Law Society of Singapore *v* Kurubalan s/o Manickam Rengaraju
[2013] SGHC 135

Case Number	: Originating Summons No 1114 of 2012
Decision Date	: 18 July 2013
Tribunal/Court	: Court of Three Judges
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Philip Fong Yeng Fatt and Kirsten Teo (Harry Elias Partnership LLP) for the applicant; Chelva R Rajah SC and Tham Lijing (Tan Rajah & Cheah) for the respondent.
Parties	: Law Society of Singapore — Kurubalan s/o Manickam Rengaraju

Legal Profession – Professional Conduct – Grossly improper conduct – Fee agreement – Champerty

18 July 2013

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This is an application by the Law Society of Singapore ("the Law Society") for an order pursuant to s 94(1) read with s 98(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the Act") that Kurubalan s/o Manickam Rengaraju ("the Respondent"), an advocate and solicitor of the Supreme Court of Singapore ("Advocate and Solicitor") of some 15 years standing, be sanctioned under s 83(1) of the Act.

2 The Respondent was engaged by his client in respect of a claim for personal injuries. The injuries were sustained in Queensland, Australia, and the claim was to be brought there. Although the Respondent was practising at the material time as an Advocate and Solicitor, the services he rendered did not relate directly to the administration of justice in this jurisdiction. The sole charge proceeded with by the Law Society against the Respondent was one of entering into a champertous agreement which provided for payment to the Respondent of either 30% or 40% of the amount recovered in respect of his client's claim for personal injuries (the actual percentage payable to the Respondent would depend on the amount recovered). It was alleged that the Respondent's conduct was in breach of s 107(1)(*b*) read with s 107(3) of the Act and that this amounted to grossly improper conduct in the discharge of his professional duty within the meaning of s 83(2)(*b*) of the Act.

3 The Respondent (in our view, correctly) admitted to the charge before the Disciplinary Tribunal. The sole issue before us was that of sentence. After hearing the parties, we ordered that the Respondent be suspended from practice for a period of six months and further that he pay the agreed or taxed costs of the proceedings. As this is the first time in more than thirty years that a lawyer here has been charged and convicted of misconduct arising out of a champertous arrangement, we thought that it would be appropriate for us to explain the grounds for our decision.

Facts

4 The facts were not in dispute. An agreed statement of facts was tendered at the hearing of

the Disciplinary Tribunal and it was supplemented by affidavits filed by the parties.

5 The Respondent was admitted as an Advocate and Solicitor in 1998. At the material time he was the sole proprietor of the firm known as Kuru & Co.

6 The complainant was his client, Madam Ho Shin Hwee ("the Complainant"). On 5 July 2003, she was badly injured in a motor accident on a highway near the city of Brisbane in Queensland, Australia. It was in the early hours of the morning and she was the passenger in a car driven by her then husband. He fell asleep at the wheel and the car went off the road into a large ditch or canal. The Complainant sustained very serious injuries as a result. She broke several bones, was paralysed on her left side and fell into a comatose state. To aggravate matters, it was some hours before medical help arrived. She initially received intensive care in Queensland and later, while still in a coma, was flown back to Singapore where she eventually regained consciousness. She spent over four months in hospital in Queensland and Singapore and, after years of medical attention and physiotherapy, has recovered somewhat. However, according to a report annexed to her affidavit, [note: 1] she still needs daily assistance from a caregiver as there remains some impairment to her motor and mental functions. Nonetheless, it is not disputed that she is *compos mentis* and nothing in these proceedings turns on the circumstances of the accident or her medical condition.

7 In early 2005, the Complainant wanted to bring a claim for compensation in respect of her injuries and the associated expenses against the relevant insurer in Australia. She was introduced to the Respondent and on 24 January 2005 she executed a Warrant to Act authorising and appointing Kuru & Co, the Respondent's law firm, to act for her in bringing or defending proceedings in respect of the incident. No fee arrangement was agreed at that time and no action was immediately commenced because there was some concern that the claim might be time-barred. It seems also that the Complainant was worried about the cost that might have to be incurred in bringing the action. The Respondent sent her some material on possible cost-sharing arrangements, including material on speculative fee agreements, which appeared to have assuaged her concerns and in the event convinced her to mount a claim.

8 On 24 April 2006, the Respondent and the Complainant signed a written agreement ("the Champertous Agreement") that became the subject of this application. The agreement reads in full: [note: 2]

> In the matter of motor vehicle accident on 5th July 2003 in Brisbane, Australia, the said HO SHIN HWEE sustained Personal Injury.
>
> It is hereby agreed that R.Kurubalan will act on his personal capacity in this matter and not has [sic] an advocate and solicitor of Singapore nor is the firm Kuru & co be [sic] in conduct of the matter.
>
> We refer to our acknowledgement relating to this matter dated 24/04/06. [note: 3]
>
> Given the unique circumstances of this case, we hereby authorise Mr. Kurubalan to act on his personal capacity. As the accident happened in Queensland, Australia I/we acknowledge that this agreement will be governed by the Laws of Queensland, Australia.
>
> We authorise him irrevocably to engage an Australian Lawyer or himself in his capacity as a lawyer enrolled in Queensland to conduct this matter.

We agree that:-

1. That we will not be liable for any cost unless the claim is successful.

2. The cost of the conduct of the matter is to be bourne [sic] by the nominated Australian firm and the same is not revoverable [sic] from us if the claim is not successful.

3. Upon successful completion the nominated Australian firm is entitled to recover all disbursements (examples;-doctors cost, courts fees, incidentals etc) plus party and party legal cost including barristers fee.

4. The nett proceeds after deducting, as per para 3 will be shared on 60/40 basis. The Lawyers to retain 40% and I/WE to receive 60%.

5. In the event the claim amount is less than $300,000 Australian Dollars than [sic] the lawyers will take a lesser percentage of 30% instead of 40%.

The agreement was signed by three persons including the Complainant and the Respondent.

9 The acknowledgement referenced in the third paragraph of the Champertous Agreement was also dated 24 April 2006 and it was in the following terms:

In the matter of motor vehicle accident on 5th July 2003 in Brisbane, Australia, the said HO SHIN HWEE sustained Personal Injury.

We acknowledge the following:-

1. We were not aware that the accident report must be made in Australia, according to their law within 9 months of the accident.

2. It was only in late January 2005, that we decided to look into the matter. As such, we have been advised that it is the first issue that has to be overcome before proceeding further in this matter.

3. We have been provided with copies of information pertaining to the above issue, cost implications under the Queensland legal system, samples of cost arrangements, basis of costing etc for me and my family to familiarise and do necessary checks on the same.

4. We realize that the disbursements in this case can run high. There could be a need to fly doctors from Singapore to Australia. All their flight, accommodation, time away from Singapore will have to be bourne [sic]. Given that there are number of doctors involved and varying levels of seniority the cost can be prohibitive.

5. As to date, there is no Australian law firm agreeable to share cost with Singapore law firm. Their reason being that their regulations does not allow for cost sharing with an overseas firm. We are advised that a solicitor in Brisbane will have to appoint a Barristor [sic] to conduct the matter.

6. We have been considering the various above factors and have held back our instructions till 24 April 06. We acknowledge that apart from not meeting reporting timeline of 9 months or one month of seeing a lawyer, the time bar on commencing the action is only two months at this

point in time...

7. Given the above constraints and time limits Kuru & Co as solicitors will be officially on record only for the purpose notifying the Insurance Bureau. The firm will not be involved thereafter. The firm will not be charging for work done to date in the interest of goodwill except for disbursements.

10 On same day *ie* 24 April 2006, the Complainant executed a second Warrant to Act [note: 4] authorising and appointing the Respondent's firm to act for her in relation to the motor incident.

11 It will be noted that the Champertous Agreement states that the Respondent was to act in his personal capacity and that his firm was not to conduct the matter. This was curious to say the least. It is plain that the Respondent expected to be remunerated for his efforts. It was not the case that he was taking this on as a personal favour rather than as a professional undertaking. In fact, the only explanation for the inclusion of these words in the Champertous Agreement is that the Respondent was seeking to maintain that he was not being engaged in his capacity as an Advocate and Solicitor. But whether this is so is ultimately a question of fact which must be resolved with regard to all the available evidence, rather than simply on the basis of the form of words contained in an agreement. In fact, by the time the matter came before us, the Respondent had accepted that the Complainant had engaged or appointed him and/or his firm in his capacity as a lawyer for the purpose of recovering compensation on the Complainant's behalf [note: 5] and by his admission to the charge he accepted that he was and remains bound by and subject to the Act and to any applicable rules of conduct.

12 In October 2009, the Complainant, her mother, her sister and the Respondent flew to Australia to meet with and engage solicitors there. The Respondent paid the cost of the flights for all of them except for the Complainant's sister. On 23 November 2009, the Complainant appointed Creevey Russell Lawyers ("Creevey Russell") to act for her in Queensland on a speculative fee basis, which is permitted there. [note: 6] An action was commenced against the insurers of the vehicle in question and a barrister was briefed. The Respondent continued to act on the Complainant's behalf by obtaining medical and other expert reports and sending these to the lawyers in Australia. The parties negotiated a settlement and an offer was sent on 23 March 2011 to the Respondent and the Complainant, and this was accepted on 28 March 2011. [note: 7]

13 On 31 May 2011, Creevey Russell sent to the Complainant and the Respondent a tax invoice for A$81,567.43 in respect of the work the firm had done on the claim plus disbursements and applicable taxes. [note: 8] Consequent to the negotiated settlement, a release and discharge agreement ("the Settlement Agreement") was signed by the Complainant on 27 June 2011 [note: 9] and also by the Respondent as a witness. Next to his signature, the Respondent affixed a stamp with his name and designation as an Advocate and Solicitor. The Complainant's lawyers had done well. The total settlement sum ("the Settlement Sum") was A$3,250,000. The Respondent, who thought he stood to get 40% of this recovery, plainly thought he had done exceedingly well for himself. For a relatively modest outlay of time and money, he was looking to recover a sum of around A$1,200,000.

14 In early July 2011, the Respondent spoke with the Complainant over the telephone. He invited her to open a joint bank account in both their names for the purpose of holding the Settlement Sum. The Respondent said that he would withdraw his name from the account once he had received his 40% share of the Settlement Sum. The Complainant discussed the Respondent's request with her mother and then decided that she would not accede to it. On 18 July 2011, Creevey Russell informed the Complainant's mother that certain documents dated 31 May 2011 needed to be signed by the Complainant so that the Settlement Sum could be transferred from the insurer to Creevey Russell's

trust account in Australia and from there to a bank account to be nominated by the Complainant. The Complainant's mother then realised that the documents had been dispatched earlier by Creevey Russell to the Respondent and that he had retained them. On 28 July 2011 she spoke to the Respondent and asked him about this, and it was only then that he forwarded the documents to her.

15 A meeting was held shortly after this on 30 July 2011. This was attended by the Complainant, her mother, her sister, the Respondent and the Respondent's wife. According to the minutes of the meeting [note: 10] prepared by the Complainant's sister immediately after the meeting, [note: 11] the Respondent had asked the Complainant to issue a letter authorising her bank to transfer to his account a sum of A$1,200,000, being his share of the Settlement Sum after the applicable deductions. He said that he would sue the Complainant if she did not agree to this or if he did not receive what he considered was his due. He also said that the Settlement Sum would remain in Creevey Russell's trust account and would not be paid out to the Complainant until these arrangements had been made for him to be paid.

16 On 10 August 2011, a sum of A$3,136,727.57 representing the Settlement Sum less Creevey Russell's fees, other applicable deductions and the cost of the transfer was paid into an account belonging to the Complainant. On 26 August 2011, the Respondent sent an e-mail to the Complainant in which he referred to the meeting of 30 July 2011 and then set out the following: [note: 12]

(a) He stated that according to the Champertous Agreement he was to share in the sum recovered by the Complainant in the proportion stated there and added that it had been agreed that he was to act in his personal capacity;

(b) He alleged that the Complainant had made a prior claim for the same incident from insurers in Singapore. As a result, the Settlement Agreement might be invalidated in which case the Complainant would be responsible for legal fees and disbursements.

(c) He said that he would institute proceedings in Australia for his fees and mentioned that she could end up facing a criminal charge of cheating notwithstanding that the benefits were obtained overseas.

(d) Finally, he said he would "proceed with the necessary action without further reference" to the Complainant if he did not hear from her within eight days.

17 On 9 October 2011, the Respondent issued under his firm's letterhead his bill of professional costs in connection with the Complainant's claim. The bill, which was sent to Creevey Russell, was for S$138,550 in respect of professional costs charged at S$500 an hour and a further sum for expenses and disbursements giving a total amount of S$156,487, or A$123,599. [note: 13] By this time, Creevey Russell was not in a position to pay this since the firm had already disbursed the Settlement Sum, less its own fees and disbursements, to the Complainant. In the meantime, on 21 October 2011, the Respondent sent an e-mail to the Complainant pressing for payment of his share of the Settlement Sum. On 26 October 2011, the Respondent again e-mailed the Complainant and her mother and set a deadline of 5 pm on 3 November 2011 for the transfer of funds to be made, failing which he said that he would "proceed in the manner I deem fit". On 27 October 2011, the Complainant, having obtained independent legal advice, made a complaint under s 85(1) of the Act against the Respondent.

Findings of the Inquiry Committee

18 An Inquiry Committee was constituted and heard the matter on 8 and 15 March 2012. The fact

of the Champertous Agreement was not disputed, but the Respondent's defence was that he had been assisting the Complainant in his personal capacity and not as an Advocate and Solicitor. On this basis, he argued that s 107 of the Act and r 37 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("the Professional Conduct Rules") did not apply to him or to his retainer by the Complainant.

19 The Inquiry Committee did not accept this defence. In its report dated 26 March 2013 [note: 14] it found that there was clear evidence that the Respondent had breached the Act in carrying out work as an Advocate and Solicitor pursuant to the Champertous Agreement, as seen in the following facts.

(a) The second Warrant to Act executed on the same day as the Champertous Agreement was a document normally used for the engagement of Advocates and Solicitors. It recited that the Respondent's firm and not the Respondent in his personal capacity had been engaged to act for the Complainant. (It may be noted in passing that this was a wholly meaningless distinction.)

(b) This Warrant to Act was drafted by the Respondent himself and stated that his firm was to represent the Complainant in its capacity as a firm of Advocates and Solicitors. The firm was only registered in Singapore and it could not possibly have acted in Queensland. It followed that the Respondent's firm could only be acting in its capacity as a firm of Singapore lawyers.

(c) The Warrant to Act included terms such as party and party costs which were normally associated with the engagement of a law firm and it was worded in much the same way as a separate Warrant to Act which the Complainant had signed for the separate purpose of engaging the Respondent to act for her as her Advocate and Solicitor in respect of divorce proceedings in Singapore.

(d) The bill of costs showed that the Respondent had acted throughout in his professional capacity as it was drafted under his firm's letterhead and only identified him as an Advocate and Solicitor and not as a solicitor of Queensland. The bill was for professional charges and much of it related to work done in Singapore, as a Singapore lawyer.

(e) Creevey Russell and not the Respondent had been engaged by the Complainant to represent her in Australia and the firm was paid and instructed by her. The Respondent continued to act for the Complainant after Creevey Russell had been engaged, but in this regard he served essentially as a middleman.

20 The Inquiry Committee also held that an Advocate and Solicitor could not evade the provisions of s 107 simply by asserting that he was acting in his personal capacity. Accordingly, it referred the matter for a formal investigation by a Disciplinary Tribunal.

21 The Inquiry Committee did note the following mitigating factors:

(a) The Respondent assisted the Claimant to obtain a much larger payout than she had initially expected;

(b) He had agreed to bear the costs of the proceedings (including disbursements) without any recourse to the Complainant in the event the claim failed;

(c) He expressed genuine regret for his actions during the hearing before the Inquiry Committee; and

(d) The Complainant admitted that she understood the terms of the Champertous Agreement and had entered into it willingly. Her reason for not honouring it was simply that she did not expect to have to pay the Respondent so much money.

Findings of the Disciplinary Tribunal

22 A Disciplinary Tribunal was constituted which heard the matter on 15 October 2012. Two charges each with an alternative were initially preferred against the Respondent. In the event only the second charge ("the Second Charge") was proceeded with. That reads:

> You, Kurubalan s/o Manickam Rengaraju, are charged that on or about 24 April 2006, you did enter into an agreement with the Complainant by which you were retained or employed to prosecute a suit, action or contentious proceeding in respect of injuries sustained by the Complainant in a motor-vehicle incident on 5 July 2003 which stipulated for or contemplated payment only in the event of success in that suit, action or proceeding which payment would amount to 30% of the proceeds if the Complainant received less than AUD$300,000.00 or 40% of the proceeds if the Complainant received AUD$300,000.00 or more, and such actions by you are in breach of Section 107(1)(b) read with Section 107(3) of the Legal Profession Act (Chapter 161) and amount to grossly improper conduct in the discharge of your professional duty within the meaning of Section 83(2)(b) of the Legal Profession Act (Chapter 161).

23 A statement of facts was agreed and at the hearing the Respondent pleaded guilty to the Second Charge. The Disciplinary Tribunal found that there was cause of sufficient gravity for disciplinary action under s 83(2) of the Act and ordered costs against the Respondent to be taxed if not agreed. [note: 15] The matter proceeded to be heard before us and the sole issue, as we have said, was that of the appropriate sanction that should be imposed in the circumstances.

The Law Society's case

24 Counsel for the Law Society, Mr Philip Fong Yeng Fatt ("Mr Philip Fong"), accepted that the two previous local decisions concerning disciplinary proceedings arising out of champertous arrangements were dated and hence of limited use or relevance. In *Law Society v Chan Chow Wang* [1974–1976] SLR(R) 237 ("*Chan Chow Wang*") and *Lau Liat Meng v Disciplinary Committee* [1965–1967] SLR(R) 641 ("*Lau Liat Meng*"), the offending solicitors had been struck off. The later of these cases was disposed of more than 35 years ago. Having regard to the evolving considerations in this area, the Law Society did not seek the striking off of the Respondent. Instead reliance was placed on both cases for the proposition that champertous agreements remain egregious and reprehensible and those who enter into them should be punished severely. In the event, the Law Society sought that the Respondent be suspended from practice for a period of 12 months.

25 The Law Society submitted that for the purposes of establishing an appropriate benchmark, the Respondent's offence could be compared to that of overcharging. It was emphasised upon us that on the facts of this case, the Respondent stood to gain more than ten times what he could possibly have billed in the normal way in respect of professional fees. As to the appropriate length of suspension, the Law Society said this should be substantial because the Respondent had "audaciously entered" into the Champertous Agreement and had taken deliberate, even dishonest, steps to enforce it. He had withheld important documents from his client and had also refused to submit his bill in a misguided attempt to delay the final computation of the Settlement Sum, hoping that in the process the Complainant would come round and meet his demands. The Law Society pointed to the following factors which it contended aggravated the offence in this case:

(a) The Champertous Agreement was drafted with the manifest aim of circumventing the prohibitions contained in the Act by devising a structure that purported to take this engagement outside the scope of the Respondent's responsibilities as an Advocate and Solicitor;

(b) The Respondent's 40% share of the Settlement Sum was a much higher proportion and as it turned out, a far larger sum, than was involved in either *Chan Chow Wang* or *Lau Liat Meng*;

(c) The Respondent took deliberate steps to enforce the Champertous Agreement:

(i) For two months he had tried to delay the payment of the Settlement Sum by withholding essential documents from the Complainant;

(ii) He repeatedly asked the Complainant to open a joint bank account with him to enable the Settlement Sum to be deposited there;

(iii) He did not respond for some months to Creevey Russell's requests for him to provide details of his professional bill, again with the objective of delaying the final computation and payment to the Complainant of the Settlement Sum;

(iv) He persistently and aggressively demanded his share of the Settlement Sum from the Complainant; and

(v) He accused the Complainant of cheating and in effect threatened her with criminal proceedings.

(d) He pleaded guilty just a little over a week before the Disciplinary Tribunal hearing and had not shown real remorse.

26 The Law Society said that while the Respondent had not been paid his professional fees and disbursements, this was not to be taken as a mitigating factor because he could have been paid any amount properly due to him had he submitted a bill in a timely manner. This he had not done because he wanted to delay the conclusion of the matter and also because he did not wish to reveal to the Complainant the fact that under the Champertous Agreement, he stood to gain more than ten times the amount he otherwise would reasonably have been able to bill for his professional fee.

27 In oral submissions before us, Mr Philip Fong further argued that champertous agreements carried some inherent risks: they did not ultimately guarantee greater access to justice because lawyers would tend to cherry pick the strongest claims since they would be investing their time and money and faced uncertain prospects of recovery. Moreover, it could also have the adverse effect of driving up insurance premiums, as has apparently been the experience in the United Kingdom after solicitors there were allowed to enter into conditional fee agreements, and this in turn could tend to raise legal costs generally. Mr Philip Fong also observed that a perverse consequence of these arrangements is that those who are forced to rely on legal services being provided on conditional terms tend to be the poor and, where they have good claims, they end up paying much more for identical services than the wealthy, who are able to afford legal services charged on a conventional basis.

The Respondent's case

28 Counsel for the Respondent, Mr Chelva R Rajah, SC ("Mr Rajah") accepted that the appropriate sanction in these circumstances should be a suspension but he submitted that it should be for a

shorter duration of between three and six months. He submitted that the Respondent had not admitted to any fraudulent or dishonest conduct and further, there had been no finding of dishonesty. No allegation of dishonest conduct had been raised below, and so the Disciplinary Tribunal had neither inquired into it nor made any such finding. It was unfair in the circumstances to spring on the Respondent the suggestion of dishonest conduct at this stage of the proceedings. Moreover, while the relevant part of s 83(2)(*b*) of the Act reads "fraudulent or grossly improper conduct", the Respondent had been charged only under the limb of "grossly improper" conduct and not under that of "fraudulent" conduct.

29 Mr Rajah also argued that champerty has lost much of its moral reprehensibility. To begin with, the prohibition was rooted in considerations of public policy rather than in any inherent immorality. Mr Rajah argued that modern public policy emphasised access to justice and the prevailing trend, at least elsewhere, has been to permit certain species of champertous agreements with this objective. For instance, England and parts of Australia have reformed their laws to permit conditional fee agreements. Indeed (though neither counsel drew this to our attention) just days before we heard the arguments in this matter, Lord Neuberger, President of the Supreme Court of the United Kingdom, had delivered the first Harbour Litigation Funding Annual Lecture entitled "From Barretry, Maintenance and Champerty to Litigation Funding", in which he touched on some of these issues.

30 Mr Rajah pointed to official pronouncements in Parliament as evidence that Singapore too was concerned with the need to preserve access to justice for those unable to afford legal representation but who, at the same time, were unable to qualify for legal aid. Mr Rajah further relied on the fact that in the present case, the Champertous Agreement did not pervert the course of justice in Singapore at all. On the contrary, it was likely that if the Complainant had not entered into the Champertous Agreement, she would not have been able to mount a claim in Australia as she could not otherwise have afforded the expense. The Champertous Agreement was therefore the key factor that enabled the Complainant actually to recover compensation for her injuries. In that sense, according to Mr Rajah, the Respondent had in fact enabled the Complainant to access justice.

31 We were also urged to have regard to the mitigating factors which the Inquiry Committee had recognised and which we have set out (at [21] above).

32 Mr Rajah accepted that because the Champertous Agreement was akin to a financial gamble on the likely outcome of the Complainant's claim and because of the potential for abuse manifested in the Respondent's conduct to which we have referred (at [25(c)] above), a fine alone would not be an appropriate sanction. Mr Rajah submitted that a suspension from practice for a period of between three and six months would be appropriate. He observed that this would be comparable to the suspension of three months imposed by this court in *Law Society of Singapore v Ang Chin Peng and another* [2013] 1 SLR 946, a case of gross overcharging where the respondents had made misrepresentations to their clients and where their conduct was found to have bordered on dishonesty.

Our Decision

Liability

33 The Second Charge was for a breach of s 107(1)(*b*) read with s 107(3) of the Act. These provisions read as follows:

> **Prohibition of certain stipulations**

107.—(1) No solicitor shall —

(*a*) purchase or agree to purchase the interest or any part of the interest of his client or of any party in any suit, action or other contentious proceeding brought or to be brought or maintained; or

(*b*) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding.

...

(3) A solicitor shall, notwithstanding any provision of this Act, be subject to the law of maintenance and champerty like any other person.

34 In a similar vein, r 37 of the Professional Conduct Rules states:

Contingency fees prohibited

37. An advocate and solicitor shall not enter into any negotiations with a client —

(a) for an interest in the subject matter of litigation; or

(b) except to the extent permitted by any scale of costs which may be applicable, for remuneration proportionate to the amount which may be recovered by the client in the proceedings.

(The Respondent had initially also been charged with a breach of r 37 but this was not proceeded with before the Disciplinary Tribunal.)

35 Having heard the parties' submissions, we agreed that s 107 of the Act and r 37 of the Professional Conduct Rules had been breached and that the Respondent had correctly admitted his liability. The rules that proscribe champertous agreements are provided for in our legislation and these can only be changed by Parliament. Whatever the policy considerations may be that affect the desirability or otherwise of permitting champertous agreements, until and unless these rules are legislatively changed, they contain express prohibitions. The transgression of these rules remains serious and is to be dealt with accordingly. In the circumstances, it was not surprising that both parties accepted that a period of suspension would be appropriate and in our judgment, that would be the normal starting point for cases of this sort. On the facts here, we were presented with a range of between three and twelve months. In the absence of any direct guidance as to where in this range this case falls, we reason this from first principles.

General principles of sentencing

36 We begin with the general sentencing principles set out in *Law Society of Singapore v Ong Lilian* [2005] SGHC 187 at [9]:

This court had in numerous cases declared that the disciplinary powers under s 83 of the LPA serve three distinct objects ... The first is to punish the errant solicitor for his misconduct. The second is to deter other like-minded solicitors from similar defaults in the future. The third is to protect public confidence in the administration of justice.

37 The following passage from *Law Society of Singapore v Ravindra Samuel* [1999] 1 SLR(R) 266 ("*Ravindra Samuel*") at [11]–[13] is also instructive:

> 11 It is convenient at this point to examine the principles to be applied in deciding what orders should be made. It is not simply a question of punishing the solicitor concerned. A further consideration must be what course should the court take to protect the public and to register its disapproval of the conduct of the solicitor. In the relevant sense, the protection of the public is not confined to the protection of the public against further default by the solicitor in question. It extends also to the protection of the public against similar defaults by other solicitors through the court publicly marking the seriousness of what the instant solicitor has done. The orders made must therefore accord with the seriousness of the default and leave no doubt as to the standards to be observed by other practitioners. In short, the orders made should not only have a punitive, but also a deterrent effect.
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> 12 There are also the interests of the honourable profession to which the solicitor belongs, and those of the courts themselves, to consider. The administration of justice can only proceed on the basis that solicitors can place reliance upon the honesty of the solicitors with whom they deal. The public too must be able to repose confidence in a profession which plays so indispensable a part in the administration of justice. Similarly, the courts of this country must be able to depend on the honesty and integrity of all practitioners appearing before them and to expect that they will maintain the highest standards of personal honesty and integrity in their dealings with the courts.
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> 13 There is therefore a serious responsibility on the court, a duty to itself, to the rest of the profession and to the whole of the community, to be careful not to accredit any person as worthy of public confidence and therefore fit to practise as an advocate and solicitor who cannot satisfactorily establish his right to those credentials. In the end therefore, the question to be determined is whether the solicitor in question is a fit and proper person to be an advocate and solicitor of the court, and the orders to be made are to be directed to ensuring that, to the extent that he is not, his practice is restricted.

38 In *Ravindra Samuel* at [15] it was further said that "where a solicitor has acted dishonestly, the court will order that he be struck off the roll of solicitors".

The rationale for s 107 of the Act

39 In our view, the actions of the Respondent were undoubtedly improper and fell well short of the standard of behaviour to be expected of Advocates and Solicitors; but these actions did not amount to dishonesty by the standards of ordinary and reasonable men: see *Twinsectra Ltd v Yardley* [2002] UKHL 12 at [30], applied in *Bultitude v The Law Society* [2004] EWCA Civ 1853 at [32]. The Respondent did not admit to dishonesty and there was no finding that he had in fact acted dishonestly.

40 The case before us is thus not one that concerned dishonesty. How then are these interests of punishment, deterrence and the protection of public confidence in the administration of justice to be sufficiently upheld by means of a suitable sanction? To answer this, it is necessary first to examine the nature of the offence. Maintenance is defined as officious intermeddling in litigation (see *Hill v Archbold* [1968] 1 QB 686 at 693) and champerty is a particular form of maintenance "where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action": *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another* [2007] 1 SLR(R) 989 ("*Otech Pakistan*") at [32]. The origins of the offence of

champerty are traceable to medieval times, [note: 16] but the public policy implicated by it might have evolved somewhat since then. In *Giles v Thompson* [1994] 1 AC 142 ("*Giles*"), Lord Mustill surveyed the development of the law and observed as follows (at 153):

> The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided an invaluable external discipline to which, as the records show, recourse was often required.
>
> As the centuries passed the courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation. In the most recent decades of the present century maintenance and champerty have become almost invisible in both their criminal and their tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a "bare right of action." The former survives nowadays, so far as it survives at all, largely as a rule of professional conduct, and the latter is in my opinion best treated as having achieved an independent life of its own.

41 In the context of professional conduct, the traditional rule was stated thus by Lord Denning MR in *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 at 393:

> English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a "contingency fee" that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. In its origin champerty was a division of the proceeds (campi partitio). An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty. Even if he was not to receive an actual share, but payment of a commission on a sum proportioned to the amount recovered — only if he won — it was also regarded as champerty: see *In re Attorneys and Solicitors Act* 1870 (1875) 1 Ch.D. 573, 575, *per* Sir George Jessel M.R. and in *Re A Solicitor, Ex parte Law Society* [1912] 1 K.B. 302. Even if the sum was not a proportion of the amount recovered, but a specific sum or advantage which was to be received if he won but not if he lost, that too, was unlawful: see *Pittman v. Prudential Deposit Bank Ltd.* (1896) 13 T.L.R. 110, *per* Lord Esher MR. It mattered not whether the sum to be received was to be his sole remuneration, or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost.

42 The traditional rationale was that such arrangements would tempt the champertous maintainer to subvert the course of justice. As Lord Denning MR observed *In Re Trepca Mines (No 2)* [1962] 3 WLR 955 ("*Re Trepca Mines*") at 966:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty

to be unlawful, and we cannot do otherwise than enforce the law, and I may observe that it has received statutory support, in the case of solicitors, in section 65 of the Solicitors Act, 1957.

43 While it may be true that there is less need to be sensitive to the concern that the "mechanisms of justice" might be vulnerable to the devices of "unscrupulous men of power" (see [40] above), it remains a fact that a lawyer who has a personal economic stake in the litigation and is not otherwise being remunerated for his services faces a potential and often acute conflict of interest. This was the point made by Lord Denning MR in the passage we cited from *Re Trepca Mines* (see [42] above) and it was reiterated by Millett LJ in *Thai Trading (A Firm) v Taylor & Anor* [1998] EWCA Civ 370 at [28] as follows:

> ... if it is contrary to public policy for a lawyer to have a financial interest in the outcome of a suit, this is because (and only because) of the temptations to which it exposes him. At best he may lose his professional objectivity; at worst he may be persuaded to attempt to pervert the course of justice.

44 Similarly, Professor Pinsler SC (Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007)) has noted (at para 13-030) that the rationale for s 107 of the Act and r 37 of the Professional Conduct Rules lay in:

> ... the conventional wisdom that the advocate and solicitor must maintain his independent and professional standing (unaffected by any personal interest in the outcome of the matter) in order to be able to act effectively in representing his client's interests.

45 In our view, one of the key elements in effectively representing a client's interest is the ability of the lawyer to maintain a sufficient sense of detachment so as to be able to discharge his duty to the court. That duty is ultimately paramount and trumps all other duties. It follows that the considerations most engaged by the offence of champerty are those concerning the administration of justice and the related need to safeguard confidence in and the honour of the profession that is tasked with the vital role of assisting the judiciary in their mission: see *Ravindra Samuel* at [12]. But these are not static principles; with the passage of time comes a better understanding of how these should be appreciated and weighed with new considerations. As Dixon J pointed out in *Stevens v Keogh* (1946) 72 CLR 1 at 28:

> The law of maintenance is founded not so much on general principles of right and wrong or of natural justice as on considerations of public policy (*per* Lord Esher): *Alabaster v Harness* [1895] 1 QB 339. Notions of public policy are not fixed but vary according to the state and development of society and conditions of life in a community. The exceptions or justifications which allow a person or body of persons to maintain a litigant in a suit do not form a closed category.

46 There is an emerging trend in some jurisdictions towards recognising that champertous fee agreements properly regulated can help indigent litigants gain access to justice. As Lord Phillips of Worth Matravers noted in *R (Factortame Ltd) v Transport Secretary (No 8)* [2003] 1 QB 381 (at 408):

> Conditional fees are now permitted in order to give effect to another facet of public policy – the desirability of access to justice. Conditional fees are designed to ensure that those who do not have the resources to fund advocacy or litigation services should none the less be able to obtain these in support [of] claims which appear to have merit.

So too, in Singapore, has there been some push to reform the law in this direction. But we reiterate

two points: first, it is for Parliament, rather than the courts, to decide whether and when such a reform is to be undertaken; and second, any such reform would almost certainly feature carefully drawn parameters that regulate the extent to which such fee arrangements would be permitted and this makes it a subject more suited for the legislature rather than for the courts to develop.

Aggravating factors

47 We return to the facts of the case. It is helpful first to frame the proper context in which mitigating or aggravating factors may affect the balance of considerations that are relevant to sentencing in disciplinary proceedings.

48 A court that exercises disciplinary jurisdiction is likely to view mitigating factors in a qualitatively different light than would a court in the exercise of its criminal jurisdiction: see *Law Society of Singapore v Tham Yu Xian Rick* [1999] 3 SLR(R) 68 at [22]:

> Because orders made by a disciplinary tribunal are not primarily punitive, considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of the disciplinary jurisdiction than on sentences imposed in criminal cases: *Bolton v Law Society* [[1994] 2 All ER 486] at 492. To state the matter another way, whatever might have been the appropriate sentence in the criminal proceedings, the objective there was rather different from that in show cause proceedings, which are civil and not punitive in nature.

49 The point simply is that even if a mitigating circumstance might be found that could weaken the case for *punishment* in a criminal case, this circumstance may often not avail an Advocate and Solicitor in disciplinary proceedings because an equally, if not more, important consideration is the protection of public confidence in the administration of justice. This interest can legitimately trump the individual offender's interest in having his punishment finely calibrated according to his precise degree of culpability. Where aggravating factors are concerned, there is usually less need to draw this distinction since a factor that aggravates the offender's particular culpability would generally tend also to aggravate the adverse impact on confidence in the administration of justice, although there may be exceptions to this.

50 With this in mind, we found that there were two factors that aggravated the gravity of the Respondent's misconduct. The first was that this was not a case where the Respondent had fallen innocently into error. The terms of the Champertous Agreement and the accompanying acknowledgement (see [8] and [9] above) show that the Respondent was fully aware that what he was doing was wrong and impermissible by the standards applicable to an Advocate and Solicitor. Indeed the documents were drafted precisely so as to afford him a platform from which he could attempt to evade liability by claiming that he was acting only in his personal capacity. The fact that this attempt was ill-conceived and that he did not succeed in this endeavour is immaterial. What is relevant is the calculated and deliberate attempt to circumvent the prohibition.

51 It was also clear from the evidence that the Respondent, throughout the material period of time, had in fact held himself out as the Complainant's legal advisor. Therefore any attempt on his part to contend that he was not in truth acting as an Advocate and Solicitor was bound to fail. From the outset, he had arranged for the Complainant to execute a Warrant to Act which was drafted in terms similar to those on which Advocates and Solicitors are usually retained. Moreover, he had written to Creevey Russell as well as other parties in the proceedings numerous times on his firm's letterhead and referred to the Complainant as his client. [note: 17] He eventually also produced a bill of costs for his professional charges. Finally, although he had ample opportunity to set the record straight that he had not been acting as an Advocate and Solicitor, he never in fact did so. To the

very end, Creevey Russell remained under the impression that Respondent was the Complainant's Singapore solicitor and after the Settlement Agreement, the firm emailed him on 27 July 2011 to seek details of his professional costs and fees. [note: 18] These were all inconsistent with the Respondent's attempted defence that he had genuinely acted in his personal capacity and in our judgment, underscore the fact that the attempt to suggest the contrary in the Champertous Agreement was nothing more than a cynical and dishonourable attempt to evade the prohibition which the Respondent fully appreciated applied to him.

52 The second aggravating factor was that when the Complainant resisted paying the Respondent the share of the Settlement Sum to which he had laid claim, the Respondent did not acknowledge his mistake or even pause for reflection, much less retreat and come to his senses. Instead he responded aggressively (see [14] to [16] and [25(c)] above) and in the process aggravated his initial breach. We do not propose to repeat what we have already set out above, save to observe that the Respondent threatened civil proceedings [note: 19] and even hinted that *criminal charges* could be brought (see [16(c)] and [25(c)(v)] above). We pause to note that this by itself might have amounted to professional misconduct: see *Law Society of Singapore v Terence Tan Bian Chye* [2007] SGDSC 10. In our view, even if these further actions did not warrant separate misconduct charges, they were at the very least unbecoming of an Advocate and Solicitor and wholly unacceptable in the context of a solicitor dealing with his client. They illustrate some of the reasons why champerty can be an obnoxious and unacceptable practice without careful limits being drawn. The evil lies in the temptation facing Advocates and Solicitors who enter into such agreements to descend into wholly inappropriate and unprofessional conduct in order to protect their own interest in windfall gains. This was evident in the Respondent's conduct in this case.

53 The Law Society initially made reference to cases of overcharging and touting and suggested that these provided appropriate reference points for the purposes of sentencing because the Respondent stood to gain A$1,200,000 which was at least ten times what he could have charged for his fees based on the bill of costs that was rendered, which itself seemed on the high side. In oral submissions, Mr Philip Fong sensibly did not press this argument. Champerty has little in common with the offence of overcharging except in so far as both arise out of or concern arrangements having to do with a solicitor's remuneration.

Mitigating factors

54 A number of mitigating factors were raised that might conduce to leniency. Those that weighed on the Inquiry Committee have been noted (at [21] above).

55 However, in our judgment, these were not relevant mitigating circumstances. While it is true that the Complainant obtained a substantial payout that far exceeded her initial expectation which was in the region of A$300,000, it was not evident how any inspiration on the Respondent's part contributed to this result. The essence of the Respondent's assistance consisted of his having enabled the Complainant to kick-start the process of pursuing her claim in Australia and in that sense actually to access justice. Once the process was begun, the bulk of the legal work was in fact carried out by Creevey Russell. In this regard, we accepted that the Complainant's medical bills were substantial and without the Respondent's help it was unlikely that she could have afforded to seek and eventually to find a suitable set of lawyers willing to act on a speculative fee basis to bring the claim in Australia. This was a particular concern in this case as it was feared that her claim might be time-barred and this rendered her prospects of success much less certain. But as against this, it may be noted that this may be said to be true to some degree in almost all champertous cases. Given the existing prohibition on such arrangements, this can have only limited weight in the balancing of factors that go to sentencing. Moreover, it was not the case that the Respondent was motivated

exclusively, or even substantially, by the purely altruistic concern of ensuring that his client was able to pursue her claim. He was in it very much for his own eventual gain as seen in his unseemly efforts to pocket the huge, unexpected windfall in the face of his client's protests.

56 It is true that his client made the complaint against the Respondent despite having known full well the nature of the Champertous Agreement at the time it was entered into and despite having benefitted from his advice and assistance (including his financial outlay of around S$16,000 for disbursements that remain unpaid to this day). But this was of no real weight since it ignored the Respondent's aggression and persistence in trying to lay claim to a substantial part of the damages the Complainant had recovered. Moreover, to place emphasis on this would be to focus unduly on the seemingly unsatisfactory aspects of the Complainant's behaviour rather than on anything that exculpated the Respondent.

57 As to the Respondent's expression of remorse, we did not think that this was made out on the admitted facts. Some indications of remorse were set out by V K Rajah J (as he then was) in *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653 at [76]:

> As such, the perception that the offence was not committed wilfully but rather on the spur of the moment, by accident or through foolish neglect, the fact that the offender offers restitution or attempts to rectify the situation after being apprised of his offence, the rapidity with which he offers restitution or takes remedial steps, and the willingness of the offender in co-operating with the relevant authorities all constitute ambient circumstances that a court can and should take into account in assessing whether the plea of guilt itself is indicative of remorse and if the offender should accordingly receive a discount in his sentence.

58 These indicia were not present here; we have discussed at some length the Respondent's improper behaviour to secure the windfall to which he thought he was entitled and we did not think such behaviour could be regarded as demonstrative of remorse even taking into account the Respondent's plea of guilt before the Disciplinary Tribunal.

59 But aside from these considerations, one issue that did feature prominently in the oral arguments was the significance of the fact that the Champertous Agreement was an agreement in respect of litigation in Queensland and not one in respect of litigation here. Section 325(1) of the Queensland Legal Profession Act 2007 states:

> A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

There is thus a prohibition on such arrangements in Queensland. However, the maximum penalty is stated to be 100 penalty units which at a rate of A$75 per unit points to a maximum fine of A$7,500. It thus appeared that if a Queensland solicitor had entered into a fee agreement such as the Champertous Agreement for the purposes of litigation in Queensland, he or she would have faced a relatively minor fine. Mr Rajah argued that in these circumstances, a more lenient view should be taken of the Respondent's conduct especially since there was little basis to contend that Singapore's public policy had been engaged in this case: no proceedings were contemplated here and there was therefore never a risk of any affront to the administration of justice in Singapore.

60 In our judgment, champertous conduct does not cease to be wrong even where the litigation in question proceeds in a foreign court. The following passage from *Otech Pakistan* at [38] is instructive:

> The law of champerty stems from public policy considerations that apply to all types of legal disputes and claims, whether the parties have chosen to use the court process to enforce their claims or have resorted to a private dispute resolution system like arbitration. ... It would be absurd, in our judgment, to condone behaviour of this kind by saying that it was permitted because the parties were looking to resolve their dispute by way of arbitration instead of in the courts. We must reiterate that the principles behind the doctrine of champerty are general principles and must apply to whatever mode of proceedings is chosen for the resolution of a claim.

Otech Pakistan had to do with the enforceability of a success fee agreement between commercial parties in the context of arbitral proceedings, but this does not detract from the relevance of the passage cited above.

61 On the other hand, recognising that this is a rule rooted in public policy, it becomes necessary for us to consider whether, for the purposes of sentencing, the same considerations of public policy apply with equal force where the conduct in question has limited bearing on the administration of justice in this country and where the jurisdiction that is directly affected either regards that conduct as legitimate and acceptable, or, as is the case here, seemingly as only modestly offensive. In a number of common law jurisdictions and in some areas of transnational legal practice including in arbitration, certain kinds of agreements previously regarded as champertous are no longer proscribed.

62 In the United Kingdom, champerty and maintenance were decriminalised in 1967. [note: 20] The general principle in English law thereafter was that champertous agreements would nonetheless remain unenforceable except where expressly permitted by the Courts and Legal Services Act 1990. Over time, the situation has evolved. Initially, only agreements under which the lawyer would receive his normal or an enhanced fee if he won and nothing or less than the usual fee if he lost were permitted. In these instances, any enhancement had to be expressed as a percentage of the normal fee that would have been charged had there been no such agreement. These agreements were known as conditional fee agreements and the uplift was called a success fee. As a result of subsequent changes, contingency fee agreements also known as "damages-based agreements" allowing the lawyer to receive a percentage of the claim if successful were permitted. Under these arrangements, the permitted percentage of the recovery which the lawyer may receive is capped depending on the type of claim: 50% in commercial claims, 35% in employment claims and 25% in personal injury claims. In such cases, the lawyer virtually becomes a joint venture partner of the client in the prosecution of the claim.

63 In Australia, the states of Victoria, South Australia, New South Wales and Queensland have all decriminalised champerty. Conditional fee agreements have since been permitted in some states: see for example ss 323 and 324 of Queensland's Legal Profession Act 2007. However, outright contingency fees or damages-based agreements remain largely prohibited in the Australian states: see s 325 of Queensland's Legal Profession Act 2007, s 285 of the Australian Capital Territory's Legal Profession Act 2006 and s 325 of New South Wales' Legal Profession Act 2004.

64 As we have already observed, our rules have not changed in the same way. But what is the position where an Advocate and Solicitor of Singapore is engaged in his professional capacity and provides legal services pertaining to a claim in a jurisdiction which takes a different view to our own on this issue?

65 Where a practitioner is dual qualified in Singapore and in the foreign jurisdiction where the claim in question is brought, it will be necessary first to ascertain whether in fact and in substance the practitioner was engaged *qua* an Advocate and Solicitor or in his capacity as a foreign practitioner.

Were the latter the case, it is likely that his conduct would fall to be considered against the regulatory framework applicable to him in that capacity. This is consistent with the views of this court in *Re Linus Joseph* [1990] 2 SLR(R) 12. The respondent there was qualified both in Singapore and Brunei and the issue was whether the words "guilty of fraudulent or grossly improper misconduct in the discharge of his professional duty" under s 80(2)(*b*) of the Legal Profession Act (Cap 161, 1985 Rev Ed) (now s 83(2)(*b*) of the Act) also referred to misconduct committed in his capacity as a Brunei solicitor. Chan Sek Keong J (as he then was) delivering the judgment of the court said they did not (at [19]):

> These words are intended to and can only refer to the discharge of his professional duty in his capacity as an advocate and solicitor of the Supreme Court of Singapore and not in some other capacity. In their context, no other construction is possible. It follows that the locus of the misconduct is irrelevant so long as it is committed by a Singapore solicitor in discharge of his duty as a Singapore solicitor. The corollary of this is that where a Singapore solicitor is also qualified to practise as a solicitor in some other country, then any misconduct by him in the discharge of his professional duty as a foreign solicitor does not fall within the first limb of s 80(2)(*b*) even if the misconduct is committed in Singapore. However, it does not follow from this principle that the misconduct of such a solicitor does not subject him to disciplinary action under some other provision of the Act.

66 The legally significant factor is therefore whether the act in question was committed by a respondent in disciplinary proceedings in his capacity as an Advocate and Solicitor. But this is not always a straightforward issue and difficult questions can arise in this regard. It is not necessary for us to traverse those issues here because although there was some indication that the Respondent was once also admitted to practise in Queensland, there was ultimately no real dispute that on the facts presented he was engaged and acted as an Advocate and Solicitor. In such a case the practitioner is squarely bound by the rules of conduct applicable to Advocates and Solicitors. If this is the correct analysis for a practitioner who is dual qualified, then the position of an Advocate and Solicitor who is assisting a client in a foreign jurisdiction where he is not admitted at all cannot be any different. In such a case, his professional conduct can only be assessed against one regulatory framework, namely, ours.

67 These issues are not academic. Commercial litigation is increasingly cross-border in nature. This can be true also of tort claims, and the present case is just one example. In international arbitration, third party funding is a significant issue especially as it is largely unregulated as compared to the position of third party funders in the domestic sphere. The latter are generally regulated in those jurisdictions where they are permitted to operate.

68 But returning to what is directly relevant for our purposes, in our judgment, even if an Advocate and Solicitor is subject to our regulatory framework, it would be permissible and generally appropriate for the court also to have regard, for the purposes of sentencing, to the applicable public policy as reflected in the regulatory framework of the jurisdiction directly affected, at least where the champertous arrangement in question has little if any impact in Singapore. Having said this, we should note that this was not a case where the Champertous Agreement had *no* impact in Singapore. Mr Rajah, as we have noted, submitted that we should view the Respondent's position more favourably because his conduct did not interfere with the administration of justice here. To the extent that this submission was founded on the fact that there were no proceedings brought in this jurisdiction, it would be correct. But it must be appreciated that the Respondent was engaged in Singapore, by a Singaporean client, in his capacity as an Advocate and Solicitor, albeit this was in order to assist his client to bring proceedings abroad.

The appropriate sentence

69 In that light we return to the case at hand. We thought and both counsel agreed that the two local precedents, *Lau Liat Meng* and *Chan Chow Wang* were dated and of little assistance. In *Lau Liat Meng*, an Advocate and Solicitor ("Lau") acted for a father in a claim arising out of his son's death. Under the arrangement they reached, Lau was to receive 25% of damages recovered. He was found guilty of champerty and was struck off the rolls. The appeal to the Privy Council was allowed in part on grounds which are not relevant here but the conviction, for entering into a champertous fee agreement, stood, and the matter was remitted to the High Court to reconsider the sentence. As Lau was the subject of later disciplinary proceedings he was either not struck off the rolls in that instance or was subsequently reinstated but the eventual outcome was not made known to us. In *Chan Chow Wang*, the respondent ("Chan"), an Advocate and Solicitor, was charged with entering into an agreement to deduct S$10 for every S$100 in damages awarded in a personal injury action. There were two other charges for fraudulent conduct. In the event Chan was found guilty of all three charges and was struck off the rolls.

70 We did not find either case illuminating given the developments in public policy in the four decades or so that have passed since those decisions. Moreover, both cases were redolent of dishonesty which, as we have said, was not the case here.

71 We were referred to some foreign precedents. In the Victoria case of *Legal Services Commissioner v Barrett (Legal Practice)* [2012] VCAT 1800, the respondent ("Barrett") faced four charges of imposing a contingency fee in a personal injury case. Barrett was found guilty on all four charges and fined A$5,000 and ordered to pay A$5,000 in costs.

72 In the Queensland case of *In the Matter of Douglas Macleod Beames* (Case No SCT/114, unreported), [note: 21] the respondent ("Beames") faced six charges but only the second and fourth charges had to do with the making of contingency fee agreements and of these two charges only the fourth was proven on the facts, although it was accepted that the clients had the benefit of independent legal advice. Overall, four of the six charges were proven and Beames was struck off on the basis that the other charges as proven showed that he was not a fit and proper person to practise as a solicitor.

73 In the English case of *Solicitors Regulation Authority v Andrew Jonathan Crossley* (Case No 10726-2011, unreported), [note: 22] the errant solicitor ("Crossley") was found guilty of seven breaches of the Solicitors' Code of Conduct 2007. He had sent about 20,000 letters to people identified as having downloaded content over the Internet in breach of copyright. These letters threatened court action on behalf of a firm representing the copyright owners unless the recipients each paid £500 to settle the claim. As between Crossley and the copyright owners, there were agreements under which Crossley would share in varying percentages in the sums recovered from the recipients. These agreements were found to have breached rule 2.04 of the Solicitors Code of Conduct 2007 (now superseded) which prohibited solicitors from entering into an arrangement to receive a contingency fee in respect of contentious proceedings before a court of England and Wales. In the event, Crossley was suspended from practice for two years and ordered to pay costs.

74 In Hong Kong, champerty remains both a crime and a civil wrong and this position was affirmed in *Winnie Lo v HKSAR* [2012] HKCFA 23 ("*Winnie Lo*"). The appellant, a practicing solicitor, appealed against a conviction for conspiracy to commit maintenance in respect of her conduct of a personal injury action, for which she had been sentenced to 15 months' imprisonment. The Hong Kong Court of Final Appeal allowed the appeal because it found on the facts that the appellant did not know of the

champerty involved, which had been practised by a fellow defendant, a claims agent, who had entered into a champertous agreement with a claimant. The court found that the appellant had agreed to act without taking costs into account and was content to take her chances in obtaining her costs from the other side, but that this did not amount to champerty (at [113]).

75 In the subsequent criminal case of *HKSAR v Mui Kwok-keung* [2013] HKDC 424, the accused ("Mui"), then a practising barrister, was found guilty of five charges relating to champerty under section 101I of the Criminal Procedure Ordinance (Cap 221). He had made five agreements with various clients to be paid between 25% and 30% of the damages awarded on their claims and received in respect of four of the agreements a total of HK$1,629,750 from a combined award of HK$4,431,563 (he was not paid anything for the last agreement). Mui was sentenced to three and a half years' imprisonment.

76 Besides the criminal charges, Mui also faced disciplinary proceedings before the Hong Kong Bar Disciplinary Tribunal pursuant to four complaints. Section 64(1)(*b*) of the Legal Practitioners Ordinance (Cap 159) prohibits "any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding." Similarly, para 124 of the Hong Kong Bar Association Code of Conduct states that "a barrister may not accept a brief or instructions on terms that payment of fees shall depend upon or be related to a contingency". Of the four complaints faced by Mui, only the second complaint had to do with entering into a contingency fee agreement. In the event he was found guilty of three of the four complaints [note: 23] including the second complaint and was sentenced to six months' suspension for each complaint, [note: 24] but these were to run concurrently. Mui appealed but the appeal was dismissed: see *Mui Kwok Keung Louie v The Bar Council* [2011] HKCA 63.

77 The foreign precedents featured sanctions that run the gamut from a small fine to suspension and even to striking off. They therefore afford us limited assistance.

78 In our view, the pith and substance of an offence under s 107 of the Act is that the Advocate and Solicitor acquires an interest in the proceeds of litigation. His ultimate remuneration depends not on the value of his efforts as a lawyer but on the outcome of the litigation. We think it would be of little deterrent effect, given the public policy interests we have discussed, to impose a fine, because this would tend to be treated as just another variable in the stakes. This is why we stated at the outset that in the normal case, the starting point would be a period of suspension. We did not think that striking off was called for in this case because we did not think the Respondent had acted dishonestly (see *Ravindra Samuel* at [15]).

79 Having regard to the fact that the offence in this case had limited impact on our jurisdiction and related to a foreign jurisdiction that appeared to take a modest view of its gravity, a period of suspension at the lowest end of the range suggested to us might have been warranted. However this was to be balanced against the two aggravating circumstances to which we have referred (see [50]–[53] above).

Conclusion

80 In all the circumstances, we thought that a six-month suspension from practice was appropriate and we so ordered, with the term of suspension to begin one month from the date of judgment in order to give the Respondent time to settle his affairs. We also ordered the Respondent to pay costs of the proceedings to be taxed.

81 We wish to emphasise that until and unless there is a change in the law, lawyers who enter into

champertous agreements can expect to face at least a substantial period of suspension and depending on the factual matrix this period could well exceed the present imposition of six months.

82 Finally, for the sake of clarity, we should touch on one aspect of this issue which did not directly arise in our case. In our judgment, it would be permissible and even honourable for an Advocate and Solicitor to act for an *impecunious* client in the knowledge that he would likely only be able to recover his appropriate fees or disbursements if the client were successful in the claim and could pay him out of those proceeds or if there was a costs order obtained against the other side.

83 In our view such an arrangement would not be caught by s 107 of the Act or r 37 of the Professional Conduct Rules because it would not amount to acquiring an interest in the fruits of litigation. In such a case, in truth, the Advocate and Solicitor is putting aside his usual desire to be assured that he will be paid his fees in the interests of ensuring that the client is not denied the opportunity to seek justice. An Advocate and Solicitor's entitlement to payment arises on the presentation of his bill, whether or not the claim is successful. But there can be no wrong in an Advocate and Solicitor taking on a matter even if, as a practical matter, he knows that the client is unlikely to be able to afford to pay his bill unless the claim is successful or a costs order is obtained.

84 In our view there is good law that arrangements of this type are not champertous. In *Ladd v London Road Car Co* (1900) 110 L. T. 80 ("*Ladd*") Lord Russell of Killowen said:

> In reference to the subject of speculative actions generally, I think it right to say, on the part of the Profession and the class of persons who were litigants in such cases, that it was perfectly consistent with the highest honour to take up a speculative action in this sense – viz., that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a bona fide cause of action, it was consistent with the honour of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases, because there was in this country no machinery by which the wrongs of the humbler classes could be vindicated. Law was an expensive luxury, and justice would very often not be done if there were no professional men to take up their cases *and take the chances of ultimate payment* but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed. [emphasis added]

85 The High Court of Australia took a similar position in *Clyne v NSW Bar Association* [1960] HCA 40 ("*Clyne*") (at [28]):

> And it seems to be established that a solicitor may with perfect propriety act for a client who has no means, and expend his own money in payment of counsel's fees and other outgoings, *although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings.* This, however, is subject to two conditions. One is that he has considered the case and believes that his client has a reasonable cause of action or defence as the case may be. And the other is that he must not in any case bargain with his client for an interest in the subject-matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding... [emphasis added]

86 The cases of *Ladd* and *Clyne* were cited with approval by Ribeiro PJ in his judgment in *Winnie Lo* (at [108]–[109]), although the case was not decided on this basis. We agree with the sentiments expressed in the extracts we have just cited. If an Advocate and Solicitor has examined a client's case and concluded in all honesty that there is a good cause of action or defence which, but for the client's impecuniosity, would likely be litigated, then he would be doing no wrong if he took on such an

engagement. This is so even if he knew that he would likely not be paid his usual fees or even his disbursements unless the claim succeeded or a costs order is obtained.

87 In this regard, the Council of the Law Society has issued two relevant practice directions. Practice Direction 3 of 2004 states:

> 1. Council considered and deliberated on the ethical propriety of a member agreeing with clients to only charge costs at an amount fixed as Party & Party costs for judgments in default of appearance and payable upon the client's recovery of such costs.
>
> 2. Council also deliberated if it was ethical for a member to charge less than the fixed Party & Party costs if clients do not recover legal costs from the Judgment Debtor.
>
> 3. Council has ruled that entering into such fee sharing arrangement will mean that a lawyer's Solicitor & Client costs is effectively dependent on the recovery of Party & Party costs by a client and such conduct can amount to a breach of section 107 of the Act.

88 And Practice Direction 2 of 2012 states:

> 1. This Practice Direction takes effect on 15 May 2012.
>
> 2. It has come to the attention of the Council that a client of a member has set the following guideline on the billing of solicitor and client costs: solicitor and client costs & disbursements would be limited to whatever party & party costs & disbursements are recovered from the other party and in the event that no costs are recovered from the other party, solicitor & client costs will be waived & only disbursements billed.
>
> 3. Council has taken the position that such a fee arrangement would be improper for the following reasons:
>
> > a. Any fee arrangement that provides for payment of solicitor-and-client costs that is contingent on the amount of party-and-party costs recovered by a client would render a solicitor in breach of s 107 of the Legal Profession Act ("LPA") and r 37 Legal Profession (Professional Conduct) Rules ("PCR") because the solicitor would have an interest in the subject matter of the litigation or be purchasing an interest in the client; and
> >
> > b. The Council has deemed a fee arrangement similar to the guideline referred to in para 2 herein as improper under Council's Practice Directions 3 of 2004 and 4 of 2004 (both dated 6 December 2004) (see: Appendix) in the context of a solicitor acting for a client in obtaining a judgment in default of appearance or defence.
>
> 4. Council continues to be of the view that in any contentious matter, it is improper for solicitors to have an interest in the subject matter of the litigation or to purchase an interest of a client. Therefore, such a fee arrangement would result in any solicitor acting for the client being in breach of s 107 LPA and r 37 PCR and liable for professional misconduct under s 83(2) LPA. Further, s 107(3) LPA provides that a solicitor, like any other person, shall be subject to the law of maintenance and champerty.

89 We make no comment on these directions in so far as they relate to fee agreements entered into with clients who can afford legal services. Indeed, these directions appear specifically to have been issued in response to fee arrangements proposed by corporate clients to practitioners seeking to

be placed on their panel of external service providers. In our judgment, this is a wholly different situation from that concerning the impecunious litigant. In the latter case, there is an overriding public interest in ensuring access to justice. The profession has taken many steps to enhance access to justice through the offering of services on a *pro bono* basis, and, for the reasons we have given and for the avoidance of doubt, we state that these practice directions should not be read to apply to Advocates and Solicitors who provide legal services on the basis we have described at [82]–[86] above to impecunious clients who would not otherwise be able to afford legal representation.

[note: 1] Record of Proceedings ("RP") vol 4 pp 846–880.

[note: 2] RP vol 1 p 101.

[note: 3] RP vol 1 p 100.

[note: 4] RP vol 1 p 102.

[note: 5] Agreed Statement of Facts at para 6; RP vol 6 p 1263.

[note: 6] RP vol 2 p 330–341.

[note: 7] RP vol 2 p 476.

[note: 8] RP vol 2 p 500.

[note: 9] RP vol 2 p 503.

[note: 10] RP vol 2 p 514.

[note: 11] Affidavit of Evidence in Chief ("AEIC") of Ho Lian Jia dated 21 July 2012 at para 38; RP vol 3 p 747.

[note: 12] RP vol 2 p 520.

[note: 13] RP vol 2 p 526.

[note: 14] RP vol 6 pp 1272–1278.

[note: 15] RP vol 6 pp 1312–1321.

[note: 16] See Percy Henry Winfield, "The History of Conspiracy and Abuse of Legal Procedure" (Cambridge University Press, 1921) at chapter VI.

[note: 17] See for instance the letter from the Respondent to M/s Rebecca Treston dated 14 October 2009; RP vol 1 p 288.

[note: 18] RP vol 2 p 513

[note: 19] RP vol 6 p 1265–1266 (ASOF, paras 18–24)

[note: 20] United Kingdom Law Commission, *Proposals for the Reform of the Law Relating to Maintenance and Champerty*, (1966) (Chairman: Mr Justice Scarman) at p 7.

[note: 21] Available at https://applications.lsc.qld.gov.au/documents/beames.pdf accessed on 15 July 2013.

[note: 22] Available at http://www.solicitorstribunal.org.uk/Content/documents/10726.2011%20-%20Crossley.pdf accessed on 15 July 2013.

[note: 23] http://www.hkba.org/the-bar/discipline/bdt/Statement%20of%20Findings%2020100408.pdf (accessed on 15 July 2013)

[note: 24] http://www.hkba.org/the-bar/discipline/bdt/Reasons%20for%20Sentence%2020100428.pdf (accessed on 15 July 2013)