Zhou Tong and others *v* Public Prosecutor
[2010] SGHC 198

Case Number	: Magistrate's Appeals Nos 124-131 of 2010
Decision Date	: 15 July 2010
Tribunal/Court	: High Court
Coram	: V K Rajah JA
Counsel Name(s)	: Leonard Loo (Leonard Loo LLP) for the appellants; Kan Shuk Weng and Davyd Chong (Attorney-General's Chambers) for the respondent.
Parties	: Zhou Tong and others — Public Prosecutor

Criminal Procedure and Sentencing

Legal Profession

15 July 2010

V K Rajah JA:

Introduction

1 All solicitors owe serious professional responsibilities to their clients and the court. Aside from the basic tenets of honesty and loyalty, it goes without saying that solicitors are expected to be competent and diligent in advising their clients and representing their interests. This fundamental professional responsibility requires every solicitor to thoroughly familiarise himself with the facts of his client's case, analyse the issues carefully, research the applicable law and then consider how best to advance the client's cause. It is, in short, a *fundamental and uncompromising requirement* that a solicitor, having taken on a case, should act conscientiously and conscionably. This is why every person admitted as an advocate and solicitor of the Supreme Court is required to make a declaration in the following form (see s 24(2) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA")):

> I, A.B., do solemnly and sincerely declare (and swear) that I will truly and honestly conduct myself in the practice of an advocate and solicitor *according to the best of my knowledge and ability* and according to law.
>
> (So help me God.)
>
> [emphasis added]

2 While the typically publicised cases of errant solicitors usually involve elements of dishonesty, professional incompetence and indolence is no less a cause for concern. Such conduct may in fact be viewed as another form of dishonesty – the receipt of fees for slipshod or non-existent work. The sloppy handling of a matter can also lead to a disciplinary finding that the client's money had been obtained under false pretences. From the viewpoint of the administration of justice, such conduct is always disturbing, but this is especially so in criminal matters where, generally, the clients and/or their families are financially challenged. To worsen matters, the client's position may on occasion be irremediably prejudiced as a result of the shoddy work. If the matter proceeds to court, a solicitor's failure to assist the court adequately would also result in wastage of judicial time and resources, and

could even, in some instances, result in miscarriages of justice. This particular matter is a startling example of a solicitor's abject failure to discharge his duty of basic diligence - both to his clients and the court. Before I deal with the facts, I should mention that the terms "advocate", "counsel", "lawyer", "solicitor" as well as "and solicitor" are used interchangeably in these grounds both in their singular and plural context.

The background facts

3 The essential facts in these eight appeals are rather unremarkable. The appellants are Chinese nationals, convicted along with 65 others, on single charges of gaming in a common gaming house under s 7 of the Common Gaming Houses Act (Cap 49, 1985 Rev Ed) ("CGHA"). Most of these 65 persons were sentenced to a fine of $1,000 after they had pleaded guilty at the earliest opportunity. The eight appellants chose to claim trial and were eventually found guilty by the District Judge. The first, second, fourth, fifth, sixth and eighth appellants were each sentenced to a fine of $2,000. The third and seventh appellants were sentenced to higher fines of $3,000 each as they had previously been convicted and imprisoned for immigration offences.

4 All eight appellants appealed against sentence, contending that it was manifestly excessive. All their Petitions of Appeal (save for their names, charge numbers and sentences) were identically worded (despite obvious differences in their personal circumstances), down to the patently apparent spelling and grammatical errors. One of the Petitions is now reproduced, in part, here:

> Your Petitioner is dissatisfied with the said judgment on the following grounds that the sentence is manifestly excessive as follows:
>
> a) The Honourable Court considered the number of people at the C11/12 Premises was an aggravating factor which greatly overweighed any mitigating consideration arising from the sum found on the premises.
>
> b) The other 2 Accused persons, namely Chen Caizhen and Zheng Qiao Ling had aggravating factor of counting the present offeces after serving imprisonment terms for previous immigration offences.
>
> c) The Honourable Court failed to consider the main mitigating factor raised was that the sum seized at the C11/12 Premises was about $1,000 and that there were 74 persons found on the premises such the amount involved in the gaming per person was less than $15 each.

Remarkably, Chen Caizhen and Zheng Qiao Ling, the seventh and third appellants respectively, also had this very same sub-paragraph (b) above as a ground of appeal in their own Petitions of Appeal.

The hearing of the appeals

5 Mr Leonard Loo ("Mr Loo") was counsel on record for all eight appellants. It emerged that well before the hearing of the appeals on 1 July 2010, four of the eight appellants could not be contacted by Mr Loo. Only the fourth to seventh appellants were present in court on the morning of 1 July 2010. The first and third appellants had apparently earlier absented themselves from an unrelated court mention and a warrant of arrest had been issued against them in the Subordinate Courts. However, these pertinent developments were only belatedly brought to the attention of the Deputy Public Prosecutor, Ms Kan Shuk Weng ("Ms Kan") and the Court during the hearing on 1 July 2010. When I queried Mr Loo on why he did not inform the Court and Ms Kan of these developments, he glibly explained that he had made unsuccessful attempts to contact his missing clients and was hoping that

they would turn up at the actual hearing itself. It was plain to me, however, that there was no basis for his feeble "optimism". As he could not contact them, there was really no reason to believe that they would appear in court.

6 I next asked Mr Loo why he had failed to file any written skeletal arguments for the appeal even though this requirement was clearly mandated by the Supreme Court Practice Directions, Part X, para 79. He breezily responded that he was relying only on oral arguments. On being pressed, he expressed some regret though he maintained that these were simple appeals that could be best dealt with through oral submissions. I conveyed to him in no uncertain terms that it was inexcusable for any solicitor not to be adequately prepared for a case. Further, this was not the first time he had failed to file his skeletal arguments in a matter placed before me. His insouciant disregard for court practices was, I emphasised, nothing short of unacceptable. However, I also made it plain that his conduct would not prejudice his clients' appeals. I then asked him to make his oral submissions.

7 Unfortunately, Mr Loo had only two strikingly brief and vacuous points to make in relation to the merits of the appeals. First, he argued that the sum of money involved in the offences was very small and that consideration ought to be given to the fact that the total stake being gambled amongst 74 persons was only about $1,000. This was essentially a rehash of the appellants' Petitions of Appeal without the addition of any further substance. Secondly, he stated that the appellants intended to return to Singapore and they believed that a lower sentence might help them ameliorate future difficulties with the immigration authorities. This submission was utterly without merit. A court is duty-bound to sentence according to law and in conformity with established sentencing principles. This was simply not an acceptable legal ground to justify the imposition of a lighter sentence. Mr Loo must have been aware of this even as he made this submission.

8 Politely put, Mr Loo's submissions, which took just a few brief minutes, left much to be desired. One of the most basic aspects of any appeal against sentence is to make comparisons between an appellant's sentence and existing benchmarks. The appellate court will then assess whether the sentence is manifestly out of line, bearing in mind the unique facts of each case. There was really no point in questioning the appellants' sentences in a legal vacuum. Every law student, let alone a competent solicitor, knows this. When I asked Mr Loo if he had undertaken any research to support his contention that the appellants' sentences were out of line with existing benchmarks, he could not refer me to any precedents that might add substance to his clients' pleas. Instead, he had the temerity to reply that I could simply exercise my discretion to reduce the sentences on compassionate grounds. Mr Loo had obviously not exerted himself in his preparation for these appeals.

9 By way of contrast, Ms Kan had clearly indicated in her written submissions, filed several days before the hearing, that the standard tariff for first offenders under s 7 of the CGHA was a fine of $1,000 in the absence of aggravating circumstances: see *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2nd Ed, 2003) at p 988. Ms Kan, exhibiting commendable diligence, had also provided a catalogue of cases where the offenders had either claimed trial to charges under s 7 of the CGHA and were subsequently convicted, or had pleaded guilty to such charges but possessed antecedents for gaming offences. The fines imposed in those cases ranged from $1,400 to a ceiling of $5,000. Two of the cases in particular were quite similar to the present appeals. In *Public Prosecutor v Yap Ah Yoon and others* [1993] 1 SLR(R) 506, the eight offenders claimed trial to a charge under s 7 of the CGHA. Six of them were traced for gaming offences while the other two had no gaming antecedents. They were all fined $2,000. Also, in *Public Prosecutor v Chua Kee Tee and others* (MA 432/92/01–05), the five offenders similarly claimed trial to a charge under s 7 of the CGHA. Four of the five offenders were traced for gaming offences while the remaining offender was untraced. They were all fined $3,000.

10 In the present case, all eight appellants chose to claim trial instead of plead guilty. They were convicted and fined $2,000 each, save for the third and seventh appellants who had antecedents for immigration offences. As mentioned above, these two individuals were fined $3,000 each. Considering the sentencing precedents referred to by Ms Kan, which could also have been discovered by Mr Loo with minimal effort, it was clear that the appellants' sentences were not manifestly excessive. On the contrary, they were entirely appropriate. These appeals were manifestly without merit.

Observations on Mr Loo's conduct as an advocate and solicitor

11 Having disposed of the merits, it now remains for me to make some important, but unpleasant, observations about Mr Loo's conduct of the case. It was clear from the outset that Mr Loo was dreadfully unprepared and had manifested a disturbingly careless attitude about the conduct of this matter even prior to the filing of the appeals. First, before filing the appeals, he was duty bound to advise his clients about the merits of their appeals and the prospects of success. How could he, in the prevailing circumstances, have advised them, in good conscience, to proceed with these appeals and accepted their fees? Secondly, he had drafted the appellants' Petitions of Appeal without applying his mind properly to the need for accuracy and/or the legal persuasiveness of the grounds. They were poorly crafted and filed *en masse* without regard to the fact that Zheng Qiao Ling and Chen Caizhen were also the third and seventh appellants in this case and his clients as well. As a result, these two individuals' Petitions of Appeal actually worked against instead of for them. There was plainly a conflict between his various clients' interests and it was quite apparent to me that Mr Loo did not give any consideration to this aspect of the appeals. Thirdly, Mr Loo had failed to undertake any legal research whatsoever. Fourth, he had inconvenienced the court and Ms Kan by failing to notify us that four of the eight appellants would not appear or that he had lost contact with them; he compounded this oversight even further by failing to file any written submissions. I was left guessing until he turned up why he had filed such obviously unmeritorious appeals. Lastly, Mr Loo had put in no effort in the preparation of his oral arguments. His bare and brief oral submissions merely regurgitated the points he made in the Petitions of Appeal and the mitigation plea made in the court below. All in all, it appears that the only effort Mr Loo put into these appeals was to draft and file the starkly unmeritorious and, for the most part, identical Petitions of Appeal. For this shoddy work, he apparently charged each of the appellants a not insubstantial sum of $1,000. Considering the amount of attention Mr Loo actually gave to this matter, his cumulative legal fees were nothing short of unconscionable.

12 I am particularly disturbed by the fact that these appeals were even filed in the first place. Any competent solicitor who had researched the benchmark sentences for offences under s 7 of the CGHA would have immediately realised that the appellants' sentences in this case were not manifestly excessive. In filing these appeals, Mr Loo had done an enormous disservice to his clients by taking their hard earned money and exciting in them false expectations that there was a basis for their appeals. His failure to prepare for his clients' case, both before and after the appeals were filed, further aggravated matters.

13 All said and done, I view with profound disquiet Mr Loo's complete disregard for the interests of his clients in this case as well as his cavalier attitude towards court procedures and his obligations *qua* officer of the court. Many lay persons, like the appellants in this case, have little knowledge or experience with the nuts and bolts of the legal machinery. They are entirely dependent on their solicitors to advise them on the most appropriate course of action to take. Unsophisticated clients are particularly vulnerable. They are ordinarily in no position to assess if their solicitors have discharged their professional responsibilities competently. They have no alternative but to assume that their solicitors will protect their interests and conduct their case to the best of their ability and in good faith. Mr Loo had, unfortunately, quite evidently decided to place his personal interests before his

clients' interests in this instance. The patent lack of effort he manifested in advising and acting for the appellants in these appeals was nothing short of disgraceful. Given my blunt observations about Mr Loo's conduct above, this might be an appropriate occasion to once again remind solicitors of their duties and responsibilities owed to clients and to the Court, and the standard of professional conduct that is expected of them at all times.

Duties of an advocate and solicitor

Duty to the client

14 An advocate and solicitor owes a duty to further the best interests of his client and to act with diligence and competence. These core duties are expressly enshrined in the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("LP(PC)R") and are reproduced below:

> **Application**
>
> **2**. ...
>
> (2) In the interpretation of these Rules, regard shall be had to the principle that an advocate and solicitor shall not in the conduct of his practice do any act which would compromise or hinder the following obligations:
>
> ...
>
> (c) to act in the best interests of his client and to charge fairly for work done ...
>
> ...
>
> **Diligence and Competence**
>
> **12**. An advocate and solicitor shall use all reasonably available legal means consistent with the agreement pursuant to which he is retained to advance his clients' interest.
>
> ...
>
> **Conduct of proceedings in client's interest**
>
> **54**. Subject to these Rules, an advocate and solicitor shall conduct each case in such a manner as he considers will be most advantageous to the client so long as it does not conflict with the interests of justice, public interest and professional ethics.

15 In particular, I made the following general observations on the standard of care and skill required of solicitors in the decision of *Lie Hendri Rusli v Wong Tan & Molly Lim (a firm)* [2004] 4 SLR(R) 594, at [42]–[44]:

> 42 It is hornbook law that a solicitor is expected ***to exercise the care and skill of a reasonably competent solicitor in discharging his duties*** under the retainer. In assessing the standard of care to be reasonably expected of a solicitor, the ***factual backdrop is of paramount importance*** . Abstract notions of skill and competence often add little to resolving the situation and have to be applied with vigilance when meandering through the undergrowth of facts. It must be appreciated that there is no magic formula that can reconcile the myriad of case law principles and any attempt to distil such principles must be tinged with pragmatism. In other words, no

single touchstone will suffice to illuminate or unravel the existence and extent of a duty in any given matrix.

43 In reality the so-called *reasonably competent solicitor* is a mere legal fiction judiciously deployed from time to time to justify risk allocation. The court is ever anxious to ***maintain and police the standards of the legal profession*** , which performs a vital role in a society that is predicated, and places a premium, on the rule of law. In the discharge of its duty to uphold the legal system, ***the legal profession must seek not only to jealously maintain high standards but to unfailingly remain alert and acutely conscious of the fact that the public perception and the standing of the profession is indivisibly determined by the standards it embraces and observes*** . Rule 2 of the Legal Profession (Professional Conduct) Rules 1998 (Cap 161, R 1, 2000 Rev Ed) ("Professional Conduct Rules") explicitly prescribes that solicitors have the following obligations:

(*a*) to maintain the Rule of Law and assist in the administration of justice;

(*b*) to maintain the independence and integrity of the profession;

(*c*) to act in the best interests of his client and to charge fairly for work done; and

(*d*) to facilitate access to justice by members of the public.

High standards, however, are not synonymous with impractical standards. Expectations of the profession must be tied to reality . A solicitor is not an underwriter for a client's business or generally speaking the commercial wisdom of a transaction. Nor is legal advice equivalent to a warranty that a legal transaction will be free of risk and problems.

44 The real issue, in any given case, ***is whether the court views the standards applied and skills discharged by the particular solicitor as consistent with the legal profession's presumed responsibilities and obligations to its clients*** . This is not a fossilised concept and standards periodically evolve as well as vary in different factual matrices. It bears mentioning that adopting the practice of the entire profession does not by itself exonerate a solicitor from the acid test of reasonableness measured by adequate competence and skill: Edward Wong Finance Co Ltd v Johnson Stokes and Master [1984] AC 296. The efflux of time or general acceptance cannot legitimise any neglect of duty by the profession as a whole.

[emphasis in italics in original; emphasis in bold italics added]

16 With reference to the observations of Mr Loo's conduct made above in [11] to [13], there is no doubt that Mr Loo had fallen far short of the standards expected of all solicitors. I was particularly disappointed by the fact that he simply parroted one version of the Petition of Appeal word for word in all the others without any regard to the desirability of individualising each of the appeals. In addition, when Mr Loo was pressed by me to explain his failure to submit any relevant authorities, he attempted to deflect the query and said that although the sentences imposed were *not* manifestly excessive, the appeal should still be allowed on 'compassionate grounds'. It was troubling that Mr Loo, a solicitor of some 14 years' standing, could make such an unmeritorious argument without providing even one supporting authority. Indeed, given the manner in which Mr Loo had conducted his clients' case it would not be wrong to say that this is a case that quite plainly transcends any plausible suggestion of inadvertent oversight; *it was clear to me that Mr Loo had consciously shown a marked indifference to his clients' interests*.

Duty to the court

Duty to the court

17 In addition to Mr Loo's failure to properly discharge his responsibilities to his clients, he had disregarded his absolute duties to the Court in assisting in the efficient and proper administration of justice. Mr Loo had, without the prior leave of Court, unilaterally decided to depart from the procedural requirement to file written skeletal arguments. There was not even a letter from Mr Loo to the Registry to inform the Court that only brief oral submissions would be made and what they might be. Even more appalling is the fact that Mr Loo had known at an earlier date that four of the appellants could not be contacted, but had failed to inform the Court and the Public Prosecutor of this until the appeal was heard. Mr Loo's conduct was prejudicial to the efficient and orderly disposal of cases. In this regard, I ought to make reference to rr 55 and 60 of the LP(PC)R:

> **Duty to Court**
>
> **55**. An advocate and solicitor shall at all times —
>
> …
>
> (*b*) use his best endeavours to avoid unnecessary adjournments, *expense and waste of the Court's time*; and
>
> (*c*) assist the Court in ensuring a *speedy and efficient trial* and in arriving at a just decision.
>
> **Conduct of Court proceedings**
>
> **60**. An advocate and solicitor when conducting proceedings in Court —
>
> (*a*) shall be *personally responsible* for the conduct and presentation of his case *and shall exercise personal judgment* upon the substance and purpose of statements made and questions asked;
>
> ...
>
> [emphasis added]

18 I had observed in an earlier decision (see *Public Trustee and another v By Products Traders Pte Ltd and others* [2005] 3 SLR(R) 449 at [34] ("*By Products Traders*")) that these provisions are not exhaustive, but are indicative of a wider responsibility that solicitors assume as officers of the court. Indeed, the solicitor's duties to the court extend beyond expressly prescribed Rules in the LP(PC)R, and include general professional and ethical practices in all facets of his interaction with the court. In this regard, although the general principles propounded in *By Products Traders* emphasise the solicitor's duty not to mislead the court, the observations with regards to the important role of the solicitor as an officer of the court are nonetheless relevant, particularly at [35] where I held:

> All solicitors *qua* officers of court have an absolute and overriding duty first and foremost to the court to serve public interest by ensuring that there is proper and efficient administration of justice.

Duty to conscientiously assess merits of a client's case

1 9 *All solicitors have an obligation to carefully assess the merits of their clients' cases before*

engaging in court proceedings. As discussed above, there are two facets to this duty. The first facet is the duty owed to clients. Solicitors who recklessly institute legal proceedings without a thought to the merits of their clients' case run afoul of the most basic tenets of ethical conduct; such solicitors in essence improperly take their clients' money and abuse the trust and confidence reposed in them. Depending on the severity of neglect or indifference on the solicitor's part, there could be different civil and/or disciplinary consequences. The second facet of the duty is that owed to the court. Solicitors who pursue appeals without adequately considering the merits of their clients' cases would be misusing the court's time, as they would not be able to constructively assist the court in evaluating the merits of the matter.

20 This is not to say, however, that solicitors should be on tenterhooks about whether or not the court might ultimately rule against their clients. There is a marked difference between adequately *considering* the merits of a client's case and *adjudicating on* them, see *Bachoo Mohan Singh v Public Prosecutor* [2010] SGCA 25 at [113]–[119]. The essential question is whether the solicitor had faithfully and diligently directed his mind to the facts of his client's case, and to the applicable law. If solicitors make the effort to conscientiously consider and evaluate all pertinent aspects of their clients' cases, there is no need for undue concern even if the court determines that there is ultimately no merit in the case. Solicitors are not expected to always "get it right". Some astute observations on the solicitor's duty to carefully assess the merits of their clients' cases can be found in Professor Jeffrey Pinsler's seminal text, *Ethics and Professional Responsibility* (Academy Publishing, 2007) at para 08-017:

> [T]here may be circumstances in which the advocate and solicitor must inform his client that it would not be appropriate to pursue the case in accordance with the latter's allegations where they are baseless, illogical and/or unsupported by evidence. The advocate and solicitor has a duty to avoid acting in a manner which is motivated by the intention of obstructing due process (for example, by distracting the court and/or delaying proceedings through the presentation of irrelevant or baseless issues) as opposed to pursuing the merits of his client's case.

21 There is no doubt here that Mr Loo had failed miserably in the discharge of his various duties to his clients and the court. The next question then was what should be the appropriate response to such serious lapses. As he had done a great disservice to his clients, I was minded to order Mr Loo to refund all his legal fees and costs. This of course raises the question of whether a court has the power to make such an order notwithstanding the desirability of such an order.

Power of court to make costs orders against a solicitor

22 It appears to me that the court may always order a solicitor to personally bear the costs of litigation by exercising its inherent jurisdiction. The leading English case on the scope of the Court's inherent jurisdiction in this respect is *Myers v Elman* [1940] AC 282 ("*Myers*"), which was interpreted by Sir Thomas Bingham MR in *Ridehalgh v Horsefield and Another and other appeals* [1994] Ch 205 ("*Ridehalgh*") (at 227) to stand for the following five propositions:

> (1) The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors. (2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not. (3) The court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice. (4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll.

While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross. (5) The jurisdiction is compensatory and not merely punitive.

23 The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors and in so doing, penalise any conduct which tends to defeat justice. As Lord Wright observed in *Myers* (at 319):

> The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. *The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ*.
>
> [emphasis added]

24 While *Myers* and *Ridehalgh* both involved the Court's exercise of its inherent jurisdiction in civil proceedings, the Court also has a parallel jurisdiction in respect of criminal proceedings. Indeed, the Court's inherent jurisdiction exists regardless of the type of proceedings before the court, and for good reason. As I observed in *By Products Traders* and above at [17], a solicitor's responsibilities and obligations as an officer of the court embrace all facets of his interaction with the court. It would be rather incongruous if the court had no inherent control over the conduct of its own officers in all proceedings before it.

25 The Court's inherent jurisdiction to make personal costs orders against solicitors was first codified in O 59 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") in respect of civil proceedings, and more recently in s 357 of the Criminal Procedure Code Act 2010 (No 15 of 2010) ("CPC Act 2010") in respect of criminal proceedings. It is to be noted that the CPC Act 2010 was passed by Parliament on 19 May 2010 and assented to by the President on 10 June 2010 but has yet come into force. I now turn to both provisions so as to elaborate on the Court's jurisdiction to make personal costs orders against solicitors in proceedings such as the present one. Ultimately, in determining the scope of the Court's inherent jurisdiction in this respect, it must be borne in mind that both O 59 r 8 and s 357 of the CPC Act 2010 are based on the very same practical and ethical considerations (see *Tan King Hiang v United Engineers (Singapore) Pte Ltd* [2005] 3 SLR(R) 529 ("*Tan King Hiang*") at [15]):

> (a) the law imposes a duty on solicitors to exercise reasonable care and skill in conducting their clients' affairs although an advocate enjoys immunity from claims for negligence by his clients in respect of his conduct and management of a case in court and the pre-trial work immediately connected with it; and
>
> (b) a litigant should not be financially prejudiced by the unjustifiable conduct of litigation by his opponent or his opponent's solicitor.

26 Section 357 of the CPC Act 2010 provides as follows:

Costs against defence counsel

357. —(1) Where it appears to a court that costs have been incurred *unreasonably* or *improperly in any proceedings* or have been wasted by a failure to conduct proceedings with *reasonable competence and expedition*, the court may make against any advocate whom it considers responsible (whether personally or through an employee or agent) an order —

(*a*) disallowing the costs as between the advocate and his client; or

(*b*) directing the advocate to repay to his client costs which the client has been ordered to pay to any person.

(2) No order under this section shall be made against an advocate unless he has been given a reasonable opportunity to appear before the court and show cause why the order should not be made.

[emphasis added]

27 Section 357 corresponds with O 59 rr 8(1) and 8(2) of the ROC which state:

Personal liability of solicitor for costs (O. 59, r. 8)

8 —(1) Subject to this Rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may make against any solicitor whom it considers to be responsible (whether personally or through an employee or agent) an order —

(*a*) *disallowing the costs as between the solicitor and his client*; and

(*b*) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or

(*c*) directing the solicitor personally to indemnify such other parties against costs payable by them.

(2) No order under this Rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made, except where any proceedings in Court or in Chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made —

(*a*) because of the failure of the solicitor to attend in person or by a proper representative; or

(b) because of the failure of the solicitor to deliver any document for the use of the Court which ought to have been delivered or to be prepared with any proper evidence or account or otherwise to proceed.

(emphasis added)

28 The English Court of Appeal considered the meaning of "unreasonably" and "improperly" in *Ridehalgh*, a case which dealt with a similar provision under English procedural law. In *Ridehalgh*, the court approved (at 231) the following three-stage test, which was formulated in the earlier case of *In re A Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] QB 293:

> (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so, did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs? (If so, the costs to be met must be specified and, in a criminal case, the amount of the costs.)

While the court in *Ridehalgh* approved of the three-stage test, the "overarching rule with regard to ordering costs against a non-party in court proceedings is that it must, in the circumstances of the case, be *just* to do so": see *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another* [2010] SGCA 21 at [29]. The other two stages may be considered as relevant factors in ascertaining where the overall balance of justice lies.

29 Additionally, Sir Thomas Bingham MR (at 232) elaborated on the meaning of the terms "unreasonable" and "improper":

> "Improper" … covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable"... aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

30 The tests and propositions which *Ridehalgh* spelt out have been unqualifiedly endorsed by our Court of Appeal in *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576, *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR(R) 220 and more recently *Tan King Hiang*. Significantly, the Court of Appeal emphasised in *Tan King Hiang* (at [20]) that a solicitor is not to be regarded as having "acted improperly or unreasonably simply because he acted for a client who has a bad case". It is his role to represent the client to the best of his ability. This, of course, does not mean that a solicitor may commence legal proceedings even if his client's case is devoid of merit: see [19], above. Rather, my point is that a solicitor should represent his client to the best of his ability after the solicitor has, *bona fide*, arrived at the view, even if incorrectly, that there is merit in his client's case.

31 As for the meaning of the phrase "reasonable competence and expedition", *Tan King Hiang* suggests at [14] that because the phrase replaced the previous requirement (under the old O 59 r 8 of the Rules of Court) that costs be incurred "improperly or without reasonable cause or wasted by undue delay or by any other misconduct or default" and there was therefore no longer any reference to "misconduct or default", a lower degree of impropriety would suffice to render a solicitor personally

responsible for costs. Further, it was also suggested in *Ridehalgh* (at 229) that the reference to "reasonable competence" suggested "the ordinary standard of negligence and not a higher standard requiring proof of gross neglect or serious dereliction of duty". Indeed, the Court of Appeal observed in *Tan King Hiang* at [21] that although the term reasonable competence "need not in every instance imply that where reasonable competence is not demonstrated there will be negligence, in most cases it will probably be so".

32 At this point, it is to be noted that "negligence" in the present context is not used as a term of art requiring proof of duty, breach, causation and damage. As Sir Thomas Bingham MR rightly pointed out in *Ridehalgh*, the expression "reasonable competence" does not invoke "technical concepts of the law of negligence" (at 232). There is hence no need to prove that the solicitor's conduct involved an actionable breach of his duty to his client. Be that as it may, the solicitor must still be proved to have given "advice, [done] acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do" (see *Ridehalgh* at 233, citing *Saif Ali v Sydney Mitchell & Co* [1980] AC 198). Thus, negligence should be understood to denote a "failure to act with the competence reasonably to be expected of ordinary members of the profession" (see *Ridehalgh* at 233 and *Tan King Hiang* at [18]).

Application of s 357 of the CPC Act 2010

33 Given the profound disquiet I entertained about how Mr Loo had failed to properly and adequately discharge his responsibilities to his clients, this appeared to me to be *prima facie* a textbook case for invoking the court's inherent jurisdiction over a solicitor *qua* officer of court to order the solicitor to refund costs paid by a client to his solicitor. It would not have been necessary for me to rely on s 357 if I was minded, after taking into account Mr Loo's arguments on this matter, to make such an order.

34 I should pause here to reiterate that the CPC Act 2010 has not yet come into force. However, in my view, s 357 merely codifies the Court's existing inherent jurisdiction. It is an alternative ***procedural*** rule or route that allows the Court to render a punitive response to a solicitor's breaches of prescribed professional ***substantive*** standards. Parliament had enacted this provision to remind solicitors of their obligation to ensure that they properly discharge all their professional responsibilities to their clients in all criminal proceedings, including magistrate's appeals. The provision should be viewed as a timely reminder to all who practice at the criminal bar. Unfortunately, at present, a small number of solicitors do not conscientiously discharge their professional responsibilities in court proceedings. Their cases are inadequately prepared and their research usually barren. These solicitors often file frivolous appeals because they do not think it will result in any personal downside. Section 357 unequivocally signals to this small number of solicitors that they will have to immediately haul themselves up by their own bootstraps.

Mr Loo's belated expression of contrition

35 I gave Mr Loo two options at the conclusion of the hearing. He could either show cause why I should not make an order requiring him to refund legal fees paid to him under the court's inherent jurisdiction over all solicitors, or he could immediately undertake to refund all fees received to each of the appellants. For obvious reasons, Mr Loo chose the latter. He must have appreciated, in light of my observations, that had he not done so disciplinary consequences might follow. He also asked to be given a "second" chance and assured me that he would be more prepared in future appearances before the courts. I readily informed him that his present shortcomings would not prejudice his clients in any future matter I might hear.

36 I should also mention for good measure, that these grounds of decision are not meant to humiliate Mr Loo. Rather, my intention is to remind all solicitors that their loyalty must lie first and foremost with the administration of justice and the advancement of their clients' interests and not elsewhere.

Conclusion

37 In the result, I dismissed all eight appeals, including the appeals of the four appellants who failed to appear. Mr Loo undertook to refund the legal fees of his clients and I understand that he has since done so. Perhaps, I should emphasise that I am not at all suggesting in these grounds that a solicitor's competence and/or efforts are to be assessed by reference to the outcome in a particular matter. While for clients, positive outcomes and competence often go hand in hand, the courts employ a different yardstick in assessing competence and diligence – that of technical proficiency. The Courts expect all advocates who appear before them to discharge their professional obligations (to their clients and to the court) conscientiously and conscionably through adequate preparation.