Wong Keng Leong Rayney v Law Society of Singapore
[2006] SGHC 179

Case Number : OS 511/2006

Decision Date : 05 October 2006

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : N Sreenivasan and Collin Choo (Straits Law Practice LLC) for the applicant; Michael Hwang SC (Law Society of Singapore) for the respondent; Jeffrey Chan Wah Teck (Attorney-General's Chambers) as amicus curiae

Parties : Wong Keng Leong Rayney — Law Society of Singapore

Administrative Law – Disciplinary tribunals – Application for leave to seek judicial review of certain findings made by Disciplinary Committee before final determination by Disciplinary Committee made – Whether application for leave to seek judicial review premature – Development of concept of prematurity

Administrative Law – Judicial review – Threshold for leave to seek judicial review – Matters susceptible to judicial review – Difference between judicial review and appeal

Evidence – Admissibility of evidence – Evidence obtained by means of private entrapment – Distinction between state and private entrapment – Relevance of nature of illegality of conduct in procuring evidence – Whether such evidence inadmissible – Whether court having discretion to reject evidence – Relevance of motive of complainant – When motive can have probative value

5 October 2006

V K Rajah J:

1 It has firmly been established that proceedings before a Disciplinary Committee constituted under s 90(1) of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the LPA") are in appropriate cases susceptible to judicial review by the High Court: *Re Singh Kalpanath* [1992] 2 SLR 639 ("*Kalpanath*") at 650, [27]; *Whitehouse Holdings Pte Ltd v Law Society of Singapore* [1994] 2 SLR 476 at 486, [38]. This case, however, presents more fundamental issues that need to be addressed. First and foremost, when is it ripe to apply for leave to seek judicial review? Should proceedings in which material evidence was obtained by means of private entrapment be allowed to proceed? Are decisions to accept or reject evidence as well as decisions to call the defence to lead evidence by a Disciplinary Committee matters that properly fall within the scope of judicial review?

The factual matrix

2 The applicant has been an advocate and solicitor of the Supreme Court of Singapore for 22 years. A complaint to the Law Society of Singapore ("the Law Society") was lodged by Jenny Lee Pei Chuan ("Lee"), alleging that the applicant had agreed to grant her a referral fee for having procured work for the applicant's firm. On the basis of this complaint, the Law Society initiated disciplinary proceedings against the applicant.

3 It appears that a law firm (whose identity has not been disclosed) had employed Anthony Tan ("Tan") of Dong Investigations and Security Consultancy Pte Ltd to investigate whether certain competing law firms were offering referral fees to estate agents in order to attract more referrals, thereby illegitimately boosting their business. Tan devised a plan where one of his private investigators would pose as an estate agent for a fictitious prospective purchaser. This was done in an effort to probe whether the other law firms would fall for the bait, ultimately offering a referral fee

to the "agent" to induce her to refer work to them. The vendors of the property and their solicitors in the transaction, however, were genuine.

4 On or about 8 February 2004, Lee was instructed by Tan to carry out his plan. Posing as an estate agent, Lee contacted the applicant to arrange for a meeting, which was eventually held on 17 February 2004. Lee represented that she had a client, Ronald Chua ("Chua"), who was interested in purchasing a property ("the property"), and instructed the applicant to act for Chua in the purported transaction.

5 According to the applicant, Lee had in an earlier telephone conversation, "persistently badgered" him to give her a portion of the costs and disbursements that he would receive from Chua. The applicant claims that he told Lee that such a payment was improper and refused her request. However, Lee's "demands" for payment were repeated in a meeting at the applicant's office on 24 February 2004. The applicant claims that though he eventually informed Lee that he would reimburse certain entertainment expenses, he refused to pay any referral fees. Accordingly, out of $500 that Lee paid to the applicant on Chua's behalf for the firm's costs and disbursements, $150 was returned to Lee for the entertainment expenses she claimed to have incurred.

6 Unknown to the applicant, the two meetings on 17 and 24 February 2004 at the law firm had been secretly recorded ("the recorded conversations"), and formed a substantial part of the evidence adduced by the Law Society in its case against the applicant in proceedings which are now pending before a Disciplinary Committee ("the DC").

Proceedings before the Disciplinary Committee

7 The applicant currently faces the following primary charges:

Charge 1

> That you, Rayney Wong Keng Leong, an Advocate and Solicitor of the Supreme Court of the Republic of Singapore, are charged that, on 17 February 2004, you attempted to procure the employment of the firm of Rayney Wong & Eric Ng, of which you were a partner, to act in relation to the proposed purchase by one Ronald Chua, of the property situate and known as No. 146, Coronation Road West, Singapore 269362 through the instructions of Jenny Lee Pei Chuan, to whom you promised to give remuneration for obtaining such employment, and you have thereby breached the provisions of Section 83(2)(e) of the Legal Profession Act (Cap 161).

Charge 2

> That you, Rayney Wong Keng Leong, an Advocate and Solicitor of the Supreme Court of the Republic of Singapore, are charged that, on 24 February 2004, you gave the sum of $150 out of $500 received by you as legal fees for legal work undertaken from 17 to 24 February 2004 in relation to the proposed purchase by one Ronald Chua of the property situate and known as No. 146, Coronation Road West, Singapore 269362 to Jenny Lee Pei Chuan as gratification to her for having procured such legal business for the firm of Rayney Wong & Eric Ng, of which you were a partner, and you have thereby breached the provisions of Section 83(2)(d) of the Legal Profession Act (Cap 161).

Alternative charges pursuant to s 83(2)(*h*) of the LPA have also been preferred.

8 At the conclusion of the Law Society's case before the DC, the applicant submitted that

there was no case to answer. This submission, in turn, depended on whether Lee's evidence (and the recorded conversations in particular) should be excluded because it had been obtained by illegal or improper means (*ie*, through entrapment by a private investigator). According to the applicant, if Lee's evidence was excluded, the DC would have had no option but to rule that there was no case to answer: see para 15 of the DC's report dated 16 January 2006 ("the DC report").

9 The DC disagreed with the applicant's submissions and refused to exclude Lee's evidence. It held that it had no discretion to exclude Lee's evidence unless she had employed illegal methods to procure it. Once Lee's evidence was admitted, the DC found that a *prima facie* case against the applicant had been established and accordingly, called the applicant to enter his defence.

The application for leave to seek judicial review

10 Dissatisfied, the applicant brought an application for leave to seek judicial review against these rulings by the DC. In particular, the applicant sought the following orders:

(a) A quashing order removing the DC proceedings to the High Court.

(b) A quashing order apropos the following determinations by the DC:

(i) the refusal to exclude Lee's evidence and the recorded conversations;

(ii) the refusal to compel Tan to reveal the identity of the anonymous law firm instructing him; and

(iii) the rejection of the applicant's submission that there was no case to answer.

(c) An order prohibiting the DC from continuing to hear and investigate the matter.

(d) A mandatory order directing that the DC subpoena one Yap Kok Kiong ("Yap"), an advocate and solicitor of the Supreme Court (whom the applicant suspects instructed Tan to entrap him), to testify and produce documents at the hearing, and that the DC reconsider whether the applicant is to enter his defence.

11 This *ex parte* application was served, as required under O 53 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), on the Attorney-General. However, given that the proceedings did not involve the Government, the Attorney-General did not take a position on whether the application ought to be allowed. Nonetheless, at my request, Mr Jeffrey Chan, Principal Senior State Counsel (Civil), who represented the Attorney-General, kindly agreed to remain as *amicus curiae*. I want to express and record my appreciation for the objective assistance he has offered in this matter. It should also be noted that even though this was nominally an *ex parte* application, I heard the opposing contentions of the Law Society. The applicant did not object to this.

12 The various issues necessary to resolve the present application can be briefly summarised as follows: First, is this application premature? Second, is there an arguable case to be made that the alleged "entrapment" warrants and compels the exclusion of the evidence enumerated at [10] above? Finally, do the applicant's complaints even fall within the scope of judicial review? I have answered the first issue in the affirmative and the latter two issues in the negative. The applicant has appealed against my decision and I now set out my grounds of decision.

The prematurity of the application

13 The present application has been brought in the midst of a hearing before the DC. At this juncture, all that the DC has decided is to admit Lee's evidence and the recorded conversations. It has also determined, applying the holding in *Hau Tua Tau v PP* [1980–1981] SLR 73, that the Law Society has established a *prima facie* case against the applicant that now requires the applicant to enter his defence. Crucially, however, the DC has not ruled that the evidence establishes sufficient cause of sufficient gravity for disciplinary action. Indeed, the DC has yet to determine the exact weight to be assigned to the evidence admitted. In addition, the DC has not curtailed or circumscribed either the applicant's ability to establish his defence or his right to call rebuttal evidence. In these circumstances, the pivotal point that arises for consideration is whether the application for leave to seek judicial review is premature.

14 The development of the concept of prematurity in English administrative law has relatively recent origins as the remedy-based approach of the common law has impeded its coherent evolution: see Jack Beatson, "Prematurity and Ripeness for Review" in *The Golden Metwand and the Crooked Cord, Essays on Public Law in Honour of Sir William Wade QC* (Christopher Forsyth & Ivan Hare eds) (Clarendon Press, 1998) ("Prematurity and Ripeness for Review") at p 222. Such a concept, when mature, could eventually more reliably guide courts in the exercise of their supervisory jurisdiction. The current approach is to consider a premature application for leave to seek judicial review in essence as one made before the actual decision-making process of the tribunal at first instance is completed. Indeed, the majority of challenges found to be premature have been in the context of interlocutory decisions, particularly those concerning the disclosure or use of evidence or other procedural matters, made during the course of a decision-making process: see Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 3rd Ed, 2004) ("*Judicial Remedies*") at paras 11-014 to 11-018. Beatson in "Prematurity and Ripeness for Review" contends, correctly in my view, at p 251:

> … that an application is in danger of being premature if it will deprive a relevant administrative body of the opportunity of applying its expertise to the question at hand, whether that question requires fact-finding, the exercise of discretion or even, although this is more controversial, a conclusion of law. It is also submitted that the occasions on which it will be possible to state that the issue before the court is solely a 'clean' or 'clear' question of law will be very rare indeed.

15 The current approach of the courts in England in respect of challenges made before a final determination by the tribunal of first instance is to almost invariably view them as premature and decline judicial review. In *Regina v Association of Futures Brokers and Dealers Ltd, ex parte Mordens Ltd* (1991) 3 Admin LR 254 ("*Mordens*"), McCollough J, at 263 unequivocally, held that:

> It is, however, desirable that the court should emphasise that *it is only in the most exceptional circumstances that the court will grant judicial review of a decision taken during the course of a hearing*, *by a body amenable to the court's supervisory jurisdiction, before that hearing has been concluded*. The practice which this court almost invariably follows is to decline to hear a challenge to an interlocutory decision until the proceedings in which it was taken have been concluded. [emphasis added]

16 This principle applies equally to disciplinary hearings. In *Regina v Chief Constable of Merseyside Police, ex parte Merrill* [1989] 1 WLR 1077, the English Court of Appeal held that the normative rule is that an aggrieved party should await the final outcome of a disciplinary hearing prior to seeking judicial review. The court astutely observed, at 1088, that:

> There can be cases in which the evidence is so substantial that it is sensible to give separate consideration to a preliminary objection … but *these must be very rare* and I do not think that

this was such a case. *It must be even rarer to have a situation in which judicial review should even be considered before a Chief Constable has reached a final decision on the complaint, if indeed one can be imagined.* Normally, the time for judicial review would not arise, if at all, before the appeal tribunal had given its decision. [emphasis added]

17 The rationale for insisting that applications for leave to seek judicial review should not be made until the tribunal concerned has had the opportunity to render its final decision is axiomatic and compellingly sensible. In *Mordens*, McCullough J articulated three policy reasons underpinning the concept of prematurity. First, there will be delay: what may be a lengthy process before the tribunal of first instance could become even more protracted if it is continually stalled by adjournments in order to seek recourse to judicial review, especially if the grounds for review are flimsy. Indeed, the delay would be further compounded if there is an appeal against the reviewing court's decision as is the case here. Second, the relationship between the applicant and person or body making the decision under attack could become decidedly strained and awkward. Once the proceedings in the reviewing court are over, the hearing before the tribunal of first instance must resume "with the tribunal once more above and between the parties, rather than alongside one and against the other". Third, it is unnecessary in many cases to come to the reviewing court on a preliminary or interlocutory decision. This is because the party aggrieved by such a decision may nevertheless be satisfied by the final outcome. A decision which was initially thought to be wrong or likely to have a material influence on the outcome may, in the final analysis, turn out to be have been correct or immaterial to the ultimate outcome. In such cases, it would simply be a waste of resources and time to adjourn the proceedings before the tribunal in order to seek judicial review in the courts. To this I am inclined to add a fourth reason. It is pertinent assuming *arguendo* that the final determination before the inferior tribunal is unsatisfactory, whether the applicant can still seek redress for the grievance before a superior court. The issue is almost invariably one of timing and not of irretrievable damage to an applicant.

18 In a similar vein, Lewis explains the general reluctance of the courts to review challenges to preliminary and/or interlocutory decisions (see *Judicial Remedies* [14] *supra* at para 11-016):

> There are strong arguments against allowing premature challenges. The error might be corrected during the decision-making process, or the error might not affect the final decision or the individual might not be dissatisfied with the final decision. It could be a waste of judicial time to review preliminary decisions rather than awaiting the final decision. *Challenges to preliminary decisions may provide a way to circumvent an appeals process*. An appeal may only be available against a final decision not a preliminary or interlocutory decision, and it may be preferable to insist upon the individual appealing against the final decision relying on the preliminary error as a ground for overturning the decision rather than challenging the preliminary decision itself. [emphasis added]

19 However, there may be exceptional circumstances where the mechanical application of the concept of prematurity could result in irreparable harm to the applicant. In such exceptional cases, it would be remiss to deny the applicant the option of judicial review. When do such cases arise and is the present application an instance of such an exceptional case?

20 In "Prematurity and Ripeness for Review" ([14] *supra*), Beatson suggests, at pp 227–228, that where an interlocutory decision has a "substantial effect", an exception to the prematurity concept may be made. The three examples the article raises are:

> (a) where the decision is not about individual items of evidence but whole areas which would fundamentally affect the conduct and utility of the procedure;

(b) where there is a real risk of irreparable damage as a result of the interlocutory decision and therefore no real opportunity to challenge it at a later stage; and/or

(c) where there is a real danger supported by evidence that there would be a breach of natural justice at the hearing.

In addition, Lewis perceptively interprets some cases as suggesting that an early challenge to an interlocutory decision may not be inappropriate if there may be savings in terms of cost in not exposing the applicant to the full decision-making process and in dealing with the matter immediately. Moreover, the courts have tended to allow the review of decisions initiating a process or commencing a train leading to criminal proceedings where a clear question of law arises or if it would be unfair to allow the process even to begin: *Judicial Remedies* ([14] *supra*) at paras 11-017 and 11-018.

21 In the present application, the applicant relies on four main grounds in an attempt to bring the case within the exceptions mentioned above. Specifically, the applicant claims that:

(a) The failure to exclude Lee's evidence, which forms the basis of the Law Society's case and which is the only evidence against the applicant in the DC proceedings, justifies judicial review.

(b) There is a clear question of law that arises from the DC's order to admit Lee's evidence.

(c) There is a real risk of irreparable damage as a result of the DC's order.

(d) There is cost savings in not exposing the applicant to the full decision-making process.

I now examine each of these arguments *seriatim*.

Whether Lee's evidence, being the only evidence against the applicant in the Disciplinary Committee proceedings, establishes this matter as an exceptional case

2 2 *Regina v Secretary of State for the Environment, ex parte Royal Borough of Kensington and Chelsea* (1987) 19 HLR 161 ("*Chelsea*") is the leading case lending support to the proposition that judicial review may be granted, notwithstanding that a challenge is brought at an early phase of the proceedings, if a decision is made on entire areas of evidence affecting the conduct and utility of the inferior proceedings. In that case, a landlord had objected to a local housing authority's decision to make a compulsory purchase order in respect of his property on the basis of complaints by his tenants that he was intimidating, harassing and gravely mistreating them. The inspector conducting the inquiry at first instance wholly excluded, as irrelevant, evidence led by the housing authority of such intimidation, harassment and mistreatment, even though such evidence formed the entire basis of the authority's decision to issue the compulsory purchase order. On the issue of whether the authority's challenge was premature, Taylor J observed:

I am very conscious of the practical dangers of opening the door of interlocutory challenge to an Inspector's conduct of an inquiry. Mr Colyer has inevitably warned that the door could quickly turn into a floodgate. He has conjured up the prospect of already lengthy inquiries becoming even longer if they are punctuated by adjournments for recourse to judicial review. …

Having taken full account of these considerations, however, one is faced here with *a most unusual case*. *Practically the whole and certainly the main thrust of the applicant's case at the inquiry, has by the challenged ruling been blocked as irrelevant, in my judgment, wrongly so.* To

decline to intervene now would not only postpone redress for a long time, and until much money has been spent, but would stultify the presentation of the applicant's real case; the inquiry would be a barren exercise, and if it had to be repeated and reconvened, witnesses' memories would be stale and faulty.

I have well in mind the power which the Inspector has under Rule 7 to determine procedure, and to admit any evidence at his discretion. But that discretion must be exercised in accordance with the law. *Totally to* ***exclude*** *evidence on whole issues which are, or may be, relevant is tantamount, in my judgment, to declining jurisdiction. I cannot emphasise too strongly that this* ***is a very exceptional case****. There is no question here of the Inspector merely excluding a piece or some pieces of evidence because such evidence is, in his view, of little value or scandalous or more prejudicial than probative. Were that the case, there could be no question of this court intervening to review his exercise of discretion. But what he has done is to mark out no-go areas, whole issues upon which we will hear no evidence, whatever its cogency or weight.* Since those issues are, in my judgment, capable of being relevant to the Secretary of State's decision, it follows ***that he has not exercised his discretion in accordance with the law***.

[emphasis added in italics and bold italics]

23 Does the principle enunciated in *Chelsea* apply to the present application? In my view, it does not. First, the court's criticism of the inspector centred not on his decision to exclude evidence *per se* but rather on the fact that he had marked out no-go areas, whole issues upon which it would hear no evidence, whatever its cogency or weight. In other words, what was objectionable was not just the scale of evidence excluded *simpliciter*, but more crucially the fact that the exclusion was not a conscientious exercise of discretion. To employ an extreme example, suppose the authority's case had depended solely on inadmissible hearsay evidence. Surely a decision to exclude all such evidence, even if it meant undermining the authority's entire case, cannot be questioned. Indeed, Taylor J clarified that:

I am not seeking in any way, nor could I, to fetter the inspector's discretion as to what evidence he should admit on those issues. *There is a clear distinction between a blanket exclusion of all evidence on an issue, and discretionary exclusion of evidence purporting to be directed to that issue.* [emphasis added]

24 Second, it should also be noted that in *Chelsea*, the court was equally impressed by the fact that the evidence that was excluded by the inspector was, in fact, relevant to the determination of the core issues. As the court put it, to exclude evidence that is, or may be relevant, is tantamount *to declining* jurisdiction. I am inclined to observe, as a subsidiary point, that there may well be a conceptual distinction between excluding relevant evidence and including inadmissible evidence. In the former case, the reviewing court would have to call for new evidence or order a retrial if it finds the evidence was wrongly excluded. That this would inevitably prolong the entire proceedings would as such be an important consideration. In the latter case, the reviewing court may simply conclude that the evidence was wrongly admitted and assign little weight if any at all to it in its own determination.

25 In the present application, the primary concerns that troubled Taylor J in *Chelsea* do not arise. The main challenge or complaint is that the DC had admitted evidence that the applicant alleges to be the product of entrapment, which the applicant maintains, ought to have been excluded. But the obvious wrinkle in the applicant's submission is that there has been no precise identification of the manner in which the DC is alleged to have failed to exercise its discretion properly in admitting Lee's evidence. Even a cursory glance at the DC report suffices to indicate that the DC

had seriously and thoroughly considered the case law and pertinent arguments that the applicant had submitted. It has not arbitrarily or whimsically made decisions on entire areas of material and critical evidence; instead, it has demonstrated a proper appreciation and consideration of the issues in question. Moreover, the DC was correct in concluding that the current jurisprudence on entrapment did not allow it the discretion to exclude Lee's evidence; had the DC chosen to exclude Lee's evidence, the Law Society may well have been the party applying for leave to seek judicial review at the appropriate juncture.

26 As for the submission that the DC had erred in failing to direct Tan to disclose the identity of his client, this is a procedural and evidential issue well within the discretionary remit of the DC. I should add that had the identity of Tan's client been at all relevant to the proceedings before the DC, and had the DC simply ignored the applicant's request to compel Tan to reveal the identity of his client, this case might have an entirely different complexion to it. As it stands, the applicant has not put forward any cogent reason why the identity of Tan's client is particularly important to his case. Was this merely a matter of a tooth for a tooth? In short, in acceding to the applicant's request and disclosing who initiated the plan to entrap the applicant what objective purpose would be achieved? As the DC chairperson, Mr Steven Chong SC, correctly observed at p 84 of the notes of evidence ("NE"):

> Chairperson: That's one point. The other point is, you know, I'm sure we are all curious to know who are these client law firms. But as to whether the Law Society will investigate, whether the client who procured the services was in fact acting unprofessionally, that is a matter for the Law Society to take it up. But I'm just concerned this should not be seen – to be used as a forum – tit-for-tat …

When pressed as to whether it mattered who the instructing law firm or law firms were, counsel for the applicant (before the DC and this court) could only vaguely suggest that it might be relevant in establishing whether the instructing law firm(s) had been motivated by jealousy or malice. No attempt howsoever was made to explain how and why the possibly malicious motive of the instructing law firm(s) was either logically or legally relevant to a decision as to whether the applicant had been entrapped. Nor is the motive of the complainant or the instructing law firm(s) relevant to whether the current proceedings against the applicant amount to an abuse of process. It would be only an abuse of process if the *prosecution* were animated by improper motives: *Re Serif Systems Ltd* (15 April 1997) (Queen's Bench Division (Crown Office List), UK). However, in the present case, the Law Society is statutorily compelled to investigate the complaint against the applicant: see s 87(2) of the LPA; *Chia Shih Ching James v Law Society of Singapore* [9184–1985] SLR 53. No improper motives can be imputed to it. While it is true, as the applicant states, that evidence of motive is generally considered relevant pursuant to ss 8, 9 and 14 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), the relevancy sections in the EA are often overinclusive when applied to specific factual matrices: see, on this point, John Woodroffe & Syed Amir Ali, *Law of Evidence* vol 1(Butterworths, 17th Ed, 2001) at pp 111–115. Thus, evidence that may be *de jure* relevant under the EA may nonetheless be *de facto* irrelevant or immaterial in a particular context. For example, while motive might be probative of an intention to harm or embarrass, it is not probative of and, on the contrary, is entirely immaterial to the central question in the present case (*viz*, whether the facts amount to entrapment). In any event, Mr Michael Hwang SC, counsel for the Law Society, was entirely correct in contending that it is always open to the applicant to subpoena and seek permission to ask leading questions of any firm or lawyer that it believes is involved in any plot against him and the other solicitors facing disciplinary charges. The DC's decision to call for the applicant to enter his defence does not extinguish this option.

27 In the circumstances, I find that the DC had neither erred nor abused its discretion in

rejecting the applicant's submission that Lee's evidence should be excluded and that Tan should be compelled to reveal who had instructed him.

Whether a clear question of law arises from the Disciplinary Committee's order

28 The applicant further submits that this is an appropriate case to grant leave to seek judicial review, notwithstanding the stage at which the DC proceedings are, because a clear and important question of law has arisen as a consequence of the DC's decision to admit Lee's evidence. For support, the applicant relies on *Regina v Horseferry Road Justices, ex parte Independent Broadcasting Authority* [1987] 1 QB 54 ("*IBA*").

29 I am not at all persuaded that *IBA* was determined on the basis that the appellant has claimed. To be sure, the court in *IBA* had to decide a question of law, *viz*, whether the complaint disclosed an offence known to law. However, it would appear that the case was ultimately resolved on the basis that there was no real alternative to seeking judicial review, and that to require the lower court to proceed with their investigation when the very jurisdiction of the court to do so was in question would have been a plain waste of resources and time: see *IBA* at 73. Therefore, while a clear question of law was at issue in *IBA*, my understanding of the case suggests that that was decidedly not the fulcrum on which the case, in the final analysis, turned on.

30 The case that the applicant might have relied on is *Regina v Broadcasting Complaints Commission, ex parte British Broadcasting Corporation (*1994) 6 Admin LR 714 ("*BBC*"), where Laws J held as follows:

> I accept that in many contexts public bodies should in principle be left to carry out their functions, according to their own perceptions of their duties, without judicial interference at interim stages. *But the powers of the Commission touch questions of editorial freedom;* they represent the measure of supervision over free expression of the broadcasting media. That is not to say that the court should in any sense presume in favour of a restrictive approach to their interpretation, but it means that *it is peculiarly important that their reach should be established, and where there exists all along a clean argument as to whether in law the Commission are entitled to entertain a complaint,* it will not generally be contrary to the public interest that its merits be determined at an early stage. Certainly, there is in my judgment nothing inappropriate in these proceedings. [emphasis added]

31 That said, *dicta* in cases must be neither invoked nor applied without a proper appreciation of their specific legal context and factual matrices. *BBC*, as the italicised words in the passage quoted clearly indicate, involved not only the important issue of the constitutional rights of the applicant, it was essentially also a fundamental challenge to the very basis of jurisdiction assumed by the Commission in hearing the complaint against the applicant. These two factors, *in conjunction with* the fact that there was a "clean argument" in law, persuaded the court that judicial review at an early stage was appropriate. In addition, as the court in the subsequent case of *Regina v Personal Investment Authority Ombudsman, ex parte The Burns-Anderson Independent Network plc* (21 January 1997) (Court of Appeal (Civil Division), UK) ("*Burns-Anderson*") astutely and correctly pointed out, *BBC* was also unique in that all the facts necessary to decide the issue were before the reviewing court and there had been a final assumption of jurisdiction by the lower court. In *Burns-Anderson*, Auld LJ, who wrote the leading judgment of the court, clearly expressed the view that the legal cleanness or clarity of a challenge to jurisdiction or its likely consequences should not normally by itself constitute a reason for depriving a tribunal in the first instance of the right to determine whether it has the jurisdiction to adjudicate on a matter brought before it.

32 Both *BBC* and *Burns-Anderson* bring into sharp focus the vital theme that leave to seek judicial review should not be lightly granted where the proceedings in the tribunal below are pending and a final determination has yet to be made. That a clean legal argument may be presented to the reviewing court is not by itself a sufficient reason to grant leave. In the usual course of proceedings before an administrative tribunal or a disciplinary committee, significant points of law or evidential issues would have to be resolved at various interim phases of the proceedings. Notwithstanding that these determinations may involve clean questions of law, it requires little imagination to recognise that the floodgates will be literally thrown open if leave were granted to attack and challenge each and every determination of such "clean" legal issues by a tribunal of first instance.

33 The facts of the present application are neither unique nor exceptional. Complaints to a tribunal often pivot on the admissibility or reliability of a single witness's evidence. This could be in relation to relevance (legal or otherwise), credibility or weightage. Often, challenging such evidence can be characterised as a clean point. Would it be permissible to challenge the admissibility or reliability of such evidence on the basis that it can be characterised as a clean point? Would this not be tantamount to the thin end of the wedge, transforming the process of judicial review to one of interim appeals or striking out applications?

34 In the final analysis, it is plain that the applicant is challenging decisions to admit and/or exclude evidence. This challenge does not go to the jurisdiction of the DC. Neither does the case turn on any hefty constitutional implications. Therefore, while the present applicant may raise a clean question of law, this by itself does not constitute an exceptional case.

Whether there is a real risk of irreparable damage as a result of the Disciplinary Committee's decision

35 The applicant asserts that there is a real risk of irreparable damage as a result of the DC's order. However, the applicant stops far short of articulating precisely what this harm could have been. That the applicant may have to face the Court of Three Judges does not, *ipso facto*, constitute *permanent* prejudice to the applicant. In fact, as Mr Hwang rightly contends, the availability of an appeal to the Court of Three Judges is a real and valid reason *not* to intervene by way of judicial review at this stage in this matter.

36 It may be appropriate, at this juncture, to reiterate the nature of the relationship between the proceedings before the Disciplinary Committee and the show cause hearing before the Court of Three Judges. Proceedings before the Disciplinary Committee are investigatory in nature: Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths, 2nd Ed, 1998) ("Prof Tan"). Choo Han Teck JC (as he then was) noted in *Carolyn Tan Beng Hui v Law Society of Singapore* [1999] SGHC 23, that the role of the Disciplinary Committee is to carry out a thorough finding of fact as to whether an advocate and solicitor was guilty of misconduct. That said, the Disciplinary Committee's findings are by no means conclusive. If the Disciplinary Committee finds that cause of sufficient gravity for disciplinary action exists, the Court of Three Judges is empowered to review the merits of the case: Prof Tan at p 896. In fact, in *Lau Liat Meng v Disciplinary Committee* [1965–1968] SLR 8, the Privy Council held that while the Court of the Three Judges was certainly *entitled* to act upon the findings of the Disciplinary Committee, it continued to retain control of the disciplinary process and had a discretion to hold a rehearing in a proper case. Even in the ordinary case, where findings of fact are not reviewed *de novo*, inferences from findings of fact and conclusions of law (such as the definition of entrapment and whether there was entrapment in this case) by the Disciplinary Committee do not merit undue deference. In point of fact, the Court of Three Judges recently acquitted an advocate and solicitor appearing before it on the basis that the Disciplinary Committee in that case had erred in the inferences it drew from the primary facts: see

Law Society of Singapore v Lim Cheong Peng [2006] SGHC 145.

37 Moreover, the Court of Three Judges is not the only recourse that an aggrieved solicitor has in disciplinary proceedings. In proper cases, a solicitor may seek leave for judicial review at the conclusion of the disciplinary proceedings. In *Kalpanath* ([1] *supra*), for instance, the applicant applied for and obtained an order for leave to quash the findings of the Disciplinary Committee (and succeeded in doing so) *after* the Disciplinary Committee in that case had made a determination that a cause of sufficient gravity for disciplinary action existed.

38 These considerations take the present application outside decisions such as *R v Commissioners for the Special Purposes of Income Tax Acts, ex parte Stipplechoice* [1985] 2 All ER 465 ("*Stipplechoice*"). In *Stipplechoice*, the facts confronting the court involved a situation in which there was no procedure for appealing against a grant of leave by an income tax commissioner to issue an assessment out of time, even though one could appeal against the assessment itself. Moreover, in that case, the applicant had been able to establish an arguable case that the information that the commissioner had relied upon could not reasonably have led to the conclusion he arrived at on the relevant issue. Accordingly, I find that the applicant has not demonstrated that there arguably exists a real risk of irreparable damage as a result of the DC's decisions that could conceivably justify an early invocation of this court's supervisory jurisdiction.

Whether there is cost savings in not exposing the applicant to the full decision-making process

39 In almost every application for leave to seek judicial review, it could conceivably be alleged or contended that resolving the disputed issue at an early stage will save costs because it avoids the inconvenience, procedural tedium as well as additional costs of having to appeal a final decision. However, the cost savings of averting an appeal cannot be assessed in isolation; it must be calibrated and evaluated against the costs and consequences involved in initiating the process for judicial review as well. Were this not the proper approach, every such application to seek judicial review will invariably be granted. In other words, in assessing whether it would be appropriate to allow a review at an early stage, a court should also take into account the *opportunity cost* of granting or not granting the application. Where the proceedings in the tribunal below are likely to be extremely lengthy and complicated, there may well be significant and negative consequences if the court fails to intervene at an early stage. Conversely, the case for intervention is much less compelling if the proceedings below are not unusually complex and lengthy because the applicant would then, without substantial delay, be able to file an appeal or leave for judicial review once the proceedings are concluded.

40 One scenario of where the court correctly found that there would be savings if it intervened at an early stage is *Regina v Tickell, ex parte London Borough of Greenwich* (12 December 1986) (Court of Appeal (Civil Division), UK) ("*Greenwich*"), which was cited by the court in *Chelsea* ([22] *supra*). In *Greenwich*, a decision was made on the 185th day of an inquiry refusing to order that certain additional investigations be conducted. The applicant was dissatisfied with this and applied for judicial review to quash the ruling. Counsel for the applicant argued that it was desirable to decide this then and there so as to avoid any waste of time and money in continuing the proceedings should the inquiry be challenged and invalidated subsequently. Parker LJ made the following remarks:

> I should also say that I fully understand and accept Mr Sullivan's reasons for seeking to raise this matter at this stage. *The Inquiry has been immensely long and immensely expensive.* It should clearly be disastrous if, when the report is made and a decision taken, there were then to be an application for judicial review which resulted in the report, or decision, being quashed and thus

throwing away the vast amounts of money already spend on the Inquiry. [emphasis added]

41 In *Chelsea* itself, Taylor J opined that the final determination in the proceedings below was likely to be very long in coming. Therefore, it would be more expeditious to allow the application for judicial review rather than compel the parties to incur additional time and expenses until a final determination was made. This is consistent with judicial commonsense.

42 In my view, the present application is a far cry from the factual scenario in either *Chelsea* or *Greenwich*. There is on the contrary a significant cost to granting this application that is not outweighed by the inconvenience, embarrassment and costs that the applicant might incur if the proceedings before the DC are allowed to run their usual course. The present application provides a textbook example of the very real drawbacks of inappropriately applying for judicial review at an early stage. Had the applicant proceeded with its case before the DC, there would in all likelihood have been a final determination of the subject complaint by now. The applicant, if dissatisfied, could and would then have taken this issue before the Court of Three Judges. Indeed, I note from the NE that the Law Society's case took merely two days to present. Instead, as a result of this strenously argued application for leave to seek judicial review and the pending appeal, this case is likely to drag on further for a significant period of time. If the applicant succeeds (although the applicant will be spared the decision of whether to take the stand), not much time or costs will be saved even if the DC proceedings are thereby short-circuited. If the applicant fails on appeal, the proceedings before the DC will proceed from where they left off. Having considered afresh the implications of allowing this application, I reiterate that it cannot be reasonably or properly contended that the result would translate to a net saving in time or resources.

Concluding observations on the prematurity of the application

43 Upon analysing the submissions made on behalf of the applicant, I am far from satisfied that this case is endowed with any arresting features that warrant or compel the exercise of my discretion to grant leave to seek judicial review, at this stage. While the Law Society's case against the applicant before the DC turns on evidence that the applicant seeks to exclude, this, in and of itself, is not a sufficient ground to grant judicial review, unless it can be shown that the DC has arguably abused its discretion or acted in a way that was tantamount to declining jurisdiction: see [22] to [24] above. Moreover, even though it may be argued that a clean question of law arises from the DC's order, this alone does not suffice to invoke my discretion. In addition, I find that any prejudice that may have been caused in allowing the DC to proceed is easily reversible either by applying for judicial review at the end of the DC proceedings or by seeking to overturn the DC's determination before the Court of Three Judges. Finally, far from saving any costs, by this court's intervention in the proceedings below, the costs of this application itself have, in all probability, already exceeded the costs which would have been incurred had the applicant embarked on the usual course of addressing grievances to the Court of Three Judges, if indeed any exist, after the final determination by the DC. In the end, I must agree with both Mr Hwang and Mr Chan that this was not by any stretch of the imagination an exceptional case. All that the DC has done was to agree to admit Lee's evidence. It has not yet determined what impact this evidence will have on the final decision. Last, but not least, it is still open to the applicant to call Yap if he is so inclined.

44 Two further points may be briefly alluded to. First, the applicant submits that one reason that this court should grant his application is because it would be of precedential value to the other cases pending before other Disciplinary Committees on similar issues. However, as Mr Chan correctly observed, every Disciplinary Committee is separately constituted and compelled by law to comply with strict timelines for the completion of its investigations. It is therefore not possible for any of the Disciplinary Committees to suspend their investigations in order to await this court's decision.

Moreover, the appellant's contention cuts both ways. That other similar cases are pending would only have been an additional (but not decisive) factor in favour of the applicant *if* he had been able to bring this application within the exceptions articulated in the case law: see [20] above. He clearly has not. Further, if this application is premature (which I have found it is), then the prospect of ruling prematurely in *several other cases* makes allowing this application even less attractive.

45 Finally, with all due respect to Mr N Sreenivasan, counsel for the applicant, my decision does not sacrifice fairness and due process at the altar of expediency. It cannot be gainsaid that the availability of judicial review constitutes an important judicial remedy for an aggrieved party's rights and is a vital component of the judiciary's armoury in ensuring that decisions by public bodies, tribunals and administrative agencies invariably hew to the rule of law. However, inasmuch as the rule of law is concerned with substance, it also requires that where fair and reasonable procedures are put in place to ensure substantive justice, those procedures should be observed in the normal course of events. Otherwise, a blatant mockery will be made not only of those procedures, but also of the processual component of the rule of law.

Entrapment

46 For the sake of completeness, I shall also address the issue of entrapment. This might further reassure the applicant that I was not unmindful of the substantive implications of my decision to deny his application.

47 It has been famously remarked that Eve was not exonerated when she attempted to plead in her defence that "the serpent beguiled me". Entrapment is not, strictly-speaking, a self-standing concept in Singapore partly because it is not recognised as a defence to a prosecution: see, the most recent Court of Appeal decision in *Amran bin Eusuff v PP* [2002] SGCA 20. Rather, entrapment is examined as part of the broader category of "illegally or improperly obtained evidence". This starting point is neither controversial nor disputed by the parties.

48 From this point onwards, the tapestry of legal issues and principles becomes more intricate. The considerations that arise for determination are as follows: first, when does conduct by the investigating party cross the line from surreptitious but legitimate investigation and surveillance into illegitimate entrapment? Second, is (and should) there be a distinction between the limits that a court will place on investigative methods conducted by the state and by private agencies? Finally, do the facts of the present case support the applicant's allegation of illegitimate entrapment?

What is entrapment?

49 The genesis in Singapore of the principle recognising that it may, in some limited circumstances, be appropriate to exclude evidence that is unlawfully obtained is to be found in *Cheng Swee Tiang v PP* [1964] MLJ 291 ("*Cheng Swee Tiang*"). The circumstances leading to this decision can be described as somewhat out of the ordinary. Two police officers had entered the appellant's shop, which dealt in textiles, provisions and cigarettes, for the express purpose of entrapping the appellant into accepting their stakes in an illegal lottery scheme. One of the officers asked to buy sugar, and when the appellant told him that he did not sell sugar, he asked whether he could buy some numbers in a lottery. The officer purchased three dollars worth of this lottery. He left the shop, told his superior officer of what had taken place, and the appellant's shop was subsequently raided and the appellant arrested. At the conclusion of the trial, the appellant was found guilty and sentenced accordingly. However, in the course of the appeal, the Solicitor-General indicated that he was not seeking to support the conviction on the evidence and the appeal was therefore allowed. In the course of the appeal, the appellant raised a point of law relating to the admissibility of evidence

obtained illegally or unlawfully. A three-member court, which included Wee Chong Jin CJ, was specially constituted to decide this issue.

50 Wee CJ, writing for the majority, held, at 292, that:

> It is undisputed law therefore that while evidence unlawfully obtained is admissible if relevant, *there is a judicial discretion to disallow such evidence, if its reception would operate unfairly against an accused*. [emphasis added]

51 While Wee CJ did not attempt to elaborate on the circumstances under which the admission of unlawfully obtained evidence would or should be considered "unfair" to the accused, he did briefly explain (at 293) that two conflicting tensions prevail in the exercise of such discretion:

> [T]here can be I think no question that from the standpoint of principle two important interests come into conflict when considering the question of admissibility of such evidence so obtained. On the one hand there is the interest of the individual to be protected from *illegal invasions of his liberties by the authorities* and on the other hand the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground. [emphasis added]

52 It would appear that, according to Wee CJ, unlawfully obtained evidence should be excluded not simply just because the evidence itself was prejudicial or unreliable. Rather, the courts would exclude such evidence on the basis that the conduct of the investigating authority has exceeded the bounds of propriety and has "illegally invaded the liberties" of the accused. In other words, the objection to the admission of unlawfully obtained evidence does not hinge on the possibility that the trial itself may become procedurally or substantively tainted. It is because the courts should not invariably condone a prosecution of allegedly unlawful conduct on the accused's part when the evidence necessary to sustain a conviction is itself obtained through illegal and unlawful means. This is sometimes known as the "judicial integrity" rationale: see Andrew Ashworth, "What is Wrong with Entrapment?" [1999] SingJLS 293 at 307. Professor Ashworth further developed and explained the concerns in "Re-drawing the Boundaries of Entrapment" (2002) Crim L Rev 161 ("Re-drawing the Boundaries of Entrapment") at 163:

> Its essence is that it would compromise the integrity of the courts if they were to act on the fruits of manifestly unacceptable practices by law enforcement officers; or, to put it another way, that criminal justice would lose its moral authority if courts did not insist that those who enforce the law should also obey the law. It is therefore, at root, a principle of consistency – that it would be inconsistent for the courts, as guardians of human rights and the rule of law, to act on evidence obtained by methods which violate human rights and/or the rule of law.

53 The decision in *Cheng Swee Tiang* ([49] *supra*) was clearly premised, not on the letter of the EA but rather, on the scaffolding furnished by the then-leading English decision of *Kuruma, Son of Kaniu v The Queen* [1955] AC 197 ("*Kuruma*"). However, *Kuruma* itself was subsequently reinterpreted by the House of Lords in *Regina v Sang* [1980] AC 402 ("*Sang*"), where it was determined that entrapment did not provide a substantive defence to a prosecution. The conduct of the police where the use of an *agent provocateur* is involved was a matter to be taken into consideration only in the mitigation of sentence. In addition, the discretion to exclude evidence on the basis that it was improperly obtained was severely curtailed. Lord Diplock, at 436, delivering what is widely regarded as the leading judgment of the House, held that there was a discretion to exclude evidence *only* where (a) it was likely to be more prejudicial than probative; and (b) the evidence was tantamount to a self-incriminatory confession which had been obtained from the defendant, after the

offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect. It may be observed, however, that some of the other Law Lords appeared to have acknowledged the existence of a more general fairness-based exclusionary discretion. Lord Salmon took the broader stance that a judge always had a discretion to reject evidence on the ground that it would make the trial unfair. Lord Fraser of Tullybelton opined that judges should be left to exercise their discretion "in accordance with their individual views of what is unfair or oppressive or morally reprehensible": *Sang* at 450. Lord Scarman echoed these sentiments.

54 The impact of *Sang* on *Cheng Swee Tiang* was considered in *Ajmer Singh v PP* [1986] SLR 454 ("*Ajmer Singh*"). That case did not involve entrapment; it concerned evidence (a blood sample) obtained in circumstances that were arguably contrary to the relevant procedures mandated under the Road Traffic Act (Cap 92, 1970 Rev Ed). In the course of its judgment, the court held that it had the discretion to exclude evidence obtained in circumstances that were tantamount to or analogous to involuntary and self-incriminating confessions, as was held in *Sang*. Crucially, the court further held that *Sang* was *consistent* with *Cheng Swee Tiang*: *Ajmer Singh* at 459, [18]. Given that *Sang* limited the exclusionary discretion of the courts to the two categories highlighted above whereas *Cheng Swee Tiang* did not, the two cases can only be reconciled if the court meant one of two things. The court could have meant to implicitly reject the narrow holding in *Sang* to the extent that the court should have a plenary discretion to exclude evidence that was unlawfully obtained if admitting such evidence would "operate unfairly" against the accused. Alternatively, the court could simply have been making the obvious point that the discretion to exclude evidence if it was tantamount to an involuntary confession fell within the broader discretionary powers that *Cheng Swee Tiang* endorsed. In *that* context, the court could not have intended to make any final pronouncement on whether *Sang* should receive unqualified acceptance in Singapore.

55 If there had been any uncertainty as to whether *Sang* applied to Singapore, the Court of Appeal's decision in *How Poh Sun v PP* [1991] SLR 220 ("*How Poh Sun*") appeared to have emphatically resolved the issue. Yong Pung How CJ, writing for the court, held at 224, [21] that:

> The observations of the Law Lords that the defences of agent provocateur and entrapment do not exist in English law would also reflect the position in Singapore. *It is not the province of the court to consider whether the CNB should have proceeded about its work in one way or the other*. The court should only be concerned with the evidence before it. [emphasis added]

56 However, any expansive reading of *How Poh Sun* suggesting that no evidence, no matter how improperly it was obtained, could ever be excluded, was short-lived and was once again brought into question in the subsequent High Court decision of *SM Summit Holdings Ltd v PP* [1997] 3 SLR 922 ("*Summit*"). As a preliminary but significant point, it should be observed that the decision in *Summit* was pronounced by Yong CJ, who had also earlier delivered the decision in *How Poh Sun*. Therefore, while it must be the case that any direct conflict must be resolved in favour of *How Poh Sun* (because it is a Court of Appeal decision), *Summit* is important to the extent that it sheds further light on the intended breadth and ramifications of the earlier ruling in *How Poh Sun*.

57 *Summit* involved a private investigator who had been hired by certain software companies to approach the petitioners to manufacture a master copy for each of eight various CD-ROMs that the investigator handed over. Unknown to the petitioner, four of the CD-ROMs contained programmes which infringed the copyright and trademark belonging to various other software companies. The petitioner purportedly agreed to manufacture the masters and handed them over to the investigator when they were completed. This formed the basis of a complaint, which led to the issuance of search warrants and a raid of the petitioners' premises.

58 The petitioners filed for a criminal revision to quash the search warrants, which the court allowed. In his grounds of decision, Yong CJ expressed "considerable misgivings" about the manner in which the investigator had procured the evidence. The critical passage in the decision is at [42], which reads:

> The petitioners naturally objected strongly to the manner in which the evidence was procured. The prosecution relied on *R v Sang* [1980] AC 402 ... to argue that entrapment was not a defence under Singapore law. ... However, *Sang* is not of universal application in all cases of illegally obtained evidence. In my opinion, *Sang* has been cited too frequently by the prosecution in an attempt to admit any evidence which is illegally or improperly obtained without any real consideration as to its underlying principles. There are several distinguishing features between *Sang* and the present case. First, as alluded to earlier, *this was not a typical case of illegality in obtaining the evidence of a crime already committed but a case where the illegality procured the very offence*. [emphasis added]

59 The rationale for *Summit's* ultimate holding is explained in [52]:

> There is a distinction between the case where police conduct has merely induced the accused person to commit the offence which he has committed (as in *Sang*) and the case where the illegal police conduct itself constitutes an essential ingredient of the charged offence. ... In the former category, it is a case where the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations, and the exclusion of evidence would in fact undermine judicial integrity in allowing such alleged offenders to get away. *In the latter category, the illegality and the threat to the rule of law which it involves assume a particularly malignant aspect. ... The integrity of the administration of criminal justice would require that such evidence be excluded*. [emphasis added]

60 It will be recalled that in *Cheng Swee Tiang* ([49] *supra*), the judicial integrity rationale was also exploited to justify the court's discretion to exclude evidence obtained in circumstances where its admissibility would operate unfairly against the accused. However, unlike the majority's approach in *Cheng Swee Tiang*, which acknowledged that it may be impossible to draw a bright line beyond which the principle of judicial integrity is violated, preferring therefore to leave the line-drawing to trial judges who would be able to take into account the "circumstances of each particular case", *Summit* appears to have drawn the line at whether or not the *illegal* methods of an investigator precedes and forms part of the illegal conduct for which the accused is being charged.

61 A couple of observations may be appropriately made at this juncture. First, it is important to realise and acknowledge that while parts of the decision in *Summit* sought to suggest that *Sang* was simply *inapplicable* to the established facts in *Summit*, the holding in *Summit*, in effect, carves out another *exception* to *Sang* in that the latter case was explicit in denying any discretion to the courts to exclude evidence regardless of how the evidence was obtained. Admittedly the facts of *Sang* are distinguishable from *Summit* but their Lordships (in particular, Lord Diplock) cannot be understood to have left open the possibility that, in some circumstances, evidence obtained by unfair or unlawful or illegal means could be excluded. Second, *Summit* could be interpreted as holding that the *only* exception to the general principle that the courts will not look at how the evidence is obtained is where the illegality of the investigating authority precedes the commission of the offence. But the factual matrix of *Summit* lent itself to such a narrowly-tailored exception and the court did not have to venture any further. Whether the court intended to leave open the possibility that there could be other situations where it might hold that it has the discretion to exclude evidence depending on how it was obtained is certainly debatable. After all, it is conceivable that the judicial integrity principle may be violated in circumstances other than the one presented by *Summit*. Indeed, this was held to

be the case in the fairly recent decision by the House of Lords in *Regina v Looseley; Attorney General's Reference (No 3 of 2000)* [2001] 1 WLR 2060 ("*Looseley*"), to which I will now turn briefly.

62 It is pertinent to note that *Sang* ([53] *supra*) has now been largely emasculated by the subsequent decision in *Looseley*. While the House continued to hold that entrapment was not a substantive defence, it held that proceedings could be stayed or evidence excluded on the ground that evidence was obtained by entrapment. Therefore, whether there had been entrapment is not relevant only to mitigation in sentencing: see, generally, Simon Bronitt, "Sang is Dead, Loosely Speaking – *R v Looseley*" [2002] SingJLS 374. In Prof Ashworth's view, the holding in *Looseley* may be summarised as follows ("Re-drawing the Boundaries of Entrapment" [52] *supra* at 170):

> A. There is no entrapment (i) if the law enforcement officers have reasonable grounds to suspect the targeted individual of involvement in a certain kind of offence, or at least reasonable grounds to suspect people frequenting a particular place to be thus involved, (ii) if the officers are duly authorised to carry out the operation, in compliance with the appropriate Code of Practice, and (iii) if the officers do no more than provide the individual with an unexceptional opportunity to commit the offence.
>
> B. If a law enforcement officer does not have reasonable grounds for suspicion, or, having reasonable grounds, goes further than the provision of an unexceptional opportunity [and thus can be said to instigate the offence or to be a substantial cause of it], that conduct amounts to entrapment and the prosecution should be stayed.

63 This case was the culmination of three parallel streams of almost independent development: first, the statutory reversal of *Sang vide* s 78 of the Police and Criminal Evidence Act 1984 (c 60) ("PACE"); second, the maturity of a doctrine of abuse of process apropos serious abuses of power by the executive; and third, the coming into force of the Human Rights Act 1998 (c 42), which protects the accused's right to fair trial. It is pertinent to note that Lord Hoffmann noted in *Looseley* at [38]:

> The court's assertion of such a jurisdiction is of recent origin. It was not even discussed as a possible response to entrapment by the Law Commission in its Criminal Law Report on Defences of General Application (1977) (Law Com No 83), which dealt with entrapment at pp 32-53. Nor was it mentioned by the House of Lords in *R v Sang* [1980] AC 402, when it was decided that the court had no discretion to exclude evidence on the ground that the offence had been procured by entrapment or that the evidence had been unfairly obtained. *It seems fairly clear, however, that if anyone had suggested such a jurisdiction, it would have been emphatically rejected. Lord Diplock, at p 432, dismissed the notion of a discretion to exclude evidence of an offence procured by entrapment as a 'procedural device' to evade the rule that entrapment was not a substantive defence. He would almost certainly have taken the same view of a stay of proceedings* as Mason CJ, Deane and Dawson JJ later did in their joint judgment in *Ridgeway v The Queen* 184 CLR 19, 40. The House in *R v Sang* said that the only constitutionally proper way in which the court could mark its disapproval was by admonishing the police (as Lord Goddard CJ) had done in *Brannan v Peek* [1948] 1 KB 68, 72 and *Browning v JWH Watson (Rochester) Ltd* [1953] 1 WLR 1172, 1177) and by imposing a light or nominal sentence. It was for the police authorities to take disciplinary action or prosecute policemen or informants who took part in the crime. [emphasis added]

64 Of course, Singapore courts are not bound by *Looseley*, any more than they are bound by *Sang*. None of these developments, which are peculiar to England, have been mirrored in Singapore: *Ong Chin Keat Jeffrey v PP* [2004] 4 SLR 483. Once it is acknowledged that our law does not

recognise a substantive defence of entrapment the issue of staying criminal proceedings does not arise. There is a real distinction between staying proceedings on the basis that they constitute an abuse of process on the one hand and dismissing proceedings on the basis that the prosecution has not discharged its burden because of evidentiary rulings against it on the other. For my part, assuming I were unfettered by any authority, I would be persuaded that there will be particularly egregious instances of misconduct where the courts should reject evidence that has been procured in a manner that might be inimically repellent to the integrity of the administration of justice. This will protect those who should not be convicted contrary to the public's sense of justice. In seeking to cut evidential Gordian knots, the ends cannot be inevitably and invariably held to justify the means. To do so can only result in indelible scars to the administration and perception of justice. Public confidence in the principled administration of justice must inevitably be the paramount consideration.

A distinction between state and private entrapment?

65 Professor Ashworth opines that as a matter of basic principle, if the basis for excluding evidence is that the judiciary ought not to be giving its imprimatur to infractions undermining the rule of law, then, indeed, some difficulty is encountered in extending this principle to private entrapment. However, he contends correctly, in my view, that the consequences of entrapment are the same whether or not the state is involved; and that "[w]e should surely not welcome a society in which private investigators and journalists are free to employ deception on whatever scale, and in whatever circumstances, they please". See, on these points, "Re-drawing the Boundaries of Entrapment" ([52] *supra*) at 176.

66 Be that as it may, the applicant in the present case has attempted to further elevate the distinction. He suggests that private investigators should be subject to far greater scrutiny than law enforcement agencies because no public interest is actually served by private investigators undertaking such conduct.

67 It is certainly true that in *Summit* ([56] *supra* at [57]), it was stated that, "There is no public interest in the members of the public undertaking such conduct." However, there can be no doubt that the court applied the *same* test in respect of police-directed entrapment (*viz*, whether the illegality preceded the offence) and private entrapment. And, if indeed the court meant to apply a more rigorous review in relation to private entrapment, it was not stated at all what that higher standard ought to be. In my view, all that Yong CJ meant by the *dictum* relied upon by the applicant was that it could be more morally reprehensible for an investigating party to engage in entrapment when it was not even instrumental to the service of any public interest; however, that did not necessarily attract a different set of legal rules. As will be explained, there is an important public interest at stake in this case: see [83] below. More pertinently, given that the holding in *Sang* ([53] *supra*) is the admissibility bedrock in Singapore, the distinction between state-directed and private entrapment cannot and does not arise. My view finds support in a recent article by Kate Hofmeyr, "The Problem of Private Entrapment" [2006] Crim L R 319 at 327–328:

> If entrapment in English law had remained where the judgment of the House of Lords in *Sang* left it, namely relegated to the status of an issue relevant to sentencing only, the so-called "problem of private entrapment" would not exist. *On the* Sang *rationale, entrapment, whether at the hands of the state or of a private party is irrelevant to the conviction of the accused.* [emphasis added]

68 In any event, the applicant has not been able to demonstrate where the difference lies between the tests to be employed in respect of private entrapment on the one hand and state-directed entrapment on the other. Indeed, in suggesting that any difficulty in defining the parameters

of investigative tactics could be ignored in this case because it involved a private investigator, the applicant is impliedly submitting that all unfavourable evidence obtained through private entrapment should be excluded. This is decidedly not what *Summit* held. Mr Chan also submitted:

> The AG would also note that if the evidence of the PI is excluded because of the misconduct of the solicitor who engaged them, this means that the solicitor under investigation may escape the consequences of his misconduct where there is clearly evidence that he did commit the acts alleged against him. The AG would opine that such a ruling may result in a public perception of the legal profession and its disciplinary processes that is even worse than that may arise if evidence improperly obtained is admitted. The AG would submit that such an outcome should be avoided at all costs.

I am persuaded by such a submission.

Whether investigative impropriety is established in this case

69 If this case were to be decided purely on the basis of *How Poh Sun* ([55] *supra*), there can be no question that this application is misconceived because the courts (and correspondingly, the DC) cannot exclude evidence no matter how inappropriately it was procured. However, as Yong CJ rightly pointed out in *Summit*, the ambit of *Sang*, and by implication *How Poh Sun,* is not without its boundaries; and the line is crossed when the *agent provocateur* himself engages in prior illegal conduct in order to procure the offence for which the accused is charged. However, Mr Chan persuasively submitted that even this exception created by *Summit* did not aid the applicant's case because Lee had not committed any offence.

70 In response, the applicant somewhat implausibly submitted that Lee had engaged in illegal conduct by cheating the applicant and by abetting the applicant's breach of the LPA in procuring her evidence. As to whether Lee had committed an offence of cheating pursuant to s 415 of the Penal Code (Cap 224, 1985 Rev Ed) ("the PC"), it is noteworthy that the applicant has merely regurgitated his arguments submitted before the DC; he has not addressed the very lucid and compelling analysis by the DC that an offence of cheating can only be made out if it can be shown that Lee had intentionally induced the person who claims to have been cheated into doing something which he otherwise would not have done.

71 I also agree with the DC that the LPA and the subsidiary rules that govern the discipline of the legal profession are neither penal nor criminal in nature. Indeed, as Prof Tan points out, the jurisdiction to discipline misconducting advocates and solicitors is on the whole civil in nature, even if elements of due process unique to the criminal process (such as requiring proof beyond reasonable doubt) are incorporated: see Prof Tan ([36] *supra*) at pp 765–767. If it were otherwise, a conviction of a solicitor for a criminal offence would bar disciplinary proceedings since it will violate the constitutional protection against double jeopardy. Similarly, conduct by a solicitor that breaches the LPA may attract criminal proceedings, not because the solicitor has breached the LPA *per se* but because his conduct is also and separately prohibited by the criminal law. Even if I am wrong on these points, I am satisfied that the particular breach of s 11A(2)(*b*) of Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) that this case involves (*ie*, the payment of a referral fee) is not itself a criminal offence. The applicant's argument that Lee had committed an offence of abetment can be characterised as imaginative.

72 The applicant then, as an argument of last resort, submits that even if Lee had not committed an offence in procuring his breach of the LPA, she had acted improperly and this suffices to give the court the discretion to exclude Lee's evidence. It is very clear that *Summit's* holding

applies only in respect of prior *illegal* conduct undertaken by an *agent provocateur*: see [59] above. Indeed, the facts of *Summit* (the investigator there had himself infringed the copyright of several companies) involved illegality, not mere ethical impropriety. In this regard, I express my agreement with Mr Chan that given the carefully modulated language employed by Yong CJ in *Summit*, its ruling should be restricted to the specific facts of that case. As I pointed out above, it may well be that *Summit* could be read more broadly; but in light of *How Poh Sun*, which held that the courts had no discretion in general to reject evidence that is *illegally or improperly* obtained, it would be now remiss for this court to presently do so in these proceedings.

73 On a careful consideration of the merits, and quite apart from the whether the application is premature to begin with, I found that the DC did not err in admitting Lee's evidence.

Conclusion

The threshold for leave

74 The standard of review that the courts apply in applications for leave to seek judicial review has now been firmly established. In *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643, Lord Diplock held:

> My Lords, at the threshold stage, for the federation to make out a prima facie case of reasonable suspicion that the board in showing a discriminatory leniency to a substantial class of taxpayers had done so for ulterior reasons extraneous to good management, and thereby deprived the national exchequer of considerable sums of money, constituted what was in my view reason enough for the Divisional Court to consider that the federation, or, for that matter, any taxpayer, had sufficient interest to apply to have the question whether the Board were acting ultra vires reviewed by the court. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. *If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application*. [emphasis added]

75 The Court of Appeal, in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR 609 ("*Colin Chan*") accepted this test and further explained at 616, [22] that:

> This passage appears susceptible to two slightly different interpretations. One is that the court should quickly peruse the material put before it and consider whether such material discloses 'what might on further consideration turn out to be an arguable case'. The other is that the applicant had to make out a 'prima facie case of reasonable suspicion'. In our view, both tests present a very low threshold and it is questionable whether there is really any difference in substance between the two interpretations.

76 More recently, in *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR 644 at [20], the Court of Appeal approved of the following formulation by the trial judge of the applicable test in applications for leave to seek judicial review (see *Lai Swee Lin Linda v Public Service Commission* [2000] SGHC 162 at [44]):

> [T]he duty of the court hearing an exparte application, such as the one at hand, was not to

embark upon any detailed and microscopic analysis of the material placed before it but as enjoined by the Singapore Court of Appeal in [*Colin Chan*] to peruse the material before it quickly and appraise whether such material disclosed an arguable and a *prima facie* case of reasonable suspicion. In my view, the applicant had more than comfortably crossed the threshold barriers and had placed adequate material before the court for it to conclude that there was indeed a *prima facie* case of reasonable suspicion.

77 Having first perused and heard the submissions of both the applicant and the respondent, I am satisfied not only that the application was premature but that even on its merits, no arguable and/or *prima facie* case of reasonable suspicion can be made establishing that the DC had wrongly admitted Lee's evidence and/or wrongly refused to compel Tan to reveal his instructing client. I should highlight that if these grounds of decision seem fairly involved, it is only because I think it might be helpful to explicate my reasoning in greater depth and detail for precedential purposes. I must confess that my first reading of the papers indicated to me that the applicant was barking up the wrong tree though I was prepared to be persuaded otherwise. The applicant's arguments have only however served to convince me that he should not be given the opportunity to delay the DC proceedings any further.

Matters susceptible to judicial review

78 One final but important observation should be made. When one scrutinises the submissions made by the applicant, it will be readily apparent that what the applicant is in fact seeking to achieve is to bring either a case stated to this court or an appeal on the merits of the DC's order to admit the evidence; not a review of the process and/or procedure by which the DC made its determination. In so far as bringing a case stated from a DC hearing to the High Court is concerned, this would be entirely improper. The case stated is a specialised procedure and available only when provided for in law. In this respect, there is no provision in the LPA allowing any party to bring a case stated to the High Court.

79 Furthermore, there is a clear distinction between the powers that a superior court exercises in judicial reviews and appeals. While judicial reviews and appeals are two avenues that an unsatisfied party in an inferior tribunal may have recourse to, they are separate and distinct in so far as they are designed to address two different *types* of wrongs that the tribunal may commit. Judicial review is almost invariably limited to examining, *inter alia*, whether the tribunal has exceeded its jurisdiction, whether there has been an abuse of discretion or a failure of natural justice, and whether the tribunal has acted irrationally, unreasonably or in bad faith. In other words, it hinges on the legality of the decision. An appeal, on the other hand has a wider scope: an appellate court may in limited circumstances evaluate the substantive merits of the decision arrived at by the tribunal: see *AG v Ng Hock Guan* [2004] 3 SLR 253 at [22]. See also, *Judicial Remedies* ([14] *supra*) at para 11-052 and William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004) at p 704. As explained in Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action* (LCB Information Services, 2nd Ed, 2000) at pp 134–142, the basic distinction between an appeal and a review operates at two levels: one is formal and the other is substantive. At the formal level, the reviewing court cannot substitute its decision for that of the administrative body under review. This is because the task of determining the rights of the parties has been statutorily conferred on the administrative body, not the court. The reviewing court may declare that the task has been performed badly in law but it cannot take the further step of actually performing the task itself. This dichotomy also explains why this application to, *inter alia,* move the proceedings before the DC to the High Court is entirely without basis. At the substantive level, a reviewing court should be acutely conscious that the task was entrusted to the DC for good reason, not least of which is the admirable statutory policy that an advocate and solicitor should first be judged by a panel of his own peers, and

accord it the necessary deference. In my view, these are cogent reasons why in a judicial review, the court should not examine the *merits* of the decisions reached by such an administrative or statutory body.

80 To the extent that the show cause proceedings determine, for the first time in the disciplinary process, whether an advocate and solicitor should be disbarred or suspended, the Court of Three Judges does not, technically speaking, sit as an appellate court over the Disciplinary Committee. However, as noted above, it does have the power to review the merits of the Disciplinary Committee's findings. Therefore, the distinction between appeals and judicial reviews applies to disciplinary proceedings under the LPA. As held by Chan Sek Keong J (as he then was) in *Kalpanath* ([1] *supra*) at 650, [27]:

> The 'show cause' proceedings are very different from judicial review proceedings, both with respect to the law as well as the procedure. *In the former, the court goes into the merits of the findings* and determination of the DC on the basis of the evidence recorded by the DC. … *In the latter, the court does not deal with the merits of the decision but with its legality on ordinary administrative law grounds*. Bias, as an aspect of procedural impropriety, is one of these grounds. [emphasis added]

81 Here, it would also be apposite to borrow the succinct summary of the disciplinary process by Prof Tan ([36] *supra*) at p 896:

> The statute is silent on the right of the solicitor to ask for a review of an adverse determination. If the Disciplinary Committee has acted without jurisdiction or in an ultra vires manner, ordinary certiorari proceedings … are available to the solicitor. *But to allow the solicitor concerned to obtain a review of the merits of the case would be outside the scope of judicial review*. Being a matter of appeal, the right to appeal must be given by statute and therefore as the statute is silent on the right of appeal against an adverse determination, *it follows that the solicitor concerned must challenge the merits in the show cause proceedings themselves*. [emphasis added]

82 In the present application, there is nothing in the submissions by the applicant that remotely resembles a procedural or processual challenge to the proceedings before the DC; instead, all that has emerged is a simple complaint against the merits of the decision to admit Lee's evidence and the refusal to compel Tan to reveal the identity of his instructing client. These, in my view, are questions that are far more appropriately resolved during the "show cause proceedings" rather than by means of a judicial review.

Some concluding observations

83 In the ultimate analysis, inasmuch as there is a compelling public interest in ensuring that investigators do not violate the very rule of law that they purport to uphold by adopting improper methods to procure evidence, there is also a competing and equally pressing public interest to weed out unethical and malign practices within the legal profession. Indeed, since the abolition of conveyancing scale fees in Singapore in 2003, a palpable sense of disquiet and anxious concern have prevailed within the legal profession that some solicitors may be engaging in unsavoury practices in order to unfairly attract business. This includes the deplorable practice of realty touting, *ie*, offering referral fees to property agents to coax them into redirecting property transactions.

84 The rules of ethics, as articulated in the LPA, its subsidiary legislation and the Law Society Practice Directions and conventions (collectively "ethical rules"), should not be perceived as an

external and inconvenient imposition of values on the legal profession but rather as an embodiment of the moral compass and aspirations of the profession. It must also be recognised that ethical rules only delineate minimal standards and duties which solicitors must observe. There is much left unsaid that must be implicitly understood and observed with intelligent flexibility. Unstinting compliance with all ethical rules and practices is in the enlightened self-interest of the profession. Without such observance and effective enforcement of ethical rules, the glue that binds and distinguishes advocates and solicitors as *professionals* as opposed to merely self-serving businessmen will soon dissolve. A solicitor is most certainly not merely a businessman or client proxy. He is an officer of the court charged with the unique responsibility of upholding the legal system and the quality of justice; see my observations in *Public Trustee v By Products Traders Pte Ltd* ("the *By Products* case") [2005] 3 SLR 449 at [26]–[36].

85 A failure by significant numbers of the legal profession to abide by and observe these ethical standards would eventually drive the entire profession down the slippery slope of ignominy. Systemic ethical corruption will fray and ultimately destroy the moral fibre of the profession. In a race to the bottom, legal practices will expend more and more valuable time and resources competing with and out-foxing each other for business rather than focusing their efforts on effectively delivering premier services to clients and appropriately discharging their wider obligations to the community. While legal practices are necessarily run as profit-making businesses, this does not, and cannot, mean that ethical constraints should be perceived as inconveniences to be either accepted and ignored at will. Solicitors who take their obligations and roles seriously should not be disadvantaged by the less scrupulous who do not.

86 The detection and prosecution of surreptitiously corrupt and unethical practices is, needless to say, extremely difficult. While it is indeed lamentable that some legal practices may have been reduced to entrapping other legal practices in their efforts to deter, detect and bring to book unethical conduct, this may perhaps afford one potent although not altogether desirable method to ferret out and discipline both unethical practices and solicitors. One cannot but acknowledge that there will be considerable if not insurmountable difficulty, in the absence of such discreet means, in proving the proclivity of a particular solicitor to commit certain types of ethical breaches. The fear of entrapment may therefore also deter wayward solicitors from engaging openly in unethical practices. Be that as it may, I cannot but register my profound misgivings in learning that some members of the profession have now, out of a sense of desperation, resorted and descended to ensnaring other practices suspected of touting simply to avoid unethical competition. These are clearly issues that the Law Society must apply itself to resolving immediately, thoroughly and fairly. Can current detection and enforcement procedures be streamlined and enhanced? The legal profession must not and cannot afford to be perceived as ethically ambidextrous. When exposed to the glare of public scrutiny, instances like this bring no credit to the profession and serve, on the contrary, only to corrode the standing of the profession. Reputational capital once lost is extremely difficult to reclaim. I had also noted in the *By Products* case at [35]:

> So overwhelming is the public interest in maintaining the dignity and honour of the legal profession through the preservation of the highest ethical and moral standards amongst solicitors that the courts cannot risk allowing it to be compromised by even a few recalcitrant individuals within the profession. If and when any such breaches come to light, they must be dealt with swiftly and severely.

87 After some initial diffidence, I have now come to the unflinching conclusion, that the administration of justice does not risk being brought into disrepute simply because unscrupulous solicitors have their *modus operandi* for improperly attracting business exposed by means of private entrapment. As the Attorney-General persuasively submits (see [68]), in the ultimate analysis, it

cannot be gainsaid that the course of justice would not be facilitated if such private entrapment evidence is deemed inadmissible on policy considerations. The broad policy considerations I have earlier spelt out also serve in a very general sense to underscore and justify the current evidential case law, which unequivocally tilts the balance in favour of excluding evidence only in exceptional cases such as those involving prior illegality in the procurement of the evidence.

88 I should add, as a precaution, that my observations do not suggest for a moment that the applicant is guilty of the charges which he faces; only that the DC did not err in law and in principle in admitting the evidence obtained by private entrapment.

89 In the result, I dismissed the application.