IN THE COURT OF THREE JUDGES OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 27

Originating Summons No 6 of 2020

In the matter of Sections 94(1) and 98(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed)

And

In the matter of Constance Margreat Paglar an Advocate and Solicitor of the Supreme Court of the Republic of Singapore

Between

The Law Society of Singapore

… *Applicant*

And

Constance Margreat Paglar

… *Respondent*

JUDGMENT

[Legal Profession] — [Disciplinary proceedings] — [Cause of sufficient gravity]
[Legal Profession] — [Professional conduct] — [Breach]
[Legal Profession] — [Show cause action]

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Law Society of Singapore
v
Constance Margreat Paglar

[2021] SGHC 27

Court of Three Judges — Originating Summons No 6 of 2020
Andrew Phang Boon Leong JCA, Judith Prakash JCA and Belinda Ang Saw Ean JAD
20 November 2020

5 February 2021 Judgment reserved.

Andrew Phang Boon Leong JCA (delivering the judgment of the court):

Introduction

1 This is an application made by the Law Society of Singapore ("the Law Society") for an order pursuant to s 94(1) read with s 98(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") that the respondent, an advocate and solicitor, be sanctioned under s 83(1) of the LPA. However, it is apposite to note at the outset that there are certain unusual circumstances that surround the present application. In particular, before the Disciplinary Tribunal ("the DT"), both the Law Society and the respondent were of the view that the DT could and ought to make an appropriate order under s 93(1)(*b*) of the LPA – put simply, both were of the view that there was *no* cause of sufficient gravity that required a reference to this court. A second point to note is that the original charges against the respondent were amended by the Law Society (after

representations were made on her behalf) with the result that the charge she faced before the DT was one that did not allege any dishonesty on her part or any benefit received at the expense of her client – an amendment that was looked upon unfavourably by the DT (see *The Law Society of Singapore v Constance Margreat Paglar* [2020] SGDT 4 ("the DT Decision") at [27]–[28]). This point is closely related to the first inasmuch as once the elements just noted were no longer part of the charge proffered against the respondent, the question arose as to whether cause of sufficient gravity existed to merit a reference by the DT to this court. Counsel for the Law Society, Mr Shashi Nathan ("Mr Nathan"), observed candidly at the outset of the hearing before us that this constituted the nub of the present proceedings – in particular, whether, in light of the amended charge, the respondent had suffered (and will suffer) prejudice should we hold that the reference from the DT was properly made. We pause to emphasise that the respondent could only be held accountable for *what she had been specifically charged for* and, hence, whilst it might be argued that had the *original* charges stood, she might have been guilty of conduct of sufficient gravity to merit a reference to this court, this was beside the point. Indeed, we observed at the oral hearing that the fact that this court could impose relatively lighter sanctions on the respondent than what the Law Society had sought before the DT was also irrelevant inasmuch as that would put the cart before the horse. Put simply, if the respondent had not been guilty of conduct of sufficient gravity meriting reference to this court, then the entire case should be remitted to the DT for the purpose of sentencing.

2 There is yet another point that might be usefully noted: the DT had in fact asked whether the respondent had any antecedents of misconduct and was notified by the Law Society that the respondent did indeed have a recent antecedent ("the Antecedent"). Although the DT stated that it ultimately did not

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give weight to the Antecedent (see the DT Decision at [58]), it did observe that "[n]evertheless, it would be useful if a Court of Three Judges could clarify for the benefit of future disciplinary tribunals whether a tribunal is empowered and be [*sic*] at liberty to consider and give weight to a respondent's antecedent misconduct in arriving at a decision and/or determining the appropriate sanction for the misconduct that is before the tribunal" (see the DT Decision at [59]).

3 We now turn to the factual background and the reasoning as well as the decision of the DT as embodied in the DT Decision.

Background

4 The respondent is an advocate and solicitor of 22 years' standing. She was the sole proprietor of C Paglar & Co ("CPC") at all material times.

5 On or around 5 October 2017, one Lim Beng Heng Bernard ("Mr Lim") engaged CPC to make a claim for damages for personal injuries he had sustained in a road traffic accident. On 21 March 2018, CPC issued a letter of demand to India International Insurance Pte Ltd ("III"), the insurer of the motor vehicle that was involved in the accident, for a sum of $9,418.05, inclusive of $2,996 as costs.

6 Between 20 April 2018 and 7 June 2018, CPC and III exchanged three settlement offers. For present purposes, it is not necessary to delve into the details of each of those settlement offers. It suffices for us to highlight that those settlement offers all contained a breakdown of the specific sums being offered for general damages, medical expenses, transport expenses, costs and disbursements. In other words, those settlement offers were *not* negotiated on a purely global basis.

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7 In particular, III had, on 7 June 2018, made a settlement offer of $3,281.35, which sum was inclusive of $1,605 in costs and disbursements ("the 7 June Proposal"). By way of a letter dated 11 June 2018, the respondent informed Mr Lim of the 7 June Proposal and advised him that the aforementioned proposal was "reasonable" and ought to be "seriously considered for acceptance". She also explained to him that, should he accept the 7 June Proposal, he would be entitled to $1,552 in damages and that he would receive a net amount of $1,017 after legal costs had been deducted. On 13 June 2018, Mr Lim instructed the respondent to accept the 7 June Proposal on his behalf.

8 The respondent, however, did *not* communicate Mr Lim's acceptance of the 7 June Proposal to III. Instead, she proceeded to make a settlement offer to III for a global sum of $4,000 on 21 June 2018 ("the 21 June Offer"). III then made a counter-offer of a global settlement sum of $3,800 ("the Final Offer"), which CPC accepted on 26 June 2018. Crucially, the respondent did not inform Mr Lim that she had made the 21 June Offer or that she had accepted the Final Offer. The 21 June Offer also marked the first time that either CPC or III had made a settlement offer on a purely *global* basis; as mentioned above at [6], the prior settlement offers all had accompanying breakdowns of the sums being offered.

9 The respondent explained that while III had offered what she regarded as a reasonable quantum of damages in its 7 June Proposal, she felt that III's offer of $1,605 in costs and disbursements was unreasonably low and was not in line with the costs guidelines for personal injury claims. She had thus made the 21 June Offer in an attempt "to bring [III's] offer on party-and-party costs and disbursements in line with the costs guidelines".

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10 Following CPC's acceptance of the Final Offer, III sent CPC a discharge voucher for the sum of $3,800 ("the Discharge Voucher"). The respondent then forwarded the Discharge Voucher to Mr Lim for his signature but did not provide an explanation or breakdown of the sum of $3,800.

11 Upon receipt of the Discharge Voucher, Mr Lim noticed that the settlement sum stated therein was $3,800 instead of $3,281.35 per the 7 June Proposal, but there had not been a corresponding increase in the compensation sum awarded to him. He contacted CPC to request a breakdown of the figure of $3,800, only to be rebuffed by CPC's staff. Mr Lim was particularly concerned that the respondent could have negotiated a higher settlement sum without his authorisation and/or fabricated the 7 June Proposal, and pocketed the difference of $518.65. Frustrated that no explanation for the settlement sum of $3,800 was forthcoming, he did not sign the Discharge Voucher and subsequently filed a complaint against the respondent with the Council of the Law Society.

The disciplinary proceedings

The charge

12 The Law Society initially preferred a charge for breach of r 5(2)(*a*) of the Legal Profession (Professional Conduct Rules) 2015 (Cap 161, S 706/2015) ("PCR") amounting to improper conduct or practice under s 83(2)(*b*) of the LPA against the respondent. Rule 5(2)(*a*) of the PCR concerns a legal practitioner's duty of *honesty* in all his dealings with his client. The original main charge against the respondent was as follows:

> That you, Constance Margreat Paglar, an Advocate and Solicitor, are guilty of a breach of Rule 5(2)(a) of the Legal Profession (Professional Conduct Rules), Legal Profession Act (Chapter 161) ("the Rules"), in that *you renegotiated and accepted a higher global settlement sum for your client Lim Beng Heng Bernard … without informing or obtaining your client's*

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> *authorization of the same after your client had instructed you to accept the offer for a lower sum, and purported to keep the difference as your fees without your client's authorization or instruction*, and such breach of Rule 5(2)(a) amounts to improper conduct or practice as an advocate and solicitor within the meaning of section 83(2)(b) of the Legal Profession Act (Chapter 161). [emphasis in original omitted; emphasis added in italics]

The Law Society also preferred two alternative charges, both of which were worded identically to the main charge, save that the first alternative charge was brought under s 83(2)(*h*) of the LPA (for misconduct unbefitting an advocate and solicitor) while the second alternative charge alleged a breach of r 17 of the PCR (which concerns a legal practitioner's conduct in relation to professional fees and costs, though it is unclear which sub-rule the respondent was alleged to have breached).

13 As mentioned, the respondent's counsel made representations to the Law Society. Thereafter, the Law Society preferred a single amended charge against the respondent under s 83(2)(*b*) of the LPA for breach of r 5(2)(*e*) of the PCR, which requires a legal practitioner to "*keep the client reasonably informed* of the progress of the client's matter" [emphasis added]. The respondent pleaded guilty to the amended charge, which read as follows:

> That you, Constance Margreat Paglar, an Advocate and Solicitor, are guilty of a breach of Rule 5(2)(e) of the Legal Profession (Professional Conduct) Rules, Legal Profession Act (Cap 161, No. S 706), in that *you failed to inform your client Lim Beng Heng Bernard … of the progress of the matter, by failing to inform him when you negotiated a higher settlement sum with [III], and by failing to explain the breakdown of the settlement sum to him*, and such breach of Rule 5(2)(e) amounts 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, 2009 Rev. Ed.). [emphasis in original omitted; emphasis added in italics]

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The DT Decision

14 It bears reiterating that, before the DT, the Law Society did *not* submit that there was cause of sufficient gravity for disciplinary action under s 83(1) of the LPA. Instead, both the Law Society and the respondent agreed that the DT could and ought to make the appropriate order under s 93(1)(*b*) of the LPA. Where they disagreed was on the issue of what the appropriate order ought to be – the Law Society submitted that a penalty of $6,000 ought to be imposed whereas the respondent contended that a reprimand would suffice.

15 Notwithstanding the above, the DT found that there *was* cause of sufficient gravity for disciplinary action. The respondent had clearly defied Mr Lim's instructions to accept the 7 June Proposal (see the DT Decision at [32] and [37]). Moreover, the DT noted that the respondent had made the 21 June Offer and accepted the Final Offer without Mr Lim's instructions or authorisation and without informing him of the same (see the DT decision at [32], [36] and [37]). In making the 21 June Offer, the respondent had also left Mr Lim vulnerable to the possibility that, instead of making the Final Offer, III might have made a counter-offer for a sum *less* than what it had offered in the 7 June Proposal (see the DT decision at [32]). The DT further found that the respondent had no basis for claiming the differential of $518.65 (*ie*, the sum of $3,800 offered by III in the Final Offer less the sum of $3,281.35 offered by III in the 7 June Proposal) as party-and-party costs.

16 Of note is the DT's conclusion that the respondent's failure to inform Mr Lim and to obtain his instructions and authorisation, before making the 21 June Offer and accepting the Final Offer, was "not due to any oversight on the [r]espondent's part, or any misguided belief as to her entitlement to renegotiate the [party-and-party] costs after [Mr Lim] had accepted the 7 June

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Proposal, but was instead part of a *deliberate approach designed by the [r]espondent to benefit herself at the expense of [Mr Lim]*" [emphasis added] (see the DT Decision at [43]). The DT found that the respondent had *deliberately* decided not to seek Mr Lim's instructions before making the 21 June Offer, so as to avoid having to explain her previous advice to him to accept the 7 June Proposal, and to forestall his claiming a share in the differential of $518.65 (see the DT Decision at [42]). The DT further inferred that, in making the 21 June Offer, the respondent had likely sought a higher *global settlement sum* rather than higher *party-and-party costs* in order to mislead III into thinking that *Mr Lim* was dissatisfied with the quantum of *damages* offered in the 7 June Proposal (see the DT Decision at [34]). In essence, therefore, the DT held that the respondent had acted *dishonestly* and had intended to enrich herself at Mr Lim's expense (namely, by obtaining higher party-and-party costs for herself) by engaging in further negotiations with III. It appears that the DT's inference of dishonesty on the respondent's part was pivotal to its decision to refer the matter to this court.

17 As a result of a query by the DT, the Law Society informed the DT about the Antecedent (see [2] above and *The Law Society of Singapore v Constance Margreat Paglar* [2019] SGDT 11). The Antecedent related to the respondent's breaches of r 5(2)(*c*) of the PCR amounting to improper conduct or practice under s 83(2)(*b*)(i) of the LPA, for failing to keep her clients informed of the progress of their respective claims over an extended period. In that case, the respondent had pleaded guilty to four charges and was ordered to pay a penalty of $4,000.

18 The DT invited submissions on whether it was entitled to take the Antecedent into account for the purpose of *sentencing*, given that the respondent had pleaded guilty to the amended charge and liability was thus not in issue. In

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other words, the DT's query was whether it could consider the Antecedent so as to determine the appropriate order *under s 93(1)(*b*) of the LPA*. The Law Society was somewhat equivocal on the issue of antecedents. It stated that it was not the Law Society's practice to rely on antecedents before the DT and did not press for the DT to consider the Antecedent, but maintained that the DT was nonetheless at liberty to do so. On the other hand, the respondent submitted that the DT ought not to consider the Antecedent. She argued that while s 83(5) LPA expressly permitted a court of 3 Judges to take antecedents into account when determining what order should be made, there was no express statutory provision enabling the DT to consider the same.

19 Faced with this quandary, the DT decided not to ascribe any weight to the Antecedent in determining if there was cause of sufficient gravity for disciplinary action. Having regard to *only* the facts of the case, the DT found that cause of sufficient gravity for disciplinary action existed (see the DT Decision at [58]). Nonetheless, the DT invited this court to clarify if the DT could consider antecedents in "arriving at a decision and/or determining the appropriate sanction for the misconduct that is before the tribunal" (see the DT Decision at [59]).

20 Following the DT's determination that there was cause of sufficient gravity, the Law Society accordingly made the present application pursuant to s 94(1) of the LPA.

The issues before this court

21 In the present application, the Law Society asks that the respondent be sanctioned under s 83(1) of the LPA. This court is *only* empowered to impose sanctions under s 83(1) of the LPA *when due cause has been shown*. However,

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before addressing if due cause has been proven, we need to consider the anterior question of whether the DT was right to find that there was cause of sufficient gravity for disciplinary action. If there was no cause of sufficient gravity under s 93(1)(*c*) of the LPA to begin with, then the matter should not have been referred to this court, and this court will be precluded from imposing any sanction under s 83(1) of the LPA.

22 Hence, the issues before this court are as follows:

(a) Did the DT err in finding that there was cause of sufficient gravity for disciplinary action under s 83(1) of the LPA?

(i) If cause of sufficient gravity was made out, has due cause been shown? If so, what is the appropriate sanction to be imposed?

(ii) If there was no cause of sufficient gravity, what order(s) should this court make?

(b) Is the DT empowered to consider antecedents, whether in determining (i) if cause of sufficient gravity for disciplinary action exists; or (ii) the appropriate measure(s) to be imposed under s 93(1)(*b*) of the LPA?

23 We will address these issues in turn.

The parties' arguments

The Law Society's case

24 In its written submissions, the Law Society submitted that the DT was "justified" in finding that cause of sufficient gravity existed and urged this court

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to impose a penalty of $6,000 under s 83(1)(*c*) of the LPA. This was in sharp contrast to its position before the DT: namely, that there was *no* cause of sufficient gravity and that the DT could and ought to order that the respondent pay a similar penalty under s 93(1)(*b*) of the LPA. To his credit, Mr Nathan candidly conceded at the outset of the hearing before us that the amended charge which the respondent had pleaded guilty to was in fact a relatively minor charge. However, this naturally raises the question of whether the respondent's wrongdoing, *as framed in the amended charge*, warranted a reference to this court.

25 On the issue of antecedents, the Law Society's stance was that antecedents were only relevant to *sentencing* and not to *liability*. The Law Society clarified that it had only provided the DT with a copy of the Antecedent in order to enable the DT to calibrate the appropriate sentence, following the respondent's plea of guilt. Had the respondent contested the amended charge, the Antecedent would not have been relevant (and the DT would not have been entitled to consider it) until liability had been established.

The respondent's case

26 Counsel for the respondent, Mr Ragbir Singh s/o Ram Singh Bajwa ("Mr Bajwa"), contended that the DT had erred in finding that there was cause of sufficient gravity and that the matter ought to be remitted to the DT. He highlighted that the misconduct alleged in the amended charge – namely, the respondent's failure to inform Mr Lim of the progress of the matter – was considerably less serious than what had been alleged in the original charges. The amended charge only particularised two failures on the respondent's part: first, her failure to inform Mr Lim when engaging in further negotiations with III (after he had instructed her to accept the 7 June Proposal); and, second, her

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failure to provide Mr Lim with a breakdown of the eventual settlement sum. Mr Bajwa submitted that the respondent's failures *as particularised in the amended charge*, while inexcusable, were not so egregious as to meet the threshold for a finding that cause of sufficient gravity existed.

27 The respondent took particular objection to the DT's inference of dishonesty on her part. Mr Bajwa argued that the DT should not have imputed any dishonesty to her as the Law Society had amended the charge to remove any element of dishonesty. Moreover, the DT's findings of dishonesty were said to be prejudicial to the respondent, who had pleaded guilty to the amended charge on the understanding that, unlike the original charges, the amended charge did not allege dishonesty. Mr Bajwa emphasised that the gravamen of the amended charge was simply the respondent's failure to inform Mr Lim of the progress of the matter. He thus argued that the matter ought to be remitted to the DT for it to decide on the appropriate sanction (and that the appropriate sanction should be a reprimand under s 93(1)(*b*)(i) of the LPA).

28 Unsurprisingly, the respondent maintained that the DT was not at liberty to consider the Antecedent. She stressed that the express statutory language of s 93(1) of the LPA did not permit the DT to take antecedents into account, whether for the purpose of determining liability or sentencing.

Our decision

Was there cause of sufficient gravity for disciplinary action?

29 We now turn to address the first and primary issue of whether the DT had erred in finding that there was cause of sufficient gravity for disciplinary action.

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30 We begin by observing that the respondent had pleaded guilty to a charge that was substantially less serious than the original charges proffered against her. The amended charge concerned a breach of r 5(2)(*e*) of the PCR, *ie*, her failure to keep Mr Lim informed of the progress of the matter. In contrast, the gravamen of the original main charge (which alleged a breach of r 5(2)(*a*) of the PCR) was that she had acted dishonestly in her dealings with Mr Lim. As Mr Bajwa rightly pointed out, the Law Society had amended the charge against the respondent to omit any and all allegations of dishonesty. The result of the amendment was that the gist of the amended charge was altogether different from that of the original charges. The amended charge only alleged that the respondent had *failed to inform Mr Lim of the progress of the matter* by: (a) *failing to inform him* when she negotiated a higher settlement sum with III; and (b) *failing to explain* the breakdown of the settlement sum (of $3,800) to him. The original charges, however, alleged much more serious misconduct, including: the respondent's failure to obtain Mr Lim's authorisation to negotiate and accept a higher global settlement sum (than that offered in the 7 June Proposal); and her retention of the differential (of $518.65) without Mr Lim's authorisation or instruction.

31 It cannot be gainsaid that the respondent could only be held to account *for the specific misconduct that she had been charged for*. To hold otherwise would be prejudicial to the respondent, since it is the charge that informs a lawyer facing disciplinary proceedings of the case that he or she has to meet and impacts the decision he or she makes as to how to respond to the disciplinary proceedings. This point was underscored in *Law Society of Singapore v Ravi Madasamy* [2007] 2 SLR(R) 300 ("*Ravi Madasamy*"). The respondent lawyer in that case was charged under s 83(2)(*h*) of the LPA for behaving disrespectfully before a District Judge in open court. While the original charge

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stipulated, *inter alia*, that the respondent lawyer had threatened the District Judge with complaints to the Ministry of Law and the Legal Service Commission, this allegation was omitted from the amended charge which the respondent lawyer subsequently admitted to. In its report, the Law Society's Disciplinary Committee expressed dissatisfaction with the deletion of the aforesaid allegation from the original charge (see *Ravi Madasamy* at [18]):

> … In particular, [the Disciplinary Committee] was unhappy with the fact that notwithstanding the deletion of limb (e) from the original charge (*viz*, that the respondent had threatened the District Judge and the court officer with complaints to the Ministry of Law and the Legal Service Commission), para 6 of the amended [Statement of Case] contained facts that supported limb (e). … The [Disciplinary Committee] felt that it had been placed in a rather awkward position in that the respondent would admit to having said to the District Judge that he would report her but yet the [Disciplinary Committee] would be unable to deal with the import of this admission as a threat since the allegation that the respondent had threatened the District Judge would be deleted from the original charge. …

In essence, the Disciplinary Committee took the view that it could not give weight to the allegation that the respondent lawyer had threatened the District Judge since that allegation was *not* made in the amended charge. The matter was subsequently referred to a court of 3 Judges. The court did not dispute the point made that the Disciplinary Committee was not at liberty to consider the allegation which had been omitted from the amended charge; it simply concluded that the Disciplinary Committee had not in fact gone beyond the amended charge in finding that cause of sufficient gravity existed.

32 Unfortunately, it appears in the present case that the DT did not confine its findings to the amended charge that the respondent had pleaded guilty to. As mentioned at [16] above, the DT found that the respondent had acted deceitfully in order to benefit herself at Mr Lim's expense. In fact, the DT went as far as to state that her actions "arguably … constituted potential breaches of trust" in so

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far as she had intended to pocket the differential of $518.65 (see the DT Decision at [45]).

33 With respect, we find that the DT had erred in making the abovementioned findings. What the DT failed to appreciate was that *even if* the respondent had indeed acted dishonestly, the amended charge, and even the Agreed Statement of Facts, contained no allegation of dishonest conduct whatsoever. The DT based its finding of dishonesty on, *inter alia*, the fact that the respondent had acted wholly contrary to Mr Lim's instructions to accept the 7 June Proposal, as well as its inference that she had intended to retain the differential of $518.65 for her own benefit. However, such instances of wrongdoing were only particularised in the *original* charges, and ***not*** in the *amended* charge. Indeed, the DT appeared to have paid little heed to the *amended* charge; its pronouncement that there was cause of sufficient gravity seemed, to us, to be based on the *original* charges. In this regard, we accept Mr Bajwa's submission that it would be prejudicial to the respondent if this court were to hold that the DT's finding of dishonesty justified its referring the matter to a court of 3 Judges. The respondent had pleaded guilty on the basis that the amended charge against her did not allege dishonesty or improper receipt of any benefit meant for Mr Lim – all that the amended charge alleged was a failure to keep Mr Lim informed of the progress of the matter, which she accepted responsibility for. It follows, therefore, that the respondent could not be held liable for dishonest conduct *which she had not been charged for*.

34 The DT's finding of dishonesty was clearly central to its determination that cause of sufficient gravity had been made out. Disregarding those findings (for the reasons canvassed at [29]–[33] above), we are not satisfied that a reference to this court was warranted. It is trite that only the *most serious cases* are heard by a court of 3 Judges; the fact that a lawyer's conduct falls within

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one or more of the limbs of s 83(2) of the LPA does not, without more, establish cause of sufficient gravity (see *Law Society of Singapore v Jasmine Gowrimani d/o Daniel* [2010] 3 SLR 390 ("*Jasmine Gowrimani*") at [24], [28] and [39]).

35 In *Jasmine Gowrimani*, a solicitor was charged with conducting herself in a manner unbefitting an advocate and solicitor under s 83(2)(*h*) of the LPA, by allegedly threatening and abusing a teacher during a meeting at a primary school. The DT found that cause of sufficient gravity existed per s 93(1)(*c*) of the LPA and referred the matter to the court of 3 Judges. However, the court of 3 Judges viewed the solicitor's misconduct as being of a relatively less serious nature; it therefore dismissed the Law Society's application for the solicitor to show cause and remitted the matter to the DT for it to decide on the appropriate form of punishment (see *Jasmine Gowrimani* at [40] and [41]).

36 In this case, the amended charge against the respondent related only to her failure to inform Mr Lim of the progress of the matter. Having regard to the amended charge framed by the Law Society, we find that while the respondent's conduct fell short of the professional standards expected of an advocate and solicitor, there was *no* cause of sufficient gravity and that the matter should not have been referred to this court. We emphasise that in arriving at our decision, we were guided by the *amended* charge preferred against the respondent. Had the original charges against the respondent stood and been either admitted to or proved, it might have been at least arguable that her conduct was of sufficient gravity to warrant a reference to this court.

37 We note the DT's misgivings regarding the amendment of the charges against the respondent (see the DT Decision at [27]–[28]). As the High Court recently observed in *Law Society of Singapore v Yeo Khirn Hai Alvin and*

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another matter [2020] 4 SLR 858 ("*Alvin Yeo*"), the Law Society has a duty to frame charges that reflect the gravamen of the complaints referred to it. Where the Law Society has framed a defective charge that fails to reflect the substance of the complaint, the DT lacks jurisdiction in hearing and investigating the charge and making a determination thereon, and the DT's determination is liable to be set aside (see *Alvin Yeo* at [66], [77] and [78]).

38 In this case, we find it slightly troubling that the tenor of the amended charge was that the respondent had merely failed to provide Mr Lim with an update on the progress of the matter. This did not seem commensurate with the gravamen of Mr Lim's complaint, which was the respondent's failure to obtain his approval before negotiating further on his behalf and the fact that she had acted wholly contrary to his explicit instructions – in other words, Mr Lim's complaint was really that the respondent had not been entitled to make the 21 June Offer in the first place. The question that therefore arose for our consideration was whether the amended charge was defective in that it failed to reflect the gravamen of the complaint, such that the DT had no jurisdiction to make its determination.

39 In our view, while the amended charge did not capture the full extent of the respondent's transgression, it was not so defective as to warrant setting aside the DT's determination for lack of jurisdiction. Moreover, no application to set aside the DT's determination has been filed. We therefore say nothing further on this issue, save to reiterate that the Law Society's duty to investigate complaints referred to it implies a concomitant duty to frame appropriate charges that adequately reflect the gravamen of the complaint (see *Alvin Yeo* at [78]). These are weighty obligations that the Law Society has been entrusted with, and the principle of self-regulation in disciplinary matters makes it even more imperative that the Law Society thoroughly discharges these duties. Any

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failure to fulfil these responsibilities would only serve to undermine the overriding purpose of legal disciplinary proceedings – to protect the public and uphold public confidence in the legal profession (see *Law Society of Singapore v Chia Choon Yang* [2018] 5 SLR 1068 at [41]). Having said that, the Law Society does of course retain the discretion to amend charges in appropriate circumstances after it has considered the relevant facts and the law. A complainant's view of the gravamen of the complaint may not always be sustainable.

40 Although we have determined that there was no cause of sufficient gravity, the amended charge against the respondent was clearly made out and involved more than a merely technical breach. In the circumstances, we order that the matter be remitted to the DT for it to determine the appropriate order to be made pursuant to s 93(1)(*b*) of the LPA. The respondent does not object to the same DT deciding on the appropriate measure, and we so order.

Is the DT entitled to take antecedents into account?

41 We now address the issue of antecedents. As stated earlier, the DT invited this court to clarify "whether a tribunal is empowered and be [*sic*] at liberty to consider and give weight to a respondent's antecedent misconduct in arriving at a decision and/or determining the appropriate sanction for the misconduct that is before the tribunal" (see the DT Decision at [59]). In light of how the DT's query has been framed, we address this issue in two parts: (a) whether antecedents are relevant when establishing *liability*; and (b) whether antecedents may be considered for the purpose of *sentencing*.

42 Before us, both the Law Society and the respondent adopted the position that antecedents should not be taken into account when determining liability.

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We agree. At the liability stage, the inquiry is whether the *specific misconduct alleged in that particular instance* has been proven. There is no room for antecedents to be considered at this stage, whether by the DT (in deciding whether cause of sufficient gravity exists) or by a court of 3 Judges (in deciding if due cause has been shown). This point is borne out by s 83(5) of the LPA, which provides that *a court of 3 Judges* may take antecedents into account but only "to determine *what order should be made*" [emphasis added]. In other words, where a matter is referred to a court of 3 Judges, the court may *only* consider antecedents for the purpose of *sentencing* and *not* to determine if due cause has been shown. There is also no provision in the LPA that empowers *the DT* to give weight to antecedents at the *liability* stage. Moreover, it is well established that disciplinary proceedings are quasi-criminal in nature, and the rule that similar fact evidence is generally inadmissible in criminal proceedings lends further weight to the notion that antecedents are irrelevant for the purpose of determining liability in disciplinary proceedings.

43 The DT expressly stated that it did not place any weight on the Antecedent in determining that there was cause of sufficient gravity in the present case (see the DT Decision at [58]). Notwithstanding the DT's disavowal of any reliance on the Antecedent in deciding to refer the matter to this court, we have some reservations as to whether this was in fact the case. In response to the respondent's submission that the DT was not at liberty to consider the Antecedent, the DT opined that the corollary of her submission was that "where there is antecedent misconduct, it would be better to leave it to the court to decide on the appropriate order for the present misconduct so that the order to be made is reflective of the object of disciplining the errant advocate. In a situation like that, a disciplinary tribunal may have no choice but to send the

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matter up for the appropriate order to be made by the court" (see the DT Decision at [54]). The DT similarly stated at [56] of the DT Decision that:

> … the Tribunal at the conclusion of the hearing invited the Respondent to consider whether the Tribunal could look into the Antecedent in deciding the appropriate sanction for the present misconduct, *with the caveat that if she did not agree there was the possibility that the Tribunal may feel constrained to refer the matter to the Court of Three Judges*. The Respondent maintained her position that the Tribunal should not consider the Antecedent. [emphasis added]

44 It thus seems that the DT might have laboured under the misconception that if the respondent did not agree to allow the DT to consider the Antecedent in order to decide on the appropriate sanction, it was *bound* to refer the matter to a court of 3 Judges. Even if the DT had not operated under such a misapprehension, the fact that it had referred the matter to this court after making the remarks quoted in the preceding paragraph certainly gives rise to that impression. We add that regardless of whether the DT in fact gave weight to the Antecedent (be it subconsciously or otherwise) in finding that cause of sufficient gravity existed, it was prejudicial to the respondent that the DT had sight of the Antecedent *before* determining that there was cause of sufficient gravity. The fact that the DT was aware of the Antecedent and was privy to its details, including, for example, the fact that it was recent and that its factual matrix was similar to that of the present case, created a risk that the DT might have relied, at least subconsciously, on the Antecedent in deciding to refer the matter to this court. We stress that antecedents should strictly *not* be used to determine *liability* in disciplinary proceedings.

45 We also disagree with the DT's proposition that "a disciplinary tribunal may have no choice but to send the matter up for the appropriate order to be made by the court" where the lawyer in question has antecedents (see the DT Decision at [54]). Whether the DT should refer a matter to a court of 3 Judges

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turns principally on whether the matter is of "sufficient gravity" to merit such a reference (see s 93(1)(*c*) of the LPA) – the presence or absence of antecedents should *not* figure in this assessment. Moreover, the DT's suggestion would hardly conduce to the expeditious handling of disciplinary proceedings (see s 93(3) of the LPA), and would militate against the DT's critical filtering function in ensuring that less serious cases of professional misconduct are not referred to the court of 3 Judges (see *Jasmine Gowrimani* at [28] and [31]).

46 Having clarified that antecedents are irrelevant at the liability stage, we now turn to consider whether the DT is empowered to take antecedents into account when determining the appropriate measure(s) to be imposed under s 93(1)(*b*) of the LPA. It is undisputed that a court of 3 Judges may consider antecedents when deciding what sanction(s) to impose under s 83(1) of the LPA – as mentioned at [42] above, the court is expressly empowered to do so by virtue of s 83(5) of the LPA.

47 The DT, in assessing the conduct of a "regulated legal practitioner" (hereafter referred to as a "lawyer") under s 93 of the LPA, may find that there exists no cause of sufficient gravity justifying further action against that lawyer pursuant to s 94(1) of the LPA. It may nevertheless conclude that some action should be taken against that lawyer pursuant to s 93(1)(*b*) of the LPA. In such situations, it may be argued that the DT has imposed some measure of liability for the lawyer's misconduct. Consequently, it is arguable that, for the purpose of deciding which limb of s 93(1)(*b*) ought to apply, the DT will *then* be engaged in a form or process of *sentencing*. Following from this, it could then be argued that the lawyer's antecedents would be relevant for the purpose of such *sentencing*. We find this argument to be a persuasive one. There is no doubt, in our view, that at *this* particular stage of the proceedings, the DT *is* engaged in the process of ***sentencing*** and is therefore entitled to look at the

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relevant antecedents of the lawyer at *this* particular point in the proceedings. Indeed, the fact that the lawyer may have antecedents may in fact assist the DT in deciding which limb(s) pursuant to s 93(1)(*b*) ought to apply as not all the sanctions are of equal severity in terms of consequences. Hence, in this case for example, Mr Bajwa argued that a reprimand pursuant to s 93(1)(*b*)(ii) would suffice, whereas Mr Nathan argued that the respondent ought to be ordered to pay a penalty pursuant to s 93(1)(*b*)(i).

48 What, then, of the argument that, even at the sentencing stage under s 93(1)(*b*), the DT is nonetheless *limited* by the language of s 93(1) itself to considering *only* "the facts of the case"? Whilst this argument is attractive at first blush, it could, in our view, be equally argued that the words "the facts of the case" in s 93(1) apply *only* to the ascertainment of *liability*. Hence, in relation to s 93(1)(*b*), the DT might conclude – in so far as the issue of *liability* is concerned – that there was misconduct, albeit not misconduct that rises to the level of sufficient gravity for the purposes of s 83 or s 83A (as the case may be) of the LPA. However, ss 93(1)(*b*)(i)–93(1)(*b*)(iv) of the LPA deal with the (quite *separate*) issue of *sentencing* in general and the precise *sanctions* that the DT may impose. In so far as *sentencing* under ss 93(1)(*b*)(i)–93(1)(*b*)(iv) of the LPA is concerned, the words "the facts of the case" in s 93(1) have *no (limiting) application*. Put simply, the approach is one of *substance* as opposed to literal linguistic form and/or application. Looked at in this light, the *substance* of the DT's decision pursuant to ss 93(1)(*b*)(i)–93(1)(*b*)(iv) of the LPA deals with *sentencing* and, in accordance with general principle, *would* permit the DT to take into account the relevant antecedents of the lawyer. It is unfortunate, though, that there is no *express* provision akin to s 83(5) of the LPA. However, as just mentioned, the inquiry is one of substance over form and, in our view, s 83(5) merely reiterates (in *express* legislative language) the relevant *general*

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principle with regard to *sentencing* in so far as the power of the court of 3 Judges is concerned. Put another way, had s 83(5) not been present, it would, in our view, *still* have been open to the court of 3 Judges to take into account relevant antecedents in sentencing. This is indeed the case in so far as the DT is concerned with regard to the exercise of its *sentencing* power pursuant to ss 93(1)(*b*)(i)–93(1)(*b*)(iv) of the LPA (notwithstanding that there is no equivalent of s 83(5)). It would be incongruous if the court of 3 Judges but not the DT is entitled to consider antecedents at the sentencing stage, when both are engaged in the same task of sentencing and might even be imposing the very same sanction. In other words, there is no principled reason why antecedents should only be relevant to sentencing before the court of 3 Judges (pursuant to ss 83(1) and 83A(1) of the LPA) but not before the DT (pursuant to s 93(1)(*b*) of the LPA).

49 Another objection that may be levelled against our position, as regards the relevance of antecedents to sentencing before the DT, arises in relation to borderline cases under s 93(1)(*b*) of the LPA. Under s 93(1)(*b*), the DT may determine that while there is no cause of sufficient gravity, some action should nonetheless be taken against the lawyer. Assume, *arguendo*, that the DT considers that the facts of the case *alone* warrant a relatively heavy penalty of $18,000, but the lawyer in question has antecedents. One may argue that, in such a case, the aggravating weight of the antecedents may well push the appropriate sentence beyond the maximum penalty of $20,000 which the Council of the Law Society is empowered to order (see s 94(3)(*a*) of the LPA). The argument here is that the DT may be placed in the awkward and unenviable position of either having to order a penalty of only $20,000 (and thereby not give full weight to the lawyer's antecedents) or to refer the matter to the court of 3 Judges

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(which is empowered to impose heavier sanctions) *despite* being of the view that no cause of sufficient gravity exists.

50 It should be noted, however, that a similar argument could also be made in the context of criminal cases – yet this has not posed a problem in criminal cases, where the court simply sentences the accused person accordingly. Moreover, in so far as s 93(1)(*b*) of the LPA is concerned, if there are any concerns that the DT may have ordered the maximum penalty of $20,000 in a borderline case as described above *only* because it felt constrained to do so, the Council of the Law Society may file an application for the DT's determination to be reviewed by the High Court (pursuant to s 97(1) of the LPA), and, if necessary, a further appeal of the High Court's review to the Court of Appeal (see *Iskandar bin Rahmat v Law Society of Singapore* [2021] SGCA 1 ("*Iskandar*") at [68], [75] and [87]). We also expect such borderline cases to be few and far between. Indeed, this objection really only presents itself where the DT determines that no cause of sufficient gravity exists *but* that the facts of the case (before taking any antecedents into account) warrant a penalty close to the maximum available to the Council of the Law Society. Such cases have been and will likely remain relatively rare.

51 In summary, for the reasons stated above, whilst a lawyer's antecedents may *not* be taken into account when establishing *liability*, they may be considered for the purpose of *sentencing*. We caution, however, that the DT should only be alerted to the fact that a lawyer has antecedents and should only have sight of such antecedents *after* it has arrived at a decision that no cause of sufficient gravity exists, and ***only*** for the purpose of determining the appropriate order under s 93(1)(*b*) of the LPA. It would be improper for the DT to be swayed by the lawyer's antecedents in deciding whether cause of sufficient gravity exists.

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Conclusion

52 For the foregoing reasons, we find that there was no cause of sufficient gravity for disciplinary action and that the DT should not have referred the matter to this court. Accordingly, we remit the matter to the same DT for it to determine the appropriate order to be made under s 93(1)(*b*) of the LPA. In light of the order we have made, we consider it just for each party to bear its own costs in these proceedings.

53 We conclude this judgment by reiterating the Chief Justice's remarks in the Court of Appeal's recent decision in *Iskandar* (at [34] and [91]) that "the disciplinary framework … set out in Part VII of the LPA [is] enigmatic and in need of review and reform" and that "Part VII of the LPA is not a model of clarity and consistency". As we have mentioned at [48] above, s 93(1)(*b*) of the LPA does not contain any express provision akin to s 83(5) of the LPA. This is unfortunate and, as this case amply illustrates, is apt to cause confusion. Legislative reform in this regard would be welcome as well.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

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