IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 3

Originating Summons No 810 of 2019

Between

Law Society of Singapore

… *Applicant*

And

Yeo Khirn Hai Alvin

… *Respondent*

Originating Summons No 812 of 2019

Between

Attorney-General

… *Applicant*

And

(1) Yeo Khirn Hai Alvin
(2) Law Society of Singapore

… *Respondents*

JUDGMENT

[Legal Profession] — [Disciplinary proceedings]
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v
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4, 11 November 2019

8 January 2020 Judgment reserved.

Valerie Thean J:

Introduction

1 Originating Summons No 810 of 2019 ("OS 810/2019") and Originating Summons No 812 of 2019 ("OS 812/2019") are applications by the Law Society of Singapore ("the Law Society") and the Attorney-General ("the AG") for a review of the disciplinary tribunal's determination in DT/15/2017 dated 28 May 2019 that no cause of sufficient gravity existed for disciplinary action: *The Law Society of Singapore v Yeo Khirn Hai Alvin* [2019] SGDT 3 ("the Determination").

2 In these applications, the Law Society and the AG contend that the Determination ought to be set aside, pursuant to s 97(4)(*b*)(ii) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"). The respondent opposes the applications.

Background

The mental capacity proceedings

3 From 28 December 2010 to 29 June 2015,[1] the respondent led a team of lawyers at WongPartnership LLP ("WP") who advised and acted for Mdm A, an octogenarian, in a series of legal proceedings. At the time, after her creation of a trust in late 2010, Mdm A was experiencing difficulties in transferring her assets out of two bank accounts because various family members had expressed concerns to her bankers that she could possibly be under the undue influence of her daughter and son-in-law. In view of the contents of the letters sent to these bankers, Mdm A was concerned that these family members might commence litigation. As anticipated, on 18 February 2011, two of Mdm A's sisters ("the Sisters") commenced Originating Summons (Family) No 71 of 2011 ("OSF 71/2011"). OSF 71/2011 was an application under s 20 of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) for a declaration that Mdm A was unable to make decisions regarding her property and affairs, and for a consequential order that deputies be appointed to make all decisions regarding such matters on her behalf.

4 OSF 71/2011 was heavily contested by Mdm A's daughter and son-in-law (as the first and second defendants), as well as Mdm A herself (as the third defendant). The case was heard at first instance by a senior district judge of the Subordinate Courts (as the State Courts were then known). Following a 30-day trial, the senior district judge found that Mdm A lacked decision-making capacity. This decision was reversed on appeal by the High Court. Eventually, OSF 71/2011 culminated in the Court of Appeal's decision in Civil Appeal No

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1 ROP Vol 2, p 409 para 1.

27 of 2014 , reported as *Re BKR* [2015] 4 SLR 81 ("*Re BKR*"). The Court of Appeal allowed the Sisters' appeal and held that Mdm A lacked capacity. Deputies were also appointed to act on her behalf. The first and second defendants were ordered to pay the costs of all proceedings, taxed on an indemnity basis, which included Mdm A's solicitor-and-client costs.[2]

5 It is not necessary in these review applications to examine *Re BKR* in detail. What is pertinent to note at this stage is that the Court of Appeal held that Mdm A lacked decision-making capacity as early as 26 October 2010 when she created a particular trust (*Re BKR* at [206]–[208]). It follows from this holding that Mdm A would have lacked capacity throughout WP's retainer from 28 December 2010 to 29 June 2015.

The Complaint

6 The complaint that gave rise to these proceedings arose out of the Court of Appeal's concern first expressed as a direction in November 2015 to Mdm A's deputies to investigate into the quantum and validity of fees paid to WP. Correspondence between the Court of Appeal and the deputies and WP, which will be detailed below, then followed. Finally on 31 July 2017, the Court of Appeal referred a complaint against the respondent ("the Complaint") to the Council of the Law Society ("the Council"),[3] pursuant to s 85(3)(*b*) of the LPA, which reads:

> (3) Any judicial office holder specified in subsection (3A), the Attorney-General, the Director of Legal Services or the Institute may at any time refer to the Society any information touching upon the conduct of a regulated legal practitioner, and the Council must —

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2 David Chong's affidavit dated 5 July 2019 ("David Chong's affidavit"), p 113.

3 David Chong's affidavit, p 31.

…

> (*b*) if that judicial office holder, the Attorney-General, the Director of Legal Services or the Institute (as the case may be) requests that the matter be referred to a Disciplinary Tribunal, apply to the Chief Justice to appoint a Disciplinary Tribunal.

7 The text of the Complaint, as well as the correspondence between the Court of Appeal and the parties leading to the Complaint, will be examined in greater detail below. It suffices to state that one key contention in these review applications concerns the scope of the Complaint.

The charges

8 After receipt of the Complaint, on 8 November 2017, the Law Society preferred four charges against the respondent. The 1st charge read as follows:[4]

> That you, *Yeo Khirn Hai, Alvin SC*, are charged that during the period of your retainer as solicitor for [Mdm A] and conduct of the proceedings on her behalf in:
>
> …
>
> from about 2 March 2011 until about 19 May 2015, had, to wit, failed to ensure that she had the necessary mental capacity to litigate and had accepted or continued to accept her instructions to litigate despite the fact that she lacked decision-making capacity and was unable to evaluate whether the consequence of the matter justified the expense or the risk involved, and had further caused her to incur legal costs which amounted to $7,562.023.77 as presented by you in Bill of Costs No. 164 of 2016, and in so doing, you have breached Rule 13 of the Legal Profession (Professional Conduct) Rules (Cap 161, R1, 2010 Rev Ed), amounting to improper conduct or practice as an advocate and solicitor within the meaning of section 83(2)(b) of the Legal Profession Act (Cap 161).

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4 K Gopalan's affidavit dated 13 August 2019 ("K Gopalan's affidavit"), p 8.

9 The 2nd and 3rd charges which were initially preferred against the respondent were identically worded to the 1st charge, save that they concerned breaches of rr 35 and 40 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("PCR 2010") respectively.

10 The 4th charge, in its initial form, read as follows:[5]

> That you, *Yeo Khirn Hai, Alvin SC*, during the period of your retainer as solicitor for [Mdm A] from 28 December 2010 to 29 June 2015 have charged her a total amount of $7,562,023.77 (excluding GST) in professional fees as presented by you in Bill of Costs No. 164 of 2016; and which you subsequently offered to reduce to $5,104,366.04 (a reduction of about 32.5%), both of which sums were grossly excessive and which constitute gross overcharging, and you have thereby breached Rule 38 of the Legal Profession (Professional Conduct) Rules (Cap 161, R1, 2010 Rev Ed), amounting to improper conduct or practice as an advocate and solicitor within the meaning of section 83(2)(b) of the Legal Profession Act (Cap 161).

Pre-hearing conference on 19 February 2018

11 At the first pre-hearing conference on 19 February 2018, the disciplinary tribunal ("the DT") directed the parties to seek clarification from the Registrar of the Supreme Court ("the Registrar") as to the scope of the Complaint. Accordingly, the Law Society wrote to the Registrar on 21 February 2018, seeking clarification as to whether the Complaint is limited to overcharging (*ie*, the alleged breach of r 38 of PCR 2010), or whether the Complaint included breaches of rr 13, 35 and 40 of PCR 2010 (which were the subject matter of the 1st, 2nd and 3rd charges respectively).[6] As for the respondent, counsel for the respondent wrote to the Registrar on 23 February 2018, stating that the respondent "[was] prepared to treat the scope of the Complaint to include

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5 K Gopalan's affidavit, p 11.

6 K Gopalan's affidavit, p 6.

whether steps were taken to ascertain [Mdm A's] capacity to engage [WP], to give instructions in legal proceedings and to incur legal fees".[7] By way of a letter dated 2 March 2018, the Registrar replied that "[i]t [was] for the Law Society, based on the information it [had] received, to frame the Charges to be heard and investigated by the Disciplinary Tribunal".[8]

Pre-hearing conference on 20 April 2018

12 Thereafter, at the next pre-hearing conference on 20 April 2018, the DT queried counsel for the Law Society, Mr Jason Lim, on whether the Law Society had a position on whether the scope of the Complaint was confined to overcharging, or included issues concerning Mdm A's mental capacity.[9] Both Mr Lim and counsel for the respondent, Mr Chelva Rajah SC, confirmed that their clients were taking the position that the scope of the Complaint included both elements. The DT recognised that the scope of the Complaint went directly towards their "jurisdiction", and requested for both parties to confirm their positions in writing. The DT indicated that it would make a "determination" after receiving the parties' views, and not hear the charges which were "excessive":[10]

> President: … We shall let you know what our views are because we think---we need to let you know because it might run into the charges. …
>
> …
>
> So if you think that, look, your charges cover more than complaints [sic], more than what our

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7 K Gopalan's affidavit, p 12.

8 K Gopalan's affidavit, p 14.

9 ROP Vol 3, p 7.

10 ROP Vol 3, p 10 ln 11 to p 11 ln 28.

jurisdiction covers, we may run into all sorts of complications, alright?

Rajah: Yes.

President: I don't know what you intend to do after that.

Advocate: Yes.

President: But you let us know---

Lim: Yes.

President: ---whether you want to take instructions or you say no, that as far as the counsel [sic] is concerned, the complaint covers both. Then we make a determination. *Then if we make the determination after hearing, we then---we shall not hear the part that we think it's excessive.*

Lim: Correct.

President: So you have to end up with---

Lim: Then we'll proceed on the basis as determined, Sir.

President: Yes?

Lim: We'll proceed on the basis as the Tribunal has---

President: I don't know.

Lim: ---would have determined by then.

President: *No, you don't have to if you don't want to. If you take the view that we are wrong then you proceed on what you think is right.*

Advocate: Yes.

Lim: Oh.

President: *You are not obliged to agree with us.*

[emphasis added]

13 Later during the pre-hearing conference, the President also added:[11]

[11] ROP Vol 3 p 19 ln 28 to p 21 ln 21.

> President: … *we will wait for you* [to file the written submissions] *and then we will tell you what we think the complaint is*. And when we have done that, you may say---we have to come back and say no, we will want to proceed on that charge on the basis that the complaint covers two matters and not one, both the---failing to ensure that the client has capacity and overcharging. You want to proceed with that, fine, but it will---don't you want to proceed on that? I'm looking at the letter from the [the Registrar], then possibly you might want to amend. You don't have to commit yourself, I know that you are taking it, right, but then you may have to amend the charges.
>
> …
>
> … we'll let you know after that what our position is, then alright, fine, I mean, if both parties say that it covers both matters, *you proceed on this---on one basis and we proceed on what we then consider to be the proper basis.* And---yes, then it'll be very interesting because *you will be going this way and we're going that way but I mean, if it has to be, it has to be.*
>
> [emphasis added]

14 It is clear from these extracts that the DT took the view that the Complaint was exclusively confined to the issue of overcharging and that issues concerning Mdm A's mental capacity were not relevant. Yet, it is also evident that the DT recognised that it was the role of the Law Society to frame and proceed with the appropriate charges arising from the Complaint. Although the DT had stated that it would not "hear the part that … [is] excessive", given the informal nature of pre-hearing conferences, this might not have been their eventual position. This is supported by the Law Society's letter to the Registrar dated 26 February 2018, where it is stated that "the [DT] also explained that it

would not interfere with the Law Society's prerogative to frame the Charges or to proceed with the [initial four charges] as stated".[12]

15 On 25 April 2018, the respondent informed the DT in writing that he was prepared to treat the scope of the Complaint "as including the question of whether or not steps were taken to ascertain [Mdm A's] capacity to engage [WP] and give them instructions in legal proceedings".[13] On the same day, the Law Society also informed the DT in writing that it would be proceeding with three amended charges (*ie*, the 1st, 3rd and 4th charges) and would be withdrawing the 2nd charge. The Law Society was of the view that the scope of the Complaint covered the three amended charges.[14]

Pre-hearing conference on 22 May 2018

16 The next pre-hearing conference took place on 22 May 2018. Although no transcript was furnished for this conference, a summary of the matters raised and directions given by the DT during this pre-hearing conference is found in a letter by counsel for the respondent dated 22 June 2018 to the DT secretariat. The salient paragraphs read:[15]

> 1. The Tribunal indicated that the purpose of these proceedings is to investigate [the Complaint] which led to these proceedings, and not to decide if fees are to be taxed, which in any event is not within the Tribunal's remit to direct.
>
> 2. As to the nature of the Complaint, the Tribunal indicated that the Court of Appeal was concerned about the amounts of approximately $7.5 million which was

12 K Gopalan's affidavit, p 13.

13 K Gopalan's affidavit, p 15.

14 K Gopalan's affidavit, p 16.

15 K Gopalan's affidavit, p 50.

> claimed originally and $5.1 million which had since been agreed between the parties (*cf.* paragraphs 14 and 15 of the Complaint), and that the Respondent's alleged failure to take steps to satisfy himself of the client's mental capacity is not a matter of concern which is to be investigated by this Tribunal.
>
> 3. The Tribunal recognised that pursuant to Rule 18 of the Legal Profession (Disciplinary Tribunal) Rules, the Tribunal can permit amendments to the charges but would not initiate such amendments, *and it is for the Law Society to frame the charges as it sees fit.*
>
> [emphasis added]

17 It would thus appear that on 22 May 2018, the DT made a determination that the scope of the Complaint pertained solely to overcharging, with the caveat that it was for the Law Society to frame the charges it saw fit. That the DT had made this determination is also supported by Mr K Gopalan's (the Director of the Conduct Department of the Law Society) affidavit of evidence-in-chief at para 7, which was unchallenged in the proceedings before the DT:[16]

> The Law Society withdrew the Second Charge on 25 April 2018 *and in the course of the proceedings the Tribunal also determined that the matters stated in the First and Third Charges were not within the scope of the [Complaint] … In other words, the Tribunal had determined that the allegations in the First and Third Charges relating to [Mdm A's] lack of mental capacity were not within the scope of the [Complaint].* [emphasis added]

18 Thereafter, on 18 June 2018, the Law Society preferred a 5th charge against the respondent. In addition, the Law Society, for the second time, sought to further amend the 1st and 3rd charges. The DT rejected these amendments on the basis that they were not within the scope of the Complaint. The proposed amendments to the 1st charge were as follows:[17]

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16 ROP Vol 2 p 2 para 7.

17 K Gopalan's affidavit, p 41.

> [1st charge] That you, *Yeo Khirn Hai, Alvin SC*, are charged that during the period of your retainer as solicitor for [Mdm A] and conduct of the proceedings on her behalf in:
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> …
>
> from about 2 March 2011 until about 19 May 2015, had, to wit, failed to ensure or take reasonable steps to ensure that she had the necessary mental capacity to litigate, ~~and/or had accepted or continued to accept her instructions to litigate despite the fact that she lacked decision-making capacity and/or was unable to evaluate whether the consequence of the matter justified the expense or the risk involved, and had further caused her to incur legal costs which amounted to $7,562.023.77 as presented by you in Bill of Costs No. 164 of 2016,~~ and ~~in so doing,~~ in failing to do so, you have been guilty of such misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession within the meaning of section 83(2)(h) of the Legal Profession Act (Cap 161).

19 As for the 3rd charge, the proposed amendments were as follows:[18]

> [3rd charge] That you, *Yeo Khirn Hai, Alvin SC*, are charged that during the period of your retainer as solicitor for [Mdm A] and conduct of the proceedings on her behalf in:
>
> …
>
> from about 2 March 2011 until about 19 May 2015, had, to wit, failed to ~~ensure that she had the necessary mental capacity to litigate and had accepted or continued to accept her instructions to litigate despite the fact that she lacked decision making capacity and was unable to~~ evaluate with her whether the consequences of the matter justified the expense of the risk involved, and ~~in so doing,~~ in failing to do so, you have breached Rule 40 of the Legal Profession (Professional Conduct) Rules (Cap 161, R1, 2010 Rev Ed), amounting to improper conduct or practice as an advocate and solicitor within the meaning of section 83(2)(b) of the Legal Profession Act (Cap 161).

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[18] K Gopalan's affidavit, p 43.

Withdrawal of 1st and 3rd charges

20 On 16 July 2018, the Law Society informed the DT that it would be withdrawing the 1st and 3rd charges, on the ground that the DT had disallowed the amendments to the 1st and 3rd charges.[19]

The charges proceeded with

21 The Law Society subsequently amended the 4th charge, and proceeded with the 4th and 5th charges, which read in their ultimate form:[20]

> [4th charge] That you, *Yeo Khirn Hai, Alvin* SC, had, to wit, claimed or charged a sum of $7,562,023.77 (excluding GST) under Bill of Costs No. 164 of 2016, issued on 21 October 2016, as professional fees in the course of your retainer as solicitor for [Mdm A], which sum was excessive and constitutes overcharging, and you have thereby breached Rule 17(7) of the Legal Profession (Professional Conduct) Rules 2015 (Cap 161), amounting to improper conduct or practice as an advocate and solicitor within the meaning of section 83(2)(b) of the Legal Profession Act (Cap 161).
>
> [5th charge] That you, *Yeo Khirn Hai, Alvin SC* had, to wit, on or about 7 April 2017, in the course of the taxation proceedings in Bill of Costs No. 164 of 2016 claimed the amount of $5,104,366.04 under Section 1 thereof, which sum was excessive and constitutes overcharging, and you have thereby breached Rule 17(7) of the Legal Profession (Professional Conduct) Rules 2015 (Cap 161), amounting to improper conduct or practice as an advocate and solicitor within the meaning of section 83(2)(b) of the Legal Profession Act (Cap 161).

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19 K Gopalan's affidavit, p 63.

20 K Gopalan's affidavit, pp 45 and 108.

The Determination

22 The substantive proceedings before the DT took place over five days, between 26 September 2018 and 25 March 2019.[21] The DT rendered its determination on 28 May 2019. It appears from the face of the Determination that the DT was only focused on the issue of overcharging without any regard to issues of mental capacity.

23 The DT held that the Law Society had not discharged its burden of proving overcharging for both the 4th and 5th charges: the Determination at [48]. Further, as for the 5th charge, the DT was of the view that given that both the first and second defendants in OSF 71/2011 had agreed to pay WP's costs at the reduced amount, "it [was] difficult to come to a conclusion that this [was] not a fee that a reasonable practitioner [could] in good faith charge or receive": the Determination at [54]. Accordingly, there was no cause of sufficient gravity for disciplinary action under s 83 of the LPA.

Legal context and issues

The nature of the court's jurisdiction in s 97 applications

24 Section 97(4) of the LPA reads:

> (4) The Judge hearing the application —
>
> (*a*) shall have full power to determine any question necessary to be determined for the purpose of doing justice in the case, including any question as to the correctness, legality or propriety of the determination or order of the Disciplinary Tribunal, or as to the regularity of any proceedings of the Disciplinary Tribunal; and

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[21] ROP Vol 3 p 2.

> (*b*) may make such orders as the Judge thinks fit, including —
>
> (i) an order directing the person who made the complaint or the Council to make an application under section 98;
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> (ii) an order setting aside the determination of the Disciplinary Tribunal and directing —
>
> (A) the Disciplinary Tribunal to rehear and reinvestigate the complaint or matter, or
>
> (B) the Society to apply to the Chief Justice for the appointment of another Disciplinary Tribunal to hear and investigate the complaint or matter; or
>
> (iii) such order for the payment of costs as may be just.

25 Section 97 of the LPA is almost identically worded to s 98(8) of the LPA, which sets out the powers of the Court of Three Judges when a matter is referred to it for disciplinary action. In the present case, the AG and the Law Society seek to invoke the court's supervisory jurisdiction to quash the Determination. They rely on the references to "correctness, legality or propriety" in these two provisions, which are directly referable to the three grounds of judicial review, illegality, irrationality and procedural impropriety: see *Mohd Sadique bin Ibrahim Marican and another v Law Society of Singapore* [2010] 3 SLR 1097 ("*Sadique*") at [10]. The respondent does not dispute the applicability of judicial review nor the grounds suggested. He supports the DT's Determination and contends that none of the grounds are made out.

26 I should clarify that the appellate jurisdiction contained within s 97 of the LPA was not invoked by parties and is therefore not the subject of this judgment. *Sadique* made clear that s 91A of the LPA, introduced by the Legal

Profession (Amendment) Act 2008 (Act 19 of 2008), consolidated the judicial review process with any hearing on merit into one process: see *Sadique* at [11]. The appellate jurisdiction which existed prior to those amendments (see *Chia Shih Ching James v Law Society of Singapore* [1985-1986] SLR(R) 209 at [8] and *Law Society of Singapore v Disciplinary Committee* [2000] 2 SLR(R) 886 at [51]) remains. Post-amendment, this reading is reinforced by the near-identical wording of s 97(4) and s 98(8) of the LPA. The Court of Three Judges has appellate jurisdiction and is able to "go into the merits of the findings and determination of the [DT] on the basis of the evidence led": *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [34].

Summary of the parties' positions on review

27 The AG's case is premised on the ground of illegality, in that the DT failed in its legal duty to hear and investigate the Complaint, in particular, the Mental Capacity Issue, which the AG defined as follows:

> (a) whether [the respondent] should have had concerns about [Mdm A's] lack of mental capacity when (i) [the respondent]/WP first met her and took instructions, (ii) when she engaged [the respondent]/WP as counsel, (iii) when WP's invoices were issued to and paid by [Mdm A]; and
>
> (b) what steps (if any) should have been and/or were taken to determine whether [Mdm A] was in a position to agree to (i) the terms of engagement of [the respondent]/WP, (ii) the type and extent of work undertaken, staffing on the matter, and fees charged, by WP, and (iii) the payment of the invoices rendered by WP[.]

The AG asks that the Determination be set aside and a new DT be appointed to hear and investigate the matter afresh.

28 The Law Society associates itself in the main with the AG's submissions, although the Law Society relies on all three heads of judicial review (*ie*, illegality, irrationality and procedural impropriety) to set aside the Determination. Further, the Law Society is also content for the matter to be remitted back to the same DT if the Determination is to be set aside.

29 The respondent, on the other hand, contends that the Complaint did not include the Mental Capacity Issue, and was only concerned with whether there was overcharging.[22] In any event, the charges that were eventually proceeded against the respondent did not include the Mental Capacity Issue, and the DT was only required to hear and investigate the charges, and not the Complaint. The DT therefore fulfilled its duty to hear and investigate the charges that were placed before it. The Law Society had unilaterally withdrew the charges pertaining to Mdm A's mental capacity. Consequently, none of the grounds of judicial review are made out. In the event that any grounds are made out, the respondent submits that it would be "unjust" to subject the respondent to another investigation, whether before the same DT or another DT.[23] In the alternative, if the matter is to be reheard, the respondent's preference is to return to the same DT, in order to save costs.[24]

30 The Law Society's application is brought outside the stipulated timeline and it seeks leave for the court to grant an extension of time. The AG's primary

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22 Respondent's submissions, para 4.

23 Respondent's submissions, paras 95–100.

24 Oral submissions, 11 November 2019.

position is that his application was filed within time, but the AG too seeks an extension of time if his application was filed out of time. The respondent resists any application for extension of time, primarily on the contention that the court has no jurisdiction to hear a review application that is filed out of time as s 91A of the LPA is a strict time-limited ouster clause.

Issues

31 The various matters may be analysed by reference to the following issues:

(a) Whether the applications are out of time, and if so, whether extensions of time should be granted to the AG and/or the Law Society. I deal with this issue last, because of the relevance of the merits of the applications to the question of extension of time.

(b) Whether the Complaint is confined to the issue of overcharging, without any reference to issues pertaining to Mdm A's mental capacity (for convenience, I refer to these issues as the "mental capacity issues").

(c) Whether the proceeded charges framed by the Law Society addressed the mental capacity issues; and if not, whether these charges are defective.

(d) If so, whether the Determination should be set aside.

(e) And if so, what further orders are required.

Whether the Complaint includes mental capacity issues

32 The first issue is whether the Complaint is limited to overcharging or includes mental capacity issues, whether as defined by the AG *ie*, the Mental

Capacity Issue (see [27] above) or otherwise. The respondent submits that the AG has not discharged his burden of showing that the Court of Appeal's concerns in the Complaint included issues concerning Mdm A's mental capacity.

Text of the Complaint

33 In my view, the text of the Complaint, read in context with the correspondence leading to the Complaint which was enclosed, shows the Court of Appeal's concern about issues pertaining to Mdm A's mental capacity. Paragraphs 7 and 8 of the Complaint reads:[25]

> 7. [The billed] amounts are objectively very large sums for what may have been in essence the same issue being revisited, albeit before different levels of court. *Other issues raised by the Deputies in their response to the Letter from the Registry dated 26 April 2017 expressing concern with the sums billed in BC 164 (see [15] below) set this concern in context.*
>
> 8. It has become clear from the *responses of both WP and TKQP that a determination of the propriety of the fees charged by WP will entail an investigation into and consideration of numerous factual matters. That determination is not one which the Court of Appeal is well-placed to undertake. A Disciplinary Tribunal will be able to investigate the matter fully. …*
>
> [emphasis added]

34 Paragraph 7 shows that the Court of Appeal's concern over the sums charged by WP had to be seen in the context of the responses by both WP and the deputies to the Registry's letter dated 26 April 2017.[26] Issues of mental capacity were covered in detail in these responses: see [46]–[47] below.

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25 David Chong's affidavit, p 32.

26 David Chong's affidavit, p 499.

35 The Complaint stated at para 8 that the propriety of WP's fees would entail an investigation into and consideration of "numerous factual matters". Some of these factual matters were referred to at para 15 of the Complaint:

> 15. On 26 April 2017, the Coram informed the parties that both the sums that were billed originally and the sums that had since been agreed between the parties were objectively very high, and that this was a matter of concern because [Mdm A] had been found to lack capacity at the material time. It then invited WP to furnish information as to *(a) the circumstances in which WP first met and took instructions from [Mdm A]; (b) the basis on which fees had been charged by WP; (c) the steps taken by WP to determine that [Mdm A] had been in a position to agree to the engagement of WP; and (d) the discount that WP had agreed to following negotiations.* It also invited TKQP to confirm if the Deputies had looked into these matters in reaching the agreement as to the proposed settlement of the matter of costs.
>
> 16. The Deputies took issue with WP's positions on various matters, and *expressed concern as to the circumstances in which WP was instructed and the propriety of the fees that have been charged by WP.*
>
> [emphasis added]

36 Therefore, it is clear from the Complaint that the Law Society was expected to frame charges which would allow for investigation into the concerns raised in the correspondence between the Court of Appeal, WP and the deputies. When one peruses the correspondence leading to the Complaint, it puts it beyond doubt that the scope of the Complaint included mental capacity issues.

Correspondence leading to the Complaint

37 I begin with the Order of Court dated 24 November 2015, where the Court of Appeal directed the deputies to investigate into the quantum and

validity of the fees incurred by Mdm A to WP.[27] Specifically, the deputies were directed to report to the Court of Appeal on:

> (i) The full circumstances in which the engagement was entered into;
>
> (ii) What steps were taken to ensure that [Mdm A] was reasonably able and competent to instruct [WP];
>
> (iii) The quantum of fees charged by [WP];
>
> (iv) What, if any, steps ought to be taken to tax or otherwise ascertain the reasonableness of such fees and to recover any excess payments that have already been made.

38 Thereafter, in a letter dated 6 May 2016, the Court of Appeal clarified that its directions referred to at [37] were so as to "ascertain the *quantum* and *validity* of the fees incurred by [Mdm A] to [WP], which will in turn determine the quantum of [Mdm A's] costs which [the first and second respondents] are liable for" [emphasis added].[28]

39 On 12 May 2016, the Court of Appeal requested for a status update of the deputies' inquiry into the "*steps taken to ensure that [Mdm A] was capable of instructing [WP]*, and the reasonableness of the fees charged by [WP]" [emphasis added].[29]

40 At this stage, the Court of Appeal was yet to be informed of the quantum of fees charged by WP. The fact that the Court of Appeal was concerned about the "full circumstances in which the engagement was entered into" and "[w]hat steps were taken to ensure that [Mdm A] was reasonably able and competent to

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27 David Chong's affidavit, p 113.

28 David Chong's affidavit, p 448.

29 David Chong's affidavit, p 450.

instruct [WP]" shows that the Court of Appeal could not have been concerned about the reasonableness of the fees charged *per se*.

41 The deputies, through their counsel, Tan Kok Quan Partnership ("TKQP"), replied to the Court of Appeal by way of two letters dated 13 May 2016 and 23 May 2016 ("the 23 May 2016 Letter").[30] In the 23 May 2016 Letter, the deputies provided an update on the inquiry of "whether [Mdm A] was capable of instructing [WP]".[31] The deputies noted that there were some areas of concern arising from a perusal of the medical transcripts which recorded Mdm A's medical assessments. The "fundamental question", as framed by the deputies, was "whether it is sufficient for solicitors to rely on medical reports or whether solicitors should be put on enquiry and seek confirmation from doctors after highlighting the specific areas which may give rise to concern".[32] Specifically, the following issues were highlighted by the deputies:

(a) First, whether WP provided the doctors with the relevant facts such that they would have appreciated the contradictions made by Mdm A to the doctors.[33]

(b) Second, whether WP should have clarified misconceptions on the part of the doctors regarding deputyship.[34]

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30 David Chong's affidavit, p 451.

31 David Chong's affidavit, p 451 para 2.

32 David Chong's affidavit, p 451 para 4.

33 David Chong's affidavit, pp 452–453.

34 David Chong's affidavit, pp 453–455.

(c) Third, whether WP should have been put on enquiry based on certain statements made by Mdm A to her doctors which expressed unfamiliarity towards WP.[35]

42 Following the 23 May 2016 Letter, the Court of Appeal, on 30 May 2016, directed the deputies to stop work on the investigation into the quantum and validity of the fees incurred by Mdm A to WP.[36] The Court of Appeal directed that WP was to tax its bill to Mdm A and the court would "review the matter after taxation".[37]

43 On 21 October 2016, WP filed Bill of Costs No 164 of 2016 ("BC 164/2016") for work done through the retainer, claiming $7,562,023.77 for Section 1 costs (before GST) and $1,324,716.69 for disbursements (inclusive of GST).[38]

44 On 7 April 2017, the deputies updated the Court of Appeal that the parties had reached an agreement on BC 164/2016, such that the Section 1 costs were lowered to $5,104,366.04 (before GST) and $1,297,556.75 for disbursements (inclusive of GST).[39]

45 Thereafter, the Registry wrote to the parties on 26 April 2017, and the relevant portions read as follows:[40]

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35 David Chong's affidavit, p 455.

36 David Chong's affidavit, p 462.

37 David Chong's affidavit, p 462.

38 ROP Vol 1B, p 3063.

39 David Chong's affidavit, p 485.

40 David Chong's affidavit, p 487.

…

The Court has taken note of the sums that were billed originally and also the sums that have since been agreed to between the parties. Both these amounts appear to the Court to be objectively very high and this is a matter of concern to the Court because the Court has found that the client lacked capacity at the material time. Before the Court determines what, if any, further directions or actions the Court intends to give or take, the Court invites:

(a) [WP] to furnish the Court with:

(i) *information as to when and in what circumstances WP first met and took instructions from the client including an explanation of who accompanied her at that time and including any attendance notes that were kept at that time*;

(ii) the engagement letter, if any;

(iii) copies of the original bills;

(iv) details of the basis on which the fees were charged including the time spent by each solicitor, the nature of the work done by each solicitor, the level of seniority of each solicitor and the applicable rates and corresponding details of the disbursements;

(v) *an explanation of what if any steps were taken to satisfy themselves that the client was in a position to agree to these matters having regard to the fact that the central issue in the case was her alleged incapacity*;

(vi) an explanation for the discount that they have already agreed to or may be willing to further extend.

…

[emphasis added]

46 The deputies replied stating that the areas of concern which they had identified in the 23 May 2016 Letter remained unanswered, which went directly towards the issue of whether Mdm A was capable of instructing WP.[41]

47 On 24 May 2017, WP provided its response to the Registry's letter dated 26 April 2017. WP submitted that in determining whether Mdm A had the requisite capacity, including to instruct lawyers, they considered that they could reasonably rely on "[h]er instructions, which were given when she was alone with [them], and how consistent and coherent she appeared to [them]" and "[t]he clear medical opinions from 5 specialists who examined her and concluded that she had mental capacity".[42]

48 Thereafter, the Registry informed the parties on 6 July 2017 that "[t]he Court of Appeal [had] considered the enclosed submissions … based on the material placed before the Court of Appeal, the Court [was] of the view that the matter should be referred to the Law Society for investigation by a Disciplinary Tribunal".[43] Accordingly, the Court of Appeal was of the view that the areas of concern highlighted by the deputies, and WP's responses, ought to be investigated by a DT. These areas of concern related to mental capacity issues.

49 I am therefore satisfied that the Complaint includes mental capacity issues, and this is evident from the text of the Complaint read in context with the correspondence leading to the Complaint. Specifically, the mental capacity issues concern the adequacy of the steps taken by the respondent and WP to

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41 David Chong's affidavit, p 502.

42 David Chong's affidavit, p 1358 para 15.

43 David Chong's affidavit, p 519.

ensure that Mdm A was capable of instructing WP and was capable of agreeing to the fees charged by WP: see [45] above.

Whether the charges addressed the mental capacity issues within the Complaint

50 It is clear from a reading of the 4th and 5th charges that they do not engage the mental capacity issues, and are only concerned with overcharging *per se*. Since the mental capacity issues were not the subject matter of the 4th and 5th charges, it follows that the DT would not have heard and investigated these issues.

51 The respondent, however, contends that the DT was at all times alive to and did investigate the overcharging charges against the factual matrix of Mdm A's mental capacity issues. In this regard, the respondent pointed to various extracts in the agreed statement of facts, the respondent's opening statement, and the transcripts to support this contention. It is not necessary for me to address this issue at length, as it is apparent from the face of the Determination that mental capacity issues were not investigated at all. This stemmed in part from the DT's determination that mental capacity issues were not within the scope of the Complaint, and the Law Society's decision to withdraw the charges pertaining to Mdm A's mental capacity and to proceed on the basis that the mental capacity issues were not relevant for the 4th and 5th charges. Mr Lim, who appeared for the Law Society in the proceedings before the DT, candidly accepted that the Law Society's case was run *on the basis that evidence of mental capacity was not relevant to the proceedings before the DT*. It follows that the mental capacity issues would not have been investigated by the DT, whether in the context of the overcharging charges or otherwise. This is reflected in the Determination itself, where the DT expressly stated that "[t]he

Coram was concerned by the sums claimed and the terms which were agreed to." There was no mention in this regard to the Court of Appeal's concern about mental capacity issues: the Determination at [8]. The DT also expressly mentioned that the 1st to 3rd charges, which touched on Mdm A's mental capacity, "did not relate to the matters of concern which the Coram had directed to be investigated into": the Determination at [13].

52 The respondent further contended that the DT did not have to deal with mental capacity issues as the Law Society had not discharged its preliminary burden of showing that there was overcharging. The mental capacity issues were "irrelevant" if "the basic issue of overcharging has not been proved". This argument misses the point that the Court of Appeal's concern was as to whether Mdm A had the capacity to instruct the respondent and WP and agree to the fees charged. Whether or not there was overcharging had to be seen against those factual determinations. Indeed, r 17(8) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("PCR 2015") provides that there is overcharging if a reasonable legal practitioner cannot in good faith charge the fee, disbursements or amount, taking into account, *inter alia,* the requirements of the client concerned and any other relevant circumstances. The analysis of whether there is overcharging must therefore take into account the mental capacity issues. These are not two distinct issues.

Whether the Determination should be set aside

Illegality

53 The AG relies only on the ground of illegality, as his contention is that the DT's failure to consider the Mental Capacity Issues meant that it had not discharged its statutory duty to hear and investigate the Complaint.[44]

54 I accept the AG's contention, citing *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at para 5–001, that a failure to fulfil a legal duty would fall under the broad head of illegality. In considering the ground of illegality, I am guided by the principles in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 ("*Tan Seet Eng*"). Citing *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 ("*GCHQ*"), the Court of Appeal in *Tan Seet Eng* stated that illegality, as a ground of judicial review, "meant the decision-maker had to correctly understand the law regulating his decision-making power and give effect to it". Illegality "serves the purpose of examining whether the decision-maker has exercised his discretion within the scope of his authority and the inquiry is into whether he has exercised his discretion in good faith according to the statutory purpose for which the power was granted, and whether he has taken into account irrelevant considerations or failed to take account of relevant considerations": *Tan Seet Eng* at [79]–[80].

55 *The King v The Board of Education* [1910] 2 KB 165 ("*Rice (Court of Appeal)*") and the decision on appeal, *Board of Education v Rice and others* [1911] AC 179 ("*Rice (House of Lords)*") explains such an approach to duties

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44 AG's submissions, para 35.

imposed by statute. A useful summary of *Rice (Court of Appeal)* is found in *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 1 SLR(R) 553 at [21]:

> … In the district of Swansea in England there were two categories of schools: "provided" and "non-provided" schools. The local educational authority gave an increase to the salaries paid to teachers in "provided" schools but did not do likewise for the salaries of teachers in "non-provided" schools. A complaint was made by the Oxford Street school, which was a non-provided school, to the Board of Education that the local education authority was acting in breach of the Education Act 1902 by paying different salaries to teachers in provided and non-provided schools. The Board of Education appointed a barrister, Mr J A Hamilton KC, to hold an inquiry into the matter. After hearing the evidence, Mr Hamilton reported that although Oxford Street school had been maintained and kept efficient, this had been done by the funds provided by the managers of the school and that the school could not be kept efficient unless higher salaries than those which the local authority fixed were paid. The Board of Education decided that there had been no failure on the part of the local education authority to fulfil its statutory duty to maintain the school and that it had not been shown that the money provided by the local education authority was inadequate for the purpose of maintaining and keeping efficient the school in question. The complainant applied for a writ of *certiorari* to quash the Board of Education's decision and for a *mandamus*. The Divisional Court held that the local education authority had no power to discriminate between provided and non-provided schools in the matter of the salaries paid to the teachers and they allowed the application on the ground that the ***board had not decided the true question submitted to them***. The board appealed and the appeal was dismissed. The Court of Appeal was of the opinion that the question placed before the board was whether there were any circumstances existing in the school managed by the complainants such as to justify a different treatment from that accorded to provided schools of the same character. ***The board did not address this question at all and there was no indication of the board's view on this matter.*** The Court of Appeal thus upheld the first instance decision to grant the application, ***holding that the board had acted in a manner that amounted to a non-exercise of the jurisdiction entrusted to it***. Cozens-Hardy MR said at 174–175:
>
> > The Divisional Court held that a writ of certiorari ought to issue on the ground that the *question submitted to the Board had not been answered*. On this simple ground I am clearly of opinion that the decision of the Divisional

> Court was correct. The question was formulated in paras 3 and 4 of the letter of 3 February 1908. It was not whether the Oxford Street school was efficient, in the sense of being able to earn a Government grant, but whether there were any circumstances existing in the case of the Oxford Street school such as to justify a different treatment from that accorded to the 'provided' schools of the same character. *There is nothing in the Board's decision to indicate that the right to discriminate, about which the whole battle raged, had ever been challenged.* …
>
> [emphasis added in italics and bold italics]

56 Accordingly, the English Court of Appeal set aside the Board of Education's ("the Board") decision on the ground that there was a "non-exercise of the jurisdiction entrusted to it" as the Board had not answered the question that was referred to it. The House of Lords agreed with the Court of Appeal's decision. The language used by the House of Lords to set aside the Board's determination was that the Board had failed to fulfil its duty to answer the true question that was referred to it (*Rice (House of Lords)* at 181). The House of Lords reasoned as follows at 182:

> *Comparatively recent statutes* have extended, if they have not originated, the practice of imposing upon departments or officers of State the *duty of deciding or determining questions of various kinds*. … if the Court is satisfied either that the Board have not acted judicially in the way I have described, *or have not determined the question which they are required by the Act to determine*, then there is a remedy by mandamus and certiorari. [emphasis added]

57 In substance, the point that both the Court of Appeal and the House of Lords were making was that the Board had not determined the question which they were required to determine statutorily.

58 I come, then, to the question of the duties imposed by the LPA. The question is whether the DT had indeed failed to fulfil its legal duty and the following sub-issues arise:

(a) Whether the DT's duty was to investigate the Complaint or the charges?

(b) If the DT's duty was to investigate the Complaint, did it fail in that duty?

Whether the DT's duty was to hear and investigate the Complaint or the charges

59 It is not in dispute that the LPA stipulates that a DT is required to hear and investigate the matter referred to it: s 93(1) of the LPA. The dispute centres on what constitutes the "matter" which must be heard and investigated by the DT: whether this is the Complaint or the charges referred to it. Both the AG and the Law Society take the position that the DT's duty is to investigate the Complaint, while the respondent's position is that the DT only has a duty to investigate the charges that are brought by the Law Society.

(1) Seah Pong Tshai

60 The AG relies on *Re Seah Pong Tshai* [1991] 2 SLR(R) 744 ("*Seah Pong Tshai*") to support his contention that the DT's duty was to investigate the Complaint. *Seah Pong Tshai* concerned show cause proceedings before the Court of Three Judges. There, the disciplinary committee (the former name of the DT) held that there was sufficient gravity for disciplinary action before the Court of Three Judges. The court held that "the determination was not sustainable as there was a fundamental error in the proceedings before the Disciplinary Committee which … vitiated the entire proceedings". The order made against the respondent to show cause was accordingly discharged: *Seah Pong Tshai* at [1].

61 In *Seah Pong Tshai*, the complaint made against the respondent was that he was paid a sum of $1,000 by the complainant, but did not perform any service that justified that sum and refused to refund it to the complainant: *Seah Pong Tshai* at [7]. However, the charge preferred against the respondent was as follows:

> You, Seah Pong Tshai, an advocate and solicitor, are charged that on or about 17 December 1987, having received the sum of $1,000 in cash as part payment of costs from one Ang Beng Kheng, *falsely denied the receipt of the said sum of $1,000* and you are thereby guilty of grossly improper conduct in the discharge of your professional duty s 80(2)(*b*) of the Legal Profession Act (Cap 161). [emphasis in original]

62 The court held that the charge framed by the Law Society was different from the complaint both in form and substance. As the court explained, "[t]he complaint was not that the respondent had falsely denied receipt of the sum of $1,000 but that the respondent had overcharged him and had refused to refund the amount." That was the "gravamen" of the complaint. Accordingly, "[t]he Law Society was in error in framing such a charge and bringing it before the Disciplinary Committee for hearing and investigation, as the Disciplinary Committee had no jurisdiction over such a matter and to make a determination thereon": *Seah Pong Tshai* at [9].

63 The court further explained that under the LPA, the disciplinary committee was appointed by the Chief Justice to "hear and investigate the matter". Critically, the court noted that the "matter" refers to the "application or complaint that has been received by the Law Society, that has been inquired into and reported upon by the Inquiry Committee and on which the Council has made a determination": *Seah Pong Tshai* at [10].

64 In my view, *Seah Pong Tshai* makes clear that the DT has a duty to hear and investigate the complaint. In the case of a complaint made by a lay complainant (*ie*, by way of s 85(1) of the LPA), the "complaint" refers to that received by the Law Society, inquired into and reported upon by the Inquiry Committee and on which the Council has made a determination: *Seah Pong Tshai* at [10]. In other words, the complaint is not the original complaint as such, but the complaint as "filtered" by the Inquiry Committee and Council. In this regard, there might be matters in the complaint which do not disclose a *prima facie* case of ethical breach or other misconduct, and therefore not warrant formal investigation and consideration by a DT: *Loh Der Ming Andrew v Law Society of Singapore* [2018] 3 SLR 837 at [69]. In contrast, for a complaint made by a judicial office holder, the Attorney-General, the Director of Legal Services or the Singapore Institute of Legal Education, pursuant to s 85(3)(*b*) of the LPA, that complaint is referred *directly* to a DT without the need for the complaint to be inquired by the Inquiry Committee. Since the LPA does not provide a filter mechanism, implicit in the legislative framework is an expectation that the entire complaint is of sufficient gravity to warrant a formal investigation and consideration by the DT, and ought to be placed before the DT.

65 At the same time, it is not inconsistent to suggest that the DT has a duty to investigate *both* the complaint and the charges, as the charges must encapsulate the gravamen of the complaint. As the AG rightly noted in reply to the respondent, the charges perform a sifting function in relation to complaints by lay complainants. Charges also give shape to the disciplinary proceedings, as the DT does not sit *in vacuo* but convicts or acquits the respondent on the basis of the charges that are before it.

66 In my judgment, the following propositions emerge from *Seah Pong Tshai* and the case law which I discuss in turn below:

(a) First, the "matter" that has to be heard and investigated by the DT is the complaint, and in a typical case, it is assumed that the matter would be the complaint as properly framed by the Law Society in the charge. Put another way, it is assumed that the substance of the complaint will be reflected in the charge, and that constitutes the matter to be heard and investigated. Where the Law Society has erred in framing the charge, then the DT's determination is liable to be set aside, as it was in *Seah Pong Tshai*.

(b) Second, the DT has a duty to hear and investigate the complaint. The DT also has a duty to hear and investigate the charges. The two duties are not mutually exclusive and in fact are complementary to one another, in that the expectation must be that the charges reflect the gravamen of the complaint and fall within the scope of the complaint.

67 I find the cases relied on by the respondent to suggest that the DT does not have a duty to investigate the complaint to be consonant instead with the principles I have mentioned above. I turn to these cases to explain.

(2) Manjit Singh

68 In *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 4 SLR 483 ("*Manjit Singh*") at [5], raised by the respondent, the Court of Appeal stated as follows:

> … Second, the disciplinary process cannot be procedurally and substantively contingent on the subsistence of a complaint. Indeed, it is settled law that a DT, once seised of jurisdiction, will be unaffected by the withdrawal of the *initial complaint*. The basic rationale for this is that the DT has been appointed to *investigate the charges formulated by the Law Society and not the complaints which occasioned those charges* (see *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308, *The Law Society of Singapore v Rajagopal Shan* [1994]

> SGDSC 2 and *Re Shan Rajagopal* [1994] 2 SLR(R) 60). By analogy with criminal prosecutions, the investigation and hearing of disciplinary charges is predicated not on the validity of the complainant's further thoughts in relation to his complaint, but on the propriety of the subject's conduct. We would also underscore that the disciplinary process cannot be held hostage to the whims of complainants, who may, in the nature of things, have a multitude of personal reasons for choosing to submit and then withdraw a complaint. The fact that a complaint has been withdrawn does not necessarily mean that there was no truth to the complaint. [emphasis added]

69 When read in its proper context, the Court of Appeal in *Manjit Singh* was not suggesting that the DT has no duty to investigate the complaint. Rather, the context of the passage above was that it concerned a lay complainant withdrawing her complaint. The Court of Appeal was simply pointing out that the mere withdrawal of the "initial complaint" would not affect the jurisdiction of the DT, as the *substance* of the complaint would continue to subsist in the charges formulated by the Law Society.

(3) Shan Rajagopal

70 I turn to the case of *Re Shan Rajagopal* [1994] 2 SLR(R) 60 ("*Shan Rajagopal*"). The respondent points out that in *Shan Rajagopal*, a case which was decided close to three years after *Seah Pong Tshai*, a similarly constituted coram held that the "matter … refers to the charges formulated by the Law Society and not the original complaint": *Shan Rajagopal* at [15]. On one reading, one might say that *Seah Pong Tshai* and *Shan Rajagopal* are inconsistent insofar as the former suggests that the matter which the DT is required to hear and investigate refers to the complaint while the latter suggests that the matter refers to the charges.

71 In my view, however, both *Seah Pong Tshai* and *Shan Rajagopal* ought to be read consistently and it could not be the intent of *Shan Rajagopal* to alter

the principles in *Seah Pong Tshai*. Given that *Shan Rajagopal* was another case which concerned the withdrawal of a complaint, the Court of Three Judges was simply making the point, as did the Court of Appeal in *Manjit Singh*, that the substance of the *complaint* continues to subsist in the charges formulated by the Law Society, which the DT is required to hear and investigate. The withdrawal of the "original complaint" does not mean that the DT has no jurisdiction to make a determination. The matter refers to the substance of the complaint as reflected in the charge, and the DT still has a duty to hear and investigate the complaint.

(4) Ravi Madasamy

72 In *The Law Society of Singapore v Ravi Madasamy* [2006] SGDSC 8 ("*Ravi Madasamy (DT)"*), the respondent was charged for failing to act with due courtesy to a District Judge by turning his back to the District Judge while being addressed, remaining seated while being addressed, speaking in loud tones to the Prosecuting Officer whilst mention cases were being carried out and responding to the District Judge in an unbecoming manner. Initially, there was a fifth aspect to the charge, which was an allegation that the respondent had threatened the District Judge to report her to the Ministry of Law and the Legal Service Commission.

73 It transpired that there was an agreement between the Law Society and the respondent for the respondent to withdraw his defence, admit to the facts in the amended statement of case and the amended charge, provided that the fifth aspect to the charge was deleted from the charge. The disciplinary committee was of the view that it was placed in a "rather awkward position" as the respondent admitted that he had said to the District Judge that he would report her. Yet, the disciplinary committee was unable to deal with that "most serious

misconduct" as it had been deleted from the proceeded charge: *Ravi Madasamy (DT)* at [21]. The respondent in the present case relies on the following paragraph from the disciplinary committee's determination at [22] to assert that the DT only has a duty to hear and investigate the charge and not the complaint:

> The Law Society is *absolutely correct that we cannot go beyond the charge preferred by them against the Respondent*. In fact, Mr Sreenivasan, learned counsel for the Respondent, took great pains to impress upon us our limitations … But that did not help us understand the Law Society's position. It would do well for the Law Society to remind itself that every single disciplinary case they undertake must "showcase" why the legal profession can be entitled to regulate themselves. Sadly, the way these proceedings were handled is not a good example. Something has gone quite wrong. [emphasis added]

74 The respondent argues that it is telling that the disciplinary committee in *Ravi Madasamy (DT)* did not seek to direct the Law Society to amend its charge, as it would have if its duty was to hear and investigate the complaint. Further, when the case went before the Court of Three Judges (see *Law Society of Singapore v Ravi Madasamy* [2007] 2 SLR(R) 300 ("*Ravi Madasamy*"), the court stated that the disciplinary committee was "entitled to express its misgivings": *Ravi Madasamy* at [51]. This suggests that the court was of the same view as the disciplinary committee, in that it was for the Law Society to frame the charges and that the committee did not have a duty to direct the Law Society to reframe the charges based on the committee's view of the complaint.

75 I accept the respondent's contention that under the principle of self-regulation, it is for the Law Society to frame the charges based on its view of the complaint. It is important to note, however, that *Ravi Madasamy* also makes clear at [47] that the Law Society's "exercise of disciplinary powers", including the "prosecution of disciplinary charges", is open to judicial review.

76 In my view, what *Ravi Madasamy* stands for is that the Law Society itself has a duty to frame charges that reflect the complaint, and where this is not done, the Law Society's power is subject to judicial review. This is clear from the following passage in *Ravi Madasamy* at [47]:

> On the first issue, the DC accepted that, on the principle of self-regulation, the Law Society had the power to amend the original charge subject to leave being obtained from the DC. That was why the DC allowed the amendments. We agree with the DC that the Law Society was so entitled, but not to the extent that counsel has claimed, *viz*, in the prosecution of disciplinary charges, the Law Society's powers are no different from those of the Public Prosecutor in relation to criminal charges. *The two powers are not equiparate.* The power of the Law Society to "prosecute" advocates and solicitors for disciplinary offences is a statutory power derived from the Act, whereas, in contrast, the prosecutorial power of the Public Prosecutor, in so far as he is also the Attorney-General, is constitutionally based: see s 336(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) read with Art 35(8) of the Constitution of the Republic of Singapore (1999 Rev Ed). The fundamental difference is vast: the exercise of disciplinary *powers by the Law Society is subject to judicial review whilst the exercise of his prosecutorial powers by the Attorney-General* qua *Public Prosecutor is not subject to judicial review.* [emphasis added]

77 Pursuant to s 91A of the LPA, that review may be dealt with in the context of a s 97 application. In *Ravi Madasamy*, there was no application made to review the Law Society's decision not to proceed with the fifth allegation in the original charge. But the passage referred in the preceding paragraph suggests that if the Law Society had proceeded with a charge that took away the gravamen of the complaint, or was outside the scope of the complaint, then that exercise of its power could be judicially reviewed.

78 In summary, the cases relied on by the respondent do not in any way show that the DT has no duty to hear and investigate the complaint. Rather, the Law Society has a concomitant duty to frame the charges appropriately, and this

is a duty that is consistent with the DT's duty to hear and investigate the complaint. Both duties may be the subject of review before me.

Exercise of statutory roles

79 In my view, there are two separate issues in relation to the exercise of statutory duties at hand, and either suffices to set aside the Determination.

(a) First, the charges brought by the Law Society did not reflect the gravamen of the Complaint. The mental capacity charges were withdrawn and in any event did not reflect accurately the mental capacity issues the Court of Appeal were concerned with. Further, the charges were also based on the wrong PCR and were thus also wholly outside the scope of the Complaint. A failure to fulfil a legal duty amounts to illegality. Since the charges were erroneous, it must follow that the Determination was also erroneous and has to be set aside.

(b) Second, because the charges were defective and did not reflect the substance of the Complaint, the DT lacked jurisdiction in hearing and investigating the 4th and 5th charges and making a determination thereon. In the present case, a second aspect of the DT's misapprehension of its jurisdiction was that it had made an erroneous determination that mental capacity issues were not within the scope of the Complaint.

(1) The defective charges

THE ROLE OF THE CHARGES

80 I first consider the Law Society's role in the preferment of the charges in disciplinary proceedings generally. Because of the principle of self-

regulation, it is for the Law Society, and not the DT, to determine what charges should be brought against the respondent: *Ravi Madasamy* at [19].

81 This is supported by r 3(1) of the Legal Profession (Disciplinary Tribunal) Rules (Cap 161, R 2, 2010 Rev Ed) ("DT Rules"), which states as follows:

> **Commencement of Disciplinary Tribunal proceedings by Society**
>
> **3.**—(1) Where the Council applies to the Chief Justice under section 89(1) to appoint a Disciplinary Tribunal to hear and investigate a matter against a regulated legal practitioner, the Society shall, within 2 working days after the date the Council makes the application —
>
> **…**
>
> (*b*) provide the Secretariat with the following information:
>
> …
>
> (ix) the charge or charges against the regulated legal practitioner;

82 Section 89(1) of the LPA, with which r 3(1) is concerned, applies where Council has determined under s 87 of the LPA that there should be a formal investigation. While there is no express provision in respect of a referral by a judicial office holder to a DT, such a referral is made pursuant to s 85(3)(*b*), which mandates that Council must apply to the Chief Justice to appoint a DT. The same responsibility to frame charges must therefore exist as part of the process of application to the Chief Justice to appoint a DT. I was informed by the Law Society that in practice, the procedure is the same as that when the DT is appointed pursuant to s 89(1) of the LPA.[45] That is to say, Council would

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45 Minute sheet 041119, p 6.

apply to the Chief Justice to appoint a DT, and within two working days, provide the charge or charges to the secretariat which provides administrative support to the DT. Neither the AG nor the Law Society contend that the Law Society's responsibility over the charges would differ depending on whether the complainant was a lay complainant (where s 89(1) of the LPA would apply) or in the case where the complainant was a judicial office holder (where s 85(3) of the LPA would apply).

THE WITHDRAWN CHARGES

83 It is convenient at this juncture to briefly mention that, the AG took the view, with which I agree, that *even if* the 1st to 3rd charges were *not* withdrawn by the Law Society, they would not have in any event fully encompassed the mental capacity issues in the Complaint. In other words, the charges preferred by the Law Society against the respondent were defective from the outset, as they did not fully capture the gravamen of the Complaint. The 1st charge, withdrawn on 16 July 2018, focused on Mdm A's mental capacity to litigate. The AG pointed out that the Complaint related to her *capacity to instruct the respondent and WP and to agree to the fees charged*. The 2nd charge, withdrawn on 25 April 2018, was concerned with a breach of r 35 of PCR 2010. Rule 35 stipulates certain information that a solicitor shall inform his client, such as the basis for which fees will be charged and the manner in which those fees and disbursements shall be paid. As regards the 3rd charge, withdrawn on 16 July 2018, the rule that was alleged to have been breached was r 40 of PCR 2010, which provides that a solicitor "shall, in appropriate cases, evaluate with a client whether the consequence of a matter justifies the expense or the risk involved". These two rules (*ie*, rr 35 and 40 of PCR 2010) do not engage the mental capacity issues.

84 Returning to the 1st charge, the Law Society's position was that it had "little or no reasonable alternative" but to withdraw the charge relating to Mdm A's mental capacity in the face of the DT's clearly communicated views. This contention ignores the fact that the DT had stated, on more than one occasion, that it was the Law Society's prerogative to frame the charges:

(a) In the Law Society's letter to the Registrar dated 26 February 2018, it is stated that "the [DT] also explained that it would not interfere with the Law Society's prerogative to frame the Charges or to proceed with the [initial four charges] as stated": see [14].

(b) At the pre-hearing conference on 20 April 2018, the DT made clear that it was the role of the Law Society to prefer the charges and that it was "not obliged" to agree with the DT as to the scope of the Complaint: see [12].

(c) At the pre-hearing conference on 22 May 2018, the DT recognised that pursuant to r 18 of the DT Rules, the DT can permit amendments to the charges but would not initiate such amendments, and it is for the Law Society to frame the charges as it sees fit: see [16].

85 The point made by the DT, referred to at [84(c)] above, merits closer attention. Rule 18 of the DT Rules states as follows:

> **Amendments of or additions to statement of case**
>
> **18.**—(1) If it appears to the Disciplinary Tribunal that the allegations in a statement of the case should be amended or added to, the Disciplinary Tribunal may permit the amendment of or addition to the statement of the case.
>
> (2) If the amendment or addition is allowed at the Disciplinary Tribunal hearing, and the amendment or addition is such as to take any party by surprise or prejudice the conduct of his case, the Disciplinary Tribunal shall grant an

> adjournment of the Disciplinary Tribunal hearing as the Disciplinary Tribunal thinks fit.
>
> (3) If the Disciplinary Tribunal permits the amendment of or addition to the statement of the case, the Disciplinary Tribunal shall also permit the respondent to amend his defence.

86 As the DT rightly recognised, the statement of case will also "[specify] the charges and allegations that the regulated legal practitioner is required to answer": see r 3(2)(*b*) of the DT Rules. The DT's view was that it could permit amendments to the charges but would not initiate such amendments. This is consonant with the Law Society's role in r 3(1) to frame the charges and pursue their prosecution as part of its responsibility in self-regulation. In this particular case, the DT had refused leave to amend the charges; however the proposed amendments to the charges merely cut down various mental capacity elements. It was the withdrawal of the charges altogether which took the mental capacity issues out of consideration.

THE 4TH AND 5TH CHARGES

87 I come then to the charges the Law Society proceeded with. It is appropriate at this juncture to deal with whether the 4th and 5th charges were correctly brought under the appropriate version of the PCR. Although the initial charges were based on the PCR 2010, this was later amended to the PCR 2015 by the Law Society. It transpired that the DT had taken the view that the PCR 2015 was applicable. In agreeing to amend the charge, it appears that the Law Society agreed with the DT's view. Before me, counsel for the Law Society also maintained that the DT was right in maintaining that view, and in that sense, there was a "parting from ways" from the AG and the respondent,[46] both of whom were of the view that the PCR 2010 was applicable.

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46 Minute sheet 041119, p 21.

88 I first briefly summarise the sequence of events leading up to the amendment relating to the applicable PCR. The 4th charge, as originally framed, alleged that the respondent was in breach of r 38 of the PCR 2010, which is the provision on gross overcharging. On 27 February 2018, the DT made the following request to the parties:[47]

> Further to the Pre-Hearing Conference of 19 February 2018 the Disciplinary Tribunal requests counsel to look into the 4th charge where it refers to the $7,562,023.77 and $5,104,366.04 as gross overcharging in breach of Rule 38 [PCR 2010], when the alleged offer to reduce the fees to $5,104,366.04 was made after BC 164 of 2016 was filed on 21 October 2016, and after the said rules were revoked and replaced by the [PCR 2015] on 18 November 2015.

89 The respondent's position was that the PCR 2010 was still applicable notwithstanding that the fee agreement took place after the PCR 2010 was revoked and replaced by the PCR 2015.[48] This is because the substance of the conduct that was to be heard and investigated by the DT occurred *before* the PCR 2015 was in force. The relevant fees and bills were charged and rendered by WP to Mdm A *before* 18 November 2015 (when the PCR 2015 came into effect). The only relevant acts after the PCR 2015 came into effect was that the bills were subject to taxation proceedings and a fee agreement was entered into. However it was still the case that the taxation proceedings and fee agreement were based on fees and bills incurred and rendered before the PCR 2015 was in force.

90 I note that in taking the erroneous view that the PCR 2015 was applicable (see also [31]–[32] of the GD), the DT was acting consistently with

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47 K Gopalan's affidavit, p 54.

48 K Gopalan's affidavit, p 55.

its misplaced view that the Complaint did not concern mental capacity issues. If the DT had appreciated that mental capacity issues were relevant in deciding whether the respondent and WP took sufficient steps to ascertain if Mdm A could instruct them and agree to the fees charged, then it would have been clear that the applicable PCR was the PCR 2010.

91 The Law Society, notwithstanding that it *initially* agreed with the respondent that the PCR 2010 was applicable, proceeded to rely on the PCR 2015 when it added the 5th charge and amended the 4th charge to change the reference from the PCR 2010 to the PCR 2015. These proceeded charges were defective. First, the charges did not encompass the mental capacity issues, and hence the gravamen of the Complaint referred by the Court of Appeal was not put before the DT. Second, the charges were in any event based on the wrong edition of the PCR, taking them outside the premise of the Complaint.

(2) Lack of jurisdiction

92 In the light of the charges proceeded with, *Seah Pong Tshai* is squarely applicable. To recapitulate, in that case, the Court of Three Judges held there that the charge was different from the complaint in both form and substance. The Law Society had erred in the framing of the charge and the DT had "no jurisdiction to hear and investigate anything else other than the complaint": *Seah Pong Tshai* at [14]. In the present case, the 4th and 5th charges (see [21]) are wholly outside the scope of the Complaint. This is because the Court of Appeal was not concerned with overcharging *per se* and whether the sums were reasonable for the nature of proceedings and the amount of work done. The true gravamen of the Complaint was as to whether the respondent and WP had taken sufficient steps to ascertain if Mdm A had the capacity to instruct them and to agree to the fees charged. Those were also the concerns highlighted by the

deputies. Whether or not there was overcharging, a related aspect of the Complaint, then had to be seen in the context of the findings made on these issues. In addition, the charges were also based on the wrong PCR and that took it outside the scope of the Complaint. Accordingly, as in *Seah Pong Tshai*, the charges were different from the Complaint both in form and substance.

Irrationality

93 Given the conclusion that I have reached, I make only brief observations on the submissions regarding irrationality for the sake of completeness. The Court of Appeal in *Tan Seet Eng* explained at [80] that irrationality, as a ground of review, seeks to ascertain the range of legally possible answers and asks if the decision made is one which, though falling within that range, is so absurd that no reasonable decision-maker could have come to it.

94 The AG's position is that irrationality does not arise, because the charges were wholly defective. The Law Society's position is that the 4th and 5th charges were broad enough to cover mental capacity issues. This is because in determining if there is overcharging (*ie*, whether a reasonable legal practitioner can in good faith charge the fee, disbursements or amount: see r 17(8) of PCR 2015), the mental capacity of the client must be taken into account. However, this is not the manner in which the Law Society ran its case before the DT, and Mr Lim, its counsel, confirmed that. It was the responsibility of the Law Society to present all the relevant facts before the DT. If the Law Society had done so, and the DT determined that it would not consider any facts relating to Mdm A's lack of mental capacity, then its Determination would be open to challenge on the ground of irrationality. But Mr Lim, who appeared for the Law Society in the proceedings before the DT, candidly accepted that the Law Society's case was run *on the basis that evidence of mental capacity was not relevant to the*

proceedings before the DT. In the circumstances, the AG's position on irrationality is, in my view, more apposite.

Procedural impropriety

95 The ground of procedural impropriety refers to a failure by the DT to observe basic rules of natural justice or a failure to act with procedural fairness towards the person who will be affected by the decision. It will also cover a failure by a DT to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice: *GCHQ* at 411.

96 The Law Society relies on the same two points for the ground of procedural impropriety, as that put forward for the ground of illegality. The Law Society's position is that "a refusal to hear evidence that might lead to a different decision amounts to procedural impropriety".[49] Specifically, it was highlighted that:

(a) The DT did not consider the fact that Mdm A had been found to lack capacity at the material time in coming to its determination on the propriety of the fees charged;

(b) The DT did not undertake adequate or proper investigation into the facts showing that Mdm A lacked mental capacity at the material time given its determination, during the course of the proceedings, that these matters were not within the scope of the Complaint.

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[49] Minute sheet 041119, p 20.

97 As I have stated in the context of irrationality, it is not tenable to suggest that the DT had refused to hear such evidence when the Law Society did not proffer the evidence. Accordingly, the ground of procedural impropriety is not made out.

Orders that should follow

Whether the Complaint should still be heard and investigated

98 I have earlier found that the issue of overcharging is not one that is distinct from the mental capacity issues: see [52] above. It therefore follows, upon my finding that the DT had not fulfilled its duty to hear and investigate the Complaint, that the Determination must be set aside in full. I do not accept the respondent's contention that the Determination should be allowed to stand as an investigation on the mental capacity issues will not affect the findings on overcharging.

99 A more fundamental question is whether it would be "unjust", as the respondent submits, for the respondent to be subject to another investigation for the same matter.[50] I accept that the respondent was fully prepared to defend himself against the mental capacity issues. Further, the respondent had also proceeded on the right basis that the applicable PCR was the PCR 2010. The situation is an unfortunate one. That the court is only able to review the errors on the part of the Law Society and the DT after disciplinary proceedings have concluded is a function of Parliament's intent in introducing s 91A of the LPA in order to speed up the DT process. The framework relies upon the Law Society and the DT dealing with their respective responsibilities as the statute envisages.

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50 Respondent's submissions, para 8.

Section 97(4)(*b*)(ii) envisions that the matter could be reheard and reinvestigated before the same DT or before a new DT, upon a review by a Judge under a s 97 application. Any fresh hearing is consistent with the legislative framework and the public interest that complaints against lawyers are fully heard and investigated.

Whether a new DT should be appointed

100 I turn then to whether the matter should be remitted to the same DT or to a new DT. The AG's position is that a new DT should be appointed to hear and investigate the Complaint. In contrast, both the Law Society and the respondent take the view that the matter may be remitted back to the same DT for the Complaint to be heard and investigated.

101 The AG submits that the case of *Secretary of State for the Home Department v Raytheon Systems Ltd* [2015] Bus LR 626 ("*Raytheon*") is pertinent. There, Akenhead J held that there was an irregularity affecting the arbitral tribunal or the award on the basis that the tribunal had failed to deal with two material issues that were raised before it. The tribunal had not applied their minds to the issues and "any right minded party to [the] arbitration would feel that justice had not been served": *The Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 at [50] and [61]. Akenhead J held that the matter, which was to be remitted, ought to be resolved by a different arbitral tribunal. He reasoned as follows at [23(b)] of *Raytheon*:

> Like Mance J on the *Lovell Partnerships (Northern) Ltd* case (1996) 81 BLR 83, I can see that it would be "invidious and embarrassing [for the tribunal] to be required to try to free [itself] of all previous ideas and to re-determine the same issues" and that even for a conscientious tribunal seeking to redetermine such issues the exercise could well "create its own undesirable tensions and pressures". Of course, it is not possible to predict what this tribunal would do if matters were

> remitted to them. If however, albeit conscientiously and competently, the tribunal in effect reached exactly the same conclusions as before, that might well lead to a strong belief objectively that justice had not been or not been seen to have been done.

102 The respondent points out that the DT is already aware of the factual matrix of the present case. He relies on *Law Society of Singapore v Jasmine Gowrimani d/o Daniel* [2010] 3 SLR 390 ("*Jasmine Gowrimani*") to contend that the matter should be sent back to the same DT. In that case, the DT had held that it did not possess the discretion to refrain from referring matters to the Court of Three Judges once all the elements of a disciplinary charge had been made out. The Court of Three Judges held otherwise and remitted the matter to the same DT for it to decide on the appropriate punishment.

103 In *Jasmine Gowrimani*, the DT had before it all the relevant facts to impose any sanction it thought fit. In fact, the DT in that case had expressly stated that they were prepared to find that there was no cause of sufficient gravity notwithstanding that all the elements of the charge were satisfied. However, the DT was persuaded otherwise by an academic commentary which was of the view that when a charge under s 83(2) of the LPA is made out, a finding of cause of sufficient gravity for disciplinary action is mandated: *The Law Society of Singapore v Jasmine Gowrimani d/o Daniel* [2009] SGDT 6 at [38]. As the Court of Three Judges clarified, this view was an erroneous one. Remitting the matter back to the same DT would therefore have provided them the opportunity to carry out what they had initially sought to do, which was to find that no cause of sufficient gravity existed and to impose alternative sanctions. In the case at hand, the Law Society would be required to frame wholly fresh charges. Counsel representing the Law Society would be required to conduct the new proceedings on a substantially different footing, with material additional evidence. *Jasmine Gowrimani* is therefore not on point. In

considering the matter afresh, there is no doubt that the same DT would conscientiously do so if the matter is remitted to it again. Nevertheless, *Raytheon* points out that there could be a wider issue of public perception if the same DT in such circumstances reaches the same conclusion. In the interests of fairness to the respondent, this should be remitted to a fresh DT, who would not be thus constrained. It follows from the same rationale that Council should also appoint fresh counsel to represent the Law Society, who will be required to adduce material evidence pertaining to the mental capacity issues and run the Law Society's case on that new basis. A second DT, assisted by counsel on both sides, could consider directions appropriate to save costs in the fresh proceedings.

Applications for extension of time

104 Both the AG and the Law Society filed applications for an extension of time to bring OS 810/2019 and 812/2019.

OS 812/2019

105 Under the scheme of the LPA, the findings and determination of the DT under s 93 will first be drawn up in the form of a report and submitted to the Chief Justice and the Law Society: see s 93(4)(*a*) of the LPA. Thereafter, s 94(4) of the LPA provides that Council must "inform the regulated legal practitioner and the person who made the complaint" of the determination of the DT within 14 days from the date the Law Society receives a copy of the report. Section 97(1) of the LPA provides that the complainant, respondent or the Council may apply to a Judge for a review of that determination "within 14 days of being notified of that determination".

106 Pursuant to s 92(1) of the LPA, the reference to a "person who made the complaint" shall be construed as including a reference to the AG. Accordingly, reading ss 94(4) and 97(1) in the light of s 92(1) must mean that Council should inform the AG of the determination of the DT within 14 days from the date the Law Society receives a copy of the report. Further, upon being notified, the AG may apply to a Judge under s 97 of the LPA for a review of the DT's determination within 14 days of being notified.

107 The respondent contends that the AG acts *on behalf* of and represents the judicial office holder in s 97 applications. Since his position is tied to that of the complainant (*ie*, the judicial office holder), he cannot stand in a different position from the complainant. In the present case, there is no evidence before the court as to when the judicial office holder was notified of the Determination. Therefore, the respondent submits that the inference to be drawn is that OS 812/2019 was brought more than 14 days after the judicial office holder was notified of the Determination.[51]

108 I disagree with the respondent's submission, which the clear wording of s 92(1) of the LPA does not permit:

> **Complaint made by Judge, etc., or Attorney-General**
>
> **92.**—(1) Where any judicial office holder specified in subsection (2) or the Attorney-General refers to the Society any information touching upon the conduct of a regulated legal practitioner, every reference in this Part to a person who made the complaint is to be construed as *including* a reference to the Attorney-General. [emphasis added]

109 The word "including" implies that the AG stands as a separate individual to the judicial office holder. Pursuant to s 94(4)(*a*) of the LPA, the Council is

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[51] Respondents' outline, paras 43–44.

required to inform *both* the judicial office holder as well as the AG of the determination within 14 days from the date the Law Society receives a copy of the report. There is nothing in the legislative scheme to suggest that the time window for the AG to bring a s 97 application runs from the time the judicial office holder is notified.

110 In the present case, the Determination was signed on 28 May 2019 and received by the Law Society on 29 May 2019 but a copy was not sent to the AG. The matter was, however, reported in the press on 19 June 2019 and arising from information received because of queries made thereafter, the AG filed OS 812/2019 on 25 June 2019. In response to a letter from the AG, the Law Society thereafter wrote to notify the AG on 2 July 2019.[52]

111 The AG, on his part, submits that there are two possible interpretations of the word "notified" in s 97(1) of the LPA. On the first interpretation, this could refer to the time when the relevant person was notified of the Determination *pursuant to the relevant statutory provisions in the LPA*. Alternatively, another interpretation of the word "notified" is that it refers to the time when the relevant person had *actual notice* of the Determination.[53] Here, the AG was made aware of the Determination on 19 June 2019. On either interpretation, the AG's submission is that he was not out of time; the application for an extension of time was filed out of a surfeit of caution.

112 In my judgment, a plain reading of s 97(1) must mean a formal notification of some sort. In the present case, the Law Society failed to do so

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52 AG's submissions, para 100.

53 AG's submissions, para 101.

until prompted by the AG. But in my view, time cannot run from 2 July 2019. On such an approach, if the Law Society were to omit to send notification altogether, time would not start to run against the AG, which would confound the purpose for which the timeline was set. In my view, it would be better to have regard to the timelines intended by the Act. As the Law Society received the DT's report on 29 May 2019,[54] the Law Society ought to have notified the AG by 12 June 2019: s 94(4) of the LPA. Thereafter, the AG was required to file the application by 26 June 2019: s 97(1) of the LPA. The AG brought OS 812/2019 on 25 June 2019. I hold therefore that no extension of time is required for OS 812/2019.

OS 810/2019

113 The Law Society, on the other hand, requires an extension of time, and there is no dispute on this. I turn then to this issue.

Whether s 91A of the LPA is a strict time-limited ouster clause

114 The respondent contends that s 91A of the LPA is a strict time-limited ouster clause. Section 91A of the LPA provides that there shall be no judicial review of the DT's determination except as provided by in ss 82A, 97 and 98 of the LPA. According to the respondent, s 97 of the LPA, by stipulating the time period for the filing of any review application (*ie*, 14 days), confines the time within which the court's jurisdiction can be invoked. If the application is brought outside the 14 days' window, the court cannot exercise jurisdiction.[55] Section 91A of the LPA reads:

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54 K Gopalan's affidavit dated 26 July 2019, para 4.

55 Respondent's outline, para 39.

> **Restriction of judicial review**
>
> **91A.**—(1) Except as provided in sections 82A, 97 and 98, there shall be no judicial review in any court of any act done or decision made by the Disciplinary Tribunal.

115 The respondent relies on two English decisions to support his contention: *R v Cornwall County Council, ex parte Huntington and another* [1992] 3 All ER 566 ("*Cornwall*") and *R v Secretary of State for the Environment, ex parte Ostler* [1976] 3 All ER 90 ("*Ostler*"). The relevant time-limited ouster clauses in both cases are worded similarly. Since *Ostler* was cited and directly applied in *Cornwall*, it is convenient to refer to the latter decision.

116 In *Cornwall*, an application was brought to review a public right of way order pursuant to s 53(2)(*b*) of the Wildlife and Countryside Act 1981 (c 69) (UK). The time-limited ouster clause, found in para 12 of Sch 15 of the Wildlife and Countryside Act 1981, was as follows:

> (1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 … or that any of the requirements of this Schedule have not been complied with in relation to it, *he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.*
>
> (2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interest of the applicant.
>
> (3) *Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever.*
>
> [emphasis added]

117 In coming to the view that para 12 was a time-limited ouster clause, such that leave to seek judicial review was set aside, the English High Court reasoned as follows at 575:

> … When paragraphs such as those considered in [*Ostler*] are used, then the legislative intention is that questions as to invalidity may be raised on the specified grounds in the prescribed time and in the prescribed manner, but that otherwise the jurisdiction of the court is excluded in the interest of certainty. This was the view of Lord Denning MR (with whom Shaw LJ agreed) [in *Ostler*] and that view is binding on this court. I would, however, have independently formed the same view *for the legislative intention seems to me to be plain from the language employed when the two sub-paragraphs of para 12 are taken together.* … [emphasis added]

118 The question of whether s 91A of the LPA is a time-limited ouster clause is therefore one of statutory interpretation. In my judgment, a plain reading of the text of s 91A read with ss 82A, 97 and 98 of the LPA makes clear that s 91A is *not* a time-limited ouster clause. As the AG rightly points out, s 91A of the LPA could not be intended by Parliament to be a time-limited ouster clause, simply because ss 82A and s 98, the other two provisions referred to in s 91A, do not contain any time limits at all. There is therefore a material difference between s 91A and the ouster clause in *Cornwall*, where para 12(1) stated that the application for judicial review had to be brought within 42 days and para 12(3) specifically provided that the court's jurisdiction would be ousted if that condition was not met: see [116] above.

119 The common feature of ss 82A (which refers to s 98), 97 and 98 of the LPA is that they concern applications to the court *after* disciplinary proceedings have concluded where the court is able to exercise supervisory and appellate jurisdiction over the DT: see [24]–[25] above. In my view, the legislative purpose of s 91A is simply to provide that a DT's findings and determination

can only be reviewed *after* the proceedings are completed, by way of the applicable provision (*ie*, ss 82A, 97 or 98).

120 This reading of s 91A of the LPA is supported by the parliamentary debates, which make plain that s 91A was introduced, by way of the 2008 amendments to the LPA, to *defer* judicial review, such that it takes place after disciplinary proceedings have concluded so as to prevent delay. The Minister of Law stated at the Second Reading of the Legal Profession (Amendment) Bill (No 16 of 2008) (*Singapore Parliamentary Debates, Official Report* (26 August 2008) vol 84 col 3251) as follows:

> … *I would clarify that judicial review is not "ousted". What we are doing is deferring it*, because what has happened in the past is that even before the tribunal proceedings and disciplinary proceedings are over, there were repeated applications for judicial review, which then dragged on and delayed the entire proceedings, vastly contributing to delays. *So, the approach has been to finish with the process, then you go for judiciary review.* … [emphasis added]

121 Woo Bih Li J held similarly in *Deepak Sharma v Law Society of Singapore* [2016] 4 SLR 192, concluding at [39] that the object of s 91A is to consolidate the judicial review process to the end of the DT process:

> Viewed against this background, s 91A is more accurately characterised as *restricting* or *consolidating* the then-existing judicial review process over DT decisions to the extent provided under ss 82A, 97 and 98 of the LPA. This is in contrast to the characterisation of the provision by the Law Society as "[providing] judicial review as a form of recourse … for DT proceedings". Section 91A's purpose is to speed up the disciplinary process *at the DT stage*. It would be a stretch, on a purposive statutory interpretation, to say that by restricting or consolidating the judicial review process over DT decisions, Parliament intended to completely exclude judicial review over decisions of a review committee which is an entirely different stage of the disciplinary process. [emphasis in original]

122 The decision of the Court of Three Judges in *Law Society of Singapore v Zulkifli bin Mohd Amin and another matter* [2011] 2 SLR 620 ("*Zulkifli*") is also relevant. In *Zulkifli*, the Law Society had failed to comply with s 87(1A) of the LPA as the Inquiry Committee had submitted its further report to the Council after the statutory timeframe had elapsed. The respondent in *Zulkifli* argued that such a breach would disempower the Law Society from referring the matter to the court. The Court of Three Judges disagreed with the respondent and held as follows at [35]–[36]:

> … Section 87(1A) of the Act merely sets timelines for certain actions to be taken by the Law Society in certain circumstances. *They were not meant to be condition precedents necessary for the exercise of the Law Society's powers to refer the findings of the DT to this court.* The modern approach as to the effect of a breach of a statutory provision is not to treat every breach as a disempowering or invalidating event. In *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR(R) 597, the Court of Appeal endorsed the modern approach in these words (at [21]):
>
> > The Judge applied this modern approach to statutory interpretation, which requires the court …:
> >
> > > … [to look] at the whole scheme and purpose of the Act and … [weigh] the importance of the particular requirement in the context of that purpose and [ask] whether the Legislature would have intended the consequences of a strict construction, having regard to the prejudice to private rights and the claims of the public interest (if any).
> >
> > …
>
> The question therefore was whether non-compliance with the time periods in s 87(1A) of the Act was fatal to the present proceedings. In our view, the answer was "no" as these provisions were enacted for the purpose of expediting the disposal of disciplinary proceedings – see the Second Reading speech of the Minister for Law in Parliament when moving the amendment bill …. *The amendments were not enacted to put obstacles in the way of disciplining errant advocates and solicitors who were guilty of professional misconduct.* …
>
> [emphasis added]

123 *Zulkifli* was a not a case concerning whether the court could grant an extension of time if a s 97 application was filed out of time. But *Zulkifli* shows that the timelines in the LPA are generally not meant "to put obstacles in the way of disciplining errant advocates and solicitors who were guilty of professional misconduct": *Zulkifli* at [36]. The primary object of Pt VII of the LPA is one of regulating the legal profession: finding that s 91A is a time-limited ouster clause detracts from that object. The complainant, the Council and the AG will lose their right to review the DT's findings and determination regardless of the merits of their application. In addition, a solicitor who is dissatisfied with the DT's imposition of alternative sanctions in s 93(1)(*b*) will also lose his right of review if he does not file his application within the 14 days' time window. I do not consider that Parliament intended for these draconian consequences to arise by introducing s 91A of the LPA.

Whether the court has the power to extend time

124 Having found that s 91A of the LPA is not a time-limited ouster clause, I deal with whether the court has power to extend time. The AG relies on three alternative grounds: s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), s 97(4)(*b*) of the LPA, and the court's inherent power to extend time.[56] The Law Society relies on s 18(2) of the SCJA.

125 I begin with s 18 of the SCJA, which reads:

> **Powers of High Court**
>
> **18.—**(1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.

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56 AG's outline, paras 71–73.

126 Paragraph 7 of the First Schedule to the SCJA confers on the High Court the power to extend time:

> **Time**
>
> 7. Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation.

127 The respondent, relying on *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 ("*Top Ten*"), contends that s 18(2) of the SCJA and para 7 of the First Schedule are not applicable to the present case as they relate to the High Court's powers in the exercise of its *civil jurisdiction* instead of its *disciplinary jurisdiction*.[57]

128 The respondent relies on the following passage in *Top Ten* (at [42]):

> We start our analysis by considering the civil jurisdiction of the Supreme Court under ss 16 and 17 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). The Supreme Court consists of the High Court and the Court of Appeal (see Art 94(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution") and s 3 of the SCJA). Section 16 of the SCJA provides for the general jurisdiction of the High Court with respect to *in personam* actions, and s 17 sets out the specific areas of law within its jurisdiction. The general powers of the High Court are set out in the First Schedule to the SCJA. None of these provisions refers to disciplinary proceedings. The ordinary meaning of an *in personam* action does not include a disciplinary action. In short, the civil jurisdiction of the High Court does not include jurisdiction over any disciplinary matter under Pt VII of the LPA. If the High Court has no jurisdiction over disciplinary matters, it follows that the Court of Appeal also has no jurisdiction over such matters …

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57 Respondent's outline, para 40.

129 I disagree with the respondent's contention. The Court of Appeal in *Top Ten* was making the point that in disciplinary proceedings, the Judge exercises disciplinary jurisdiction under Pt VII of the LPA, and not civil jurisdiction under ss 16 and 17 of the LPA. The Court of Appeal explained, at [44]–[45], that a Judge in the context of a s 97 application is, following s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed), "a judge of the *High Court* exercising disciplinary jurisdiction under Pt VII of the LPA, and not a judge of the High Court exercising civil jurisdiction under ss 16 and 17 of the SCJA". It does not follow that because the Judge is exercising disciplinary rather than civil jurisdiction, that s 18(2) is inapplicable. In my view, given that a Judge in a s 97 application is still sitting as a Judge of the High Court, albeit exercising disciplinary jurisdiction instead of civil jurisdiction, s 18(2) of the SCJA applies and confers on the Judge the powers under the First Schedule.

130 In this regard, a distinction ought to be drawn between a court's *jurisdiction* and a court's *powers*. As stated by Chan Sek Keong J (as he then was) in *Muhd Munir v Noor Hidah and other applications* [1990] 2 SLR(R) 348 at [19]:

> The jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it. The powers of a court constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute. The jurisdiction and powers of the High Court are statutorily derived. Whether it has any common law jurisdiction or powers is a question which is not relevant here. A court may have jurisdiction to hear and determine a dispute in relation to a subject matter but no power to grant a remedy or make a certain order because it has not been granted such power, whereas if a court has the power to grant a remedy or make a certain order, it can only exercise that power in a subject matter in which it has jurisdiction. The distinction between jurisdiction and power is recognised in the SCJA, ss 16 and 17 (which confer jurisdiction) and s 18 (which confers powers). …

131 In my judgment, a Judge hearing a s 97 application is a Judge of the High Court exercising disciplinary jurisdiction, and would have the powers vested in the High Court, including those in the First Schedule by virtue of s 18(2) of the SCJA. I therefore hold that the court has the power to extend time in a s 97 application under s 18(2) of the SCJA read with para 7 of the First Schedule.

132 I next turn to s 97(4)(*b*) of the LPA. The AG contends that s 97(4)(*b*) of the LPA also confers on the Judge the power to extend time as that power is an "intrinsic part of the court having control over its own processes".[58] Section 97(4)(*b*) provides that the Judge hearing the application "may make such orders as the Judge thinks fit". Rather than seeing s 97(4)(*b*) as a stand-alone provision which confers upon the court the power to extend time, I view s 97(4)(*b*) as referring to the width of the orders the court may make pursuant to its full arsenal of powers necessary to do justice in the case, which would include s 18 of the SCJA.

133 I come to the last argument on the inherent powers of the court. As I have concluded that there is an express statutory provision, I do not rely on the court's inherent powers. Courts would generally not invoke such powers where statutory powers are present, save in exceptional circumstances: see *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [81], cited by the Court of Appeal in *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [39], and *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27]).

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58 Minute sheet 041119, p 15.

Whether the court should grant the Law Society an extension of time

134 Finally, I turn to the issue of whether the Law Society should be granted an extension of time. Regarding the criteria for such an extension of time, I consider that the test for extensions of time to appeal from court decisions, found in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 ("*Lee Hsien Loong*") at [18], is relevant. In my view, it is appropriate to use the same criteria for extensions of time to apply under s 97 of the LPA against a DT's determination, as such a determination is made after a trial on charges, similar to court proceedings. The single judge hearing such an application exercises appellate jurisdiction: see [24]–[25] above on my views on the supervisory and appellate jurisdiction. While in this case parties relied on grounds for judicial review of the DT's determination, I do not think the inclusion and consolidation of judicial review should displace the standard that should be in play for the purposes of appellate jurisdiction. Consonant with the parliamentary intent of having a single process governing both the court's appellate and supervisory jurisdiction, the same criteria should apply whether an applicant in a s 97 application seeks to invoke the court's supervisory and/or appellate jurisdiction, for reasons of coherence and consistency. On a related note, in respect of judicial review, I note that O 53 r 1(6) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") specifies the criteria for granting extensions of time to applications for quashing orders. The applicant must ensure that "the delay is accounted for to the satisfaction of the Judge". It is an open question as to whether this exception, which the Court of Appeal in *Per Ah Seng Robin and another v Housing and Development Board and another* [2016] 1 SLR 1020 (*"Per Ah Seng*") referred to as the "delay exception", applies where statute prescribes a time period, as in the present case: *Per Ah Seng* at [46]. Notwithstanding, *Top Ten* states at [34] that disciplinary proceedings under the LPA are "specialised forms of

inquisitorial proceedings with adversarial elements … and judicial proceedings … to which the Rules of Court are not applicable because they are not civil proceedings as defined in those rules". For the various reasons explained above, therefore, I am of the view that the *Lee Hsien Loong* factors are appropriate to the issue of extensions of time to apply under s 97 of the LPA.

135 These factors are the following:

(a) The length of the delay;

(b) The reasons for the delay;

(c) The merits of the application;

(d) The prejudice to the respondent if the extension of time was to be granted.

136 These factors are not to be applied mechanically. As stated by the Court of Appeal in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [30], "it is the overall picture that emerges to the court as to where the justice of the case lies which will ultimately be decisive". The four factors are of equal importance and are to be balanced amongst one another, having regard to all the facts and circumstances of the case concerned: *Lee Hsien Loong* at [28].

137 Turning to the facts at hand, the Determination was received by the Law Society on 29 May 2019.[59] OS 810/2019 was filed on 25 June 2019.[60] There was thus a delay of 13 days. As for the reasons for the delay, I was informed by the

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[59] Law Society's submissions, para 4.

[60] Law Society's submissions, para 10.

Law Society that some time and effort was expended to seek the views of Senior Counsel to review the Determination. A special meeting was convened on 21 June 2019 for Council to consider the Determination and there was a vote to determine if the matter should be reviewed pursuant to s 97 of the LPA. The vote closed on 24 June 2019 and the application was filed the next day. With respect, these reasons do not provide strong justification for the delay of close

to two weeks. Nevertheless, I place significant weight on the fact that there are strong merits to the application to set aside the Determination, for all the reasons I have explained above. In the context of considering an extension of time to appeal, the court adopts a "very low threshold", the test is whether the appeal is "hopeless": see *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 ("*ARW*") at [76]. Using this threshold, the strong merits to the application ought to render this a particularly weighty factor. As for the last factor, prejudice, the Court of Appeal in *ARW* explained that the court is entitled to take into account the prejudice to the respondent, but also to the applicant and the public interest: *ARW* at [80]. In my view, this factor is particularly relevant in an application to file a s 97 application out of time, given the public interest in regulating advocates and solicitors who might be guilty of misconduct: see [123] above. In any event, the AG's application in OS 812/2019 does not require an extension of time: the present circumstances are therefore such that the outcome of a grant of an extension to the Law Society would not result in any change in the final orders made. In the circumstances, taking matters in the round, I consider that the interests of justice lies in favour of granting an extension of time to the Law Society to file OS 810/2019.

Conclusion

138 In conclusion, the Determination is set aside in its entirety pursuant to s 97(4)(*b*) of the LPA. The Law Society is to apply to the Chief Justice for the appointment of another DT to hear and investigate the Complaint. Fresh charges are to be framed for these purposes and fresh counsel instructed by the Law Society.

139 The AG, the Law Society and the respondent have confirmed that they would not ask for costs regardless of the result of these applications. I therefore make no order on costs.

Valerie Thean
Judge

Gregory Vijayendran SC (Rajah & Tann Singapore LLP), Jason Lim and Teng Boon Hui (De Souza Lim & Goh LLP) for the applicant in OS 810/2019;
Kristy Tan and Jamie Pang (Attorney-General's Chambers) for the applicant in OS 812/2019;
Chelva Rajah SC (Tan Rajah & Cheah) for the respondent.