant is entitled to claim that it is in a general sense nothing less than a re-hearing of his case and a review of the decision. Nevertheless, an appellate court works under certain limitations which are inherent in any appeal that does not take the form, as this does not, of starting the case all over again and hearing the witnesses afresh. In the High Court, where appeals to the Court of Appeal are by function by way of re-hearing, there are well-recognised principles which give some measure of precedence to the decisions of the tribunal that has seen and heard the witnesses over what might otherwise be the view of the facts preferred by the appellate court which has only the record of the evidence to study.

I do not disagree that the decision below should be given some precedence provided that the court's wider role in an appeal is borne in mind.

Section 34(1)(c) of the Act

34 As the IC and the Board proceeded under s 34(1)(c) of the Act, I set out below this provision:

> Where the Board, upon consideration of the report of an Inquiry Committee, is satisfied that a public accountant has been guilty of such improper or dishonourable conduct in the discharge of his professional duty or such improper or dishonourable conduct which, in the opinion of the Board, renders him unfit to be a public accountant or would bring the profession of public accountancy into disrepute; the Board may, after giving the public accountant concerned a reasonable opportunity of being heard, exercise one or more of the powers referred to in subsection (2).

35 There are two separate limbs under s 34(1)(c). The first is that the Board may exercise its powers where the public accountant has been guilty of improper or dishonourable conduct in the discharge of his professional duty. The second limb is that improper or dishonourable conduct which, in the opinion of the Board, renders the public accountant unfit to be a public accountant or would bring the profession of public accountancy into disrepute, entitles the Board to exercise its powers. Under the second limb, the conduct in question need not be in the discharge of the accountant's professional duty.

36 The IC and the Board proceeded under the second limb but it is important to bear in mind that the second limb has more than one requirement.

37 The first requirement is that there must be improper or dishonourable conduct. The second requirement is that such conduct must, in the opinion of the Board, render the public accountant unfit to be a public accountant or would bring the profession of public accountancy into disrepute. Accordingly, I do not accept Mr Rai's submission that once improper conduct is established, it is not necessary to show further that such conduct would bring the profession into disrepute. The second requirement is found in the second limb but not the first limb. If Mr Rai was correct, then the qualifying words "which, in the opinion of the Board, … would bring the profession of public accountancy into disrepute" would be redundant.

38 Furthermore, the Parliamentary debates on the predecessor of s 34(1)(c) also indicate that these words constitute a separate requirement. Section 34(1)(c) is a different provision from what was considered in *Chew Kia Ngee* ([28] *supra*) and *Wong Kok Chin v Singapore Society of Accountants* [1989] SLR 1129. The predecessor of s 34(1)(c) was introduced by the Accountants (Amendment) Bill (No 45 of 1998) as an amendment to s 21(1) of the Accountants Act (Cap 2A, 1998 Rev Ed). Under the Bill, the proposed s 21(1)(a)(ii) reads as follows:

> **Suspension or cancellation of registration.**
>
> 21.—(1) Upon consideration of the report of an Inquiry Committee, the Board may —
>
> (a) by order suspend the public accountant from practice for a period not exceeding two years or by order cancel the registration of any public accountant if —
>
> (i) …
>
> (ii) the public accountant has been guilty of such improper or dishonourable conduct in the discharge of his professional duty which, in the opinion of the Board, renders him unfit to be a public accountant or would bring the profession of public accountancy into disrepute …

39 As can be seen, the differences between the proposed s 21(1)(a)(ii) then and s 34(1)(c) before me are minor for present purposes in that under s 34(1)(c), there are two limbs instead of one and under the second limb, the improper conduct is not confined to the discharge of professional duty. However, both the proposed s 21(1)(a)(ii) and s 34(1)(c) have the qualifying words that I referred to earlier at [37].

40 On 26 November 1998, on the Second Reading of the Bill to introduce s 21(1)(a)(ii), among other amendments, the then Finance Minister, Dr Richard Hu Tsu Tau, said:

> The proposed amendments to section 19 are really consequential to the broadening of the causes for deregistration in section 21. … *Some may say that this appears draconian, but let me assure Members that the provisions will not be triggered when a public accountant has committed an improper act per se*. An inquiry can only proceed if the act has an adverse impact on the general standing of the profession, or shows that the public accountant is unfit for his profession. This is a fair application of the law, in order to safeguard and uphold the integrity of the accounting profession. [emphasis added]
>
> [See the *Parliamentary Debates, Official Report* (26 November 1998) at col 1719.]

41 The above statement reinforces my view that improper conduct *per se* is not sufficient for the second limb of s 34(1)(c). It must, in the opinion of the Board, amount to conduct which would bring the profession of public accountancy into disrepute.

The IC's report and the Board's decision

42 Before I deal with the substance of the IC's report ("the Report"), I would like to mention that I noticed that the Report referred to the Firm as "the Respondents". Section 32 of the Act refers to complaints about the conduct of any public accountant or the conduct of business by any accounting corporation. There is no reference to a complaint against a firm of public accountants presumably because a firm is not a separate legal entity from the partners of the firm. Consequently, any complaint about the conduct of a firm to the Board should be directed to the conduct of a particular public accountant or accountants of the firm and not to the firm generally. Likewise, the IC and the Board will then be considering the conduct of the individual(s). Therefore, for the purpose of my judgment, I will substitute the Report's references to the Respondents, *ie,* "the Firm" with "the appellants" instead.

43 The Report summarised the complaint as the appellants' failure to return documents belonging to Ryoma. It noted the appellants' explanation that they had to retain the documents in order to report wrongdoings to the relevant authorities. It then stated the issue as "whether the [appellants] are entitled to retain the books and documents for the reason given".

44 Paragraph 3.7 of the Report stated that the IC was of the view that the issue of whether the appellants were obliged to disclose wrongdoings to the relevant authorities was not relevant to the complaint. The IC was of the view that letters from the appellants as well as the legal opinion from Lee & Lee did not address the issue as to whether the appellants had the right to retain the documents. As the IC was of the view that the appellants had no such right, the IC reached the conclusion which I have mentioned.

45 However, as the IC was of the view that the appellants "appear to have acted out of a misguided sense of moral obligation rather than out of malice in withholding the books and documents of Ryoma", the IC recommended that the appellants be censured. As I have said, the Board's decision

was to censure each of the appellants.

Were the appellants entitled to retain Ryoma's documents?

46 On the question as to whether the appellants were entitled to retain Ryoma's documents, the appellants emphasised that they had a duty to disclose the irregularities. In Lee & Lee's letter dated 27 August 2003 to the IC, Lee & Lee said that s 39(1) of the CDT Act and s 62(3) of the Goods and Services Tax Act (Cap 117A, 2001 Rev Ed) ("the GST Act") had operated on the appellants' mind at the time. In the appellants' first joint affidavit, they say they were mindful of three provisions at the time, *ie*, the two already mentioned and s 207(9) of the Companies Act.

47 However, s 62(3) of the GST Act did not impose a duty on the appellants to make such a disclosure. There was also a question as to whether s 207(9) of the Companies Act imposed such a duty in view of the fact that the appellants did not provide an auditor's report in the circumstances. As for s 39(1) of the CDT Act read together with the definition of "criminal conduct" and "serious offence" therein as well as the Second Schedule thereof, there was also a question whether the appellants were under a duty to disclose the irregularities. Nevertheless, Mr Rai proceeded on the assumption that there was such a duty under s 39(1) of the CDT Act and he submitted that a duty to disclose did not amount to a duty to retain documents which belonged to Ryoma.

48 Before the IC and before me, the appellants and Mr Quek maintained that the appellants had a right to retain Ryoma's documents in view of their duty to disclose and also because the appellants were concerned that Ryoma would destroy or alter the documents should the documents be returned to it.

49 I am of the view that the appellants were not entitled to retain Ryoma's documents. A duty to disclose does not *per se* amount to an entitlement to retain documents, especially when the owner of the party entitled to the documents has demanded for their return. The appellants' concern about destruction or alteration, while legitimate, did not give them the right they claimed when none existed in the first place.

Was there improper conduct?

50 However, in my view, it is not every incorrect step, whether by way of act or omission, that amounts to improper conduct. Otherwise, life would be intolerable for public accountants. On this point, I am of the view that the IC had erred because it seems to me that the IC had approached the matter on the basis that if the appellants were not entitled to retain Ryoma's documents, then the appellants were necessarily guilty of improper conduct.

51 In *Chew Kia Ngee* ([28] *supra*) at 1007, [15], Thean J said that the appellant's conduct should be judged and determined in relation to the time and circumstances in which he had signed a form without completing it.

52 In *Wong Kok Chin* ([38] *supra*), the appellant faced a number of charges. The third and sixth charges were in relation to his audit of a company's accounts for a particular year. Yong Pung How J (as he then was) said at 1149, [40]:

> It is not in dispute that Lee and Loh were engaged from the beginning in a massive fraud. The fact of the matter is that the appellant and his firm were up against people who were not only completely unscrupulous but were also highly skilled in covering up their fraudulent activities. They were able to completely rewrite their account books, and for a long time to almost frustrate

the entire investigating machinery of the MAS. It was only after a long and painstaking investigation, with all the resources of the Commercial Crime Division and with Lee turning state witness, that the details of the fraud were uncovered. So far as the appellant and his firm were concerned, it would not be possible to come to a decision even on their culpability without taking into full account the circumstances in which they were placed. In my judgment, it would be unsafe and unsatisfactory to allow the findings on the third and sixth charges to stand, and they must be set aside.

5 3 *Wong Kok Chin* involved s 34(1)(b) of the Accountants Act (Cap 212, 1970 Rev Ed). This provision later became s 33(1)(b) of the Accountants Act (Cap 2, 1985 Rev Ed) which was considered in *Chew Kia Ngee*. In *Wong Kok Chin*, the third charge was one of "gross neglect" and the sixth charge was one of "grave impropriety". In *Chew Kia Ngee*, the charge pertained to a "discreditable" act. Furthermore, the facts in those two cases are different from those before me. Nevertheless, I am of the view that the point made in these two cases, that one should not look at the public accountant's conduct in isolation, also applies to the case before me.

54 As for "improper" conduct, Mr Quek referred to *Words and Phrases Legally Defined* (3rd Ed, 2003 Supplement) which quotes the Australian decision *O'Connell v Palmer* (1994) 53 FCR 429 at 434:

> In our view the word "improper" appearing as part of the expression "improper conduct" in reg 18(1)(d) of the Australian Federal Police (Discipline) Regulations 1979 (Cth) … is directed at conduct which may be regarded as lacking propriety or as unbecoming or unseemly in the circumstances. We do not regard the regulation as seeking to embrace in addition conduct which is merely technically irregular.

55 Mr Quek also referred to *Ridehalgh v Horsefield* [1994] Ch 205 where Sir Thomas Bingham MR (as he then was) said at 232:

> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

56 It is my view that, for the purpose of the second limb of s 34(1)(c), conduct may be improper even if it does not amount to a significant breach of a substantial duty imposed by a relevant code of professional conduct. Indeed, it is evident from the judgment of Sir Thomas that he was referring to such conduct only as an illustration.

57 Mr Rai relied on *Chew Kia Ngee* as an analogy. The question there was whether the appellant had committed an act or default "discreditable to an accountant" within s 33(1)(b) of the Accountants Act (Cap 2, 1985 Rev Ed). Thean J cited with approval the judgment of Pape J in *Mercer v Pharmacy Board of Victoria* [1968] VR 72 where the question was whether a pharmacist was guilty of conduct discreditable to a pharmaceutical chemist under s 96(3)(e) of the Medical Act 1958 of the State of Victoria. Pape J said, at 85:

> In my view "conduct discreditable to a pharmaceutical chemist" includes any conduct in relation to the carrying on of the business of a chemist which would be reasonably regarded by other chemists of good professional competence as calculated to destroy or lower public confidence in

> that chemist, or as injuring the credit or standing of the chemist in his professional capacity. I do not think it necessary that his conduct should be dishonest or fraudulent, or that it should involve any moral turpitude. It is enough if it brings discredit on him as a pharmaceutical chemist or on the profession as a whole. Nor do I think it necessarily follows that conduct which is due solely to negligence or inadvertence cannot be said to be discreditable conduct, because the chemist is in a position where his duties are to a large extent laid down by regulation or by the Act, and where great care is required in the carrying out of those duties and because failure to exercise that degree of care expected of him must necessarily lower public confidence in him and discredit him in the eyes of his professional brethren.

58 Although s 34(1)(c) of the Act refers to "improper" conduct and not "discreditable" conduct, I am also of the view that conduct which is due solely to negligence or inadvertence can be improper conduct, although not necessarily so.

59 Here, the appellants had wrongly but genuinely believed that they were entitled to retain the documents because of their duty to disclose. There was also some basis for their fear about destruction or alteration of evidence if the documents were returned. Accordingly, if there was nothing more, I would not have been inclined to consider their conduct as improper. However, that was not all.

60 The appellants say that they believed they were under a duty to disclose but yet they did not do so until much later. Furthermore, when they finally did so in July 2002, it was pursuant to the suggestion of the settlement judge in February 2002. The first written demand for the documents had already been made about 11 months earlier in March 2001. The appellants' services as auditors and tax agents had been terminated in May or June 2001. Awaiting an explanation from Ryoma could no longer be a valid excuse after termination. The appellants should have either returned the documents or made the disclosure while withholding the documents since they say that is what they believed they were entitled to do. They did neither and were content to let the matter drag on and on. I do not think a public accountant is justified in refusing to return his client's documents on the basis that he has to make disclosure, and then not make the disclosure promptly.

61 Mr Quek relied on *Davies v Davies* [1960] 1 WLR 1004, where Devlin LJ stated, at 1010:

> But taking it (as they have said) that there is no universal practice one way or the other, it seems to me that it is impossible to say that what [the solicitor] did amounted in any way to misconduct. Had there been a clear practice which he had infringed, it might be different. Without there being a clear practice, it could not be said that what he did amounted to misconduct. *In the absence of a clear practice, he was entitled to use his own judgment*. [Mr Quek's emphasis]

62 I do not think that that judgment assists the appellants. They said they had given Ryoma enough opportunity to explain the irregularities and had repeatedly stressed to Ryoma that if it persisted in not explaining them, the appellants would have no choice but to disclose the irregularities to the relevant authorities. Yet they did not act in accordance with their own convictions. They retained Ryoma's documents notwithstanding letter after letter demanding the return of the documents, and in the face of the termination of their services and the threat of and commencement of legal proceedings, while still not making disclosure to the relevant authorities.

63 In all the circumstances, I am of the view that the appellants' conduct in retaining Ryoma's documents was improper.

Did the improper conduct bring the profession of public accountancy into disrepute?

64 The Report suggested that the IC had approached the matter on the basis that if the appellants were not entitled to retain the documents, this was necessarily improper conduct which would necessarily bring the profession of public accountancy into disrepute. Although s 34(1)(c) suggests that it is for the Board to determine if the appellants' improper conduct would bring the profession into disrepute, it seems to me that the Board adopted the same approach as the IC and did not address its mind to the second requirement.

65 Accordingly, there was nothing in the Report or in the Board's decision which suggested that the second requirement had been met. On my part, I do not see how the appellants' conduct would bring the profession of public accountancy into disrepute.

Conclusion

66 In the circumstances, I allow the appeal and set aside the order made by the Board against each of the appellants, including its order on costs and expenses in respect of the hearing before the IC.

67 As for the issue of costs of the appeal, I am of the view that each party is to bear its own costs. Although the appeal is allowed, I have concluded that the appellants were guilty of improper conduct. For the avoidance of doubt, each party is also to bear its own costs of the hearing before the IC.

Appeal allowed.

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[1]See the notes of the hearing before the IC on 28 July 2003 at p 9