Law Society of Singapore v Liew Boon Kwee James
[2007] SGHC 209

Case Number : OS 220/2007, SUM 792/2007

Decision Date : 04 December 2007

Tribunal/Court : High Court

Coram : Andrew Ang J; Chan Sek Keong CJ; Tay Yong Kwang J

Counsel Name(s) : Prem Gurbani (Gurbani & Co) for the applicant; S Magintharan (Netto & Magin LLC) for the respondent

Parties : Law Society of Singapore — Liew Boon Kwee James

Legal Profession – Show cause action – Lawyer attempting to procure conveyancing work by offering monetary reward to individuals referring such work to him – Lawyer pleaded guilty to charges for grossly improper conduct in discharge of his professional duty brought against him by Law Society of Singapore – Appropriate punishment in light of certain mitigating circumstances – Sections 83(2)(d), 83(2)(e) Legal Profession Act (Cap 161, 2001 Rev Ed)

4 December 2007 Judgment reserved.

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

Introduction

1 This is an application by the Law Society of Singapore ("the Law Society") pursuant to s 94(1) read with s 98 of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the Act") for James Liew Boon Kwee ("the respondent") to show cause as to why he should not be dealt with under s 83(2)(*e*) or s 83(2)(*h*) of the Act and s 83(2)(*d*) or s 83(2)(*h*) of the Act.

2 By way of background, it must be mentioned that the respondent in this case is the third advocate and solicitor who has been referred to this court by the Law Society for disciplinary offences involving promises to pay and/or the payment of referral fees to a real estate agent as remuneration for referrals of conveyancing work. The other cases were *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207 ("*Phyllis Tan*") and *Law Society of Singapore v Bay Puay Joo Lilian* [2007] SGHC 208 ("*Lilian Bay*"). There is also an appeal to the Court of Appeal based on similar facts, *viz*, *Wong Keng Leong Rayney v Law Society of Singapore* [2007] SGCA 42. The respondent was ensnared by the same estate agent, one Jenny Lee Pei Chuan ("Jenny"), in one of a series of sting operations set up by one or more conveyancing lawyers to obtain evidence of such activities against law firms suspected of being engaged in this kind of unprofessional conduct.

Background

The charges

3 The respondent was brought before a disciplinary committee ("the DC") appointed by the Law Society on the following amended charges:

Amended
Charge 1

That you, Liew Boon Kwee, an Advocate and Solicitor of the Supreme Court of the Republic of Singapore, are charged that, on 17 February 2004, your employee Tan Jeok Kiow, with your authority and consent, attempted to procure the employment of the firm ~~Liew~~ Boon Kwee & Co, of which you were a partner ~~the sole proprietor~~, to act in relation to the proposed purchase by one Ronald Tan of the property situate at and known as No. 33, Trevose Crescent, Singapore 298048 through the instruction of Jenny Lee Pei Chuan, to whom Tan [Jeok] Kiow promised to give remuneration for obtaining such employment, and you have thereby breached the provisions of Section 83(2)(e) of the Legal Profession Act (Cap 161).

Amended
Alternative
Charge 1

That you, Liew Boon Kwee, an Advocate and Solicitor of the Supreme Court of the Republic of Singapore are charged that, on 17 February 2004, your employee Tan Jeok Kiow, with your authority and consent, attempted to procure the employment of the firm of ~~Liew~~ Boon Kwee & Co, of which you were a partner ~~sole proprietor~~, to act in relation to the proposed purchase by one Roland Tan of the property situate at and known as No. 33, Trevose Crescent, Singapore 298048 through the instructions of Jenny Lee Pei Chuan, to whom Tan [Jeok] Kiow promised to give remuneration for obtaining such employment, and you are thereby guilty of misconduct unbefitting an advocate and solicitor as a member of an honourable profession within the meaning of Section 83(2)(h) of the Legal Profession Act (Cap 161).

Amended
Charge 2

That you, Liew Boon Kwee an Advocate and Solicitor of the Supreme Court of the Republic of Singapore, are charged that, on 24 February 2004, you authorized or consented to the giving of $250 out of the fees received by your employee, Tan Jeok Kiow, as legal fees for legal business undertaken from 17 to 24 of February 2004 in relation to the proposed purchase by one Ronald Tan of the property situated at and known as No. 33, Trevose Crescent, Singapore 298048 to Jenny Lee Pei Chuan as gratification to her for having procured such legal business for the firm of ~~Liew~~ Boon Kwee & Co, of which you were a partner ~~the sole proprietor~~, and you have thereby breached the provisions of Section 83(2)(d) of the Legal Profession Act (Cap 161).

Amended
Alternative
Charge 2

That you, Liew Boon Kwee, an Advocate and Solicitor of the Supreme Court of Singapore, are charged that, on 24 February 2004, you authorized or consented to the giving of $250 out of the fees received by your employee, Tan Jeok Kiow, as legal fees for legal business undertaken from 17 to 24 of February 2004, in relation to the proposed purchase by one Ronald Tan of the property situated at and known as No. 33, Trevose Crescent, Singapore 298048, to Jenny Lee Pei Chuan as gratification to her for having procured such legal business for the firm of ~~Liew~~ Boon Kwee & Co, of which you were a partner ~~the sole proprietor~~, and you are thereby guilty of misconduct unbefitting an advocate and solicitor as a member of an honourable profession within the meaning of Section 83(2)(h) of the Legal Profession Act (Cap 161).

The facts

4 In early February 2004, Jenny, a part-time private investigator and part-time real estate agent, was engaged by a private investigation agency, *viz*, Dong Security & Investigation Agency ("Dong Security") (acting under the instructions of one or more law firms to investigate suspected touting by certain other law firms for conveyancing work). Acting on a well-conceived plan, Jenny spoke to one J K Tan ("Tan"), the client services manager of the respondent's firm ("the firm"), on 16 February 2004 on the prospect of referring conveyancing work to the firm for a fee. The next day, on 17 February 2004, Jenny met Tan in the premises of the firm and in the course of the meeting agreed to instruct the firm to act for one Ronald Tan in relation to the purchase of a house at 33 Trevose Crescent. At this meeting, Tan had used the expression "cover fee" to refer to the referral fee that Jenny was seeking. The firm's conveyancing manager, one Rachel Low, was present at the meeting when Tan uttered these words, but she showed no reaction whatsoever to them. Following this meeting, the firm proceeded with the preliminary conveyancing work in connection with the purchase transaction. On 24 February 2004, Jenny informed Tan that the sale had been aborted and offered to pay $500 for the firm's legal fees, which was eventually settled at $350. As promised, Tan paid Jenny the sum of $250 for referring the transaction to the firm.

Evidence before the DC

5 Unknown to Tan, the telephone conversation of 16 February 2004 and the conversations at the meetings of 17 and 24 February 2004 had been recorded by Jenny using an audio/video recorder. These recordings were subsequently introduced in evidence by the Law Society at the DC proceedings and, together with the testimony of Jenny, formed the thrust of the Law Society's case against the respondent. On his part, the respondent did not dispute that Tan had made the offer to pay gratification to Jenny or that a sum of $250 had been paid to Jenny. However, he put forward the defence that Tan acted on a frolic of his own, without the respondent's knowledge, consent or authority. The respondent also objected to the admissibility of the audio/video recordings relied upon by the Law Society on the ground that they were "entrapment evidence".

The DC hearing and findings

6 Prior to the commencement of the DC proceedings, the respondent sought leave of the High Court to apply for judicial review against the decision of the inquiry committee (via Originating Summons No 1321 of 2005). However, the application for leave was dismissed by the court.

The parties' cases

7 At the commencement of the DC proceedings, counsel for the respondent raised preliminary objections to the admissibility of audio/video recordings and transcripts of the conversations and meetings between Jenny, Tan and Rachel Low in February 2004. The DC, after hearing submissions from both parties, ruled that the recordings were admissible as evidence. The Law Society called three witnesses: (a) Jenny; (b) the director of Dong Security; and (c) the operations director of Dong Security. Jenny testified on her meetings with Tan and the recording of their conversations. In the course of the hearing, the DC also listened to and viewed the audio/video recordings made by Jenny. At the conclusion of the Law Society's case, counsel for the respondent made a submission that there was no case to answer on the grounds that the audio/video recordings were inadmissible in evidence, that they were "technically" unreliable, and that Jenny's evidence did not in any way support or establish an essential ingredient of the disciplinary charges, *viz*, that the respondent had authorised or consented to Tan's conduct. The DC ruled that on the evidence there was a *prima facie* case for the respondent to answer. However, the respondent elected to remain silent and, further, not to call any witness to testify on his behalf.

8 In his closing submission, counsel for the Law Society contended that the evidence showed that there was sufficient cause of gravity for the two charges to be referred to a court of three judges under s 83 of the Act. In response, counsel for the respondent reiterated his earlier arguments made in connection with his submission that there was no case to answer.

The DC's findings

9 After hearing the parties, the DC made its findings. The following passage at para 89 of the DC's report sets out the findings of the DC:

> We were therefore not persuaded by the Respondent's submissions on the evidence before us, and applying the dicta of Yong CJ in *Oh Laye Koh ...* we accepted the Law Society's submission that the circumstantial evidence, coupled with the adverse inferences, pointed to the guilt of the Respondent. The circumstantial evidence in relation to Tan's conduct and Rachel's awareness/involvement demanded an explanation from the Respondent. His silence and his failure to call his witnesses to testify was an additional link which completed the chain of evidence against him. The only "reasonable inference" we could draw from Tan's conduct was that he had paid the referral fees with the authority and consent of the Respondent.

10 The DC determined that the Law Society had proved its case with respect to Amended Charges 1 and 2 preferred against the respondent and dismissed the alternative charges. The DC also found that cause of sufficient gravity for disciplinary action existed under s 83 of the Act. As the DC proceedings lasted seven days, the DC ordered the respondent to pay the Law Society $5,000 being costs for the preliminary objection, and $60,000 for the proceedings.

The issues before this court

11 Before us, counsel for the respondent contended that the DC had erred in law and fact in finding against the respondent for the following reasons, *viz*, that the DC:

(a) failed to fairly and impartially evaluate the evidence of Jenny before accepting it;

(b) admitted inadmissible and prejudicial evidence against the respondent;

(c) disallowed the disclosure of the "protected client", *ie*, the instructing solicitor;

(d) held that the respondent had personally authorised or consented to Tan's conduct in agreeing to pay and in paying the referral fee to Jenny;

(e) held that the Law Society had discharged the burden of proof beyond a reasonable doubt;

(f) drew an adverse inference wrongly against the respondent for his election not to give evidence or to call witnesses;

(g) failed to give sufficient weight to the evidence tendered by the respondent or the significant doubts raised in the evidence of Jenny on the innocence of the respondent; and

(h) imposed costs of an unprecedented amount of $65,000 against the respondent.

We will now consider these arguments in turn, together with the opposing arguments of the Law Society.

The DC's evaluation of the evidence

12 The respondent's submission under this heading was that the DC was wrong to find that the Law Society had discharged the burden of proof beyond a reasonable doubt that the respondent had personally authorised or consented to his manager, Tan, to agree to pay or to pay a referral fee to Jenny. Counsel for the respondent took particular objection to the Law Society's reference to a "yellow file" which Jenny alleged she had seen in the possession of Tan at their second meeting and which allegedly contained records of previous referral fees paid by Tan. The Law Society had relied on this file, which was not produced before the DC, to argue that there was a systematic operation by the firm to tout for conveyancing work. Counsel argued that the Law Society had referred to this file in order to "supplement the gaps" in its case.

13 In our view, the respondent's complaint has no substance. We agree with the DC's evaluation of the evidence. Although counsel for the Law Society readily conceded that there was no "direct evidence" linking the respondent with the charges complained of, the DC was able to point to a mass of circumstantial evidence that cumulatively pointed "inevitably and inexorably" to the guilt of the respondent. The circumstantial evidence consisted of the following facts:

(a) Tan showed readiness in agreeing to pay referral fees to Jenny during the telephone conversation on 16 February 2004 where he used the euphemistic expression "we cover three hundred".

(b) Tan's offer to "cover" Jenny (*ie*, to give referral fees) was made in the presence of Rachel Low, the conveyancing manager of the firm on 17 February 2004.

(c) Rachel Low did not react at all to Tan's brazen offer, as she should have if it had been made on a frolic of his own, as alleged by the respondent.

(d) Tan's promises to pay the referral fee were made in his capacity as an employee of the firm, and he made them whilst working in the premises of the firm.

(e) The audio/video recordings and the transcripts of the conversations between Jenny and Tan did not show that he was making his offers otherwise than on behalf of the firm.

(f) The recording and the transcript of the conversation of 17 February 2004 indicate that when Tan referred to "the lawyer" or "the boss" in connection with the referral fees, he had meant to refer to the respondent and not to another salaried partner in the firm who had no management authority or functions.

(g) The recording and the transcript of the conversation of 24 February 2004 indicate that Tan had told Jenny that the respondent was aware that the referral fee would be paid to her.

(h) Tan informed Jenny on 24 February 2004 that she would be "covered for two hundred and fifty dollars".

Accordingly, we reject the respondent's argument that the DC had failed to fairly and impartially evaluate the evidence of Jenny before accepting it.

Admitting inadmissible and prejudicial evidence

The parties' arguments

14 Next, the respondent raised several arguments with respect to the evidence against him. The first was that the DC failed to determine, before receiving the audio/video recordings and the transcripts as evidence, whether the Law Society had discharged the burden of proving that they were admissible or reliable. It was further argued that:

(a) the recordings were not admissible because the primary evidence, *viz*, the audio recorder and the VCD recorder which purported to record the conversation, was not produced before the DC;

(b) the Law Society called no expert witnesses to testify; and

(c) the two witnesses called to testify on the making of the transcripts were tainted witnesses and they also admitted that they had no training in ensuring that the machines were operating properly and reliably.

The Law Society's response to this argument was that:

(a) although it could not produce the audio recorder and the VCD recorder, it did produce the original audio and video tapes;

(b) the DC was only required to satisfy itself of the provenance and history of the tapes; and

(c) it had called witnesses to testify on the authenticity of the tapes.

The Law Society also submitted that the audio and video tapes (and the related transcripts) were "documentary evidence": see Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (LexisNexis, 2nd Ed, 2003) at p 226. On the question of the accuracy of the transcripts, the Law Society pointed out that counsel for the respondent had conceded before the DC (on 16 May 2006) that the transcripts of the audio/video recordings reflected accurately what was recorded in the recordings.

15 Secondly, in relation to the issue of admissibility of the audio/video tapes and the related transcripts, the respondent argued that the evidence was obtained by trickery and that it was "entrapment" evidence, and by reason of the decision of the House of Lords in *Regina v Looseley* [2001] 1 WLR 2060 ("*Looseley*") (in which the House of Lords declined to follow *Regina v Sang* [1980] AC 402 ("*Sang*") and decided that any prosecution founded on entrapment evidence was an abuse of process, to which the court should respond by staying the relevant proceedings), this court should reconsider the applicability in Singapore of *Sang.* Counsel for the respondent also argued that this court should exclude the entrapment evidence on the principle stated by the High Court in *SM Summit Holdings Ltd v PP* [1997] 3 SLR 922 ("*Summit*"). In response to this argument, the Law Society submitted that *Summit* was distinguishable on the facts and that in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 ("*Rayney Wong*"), a similar case concerning another solicitor, the High Court was of the view that there was no basis for this court to exercise any discretion to exclude entrapment or illegally obtained evidence. It was held in *Rayney Wong* that *Sang* was still the law in Singapore (as it had been endorsed by the Court of Appeal in *How Poh Sun v PP* [1991] SLR 220).

Conclusion in relation to the evidence

16 In our view, the respondent's arguments in relation to the authenticity and reliability of the audio/video recordings (and the related transcripts) have no merit. We agree with the DC's findings

they were authentic and reliable.

17 As for the respondent's arguments in relation to the admissibility of the audio/video tapes and the related transcripts, we have earlier mentioned that this is the third case that has come before us for determination on similar facts. All the arguments made by the respondent in this appeal have been made in the previous two cases. We do not propose to repeat our views on these arguments for two reasons. First, the argument based on *Looseley* or *Summit* is not relevant unless the respondent shows that the conduct of Jenny in procuring the evidence against the respondent was such that it could amount to entrapment or that the evidence could be considered illegally or improperly obtained. The respondent has not contended that the evidence obtained by Jenny against him was either illegally or improperly obtained, other than raising the argument that the evidence is prejudicial to the respondent as it was obtained by trickery. As for entrapment, there is also no allegation that Jenny instigated or pressurised him (Tan) into agreeing to pay the referral fee or that but for such instigation he would not have agreed to pay such fee. We should point out that the respondent elected not to give or call any evidence after his defence was called. In the circumstances, the respondent's arguments on entrapment and trickery are irrelevant and we reject the arguments under this heading accordingly.

Disallowing disclosure of identity of "protected client"

18 The respondent's next contention was that the entrapment was done pursuant to the dishonest and unlawful conduct of Jenny's "protected client" and that the DC was wrong in not disclosing the identity of this person so that he could be cross-examined on his motive in entrapping the respondent. In para 77 of its report, the DC considered the relevance of this argument in the light of counsel's submission that all he wanted to find out was whether Jenny was instructed to approach the respondent with the purpose of procuring evidence of the commission of an offence by the respondent and then to use the evidence against the respondent. In this connection, counsel referred to the decision in *Summit* as the basis of his argument. In response, the Law Society relied on the decision of the High Court in *Rayney Wong* ([15] *supra*) where it was held that the DC in that case did not err in not ordering the disclosure of the identity of the instructing solicitor.

19 Having regard to the reason given by counsel for the respondent for wanting to know the identity of Dong Security's client, we are of the view that the DC was correct in rejecting the respondent's request. The respondent was merely fishing for evidence of the motive of the "protected client", which, in any case, we have held to be irrelevant in the disciplinary proceedings in another case in this series of cases: see *Phyllis Tan* ([2] *supra*) at [51].

No prima facie evidence that the respondent had authorised payment

20 The respondent argued that the Law Society had failed to discharge the burden of proving that the respondent had personally authorised or consented to the conduct of Tan on 17 February 2004 when he agreed to pay Jenny a referral fee.

21 The DC's finding on this argument is found at para 37 of its report as follows:

> Applying the principles in *Haw Tua Tau* [*v PP* [1980-1981] SLR 73] and [*PP v*] *Oh Laye Koh* [[1994] 2 SLR 385], based on the totality of the evidence before us, in particular, the conduct of Tan and the knowledge of Rachel in respect of the giving of referral fees, we accepted the Law Society's submission that a reasonable inference to be drawn (subject to rebuttal evidence by the Respondent) was that the Respondent, as the sole equity partner of a two-man practice, had authorised or consented to the practice of giving referral fees to real estate agents by Tan. We

were therefore of the view that there was a case for the Respondent to answer.

We agree with the DC on this finding.

The Law Society has not discharged the burden of proof beyond a reasonable doubt

22 Another argument of counsel for the respondent was essentially that there was no direct evidence that the respondent had authorised Tan to agree to pay the referral fee and that the DC was wrong in holding that he had given such authority. The test is that the inference must be irresistible before it can be drawn, and this is not the case here because the DC relied on a non-existent "yellow file" to supplement the gaps in the Law Society's evidence and arrive at the conclusion that there was a "systematic operation" by the firm to tout. It was also argued that the DC erred in holding that the respondent's election not to give evidence or to call witnesses in his defence amounted to an "additional link" and pointed "inevitably and inexorably" to his guilt.

23 The Law Society's arguments in response were as follows. The circumstantial evidence on which the DC relied showed that the respondent was guilty of the disciplinary charges and that Tan had conducted a systematic touting operation. The Law Society pointed out that when Jenny first spoke to Tan on 16 February 2004, the latter boasted that he had just paid another agent more than $3,000 and that the agent had referred more than 30 cases to him. It should be noted that the respondent has elected not to call Tan to deny the contents of this conversation.

24 In our view, the respondent's argument has no substance (see [12] above).

Drawing adverse inferences against the respondent

The parties' arguments

25 In substance, the argument of counsel for the respondent was that the DC's adverse inference that the election of the respondent not to give evidence or call his witness "pointed inevitably and inexorably to his guilt" was misconceived. Counsel argued that the DC failed to fairly and impartially consider the explanations given by the respondent for his decision to elect not to testify and not to call other evidence on his behalf. He contended that the respondent was entitled to elect not to give evidence and that the whole of the Law Society's case was based solely on extrapolations and speculation, bordering on "suspicion" that the respondent must have authorised or consented to the conduct of Tan. Furthermore, no consideration was given to Tan's admission that he was acting on a frolic of his own, which would have supported the respondent's argument that more than one reasonable inference could have been elicited from the factual matrix, and that in those circumstances, the inference most sympathetic to the respondent ought to have been accepted. Another criticism of the DC's finding was that the DC had "dropped the mantle of a judge" and "assumed the robe of the Law Society's counsel" by formulating a "train of inquiry", that would have inevitably led to the respondent being found guilty of the charges if he had given evidence in the proceedings. Lastly, it was submitted that the DC had misconstrued and misapplied the principles stated in *Oh Laye Koh v PP* [1994] SGCA 102, in holding that the respondent's silence and failure to call his witnesses to testify was *an additional link* which completed the chain of evidence against him.

26 In response, counsel for the Law Society submitted that the DC was correct in relying on *Oh Laye Koh v PP* as authority for the proposition that the silence of the respondent could be regarded as the additional link to complete the chain of evidence against him. Counsel for the Law Society further argued that the respondent was not entitled to rely upon his written explanation, Tan's statutory declaration, as well as the affidavits of Rachel Low and Raghbir Singh (a salaried partner of the

respondent's firm at the material time), as none of them testified in the proceedings. In any case, counsel for the Law Society submitted that the evidence of the audio/video recordings together with the respondent's refusal to give evidence and call any other witnesses to rebut the inference (drawn from his failure to testify), was sufficient to discharge the burden of proving the disciplinary charges beyond a reasonable doubt.

Conclusion in relation to the Law Society's decision to draw adverse inferences

27 We agree with the submissions of the Law Society. We cannot find anything wrong in principle with the decision of the DC to draw an adverse inference against the respondent for failing to give evidence on oath. In our view, the DC was entitled to draw the inference that the respondent had authorised or consented to Tan agreeing to pay and subsequently paying the referral fee to Jenny. If Tan had been acting on a frolic of his own, the respondent could have said so on oath, but he elected not to do so. He could also have called Tan to testify to the same effect, and also that the euphemistic expressions he had used to indicate the reward payable to Jenny did not mean what an ordinary or reasonable person would have understood them to mean.

28 We also agree with the submission of the Law Society that the respondent's affidavit, Tan's statutory declaration and the affidavits of Rachel Low and Raghbir Singh could not be regarded as evidence for the purpose of the DC proceedings. It is necessary to point out that the DC proceedings were oral proceedings and that affidavits filed in such proceedings are not evidence unless the parties agree otherwise. By not testifying and not calling witnesses to testify on his behalf, the respondent has in fact called no evidence at all. In the circumstances, we see no reason to disagree with the findings of fact of the DC.

Excessive hearing costs

29 The respondent complained that the costs awarded against him by the DC were unprecedented in amount and that the DC had erred in principle and on the facts in doing so. However, apart from making this assertion, counsel for the respondent has not shown where the DC had gone wrong. Having regard to the discretionary power of the DC under s 103 of the Act to make an order of the costs of and incidental to all proceedings under s 98, 100 or 102 of the Act against the respondent, we have no alternative but to reject the respondent's argument on the issue of costs.

Our decision

30 For the reasons given above, we find that the disciplinary charges under Amended Charges 1 and 2 have been proved against the respondent and accordingly make absolute the show cause order. This leaves us with the question as to the appropriate penalty to be imposed on the respondent.

Penalty to be imposed

31 In this connection, we refer to our judgment in *Lilian Bay* ([2] *supra*) at [46] to [50], where we considered the relevant factors to be taken into account in order to determine the appropriate penalty to impose in a case of touting of the same nature. In the present case, there is some evidence that the scale of touting that the respondent had engaged in through Tan was more serious than what the lawyer in *Lilian Bay* was found to have done. Furthermore, as opposed to the case in *Lilian Bay*, the referral fees were actually paid out in the present case. In the circumstances, we consider that a period of suspension from practice of 12 months with immediate effect would be appropriate to impose on the respondent and we so order. The respondent must also pay the costs of

the Law Society in this application and in the proceedings before the DC.