IN THE COURT OF THREE JUDGES OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 87

Originating Summons No 3 of 2015

In the matter of Sections 94(1) and 98(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed)

And

In the matter of Thirumurthy Ayernaar Pambayan, an Advocate and Solicitor of the Supreme Court of the Republic of Singapore

Between

LAW SOCIETY OF SINGAPORE

… *Applicant*

And

THIRUMURTHY AYERNAAR PAMBAYAN

… *Respondent*

GROUNDS OF DECISION

[Legal Profession] — [Professional Conduct] — [Breach]
[Legal Profession] — [Disciplinary Proceedings]

Law Society of Singapore
v
Thirumurthy Ayernaar Pambayan

[2016] SGHC 87

Court of Three Judges — Originating Summons No 3 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Judith Prakash J
19 April 2016

6 May 2016

Chao Hick Tin JA (delivering the grounds of decision of the court):

1 This was an application brought by the Law Society of Singapore ("the Law Society") under s 98(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA") for the respondent, Thirumurthy Ayernaar Pamabyan ("the Respondent") to be dealt with pursuant to 83(1) of the LPA.

2 The Respondent was admitted to the bar about 15 years ago on 11 October 2000. He practised as a sole proprietor at M/s Murthy & Co. Prior to admission to the bar, the Respondent was a senior investigation officer with the Singapore Police Force. He retired in 1997 after 27 years of service and was the president of the Singapore Police Retirees' Association.

3 These disciplinary proceedings arose from a complaint by one Chandran s/o Eruthi Yanathan ("the Complainant), to the Law Society on 7

October 2013. The gravamen of the complaint was that the Respondent, who was the Complainant's solicitor at the material time, had requested two loans from the Complainant in January and June 2012.

4 The Law Society subsequently brought two charges under s 83(2)(*b*) of the LPA against the Respondent for having acted in breach of r 33(*a*) of the Legal Profession (Professional Conduct) Rules (Cap 161, r 1, 2010 Rev Ed) ("the 2010 Rules"), which mandates that an advocate and solicitor is not to enter into prohibited borrowing transactions, by obtaining two loans of at least $11,000 in total from the Complainant. We digress to note that the 2010 Rules have since been replaced by the Legal Profession (Professional Conduct) Rules 2015) (Cap 161, s 706/2015) ("the 2015 Rules"), which came into effect on 18 November 2015, and that, under the 2015 Rules, the rule against prohibited borrowing transactions is found in r 23(1). The 2010 Rules still apply in respect of the present case as the acts complained of occurred before the 2015 Rules came into effect.

5 The disciplinary tribunal ("the DT") was satisfied that there was cause for sufficient gravity for disciplinary action to be brought against the Respondent, who admitted to the two charges under s 83 of the LPA, as a breach of a rule of conduct under the 2010 Rules constitutes improper conduct or practice unbefitting of an advocate and solicitor.

6 The Respondent explained that he resorted to borrowing from the Complainant, whom he regarded not only as a client but also a "good friend and close acquaintance", because he was in financial difficulties. He was struggling to repay loans that he had taken from various banks and creditors in order to finance his two children's studies in Australia, to pay the mortgage

repayments of his flat, and to manage his law firm. He asked the Complainant for a loan of $3,000 in January 2012 to pay his creditors and to meet his office expenses. About half a year later in June 2012, he approached the Complainant again for a loan of $8,000 in order to repay a sum of $8,184.94 owed to a bank in order to stave off bankruptcy proceedings that the bank had commenced against him. The evidence suggested that the parties agreed that the Respondent would pay an additional sum of $5,000 as interest for the second loan.

7 Although the fact that an errant solicitor, who had borrowed from his client, has repaid the loan is relevant neither to liability nor as a mitigating factor, the issue of whether repayment had been made still had to be determined as the lack of repayment serves as an *aggravating* factor: *Law Society of Singapore v Yap Bock Heng Christopher* [2014] 4 SLR 877 ("*Christopher Yap*") at [30]. It was undisputed that the Respondent had repaid some monies to the Complainant but the parties disagreed on the amount that had been repaid. According to the Complainant, the Respondent had only repaid him $8,500. The Respondent, however, asserted that he had repaid $14,000 for the two loans, save for a sum of $2,000, which should only be seen as the interest component of the second loan. He explained that he had not repaid the remaining $2,000 because he had intended to discuss with the Complainant whether that could be offset from the legal fees that the Complainant still owed him. The DT did not make any conclusive finding on the amount that had been repaid. We found the Respondent's account to be more credible than the Complainant's after assessing the evidence that was before us.

8 There is no room for doubt, especially after this court's judgment in *Christopher Yap*, that a breach of r 33 of the 2010 Rules is viewed extremely seriously by the court. Such behaviour has to be sanctioned because, in most cases, a client is vulnerable vis-à-vis his solicitor who enjoys a position of influence over him. A client, who is approached by his solicitor for a loan, would find it difficult to deny the solicitor's request because of the trust and confidence that he has reposed in his solicitor: *Christopher Yap* at [28]. Further, a solicitor would be in clear breach of his fiduciary duties to the client in that he has placed his interests ahead of that of the client by asking for a loan without ensuring that the client first obtains independent legal advice: *Christopher Yap* at [29]. One of the key purposes of the disciplinary process is precisely to uphold the norms of fiduciary conduct: *Law Society of Singapore v Uthayasurian Sidambaram* [2009] 4 SLR(R) 674 at [1], cited in *Christopher Yap* at [29].

9 It was, however, undisputed that this case had hardly any aggravating factors than the two precedents cited by the Law Society, *Christopher Yap* and *Law Society of Singapore v Devadas Naidu* [2001] 1 SLR(R) 65 ("*Devadas Naidu*"). In both of these cases, a term of suspension of two years was imposed on the errant solicitors for the prohibited borrowing transaction.

10 The conduct of the Respondent was far less egregious than the solicitor in *Christopher Yap*, where the solicitor had requested a loan of the substantial sum of $34,000 from the client when the client was incarcerated in Indonesia, thus placing him under tremendous psychological pressure to agree to give the loan. Further, after obtaining the loan, the solicitor in *Christopher Yap* avoided the complainant and the complainant's sister for an extended period of time in order to avoid repaying the loan. Thereafter, when the complainant's sister

attempted to seek the repayment of the loan from the solicitor, the solicitor not only refused to do so but expressed frustration and threatened to respond accordingly. He eventually retaliated by demanding for payment of his legal fees totalling $118,000 and seeking to increase them to $148,000 at taxation (the fees were eventually taxed down to $20,000). Lastly, unlike the Respondent who had made substantial repayment, the solicitor in *Christopher Yap* had only repaid $700 of the $34,000 loan.

11 Although the conduct of the errant solicitor in *Devadas Naidu* was not as egregious as that of the solicitor in *Christopher Yap*, there were also significant aggravating factors present in *Devadas Naidu* that were absent in the present case. The client in *Devadas Naidu*, who had gotten on friendly terms with the solicitor, was not pressurised to make the loan of $28,000 out of fear or concern that the solicitor would otherwise not act properly for him, but had done so out of sympathy or "a degree of social awkwardness" (at [15]). The solicitor's conduct after he received the loan was, however, deplorable. He avoided seeing the client, and disregarded and failed to discharge his responsibility in respect of the divorce matter that he was representing the client in. The client eventually had to engage a new firm of solicitors to take over the divorce matter. Further, the client had to commence legal proceedings against the solicitor in order to obtain repayment of the loan.

12 In contrast, there was almost no aggravating factor in the present case. Although this did not alter the fact that the Respondent's conduct was in breach of r 33(*a*) of the 2010 Rules, we noted that the Respondent had approached the Complainant for a loan because he considered the Complainant to be a "good friend". There was no evidence that the Complainant was threatened or unduly influenced into making the loans. In

fact, the evidence suggested that the Complainant was the one who was in a position of control as evident from the fact that he felt confident enough to demand a usurious interest of $5,000 for the second loan. Although there was no evidence to suggest that the Complainant was a "professional" unlicensed moneylender, the second loan resembled an unlicensed moneylending transaction. Further, the Respondent did not avoid the Complainant and continued to act for him after taking the loans. Indeed, the Complainant continued to engage the respondent as solicitor for three further matters *after* the loans had been made. This suggested that the Complainant was satisfied with the way the Respondent was handling his matters. This was clearly unlike the situations in *Christopher Yap* and *Devadas Naidu* where the solicitors not only breached r 33(*a*) but also failed thereafter to discharge their duties to their clients with due diligence. The dereliction of a solicitor's duty to his client is, in our view, a very serious aggravating factor. Moreover, unlike the solicitors in the two precedents, the Respondent had substantially repaid the sums even before the complaint was made. Although the Respondent still owed the Complainant $2,000, we accepted his submission that this must be considered in the context that he had been charged $5,000 as interest for the second loan and that he was trying to discuss with the Complainant whether he could offset this sum of $2,000 from the legal fees that the Complainant still owed him before the complaint was lodged.

13 Counsel for the Law Society, Mr Melvin Chan ("Mr Chan"), submitted that, nevertheless, a term of suspension was warranted given that a breach of r 33(*a*) of the 2010 Rules constituted a serious breach of a solicitor's fiduciary duty to his client. Counsel for the Respondent, Mr Chelva Retnam Rajah *SC* ("Mr Rajah"), on the other hand, submitted that a fine should suffice given the lack of aggravating factors in the present case. In support of his submission,

Mr Rajah referred us to a passage from pp 303-304 of Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) in which the learned author cited two cases where fines, and not terms of suspension, were meted out to solicitors who acted in breach of the rule against prohibited borrowing transactions. Apart from the very brief summary of the two cases that was set out in the cited passage, neither counsel was able to provide us with more details about these cases including the tribunals which imposed the punishment of a fine. Notwithstanding the lack of information on these two cases, we extrapolated that they could not have been decisions of this court as it was only by virtue of an amendment to the LPA effected in 2008 that this court was accorded the option to impose a fine to bridge the gulf between a censure and suspension (see [24] of *Christopher Yap*). The two decisions, which were made in October 2006 and December 1997 respectively, could not thus have been the decisions of this court as they predated the amendments.

14 In any event, we were in agreement with Mr Chan that a term of suspension was warranted despite the absence of aggravating factors. It was necessary for us to send a consistent and strong message to the profession that a breach of r 33(*a*) of the 2010 Rules (or what is now r 23(1)(*a*) under the 2015 Rules) is viewed seriously by this court, and that a solicitor should under no circumstances borrow from his client unless any of the exceptions (*ie*, r 34 of the 2010 Rules or more pertinently, r 23(2) of the 2015 Rules) applies. Having said this, we were keenly cognisant that the need for general deterrence had to be balanced with the particular facts and circumstances of each case. After having carefully considered the circumstances of the present case – in particular the lack of aggravating factors (as summarised at [12] above) and the fact that we believed that the Respondent was genuinely

remorseful, we held that a relatively short term of suspension of two months would, on the facts of this case, be adequate punishment and yet convey the message that such misconduct was not tolerated.

15 We awarded the costs of this application to the Law Society, to be taxed if not agreed. We also granted the Respondent's request for the term of suspension to commence on 1 June 2016 to allow him time to settle his existing matters.

Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge

Melvin Chan Kah Keen and Tan Tho Eng (TSMP Law Corporation) for the applicant;
and
Chelva Retnam Rajah *SC* (Tan Rajah & Cheah)
for the respondent.
