IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 87

Originating Summons No 916 of 2020

Between

(1) Lee Wei Ling
(2) Lee Hsien Yang

… *Plaintiffs*

And

(1) Law Society of Singapore

… *Defendant*

JUDGMENT

[Legal Profession] — [Disciplinary procedures]
[Legal Profession] — [Disciplinary proceedings]
[Legal Profession] — [Professional conduct]

TABLE OF CONTENTS

Lee Wei Ling and another
v
Law Society of Singapore

[2021] SGHC 87

General Division of the High Court — Originating Summons No 916 of 2020
Valerie Thean J
1, 8, 22 February 2021

21 April 2021 Judgment reserved.

Valerie Thean J:

Introduction

1 This application pursuant to s 96(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) (the "LPA") arises out a complaint made by the executors of the estate of Mr Lee Kuan Yew ("Mr Lee") to the Law Society of Singapore ("the Law Society") on 5 September 2019 concerning Ms Kwa Kim Li ("Ms Kwa"). Ms Kwa had assisted Mr Lee with drafting six wills between 20 August 2011 and 2 November 2012.

2 The letter of complaint dated 5 September 2019 comprised four heads of complaint. After considering reports dated 8 May 2020 and 3 August 2020 from the Inquiry Committee, the Council of the Law Society ("the Council") decided that it would apply to the Chief Justice to appoint a Disciplinary

Tribunal ("DT") in respect of only the second head of complaint.[1] The executors now ask for an order that the Law Society be directed to apply to the Chief Justice to appoint a DT for a formal investigation into Ms Kwa's conduct in relation to the remaining first, third and fourth heads of complaint.

Facts

The wills

3 Mr Lee passed away on 23 March 2015. Prior to his death, Mr Lee executed eight wills. Six of those eight wills were prepared by Ms Kwa. Mr Lee's earliest will, dated 7 December 1995, and his final will, dated 17 December 2013 ("the Final Will"), were not prepared by Ms Kwa. The six wills prepared by Ms Kwa were executed on the following dates:[2]

(a) 20 August 2011 ("the First Will");

(b) 21 December 2011 ("the Second Will");

(c) 6 September 2012 ("the Third Will");

(d) 20 September 2012 ("the Fourth Will");

(e) 4 October 2012 ("the Fifth Will"); and

(f) 2 November 2012 ("the Sixth Will").

4 The executors named in Mr Lee's Final Will are Mr Lee Hsien Yang ("Mr LHY") and Dr Lee Wei Ling ("Dr LWL"). I shall refer to Mr LHY and

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1 First Affidavit of Lee Hsien Yang ("LHY-1") at pp 130–131.

2 LHY-1 at pp 13–14.

Dr LWL collectively as "the executors". The beneficiaries of Mr Lee's estate were his three children: the executors and Mr Lee Hsien Loong ("Mr LHL") (collectively, "the beneficiaries").[3]

The beneficiaries' queries and Ms Kwa's emails in response

5 After Mr Lee's death, Mr LHL and Dr LWL made requests to Ms Kwa for records and information regarding the various wills that Mr Lee signed prior to his Final Will.

6 Ms Kwa replied to both siblings in an email dated 4 June 2015 captioned "Chronology of 6 Wills – my file records with focus on Oxley" (the "4 June 2015 Email"),[4] and included Mr LHY in this email. Ms Kwa explained that she thought it best to respond to the three beneficiaries of Mr Lee's estate.

7 In the 4 June 2015 Email, Ms Kwa informed the executors and Mr LHL of the six wills signed by Mr Lee from August 2011 to November 2012, and attached copies of the six cancelled wills. In the first section of the email, Ms Kwa explained why Mr Lee had signed six different wills over 15 months. Ms Kwa explained that much of the discussion between her and Mr Lee regarding the six wills was in relation to three issues. First, where Dr LWL was to live. Second, how Mr Lee's estate was to be divided (whether equally or unequally between the three beneficiaries). Third, how to divide the property at 38 Oxley Road ("the Oxley property") in the most practical manner.

8 In the second section of the 4 June 2015 Email, Ms Kwa then listed three points on the Oxley property. First, that all six wills provided for the Oxley

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3 LHY-1 at para 14(b).

4 LHY-1, at pp 19–21.

property to be given to Mr LHL. Second, that Dr LWL's right to stay at the Oxley property changed between the First and Fourth Wills. In the Fifth and Sixth Wills, Dr LWL had a right to stay at the Oxley property subject to Mr LHL's consent, and Mr Lee had instructed Ms Kwa to insert a specific paragraph that stipulated that Dr LWL had no life interest in the Oxley property. Third, that a clause providing for the Oxley property to be demolished either upon Mr Lee's passing or after Dr LWL had moved out, whichever was later ("the Demolition Clause"), was removed in the Fifth and Sixth Wills.[5]

9 In this same section, Ms Kwa stated:[6]

> Each time [Mr Lee] signed a new Will, he would ask me to destroy the old Will. I have managed to put together the cancelled photocopies.

10 Finally, Ms Kwa gave a chronological account of events from 7 December 1995 to 2 November 2012, taking the form of a ten-point summary, (a) to (j).[7]

11 Subsequently, and after receipt of further queries from Mr LHL and Dr LWL, Ms Kwa wrote another email on 22 June 2015 to the three beneficiaries (the "22 June 2015 Email"). This email carried the subject header "Estate of Lee Kuan Yew" and read as follows:[8]

> Dear Hsien Loong, Wei Ling and Hsien Yang,
>
> Further to my note to you dated 4 June 2015, Hsien Loong has asked me:
>
> 1) For a copy of draft Will dated 19th August 2011.

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5 LHY-1 at p 19.

6 LHY-1 at p 19.

7 LHY-1 at pp 20–21.

8 LHY-1 at p 66.

> 2) About the background which led to the signing of your father's last Will dated 17 December 2013 ("Will no. 7")
>
> Wei Ling also asked me the same question 2 in May 2014.
>
> I thought best to write to all of you, so that everyone has the same reply from me.
>
> After your father signed Will no. 6 dated 2nd November 2012, he did not instruct me to change his Will.
>
> I first learnt about Will no. 7 via email from Fern and Lin Hoe.
>
> I attach:
>
> 1) Draft Will 19 August 2011 with cover email.
> 2) Email trail of 16 December 2013 from Fern.
> 3) Email trail of 3 January 2014 from Lin Hoe.

12 On 24 June 2015, the executors' solicitors wrote to Ms Kwa to note that the documents and information relating to the past wills of Mr Lee were the subject of attorney-client privilege and confidential. They requested that no further documents be disclosed to any party save for the authorised representatives of Mr Lee's estate.[9]

The executors' request for documents

13 On 25 February 2019, the executors, again through their solicitors, wrote to Ms Kwa to request all original files, correspondence, notes, and other documents pertaining to Mr Lee's instructions to Ms Kwa concerning the first six wills. Ms Kwa then transferred her complete set of documents to the executors' solicitors on 8 and 12 March 2019.[10]

14 At this juncture, the executors discovered a file note dated 21 December 2011 in which Ms Kwa had recorded that she "tore up" Mr Lee's First Will in

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9 LHY-1, at p 15.

10 LHY-1, at p 15.

front of him ("the 21 December 2011 File Note").[11] The executors also uncovered emails between Ms Kwa and Mr Lee between 30 November and 13 December 2013 ("the November and December 2013 Emails").[12] These additional documents, when read together with the 4 June 2015 Email and 22 June 2015 Email, informed the basis of the executors' complaint against Ms Kwa.

The letter of complaint and this application

15 The executors listed four heads of complaint in their letter of complaint to the Law Society dated 5 September 2019:[13]

(a) first, that Ms Kwa had failed to follow the instructions of Mr Lee to destroy his superseded wills (the "First Complaint");

(b) second, that Ms Kwa had breached privilege and her duties of confidentiality by sending emails with records of communications with Mr Lee to Mr LHL who was not an executor of the estate (the "Second Complaint");

(c) third, that Ms Kwa had failed to keep proper contemporaneous notes and records of all the advice given and instructions received from Mr Lee (the "Third Complaint"); and

(d) fourth, that Ms Kwa had given false and misleading information to the executors in her 4 June 2015 Email and 22 June 2015 Email (the "Fourth Complaint").

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11 Second Affidavit of Lee Hsien Yang ("LHY-2") at p 346.

12 LHY-2 at pp 355–357.

13 LHY-1 at pp 13–17.

16 Inquiry Committee 53 of 2019 ("the IC") was constituted on 15 November 2019 to examine these complaints. On 8 May 2020, the IC issued a report recommending that the First and Second Complaints be referred to a DT, whilst the Third and Fourth Complaints were to be dismissed ("the First IC Report").[14]

17 In its letter dated 3 July 2020 (the "3 July 2020 Letter"), the Council, in exercise of its powers under s 87(1)(*d*) of the LPA, posed queries on the First and Second Complaints.[15]

18 In response, a further report dated 3 August 2020 ("the Second IC Report") maintained, by a majority view, the IC's position that the Second Complaint be referred to a DT.[16] On the First Complaint, the IC held a hearing on 22 July 2020 to hear Ms Kwa's explanations.[17] In the Second IC Report, the IC was of the unanimous view that the First Complaint should be dismissed on the basis that the documentary evidence failed to demonstrate that Mr Lee "had expressly intended for all of his prior Wills to be physically destroyed or torn up by [Ms Kwa]".[18]

19 On 7 September 2020, the Law Society wrote to the executors to inform them that the Council had accepted and adopted the findings of the IC and had determined the following:[19]

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14 LHY-1 at pp 134–153.

15 LHY-2, at pp 363–364.

16 LHY-1 at p 159.

17 LHY-1 at p 155.

18 LHY-1 at p 159.

19 LHY-1 at pp 130–131.

(a) under s 87(1)(*a*) of the LPA, a formal investigation by a DT was not necessary in respect of the First, Third and Fourth Complaints; and

(b) under s 87(1)(*c*) of the LPA, a formal investigation by a DT was necessary in respect of the Second Complaint, and a DT would be appointed in due course.

20 The executors, being dissatisfied with the Council's determinations on the First, Third and Fourth Complaints, filed this application on 21 September 2020, asking that the Law Society be directed to apply to the Chief Justice to convene a DT also for those heads of complaint.

Decision

21 I grant the application in respect of the First and Fourth Complaints, for the reasons that follow.

Legal context of application

22 The disciplinary framework under the LPA has been described by the Court of Appeal as a calibrated framework where complaints against solicitors are escalated through various bodies constituted under the LPA, culminating with a referral to the Court of Three Judges: *Iskandar bin Rahmat v Law Society of Singapore* [2021] SGCA 1 ("*Iskandar*") at [20]–[22].

23 An overview of the disciplinary process is useful in order to understand an IC's role in the process. In *Iskandar* at [21], the Court of Appeal referred to the summary set out in *Deepak Sharma v Law Society of Singapore* [2016] 4 SLR 192 ("*Deepak Sharma*") at [28]–[32], as follows:

(a) When a complaint is made, the Council shall refer the complaint to the Chairman of the Inquiry Panel ("the Chairman"): see ss 85(1) and 85(1A). The Chairman shall constitute a Review Committee to review the complaint and the Review Committee may direct the Council to dismiss the matter if it considers that the complaint is frivolous, vexatious, misconceived or lacking in substance or, in any other case, may refer the complaint back to the Chairman: see ss 85(6) and 85(8).

(b) If the complaint is referred back to the Chairman, the Chairman shall constitute an Inquiry Committee to inquire into the complaint or information: see s 85(10). The Inquiry Committee shall report its findings and recommendations to the Council and the Council shall consider the report and then determine whether: (i) a formal investigation is not necessary; (ii) no cause of sufficient gravity exists for a formal investigation but the solicitor should be given a warning, reprimanded, ordered to comply with remedial measures or ordered to pay a penalty; (iii) there should be a formal investigation by a DT; or (iv) the matter should be referred back to the Inquiry Committee for reconsideration or a further report: see ss 86(1), 86(7) and 87(1). Importantly, the Inquiry Committee in general makes recommendations to the Council and it is the Council that decides whether to accept those recommendations or not: see s 86(7) and 87(2). One exception to this is where the Inquiry Committee finds that the complaint is frivolous or vexatious, in which case it may make an adverse costs order against the complainant: see s 85(19). Such an order may be reviewed by a judge on the complainant's application and such a judge may affirm, vary or set aside that order or make other orders as to costs as may be just: see ss 85(19A), 85(19B) and 85(19C). Curiously, it is not clear if the powers of such a judge are confined to matters of costs or whether they extend

to directing that the Inquiry Committee's determination that the complaint is frivolous or vexatious be reconsidered by that or some other Inquiry Committee.

(c) The matter ordinarily does not proceed to the next stage unless the Council determines that a formal investigation is necessary, in which case it shall apply to the Chief Justice to appoint a DT to hear and investigate the matter: see s 89(1). The DT will record its findings in relation to the facts and determine whether: (i) no cause of sufficient gravity for disciplinary action exists; (ii) while no cause of sufficient gravity for disciplinary action exists, the solicitor should be reprimanded, ordered to comply with remedial measures or ordered to pay a penalty; or (iii) cause of sufficient gravity for disciplinary action exists: see s 93(1).

(d) Where the DT determines that cause of sufficient gravity for disciplinary action exists, the Law Society shall make an application for an order that the solicitor be struck off the roll, suspended, ordered to pay a penalty or censured. This application is heard by the Court of Three Judges: see ss 98(1) and 98(7).

24 In the present case, the executors' application seeks a review of the findings at step (b) of the process. The executors argue that, in addition to the Second Complaint, the Council ought to have sent the First, Third and Fourth complaints onwards to a formal investigation by a DT.

Role of the Inquiry Committee

25 In order to consider the executors' arguments, the statutory duty of an IC must be understood. The statutory duty of the IC is to determine whether

there is a *prima facie* case of an ethical breach or misconduct of sufficient gravity that warrants formal investigation and consideration by a DT. Further, the IC may decline to make a recommendation that the matter be referred to a DT where, even if taken at face value, the matter would not raise sufficiently grave concerns as to warrant formal investigation: *Loh Der Ming Andrew v Law Society of Singapore* [2018] 3 SLR 837 ("*Andrew Loh*") at [68]. The Court of Appeal has explained in *Subbiah Pillai v Wong Meng Meng and others* [2001] 2 SLR(R) 556 ("*Subbiah Pillai*") that the assessment conducted by the IC is "essentially a screening exercise", and the function of the IC is "to eliminate frivolous complaints and to ensure that only complaints which have been *prima facie* established will proceed to be heard formally": at [59] and [32] respectively.

26 The IC's screening is to deal with two main issues, both of which are engaged in this application. First, to determine whether the matter is potentially of sufficient gravity. And second, to assess, on such a matter, whether a *prima facie* case exists.

27 For present purposes, it is useful to understand more fully the *prima facie* standard that is the standard pertinent to the IC's consideration. Under s 82A of the LPA, which is the analogous provision to s 96 for disciplinary proceedings against Legal Service Officers and non-practising solicitors, the Chief Justice may grant leave for an investigation to be made into the complaint of misconduct and appoint a DT where the Chief Justice is of the opinion that the applicant has made out a "*prima facie* case" for an investigation into his complaint: s 82A(6). In *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 ("*Re Nalpon*") at [27]–[29], Chan Sek Keong CJ held that the meaning of "*prima facie* case" in s 82A(6) of the LPA should be given the same meaning as in criminal proceedings because the standard of proof in criminal proceedings is

proof beyond reasonable doubt. In the context of criminal proceedings, the consideration of whether a *prima facie* case has been established occurs at the close of the Prosecution's case*, before the judge hears the Defence's case*. At this point, there must be evidence, which is "not inherently incredible", supporting every element of the offence: see s 230(*j*) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). Whilst there is cross-examination and testing by the Defence during the presentation of the Prosecution's case, this goes towards determining whether the evidence is "inherently incredible". As such, when a judge finds that there is a *prima facie* case, the judge will not have heard the other side's case. This is important as it means that the court will not have begun to engage in a substantial fact-finding exercise. Rather, the court will have determined that the Prosecution's case theory is established based on the evidence before it, assuming that the evidence is not "inherently incredible".

28 Sundaresh Menon CJ further elaborated on the meaning of "inherently incredible" in *Re Parti Liyani* [2020] 5 SLR 1080 at [27], again in the context of an investigation into misconduct under s 82A(6) of the LPA:

> 27 In other words, the question is whether the evidence, if accepted by the court, would be sufficient to prove every element of the offence in question, either directly as a primary fact, or inferentially as a secondary fact (*Re Nalpon* at [22]–[24]). However, this does not mean that the court must, at this stage, unquestioningly accept all evidence proffered and instead may find that the evidence *is discredited or wholly unreliable*. Further, the court may not draw an inference from primary facts unless it is reasonable to do so (see [*Re Salwant Singh s/o Amer Singh* [2019] 5 SLR 1037] at [34]–[44]; *Re Nalpon* at [25]).
>
> [emphasis added]

29 The IC, therefore, considers the credibility and reliability of the evidence, and ensures that every aspect of the charge is supported by evidence that is not inherently incredible. The tasks of weighing up all the facts and coming to specific factual findings, on the other hand, are intended by statute to

be placed upon the shoulders of the DT. The nature of the inquiry conducted by the IC, therefore, does not call for the IC to deal with substantial issues of fact and to make a definitive decision on those facts in contest.

Role of the Council

30 The IC, after its deliberations, submits a report to the Council, which considers the report and makes a determination. It is important to note that fundamentally, it is the IC that makes recommendations, and it is the Council that makes decisions on whether to accept those recommendations or not: *Iskandar* at [21(b)]. The Council's consideration of the IC's report is governed by s 87 of the LPA, which reads:

> **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, while no cause of sufficient gravity exists for a formal investigation, the regulated legal practitioner should be —
>
> (i) ordered under section 88 to pay a penalty that is sufficient and appropriate to the misconduct committed;
>
> (ii) reprimanded or given a warning;
>
> (iii) ordered to comply with one or more remedial measures; or
>
> (iv) subjected to the measure in sub-paragraph (iii) in addition to the measure in sub-paragraph (i) or (ii);
>
> (*c*) that there should be a formal investigation by a Disciplinary Tribunal; or
>
> (*d*) that the matter be referred back to the Inquiry Committee for reconsideration or a further report.

(1A) Where the Council has determined under subsection (1)(d) that a matter be referred back to the Inquiry Committee for reconsideration or a further report —

(*a*) the Council shall notify the Inquiry Committee accordingly;

(*b*) the Inquiry Committee shall submit its response or further report to the Council within 4 weeks from the date of the Council's notification; and

(*c*) subsection (1)(*a*), (*b*) and (*c*) shall apply, with the necessary modifications, in relation to the response or further report of the Inquiry Committee as it applies in relation to the report of the Inquiry Committee.

(2) If the Inquiry Committee in its report, read with any response or further report submitted under subsection (1A)(*b*), 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 Tribunal is not necessary, the Council may, if it disagrees with the recommendation, request the Chief Justice to appoint a Disciplinary Tribunal.

(3) Where the report of the Inquiry Committee, read with any response or further report of the Inquiry Committee submitted under subsection (1A)(*b*), discloses the commission of —

(*a*) any other misconduct by the regulated legal practitioner which has not been referred to or inquired into by the Inquiry Committee, the Council shall, if it determines that there should be a formal investigation of such misconduct, have power to prefer such charge against the regulated legal practitioner as it thinks fit with respect to that misconduct; or

(*b*) any offence involving fraud or dishonesty by the regulated legal practitioner, the Council shall immediately refer the matter to the police for investigation.

(4) The Council shall inform the regulated legal practitioner and the person who made the complaint of the manner in which it has determined the complaint within 14 days of the determination, and in the event of the determination being that a formal investigation is unnecessary, the Council shall on the request of the person furnish him with its reasons in writing.

31 The effect of s 87(2) on the Council's discretion under s 87(1) is in dispute in the present application.

Role of the court in s 96 applications

32 Section 96 of the LPA directs the court to consider *the Council's determination* under s 87(1)(*a*) or s 87(1)(*b*). I am not directly reviewing the IC's recommendations and reasoning, although of course these are relevant for considering whether the Council's determination was correct. In reviewing the Council's determination, the court sits in exercise of its appellate and supervisory jurisdiction. As explained by Woo Bih Li J in *Andrew Loh* at [81]–[83]:

> (a) First, the function of the court sitting in exercise of its supervisory jurisdiction is to ensure that inferior tribunals stay within their allotted jurisdiction and observe the law, *ie*, by looking at the legality of the decision-making process rather than its merits, applying the grounds of illegality, irrationality and procedural impropriety.
>
> (b) Second, in the exercise of its appellate jurisdiction, the court will examine the substantive merits of the Council's or IC's decision. Here, the court should be slow to disturb or interfere with the findings of fact by the IC unless it can be shown that supporting evidence was lacking, there was some misunderstanding of the evidence, or there are other exceptional circumstances to justify the court doing so.

33 Both the supervisory and appellate jurisdiction are engaged in this review of the IC's decisions on the First, Third and Fourth Complaints. I deal with each complaint in turn.

The First Complaint

34 The First Complaint was that Ms Kwa had failed to follow Mr Lee's instructions to destroy his superseded wills.[20] The IC first found (in the First IC Report) that there was a *prima facie* case regarding the First Complaint, but after considering the two queries posed by the Council, the IC issued the Second IC Report that recommended no further formal investigation. It was this second recommendation which the Council accepted.

35 The executors' contentions regarding the First Complaint are twofold. First, they assert that it was procedurally incorrect for the Council to pose further queries once the IC had decided in the First IC Report that a *prima facie* case of sufficient gravity was made out. The second was in respect of the substance of the decision of the Council that there was no *prima facie* case of sufficient gravity.

The procedural issue

36 I deal first with the procedural issue. The interpretation of s 87 of the LPA (set out below at [41]–[55]) is at the heart of this procedural issue.

37 Section 87(2)(*a*) obliges the Council to use subsection (1)(*c*) to determine that there should be a formal investigation by a DT where such a course is recommended by the IC in its report. As the Court of Appeal mentioned in passing in *Iskandar* at [22]:

> … Where the committee or tribunal determines that the complaint should advance to the next stage in the process, such a determination *must* be given effect: see s 85(10) in the case of the Review Committee, ***s 87(2)(a) in the case of the Inquiry***

[20] LHY-1 pp 14–15.

> ***Committee***, and s 94(1) in the case of the Disciplinary Tribunal.
> …
> [emphasis in original in italics; emphasis added in bold italics]

38 It is common ground that, in some circumstances, s 87(2)(*a*) imposes a duty on the Council to accept the IC's recommendation for a formal investigation.[21] However, parties differ on *when* the Council's duty under s 87(2)(*a*) arises. The executors' position is that the duty arises immediately upon receiving a report that recommends formal investigation. The Law Society's position is that in such a situation, the Council may still ask for a further report using subsection (1)(*d*), and it is only where the IC's further report also recommends a formal investigation, that the duty arises.

39 The executors argue that the Council must make a determination that there should be a formal investigation by a DT under s 87(1)(*c*) as soon as the IC has made such a recommendation,[22] citing Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998) ("Tan Yock Lin") at p 854 in support:[23]

> A crucial question is the extent to which the Council or Disciplinary Board is bound by the recommendations of the Inquiry Committee or Investigating Tribunal. *The Council or Board is only obliged simply to rubber stamp and adopt the recommendation as to a formal investigation. If the Committee or Tribunal recommends a formal investigation, the Council or Board is obliged to determine accordingly.*
>
> [emphasis added]

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21 Defendant's Further Written Submissions dated 22 February 2021 ("DWS-3") at para 4; Plaintiffs' Further Written Submissions dated 22 February 2021 ("PWS-3") at para 22.

22 PWS-3 at paras 47 and 53.

23 Plaintiffs' Written Submissions dated 25 January 2021 ("PWS-1") at paras 37–38.

On this approach, the Council is not empowered to determine that the matter be referred back to the IC for reconsideration or a further report under subsection 1(*d*) where the IC has made a recommendation for a formal investigation in its first report. Thus, the executors argue, the Council's decision to pose queries regarding the First Complaint after the First IC Report had recommended that it be referred to a DT was procedurally improper.

40 On the other hand, the Law Society argues that the Council was within its powers in using subsection (1)(*d*) to refer the matter back to the IC for reconsideration or a further report even where there was an initial recommendation by the IC for a formal investigation. In such a case where the Council had referred queries to the IC, the Council's duty to accept the IC's recommendation for a formal investigation would only arise if the IC's further report *also* recommended a formal investigation. Otherwise, argues the Law Society, ss 87(1)(*d*), 87(1A) and 87(2) would be rendered meaningless.[24] In this context, I note that Tan Yock Lin's text was published in 1998, and the author in the footnote for the paragraph cited a 1987 case, *Re An Advocate and Solicitor* [1987] 2 MLJ 21 ("*Re An Advocate*"), which had discussed the issue "obliquely but inconclusively". Both concerned earlier versions of the section in discussion.

41 In the light of the two interpretations a plain reading of the text of s 87 of the LPA allows, I use the three-step framework structured by the Court of Appeal in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37] and [54(c)] as a guide to interpreting s 87:

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[24] DWS-3 at para 4.

(a) First, the possible interpretations of the provision must be ascertained, with regard to the text of the provision and the context of the provision within the statute as a whole.

(b) Second, the legislative purpose or object of the statute must be ascertained.

(c) Finally, the possible interpretations of the text should be compared against the purposes or objects of the statute, and the interpretation that furthers the purpose of the statute is to be preferred.

(a) Possible interpretations

42 In the first step of ascertaining the possible interpretations of s 87, I am guided by the ordinary words of the provision, and endeavour to give significance to every word in the enactment: see *Tan Cheng Bock* at [38].

43 The plain text of s 87 is able to support both interpretations put forth by the parties. Subsection (2), on its face, circumscribes subsection (1). The executors argue that this means that wherever the IC has recommended a formal investigation, the Council's power is limited to making the same determination. As I have noted at [40] above, the Law Society argues that such an interpretation would render ss 87(1)(*d*), 87(1A) and 87(2) meaningless. However, this is incorrect because s 87(1)(*d*) may be used in all other circumstances; it is not rendered otiose on the executors' interpretation of the section because it is only where the IC recommends a formal investigation that the Council is prevented from exercising the power under s 87(1)(*d*). Nevertheless, as the Law Society also points out, there appears to be nothing in the section that disallows the Council from referring the matter back to the IC under subsection (1)(*d*) prior to dealing with the matter under subsection (2); indeed, subsection (2) itself

refers to the fact that an IC's report could be "read with any … further report", implying that the Council's power to refer the matter back to the IC for reconsideration or a further report under subsection (1)(*d*) is not circumscribed. On the Law Society's approach, the Council would be at liberty to pose queries to the IC even where an initial recommendation for a formal investigation is made. In such circumstances, it would then only be mandatory to send the matter to a DT where the IC, in its subsequent report, makes a recommendation for a formal investigation. In this context, the use of the word "any" is equivocal. It could suggest that there are situations where there could be no further report or response. This would occur wherever the Council chooses to act on the strength of the first report. The lacuna in the section is this: whilst making mandatory the Council's duty to exercise its power to determine that there should be a formal investigation by a DT under subsection (1)(*c*) wherever the IC recommends thus, it does not make clear whether the Council has the power to refer the matter back to the IC under subsection (1)(*d*) before this duty arises.

44 Coming to the context of the section within its larger statutory framework, the executors point out that the scheme of the relevant LPA sections is to advance cases onward toward formal investigation. As summarised by the Court of Appeal in *Iskandar* at [24]:

> Second, under ss 96 and 97, a dissatisfied *complainant* can apply to a Judge to advance the complaint to the next stage of proceedings while under ss 95 and 97, a dissatisfied *solicitor* can apply to a Judge to review the decision to impose a sanction on him where that sanction falls short of referring the proceedings to the next stage. Third, if the committee or tribunal refers the complaint to the next stage, a solicitor has no recourse and cannot prevent that from happening. ***While this might appear to suggest a legislative preference for the complaint being advanced in the event of any doubt***, it would be wrong to view this as prejudicial to the solicitor in some way because this ultimately concerns a matter of public interest and the [Court of Three Judges ("C3J")] retains full power to set aside the Disciplinary Tribunal's determination

> and give further directions where appropriate. ***A determination by any tribunal or committee, other than the C3J, is therefore not final and the solicitor retains the right to challenge all allegations against him before the C3J.***
>
> [emphasis in original in italics; emphasis added in bold italics]

45 The purpose of an IC, therefore, is to act as a screening device, as the Court of Appeal mentioned in *Subbiah Pillai* (see [25] above). Within this context, however, neither party's reading detracts from the IC's purpose. While permitting the Council to pose queries to the IC would take time, the Council is in any event bound by the timelines set out in subsection (1A), and the contours of its supervision must take reference from the IC's role. Further, as the Law Society envisages, there are circumstances where there would be good reason for the Council to refer a complaint back to the IC:[25]

(a) where the Council identifies a factual error made by the IC;

(b) where the Council feels that the reasoning by the IC is inadequate or incomplete, or the IC has not dealt with the gravamen of the complaint;

(c) where there is relevant case law or a rule or provision (in either the LPA or the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("the PCR")) which should inform the IC's disposal of the matter, but which the IC failed to consider; and

(d) where the IC was relying on a rule or provision which was not in existence at the date of the facts the complaint was based on.

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[25] DWS-3 at para 23.

In such circumstances, queries from the Council could sharpen the focus of the disciplinary process and make proceedings more effective.

(b) Legislative purpose

46 As the words of the statute yield two possible interpretations, I come then to the second step, an examination of the legislative purpose of the statute. In the present case, the legislative history of s 87 is illuminating.

47 The source of the current provision is found in the Legal Profession Act (Cap 217, 1970 Rev Ed) ("the 1970 LPA"). The then s 88 comprised two subsections:

> **Council's consideration of report**
>
> **88.**—(1) The Council shall consider the report of the Inquiry Committee and according to the circumstances of the case shall determine —
>
> (*a*) that a formal investigation is not necessary; or
>
> (*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 89 of this Act; or
>
> (*c*) that there should be a formal investigation by a Disciplinary Committee; or
>
> (*d*) that the matter be referred back to the Inquiry Committee, or adjourned for consideration.
>
> (2) The Council shall inform the advocate and solicitor and the person who made the application or complaint of the manner in which it has determined the application or complaint and in the event of the determination being that a formal investigation is unnecessary the Council shall on the request of that person furnish him with their reasons in writing.

48 *In its original iteration, the Council possessed the option to refer the matter back to the IC under the then s 88(1)(*d*), which is analogous to the present s 87(1)(*d*). The analogous provision to the current s 87(2) of the LPA,*

however, was not present. This provision circumscribing the discretion of the Council was inserted by the Legal Profession (Amendment) Act 1979 (Act 11 of 1979), which amended the 1970 LPA. It was inserted as subsection (1A) of s 88:

> (1A) 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) of this section; 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.

49 Subsection (1A)(*a*) thereby puts a positive obligation upon the Council to "determine accordingly" wherever the IC has recommended a formal investigation, whereas subsection (1A)(*b*) permitted the Council to disagree where the IC had recommended that a formal investigation was not necessary. The courts in *Law Society of Singapore v Chia Shih Ching James* [1983–1984] SLR(R) 596 ("*James Chia*") at [16] and *Re An Advocate* at 31–32 recognised that the Council no longer possessed the power to review and disagree with a recommendation of the IC that there should be a formal investigation; it was now required by the section to determine that there should be a formal investigation. The latter authority was the authority relied upon by Tan Yock Lin in his 1998 text: Tan Yock Lin at p 854. While neither case dealt specifically with the Council's power to use subsection 1(*d*) prior to acting under subsection (1A)(*a*), subsection (1A)(*a*) contained a clear direction as to what the Council was obliged to do once a recommendation for a formal investigation was made by the IC. With the clear direction given by subsection (1A)(*a*), neither of the options set out in subsection (1)(*d*) – referring the matter back to the IC or adjourning the matter for consideration – would have been appropriate. *Subsection (1A), in circumscribing the power of the Council*

prescribed in subsection (1), further did not contain the words "read with any response or further report". In my view, in this iteration of the section, the Council had no power to use subsection (1)(*d*) when an IC in its first report had concluded that a formal investigation was necessary.

50 The Legal Profession Act (Cap 161, 1990 Rev Ed) ("the 1990 LPA") renumbered subsection (1A) to subsection (2), and the provision itself was renumbered as s 87. In 1993, the Legal Profession (Amendment) Act 1993 (Act 41 of 1993) amended the 1990 LPA. The main amendments included the addition of the phrase "reconsideration or a further report" into subsection (1)(*d*), and the addition of a new subsection (2A) which allowed the Council to prefer further charges or refer possible criminal offences to the police for investigation. In the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the 2001 LPA"), subsection (2A) became subsection (3), and subsection (3) became subsection (4).

51 The Legal Profession (Amendment) Act 2008 (Act 19 of 2008) then introduced several amendments ("the 2008 amendments"). A new subsection (1A), specifying timelines for the Council's exercise of its power to refer the matter back to the IC under subsection (1)(*d*), was inserted. The phrase "read with any response or further report submitted under subsection (1A)(*b*)" was added to s 87(2) at the same time. The question then is: *did the draftsman intend to change the law by this insertion?*

52 There was no discussion of the phrase in the 2008 Parliamentary debates. The 2007 report that occasioned the 2008 amendments provides some guidance on the purpose of the amendments: *Report of the Committee to Develop the Singapore Legal Sector* (September 2007) ("the 2007 report"). In this report, the issue of implementing timelines in legal disciplinary proceedings

was heavily discussed. There were recommendations to implement such timelines in every part of the disciplinary framework, including situations where the Council had remitted a matter to the IC. The 2007 report states (at p 50):

> 4.9 To provide guidance to each Review Committee, Inquiry Committee and Disciplinary Tribunal as to the maximum amount of time that each should take to decide any matter, *the Committee recommends strict adherence to stipulated timelines*. These include:
>
> …
>
> (e) Where the Law Society Council has determined under section 87(1)(*d*) of the Legal Profession Act that a matter be referred back to an Inquiry Committee for reconsideration or a further report, the Inquiry Committee should submit its response or further report within four weeks, and the Law Society Council should make a determination under section 87(1)(*a*), (*b*) or (*c*) of the Legal Profession Act *within one month of the receipt of the response or further report*.
>
> [emphasis added]

53 The function of subsection (1A) was, therefore, to provide a stipulated timeline in cases where the Council has referred a matter back to the IC, in view of the Committee's concern for expedition. This militates against an interpretation that the Council was given fresh powers by the addition of the phrase "read with any response or further report submitted under subsection (1A)(*b*)" to subsection (2). Rather, in the light of the fact that subsection (1A) was procedural in nature, the phrase "read with any response or further report submitted under subsection (1A)(*b*)" must have been an ancillary amendment designed to harmonise the language of subsections (2) and (3) with the addition of subsection (1A). This is why subsection (2) does not make clear that, in situations where the IC has recommended a formal investigation, the Council still has the power to refer the matter back to the IC for a further report, and instead merely provides for the situation where the Council has already done so (by providing that the IC's report should be read with any response or further

report *submitted* under subsection (1A)(*b*)). This suggests that the draftsman envisaged that there would remain situations where no further report could be requested by the Council. This position is supported by the Explanatory Statement in the Legal Profession (Amendment) Bill (Bill No 16/2008), which states that the "amendments to section 87(2) and (3) … are *consequential*" [emphasis added] to the addition of s 87(1A).

(c) Interpretation consonant with legislative purpose

54 In the light of the legislative history of the section and the specific purpose of the 2008 amendments, I conclude that the executors are correct in their interpretation of the section. The section was specifically amended in 1979 to circumscribe the Council's power under subsection (1), by the insertion of what is now subsection (2). At the time of the insertion, the words of the new subsection (2) limited the Council's use of subsection (1)(*d*) whenever an IC had recommended a formal investigation. When the subsection was further amended in 2008, the draftsman, by stating in subsection (2) that the IC's report should be "read with *any* response or further report" [emphasis added], then provided for situations where there would be no further report, either if the Council agreed with the IC's findings on its first report, or if the IC recommended a formal investigation in its first report. The circumstances surrounding the amendment of this section indicate that the addition of the phrase "read with any response or further report" was a harmonising amendment to accommodate the timelines for such further reports *in circumstances where the Council had the power to refer the matter back to the IC for a further report*, and not one which was intended to enable the Council to refer the matter back to the IC using subsection (1)(*d*) where previously it was not able to do so. To read the section in this manner is consistent with the role of the IC to act as a screening device to ensure that complaints which have been *prima facie*

established will proceed to be formally investigated by a DT (see [25] above), and sharpens the emphasis on the DT being the fact-finding tribunal. As highlighted by the Court of Appeal in *Iskandar* at [24], the solicitor is not prejudiced by the complaint being advanced to the next stage in this manner because the Court of Three Judges retains full power to set aside the DT's determination.

55 In this case, the Council, therefore, had an obligation to accept the IC's recommendation in the First IC Report that there should be a formal investigation by a DT in respect of the First Complaint. In my judgment, it was procedurally defective on the Council's part to refer the matter back to the IC, and the Council was consequently not able to accept and adopt the IC's findings in the Second IC Report. The charge as framed by the IC in the First IC Report should be dealt with in a formal investigation by a DT following the procedure envisaged by the LPA.

The substantive issue

56 In any event, even if the Council had the power to pose queries and seek a further report from the IC, I am of the view that on these particular facts, the Council ought not to have accepted the findings of the IC in the Second IC Report.

Facts relevant to the substantive issue

57 In the First IC Report, the IC had found a *prima facie* case of an ethical breach, and noted that since Mr Lee has passed on, the only basis on which the complaint could be assessed was the documents and the responses provided by

Ms Kwa to the IC.[26] The IC framed the issues as follows. First, had Mr Lee instructed Ms Kwa to destroy any of the First to Sixth Wills? Second, if he had, did these instructions to extend to the other wills?[27] With regards to the first issue, the IC noted that Ms Kwa was unable to respond in a direct manner, and that she could not precisely recall what Mr Lee had said to her, but she was sure that he had wanted to make sure that the wills were invalidated so as to avoid confusion over which document was his last and final will, and did not prescribe a specific method.[28] As such, this was of little use to the IC. Instead, the IC noted that the 21 December 2011 File Note handwritten by Ms Kwa stated the First Will had been torn up, and observed that even if this meant that Mr Lee had instructed Ms Kwa to tear up the First Will, it did not mean this instruction necessarily extended to the Second to Sixth Wills. However, the IC then looked at the various occasions where Ms Kwa had used the words "destroy" or "tore up" with regard to the wills.[29] On this basis, the IC had found that there was a *prima facie* case that should be investigated, and made a recommendation to the Council for a formal investigation by a DT.

58 In response to this initial recommendation by the IC, the Council in its 3 July 2020 Letter posed two further questions regarding the First Complaint:[30]

> The first head of complaint is that [Ms Kwa] failed to comply with [Mr Lee's] specific instructions to destroy his 1st to 6th Wills. The Council has noted that where a will is revoked by "*destroying*", there must be an express intention to destroy, which goes towards essentially invalidating a previous will ahead of a fresh one. It can be done by referring to all previous wills and revoking them, or alternatively via physical

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26 LHY-1 at pp 144–146.

27 LHY-1 at p 144.

28 LHY-1 at p 145.

29 LHY-1 at p 145; LHY-1 at p 19; LHY-2 at p 309; LHY-2 at p 337.

30 LHY-2 at pp 363–364.

> destruction. ***Has the IC considered if there is a distinction between destruction of a will and something that goes towards invalidation of a previous will?*** The Council would also like the IC to ***consider the subject of the solicitor keeping a record of that will for the purposes of their own file copy.*** The Council has queried that ***where there was compliance by the solicitor with the intention to revoke, and a revocation by destruction was not carried out by the solicitor as the solicitor wished to maintain a file copy – is there any wrong doing by the Solicitor in that instance?***
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> [emphasis in original in italics; emphasis added in bold italics to highlight the two queries]

59 In response to these questions, the IC issued the Second IC Report, where it changed its stance and unanimously recommended that the complaint be dismissed. In doing so, the IC accepted the oral explanation given by Ms Kwa during her hearing *via* video-conference on 22 July 2020.[31] Ms Kwa explained that she used the word "destroy" in a colloquial manner to explain the impact of revocation of a will to lay persons. The IC noted that the executors are English-educated and would have understood terms such as "revocation", "invalidate" and "supersede", and as such the colloquial use of the word "destroy" was unnecessary. Nonetheless, the IC accepted that Ms Kwa had used the word "destroy" informally.[32] Further, the IC also reconsidered the 21 December 2011 File Note where Ms Kwa had said she "tore up" Mr Lee's First Will. The IC noted that it appeared that Ms Kwa had forgotten why her note had said that the First Will was torn up due to the passage of time, and thus declined to infer that Mr Lee had instructed Ms Kwa to physically destroy the First Will.[33] Finally, the IC found that even if the First Will had been torn up or physically destroyed, it would have been necessary for Ms Kwa to have copies of Mr Lee's other wills as she regularly needed to refer to them when he asked

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31 LHY-1 at pp 158–159.

32 LHY-1 at p 158.

33 LHY-1 at p 158.

her about their contents.[34] In summation, the IC stated that there was not enough documentary evidence to demonstrate that Mr Lee had expressly intended for all his prior wills to be physically destroyed or torn up by Ms Kwa, or to demonstrate that Mr Lee had expressly instructed Ms Kwa to revoke his prior wills by means of physical destruction.[35]

60 The Council thereafter accepted the IC's recommendation in the Second IC Report.

Analysis on the substantive issue

61 The IC plays a screening role on two levels, first to ascertain that the complaint is of sufficient gravity; and then, for sufficiently grave complaints, whether a *prima facie* case has been made out. From the narrative above, when the Council referred the issue back to the IC, the Council was querying whether the matter was of sufficient gravity. The Council's first question asked whether there was any difference between physical destruction and invalidation of a will. The second question asked whether there would be any wrongdoing by a solicitor who complied with the intention to revoke but did not destroy the will as he wished to maintain a file copy. Implicit in the second question is a solicitor's duty to keep proper records (and the particular client's frequent reference to those records in the present case). If both these professional practice queries were answered in the negative, there would not be any misconduct of sufficient gravity.

62 In the Second IC Report, the IC, on its part, did not answer the queries posed. Instead, the IC interviewed Ms Kwa and came to a factual conclusion

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34 LHY-1 at pp 158–159.

35 LHY-1 at p 159.

that there was insufficient evidence that Mr Lee had issued an instruction to physically destroy his former wills, when previously in the First IC Report it had concluded on the basis of contemporaneous records that there was a *prima facie* question whether Mr Lee had instructed Ms Kwa to destroy, and if so which, of the first six wills.[36] In arriving at this factual conclusion in the Second IC Report, the IC relied on various "key assertions by [Ms Kwa] not provided in [her] earlier written explanations".[37] Whether Mr Lee had given such an instruction and whether this remained his instruction throughout the preparation of the six wills were factual issues. As the IC had initially concluded that there was a *prima facie* case on these issues, their statutory role was not to make a finding on this factual issue, but merely to channel it to the proper fact-finding body: the DT: see [29] above, and on a related note, *Tan Ng Kuang and another v Law Society of Singapore* [2020] SGHC 127, at [7]–[9] and [17]. In these circumstances, the Council was, on the receipt of the Second IC Report, confronted with not only a lack of an answer to the professional practice queries posed, but also two conflicting views as to whether a *prima facie* case was made out on a factual issue. In such a case, the Council ought to have, even if it were empowered to read the First IC Report together with the Second IC Report, concluded that a formal investigation by a DT would be necessary.

63 Therefore, quite apart from the procedural issue, the application concerning the First Complaint would be one in which I would have exercised my appellate jurisdiction. This is not necessary because of my earlier holding on the procedural issue.

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36 LHY-1 at pp 144–145.

37 LHY-1 at p 158.

The Third Complaint

64 The Third Complaint was that Ms Kwa had failed to maintain proper records of all instructions and advice.[38] In particular, the executors complain that she neglected to keep records of two specific telephone conversations.

65 In the First IC Report, the IC found that Ms Kwa had kept "sufficient records and/or notes regarding the instructions received and advice rendered to [Mr Lee]".[39] The First IC Report then went on to list a number of different examples of Ms Kwa's notes and/or records. The IC was satisfied that Ms Kwa had taken sufficient notes to allow Mr Lee to properly execute his six wills, and that these six wills indeed seemed to have been executed without any problems.[40] The Council accepted these recommendations.

66 In their initial submissions in support of the application, the executors relied upon the encompassing nature of r 5 of the PCR. Rule 5(2)(*k*) imposes a duty to maintain proper contemporaneous records of "all instructions received from, and all advice rendered to, the client". The executors also submitted that such records are even more critical in the context of wills in verifying the wishes and intentions of the testator in the event that any part of the will is challenged or questioned,[41] citing *Chee Mu Lin Muriel v Chee Ka Lin Caroline (Chee Ping Chian Alexander and another, interveners*) [2010] 4 SLR 373, where the Court of Appeal stated at [60] that "solicitors who undertake the task of preparing wills and/or witnessing the execution of wills … should make a contemporary

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38 LHY-1 at pp 16–17; PWS-1 at paras 90–91.

39 LHY-1 at p 149.

40 LHY-1 at p 150.

41 PWS-1 at para 83.

written record of his or her attendances on the testator so that he or she would be able to recall exactly what had transpired during the meeting or meetings".[42]

67 The Law Society submitted that Ms Kwa did keep sufficient notes. In support, they cited various examples of her handwritten notes, and argued that a mere failure to keep detailed and formal notes on every occasion should not of itself result in a sanction against a legal professional.[43]

What was the applicable ethical rule?

68 Rule 5(2)(*k*) of the current version of the PCR (which came into operation on 18 November 2015) was not in force at the time of the alleged breaches, being November and December 2013. Counsel agreed at the hearing that the applicable rule is r 12 of the 2010 version of the PCR, the Legal Profession (Professional Conduct) Rules (GN No S 156/1998, 2010 Rev Ed) ("the 2010 PCR"). Rule 12 was a broad rule that required an advocate and solicitor to "use all reasonably available legal means consistent with the agreement pursuant to which he is retained to advance his client's interest".

69 In line with the wider context of r 12, at the time of the alleged breaches, the keeping of good records was a matter of prudent practice. In *Lie Hendri Rusli v Wong Tan & Molly Lim (a firm)* [2004] 4 SLR(R) 594 ("*Lie Hendri Rusli*"), the High Court noted at [71] that there were "no mandatory legal provisions specifically prescribing" the keeping of records, and rather, observing such practices would be an "exercise in precaution and prudence". Specifically, the court observed that proceedings against a solicitor could be thwarted if they had kept such records and notes, and that these notes and

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42 PWS-1 at para 86.

43 DWS-1 at para 32(c) and 32(g).

records could be of "real assistance in clarifying matters and corroborating a solicitor's testimony in the event of a dispute over what has transpired" (at [63]). Therefore, the issue was not one of technical observance but of a holistic assessment of the solicitor's conduct and his ability to explain his conduct. In *Lie Hendri Rusli* the High Court explained at [63] that "all that can fairly be said of the absence of contemporaneous notes is that the solicitor may find himself handicapped when the credibility of his evidence is assessed". The High Court in *Law Society of Singapore v Tan Phuay Khiang* [2007] 3 SLR(R) 477 at [83] dealt with the issue in similar terms.

Whether r 12 of the 2010 PCR was breached

70 I take in turn the contentions regarding each communication.

71 The first was a call on 29 November 2013, mentioned in an email dated 30 November 2013 in which Ms Kwa recounted that she had called Mr Lee the day before.[44] While there were no separate file notes on this conversation, the email related in depth the conversation Ms Kwa had with Mr Lee, and formed in itself a contemporaneous record. This was a sufficient record.

72 The second contended omission related to a possible call on 12 December 2013. In an email to Mr Lee on 12 December 2013, Ms Kwa mentioned she would call him about de-gazetting the Oxley property, "later today".[45] She was unable to provide file notes or records of any discussions, nor did she have any independent recollection of the discussion with Mr Lee at the material time.

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44 LHY-2 at p 305.

45 LHY-2 at p 305.

73 There are two possible alternative scenarios. One is that no call took place. There is no evidence that a call took place. Mr Lee subsequently replied the next day to Ms Kwa's email without referring to any call on the previous day.[46] The second possibility is that there was a call, with no record taken. Would this be a breach of Ms Kwa's duty to advance her client's interest under r 12 of the 2010 PCR? It is pertinent to note that the subject of the conversation was to be how to deal with the escalation of value of the Oxley property in the event that it was de-gazetted and redeveloped. After the weekend following these emails, however, the subject of the conversation appeared to have been overtaken by events. On Tuesday, 17 December 2013, Ms Kwa was informed by Mrs Lee Suet Fern, Mr LHY's wife, and Ms Wong Lin Hoe from Mr Lee's office ("Ms Wong") that a new will revoking all previous wills had been signed by Mr Lee.[47] As she was told by Mrs Lee Suet Fern that the new will went back to Mr Lee's 2011 will, Ms Kwa would have realised that the conversation on the potential escalation of the price of the Oxley property was no longer relevant. The issue pertained to the deletion of the Demolition Clause and the anticipated redevelopment of the Oxley property, which featured in the Fifth and Sixth Wills in 2012 but not the First and Second Wills in 2011. Further, there was an instruction on 17 December 2013 from Mr Lee to Ms Wong to inform Ms Kwa that the contents of the Final Will reflected "the agreement between the siblings".[48] Her client at this point in time was Mr Lee, and by 17 December 2013, there was no further interest of his to pursue at that point in relation to the call, if it had taken place. Therefore, not only is there no *prima facie* case, the matter is of little gravity.

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46 LHY-2 at p 305.

47 LHY-1 at p 73.

48 LHY-1 at p 75.

74 I agree with the IC that these two contentions, when considered in the context of the various records kept, do not raise any *prima facie* failure to keep proper records. I therefore dismiss the executors' application in relation to the Third Complaint.

The Fourth Complaint

75 The Fourth Complaint was that Ms Kwa gave false and misleading information to the executors in her 4 June 2015 Email and 22 June 2015 Email by omitting to mention discussions and the November and December 2013 Emails she had exchanged with Mr Lee regarding his Final Will and the Oxley property.[49] The 4 June 2015 Email and the 22 June 2015 Email have been detailed above at [6]–[11].

76 The IC unanimously recommended that the Fourth Complaint be dismissed. With regard to the 4 June 2015 Email, the IC focused on the fact that in this email, Ms Kwa had stated that the email was to act as a summary of Mr Lee's wills based on her file records, which was consistent with her first response to the IC. Further, while the 4 June 2015 Email did not mention the contents of the 30 November 2013 email from Ms Kwa to Mr Lee, this omission did not, in the IC's opinion, seem relevant as there was no dispute on the veracity and/or completeness of the Sixth Will.[50] With regard to the 22 June 2015 Email, the IC's report focused on the fact that there was no evidence to show that any codicil to the Sixth Will was prepared by Ms Kwa, despite the fact that it seemed that Mr Lee had instructed her to prepare a codicil in their email exchange of 12 and 13 December 2013.[51]

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49 LHY-1 at pp 15–17.

50 LHY-1 at p 151.

51 LHY-1 at pp 151–152.

Whether the statements were false and misleading

77 In her 4 June 2015 Email, Ms Kwa framed the request made by Mr LHL and Dr LWL as one for "file records of [Mr Lee's] previous Wills, for notes/emails/information on his instructions to [Ms Kwa] regarding Oxley".[52] In her response, Ms Kwa seemingly limited the scope of this request to information regarding the first six wills *with a focus* on the Oxley property. First, the subject of the email specifically states: "Chronology of 6 Wills – my file records with focus on Oxley".[53] Second, the headings in the 4 June 2015 Email all mention the first six wills, although not necessarily the Oxley property: the first header is the "Background why [Mr Lee] signed 6 Wills over 15 months" and the second is "a brief 3 point summary regarding the Oxley Clauses in the 6 Wills".[54] Third, in the ten-point summary on the second and third pages of the 4 June 2015 Email, Ms Kwa covered only the history of Mr Lee's wills from 7 December 1995 until 2 November 2012, *ie*, the date of the signing of the Sixth Will. Thus, Ms Kwa's summary was limited to the work she had completed up to and including the Sixth Will.

78 The executors contend that the 4 June 2015 Email contained a "significant omission": although the 4 June 2015 Email was a comprehensive record of all of Ms Kwa's discussions with Mr Lee regarding his first six wills, it failed to mention her discussions with Mr Lee in the November and December 2013 Emails.[55] The executors also take issue with the IC's reasoning. They submit that the IC, in finding that Ms Kwa's omission did not disclose a *prima*

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52 LHY-1 at p 19.

53 LHY-1 at p 19.

54 LHY-1 at p 19.

55 PWS-1 at paras 96–97.

facie case of misconduct, had relied on a single line in the 4 June 2015 Email where Ms Kwa had stated she would "summarise" Mr Lee's wills based on her file records. They contend that the IC had placed too much weight on Ms Kwa's explanation and instead, the whole of the 4 June 2015 Email should have been examined.[56]

79 The executors find support in the wide scope of the ten-point summary on the second and third pages of Ms Kwa's 4 June 2015 Email, which included references to emails between Ms Kwa and Mr Lee on the Oxley property, but not the November and December 2013 Emails.[57] In particular:

(a) The first two points of the summary, points (a) and (b), dealt with a will prior to the First Will in August 2011.

Ms Kwa does, however, state that this was "[f]or background information".[58] This is the only point in the summary where the phrase "for background information" appears. Therefore, in my view, Ms Kwa made plain that these points prefaced her chronology of the six wills and did not expand the scope of the ten-point summary.

(b) Point (g) dealt with the issue of the Oxley property being gazetted. The executors thus argue that the summary was not limited to just the six wills as Ms Kwa framed it, and would rightly include *all issues regarding the Oxley property*, including the discussions on the Oxley property in the November and December 2013 Emails prior to Mr Lee's Final Will.

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56 PWS-1 at paras 104–105.

57 PWS-1 at para 106.

58 LHY-1 at p 20.

> Nevertheless, in context, it is clear that Ms Kwa's explanation at point (g) was to preface the explanation given for the Fifth Will at point (i) and was also relevant to the Sixth Will at the final point, point (j).

Thus, the scope of information that Ms Kwa was purporting to give in the ten-point summary was that of the work she had done in relation to the first six wills, with a focus on issues relating to the Oxley property *that arose during her work on the first six wills*. It was clear that Ms Kwa had answered the query *that she sought to answer in her 4 June 2015 Email*. That was the basis, also, of the IC's recommendation in the First IC Report.

80 Taking the email as a whole, nevertheless, its frame and opening did represent its content to be a comprehensive summary of the work done by Ms Kwa on the first six wills and the Oxley property. Yet it failed to include information about: (a) Mr Lee's instructions regarding changes to the Sixth Will, and (b) their discussions regarding the Oxley property in 2013. This could have misled the executors into thinking that the 4 June 2015 Email contained everything regarding the first six wills and the Oxley property. *Having regard to the initiating queries*, furthermore, Ms Kwa's answer could, in that context, be misleading in not being a full answer. This was also probably the reason that she received a further query from Mr LHL in response to her 4 June 2015 Email, which then reminded her of the width of Dr LWL's earlier query, and to which she sought to respond in her 22 June 2015 Email. *Her answer in the 22 June 2015 Email should be considered in this context*.

81 Ms Kwa's 22 June 2015 Email was framed as a response to a request from Mr LHL for a copy of a draft will dated 19 August 2011, and more importantly, for the "*background which led to the signing of [Mr Lee's] last*

*Will dated 17 December 2013 [*ie*, the Final Will]*". She also noted that Dr LWL had asked her about the background to the Final Will in May 2014.[59]

82 With this enhanced rubric, it would have been plain that the November and December 2013 Emails were relevant, as they formed background to the Final Will, which was the subject of the requests from Mr LHL and Dr LWL. The Final Will contained changes regarding the shares allocated to each beneficiary and the demolition of the Oxley property. The emails of 30 November 2013 and 12 December 2013 reflected Mr Lee's concerns about both these issues. However, Ms Kwa did not describe or attach these emails. In addition, Ms Kwa stated that after Mr Lee had signed his Sixth Will, "he did not instruct [her] to change his Will". This representation was not correct, as the November and December 2013 Emails show instructions from Mr Lee to Ms Kwa regarding changes to his Sixth Will: the 12 December email suggests the addition of a codicil to change the shares given to each child, and the 13 December email mentions another codicil regarding carpets in the Oxley property. In fact, the IC had stated as much, noting that the 12 and 13 December 2013 emails suggested that Mr Lee had instructed Ms Kwa to prepare a codicil to the Sixth Will.[60]

83 In my view, in the full context of the initial queries, the 4 June 2015 Email contained an omission. The 22 June 2015 Email made a representation that was not true, and omitted to answer fully the specific question that was repeated. The issue is whether these emails should be characterised as false and misleading, and the executors submit that they should be so characterised. As the executors point out, the IC contradicts itself in its First IC Report by stating

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59 LHY-1 at p 66.

60 LHY-1 at p 151.

that the "emails dated 12 and 13 December 2013 suggests [*sic*] that [Mr Lee] had instructed [Ms Kwa] to prepare a codicil to the 6th Will", and then concluding that Ms Kwa's statements were not false or misleading.[61] I agree that the statements in Ms Kwa's 4 June 2015 Email and 22 June 2015 Email, *as a factual matter*, could be said to be *prima facie* false and misleading. Whether the statements are false and misleading *as an ethical matter*, on the other hand, involves two issues that the IC did not fully consider (nor were arguments raised to the IC on this point). The first is the ethical duty owed, and the second, the mental state relevant to that duty. In my view, an examination of the potential ethical breach and mental state appurtenant to such breach would be necessary to conclude whether, *as an ethical matter*, Ms Kwa's statements were *prima facie* false and misleading.

Ethical context and mental element relevant

84 The issues of the ethical duty owed and the mental state relevant to that duty are intertwined: the issue of the type of intent necessary for professional misconduct necessarily involves an assessment of the misconduct alleged or rule breached. A *prima facie* case is required for the requisite mental element. As the issues had not been raised before the hearing, I allowed counsel time to file further written submissions. In these submissions, counsel largely focused on the mental elements of dishonesty and negligence.

85 In their further submissions, the Law Society emphasised Ms Kwa's lack of intention to mislead the executors. Their submission was that "deliberate intent" is required, and a lawyer must have "*mens rea*" to make a false and

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61 LHY-1 at pp 151–152; PWS-1 at paras 110–111.

misleading statement.[62] They specifically cited the case of *Law Society of Singapore v Udeh Kumar s/o Sethuraju and another matter* [2017] 4 SLR 1369 ("*Udeh Kumar*"). This case clarifies that a lawyer can be deceiving or misleading by "passive concealment of material facts, the presentation of half-truths, and the active articulation of untruths and/or misrepresentation of facts" at [33]. It then held that for a lawyer to have *knowingly* deceived or misled they must have done so either (a) knowingly; (b) without belief in its truth; or (c) recklessly, without caring about its veracity: *Udeh Kumar* at [34]–[35].[63] In each case, the focus is on whether there was an absence of an honest belief in the truth of what is being stated: *Udeh Kumar* at [36]. *Udeh Kumar* was, however, a case concerning r 56 of the 2010 PCR, which concerns a solicitor's duty not to "knowingly deceive or mislead the Court". Whilst r 56 is not in contention in this case, I agree with the Law Society that the principles laid out in *Udeh Kumar* should also apply to other situations where a lawyer had knowingly deceived or misled someone.

86 On the issue of negligence, the Law Society contends that only serious errors would result in a failure to act diligently and competently, while making a careless error would not.[64] No submissions were made on the appropriate standard of care nor was any authority referenced for this proposition.

87 The executors, on their part, submit that misconduct may be found in the following instances:

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62 Defendant's Further Written Submissions dated 8 February 2021 ("DWS-2") at paras 8 and 17–20.

63 DWS-2 at paras 13–16.

64 DWS-2 at para 6

(a) where a solicitor has made a false and misleading statement (or concealment) knowingly and deliberately, they would be in breach of their general duty of honesty;[65] and

(b) where a solicitor has made a false and misleading statement (or concealment) unintentionally, *eg*, as a result of carelessness or lack of competence, they would be in breach of the standards of conduct required of a solicitor.[66]

88 In this context, the ethical misconduct the executors allege is "misconduct unbefitting an advocate and solicitor" under s 83(2)(*h*) of the LPA. This provision seeks to "ensure that the conduct of the solicitor concerned meets the high levels of professionalism expected of practising lawyers": *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 at [80]. The executors also rely on the duties of honesty, diligence and competence encapsulated in rr 2 and 12 of the 2010 PCR.

89 In respect of the mental element, the executors submit that Ms Kwa, in making the statements in her 4 June 2015 Email and 22 June 2015 Email, failed to meet the requisite standards of care and skill expected of a legal practitioner.[67] In *Law Society of Singapore v Chiong Chin May Selena* [2013] SGHC 5, for example, the Court of 3 Judges, in finding Chiong guilty of misconduct unbefitting an advocate and solicitor in relation to Law Society's complaints of negligence, held at [25] that Chiong's misconduct spoke of disorganisation or lack of care on the part of Chiong, rather than a deliberate act on her part to

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65 Plaintiff's Further Written Submissions dated 8 February 2021 ("PWS-2") at paras 33 and 41(a).

66 PWS-2 at paras 34 and 41(b).

67 PWS-2 at para 47.

mislead the client. The executors further submit that it is possible that Ms Kwa may have "knowingly and deliberately omitted mention of her communications with Mr Lee" in the November and December 2013 Emails.[68] These contentions require consideration of three issues before any inferences as to Ms Kwa's deliberate intention or negligence may be made. First, in the 22 June Email, sent to answer a specific request on the background to the Final Will dated 17 December 2013, Ms Kwa was able to produce email chains from Mrs Lee Suet Fern dated 16 December 2013, which were sent only three days after the last of the 13 December 2013 emails. It is then possible, the executors argue, to draw an inference that Ms Kwa would have gone through her emails thoroughly from that time period regarding that subject, and should have come across the 30 November and 12 and 13 December 2013 emails. Second, both requests and emails were sent after Mr Lee's passing in 2015. By this time, there was an ongoing public discussion regarding his wishes in relation to the Oxley property and she would have been aware of the significance of all of his wishes in relation to the equal shares of the beneficiaries and the Oxley property. Lastly, the executors point to the fact that while Ms Kwa could have corrected any misimpression at any time after 22 June 2015, she only disclosed these emails when requested, and almost four years later, in March 2019.[69]

90 To complete the picture, I would add that the IC's implicit assumption that Ms Kwa did not intend to make any false and misleading statement is also a plausible one. I frame it as an implicit assumption, because the IC, on the one hand, acknowledged in its analysis that Ms Kwa's statement was not correct, and yet, on the other hand, rested their conclusion on the fact that no codicil to

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68 PWS-2 at para 48.

69 PWS-2 at para 43.

the Sixth Will was in fact drafted by Ms Kwa.[70] It appears that they drew the inference that she had inadvertently forgotten about the instructions from Mr Lee, it became unnecessary for her to act on the email, and his Sixth Will had been superseded. Premised on this, the IC concluded that there was insufficient evidence, in their words, "even at a *prima facie* level", to find that Ms Kwa's 22 June 2015 Email was false and misleading. This conclusion made it unnecessary for the IC to consider whether any ethical duty was breached.

91 There is thus a range of possibilities as to what inference should properly be drawn. What is relevant here is that the task of the IC would not have been to make the inference as to Ms Kwa's intention, but to assess *whether* there was a *prima facie* case that ought to have been tested by a tribunal of fact to consider whether such an inference should be made. This is because the particular inferences to be drawn in this case would require a consideration of Ms Kwa's defence and her explanation on cross-examination. The task of drawing such inferences would fall on a DT during a formal investigation, where cross-examination would be crucial to the assessment of whether Ms Kwa's omissions and misstatement were deliberate, negligent or inadvertent.

92 A further point is that on the issue of negligence, the standard of professionalism expected in the particular circumstances, in the light of the specific queries posed and then repeated, must also be established by a DT. Negligence could, in appropriate circumstances, amount to an ethical breach, and the factual backdrop is of paramount importance in this assessment: see *Lie Hendri Rusli* at [42]. The executors have relied upon rr 2 and 12 of the 2010 PCR. Law Society argued in passing at the hearing that r 12 is engaged in the context of advancing a client's interest and the executors were not Ms Kwa's

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70 LHY-1 at p 152.

clients. They did not elaborate on this argument or the relationship between Ms Kwa and the executors in their further submissions, nor did they deal with r 2 of the 2010 PCR, which the executors also relied upon. The specific duty must be considered in the context of the professional standard to be expected. *Udeh Kumar*'s statements were in the context of his duty to the court under r 56 of the PCR. *Chiong Chin May Selena'*s her statements were to her client. In this context, two points are relevant. First, the finding of the IC on the Second Complaint was that Ms Kwa owed duties to the estate of Mr Lee and his executors; and amongst these duties, a duty of confidentiality. Second, the misleading statements were made in the circumstances of the possible breach of this duty of confidentiality. The standard of due care applicable to these circumstances should be considered by the same DT charged with formally investigating the Second Complaint.

93 I therefore hold that a *prima facie* case on a matter of sufficient gravity for formal investigation is established for the Fourth Complaint. The charge should rest on s 83(2)(*h*) of the LPA. For the avoidance of doubt, I add that the DT is not bound by my assessment of the evidence before me. Their consideration of the matter will be *de novo*, and the heads of complaint may be appropriately reframed: *Andrew Loh* at [174].

Conclusion

94 I grant an order directing the Law Society to apply to the Chief Justice for the appointment of a DT in relation to the First and Fourth Complaints. The charge for the First Complaint should be as framed by the IC in the First IC Report. The charge for the Fourth Complaint should rest on s 83(2)(*h*) of the LPA.

95 The executors have been substantially successful. The Law Society was discharging its regulatory function in its defence of the application; in the usual case, costs would not be ordered against it: see *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 at [24]; *CBB v Law Society of Singapore* [2021] 3 SLR 513 at [15]–[18]. Parties are at liberty to write in within two weeks if they require an order on costs or any consequential directions.

Valerie Thean
Judge of the High Court

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