Wee Soon Kim Anthony v Law Society of Singapore
[2006] SGHC 214

Case Number : OS 8/2006

Decision Date : 27 November 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Plaintiff in person; Jimmy Yim SC, Abraham Vergis and Daniel Chia (Drew & Napier) for the Defendant

Parties : Wee Soon Kim Anthony — Law Society of Singapore

Legal Profession – Professional conduct – Breach – Gross overcharging – Fee sought to be charged in bill of costs found unreasonable upon taxation – Whether such fee amounting to gross overcharge – Whether dispute as to existence of fee agreement relevant to determination of whether overcharging taking place – Whether formal investigation by Disciplinary Committee to determine existence of gross overcharging warranted on facts of case – Rule 38 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed)

Legal Profession – Professional conduct – Procedure – Application to judge upon dissatisfaction with Council of Law Society's determination – Exemption of borrowing transaction – Whether person dissatisfied by decision of Council of Law Society to invoke r 34(c) of Legal Profession (Professional Conduct) Rules to exempt borrowing transaction from r 33 entitled to apply to judge against decision pursuant to s 96 of Legal Profession Act – Section 96 Legal Profession Act (Cap 161, 2001 Rev Ed), rr 33, 34(c) Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed)

27 November 2006 Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff, Mr Anthony Wee Soon Kim ("Mr Wee"), sued his bankers UBS Ag in High Court Suit 834 of 2001 ("Suit 834"). In 2003, at a time when Suit 834 was part-heard, Mr Wee discharged his then lawyers and engaged Mr Lim Chor Pee ("LCP"), the sole proprietor of M/s Chor Pee & Partners ("the firm"), to represent him in the case. Mr Wee discharged LCP as his solicitor some time in December 2004.

2 In April 2005, Mr Wee made four complaints to the defendant herein, The Law Society of Singapore ("the Law Society"), against LCP. These complaints were:

(a) that LCP had, contrary to r 33 of the Legal Profession (Professional Conduct) Rules (Cap 161, R1, 2000 Rev Ed) ("the Rules"), entered into prohibited borrowing transactions with Mr Wee in that he had taken loans for himself and for the firm from Mr Wee at a time when he was acting for Mr Wee;

(b) that by rendering a bill to Mr Wee in the sum of $612,300 on 13 January 2005, LCP had grossly overcharged Mr Wee in breach of r 38 of the Rules;

(c) that LCP had breached r 35(c) of the Rules by failing to inform Mr Wee of the estimate of fees and also r 35(e) of the Rules by failing to inform him of the approximate amount of costs incurred to date every six months or by delivering interim bills, in relation to Suit 834; and

(d) that LCP had failed to place a sum of $10,000 received from Mr Wee on fixed deposit despite having said that he would do so.

3 The Law Society appointed an Inquiry Committee ("IC") to look into Mr Wee's complaints. The IC issued its report on 31 October 2005. In summary, the IC found that:

(a) there had been a breach by LCP of r 33 but that that breach did not warrant a formal investigation by the Disciplinary Committee ("DC") and instead a penalty of $2,000 would be sufficient and appropriate to the misconduct committed;

(b) the complaint of overcharging had not been made out;

(c) with regard to rr 35(c) and (e), the circumstances had been adequately explained by LCP and the complaint was thus not made out; and

(d) there were no grounds for disciplinary action on the complaint relating to the fixed deposit.

4 The Council of the Law Society ("the Council") held a meeting on 9 December 2005 to consider the IC's report. After deliberation, it adopted the recommendations made to dismiss the complaints relating to r 38, rr 35(c) and (e) and LCP's failure to place the $10,000 on fixed deposit. As for Mr Wee's complaint relating to the prohibited loan transaction under r 33, the Council exercised the powers given to it by r 34(c) and made a determination that r 33 should not apply to the loans given by Mr Wee to LCP and the firm.

5 Mr Wee was dissatisfied with the result of his complaint. He therefore filed the present originating summons in January 2006 and asked for relief pursuant to s 96 of the Legal Profession Act (Cap 161, 2000 Rev Ed) ("the Act").

The statutory framework

6 The relevant provisions of the Rules are:

Definitions for purposes of rules 33 and 34

32. For the purposes of rules 33 and 34 —

"independent advice" means advice by an advocate and solicitor not being a party to the transaction nor representing any associated party and where the advocate and solicitor certified in writing that he has given such advice;

"prohibited borrowing transaction" means any transaction under or by virtue of which money or valuable security is borrowed (directly or indirectly and whether with or without security) by an advocate and solicitor from his client or by an associated party from that client unless the client is an excepted person.

Prohibited borrowing transaction

33. Subject to rule 34, an advocate and solicitor shall not –

(a) enter into a prohibited borrowing transaction;

Exempted borrowing transaction

34. Rule 33 shall not apply to any transaction in respect of which —

(a) all parties thereto, other than the advocate and solicitor or the associated party, have received independent advice and the certificate referred to in the definition of "independent advice" in rule 32 as to that advice has been given prior to the transaction being entered into; and the advocate and solicitor has made full disclosure of any interest of the advocate and solicitor and of any associated party;

(b) the advocate and solicitor does not act for the client in relation to the transaction but the client is represented by an independent advocate and solicitor; or

(c) the Council determines (either before or after the transaction is entered into) that it shall not apply to that particular transaction.

Fees

35. An advocate and solicitor shall inform the client of —

(c) the estimates of the fees and other payments, which shall not vary substantially from the final amount, unless the client has been informed of the changed circumstances in writing;

(e) the approximate amount of the costs to date in every 6 months whether or not a limit has been set or deliver an interim bill in appropriate cases.

Gross overcharging

38. An advocate and solicitor shall not render a bill (whether the bill is subject to taxation or otherwise) which amounts to such gross overcharging that will affect the integrity of the profession.

7 The regime under which the IC and the Law Society considered the complaints that Mr Wee made is that established by Part VII of the Act and in particular, s 85 "Complaints against advocates and solicitors", s 86 "Inquiry", s 87 "Council's consideration of report" and s 96 "Procedure for complainant dissatisfied with Council's decision". Under this regime, when the Law Society receives any complaint it refers the same to the Chairman of the Inquiry Panel who then immediately constitutes a Review Committee to review the complaint. If the Review Committee does not consider that the complaint is frivolous, vexatious, misconceived or lacking in substance, it will refer the matter back to the Chairman of the Inquiry Panel who will then constitute an inquiry committee. The inquiry committee conducts its inquiry in accordance with the provisions of s 86 and, on completion thereof, issues its report dealing with the question of the necessity or otherwise of a formal investigation by a Disciplinary Committee. This is found in s 86(7), which provides:

(7) The report of the Inquiry Committee shall, among other things, deal with the question of the necessity or otherwise of a formal investigation by a Disciplinary Committee and, if in the view of the Inquiry Committee no formal investigation by a Disciplinary Committee is required, the Inquiry Committee shall recommend to the Council —

(a) a penalty sufficient and appropriate to the misconduct committed; or

(b) that the complaint be dismissed.

I note here that in *Whitehouse Holdings Pte Ltd v Law Society of Singapore* [1994] 2 SLR 476 ("*Whitehouse*"), the Court of Appeal said that the role of the inquiry committee was merely to investigate the complaint and consider whether or not there was a *prima facie* case for a formal investigation. It did not have to make any conclusions on misconduct or whether an offence was committed. This holding was endorsed by the same court in the subsequent case of *Subbiah Pillai v Wong Meng Meng* [2001] 3 SLR 544. This observation, however, does not prohibit any inquiry committee from, in an appropriate case, coming to a conclusion on misconduct since under s87(7) an inquiry committee shall recommend to the Council an appropriate penalty where it finds misconduct has been committed but considers that no formal investigation is required.

8 Once the Council has received the report, it has to consider it and make various determinations in accordance with s 87. For present purposes, only sub-ss (1) and (2) are relevant:

Council's consideration of report

87. —(1) The Council shall consider the report of the Inquiry Committee and according to the circumstances of the case shall, within one month of the receipt of the report, determine —

(a) that a formal investigation is not necessary;

(b) that no cause of sufficient gravity exists for a formal investigation but that the advocate and solicitor should be ordered to pay a penalty under section 88;

(c) that there should be a formal investigation by a Disciplinary Committee; or

(d) that the matter be adjourned for consideration or be referred back to the Inquiry Committee for reconsideration or a further report.

(2) If the Inquiry Committee in its report recommends —

(a) that there should be a formal investigation, then the Council shall determine accordingly under subsection (1); or

(b) that a formal investigation by a Disciplinary Committee is not necessary, the Council may, if it disagrees with the recommendation, request the Chief Justice to appoint a Disciplinary Committee.

9 The complainant is notified thereafter of the Council's decision. If he is dissatisfied with the result, he may bring the matter to court in accordance with the procedure set out in s 96 of the Act. This so far as relevant provides:

Procedure for complainant dissatisfied with Council's decision

96. —(1) Where a person has made a complaint to the Society and the Council has determined —

(a) that a formal investigation is not necessary; or

(b) that no sufficient cause for a formal investigation exists but that the advocate and solicitor concerned should be ordered to pay a penalty,

that person, if he is dissatisfied with the determination, may within 14 days of being notified of the Council's determination apply to a Judge under this section.

…

(4) At the hearing of the application, the Judge may make an order —

(a) affirming the determination of the Council; or

(b) directing the Society to apply to the Chief Justice for the appointment of a Disciplinary Committee,

and such order for the payment of costs as may be just.

10 The role of the court on hearing an application under s 96 was explained in *Whitehouse* where the Court of Appeal said it was that of an appeal court supervising a subordinate tribunal rather than that of a court of first instance exercising original jurisdiction. Yong Pung How CJ made the following observations on s 96 (at 486-487):

> The role of the court in a s 96 application was clearly spelt out in *Wee Anthony.* The court's jurisdiction is appellate and supervisory in nature and cannot be that of an original jurisdiction. In the present case, it would not be correct to classify the assumption of jurisdiction by the court here as belonging to the latter category. …
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> Mr Ramakrishnan also submitted before us that the appropriate remedy for a dissatisfied complainant was to proceed under s 96 and that there was no necessity to incur additional expense by resorting to other remedies. We agree. Prerogative orders are, of course, concurrently available here. However, its scope of application would also extend to areas outside the ambit of s 96 and s 97 (for complainants dissatisfied with a disciplinary committee's decision). …
>
> As we have said, we are of the view that there was relevant determination by the Council. Section 96 was enacted as a specific appeal procedure for dissatisfied complainants and therefore should be the procedure of first resort. We do not find it inconsistent with the supervisory powers of the court under s 96 to assume jurisdiction here.

With the foregoing structure and guidance in mind, I turn to consider each of the complaints that Mr Wee had made to the Law Society and how they were dealt with by the IC and the Council.

The specific complaints

Breach of r 33

11 The factual background to this complaint is that Mr Wee started Suit 834 in July 2001. In March 2003, Mr Wee asked LCP to take over the case as his solicitor. At that time, Suit 834 was part-heard, having been heard over 17 days in 2002 and was fixed to recommence in June 2003. LCP agreed to act for Mr Wee despite the short notice and thereafter conducted the trial on his behalf for a further 27 days from 23 June 2003 to 28 July 2003. During the period between March and June 2003, the firm raised several invoices for the work done in relation to Suit 834.

12 On 19 May 2003, while in the course of acting for Mr Wee, LCP asked Mr Wee for, and

received, a personal loan of $20,000. Three further personal loans were made on 30 May 2003 ($8,500), 9 June 2003 ($39,000) and 25 June 2003 ($16,500). In addition, Mr Wee made loans to the firm totalling $307,000 as follows: 17 June 2003 ($75,000), 27 June 2003 ($50,000 and $150,000) and 28 August 2003 ($32,000) which LCP said he would repay by monthly instalments of $7000 each. In September 2003, the firm paid Mr Wee the first such instalment but no further instalments were forthcoming thereafter.

13 On 30 December 2004, Mr Wee's claim in Suit 834 was dismissed. Mr Wee's appeal against the decision was dismissed in May 2004. In December that year, Mr Wee discharged LCP as his solicitor.

14 On 3 January 2005, Mr Wee served LCP with two statutory demands demanding repayment of the personal loans and the loans to the firm. Ten days later, the firm sent Mr Wee an invoice for work done on Suit 834 ("the invoice"). The amount charged as costs was $612,300. The amount payable after adding GST of $30,615 and deducting the sum of $275,000 that Mr Wee had already paid as fees, was $367,915. The next day, LCP applied to set aside the statutory demand in respect of the loan made to the firm on the basis that the outstanding balance of $300,000 had to be set off against the amount due to the firm for work done in Suit 834 and therefore there was nothing owing to Mr Wee. The statutory demand was set aside on 16 February 2005.

15 On 16 March 2005, LCP applied for a petition of course, *inter alia*, for bills relating to Suit 834. In response, Mr Wee asserted that there had been an agreement to cap the costs for that action at $275,000 ("the fee agreement"). Shortly thereafter, the complaint that led to these proceedings was filed with the Law Society.

16 The petition of course was heard by the High Court in May 2005. The High Court found that, as submitted by LCP, there was no fee agreement and ordered that the firm's bill proceed to taxation. Mr Wee appealed. His appeal was successful and on 6 December 2005, the Court of Appeal affirmed that there had been an agreement to cap fees at $275,000.

17 In the meantime, on 9 September 2005, LCP applied to the Council pursuant to r 34(c) for a determination that the prohibition under r 33 did not apply to the loans in question. The Council took the view that as the subject matter of the application related to Mr Wee's complaint which was then pending before the IC, it was unable to make a determination on the matter. It indicated that Mr Wee might wish to forward his submissions to the IC for their consideration.

18 When the IC issued its report, it took the view that it had no powers under the Rules to deal with LCP's application under r 34(c) since that expressly empowered the Council to make the determination. The IC noted, however, that if the Council should determine that r 33 should not apply to the loans in question, it would then follow that the complaint of breach of r 33 must fail. On the substantive question, the IC expressed the following views:

(a) there was no doubt that LCP had committed a breach of r 33 unless the Council subsequently granted LCP's application under r 34(c). Whether Mr Wee was unduly influenced to make the loans to LCP was irrelevant to the question of whether the rule had been breached;

(b) however, the consequences of the breach were relevant to the question of the gravity of the breach and so were the circumstances under which the loans were sought and Mr Wee's susceptibility to influence from LCP;

(c) it was clear that Mr Wee was fully aware what the loans were about and what the consequences of making them were. In addition, given his experience, the inference was

irresistible that LCP was also aware of the long standing prohibition against solicitors borrowing from clients;

(d) the IC could not, however, ignore the circumstances under which the loans were requested. Suit 834 was part heard and scheduled to resume in June 2003. Mr Wee's previous solicitors had asked to be discharged and Mr Wee had sought LCP's help with respect to Suit 834. All his experience and savvy notwithstanding, Mr Wee would be in an invidious position when faced with requests for loans from LCP whose help he needed in the part heard action; and

(e) the IC could not, therefore, accept LCP's submission that the breach of r 33 in this case was merely technical. The IC was, however, also of the view that the circumstances of the case did not warrant a formal investigation by a disciplinary committee and that a penalty of $2,000 would be sufficient and appropriate to the misconduct committed.

19 The Council considered the findings of the IC over two Council meetings. In relation to the complaint regarding the loans, the Council considered LCP's application under r 34 and it then exercised its discretionary power pursuant to r 34(c) to make a determination to exempt the loans from the application of r 33. In its letter of 15 December 2005 notifying Mr Wee of its decision, the Council explained to Mr Wee that LCP had been exempted from the application of r 33 for "at least the following reasons":

(a) The loan was made by Mr Wee to LCP on account of their long friendship at the Bar;

(b) There was no evidence that LCP exercised undue influence on, or took advantage of, Mr Wee at the material time;

(c) The complaint against LCP had been lodged some two years after the loans were made despite the fact that Mr Wee was or must have been fully aware of r 33; and

(d) Mr Wee's letter of 21 November 2005 did not explain why he was of the view that r 33 should be strictly applied given the fact that Mr Wee was a lawyer who had had considerable legal and commercial experience at the material time.

20 Before me, Mr Wee who appeared in person, relied on the grounds given by the IC for finding that LCP was in breach of r 33 and argued that there was no lawful basis for the Council to resurrect r 34(c) to trump r 33 especially when it had previously dismissed the application for an exemption under r 34(c) on the ground that the matter was already before the IC for an investigation. In Mr Wee's view, the IC having found that r 33 had been breached, the Council should have sent the matter to a DC.

21 The Law Society's response was two fold. First, it denied that it had dismissed LCP's application under r 34(c) when the same was first made in September 2005. Instead, it had taken the view that it could not deal with the application whilst the matter was before the IC. In effect therefore, it had adjourned consideration of the application until the IC had made its report. I agree with this submission. It is supported by evidence in the form of the Law Society's written response to LCP when it received his application.

22 The second submission made by the Law Society was more substantial. It was that Mr Wee, by bringing an appeal under s 96 of the Act, had invoked the wrong procedure in relation to the decision made by the Law Society on the loans. It noted that the Council had exercised its discretion pursuant to r 34(c) to exempt the loans from the rigours of r 33. It argued that if Mr Wee was

dissatisfied with that determination, his proper recourse would have been to apply for judicial review and prerogative remedies. In this connection, it cited *Whitehouse* which had confirmed that prerogative remedies are available for matters arising under the Act in general.

23 In my judgment this argument cannot be rebutted. The appeal procedure under s 96 of the Act is available only when the Council has made one of two types of determination: either a determination that a formal investigation is not necessary or a determination that no sufficient cause for a formal investigation exists but that the advocate and solicitor concerned should be ordered to pay a penalty. In either of those two cases, the complainant who is dissatisfied with the determination, may invoke his right of appeal to the court under s 96. Neither of these determinations was made in this case. In fact, by making its decision under r 34(c) to exempt the loans from r 33, the Council removed the substratum of the complaint made by Mr Wee. Once the loans were approved in this way, nothing remained that could be complained about. Therefore, s 96 could not apply to this case, *ie*, the Council could not have determined the loan complaint since the effect of the invocation of r 34 was to exempt the loans from determination.

24 The proper course for Mr Wee to have taken in order to challenge the Council's decision would have been to apply for a Quashing Order pursuant to O 53 of the Rules of Court (Cap 322, R5, 2004 Rev Ed). Of course had he done so, he would only have been able to succeed if he was able to persuade the court that the Council's decision had to be set aside because the Council had acted without procedural propriety or had an improper purpose or that the decision was irrational or illegal. He would not have been able to ask the court (as he did in this application under s 96 of the Act) to examine the reasons that Council gave for invoking the rule, to weigh those reasons and to affirm or vary the decision.

25 There is no doubt that the Law Society and its decisions are amenable to judicial review. That course is less attractive to complainants such as Mr Wee than asking the court to exercise its appellate jurisdiction under s 96 because appeals are concerned with the substantive merits of the case whereas reviews deal only with the legality of the decision under review. A court conducting a judicial review does not question the merits of the exercise of discretion and cannot substitute its own views as to how the discretion should be exercised for the course actually taken (see *Chan Hiang Leng Colin v PP* [1994] 3 SLR 662). Mr Wee may be aggrieved by this result but the legislation is clear and the court's appellate jurisdiction is not available except in the circumstances described in s 96.

Breach of r 38

26 The background facts relating to this complaint have been set out above. There is only one other matter that needs to be mentioned and that is that the bill presented for taxation was in the sum of $700,000 and this sum was taxed down to $390,000. As the amount taxed off exceeded one-sixth of the original amount of the bill, the Registrar ordered that the costs of the taxation fixed at $500 be paid by the firm to Mr Wee pursuant to s128(1)*(a)* of the Act.

27 The IC noted that the complaint of gross overcharging related only to the firm's bill for $612,300 for work done in respect of Suit 834. In its first report issued after the High Court had held that there was no fee agreement and before the decision of the Court of Appeal, the IC took the position that the previously quoted figure of $275,000 was irrelevant since no fee agreement had been reached. That quote was an estimate made at an early stage of the proceedings and it would be wrong to use it to decide on the bill issued after all the work had been done. The IC considered the bill presented by M/s Drew & Napier LLC who had acted for UBS Ag in Suit 834 and stated that for the period after January 2003, Drew & Napier LLC had claimed $636,000 as party and party costs and the High Court had allowed $380,000 for this period. This bill was relevant because it was for

approximately the same period as the firm's bill of costs in Suit 834. Whilst Drew & Napier's bill had been drawn with a certificate for two counsel which was not the case for the firm's bill, the IC noted that LCP had taken on Suit 834 at short notice, at a time when it was part-heard and that he had had to apprise himself of all that had taken place prior to his taking over conduct of Suit 834. In addition, LCP's bill was for solicitor and client costs and these were allowed by the assistant registrar at $390,000. In these circumstances, the IC took the view that the complaint of gross overcharging had not been made out.

28 After the Court of Appeal held that there had been a fee agreement, the Council referred the overcharging complaint back to the IC for further consideration. On 10 November 2005, the IC issued a supplemental report which stated that the Court of Appeal's decision did not affect its recommendation on the complaint of gross overcharging. The most that could be said was that there was a *bona fide* dispute between Mr Wee and LCP as to whether there was a binding agreement to cap fees. That dispute had been properly brought before the courts and a final decision had been made by the Court of Appeal. In the absence of such a *bona fide* dispute, it might be argued that an advocate and solicitor who rendered a bill grossly in excess of the agreed fee might be in breach of r 38. But that was not the case here and therefore the IC still considered that the complaint should be dismissed.

29 Before me, Mr Wee contended that the IC had made an unbalanced finding that the complaint of gross overcharging was not made out because the assistant registrar had, on taxation, allowed $390,000. In so finding, the IC had ignored the fact that the assistant registrar had ordered LCP to pay the costs of the taxation proceedings. Implicit in this order was a holding that the tax invoice of $612,300 submitted for taxation was unreasonable. The IC had also ignored the fact that the brunt of formulating the statement of claim and attending to 14 days of the proceedings had been borne by Mr Wee's first set of solicitors and Queen's Counsel. Additionally, the IC had not considered the exaggerated and inflated hours of work reflected in the bill. As far as the dispute was concerned, Mr Wee said that the Court of Appeal had held that the fee agreement existed and the Council should have taken account of this.

30 The Law Society submitted that LCP's fees were not exorbitant given the nature of the work done. His invoice for $612,300 consisted of the earlier sum of $275,000 (already invoiced and paid) and an additional sum of $367,915. This invoice was not excessive in itself because:

(a) LCP was instructed on an urgent basis to take over a part-heard matter;

(b) the invoice covered 27 hearing days, closing submissions (for the whole hearing which took 44 days) and one interlocutory appeal to the Court of Appeal. The total time expended was 1020.5 hours;

(c) it was a technical and complex case involving losses suffered on a foreign exchange deal and expert evidence was adduced and had to be dealt with;

(d) if the total amount claimed by LCP was divided by the number of hearing days LCP attended (27), the daily rate was $23,000 (I note that the correspondence shows that LCP had originally wanted to charge a brief fee of $150,000 and a daily refresher of $7,500 which in total would have meant a day rate of $13,055); and

(e) the bill should be compared with Drew & Napier's bill which was taxed down to $380,000 and also with the estimate given by Mr Wee's first set of solicitors who had said that their fees for 14 days of trial would be about $346,000.

31 The Law Society also submitted that the agreement on fees could not form the basis for concluding that LCP had grossly overcharged Mr Wee because the circumstances showed that there was a genuine dispute as to whether such an agreement existed. It would not be right, therefore, to base a charge of gross overcharging on the difference between the bill presented and the amount allegedly agreed to.

32 I think it would be helpful to set out the legal context in which a court has to consider a complaint of gross overcharging under r 38. In *Re Lau Liat Meng* [1992] 2 SLR 203, the respondent solicitor had charged the complainant $22,454.60 as fees for professional services rendered by him in obtaining letters of administration to an estate with assets of $68,394. The disciplinary committee found him guilty of overcharging and when he appeared before the court of three judges, Yong Pung How CJ stated:

> In our opinion, the law applicable to this case is straightforward. In considering whether all the elements of the charge have been proved, the first question is whether the reduced fee of $22,454.60 was far in excess of and disproportionate to what the respondent was entitled to charge for the services which he rendered. The next question is whether such overcharging, if proved, amounts to grossly improper conduct in the discharge of his professional duty. On the evidence, the disciplinary committee had no difficulty in answering both questions and finding that the charge had been proved beyond reasonable doubt.
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> It is settled law that solicitors rendering exorbitant or excessive bills lay themselves open to disciplinary action (see *Abdul Rahim Rajudin*), for they have abused the trust and confidence reposed in them.

33 There is, however, a difference between legal rules governing the determination of costs payable to lawyers and the rule that excessive overcharging may be professional misconduct. This was well explained by Ipp J in the Australian case of *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 at 209-210 ("*D'Alessandro*"):

> The standards applied under the court's duty to monitor the taxation of bills of costs agreements, and the court's duty to supervise the disciplinary of legal practitioners are not necessarily the same and do not serve identical purposes. A fee that a solicitor may seek to charge by way of a bill of costs may, upon taxation, be found to be unreasonable and therefore subject to appropriate reduction. It does not, however, necessarily follow that the fees so charged by the bill of costs are so excessive as to constitute a breach of ethics. The test for determining whether excessive or unreasonable overcharging constitutes professional misconduct would generally be more stringent than that which is applied when determining whether the amount claimed under a bill of costs or under a s 59(1) costs agreement should be reduced, or whether the costs agreement should be cancelled. What is lawful may not necessarily be ethical, and, indeed, what is unethical, may not necessarily be unlawful.

In *The Law Society of the Australian Capital Territory v Lardner and Andrews* [1998] SCACT 24, the Supreme Court after citing the above passage from *D'Alessandro*, went on to comment:

> It follows that a costs agreement, even if legally valid, may result in excessive overcharging which in turn, may support a finding of professional misconduct. Ipp J also noted, however, that to claim a fee on a reasonably arguable basis, albeit wrongly, cannot be characterised as unprofessional. Mere lack of success on a solicitor/client taxation, therefore, will not necessarily establish unprofessional conduct though it may establish the fact of overcharging.

In the same case, the Supreme Court noted that it was not correct to determine that an overcharge by a solicitor was a gross overcharge simply on the basis that on taxation the bill had been reduced by one-sixth or more. This was because such a reduction might "indicate no more than a legitimate and reasonable difference of opinion between the taxing officer and the solicitor".

34 It can be very difficult to determine when an overcharge becomes a "gross overcharge". *Re Han Ngiap Juan* [1993] 2 SLR 81 was a case where the solicitor concerned had charged $6,725 for acting in a purchase of a property when the correct charge should have been $1,975, and a further $3,000 for filing an application for lapsing of caution when the correct fee should have been $100. Those charges were clearly excessive and were held to be so. On the other hand, in *Re Abdul Rahim Rajudin* [1989] 1 MLJ 289, one of the charges brought against the solicitor was that a bill rendered by him for $150,000 was excessive. Although the court did not think that in the circumstances, the respondent was justified in rendering a bill for that amount, the court was of the opinion that it was improper conduct which fell short of grossly improper conduct in the discharge of his professional duty. In Australia, in the case of *The Council of the New South Wales Bar Association v Timothy Meakes* [2006] NSWADT 67, the tribunal referred to two previous cases where overcharges of approximately 60% and 40% respectively over and above the amounts assessed by the taxing master were held to be gross overcharging, and found that an overcharge of 66% was a gross overcharge.

35 In this particular case, the IC's approach was to compare the amount of the bill as taxed by the assistant registrar with the amount of the invoice and consider whether the amount of the latter was a gross overcharge. Mr Wee's position was that it should have compared the invoice amount to the agreed amount per the fee agreement. The IC, and subsequently, the Council, rejected this position on the basis that there could not be gross overcharging if there was a *bona fide* dispute as to the existence of the fee agreement. I cannot accept this argument. It is not relevant to the determination of overcharging whether or not there was a genuine dispute as to the existence of a fee agreement. The only relevant factor is whether the amount charged by the solicitor is reasonable in the light of the work done and the other circumstances of the case, for example, urgency and the seniority of the solicitor. Whether a dispute over the existence of a fee agreement is *bona fide* or not is a question that goes to the issue of whether the solicitor concerned has acted improperly in rendering a bill that was in excess (even if not grossly in excess) of the agreed fee. It seems to me that if a solicitor knows that he has made a fee agreement with a client and yet renders a bill for an amount that is larger than that which has been agreed for the work covered by the agreement, he would be guilty, at least, of misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession. In this case, the IC's finding that there was a genuine dispute as to the existence of the fee agreement meant that there would not be a *prima facie* case that LCP had been guilty of this type of misconduct. It did not, however, mean that in rendering the invoice he had not grossly overcharged.

36 The correct approach was that taken by the IC in the first instance in comparing the invoice amount with the taxed bill. That was correct because the taxed bill was the result of a detailed consideration of the work done by LCP by an independent adjudicator who was familiar with solicitors' costs and the levels of billing allowed by the courts. Thus, the amount of $390,000 which the assistant registrar allowed reflected the fair and reasonable charge for the firm's work. It showed that $612,300 was an overcharge. That overcharge was 57% over and above the amount assessed by the assistant registrar. In fact, the bill presented for taxation was for $700,000 and if the difference between that amount and $390,000 is calculated, the overcharge would be in the region of 79%.

37 The IC was, however, correct to consider the matter on the basis of $612,300 as that invoice was the subject of the complaint. As I have stated above, the IC did not consider there to be have been gross overcharging because of the circumstances which it mentioned in its report and

which I have cited above. I, however, take a different view. As the court in *Re Han Ngiap Juan* stated, at 88, whether the fact of overcharging amounts in law to grossly improper conduct depends on the individual circumstances of each case.

38 In this case, the relevant circumstances are that LCP was retained in March 2003. On 2 April 2003, there was a discussion on the question of fees (this is the discussion that the Court of Appeal subsequently found to have resulted in the fee agreement) and on 3 April 2003, LCP issued an invoice to Mr Wee for the sum of $50,000 which was duly paid. Thereafter, on various dates between 8 April 2003 and 12 June 2003, LCP issued nine more invoices to Mr Wee, all of which were duly paid. At the end of the day, Mr Wee had paid $275,000 as fees as well as GST thereon and a certain amount for disbursements. No further bill for Suit 834 itself was rendered by LCP thereafter until the invoice sent on 13 January 2005 (some 18 months later) by which time Mr Wee had sent out the statutory demands for repayment of the loans he had made. LCP's next step was to apply to set aside those statutory demands on the basis that he had a valid defence of set off to the claims for repayment of the loans. Without expressing a conclusion on the matter, it appears to me that that combination of circumstances really calls for a proper investigation to determine whether there was gross overcharging. In this connection, any amount that was charged for a collateral purpose and not as a reflection of the work done would appear to be a gross overcharge. The IC only needed to determine whether there was a *prima facie* case. In doing so, it should have taken all the circumstances into account. In my judgment, it was not sufficient to consider the amount of the invoice in relation only to the circumstances in which LCP was retained and the amount charged by Drew & Napier without taking account of the wider circumstances of the case. It should have considered the relevance, if any, that the loans had to the invoice.

Breach of r 35 and the allegation as the lack of regular updates

39 The complaint here was that in contravention of rr 35(c) and (e) of the Rules, LCP did not report to Mr Wee every six months on the legal and other costs incurred. Mr Wee alleged that LCP failed to warn him of the possibility that fees would exceed $275,000 and also did not deliver interim bills. LCP, however, submitted that he gave Mr Wee nine invoices between 3 April and 12 June 2003 to the account of the retainer and fees and disbursements. He did not update Mr Wee thereafter because there was nothing else to do after the trial had concluded save to wait for the verdict. The IC accepted LCP's explanation and stated that any breach was likely to be too trivial to warrant an investigation. The Council accepted the IC's report.

40 I endorse the IC's conclusion on this complaint as being patently correct. True, LCP did not submit half yearly reports to Mr Wee. Yet, the nature of the breach was so technical as to be *de minimis*. In fact, bearing in mind Mr Wee's position that at all times there was a fee agreement in place, he cannot have expected to receive further interim bills after 12 June 2003 when he had already been billed for the total amount agreed. Mr Wee did not complain about any perceived lack of updating during the period in question and no one suffered any detriment as a result of the omission.

Failure to place $10,000 in a fixed deposit account

41 This complaint related to Mr Wee's intended appeal against the outcome of Suit 834. Mr Wee had to provide $10,000 as security for the costs of the appeal and when he forwarded the money to LCP, LCP told him that he would place it in a fixed deposit account. Instead, LCP put the money in the firm's account. LCP's argument before the IC was that although he had not done as he said he would, Mr Wee did not suffer any loss by his omission. First, any interest that accrued from a fixed deposit would in any case belong to the firm which was holding it as stakeholder rather than to Mr Wee himself. Second, the purpose for which the money was forwarded was fulfilled. It was security for

costs of the appeal and when the appeal was lost, the successful respondent duly received payment of the $10,000 from the firm.

42 The IC accepted LCP's explanation. It concluded that the oversight was unintentional, that LCP had not profited unduly from the error and that the money was used for its proper purpose. Therefore, it recommended that this complaint be dismissed. Before me, Mr Wee argued that in his letter of 30 December 2003, LCP had said that the money would be placed in a fixed deposit account because he wanted to use the money for his own benefit and had given this undertaking in order to persuade Mr Wee to allow him to hold on to the money instead of following the usual course of paying the security to the Accountant-General. The IC had not investigated whether the $10,000 had remained in the firm's client's account throughout 2004 and 2005 until it was withdrawn in April 2005 for payment to Drew & Napier. It should have investigated whether the money was misused instead of accepting the excuse that the failure to put it on fixed deposit was due to an oversight.

43 I do not accept Mr Wee's submissions. He was merely speculating that the money may have been misused. The fact remains that when the money had to be paid out, LCP produced it and it was paid over to Drew & Napier on Mr Wee's behalf. Mr Wee did not suffer any loss by reason of the omission to put the money in a fixed deposit account. The loss of interest was suffered by the firm. This complaint was another technical one and the Council was fully entitled to accept the IC's recommendation that no formal investigation was required.

Conclusion

44 I have found that three of Mr Wee's complaints have not been substantiated. With respect of the fourth complaint, that relating to gross overcharging, I take the view that there are grounds to investigate whether LCP's invoice for $612,300 was a gross overcharge and/or it was misconduct on the part of LCP to issue that invoice. I therefore make the following orders:

(a) that the determination of the Council in relation to the complaints relating to breach of rr 35(c) and (e) and the fixed deposit issue be affirmed;

(b) that there be no order on the complaint relating to breach of r 33; and

(c) that the Law Society shall apply to the Chief Justice for the appointment of a disciplinary committee in relation to the complaint concerning the issue of the invoice for $612,300.

45 I will hear the parties on costs.