Re Lim Kiap Khee
[2001] SGHC 160

Case Number : OS 600376/2001

Decision Date : 30 June 2001

Tribunal/Court : High Court

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Aziz Tayabali (Aziz Tayabali & Associates) for the applicant; Respondent absent

Parties : —

Legal Profession – Show cause action – Grossly improper conduct – Mere negligence insufficient – Intention to deceive not required – Breach of undertaking to pay of moneys held as stakeholder – s 83(2)(b) Legal Profession Act (Cap 161, 1994 Ed)

Legal Profession – Show cause action – Misconduct unbefitting advocate and solicitor – Failure to deposit stakeholder moneys into client account – ss 83(2)(h) & 83(2)(j) Legal Profession Act (Cap 161, 1994 Ed) – r 3 Legal Profession (Solicitors' Accounts) Rules (Cap 161, R 8, 1990 Ed)

Legal Profession – Show cause action – Appropriate penalty – Striking off – No fraud or intention to deceive – Gravity of misconduct – Deliberate breach – Prior antecedents – Lawyer of 20 years standing – Failure to mitigate – Failure to appear at present proceedings

(delivering the grounds of judgment of the court): This was a show-cause proceeding brought by the Law Society under s 98(1) of the Legal Profession Act (Cap 161, 1994 Ed) (`the Act`) against the respondent, Lim Kiap Khee, an advocate and solicitor that he be dealt with under the Act for misconduct. Upon hearing counsel for the Society, and the respondent not appearing, we ordered that the respondent be struck off the roll of advocates and solicitors. We now give our reasons.

Cause for complaint

The respondent was admitted as an advocate and solicitor of the Supreme Court on 16 January 1974. He had since 25 April 1997 ceased to practise law. At all material times he was the sole proprietor of his own legal firm M/s Lim Kiap Khee & Co. The disciplinary action arose out of a complaint, dated 11 March 1999, lodged by Wearnes Development (Pte) Ltd (`Wearnes`) against the respondent for having breached an undertaking (`the undertaking`) given to Wearnes by the respondent on 27 April 1995 as a solicitor.

The undertaking was given by the respondent in the following circumstances. Wearnes were the developers of a detached house at No 6 Cornwall Gardens (`the property`). On 21 June 1994, Wearnes sold the property at a public auction to Lum Kok Seng and Chin Leng Kee (`original purchasers`) at a price of $7,860,000. On 23 November 1994 the original purchasers sub-sold the property to Shyam Mangharam Ganglani (`sub-purchaser`). The sub-purchaser was represented by the respondent in the transaction.

Under cl 5(1)(j) of the original sale and purchase agreement, the last 15% of the purchase price was to be paid in the following manner:

> *On completion of the sale and purchase of the property in accordance with clause 16 hereof, the purchaser shall pay to the vendor the balance of the fifteen (15) per cent of the purchaser price which shall be dealt with as follows:*

(aa) two (2) per cent of the purchase price shall be paid forthwith to the Vendor;

(ab) the remaining thirteen (13) per cent of the purchase price shall be paid to the Purchaser`s Solicitors as stakeholders to be dealt with as follows:

(i) eight (8) per cent of the purchase price shall be paid to the Vendor within seven (7) days of the receipt by the Purchaser or his solicitors of the Certificate of Statutory Completion of the building issued by the Building Authority or a photographic copy thereof duly certified as a true copy by the Vendor`s solicitors;

(ii) five (5) per cent of the purchase price or any balance thereof (after any deduction has been made in accordance with clause 20 hereof and for moneys owing to the Purchaser) shall be paid to the Vendor on the expiry of 12 months from the date of notice to take vacant possession to the Purchaser.

By the end of November 1994, construction of the property was completed. On 2 December 1994, Wearnes gave notice to the original purchasers to take vacant possession of the property and forwarded therewith the temporary occupation permit. Accordingly under cl 5(1)(j)(ab)(ii) the last 5% of the purchase price was to be paid upon expiry of 12 months from the date of notice. It was generally accepted that the 5% payment should be made on 1 December 1995.

In the meantime, on 31 March 1995, Wearnes served a notice to complete on the original purchasers` solicitors. Later by mutual agreement, the date for completion was extended to 31 May 1995. On 29 April 1995, through a tripartite transfer, the sale of the property was completed in favour of the sub-purchaser. In accordance with cl 5(1)(j), 2% of the last 15% of the purchase price was paid on that day. With regard to tbe balance 13%, it was mutually agreed that the respondent`s firm would step into the shoes of the original purchasers` solicitors and hold that sum and release it to Wearnes as provided in cl 5(1)(j)(ab). This was evidenced by a written undertaking dated 27 April 1995 given by the respondent`s firm to Wearnes. There could not be any doubt that the undertaking was given by the respondent, as the sole proprietor of his firm, in his capacity as solicitor. As the substance of the complaint concerned this undertaking, we shall set out the letter in extenso:

We confirm that we are holding the sum of $1,021,800-00 as stakeholders.

We undertake to release the sum of $1,021,800-00 as follows:-

(a) ***$628,800.00*** *shall be paid to you* ***within seven (7) days*** *of receipt by us of a copy of the Certificate of Statutory Completion relating to the property; and*

(b) ***$393,000.00*** *or any balance thereof (after any deduction has been made in accordance with clause 20 of the Special Conditions and for moneys owing to Lum Kok Seng and Chin Leng Kee) shall be paid to you on or before* ***1st December 1995*** *.*

On 14 August 1995, Wearnes` solicitors forwarded to the respondent`s firm the certificate of statutory completion issued by the competent authority on 28 July 1995. Following this, and in accordance with cl 5(1)(j)(ab)(i), 8% of the purchase price should be paid over to Wearnes within seven days of 14 August 1995, ie by 21 August 1995. No such payment was, however, made by the respondent`s firm to Wearnes. Instead on the same day, 14 August 1995, the respondent wrote to Wearnes` solicitors alleging that his client, the sub-purchaser, had `found several defects due to defective workmanship and/or the quality of material used in the construction of the property`. On 16 August 1995, Wearnes` solicitors reminded the respondent of his undertaking and that under cl 5(1)(j) deduction for defects could only be made from the last 5% of the purchase price. Notwithstanding this clarification, the respondent`s firm persisted in its refusal to pay. A further reminder was sent on 11 September 1995. It was only on 19 October 1995, a delay of almost two months, that the respondent`s firm paid out the 8% to Wearnes.

Wearnes also complained in relation to the payment of the last 5% of the purchase price. On this, Wearnes solicitors wrote on 19 November 1995 to the respondent`s firm reminding the latter that payment of the 5% was due on 1 December 1995. Thereafter some correspondence ensued on the question of defects. But Wearnes maintained that there were no outstanding defects for which they were liable. On 6 August 1996, Wearnes instituted an originating summons to claim payment for the last 5% against both the sub-purchaser and the respondent and also for interest for the late payment of the 8%. On 4 November 1997, the High Court gave judgment in favour of Wearnes where, inter alia, the respondent`s firm was ordered to make payment of $210,000 to Wearnes. In addition the respondent`s firm and the sub-purchaser were required to pay interest on late payment. As no payment was forthcoming, bankruptcy proceedings were commenced by Wearnes against the respondent and the sub-purchaser. On 12 February 1999, bankruptcy orders were made against them. It was only on 28 June 1999 that the respondent made payment of $210,000 to Wearnes` solicitors. A month later, he made payment in respect of late interest and costs.

Charges against the respondent

Before the Disciplinary Committee (`DC`), chaired by Mr TPB Menon, three charges were preferred against the respondent and they were:

First Charge

That the Respondent Lim Kiap Khee is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of Section 83(2)(b) of the Legal Profession Act (Chapter 161, 1994 Revised Edition) and/or is guilty of such misconduct unbefitting an advocate and solicitor as a member of an honourable profession within the meaning of Section 83(2)(h) of the Legal Professional Act (Chapter 161, 1994 Revised Edition), in that despite the undertaking dated 27 April 1995 given by M/s Lim Kiap Khee & Co, of which the Respondent Lim Kiap Khee was the proprietor (`the undertaking`), to M/s Wearnes Development (Pte) Ltd confirming that the sum of $1,021,800.00 is being held by M/s Lim Kiap Khee & Co, as stakeholders and undertaking to release to Wearnes the sum of $628,800.00 within seven (7) days of receipt by M/s Lim Kiap Khee & Co, of the Certificate of Statutory Completion or a certified copy thereof (CSC) of the property known as 6, Cornwall Gardens, Singapore, which said CSC was forwarded to M/s Lim Kiap Khee & Co, on 14 August 1995, the Respondent Lim Kiap Khee in breach of the undertaking given failed and/or neglected to pay to Wearnes the sum of $628,800.00 or any part thereof within seven (7) days of receipt of the CSC, but which payment of $628,800.00 was made to Wearnes only on or about 19 October 1995.

Second Charge

That the Respondent Lim Kiap Khee is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of Section 83(2)(b) of the Legal Profession Act (Chapter 161, 1994 Revised Edition) and/or is guilty of such misconduct unbefitting an advocate and solicitor as a member of an honourable profession within the meaning of Section 83(2)(h) of the Legal Professional Act (Chapter 161, 1994 Revised Edition), in that despite the undertaking dated 27 April 1995 given by M/s Lim Kiap Khee & Co, of which the Respondent Lim Kiap Khee was the proprietor (`the undertaking`), to M/s Wearnes Development (Pte) Ltd confirming that the sum of $1,021,800.00 is being held by M/s Lim Kiap Khee & Co, as stakeholders and undertaking to release to Wearnes the sum of $393,000.00 or any balance thereof (after any deduction has been made in accordance with Clause 20 of the Conditions of Sale and for moneys owing to the purchasers Lum Kok Seng and Chin Leng Kee) on or before 1 December 1995 and despite Wearnes` Solicitors` letter of 6 June 1996 to M/s Lim Kiap Khee & Co, stating that there are no outstanding defects which their clients are liable for and/or legal proceedings in Originating Summons No. 779 of 1996 commenced against Lim Kiap Khee on 6 August 1996, the Respondent Lim Kiap Khee in breach of the undertaking given failed and/or neglected to pay to Wearnes the sum of $393,000.00 or any part thereof even till the date of the Respondent Lim Kiap Khee ceasing practice.

Third Charge

That the Respondent Lim Kiap Khee is guilty of contravening or failing to comply with the Legal Profession (Solicitors` Accounts) Rules (1990 Revised Edition) made pursuant to the provisions of the Legal Profession Act (Chapter 161), within the meaning of Section 83(2)(j) of the Legal Profession Act (Chapter 161, 1994 Revised Edition) and/or is guilty of such misconduct unbefitting an advocate and solicitor as a member of an honourable profession within the meaning of Section 83(2)(h) of the Legal Profession Act (Chapter 161, 1994 Revised Edition), in that despite the undertaking dated 27 April 1995 given by M/s Lim Kiap Khee & Co, of which the Respondent Lim Kiap Khee was the proprietor ("the undertaking"), to M/s Wearnes Development (Pte) Ltd (Wearnes) confirming that the sum of $1,021,800.00 is being held by M/s Lim Kiap Khee & Co, as stakeholders, which sum constituted firstly, an amount of $628,800.00 which was undertaken to be released to Wearnes within seven (7) days of receipt of the Certificate of Statutory Completion or a certified copy thereof for the property known as No. 6 Cornwall Gardens, Singapore, which was so released to Wearnes on or about 19 October 1995, and secondly an amount of $393,000.00 which was undertaken to be released to Wearnes on or before 1 December 1995, but which amount was not released to Wearnes even until the date the Respondent Lim Kiap Khee ceased practice on 25 April 1997, the Respondent Lim Kiap Khee in breach of the undertaking/confirmation given failed and/or neglected to arrange for the balance sum of $393,000.00 to be paid into the clients` account of Lim Kiap Khee & Co before the Respondent Lim Kiap Khee ceased practice on 25 April 1997, in contravention or failing to comply with Rule 3 of the Legal Profession (Solicitors` Accounts) Rules (1990) (Revised Edition).

We should add that the third charge was preferred by the Law Society during the course of the DC proceedings.

Absence of the respondent

The DC heard the matter over four days, namely, on 5 October, 19 October, 29 November and 12 December 2000. At none of these hearings was the respondent present, nor was he represented by counsel, as he could not be contacted at either his last known residential or business address. The DC even inserted notices of the disciplinary hearings in both The Straits Times and The New Straits Times (Malaysia) to notify the respondent of the same. However, they were of no avail.

The only provision in the Act which touches on the question of service is s 104 and it reads:

> *If the person whose conduct is the subject of inquiry fails to attend before the court, a Disciplinary Committee, the Council or the Inquiry Committee, as the case may be, the inquiry or proceedings may be proceeded with without further notice to that person upon proof of service by affidavit or statutory declaration.*

There was affidavit evidence before us showing the services effected on the respondent in relation to both the hearing before the DC as well as before us. It seemed to us that the respondent did not wish to partake in any disciplinary action which would be instituted against him. Thus, he was not present before us; nor was he represented by counsel to make submission on his behalf.

Findings of the DC

The DC, after due deliberation, found that there existed cause of sufficient gravity for disciplinary action against the respondent under s 83 of the Act on all the three charges. On the first two charges, the DC found him to be in clear breach of the undertaking which he gave on 27 April 1995. As regards the third charge, while finding that the respondent was guilty of the charge, having contravened s 83(2)(j), the DC noted that there was insufficient evidence to show whether the $393,000, or indeed any part of the $1,021,800 constituting the 13% of the purchase price, was ever deposited into the client account of the respondent`s firm prior to 25 April 1997, the date on which the respondent ceased to practise. But the evidence before the DC showed clearly that when the respondent ceased practise on 25 April 1997, the 5%, amounting to $393,000, was not deposited into the client account of the respondent`s firm.

Grossly improper conduct

On the facts as we have enumerated above, there can be no doubt that the misconduct enumerated in the three charges brought against the respondent had been amply established. The only question we needed to address was, in relation to the first two charges, whether the conduct constituted grossly improper conduct under s 83(2)(b) or misconduct unbefitting an advocate and solicitor under s 83(2)(h), and in relation to the third charge whether the breach of r 3 of the Legal Profession (Solicitors` Accounts) Rules (Cap 161, R 8, 1990 Ed) (`the Rules`) constituted conduct unbefitting an advocate and solicitor within the meaning of s 83(2)(h).

Grossly improper conduct had been described by Wee Chong Jin CJ in **Re Marshall David** [1972-1974] SLR 132 [1972] 2 MLJ 221 at 224 as `conduct which is dishonourable to him as a man and dishonourable in his profession`. The origin of this description is to be found in the speech of Lord Esher in **Re Cooke** [1889] 5 TLR 407 at 408. However, Lord Esher also said that it would not suffice if

the conduct was only such as to support an action for negligence or want of skill. Lord Esher did not address the point whether to constitute grossly improper conduct there must always be an intention to deceive.

In **Rajasooria v Disciplinary Committee** [1955] 1 WLR 405 Lord Cohen, delivering the judgment of the Privy Council, said that they did not `read into Lord Esher`s words a statement that a finding that intention to deceive is always an essential element in grossly improper conduct`.

The approach taken in ***Rajasooria*** was adopted by this court of three judges in **Re Han Ngiap Juan** [1993] 2 SLR 81 where the misconduct in question was in overcharging a client in relation to a conveyancing transaction and where there was no finding of any element of deceit. There, this court stated (at p 88):

> *The passage is not without its difficulties but on the whole it appears to us to be a general statement of principle that an intention to deceive is not necessarily always an element of grossly improper conduct, even though in* ***Rajasooria****`s case itself, the Board was of the view that some element of deceit was involved, and the statement of principle might therefore be obiter. Even so, we are in full agreement with this statement of principle.*

Finally we would refer to an earlier local case, **Re Seow Francis T** [1972-1974] SLR 469 [1973] 1 MLJ 199 where a solicitor gave an undertaking that he would hand over all relevant books and files to the police in relation to a criminal case against his partner. He did not conduct a search for the documents and instead relied upon that partner to hand the documents over. Certain files were as a result not handed over. His negligence in relying upon the efforts of the partner, was held to constitute culpable negligence and thus amounted to grossly improper conduct. In coming to this conclusion, the court did not refer to any authority but had described his conduct as `gross failure ... to honour his undertaking`.

We would reiterate our views on ***Han Ngiap Juan*** (supra) that intention to deceive need not be present to constitute grossly improper conduct. This is consistent with s 83(2)(b) which refers to `fraudulent or grossly improper conduct`. If deception is always necessary to constitute grossly improper conduct, the legislature would not, in that provision, have distinguished `grossly improper` conduct from `fraudulent` conduct. On the other hand, while simple negligence or want of skill would not, as pointed out by Lord Esher, constitute grossly improper conduct, it must also be recognised that there are degrees of negligence. Furthermore, the gravity of a negligent act must be viewed in the context of the matter, taking into account all the circumstances of the case.

We noted that how negligence on the part of a solicitor was regarded was not uniform in various jurisdictions. On the one hand, in the Canadian case, **Re A Solicitor** [1936] 1 DLR 368, even gross negligence were held not to amount to professional misconduct. However, in New Zealand, in **Re M** [1930] NZLR 285, it was said that the failure of the solicitor to have his trust accounts audited amounts to professional misconduct. The New Zealand Court of Appeal held that neglect amounted to professional misconduct. In **Re A Solicitor** [1972] 2 All ER 811, where a solicitor was in breach of the accounts rules, Lord Denning said that `negligence in a solicitor may amount to professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession`. In our judgment, it is in the public interest to adopt a standard which would encourage members of the profession to maintain a high degree of professionalism and diligence at all times. It is not possible to generalise how an individual act of neglect is to be regarded except in its context.

Reverting to the circumstances of the present case, to characterise the failure of the respondent to pay up the 8% and the 5% to Wearnes on due dates as mere negligence would be a gross understatement. The respondent had confirmed that he was holding the money ($1,021,800) and would pay to Wearnes in accordance with cl 5(1)(j). He was reminded to pay on the due dates and yet failed to do so. The failure was clearly not due to an oversight. It was, in each instance, a deliberate act on his part to disregard the undertaking he had given. It is of the utmost importance that a solicitor should abide by the undertaking he formally gives. It is the very foundation of an honourable profession that its members act honourably. To deliberately breach an undertaking solemnly given would seriously undermine the integrity of the profession and would bring it into disrepute. Such a conduct, in our opinion, clearly constitutes grossly improper conduct, especially in the circumstances here where the respondent did not even bother to explain himself. We need hardly explain that once a misconduct constitutes grossly improper conduct, that act would, ipso facto, be an act unbefitting an advocate and solicitor under s 83(2)(h): see **Law Society of Singapore v Ng Chee Sing** [2000] 2 SLR 165 .

Contravention of r 3

The third charge relates to a contravention of r 3 of the Rules, which provides that:

> *Subject to rule 9, every solicitor who holds or receives client`s money, or money which under rule 4 he is permitted and elects to pay into a client account, shall without delay pay such money into a client account.*

The exception in r 9 has no relevance to the facts of the present case.

By the respondent`s letter of undertaking dated 27 April 1995 the respondent stated that he had received the sum of $1,021,800 from the client and would be holding the same as stakeholder. On the date the respondent ceased practising as an advocate and solicitor he had not arranged to have the 5% payment, amounting to $393,000, paid into the client account of his firm.

While one may be tempted to think, on first blush, that a breach of this rule is really something quite technical but this is not so when one considers the rationale behind that rule. We would merely wish to reiterate what this court stated in relation to this rule in the case **Law Society of Singapore v Prem Singh** [1999] 4 SLR 157 at [para]22:

> *Rule 3 of the Legal Profession (Solicitors` Accounts) Rules prescribes a mandatory requirement that the client`s funds be placed into a separate account. The purpose of this rule is to protect the public and to instil public confidence in solicitors. If a member of the public is going to deposit his funds with a solicitor, there has to be some form of assurance that the funds will be well protected in a separate client account and will not be misappropriated. In our opinion, the respondent`s omission to place the funds in his client account was a serious breach of the Legal Profession (Solicitors` Accounts) Rules.*

We accordingly confirmed the DC`s finding that this contravention of r 3 on the part of the respondent constituted a `serious breach` and we held that he was guilty of misconduct unbefitting an advocate and solicitor.

Penalty

We now turn to the question of penalty. Under the Act the court has the power, upon due cause shown, of either censuring the member, or suspending him for up to five years or striking him off the roll. Ordinarily, where the misconduct does not involve fraud or intention to deceive, striking off would not be imposed. But this is not an absolute rule. Ultimately, it is the gravity of the misconduct, or where there is more than one act of misconduct, the totality of them all which will be determinative. Equally relevant here is the presence of antecedents.

We noted that in relation to the first two charges, the two sums due were eventually paid to Wearnes. But in relation to the second charge, payment was only made after considerable delay and after enforcement actions had been taken out by Wearnes, including the institution of bankruptcy proceedings. The gravamen of the first two charges was in the breach of a solemn undertaking given by the respondent in his professional capacity. What was really aggravating was the fact that the breach was not brought about by an oversight but was indeed deliberate. Thus, in the context of an honourable profession, where a member`s word should be his bond, such a breach undermines the integrity of the profession and brings it into disrepute. In relation to the payment of the 5%, if it were in fact true that there was a genuine dispute between the sub-purchaser and Wearnes as to defects, the correct thing for the respondent to do would have been to take out an interpleader summons.

There were three other factors which were also relevant and which we had taken into consideration in determining the penalty. First, counsel for the Law Society had brought to our attention the fact that the respondent had been suspended from practice for a period of one year in relation to an earlier and unrelated set of misconduct offences (five charges altogether) under s 83(2)(b) where he issued bills of costs, incurred by one company, to another company for whom no services were rendered. Section 83(5) permits this court to take such antecedents into account. He ceased practising on 25 April 1997 because of that suspension order which was made by the court on 24 April 1997. Second, at the time of the misconduct, the respondent was an experienced lawyer of more than 20 years` standing. Third, the respondent had totally ignored these proceedings and had not sought to mitigate. There were no mitigating factors placed before us. Therefore, in all the circumstances, it was our judgment that the respondent should be struck off the roll and we did so order. He was also ordered to bear the costs of the proceedings.

Outcome:

Order accordingly.