Wong Keng Leong Rayney v Law Society of Singapore
[2007] SGCA 42

Case Number : CA 69/2006

Decision Date : 06 September 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tan Lee Meng J

Counsel Name(s) : N Sreenivasan (Straits Law Practice LLC) for the appellant; Michael Hwang SC and Desmond Ang (Michael Hwang) for the respondent

Parties : Wong Keng Leong Rayney — Law Society of Singapore

Administrative Law – Disciplinary proceedings – Whether misconduct of private non-state agent in procuring incriminating evidence against professional person compromising integrity of disciplinary process – Whether doctrine of abuse of process applicable to disciplinary proceedings – Sections 415, 511 Penal Code (Cap 224, 1985 Rev Ed)

Evidence – Admissibility of evidence – Whether evidence entrapment or illegally obtained

Legal Profession – Disciplinary procedures – Whether evidence inadmissible because illegally or improperly obtained – Whether motive of law firm instigating sting operation relevant

Legal Profession – Professional conduct – Breach – Lawyer paying referral fee to estate agent in fictitious conveyancing transaction – Sections 83(2)(d), 83(2)(e), 83(2)(h) Legal Profession Act (Cap 161, 2001 Rev Ed) – Rule 11A(2)(b) Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed)

6 September 2007 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by Rayney Wong Keng Leong ("the appellant") against the decision of V K Rajah J (as he then was) ("the Judge") dismissing his application for leave to apply for judicial review of certain decisions of the disciplinary committee ("the DC") appointed by the Law Society of Singapore ("the Law Society") in the course of hearing two sets of disciplinary charges against the appellant under the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the Act"). This appeal involves issues of fact and law and important issues of policy in relation to our criminal justice system.

2 The DC proceedings arose from one in a series of sting operations mounted against eight to ten law firms suspected of paying referral fees in cash or in kind to estate agents for referring conveyancing business to them. In the present case, the appellant, who was ensnared in one of the operations, has alleged that the operation was mounted by a particular law firm ("the instructing solicitor"). The resulting disciplinary charges brought against him were for: (a) promising to pay to the estate agent, one Jenny Lee Pei Chuan ("Jenny"), a referral fee for agreeing to introduce a conveyancing transaction to him; and (b) paying Jenny a referral fee after it was aborted.

Background

The charge

3 The relevant facts of this case are set out in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 ("*Rayney Wong*"). Briefly, the appellant is an advocate and solicitor of about 22 years' seniority and a partner in a law firm. The Law Society, upon receiving a complaint from Jenny that the appellant had paid her a fee with respect to a conveyancing transaction, referred it to an inquiry committee ("the IC") which, after due inquiry, found that there was a *prima facie* case for a formal investigation and referred the matter to the DC. The following charges were made against the appellant:

(a) attempting to procure the employment of his firm to act in relation to the proposed purchase by the fictitious purchaser, through the instructions of Jenny, to whom he had promised to pay a referral fee, in breach of s 83(2)(*e*) of the Act; or alternatively in breach of s 83(2)(*h*) of the Act; and

(b) giving to Jenny as gratification the sum of $150 out of $500 received by him as legal fees for legal work undertaken in relation to the proposed purchase by the fictitious purchaser, in breach of s 83(2)(*d*) of the Act; or alternatively in breach of s 83(2)(*h*) of the Act.

The Disciplinary Committee hearing and findings

The Law Society's case

4 In the DC proceedings, the Law Society's main witness was Jenny. She testified on how the arrangement for the payment came about. She had telephoned the appellant to ask whether he would be prepared to act for a purchaser in a conveyancing transaction. They subsequently met in his office when the appellant agreed to act for the purchaser. The purchaser was a fictitious person as he was invented by Jenny, although there was a real vendor and the property, the subject matter of the transaction, had been advertised for sale. The appellant carried out the preliminary legal work in the form of searches and requisitions. At a second meeting with the appellant, Jenny informed him that the sale was aborted. She paid him $500 for work done, and he then paid her $150 as reimbursement for her expenses. Unbeknown to the appellant, Jenny had surreptitiously recorded their conversations at both meetings ("the audio recordings").

5 The Law Society tendered as evidence the audio recordings, together with copies of the transcripts. The appellant did not object to Jenny's testimony on how she succeeded in getting the appellant to agree to pay her a referral fee or to the admission of the audio recordings (and the related transcripts). For reasons which will become clear later, we will, in this judgment, refer to this collection of evidence as "the impugned evidence". In the course of the hearing, the appellant applied to the DC for an order to direct Jenny's employer to disclose the identity of the instructing solicitor so that he could be cross-examined on his motive in "entrapping" the appellant. The appellant alleged that the instructing solicitor had mounted the operation against him and the other lawyers with an improper motive, *viz*, to eliminate the competition in order to increase his own conveyancing work. The DC rejected the application on the ground that the motive of the instructing solicitor was irrelevant to the conduct of the appellant in relation to the disciplinary charges against him.

The appellant's case

6 At the conclusion of the Law Society's case, counsel for the appellant submitted that the appellant had no case to answer on the ground that the impugned evidence had been wrongly admitted as it was obtained illegally by Jenny, and that but for such evidence the appellant had no case to answer. Counsel contended that Jenny had committed two offences in the course of procuring the impugned evidence. Firstly, she had deceived the appellant into believing that the

purchase transaction was a genuine transaction, and thereby caused or instigated him into agreeing to pay, and subsequently paying, a referral fee to her. In the circumstances, she had committed the offence of cheating under s 415 of the Penal Code (Cap 224, 1985 Rev Ed). Secondly, by so acting, Jenny had abetted the appellant in committing a breach of r 11A(2)(*b*) of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed).

The Disciplinary Committee's findings

7 The DC dismissed the appellant's arguments and held that (a) under the law there was no discretion to exclude the impugned evidence, even if it had been illegally obtained unless its prejudicial effect outweighed its probative value; (b) the impugned evidence was not illegally obtained as Jenny had not committed any offence in the course of obtaining it; and (c) the appellant's agreement to pay, and the payment of, the referral fee were made voluntarily. The DC accordingly called upon the appellant to enter his defence.

8 Dissatisfied with the DC's rulings, the appellant applied to the High Court for leave to apply for judicial review and the following orders: (a) an order to quash the decision of the DC and to stay the DC proceedings permanently; (b) an order to quash the DC's rulings that: (i) the impugned evidence was not illegally obtained; (ii) the impugned evidence was admissible in evidence; and (iii) the identity of the instructing solicitor was not subject to disclosure to the appellant.

Proceedings in the High Court

9 The broad issues of law canvassed before the High Court were as follows:

(a) whether the application for judicial review was premature;

(b) whether the subject matter of the application was amenable to judicial review;

(c) whether the DC had erred in law in admitting the impugned evidence, and if so, whether further proceedings should be permanently stayed.

Decision of the Judge

10 The Judge heard full arguments from the appellant and the Law Society on the procedural and the substantive issues. He dismissed the leave application on the ground that it was premature. He held that the application should only have been brought after the DC had decided that the appellant's misconduct was of sufficient gravity to be referred to the court of three judges.

11 Even though the substantive issues on the law became irrelevant as a result of his decision that the leave application was premature, the Judge nevertheless gave his views on the legal issues as follows:

(a) The DC did not err in law in admitting the impugned evidence as this court in *How Poh Sun v PP* [1991] SLR 220 ("*How Poh Sun*") held, applying the House of Lords' decision in *Regina v Sang* [1980] AC 402 ("*Sang*"), that courts had no discretion in general to reject evidence that was illegally or improperly obtained.

(b) Jenny had not committed any offence in procuring the impugned evidence.

(c) The DC was correct in refusing to order the disclosure of the identity of the instructing solicitor as his motive in initiating the operation against the appellant was irrelevant to the

latter's conduct.

The issues before this court

12 The main issues raised by the appellant in this appeal are as follows:

(a) whether the application for judicial review was premature;

(b) whether the DC was wrong in law in finding that the impugned evidence was not illegally or improperly obtained; and

(c) whether, if the impugned evidence were illegally or improperly obtained, it was admissible in disciplinary proceedings.

13 The related legal issues arising from the third main issue that were canvassed by the appellant are as follows:

(a) whether *How Poh Sun* should be followed by this court, having regard to the recent decision of the House of Lords in *Regina v Looseley* [2001] 1 WLR 2060 ("*Looseley*") which declined to apply *Sang* and held that entrapment was an abuse of process and the consequent prosecution should be stayed;

(b) whether the law, as stated in *SM Summit Holdings Ltd v PP* [1997] 3 SLR 922 ("*Summit*"), that illegally obtained evidence procured by a preceding unlawful act by a state party is inadmissible as evidence ("the *Summit* exception") is consistent with *How Poh Sun*, and, if so, whether it should be applied in the present case; and

(c) whether this court should stay the disciplinary proceedings by analogy to an abuse of process under *Looseley* on the ground that Jenny's conduct in breaking the law to entrap the appellant was an abuse of the disciplinary process.

14 In this judgment, we will consider the procedural issue and the question as to whether Jenny had committed any offence in getting the appellant to agree to pay, and to pay, her a referral fee, and whether such conduct amounted to entrapment. For reasons which we will give later, we will not be addressing the other issues relating to the admissibility of the impugned evidence.

The issue of prematurity in judicial review

15 It is a well-established principle that the decisions of inquiry committees and disciplinary committees, like those of all other subordinate tribunals in Singapore, are subject to judicial review: see *Re Singh Kalpanath* [1992] 2 SLR 639; *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85. However, the novel feature in the present case, unlike in the two cases referred to, is that the subject matter of the appellant's application is an interlocutory and not a final decision. The Judge dismissed the leave application for judicial review on the ground that it was premature as the DC's interlocutory decision did not have a substantial effect on the appellant. The Judge held that the appellant should have waited until the DC had decided that the disciplinary charges were of sufficient gravity to be referred to the court of three judges. Until then, it could not be said that the DC's interlocutory decision had a substantial adverse effect on him. In reaching his conclusion, the Judge followed the general approach of the English courts (in *Regina v Association of Futures Brokers and Dealers Ltd, ex parte Mordens Ltd* (1991) 3 Admin LR 254 *per* McCollough J at 263) that:

> [I]t is only in the most exceptional circumstances that the court will grant judicial review of a decision taken during the course of a hearing, by a body amenable to the court's supervisory jurisdiction, before that hearing has been concluded.

He also accepted (see *Rayney Wong* ([3] *supra*) at [18]) the policy reasons for discouraging premature challenges to administrative decisions as summarised in Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 3rd Ed, 2004) at para 11-016 as follows:

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

16 It is difficult to disagree with the logic of the Judge's reasoning that until the DC decides that the disciplinary charges are of sufficient gravity to be referred to the court of three judges, it cannot be said that calling on the appellant to enter his defence has an adverse effect on him. If the appellant elects to give evidence, he may or may not be able to convince the DC that the Law Society has not proved its case against him. We just do not know what the outcome would be as he has not given his version of the events that took place between him and Jenny.

17 However, the appellant's argument is that whatever the final determination of the DC may be, it is irrelevant because the DC's decision calling upon him to enter his defence is an error of law that has a substantial effect on him. It is an error of law because it is based on the impugned evidence, which is inadmissible in law. It has a substantial effect on him because (a) but for such evidence, the DC would have no basis to call for his defence since there was no other evidence to support the disciplinary charges preferred against him; (b) the DC's decision has wrongly shifted the evidential burden onto the appellant, and would deprive him, as an accused person, of the presumption of innocence; and (c) if he elects not to enter his defence, he is likely to be found guilty of the disciplinary charges against him.

Substantial effect of defence being called

18 In support of his argument on substantial effect, counsel for the appellant relies on the test propounded by Jack Beatson, "Prematurity and Ripeness for Review" in *The Golden Metwand and the Crooked Cord, Essays on Public Law in Honour of Sir William Wade QC* (Christopher Forsyth & Ivan Hare eds) (Clarendon Press, 1998) and which was accepted by the Judge (at [20] of his judgment) as suggesting that where there is an error of law in making an interlocutory decision which has a "substantial effect", an exception to the prematurity concept, and hence a quashing order, may be made.

Meaning and effect of error of law in the DC's decision

19 In support of his argument on error of law, he relies on the following statement of Lord Cooke of Thorndon in *Regina v Bedwellty Justices, Ex parte Williams* [1997] AC 225 ("*Ex parte Williams*"), at 233, as follows:

> To convict or commit for trial without any admissible evidence of guilt is to fall into an error of

law. As to the availability of certiorari to quash a committal for such an error, I understood at the end of the arguments that all your Lordships were satisfied that in principle the remedy is available and that the only issue presenting any difficulty relates to the exercise of the court's discretion.

In *Ex parte Williams,* the House of Lords drew a distinction between a case of inadmissibility of evidence and one of insufficiency of evidence, applying its previous decision in *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220. In the former case, there would be an error of law which is amenable to judicial review, but not in the latter case. Counsel for the appellant contends that the present case concerns the wrongful admission of inadmissible evidence, which is an error of law that is amenable to judicial review.

20 In *Ex parte Williams*, the applicant, the co-defendants and certain witnesses were committed to trial for conspiracy to pervert the course of justice. The applicant contested the committal, but the other defendants did not. The justices did not hear oral evidence against the applicant but, after being shown transcripts of police interviews in which the other defendants had admitted to the conspiracy and implicated the applicant, the justices committed him for trial. On the applicant's motion for judicial review to quash the committal, the Divisional Court held that although there had been no admissible evidence before the justices on which the applicant could properly have been committed, it was not the practice of the Divisional Court to exercise its discretion to order *certiorari* to quash a committal on the ground of inadmissibility of evidence or insufficiency of evidence. The motion was accordingly dismissed. The applicant's appeal to the House of Lords was allowed. Their Lordships held that although *certiorari* was at the discretion of the court, it would normally follow in instances where there had been no admissible evidence before the justices of the defendant's guilt or where the committal had been so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences for the defendant, and the review court would be slow to interfere on a complaint that the evidence had been admissible but insufficient, which would be more appropriately dealt with at the trial.

Assumptions underlying the appellant's argument against prematurity

21 The appellant's argument that the leave application is not premature rests on a number of factual, legal and policy premises, all of which, in his counsel's submission, can be demonstrated as supportable on the evidence before the DC and the law applicable in Singapore or as developed in England. The first premise (which is one of mixed fact and law) is that the impugned evidence is entrapment evidence or is evidence that has been illegally or improperly obtained under Singapore law. The legal premise is that the *Summit* exception ([13] *supra*) is not inconsistent with *Sang* ([11] *supra*) and that it applies to the impugned evidence, thereby rendering it inadmissible as evidence. The first policy premise is that *Looseley* ([13] *supra*) should be applied in Singapore and that *Summit*, whether or not inconsistent with *Sang*, should be affirmed by this court, and the second policy premise is that if the first policy premise is substantiated, then the law applicable to criminal proceedings should be applied to disciplinary proceedings.

22 If *all of these premises (or assumptions)* are made good, it may then be said that where there is entrapment, any prosecution founded on it would be stayed as an abuse of process and where the evidence is illegally obtained in the manner disapproved of in *Summit*, the evidence would be excluded. However, if the first premise of mixed fact and law (that there was entrapment or that the impugned evidence was illegally obtained) is not substantiated, then the appellant's appeal fails as there would be no factual basis upon which to even consider what the law is in relation to entrapment or illegally obtained evidence.

23 In our view, given the basis on which this appeal has been argued, it is not necessary for this court to consider whether the leave application is premature, interesting as this legal issue may be in this developing area of the law on judicial review. The Judge has provided an extensive survey of the developments in England and we do not propose to traverse the same ground again. We must now proceed to determine whether the impugned evidence was entrapment or illegally obtained evidence.

Was the impugned evidence entrapment or illegally obtained evidence?

24 Before we address this question, it is necessary that we provide a brief account of the legal matrix that forms the backdrop to the question and in which the appellant has made his two alternative legal arguments bearing on the impugned evidence. The first argument is that it was illegally obtained, and is therefore inadmissible under the *Summit* exception, which the High Court has carved out from *Sang*. The second is that it was obtained by entrapment and as such would be an abuse of the disciplinary process, requiring this court to respond by staying the DC proceedings. In *Looseley*, the House of Lords ruled that state-directed entrapment, for the purpose of prosecuting a person who might not have otherwise committed the offence, was an abuse of process requiring the court to stay the proceedings. The appellant argues that the disciplinary process should be accorded the same recognition as the judicial process in relation to abuse of process. Moreover, in *Summit*, the High Court held that the principle against the admissibility of illegally obtained evidence applicable in public prosecutions was also applicable to private prosecutions.

25 In *Summit*, the High Court did not make an explicit finding that there was entrapment by the private investigator, although the court expressly distinguished *Sang* on the basis that in *Sang* the police conduct had merely induced (*ie*, in the sense of having provided the opportunity to) the accused person to commit the offence, whereas in *Summit* the unlawful conduct of the private investigator was an essential ingredient of the charged offence: see [52] of *Summit*. The way in which *Sang* was distinguished does not seem to imply that what the private investigator did was entrapment (as defined in *Looseley*). It would appear that no instigation or inducement is necessary so long as the preceding conduct is unlawful and is an essential ingredient of the charged offence. Nevertheless, in this appeal, we will proceed on the basis that counsel for the appellant relies on both grounds, *ie*, entrapment and illegally obtained evidence.

Distinction between "entrapment evidence" and "illegally obtained evidence"

26 It should be noted that in the formulations of the applicable principles in some of the cases we have referred to, the courts have not explicitly drawn a distinction between entrapment evidence and illegally or improperly obtained evidence. For example:

(a) In *Kuruma, son of Kaniu v The Queen* [1955] AC 197 ("*Kuruma*"), the Privy Council was concerned with evidence obtained in the course of and by means of an unlawful act (*ie*, an illegal search). No issue of instigation or inducement arose in that case.

(b) In *Cheng Swee Tiang v PP* [1964] MLJ 291, the High Court (comprising three judges) dealt with the case as one concerning illegally obtained evidence, although the police had a valid search warrant to search the accused's premises. However, the police search was preceded by the action of another police officer who had bought from the accused bets on what was known as a 10,000 character lottery (which was illegal). The court did not use the expression "entrapment" but did refer to illegally obtained evidence and evidence obtained by an *agent provocateur*.

(c) In *Sang*, the defence of the accused was that he had been "entrapped" by a police

informer, but the House of Lords held that entrapment (in the full sense of persuading someone to commit an offence which he would not otherwise have committed) was not a defence under English law and that this principle could not "be evaded by the procedural device of preventing the prosecution from adducing evidence of the commission of the offence" (*per* Lord Diplock at 432). However, the ruling given by the House of Lords was that the court had "no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by *improper or unfair means*" [emphasis added] (*per* Lord Diplock at 437). The word "improper" would include what is unlawful and also "entrapment" in its full sense, but given the breadth of the principle, it was not necessary to distinguish between different kinds of improper conduct.

(d) *Ajmer Singh v PP* [1986] SLR 454 ("*Ajmer Singh*") was a case of illegally obtained evidence (the doctor took a blood specimen from the accused without his consent as required by the relevant legislation) and had nothing to do with entrapment.

(e) In *How Poh Sun* ([11] *supra*), the Court of Appeal held that entrapment was not a substantive defence to a criminal charge. The court also applied Lord Diplock's formulation of the law in *Sang*, but did not rule on whether or not the evidence procured by the narcotics officer was or was not entrapment evidence. The court appeared to have assumed that any evidence obtained by an *agent provocateur* was entrapment evidence. Similarly, in the three subsequent decisions, *viz*, *Goh Lai Wak v PP* [1994] 1 SLR 748, *PP v Rozman bin Jusoh* [1995] 3 SLR 317 and *Amran bin Eusuff v PP* [2002] SGCA 20, the Court of Appeal in each case merely referred to its decision in *How Poh Sun*, without making clear whether it was dealing with a case of entrapment evidence or one of illegally obtained evidence.

(f) In *Summit*, the High Court found that the evidence against the alleged copyright infringer was illegally obtained (the private investigator committed an offence prior to causing the applicant to commit the copyright and trade mark offences), but made no explicit finding as to whether there was entrapment, although it reiterated the law in Singapore that entrapment was not a substantive defence.

(g) In *Looseley*, the House of Lords held that although entrapment was not a substantive defence to a criminal charge, it was an abuse of process which merited a stay of the proceedings. Lord Hoffmann said at [48] that the objection to entrapment evidence was that the state should not instigate the commission of criminal offences in order to punish the offenders. The focus of the judgments in *Looseley* was directed more at the unacceptable conduct of a state agent in instigating the defendant to commit the offence rather than on the criminal conduct of the defendant.

27 Although the Judge has observed at [47] of his judgment that in some of these cases, "entrapment is examined as part of the broader category of 'illegally or improperly obtained evidence'", we are of the view that it would conduce to greater clarity in the analysis of the policy considerations underpinning the relevant decisions if a clear distinction is drawn between the nature of entrapment evidence and that of illegally or improperly obtained evidence, although the two categories overlap in certain cases. "Entrapment" involves luring or instigating the defendant to commit an offence which otherwise, or in ordinary circumstances, he would not have committed, in order to prosecute him. Entrapment invariably entails unlawful conduct by an *agent provocateur*, in the form of abetment of the offence by instigation or intentionally aiding the defendant to commit the offence (see s 107 of the Penal Code). However, obtaining evidence illegally or improperly does not necessarily involve any instigation or inducement on the part of the agent: see *Kuruma* and *Ajmer Singh.* As we have mentioned earlier, when Lord Diplock used the expression "improper or unfair means" in stating the law in *Sang*, he was using it in the context of an argument based on entrapment: see 437 of *Sang*. We

know of no principle which states that evidence that has been procured improperly or unfairly in order to prosecute offenders but which is not procured unlawfully is an abuse of process or that it is inadmissible in evidence, except when there would be unfairness at the trial in terms of its prejudicial effect exceeding its probative value. In this connection, neither counsel addressed this court on the admissibility provisions in the Evidence Act (Cap 97, 1997 Rev Ed) and the relevance of the legislative policy underlying these provisions. In our view, these issues are relevant but it would be more convenient for the court of three judges to consider this question in the case of *Law Society of Singapore v Tan Guat Neo Phyllis* Originating Summons No 2386 of 2006 ("*Phyllis Tan*").

28 In *Looseley*, Lord Nicholls of Birkenhead at [1] defined state-directed "entrapment" generally as the process whereby "the state through its agents … lure[s] its citizens into committing acts forbidden by the law and then seek[s] to prosecute them for doing so". Lord Hoffmann at [36] defined it as follows:

> Entrapment occurs when an agent of the state – usually a law enforcement officer or a controlled informer – causes someone to commit an offence in order that he should be prosecuted.

The objection against such action is that such conduct may trap the unwary innocent into committing an offence. The other objection is that the state should not commit offences as it is contrary to the rule of law, and may also lead to the creation of more offences, which is contrary to the public interest. For present purposes, we shall use the expressions "entrapment" and "entrapment evidence" in the way as defined by Lord Nicholls and Lord Hoffmann in *Looseley* (but bearing in mind "luring" and "causing" usually involve the accused being "incited, instigated, persuaded, pressurised or wheedled" into committing the offence (see Lord Bingham of Cornhill CJ in *Nottingham City Council v Amin* [2000] 1 WLR 1071 at 1076–1077), to distinguish entrapment evidence from evidence illegally or improperly obtained where there is no element of instigation.

29 The Law Society disagrees with all the premises on which the appellant has based his appeal. It takes the view that Jenny's conduct did not amount to entrapment nor was the impugned evidence illegally obtained. It also takes the view that in any case *Looseley* is not law in Singapore and that *Sang* remains the law and that *Summit*, even if upheld by this court, has no application to the facts in this case. The Law Society argues that Jenny had merely given an opportunity to the appellant to offer her a referral fee as opposed to having caused him to make the offer, and/or, subsequently, to pay the referral fee. As found by the DC, the appellant did what he did "voluntarily", and the appellant would have done the same thing if any other estate agent had approached him with a genuine offer of referral work. On the issue of illegality, the DC also found that Jenny's conduct was not cheating under the Penal Code as alleged by the appellant, and was therefore lawful. The Law Society contends that the *Summit* exception is contrary to the authority of *Sang*, and that in any case *Summit* has no application to the facts in the present case. It further argues that the abuse of process doctrine in *Looseley* does not and should not apply to disciplinary proceedings as it is directed against abuse of executive power (which undermines the rule of law and the integrity of the judicial process). Finally, the Law Society argues that there could be no abuse of process in the present case as it was merely discharging its statutory duty in bringing disciplinary charges against the appellant on the recommendations of the IC.

Sub-issues before this court

30 The sub-issues raised in argument on the question of entrapment in this appeal may be summarised as follows:

(a) whether there was entrapment, *ie*, whether Jenny "can be said to have caused the

commission of the [disciplinary] offence, rather than merely providing an opportunity for the [appellant] to commit it" (see Lord Hoffmann in *Looseley* at [50] and [70]);

(b) whether Jenny had committed any offence in inducing the appellant to agree to pay and/or to pay the referral fee; and if so,

(c) whether it falls within the *Summit* exception; and if so,

(d) whether, as a matter of policy, we should affirm *Summit* and/or apply *Looseley* and reject *Sang*; and

(e) when is entrapment an abuse of process?

(1) Was there entrapment?

31 In our view, the first issue can be easily disposed of. The DC has found as a fact that the appellant had promised to pay the referral fee and subsequently carried out his promise by doing so "voluntarily", *ie*, the appellant was not instigated or coaxed by Jenny into agreeing to pay the referral fee. Further, the DC also found as a fact that the appellant would have done what he did had the fictitious purchase transaction been a genuine transaction. In other words, the operative cause of his agreement to pay the referral fee was not that he was led to believe that the purchase transaction was real, but because he was predisposed or ready and willing to pay for any referral work that Jenny would introduce to him. We agree entirely with the DC's finding on this point. Jenny did not have to entrap the appellant to agree to pay the referral fee as the appellant was ready and willing to pay it to whomsoever referred conveyancing work to him.

(2) Has Jenny committed any offences in procuring the evidence against the appellant?

32 We consider next whether Jenny has committed the offence of cheating or attempted cheating as alleged by the appellant. In the present case, the appellant is facing two sets of disciplinary charges under the Act. The first charge relates to the appellant's promise to pay a fee to Jenny for agreeing to refer conveyancing work to him. The second charge relates to the sharing of legal fees with Jenny.

(A) CHEATING AND ATTEMPTED CHEATING UNDER SECTION 415, PENAL CODE

33 With respect to the first charge, counsel for the appellant argues that Jenny's conduct amounted to attempted cheating under s 415, read with s 511, of the Penal Code. Section 415 provides as follows:

> Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

It should be noted that at the DC hearing and before the Judge, the appellant had advanced a different argument, *ie*, that Jenny's conduct amounted to cheating under s 415 of the Penal Code. The DC rejected this submission on the ground that Jenny's deception did not cause the appellant to agree to pay or to pay Jenny the referral fee for the reason that he would have done exactly the same thing if the purchase transaction had been genuine. In other words, the appellant was ready

and willing to pay referral fees if a real conveyancing transaction had been referred to him by any estate agent. The Judge accepted the DC's "very lucid and compelling analysis" in coming to this finding of fact and affirmed the DC's finding on this point (*Rayney Wong* at [70]).

34 It is now argued before us that this was a case of attempted cheating. However, counsel has not been able to explain why Jenny's conduct constituted attempted cheating rather than cheating. The elements of cheating, in terms of s 415 of the Penal Code, would be the deception by Jenny (that there was a genuine purchase transaction when there was none) and the appellant having acted on the deception (agreeing to pay and paying the referral fee) which he would not have done had he known that there was no genuine purchase transaction and which had caused him harm (the disciplinary charges). On the evidence on record, these essential elements of the offence of cheating are all present. Therefore, if Jenny had committed an offence, it had to be the substantive offence of cheating and not the offence of attempted cheating. Her conduct had gone beyond the stage of an attempt.

35 It is obvious that if the appellant had known that Jenny's offer of referral work was merely a ploy to get him to commit a disciplinary offence, he would not have responded by agreeing to give a referral fee. In that sense he was deceived into making the promise. But the DC found that the appellant would have acted in exactly the same way if Jenny had introduced a genuine conveyancing transaction to him. In the context of professional ethics, the appellant's agreement is in substance no different from an ordinary case of touting for future work. It is unethical for a lawyer to enter into an agreement with a person to tout for the lawyer. The essence of the appellant's misconduct is in his promise to pay the referral fee and/or the carrying out of his promise. It had nothing to do with the existence or otherwise of the conveyancing work that was promised him when he made his promise to pay the referral fee. In any event, the evidence shows that the appellant had acted on the basis that the purchase transaction was genuine. He accepted payment of $500 for work done by him and he demonstrated his intention to break the code of conduct applicable to him by paying $150 to Jenny as her referral fee. The payment of the referral fee confirms the DC's findings that he certainly would have acted in exactly the same way if the purchase transaction had been genuine.

36 In our view, counsel's new argument that this was a case of attempted cheating has no substance. Jenny neither cheated the appellant nor attempted to cheat him in terms of s 415, read with s 511, of the Penal Code.

(B) SHARING OF LEGAL FEES

37 With respect to the second charge that the appellant shared legal fees with Jenny, it is argued that there was no misconduct as the $500 that Jenny gave to the appellant were not legal fees but "sting" money, and which could not be regarded as legal fees unless there was a genuine sale and purchase transaction. This is a spurious argument founded on labelling the legal fees as something else. It cannot be disputed that the appellant received the sting money *as legal fees* for work done and not as sting money. This is obvious. He was paid $500 as legal fees for work done, and from those fees, he paid a fee of $150 to Jenny as he had promised.

(C) ABETMENT OF A BREACH OF RULE 11A(2)(B) OF THE LEGAL PROFESSION (PROFESSIONAL CONDUCT) RULES

38 The next argument of the appellant is that Jenny instigated the appellant to act in a manner contrary to professional conduct and thereby abetted the appellant in committing a breach of r 11A(2)(*b*) of the Legal Profession (Professional Conduct) Rules. The DC had rejected this argument on the ground that a disciplinary offence was not a criminal offence and therefore the question of an

illegal act did not arise. The Judge, in affirming this finding, held that a disciplinary offence was civil in nature, even if the standard of proof was the criminal standard of proof beyond a reasonable doubt. We agree with the decision of the DC and that of the Judge.

(3) Was the impugned evidence improperly obtained?

39 The appellant has also argued that as the impugned evidence was improperly obtained, the DC and the court below should have stayed the proceedings under *Looseley* or have excluded it under *Summit.* It is said that there was impropriety because: (a) Jenny had deceived so many people in order to ensnare the appellant; and (b) the instructing solicitor on whose behalf Jenny had carried out her mission had an improper motive. This argument was also made to the DC and the Judge, but it was made on the basis that improper conduct "suffices to give the court the discretion to exclude [Jenny's] evidence" in the context of the decision in *Summit* (see *Rayney Wong* at [72]). The Judge addressed the argument and dismissed it on the ground that "*Summit's* holding applies only in respect of prior *illegal* conduct undertaken by an *agent provocateur*" (at [72]). This argument was a non-starter for the simple reason that the appellant had not objected to the admission of the impugned evidence when it was being adduced. As the DC was not called upon to exercise any discretion in admitting the impugned evidence, this issue could not arise. We have already stated earlier at [27] that there is no principle of evidence that excludes improperly or unfairly obtained evidence that is not also illegally obtained.

40 The appellant has not explained why improperly obtained evidence is not admissible in evidence since the general rule is that all relevant evidence is admissible: see ss 5 and 138 of the Evidence Act, and *Kuruma* ([26] *supra*) *Cheng Swee Tiang* ([26] *supra*) and *Sang*. As we have mentioned earlier, these three decisions are authority for the principle that improperly obtained evidence is admissible unless it operates unfairly against the accused. However, the element of unfairness in this context has nothing to do with *how* the evidence was obtained, but rather with its prejudicial effect at the trial. Improperly obtained evidence is admissible unless its prejudicial effect exceeds its probative value. In the present case, even if Jenny's evidence was improperly obtained, its probative value was overwhelming when weighed against its prejudicial effect. Improperly obtained evidence does not come under *Summit* or *Looseley* unless it is illegally obtained or unless it is entrapment evidence. Accordingly, the argument of impropriety without illegality has no legal effect under any of these decisions. In any case, apart from inconveniencing a few people, such as the prospective vendor and his solicitors in giving them the false hope of an imminent sale, it is difficult to see why the instructing solicitor's conduct was improper. Leaving aside *Summit* and *Looseley* and without deciding whether they reflect the legal position in Singapore, we know of no principle that improperly or unfairly obtained evidence which does not include an element of illegality is inadmissible or is an abuse of process.

41 The Law Society's position is that the instructing solicitor's objective in exposing the unfair and unprofessional practices associated with touting for conveyancing work was to maintain the high ethical and professional standards of the Bar. This is necessary and desirable, as in the words of V K Rajah J (as he then was) in *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR 449 at [35]:

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

42 In the present case, although the Judge initially found it necessary to express his "profound misgivings" (*Rayney Wong* at [86]) as to the standing of the legal profession should its members descend to such a low level of ethical conduct in ferreting out professional misconduct, he finally came to the conclusion, correctly in our view, that there was no risk of the administration of justice "being brought into disrepute simply because unscrupulous solicitors have their *modus operandi* for improperly attracting business exposed by means of private entrapment" (at [87]). In our view, whilst honour among thieves may be a virtue among thieves, we cannot see why whistle-blowing among thieves (even assuming this to be the case here) should be regarded by the court as so odious that the evidence thereby obtained should not be admitted as evidence or that the relevant proceedings (the DC proceedings) should be stayed. In this connection, we agree with the submission of the Law Society that in balancing the policy objective of protecting the integrity of the disciplinary process and of maintaining public confidence in the disciplinary standards of the legal profession, the latter objective should be given much greater weight. After all, if a solicitor commits a criminal or a disciplinary offence in entrapping another solicitor, he would be subject to both the criminal process and the disciplinary process in relation to his conduct, whereas if the court were to exclude the evidence or stay the disciplinary proceedings, it could only bring the courts into disrepute if the perception is given that the errant solicitor is more deserving of protection than the *agent provocateur*.

43 As for the second argument based on evil motive, the appellant has provided no evidence whatever to show what the motive of the instructing solicitor was. It is alleged that the sting operation was motivated by malice, and far from trying to uphold the standards of the legal profession or to restore a level playing field for all conveyancers, the instructing solicitor was abusing the disciplinary process by procuring evidence by improper means (using deception) for the improper purpose of eliminating his competitors, and thereby increasing his own business improperly. It was on this basis that the appellant had applied to the DC to order Jenny's employer to disclose the identity of the instructing solicitor so that he could be examined on his motive in setting up the operation.

(4) Irrelevance of motive and identity

44 In this appeal, counsel for the appellant has reiterated his arguments on the relevance of the identity and the motive of the instructing solicitor. He has referred to Lord Nicholls' statement at [27] in *Looseley* that one of the considerations for judicial review would be where the police had acted in good faith and not "as part of a malicious vendetta against an individual or [a] group of individuals". Counsel has also referred us to *Re Serif Systems Ltd* ([1997] EWHC Admin 369) where the court held that motive was a relevant factor in determining whether the private prosecutions initiated in that case were an abuse of process and that in a proper case it would exercise its wider supervisory jurisdiction to uphold the rule of law. As there was *prima facie* evidence that the respondents had a political purpose or motive in instigating the prosecutions of the applicant, the court refused to set aside the leave granted for judicial review of the prosecutions. On the issue of motive, Auld LJ said at [17]:

> In my view, it is arguable that improper motive is a relevant matter, depending on the circumstances, in considering whether criminal proceedings before magistrates are an abuse of their process. This is not necessarily a matter of mixed motives of the sort to which Lloyd LJ referred in the *Ex parte South Coast Shipping Company* case at page 28 of the judgment. It is for consideration whether there is a primary motive and one which is so unrelated to the proceeding that it renders it a misuse or an abuse of the process. I found the reference by Fox LJ in *Speed Seal Limited v Paddington* [1985] 1 WLR 1327, at 1335, to section 682 of the latter report of the American Restatement, Second Edition, Torts, a useful touchstone for consideration of the issue:

> "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

45 The decisions reviewed by Auld LJ show that the power of the court to stay private prosecutions based on the ground of abuse of process is sparingly exercised. In *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex parte South Coast Shipping Co Ltd* [1993] QB 645 ("*South Coast*"), Lloyd LJ held that the mere presence of an indirect or improper motive for launching a prosecution did not necessarily vitiate it and the court would be slow to halt such a prosecution in a case of mixed motives unless the conduct was truly oppressive. In the passage we have quoted above, Auld LJ referred to Lloyd LJ's holding and augmented it by stating that the motive impugned must be the primary motive and one that is so unrelated to the proceedings that it renders it a misuse or abuse of the process.

46 Before we consider the import of these decisions, we should first deal with a relevant consideration which has not been addressed by counsel in this appeal. In the present case, the appellant was able to name the solicitor he believed to be the instructing solicitor. As such, if the appellant had any evidence of the instructing solicitor's evil motive, there was nothing to prevent him from disclosing the evidence to the DC to support him in his application to order the instructing solicitor to attend for cross-examination. His failure to do this, coupled with his failure to explain why he did not do this, could only have meant that he was merely fishing for evidence of a motive that he thought would get him out of his predicament. We should also add that, in any event, there is nothing to prevent the appellant from adducing such evidence as he has in support of his allegation, if and when he decides to enter his defence at the resumed hearing. In our view, the DC was correct in declining to order the Law Society to call the instructing solicitor to testify.

47 Reverting to the *South Coast* line of cases, we are of the view that they do not assist the appellant for two reasons. The first reason is that the rationale of these decisions is that it is an abuse of the court process to use it for a purpose (which must be the sole or dominant purpose) for which it is not intended, *ie*, a purpose that does not serve to enforce the law and bring offenders to justice. In *South Coast*, the court process was used to disqualify certain persons from standing for elections. Given the requirement of a sole or dominant purpose or motive in order to set aside private prosecutions, we do not see how the principles, formulated by Lloyd LJ and Auld LJ, can assist the appellant in the present case, even assuming that the principle applies to disciplinary proceedings. In the present case, unlike the applicant in *Re Serif Systems Ltd* ([44] *supra*), the instructing solicitor can claim to have at least three reasons for wanting to expose suspected touting by the appellant: (a) to maintain a level playing field for all conveyancers; (b) to improve his own business; or (c) to uphold the reputation of the Bar. In this context, an order to compel the instructing solicitor is not likely to assist the court in determining whether the instructing solicitor has a sole or dominant motive and what that motive is. The appellant is merely fishing for a slippery and unidentifiable "evil motive". Compounding this difficulty is a procedural problem: Whose witness would the instructing solicitor be? The third reason is that in the present case the appellant is subject to a code of professional conduct and ethics which the parties in the *South Coast* line of cases are not. Even if the sole or dominant motive of the instructing solicitor is to eliminate the appellant as a competitor, and improper or unfair means (or even illegal means) are used, why should it matter more to the administration of justice, as has been argued, that the appellant be let off because the source of the evidence incriminating him is tainted? The only justification given by the appellant is that if there is an abuse of the disciplinary process, then the approach in *Looseley*, in staying criminal proceedings which amount to an abuse of process, should be adopted by this court. In our view, there is no analogy between the two types of proceedings.

48 In our view, the more important question is whether, in disciplinary proceedings against advocates and solicitors who are officers of the court, the motive of the complainant is relevant to the obligation of the Law Society to carry out its duties under the Act to bring disciplinary proceedings against errant lawyers. English decisions such as *South Coast* have held that motive is relevant to support a plea of abuse of process in private prosecutions and not in relation to the admissibility of evidence. Motive was not considered relevant in *Summit* nor in *Looseley*: only the conduct of the *agent provocateur* was considered relevant. The questions asked in the two cases were, respectively: "Was his conduct unlawful?" and "Did he entrap the defendant?" Indeed, we might also add that in *Looseley*, Lord Hoffmann accepted that certain kinds of unlawful conduct do not constitute an abuse of process. At [70], Lord Hoffmann said:

> No doubt a test purchaser who asks someone to sell him a drug is counselling and procuring, perhaps inciting, the commission of an offence. Furthermore, he has no statutory defence to a prosecution. But the fact that his actions are technically unlawful is not regarded in English law as a ground for treating them as an abuse of process: see *R v Latif* [1996] 1 WLR 104 and compare *Ridgeway v The Queen* [(1995)] 184 CLR 19.

49 In the present case, we have already found that, on the evidence, Jenny had done nothing illegal or improper in procuring the evidence of the appellant's professional misconduct. On the basis of this finding alone, this appeal must be dismissed.

Does the doctrine of abuse of process in criminal proceedings apply to disciplinary proceedings?

50 As part of its argument, the Law Society has raised an important argument as to whether the doctrine of abuse of process further developed in *Looseley* to protect the integrity of the judicial process is applicable to disciplinary proceedings at all as a matter of policy. Although *Looseley* involved criminal proceedings, counsel for the appellant contends that the doctrine should apply, by analogy, to disciplinary proceedings. The Law Society has contended to the contrary: that the doctrine of abuse of process should not apply to disciplinary proceedings at all as the objective of such proceedings is different from the objectives of criminal proceedings. The objectives of criminal proceedings are the vindication of the harm or injury done to society by punishing offenders and to maintain law and order. The Law Society has pointed out that this court is not sitting as an ordinary court of law but as the final disciplinary court under the Act, and, in that capacity, it is exercising its judicial power as a disciplinary court under the Act: see *Attorney-General of the Gambia v Pierre Sarr N'Jie* [1961] AC 617. As such, it does not have to follow all the principles of law that apply to ordinary court proceedings.

51 We accept this argument. The objective of disciplinary proceedings is to uphold the standards of the profession (here the legal profession) in order to retain public confidence in the honesty, integrity and professionalism of its members. Lawyers are officers of the court and as such must maintain the highest ethical standards in their professional work and conduct. The disciplinary process is part of the statutory framework designed to punish errant lawyers in order to promote this objective. For this reason, there is, in our view, a higher public interest in disciplining errant lawyers than in letting them off, however the evidence is obtained. It should not matter who the *agent provocateur* is, whether he be another advocate and solicitor or a member of the public. It is the misconduct of the lawyer that the disciplinary process is designed to investigate and penalise, if guilt is determined.

52 For the same reason, we are of the view that the motive of the *agent provocateur* is not relevant to and should not be allowed to excuse the professional misconduct of the lawyer. Should

the *agent provocateur* be guilty of wrongdoing, he should also be subject to the ordinary processes of the law, like any other offender or tortfeasor, including disciplinary proceedings, if he is a lawyer. The legal profession expects its members to have and to abide by the highest ethical standards in their practice. If a lawyer fails to abide by such standards, he should not be excused on the ground that his own misconduct was brought about by the wrongful conduct of another lawyer. We see no reason to apply the doctrine of abuse of process applicable in criminal prosecutions to disciplinary proceedings, with the consequence of letting off errant lawyers.

53 Counsel for the Law Society has referred us to the decision in *Re Saluja* (2006) 92 BMLR 153 (a disciplinary case against a doctor). In *Re Saluja*, Goldring J, after reviewing the authorities, held that the doctrine of abuse of process applied in *Looseley* had no application to misconduct by private non-state *agent provocateurs*. At [129] of his judgment, Goldring J said:

> [T]here is nothing to suggest proper consideration of the substantial difference between a doctor at his professional practice being pressed to provide a false medical certificate and a drug dealer being importuned by an undercover officer. On the face of it, (and of course I bear in mind the merits have not been decided) Dr Saluja could have said no when asked to provide the certificate. He could have asked the 'patient' to leave. It is difficult to see how the offer of money in such circumstances, albeit with some importuning or pressure, could be said to amount to such misconduct by the journalist as to compromise the integrity of the disciplinary process. It seems to me to fall well short of that.

54 It was accepted in *Re Saluja*, or at least the court in this passage appears to have implicitly accepted the principle, that some kinds of conduct by the private non-state agent in procuring incriminating evidence against a professional person (a doctor in that case) could amount to misconduct such as to compromise the integrity of the disciplinary process. In other words, the doctrine of abuse of process could, by analogy, apply to disciplinary proceedings. However, for the reasons we have already given, we are of the view that it is not appropriate to apply the analogy to disciplinary proceedings in Singapore.

Related legal issues irrelevant

55 We have summarised in [13] the related legal issues in connection with the decisions in *Sang*, *How Poh Sun*, *Summit* and *Looseley*. Our affirmation of the DC's finding (which has also been affirmed by the Judge) that the impugned evidence was neither obtained by entrapment nor obtained illegally or improperly, means that this appeal must be dismissed. It is therefore not necessary for us to consider the arguments of counsel for the appellant and for the Law Society on the remaining related issues. We do not propose to do so in this judgment. However, after we heard this appeal, we also heard three cases where Jenny had made similar complaints of misconduct against three other solicitors, *viz*, Phyllis Tan Guat Neo, Lilian Bay Puay Joo and James Liew Boon Kwee. In all these cases, counsel for the solicitors and the Law Society have made substantially similar arguments on issues similar to the related issues. As we have found the arguments of counsel on entrapment evidence in *Phyllis Tan* ([27] *supra*) to be more comprehensive than those made in this case, we have decided to address in *Phyllis Tan* the remaining related issues raised by the appellant in this appeal in conjunction with similar issues raised in that case.

Conclusion

56 In the circumstances, and for the reason that the appellant has failed to cross the first threshold in the appeal, *ie*, he has failed to substantiate the first premise of his case, we dismiss the appeal with costs and the usual consequential orders.

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