Law Society of Singapore v Tham Kok Leong Thomas
[2005] SGHC 231

Case Number : OS 1312/2005, NM 84/2005

Decision Date : 23 December 2005

Tribunal/Court : High Court

Coram : Chao Hick Tin JA; Tay Yong Kwang J; Yong Pung How CJ

Counsel Name(s) : Bernard Doray and Foo Soon Yien (Bernard Rada and Lee Law Corporation) for the applicant; Chelva R Rajah, SC (Tan Rajah and Cheah), Lai Swee Fung and G Dinagaran (Unilegal LLC) for the respondent

Parties : Law Society of Singapore — Tham Kok Leong Thomas

Legal Profession – Show cause action – Whether advocate and solicitor breaching undertaking as stakeholder by prematurely releasing monies to client – Advocate and solicitor making misleading statements that stakeholder sums still intact – Whether solicitor's conduct amounting to grossly improper conduct or conduct unbefitting an advocate and solicitor – Appropriate penalty – Sections 83(1), 83(2)(b), 83(2)(h)Legal Profession Act (Cap 161, 2001 Rev Ed)

23 December 2005

Tay Yong Kwang J (delivering the judgment of the court):

1 This was an application under s 98(5) of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("LPA") taken out by the Law Society of Singapore ("the Law Society") to make absolute an order to show cause against the respondent. These proceedings relate to two charges alleging grossly improper conduct on the part of the respondent in respect of his conduct as a stakeholder in circumstances which we now relate.

The facts giving rise to the two charges

2 The respondent was admitted as an advocate and solicitor in 1974. He has been practising as M/s Thomas Tham & Co ("the law firm"). Dr Sam Lin Wang ("Dr Wang") was one of his clients, representing two companies known as Golden Gate Technologies (S) Pte Ltd ("the Singapore Company") and Golden Gate International Group Pte Ltd ("the Foreign Company"). The complainant was Sanchai Taevivat ("Taevivat"), a Thai businessman who is in the business of the import and sale of cars in Bangkok. SLS Karl Pte Ltd ("SLS") is a Singapore company from which Taevivat purchased cars. Jerry Lum was the sales manager of SLS.

3 In the late 1990s, Taevivat had difficulty obtaining banking facilities to import cars into Thailand. He found out through some friends that someone in Singapore was able to assist in opening letters of credit for a fee.

4 In the morning of 19 April 2001, Taevivat was in Singapore. He went with Jerry Lum of SLS and three Thai associates to meet Dr Wang at the latter's office here. Taevivat needed a letter of credit for US$500,000 in favour of SLS by 26 April 2001 so that new Mercedes Benz cars of that value could be imported into Thailand. Dr Wang wanted Taevivat to deposit US$60,000 with him in return for opening the letter of credit. Taevivat did not agree with this arrangement. He suggested giving a banker's guarantee instead. Dr Wang then suggested that Taevivat deposit the said amount of money with his (Dr Wang's) lawyer and that the same lawyer draw up the agreement between the parties.

5 Dr Wang then called the respondent. After the respondent arrived in Dr Wang's office, the issue of the deposit and the prospect of him acting as a stakeholder of the money were discussed in

his presence. After a while, the respondent returned to his office.

6 In the afternoon, Dr Wang, Taevivat and Jerry Lum went to the respondent's law office where the respondent prepared three documents. The first of these was an agreement between the Foreign Company (it should have been the Singapore Company) and SLS whereby the Foreign Company agreed to issue a letter of credit in favour of SLS. Besides setting out the requirements of the letter of credit, cl 2 of this agreement provided:

> In consideration of [the Foreign Company] issuing the said Commercial Letter of Credit herein, [SLS] shall place a sum of US$60,000/- (United States Dollars Sixty Thousand) as fees which sum shall be held by M/s Thomas Tham & Company of No: 81 Kampong Bahru Road, Singapore 169378, and shall be released to [the Foreign Company] when the said Letter of Credit is issued **not later than 26th April 2001**. This Letter of Credit shall be verified and authenticated by the Adivisng [*sic*] Bank.

This agreement was signed the same day (19 April 2001). The signing by the authorised signatory of the Foreign Company was witnessed by someone from the law firm (said to be the respondent's secretary) with a round stamp of the law firm affixed over the witness's signature.

7 The second document was an "Acknowledgement Receipt" of the same date in the following terms:

> We Thomas Tham & Company hereby acknowledge receipt of the sum of United States Dollars Sixty Thousand Only (US$60,000.00) from [Taevivat] … pursuant to an Agreement dated the 19th day of April 2001 made between [the Foreign Company] of the one part and [SLS] of the other part.

This was printed on the law firm's letterhead and was signed and stamped with the law firm's stamp. It was not in dispute that the amount of US$60,000 in cash was deposited with the law firm that day.

8 The third document prepared and signed that day was a "Letter of Undertaking" whereby Taevivat confirmed that he had requested Dr Wang to issue the said letter of credit and acknowledged that he (Taevivat) would be indebted to Dr Wang in the amount of US$500,000 when the letter of credit was utilised and be personally liable to pay the said amount to Dr Wang on or before 26 October 2001. The signing of this document did not appear to have been witnessed by anyone from the law firm.

9 After the said deposit was placed with the respondent, Dr Wang requested the respondent that very same day to release US$54,000 to him so that he could pay his bankers. Initially, the respondent was not willing to do so. He finally relented on the condition that Dr Wang give him a personal cheque for US$54,000 and sign an indemnity in favour of the law firm. Dr Wang then handed over a personal cheque from Standard Chartered Bank dated 19 April 2001 for the said amount, payable to the law firm. He also signed an "Acknowledgement Receipt" dated the same day whereby he acknowledged receipt of the same amount "pursuant to an Agreement dated the 19th day of April 2001 made between [the Foreign Company] of the one part and [SLS] of the other part". In this document, Dr Wang also undertook to immediately refund the said amount to the law firm in the event that he was unable to issue the aforesaid letter of credit.

10 After signing the above documents, Taevivat and Jerry Lum arranged to meet a solicitor from the law firm of M/s Tang & Tan. It came to light that the Foreign Company named in the documents was not registered in Singapore. Taevivat and Jerry Lum then retained the said solicitor to represent

them in the further conduct of the matter.

11 An exchange of correspondence took place between Tang & Tan and the law firm. Tang & Tan's letter to the law firm dated 21 April 2001, after referring to a telephone conversation with the respondent and stating that the Foreign Company's name could not be traced in the records of the Registry of Companies, went on to state:

> In the premises, we have requested your Mr. Thomas Tham not to release the sum of US$60,000.00 to anyone until we take further instructions from our client and revert to you.
>
> Please let us have your written confirmation that you will hold the aforesaid sum in your client's account until the matter is resolved.

The law firm replied on 23 April 2001 stating:

> We confirm that we will hold the aforesaid deposit of US$60,000/- and according to the Agreement that our clients signed with [SLS], this sum shall be released when the Letter of Credit is issued …

It also explained that there was a typographical error as to the contracting party in the agreement and that the name of the Foreign Company should be substituted with the name of the Singapore Company.

12 On 27 April 2001, Tang & Tan wrote to the respondent to "[p]lease let us have your confirmation that you are still holding the US$60,000.00 as stakeholders and will not release the sum to anyone until the matter is resolved". Further letters were exchanged between the solicitors but the confirmation sought was not provided by the respondent. On 30 April 2001, Tang & Tan wrote to remind the respondent about the request and to seek his confirmation that the said sum of money had been deposited into the respondent's client's account. The law firm replied the same day stating that the respondent was abroad and would revert the following week.

13 On 9 May 2001, the law firm replied, asking whether the letter of credit had been verified and authenticated and "[i]f so, please confirm that we may release the US$60,000.00 to our clients". On 10 May 2001, Tang & Tan wrote to the respondent noting that their request for confirmation about the US$60,000 was still not met and claiming that the respondent's clients were in breach of the agreement of 19 April 2001. A demand was also made for the return of the said sum by 11.00am the next day. By its letter of 11 May 2001, the law firm replied, stating, among other things:

> We confirm that we are still holding the said sum pending the outcome between our respective clients on this matter.
>
> …
>
> We are instructed to retain the said sum of US$60,000/- until the matter is resolved between our respective clients.

14 On 20 June 2001, the remaining US$6,000 was released by the respondent to Dr Wang. As with the earlier release of the US$54,000, Dr Wang also gave the respondent a cheque (of the Singapore company) for US$6,000 dated 20 June 2001 and an acknowledgement of receipt in terms similar to those of the first.

The charges against the respondent before the disciplinary committee

15 The charges formulated by the Law Society at the disciplinary committee hearing were:

FIRST CHARGE

That THOMAS THAM KOK LEONG is guilty of such misconduct unbefitting an advocate and solicitor or as a member of an honourable profession within the meaning of Section 83(2)(h) of the Legal Profession Act (Chapter 161) in that on 19 April 2001 or any time thereafter, in breach of Rule 3 of the Legal Profession Act (Solicitor's Account) Rules, he failed and/or neglected to pay client's monies of cash US$60,000 into a client's account of Thomas Tham & Company.

SECOND CHARGE

That THOMAS THAM KOK LEONG is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of Section 83(2)(b) of the Legal Profession Act (Chapter 161) in that he on 19 April 2001 and 20 June 2001, despite his undertaking or duty to hold US$60,000 cash as stakeholder, did breach his undertaking or duty as stakeholder when he released US$54,000 and US$6,000 respectively to one Sam Lin Wang in exchange for two (2) cheques for the same amounts which were not banked in.

ALTERNATIVE SECOND CHARGE

That THOMAS THAM KOK LEONG is guilty of such misconduct unbefitting an advocate and solicitor or as a member of an honourable profession within the meaning of Section 83(2)(h) of the Legal Profession Act (Chapter 161) in that he on 19 April 2001 and 20 June 2001, despite his undertaking or duty to hold US$60,000 cash as stakeholder, did breach his undertaking or duty as stakeholder when he released US$54,000 and US$6,000 respectively to one Sam Lin Wang in exchange for two (2) cheques for the same amounts which were not banked in.

THIRD CHARGE

That THOMAS THAM KOK LEONG is guilty of grossly improper conduct in the discharge of his professional duty within the meaning of Section 83(2)(b) of the Legal Profession Act (Chapter 161) in that he after 19 April 2001 and particularly by three (3) letters dated 23 April 2001, 9 and 11 May 2001, falsely misled and deceived the Complainant and his solicitors that he was continuing to hold the US$60,000 as stakeholder when he was not.

The first charge was not in issue before us as the Law Society had asked the disciplinary committee to discharge the respondent on that charge.

The findings of the disciplinary committee

16 Although the word "stakeholder" was not used in the discussions or in the documents, the respondent accepted that he had understood that his role was to be a stakeholder pending the issue of the letter of credit. He said he agreed to release the US$54,000 because Dr Wang, until then his good client, had put pressure on him by telling him that without the money, he would not be able to obtain the letter of credit. The respondent did not expect anything would go wrong. At the time he released the money, he did not believe that he had done anything wrong as he had Dr Wang's cheque which was as good as cash and which he could deposit to recover the same amount. By 20 June 2001, when he released the second amount, Dr Wang had told him that the matter of the letter of

credit was settled between the parties and that he could release the remaining amount.

17 The disciplinary committee was of the opinion that the respondent had breached his duty as a stakeholder by releasing the first amount. It held that it must have been clear to the respondent that Dr Wang's personal credit was not sufficient for Taevivat and that was the reason Taevivat wanted the money held by a stakeholder. Accordingly, Dr Wang's cheque could not be regarded as being as good as cash in the circumstances. Further, the value of the cheque was questionable since it would be apparent from Dr Wang's request for the first sum of money that he lacked financial resources.

18 While accepting that the respondent did not intend to benefit personally and that he merely wanted to facilitate the performance of the letter of credit transaction, the disciplinary committee felt that this did not justify him in disregarding the express instructions of Taevivat by releasing the first amount because a stakeholder owes a duty not only to his client but to third parties as well and has a duty to hold on to money deposited with him in accordance with what has been agreed between the stakeholder and the parties (*Ong Hun Seang v Yeoh Oon Teik* [1996] 3 SLR 156).

19 For the second amount released, the disciplinary committee was also of the view that the respondent had breached his duty as a stakeholder as he should have known then that there was a potential dispute over the money deposited with him and that he could be sued by Taevivat. It did not accept that the respondent genuinely believed that he was entitled to release the money to Dr Wang because the matter had been settled. If the respondent did believe so, there would have been no necessity to require a cheque and an indemnity from Dr Wang.

20 On the letters written by the respondent to Tang & Tan, the disciplinary committee was of the view that the language used in the respondent's letter of 23 April 2001 was clear and unqualified and that it would deceive the reader into believing that the US$60,000 was still with the respondent or the law firm.

21 However, the disciplinary committee did not think that the respondent's letter of 9 May 2001 was sufficient evidence of an intention to mislead or deceive. This was because that letter was principally an inquiry as to whether the letter of credit that had been issued was verified and authenticated in accordance with what had been agreed between the parties. Further, Tang & Tan's reply the following day showed that it did not regard the respondent's reply of 9 May 2001 as a statement that he continued to hold the amount deposited because it stated that the respondent had not replied to the earlier request for confirmation about the money.

22 On the last of the three letters mentioned in the third charge against the respondent (dated 11 May 2001), the disciplinary committee found that it meant that the respondent or the law firm was still in possession of the money and that no part of it had been released to anyone. It did not accept the argument that the letters of 23 April and 11 May 2001 were simply cases of bad or careless drafting.

23 While accepting that Taevivat was not the respondent's client and that the respondent was not a trustee of the money deposited with him, the disciplinary committee opined that the respondent nevertheless owed Taevivat a duty not to release the money unless the stipulated conditions were satisfied. In the view of the disciplinary committee, implicit in the agreement to act as stakeholder was an undertaking by the respondent as a solicitor to the depositing party, whether a client of the respondent or not, that he would not release the money until the agreed conditions were met. By releasing the two amounts when it was clear that the said conditions had not been met, the respondent's conduct amounted to grossly improper conduct in the discharge of his professional duty

under s 83(2)(*b*) of the LPA and the second charge set out above was made out. Alternatively, the disciplinary committee found that the respondent's unauthorised conduct in releasing the money in two tranches amounted to conduct unbefitting an advocate and solicitor within the meaning of the alternative second charge.

24 The disciplinary committee also found that the respondent did deliberately attempt to mislead and deceive Taevivat and his solicitors by his two letters and that such conduct amounted to grossly improper conduct in the discharge of his professional duty. Accordingly, the third charge was also established.

25 The disciplinary committee therefore determined under s 93(1)(*c*) of the LPA that cause of sufficient gravity existed for disciplinary action under s 83 of the LPA in relation to the second charge (or the alternative second charge) and the third charge.

The decision of the court

26 Before us, the findings of the disciplinary committee were largely unchallenged. The respondent, through his counsel, accepted that he had breached his contractual duties as a stakeholder (where the second charge was concerned) and that his conduct in writing the two letters in issue (in the third charge) was grossly improper conduct within the meaning of s 83(2)(*b*) of the LPA. It was argued, however, that it was not implicit in this case that the respondent's contractual obligation amounted to a solicitor's undertaking. This was because, in the three documents evidencing the stakeholding agreement, no reference was made to any solicitor's undertaking being given by, much less being sought from, the respondent. It was further submitted that there was no need to imply a solicitor's undertaking in order to give business efficacy to the said agreement.

27 In our opinion, it was unarguably clear on the facts of this case that the respondent's role in the entire transaction was not in a personal but professional capacity. In other words, the respondent was brought into the transaction because he was an advocate and solicitor and not as a good friend of Dr Wang. The following facts put this beyond doubt:

(a) Dr Wang suggested that Taevivat deposit the US$60,000 with his (Dr Wang's) lawyer and that the same lawyer draw up the agreement between the parties. There was no evidence that Taevivat trusted the respondent as a person or friend rather than as a lawyer. The evidence showed that Taevivat deposited the money with the respondent because he was performing the role of a lawyer.

(b) The agreement (at [6]) stipulated that the money was to be held by "M/s Thomas Tham & Company of No: 81 Kampong Bahru Road, Singapore 169378", the law firm's name and business address.

(c) The acknowledgement of receipt of the money was printed on the law firm's letterhead and was stamped with the law firm's stamp.

(d) The undertaking given by Dr Wang to the respondent was to refund to the law firm the money released prematurely.

(e) All subsequent correspondence which the respondent had with Tang & Tan was done on the law firm's letterhead and in the name of the law firm.

In the same way as it was acknowledged that the respondent was acting as a "stakeholder" without

the need for that word to appear in the documents, so it was not necessary to provide explicitly in the documents that the respondent was acting as a solicitor. That was already amply clear and it would only be stating the obvious.

28 A stakeholder, by agreeing to assume that role, undertakes to the parties involved in the transaction giving rise to the need for the stakeholding function that he will perform his role impartially and will hold the money in issue until the occurrence of the specified eventuality. Where the stakeholder is performing that function as a solicitor, the undertaking is not merely a contractual obligation which can be enforced by a civil action. It is elevated to an undertaking given by someone from an honourable profession, the breach of which also attracts disciplinary action. As Hamilton J in *United Mining and Finance Corporation, Limited v Becher* [1910] 2 KB 296 at 307, in explaining the expression "in his capacity as a solicitor", said:

> Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third parties in the way of his profession, gives an undertaking to those third parties incidental to those negotiations, that undertaking is one which is given in his capacity as a solicitor and not as a mere layman undertaking the office of stakeholder or guaranteeing the payment of money. It seems to me that the part which solicitors are nowadays well known to play in elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings for the payment of money and of a similar character, and that those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust.

29 A solicitor who breaches his undertaking in circumstances as blatant as those in the present case, by knowingly permitting 90% of the deposit to be released contrary to the agreed terms the very same day, is certainly guilty of grossly improper conduct in the discharge of his professional duty. He has disregarded the trust reposed in him by Taevivat and substituted the security which Taevivat thought he had with something else without authorisation. Where the second release of money was concerned, we agree with the views of the disciplinary committee (at [19] above). The second charge was therefore established. Even if the second release was excusable, and it patently was not, a charge of grossly improper conduct under s 83(2)(*b*) of the LPA would have been made out nonetheless. As stated in *Re Lim Kiap Khee* [2001] 3 SLR 616 (at [21]):

> It is of the utmost importance that a solicitor should abide by the undertaking he formally gives. It is the very foundation of an honourable profession that its members act honourably. To deliberately breach an undertaking solemnly given would seriously undermine the integrity of the profession and would bring it into disrepute. Such a conduct, in our opinion, clearly constitutes grossly improper conduct, especially in the circumstances here where the respondent did not even bother to explain himself.

30 We need only say that the alternative second charge, which is now irrelevant in the light of our holding, would obviously have been made out as well since "misconduct unbefitting an advocate and solicitor" under s 83(2)(*h*) of the LPA is not confined to misconduct in the solicitor's professional capacity (*Law Society of Singapore v Heng Guan Hong Geoffrey* [2000] 1 SLR 361) and once a misconduct constitutes grossly improper conduct, that act would, *ipso facto*, be an act unbefitting an advocate and solicitor under s 83(2)(*h*) of the LPA (*Re Lim Kiap Khee* at [21]).

31 The respondent rightly acknowledged that his conduct in writing the two letters dated

23 April and 11 May 2001 was sufficient to establish the third charge. It did not matter that the disciplinary committee considered the letter dated 9 May 2001 (also specified in the third charge) to be innocuous. The two letters in issue were neither inadvertent nor drafted shoddily. They sought to reassure Taevivat and his solicitors that the deposit was intact and safe with the respondent or the law firm when the respondent had already released 90% of the amount the very same day the documents were signed.

32 Counsel for the respondent urged us to consider the following factors before imposing the appropriate sanction on the respondent. The respondent has been practising for 31 years without any blemish on his record. He is well regarded by his peers and he is the honorary legal adviser to more than 30 temples and associations in Singapore. As stated by the disciplinary committee, the respondent did not intend to benefit personally but wanted to facilitate the performance of the transaction. He is now liable to Taevivat in a civil action for the deposit released by him to Dr Wang, a foolish act that he bitterly regrets. He is truly sorry for the trouble he has caused and there is no likelihood at all of a recurrence of such foolish conduct on his part.

33 Section 83(1) of the LPA provides that errant advocates and solicitors may be struck off the roll or suspended from practice for up to five years or censured. Under s 83(5) of the LPA, the court may, in addition to the facts of the case, take into account the past conduct of the respondent in determining the proper order to make.

34 In *Re Marshall David* [1972–1974] SLR 132, the respondent there, then a leading member of the legal profession, was suspended from practice for six months for breaching an oral undertaking (about not leaking court documents to the press before trial) made to the Attorney-General in the chambers of and in the presence of the Chief Justice.

35 In *Re Seow Francis T* [1972–1974] SLR 469, the respondent there gave an undertaking over the telephone to the Attorney-General to hand over all books, files and documents pertaining to a company whereupon the Attorney-General instructed the police to discontinue a search in the respondent's law office. The respondent subsequently confirmed, relying on his partner, that all relevant files had been handed over to the police. This turned out to be incorrect as several relevant documents were still in the law office. For the breach of that undertaking, the respondent in that case was suspended from practice for one year.

36 In *Re Lim Kiap Khee* ([29] *supra*), the respondent there was found guilty on two counts of grossly improper conduct in failing to abide by a stakeholder's undertaking, given in his capacity as a solicitor, to release certain sums of money within certain periods. In addition, he was also found guilty of one count of breaching the then Legal Profession (Solicitors' Accounts) Rules (Cap 161, R 8, 1990 Rev Ed). In striking the respondent there off the roll, the court noted that the breaches of undertaking were deliberate and that he had previous antecedents of five misconduct charges for which he had been suspended from practice for one year. He was also an experienced lawyer of more than 20 years' standing and had completely ignored the disciplinary proceedings from their inception. There was therefore no mitigating factor at all before the court.

37 In the present case, the respondent really should have known better than to cave in to his erstwhile client's unreasonable demands. He should have known that substituting a cheque and a promise for cash in hand was not something he should have done as a stakeholder, particularly in his capacity as a solicitor. His foolishness is now further borne out by the fact that the cheques are obviously worthless or he would have banked them in and paid out the stakeholding amount instead of being sued by Taevivat. We were satisfied that it was a case of foolishness compounded by the letters written with an ostrich-like mentality. The respondent was hiding from reality and hoping that

things would somehow work out and that the parties would be able to resolve their differences and get him out of the mess he had dug himself into. In the circumstances, we suspended the respondent from practice for a period of two years. We also ordered him to pay the costs of the Law Society in the entire disciplinary proceedings.