Boey Pang Sim Richard *v* Law Society of Singapore
[2015] SGHC 302

Case Number : Originating Summons No 527 of 2015

Decision Date : 26 November 2015

Tribunal/Court : High Court

Coram : George Wei J

Counsel Name(s) : The plaintiff in person; Joseph Liow Wang Wu (Straits Law Practice LLC) for the defendant.

Parties : BOEY PANG SIM RICHARD — LAW SOCIETY OF SINGAPORE

Legal Profession – Professional Conduct – Breach

Legal Profession – Conflict of interest

26 November 2015 Judgment reserved.

George Wei J:

Introduction

1 This is an application brought pursuant to s 96 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") for an order directing the Law Society of Singapore ("the Law Society") to apply to the Chief Justice for the appointment of a Disciplinary Tribunal (as defined in s 2 of the LPA).

Background

2 The applicant, Richard Boey Pang Sim ("Mr Boey"), made a complaint to the Law Society against Mr Jawharilal Balachandran ("Mr Balachandran") of M/s Ramdas & Wong. In his complaint, Mr Boey raised the following allegations of misconduct:

(a) first, that Mr Balachandran placed himself in the position of a conflict of interest ("the first complaint");

(b) second, that Mr Balachandran provided untrue and misleading statements when preparing his client's defence ("the second complaint"); and

(c) third, that Mr Balachandran took unfair advantage of Mr Boey ("the third complaint").

3 The Review Committee directed the Council of the Law Society ("the Council") to dismiss the second complaint and further directed the remaining complaints to be referred for further investigation.

4 An Inquiry Committee ("the Committee") was constituted to inquire into the conduct of Mr Balachandran *vis-à-vis* the remaining complaints. After careful consideration, the Committee was of the unanimous view that there was no necessity for a formal investigation by a Disciplinary Tribunal and recommended that the complaints against Mr Balachandran be dismissed. [note: 1] The

Committee's recommendation was considered and accepted by the Council. [note: 2] Mr Boey's complaints were accordingly dismissed.

5 Being dissatisfied with the Council's decision to dismiss his complaints, Mr Boey applied under s 96 of the LPA for an order directing the Law Society to apply to the Chief Justice for the appointment of a Disciplinary Tribunal.

6 To be clear, Mr Boey does not appear to quarrel with the Review Committee's decision to dismiss his second complaint. Thus, only the first and third complaints are relevant to the present application.

Material events

7 Sometime in 2012, a personal injury action was brought by a man who slipped and fell in a commercial building, Petro Centre ("the Personal Injury Suit"). The said incident had occurred in 2009. The action was brought against the cleaners and the management corporation ("MCST") of that building. The MCST's insurers had repudiated the MCST's insurance policy in respect of that incident on the ground that the insurers had not been notified of the incident. Following that, the MCST joined its managing agent, Exceltec Property Management Pte Ltd ("Exceltec"), as a third party to the suit on the basis that it was Exceltec's responsibility to inform the MCST's insurers of the incident.

8 Mr Balachandran was engaged by Exceltec's insurer (an insurance company known as Tenet Sompo Insurance Pte Ltd ("Tenet Sompo")) to defend Exceltec in the third party proceedings. Exceltec's pleaded defence was that Mr Boey, an employee of Exceltec, had faxed the incident notice to the MCST's insurers. As such, Mr Boey participated in the Personal Injury Suit as a material witness of fact. Leave was obtained on 10 April 2014 for Mr Boey to attend trial under subpoena, and to dispense with his affidavit of evidence-in-chief ("AEIC"). [note: 3]

9 In the following year (*ie*, 2013), Mr Boey brought a defamation suit against his superior in Exceltec, Mr Loi Boey Khew ("Mr Loi") ("the Defamation Suit"). Mr Boey alleged that Mr Loi had written an internal email to other employees of Exceltec suggesting that Mr Boey was unprofessional and irresponsible in the performance of the duties that he owed to Exceltec.

10 Mr Balachandran was engaged to defend Mr Loi in the Defamation Suit. Mr Loi's pleaded defences included qualified privilege and justification. Notably, in the Defamation Suit, Mr Boey was independently represented by Christopher Bridges Law Practice. As will be seen later in this judgment, the pleaded facts in the Defamation Suit are not connected with the events in the Personal Injury Suit. Neither are they connected with the matters arising in the third party proceedings that arose in connection with the Personal Injury Suit.

The nature of an application under s 96 of the LPA

11 Before delving into the main issues that have arisen for determination, it is useful to briefly comment on the nature of an application under s 96 of the LPA.

12 The role of the Committee is to investigate complaints against advocates and solicitors and to consider whether or not there was a *prima facie* case for formal investigation: *Wee Soon Kim Anthony v Law Society of Singapore* [2007] 1 SLR(R) 482 ("*Anthony Wee*") at [7]. Thereafter, the recommendations of the Committee will be considered by the Council which will make its determination in accordance with s 87 of the LPA.

13 A person dissatisfied with a determination made by the Council upon a report rendered by a Committee may make an application to a Judge under s 96 of the LPA. On hearing an application under s 96, it must be borne in mind that the role of the court is that of an appellate court supervising a subordinate tribunal, rather than that of a court exercising original jurisdiction: *Anthony Wee* at [10].

14 At the hearing of the application, the court is empowered under s 96(4) of the LPA to: (a) affirm the determination of the Council; or (b) direct the Law Society to apply to the Chief Justice for the appointment of a Disciplinary Tribunal. It also has the power to make such order as to costs as is just.

The first complaint

15 The basis for Mr Boey's first complaint is r 31 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("PCR") which provides:

> **Not to act against client**
>
> 31.—(1) An advocate and solicitor who has acted for a client in a matter shall not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter.
>
> (2) For the purposes of paragraph (1), the term 'client' includes a client of the law practice of which the advocate and solicitor is a partner, a director, an associate or an employee, whether or not he handles the client's work.
>
> …

The parties' positions

16 Mr Boey claims that Mr Balachandran was instructed to prove in the third party proceedings against Exceltec in the Personal Injury Suit that he had duly performed his duties professionally and responsibly and had faxed over the notice of claim to the MCST's insurers in a timely fashion. According to Mr Boey, this conflicts with Mr Balachandran's instructions in the Defamation Suit *viz*, to prove that Mr Boey was unprofessional and irresponsible.

17 Mr Balachandran's response is two-fold. First, he argues that at no point was Mr Boey his client or a person involved in or associated with his client in the Personal Injury Suit. In his view, his client was Tenet Sompo and he was engaged for the purpose of defending Exceltec. Mr Boey claims to be associated with Exceltec because he was an employee who was at the "front-line" of the legal battle for the company. However, the fact that Mr Boey was involved with the company does not mean that as a matter of law, he is "associated" with the company, in such a manner that the duties of a solicitor are owed to him as a client for the purposes of r 31(1) of the PCR.

18 Second, Mr Balachandran argues that the two suits do not constitute same or related matters within the meaning of r 31(1) of the PCR. In the Personal Injury Suit, Mr Balachandran was not engaged to prove in the third party proceedings against Exceltec that Mr Boey had acted professionally and responsibly. Rather, Mr Boey's involvement in the Personal Injury Suit and third party proceedings therein was limited to proving a narrow point of fact relating to a specific one-off event – whether the notice of incident was sent by fax to the MCST's insurers. [note: 4] In the Defamation Suit, the events relied upon in support of the defence of justification occurred between September 2012 and June 2013. These events significantly post-date the events of the Personal

Injury Suit which occurred in or around March 2011.

19 To establish a *prima facie* case for his first complaint, there are two hurdles that Mr Boey has to cross. First, he has to show that he was a person "involved in or associated with the client" in the Personal Injury Suit. Second, he has to show that the third party proceedings in the Personal Injury Suit and the Defamation Suit constitute related matters.

The Committee's decision

20 The Committee found against Mr Boey on both issues and dismissed the first complaint.

21 On the first issue, the Committee determined that Mr Boey was not a client of Mr Balachandran or his firm, neither was he a person who was involved in or associated with the client in the Personal Injury Suit.

22 In arriving at its conclusion, the Committee adopted a purposive approach in construing the term "persons who were involved in or associated with the client in that matter". In its view, only persons who had the power to retain and employ and who did retain and employ the solicitor in question would fall within the ambit of r 31(1). Such persons would stand in a relationship *vis-à-vis* the solicitor such that a duty of trust and confidence would arise. [note: 5]

23 On the second issue, the Committee found that the subject matter of the two suits was neither the same nor related to each other. The Defamation Suit was a fresh and independent matter which was unrelated to any work which Mr Balachandran had done for his client, Exceltec. [note: 6]

The applicable law

24 This case raises issues as to the limits of the proscription against an advocate and solicitor acting against a former client.

25 It is well-established that an advocate and solicitor owes an unflinching duty of loyalty to his client. Even after the solicitor-client relationship ceases, the advocate and solicitor remains duty-bound to preserve the confidentiality of information that was imparted during the subsistence of the solicitor-client relationship.

26 Where the advocate and solicitor is subsequently engaged by an adverse party in a related matter, there is a real danger that confidential information in the possession of the advocate and solicitor may be used against the former client. This is where r 31(1) of the PCR comes into play. In essence, the rule prohibits the advocate and solicitor as well as his firm from acting against the client or persons involved in or associated with the client in the same or related matter.

Pre-1998 position

27 I pause briefly to note that the PCR only came into being on 1 June 1998. It was introduced under s 71 of the LPA which provided that the Council of the Law Society may make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. Therefore, a brief examination of the pre-1998 position would be helpful to the extent that it provides context to r 31 of the PCR. There is a more detailed analysis of the pre-1998 position in *Vorobiev Nikolay v Lush John Frederick Peters and others* [2011] 1 SLR 663("*Vorobiev Nikolay*").

28 In *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy

Publishing, 2007) ("*Ethics and Professional Responsibility*"), Jeffrey Pinsler SC ("Prof Pinsler") sets out a helpful summary of the history behind r 31(1) of the PCR which came into effect in 1998. The learned author, at para 16-008, expressed the view that the provision may need a purposive interpretation at least to the extent of its application to precise circumstances. Prof Pinsler makes the general point that an examination of the pre-1998 rulings of the Singapore courts shows that r 31 of the PCR is *stricter* than the common law position.

29 Under the pre-1998 position, the acid test to determine whether one may act against a former client is whether the lawyer had information which he had confidentially obtained from his former client: see *Seet Melvin v Law Society of Singapore* [1995] 2 SLR(R) 186; *Wong Kok Chin v Singapore Society of Accountants* [1989] 2 SLR(R) 633; *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1994] 3 SLR(R) 38. The court must be satisfied that as a matter of substance (not form) that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act.

30 In *Ethics and Professional Responsibility*, at para 16-012, Prof Pinsler observed that a stricter position has been taken in the UK by the House of Lords in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 ("*Bolkiah*"). In that case, it was held that once it is shown (i) that the lawyer is in possession of information confidential to the former client and to the disclosure of which he has not consented; and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own, then the burden was on the lawyer to show that his acceptance of the new instructions will not increase the risk that information which is confidential to the former client will come into the possession of a party with an adverse interest. This is done by showing that there is no real risk that the confidential information will be disclosed. The burden on the former client is not a heavy one and the risk of disclosure need not be substantial. See Lim Wee Teck, *China Walls: A Post-Bolkiah Consideration*, Singapore Law Gazette (December 2001) and the subsequent English cases referred to therein.

31 Either way, the common law position identifies the issue as to whether the lawyer had obtained confidential information of the former client in the earlier proceedings. If he did, then under the *Bolkiah* approach the burden is on the lawyer to show that his continuing duty to preserve the confidentiality of the information obtained from the former client is not prejudiced. Under the approach taken by the Singapore cases referred to above, the question is whether as a matter of substance (not form) that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.

Post-1998 position

32 In 1998, the PCR was introduced in Singapore under the LPA. Rule 31 of the PCR sets out the provisions relating to the duty of the advocate and solicitor not to act against his former client. This includes a duty not to act when the advocate and solicitor becomes a member of a different law practice.

33 For convenience, r 31(1) of the PCR is set out again:

> An advocate and solicitor who has acted for a client in a matter shall not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter.

34 The rule also makes clear that it does not matter whether the advocate and solicitor in question personally handled the client's work so long as he was a partner, a director, an associate or employee of the law practice in question. That said, an exception is carved out where the advocate

and solicitor leaves to join another law practice which has not previously acted for the party (or persons involved in or associated with the matter). In that situation, his new law practice may act against his former client in the same or related matter as long as he is not involved and does not disclose confidential information to any other member of the law practice: r 31(4) of the LPA.

35 There is no definition of who is a client in the PCR. I note, however, that s 2(1) of the LPA defines client as including:

> (*a*) in relation to contentious business, any person who, as a principal or on behalf of another person, retains or employs, or is about to retain or employ, a solicitor, and any person who is or may be liable to pay a solicitor's, a law corporation's or a limited liability law partnership's costs; and
>
> (*b*) in relation to non-contentious business —
>
> > (i) any person who, as a principal or on behalf of another, or as a trustee, an executor or an administrator, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs or is about to retain or employ, a solicitor, a law corporation or a limited liability law partnership; and
> >
> > (ii) any person for the time being liable to pay a solicitor, a law corporation or a limited liability law partnership for his or its services any costs;

36 As mentioned earlier (above at [28]), r 31 of the PCR is stricter than the pre-1998 common law position. In *Ethics and Professional Responsibility*, at para 16-014, Prof Pinsler commented that r 31(1) applies even if the lawyer has not acquired confidential information. Indeed, in *Vorobiev Nikolay*, Lee Seiu Kin J ("Lee J") held that there is nothing in r 31(1) which limits the concept of "related matters" to matters where confidential information has been passed (at [19]). Lee J took the view that there is a larger public interest beyond the need to protect against the disclosure of confidential information (at [24]). This is the solicitor-client relationship of trust and *public* confidence in the integrity of the legal profession, which is not dependent on the giving of confidential information.

37 Indeed, this was the observation made by the Court of Three Judges in *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [24]:

> … The underlying rationale for such a rule [*ie*, rule 31] is to ensure that the trust between lawyer and client is not compromised and that, on the contrary, the confidence of the client is in fact maintained. *There is, indeed, a larger public interest that underscores such a rule.* The legitimacy of the law in general and the confidence of clients in their lawyers in particular are of fundamental importance and will be undermined if such a rule is not observed. *Indeed, the fact that a client may feel that he or she is let down or betrayed by his or her lawyer can be very damaging to the standing of the profession as a whole.*
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> [emphasis added]

38 Whilst the above observation was made in respect of the rules proscribing conflict of interest and the practice of law by unauthorised persons, the larger public interest that underlies r 31 of the PCR cannot be denied. At the end of the day, it must be appreciated that one of the key obligations of an advocate and solicitor is to maintain the integrity of the profession, and he should not act in a manner that is contrary to this obligation. The provisions of the PCR are to be interpreted with this in mind.

Definition of "persons who were involved in or associated with the client in that matter"

39 To paraphrase, r 31(1) of the PCR prohibits an advocate and solicitor who has acted for a client in a matter from acting, in the same or any related matter, against persons who were "involved in or associated with" the client in that matter. The issue here is whether Mr Boey, in his capacity as a material witness in the Personal Injury Suit (the third party proceedings), constitutes a person "involved in or associated with" the client in the matter.

40 Mr Boey is not the client of Mr Balachandran in the strict sense set out in s 2(1) of the LPA (reproduced earlier at [35]). The only question is whether he is properly to be regarded as a person involved in or associated with the matter which Mr Balachandran was instructed on, that is, to defend the third party proceedings in the Personal Injury Suit on the basis that notice of the incident had been duly given by Exceltec.

41 The only local authority on point appears to be the District Court decision in *Richard Hoare v Norhayati Binte Abdul Jali* [2011] SGDC 58 ("*Richard Hoare*"). In that case, the plaintiff (husband) was a founder and managing director of a company, CSM Engineers, for which the solicitor and her firm had acted in three matters from 1997 to 2002. The plaintiff was subsequently involved in ancillary matters (divorce proceedings) with the defendant relating to property division and maintenance. The defendant's application for discovery and interrogatories in the divorce matter had surfaced some of the assets and activities of CSM Engineers and its group of companies ("the CSM Group") involved in the previous retainers. The defendant intended to present that information to the court for determination of division of matrimonial assets and maintenance. The plaintiff-husband applied, on the basis of r 31 of the PCR, to restrain a solicitor and her firm from acting for the defendant-wife in the divorce ancillary matters. The plaintiff's application was granted.

42 An issue that surfaced was whether the plaintiff-husband fell within the definition of a former "client" or a person who was "involved in or associated with" a former client. The learned District Judge held in the affirmative. In coming to her conclusion, it was observed (at [25]) that although the company was the client in the previous retainers, the plaintiff as its managing director, was the person, who, on its behalf, had an express or implied power to retain and employ and did so retain or employ the solicitor's firm. Besides, the District Judge noted (at [26]) that the defendant wife had taken the position that the company's assets belonged to and were akin to the plaintiff's personal assets as the plaintiff was the beneficial owner of the company.

43 Given the relatively few local cases addressing the scope of "persons who were involved in or associated with the client in [the original matter]", it will be useful to seek guidance from other jurisdictions. But, before doing so, I should make clear that neither the plaintiff (who is unrepresented) nor the defendant cited the cases that will be referred to later on. Whilst the Committee's report did refer to some Canadian Law Society rules such as the Code of Professional Conduct of the Law Society of Saskatchewan and the Rules of Professional Conduct of the Law Society of Upper Canada, there was no argument before me on the case authorities discussed below from Canada, US or UK. I make this comment simply for context and to explain why it may be helpful to review some overseas decisions. In doing this, it is clear that the Committee's main role is to investigate the facts and make recommendations. No criticism is intended of the Committee's report or counsel who appeared. To be clear, the review of overseas cases from Canada, US and UK does not purport to be exhaustive.

44 It is apposite to begin with an examination of Canadian cases which have considered the scope of the same extension to the definition of a former client (*ie*, "persons who were involved in or associated with the client in that matter").

45 In *Gainers Inc v Peter H Pocklington* 21 Alta L R (3d) 363, ("*Gainers Inc*") the issue before the Alberta Court of Queen's Bench was whether the law firm of McLennan Ross and its members were disqualified from acting on behalf of the plaintiff in a suit which was commenced in 1990 ("the Suit"). The defendant in that case was Mr Pocklington, who was formerly the controlling will and mind of the plaintiff company. The firm had previously (at which time Mr Pocklington was in charge) advised and represented the plaintiff company in a labour-management dispute between 1984 and 1986.

46 Mr Pocklington applied to disqualify McLennan Ross and its members from acting for the plaintiff company in the Suit. He argued that he was considered a former client of McLennan Ross since a reasonably informed person would be bound to regard the plaintiff-company and him as being identical for all practical purposes. In response, the plaintiff-company argued that it is only the company which can complain of a conflict of interest, not the director/sole owner of the company.

47 McDonald J agreed with Mr Pocklington. The learned judge accepted that the Canadian Bar Association's Code of Professional Conduct ("the Code") was applicable to the legal profession in Alberta and the relevant part of the Code stated:

> A lawyer who has acted for a client in a matter should not thereafter act against him (or ***against persons who were involved in or associated with him in that matter***) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person.
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> [emphasis added in bold italics]

48 The learned judge noted that the overriding policy was not only that there be no actual conflict but there be no appearance of conflict. To this end, the public represented by the reasonably informed person must be satisfied that no use of confidential information would occur. On this basis, the learned judge found that at the time Mr Pocklington disclosed the confidential information to the solicitor, *his interests and those of the plaintiff company were for all practical purposes identical*. Therefore, he concluded that any reasonably informed person would have disregarded the corporate veil and regarded the company's sole owner as an "informal client" or "as good as his client", and McLennan Ross owed to Mr Pocklington very similar duties to those which they would have owed to him had he been a client in the strict sense (at [33]).

49 I pause to comment that in *Gainer's Inc* the applicable Canadian rule whilst similar, is not on all fours with r 31 of the PCR.

50 The "informal client" approach was affirmed by the Canadian Federal Court of Appeal ("FCA") in *Almecon Industries Ltd v Nutron Manufacturing Ltd (FCA)* [1994] FCJ 1209. Almecon sued Nutron and Anchortek for the infringement of the same patent. GL, a solicitor, who was originally employed by Anchortek's law firm, became an associate lawyer with Almecon's law firm. After the change in employment, he found himself involved in prosecuting the claim brought by Almecon against Nutron. Nutron applied to remove Almecon's law firm as solicitors of record within the patent infringement action.

51 The defendants' lawyers had worked together to prepare a common defence. It was not disputed that the communications between the solicitors of both defendants originated in a confidence that they would not be disclosed. The court found that the element of confidentiality was

essential to continued relations between the parties who, while having a common interest, were represented by different solicitors (at [36]). Therefore, despite the lack of a direct solicitor-client relationship, the court held that Nutron could properly be described as an "informal client" of Anchortek's solicitors (at [36]) and Almecon's solicitors were accordingly removed.

52 The "informal client" approach was also adopted by the British Columbia Supreme Court in *Stanley v Advertising Directory Solutions Inc* [2007] BCJ 1674. In that case, a third party in the suit, Verizon, applied for an order to remove the law firm acting for the defendant. Verizon was originally the owner of the defendant until 2004 when it sold the defendant to another party. The plaintiff commenced the action on 1 December 2004 for damages for wrongful dismissal. In its defence, the defendant alleged, *inter alia*, that the plaintiff was an employee of Verizon and not the defendant.

53 The position advanced by Verizon was that the law firm working for their then subsidiary would naturally be thought of as Verizon's lawyer as well. There was an identity of interest between the law firm and Verizon by virtue of their working together on the same team in relation to the plaintiff's employment, and later in defence of the plaintiff's action for damages for wrongful dismissal.

54 Against that, the defendant argued that the law firm had no retainer or contract with Verizon, never opened a file for Verizon and never met with Verizon except by way of telephone calls which always included the defendant's in-house legal counsel. The only correspondence was by way of email, most of which was sent to a group of recipients including Verizon's counsel. The firm never billed Verizon nor received any remuneration from Verizon, and never took instructions from Verizon, and did so only from the defendant. The firm never told Verizon that it was representing the company, and there could be no reasonable expectation by Verizon that the firm was protecting its interest as opposed to the defendant's.

55 It was held that even though Verizon recognised the firm as primarily, or even exclusively, the defendant's counsel, and the only party giving instructions to the firm, that did not mean that Verizon was not reasonably expecting the firm to advise and protect Verizon as well (at [35]). They were sharing resources as a team. It was further held that the evidence of communications between the solicitor in question and representatives of Verizon indicated a probability that their communications were in regard to matters confidential to Verizon, and that there was a *relationship equivalent to a solicitor/client relationship* (at [36]).

56 The above-mentioned Canadian cases are not of course binding in Singapore. The applicable rules, whilst similar, are not on all fours, and it cannot be assumed that the approach to professional rules, ethics and code of conduct are the same. What is clear, however, is that the issue and problem arising from lawyers acting against former clients and associated persons etc. has arisen in many jurisdictions. This includes the United States as appears from cases such as *Meehan v Hopps* 301 P 2d 10 (Cal 1956) and *In re Banks* 584 P (2d) 284.

57 The "informal client" approach also finds support in the English case of *In re a Firm of Solicitors* [1992] 1 QB 959. In this case, the firm of solicitors acted for a company, ASM, which was under investigation for its conduct as manager of two Lloyd's underwriting syndicates. Other companies (the A&A companies) that were wholly independent of but closely associated with ASM, cooperated closely with ASM and agreed to give ASM's solicitors full information even if such information could be used against them. A&A did, in fact, give such confidential information to the solicitors.

58 Later, the same solicitors acted for a third syndicate which was being sued by one of the A&A companies, SD. SD applied for and obtained an injunction restraining the firm of solicitors from acting for the third syndicate on the ground that the firm had acquired related confidential information and

knowledge from the A&A companies when acting for ASM in the investigation of the other two syndicates. Parker LJ said (at 965):

> On the totality of the evidence there can in my judgment be no doubt whatever that [A & A] and their subsidiaries did supply detailed information to the firm and to [ASM] concerning the very matters which will be explored in the main action and that *although none were at any time clients of the firm the relationship between them was such that they can properly be described as informal clients*. In my judgment also the firm owed to them very similar duties to those which they would have owed had they been clients in the strict sense.
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> [emphasis added]

59 In the other judgment, Sir David Croom-Johnson said (at 976):

> … It is clear that in 1983 and 1984 [A & A] gave detailed information to [ASM], for whom the firm of solicitors were then acting. *Although they were not strictly the clients of the firm they were as good as their clients*, and for the purpose of the present application should be treated accordingly.
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> [emphasis added]

60 Again, I stress that whilst it may be helpful to look at English cases, the decision is not binding in Singapore and the applicable rules and approach to professional rules, ethics and code of conduct are not necessarily the same.

61 Returning to the position in Singapore, it is clear that where an individual consults a solicitor on behalf of a corporate entity (for example, a managing director of a company who instructs and consults the solicitor on a company matter) the same solicitor will be precluded from acting against the corporate entity in the same or related matter. That is not to say, however, that the solicitor is always free to act against all other persons apart from the corporate entity itself.

62 The decision in *Richard Hoare* should not be construed to mean that any person who has the power to retain or employ solicitors for the purposes of the earlier matter would automatically fall within the scope of persons involved in or associated with the former client in the earlier matter. This is not borne out by a closer scrutiny of the decision. Before I proceed to take a closer look at the decision in *Richard Hoare*, it is to be stressed that in any case, there is no evidence to suggest that Mr Boey was even in a position where he could have instructed Mr Balachandran for that matter.

63 In *Richard Hoare*, quite apart from the plaintiff (the former managing director) enjoying the power to retain or employ solicitors for the earlier matters, the learned District Judge stressed the fact (at [26]) that the defendant-wife had taken the position that "the assets of the [CSM Group] … belong[ed] to and [were] akin to the [plaintiff-husband's] personal assets". In this connection, the learned District Judge referred to the High Court decision in *Tay Ang Choo Nancy v Yeo Chong Lin and another (Yeo Holdings Pte Ltd, miscellaneous party)* [2010] SGHC 126 in which Judith Prakash J treated a company as the alter ego of a party and disregarded the corporate ownership in the context of matrimonial proceedings. Thus, the decision in *Richard Hoare* is authority in Singapore for the proposition that an "associated person" under r 31 of the PCR will include a person such as a managing director who had the power to retain the lawyer to act for the company at least in those cases where it is clear that that person was the beneficial owner of the company such that the assets of the company are in reality his own.

64 Returning to the present case, r 31 of the PCR provides that the advocate and solicitor shall not act against "persons who were involved in or associated with the client in that matter." Mr Boey clearly does not fall within the definition of client in s 2(1) of the LPA. Mr Boey was not the person who had engaged Mr Balachandran for and on behalf of Exceltec (or indeed Tenet Sompo). Mr Boey was not responsible for the costs of Mr Balachandran (or the law practice) for the third party proceedings in the Personal Injury Suit.

65 This leaves to be determined the issue of whether Mr Boey falls within the scope of a person involved or associated with the matter that was the subject matter of the previous instruction.

66 On one interpretation, r 31 might extend so far as to include any employee of the client, Exceltec, who had any involvement, no matter the nature of the involvement. On this basis, a clerk employed by the former client, who had no substantive role to play in the matter, besides transmitting the relevant information to the solicitor, may be able to object to the solicitor acting against him in a subsequent related matter. This, in my view, could not have been the intent behind r 31 of the PCR. Such a broad interpretation would place an excessive and unnecessary shackle on a litigant's right to appoint counsel of his choice. As was observed in *Grimwade v Meagher* [1995] 1 VR 446 at 452, due regard must also be given to the public interest that a litigant should not be deprived of his or her choice of solicitors without good cause. An interpretation of r 31(1) of the PCR must be calibrated to strike a balance between protecting the former client and not unduly restricting the new client's right to appoint counsel of his or her choice.

67 In my view, the better reading of r 31 of the PCR is that it only precludes a lawyer from acting against persons "involved in or associated with" a former client in the original matter where they can also be said to be "as good as clients" or an "informal client." As is clear from the preceding analysis, there are two categories of persons which have been found to fall within the definition of an "informal client". The first category concerns the situation where the associated/involved person is akin to the *alter ego* of the client. This may occur where the fortunes of the associated/involved person are so intertwined with the actual client that he/she may properly be described as someone as good as a client (see for example *Richard Hoare*). The second category concerns the situation where the associated/involved person had divulged information above and beyond what he was required to.

68 Mr Boey does not belong in either of the above categories. In the present case, it is unlikely that Mr Boey's involvement in the Personal Injury Suit and third party proceedings (even as a material witness to the question whether notice of the accident was given) would place him in a situation in which he was as good as Mr Balachandran's client.

6 9 *First*, there is no basis to think that Mr Boey was the *alter ego* of Exceltec. Given that as a matter of law, r 31(1) of the PCR *can* be engaged even when the lawyer has not acquired confidential information, the court must be entitled to have regard to all the facts and circumstances in deciding whether a person, who was not the client, was involved in or associated with the client such that r 31(1) *is* engaged. An incidental involvement (such as where the person acted in a purely functional capacity to transmit company information to the lawyer) is unlikely to be sufficient. In coming to my decision, I note also that in respect of the Personal Injury Suit, both the company and Mr Boey would heave a sigh of relief if the third party suit was successfully defended. But they would do so for different reasons. The company would heave a sigh of relief as it would not be liable to pay compensation to the MCST. In contrast, Mr Boey would be relieved because the company would not have a reason to bring a suit against him for his failure to notify the insurer. In this connection, I note that Mr Boey appears to have been, at all material times, fully alive to the possibility that the company may take an adverse position against him should it be found that he had failed to notify the company's insurer. This was clear from his insistence on a letter of indemnity from Exceltec.

70 In addition, I observe that Mr Boey did not say that Mr Balachandran was, besides representing Exceltec, acting for him in the Personal Injury Suit. Quite to the contrary, he appears to have received advice from his own solicitor at the material time. [note: 7]

7 1 *Second*, there is also no basis to think that Mr Boey had divulged information above and beyond what he was required to as an employee of Exceltec.

72 Whilst Mr Boey claimed that Mr Balachandran had full access to his personal particulars and employment data, [note: 8] there were no details or documentary evidence proffered in support of his claim. In any case, the company's records on its employees do not belong to the employees themselves. Leaving aside any confidentiality obligation, the records belong to Exceltec and there can be no objections to Exceltec's use of such records in the present circumstances.

73 Moreover, Mr Boey did not say that he had communicated information over and above what he was required to in his capacity as Exceltec's employee. Indeed, the Inquiry Committee found that Mr Boey has never in his complaints alleged that he had divulged or shared any confidential information with Mr Balachandran during his interactions with him with regard to the subject matter of the Personal Injury Suit.

74 Nevertheless, because the issue and case law was not argued at length, I prefer not to decide the case on this ground. As will be seen, this is not necessary, as I am in any case of the view that the Personal Injury Suit (third party proceedings) and the Defamation Suit do not constitute related matters within the meaning of r 31 of the PCR.

Definition of "any related matter"

75 It will be useful to begin the discussion with the comments of the Ethics Committee of the Law Society in "Duties to Former Clients: Ethical Considerations" in *Law Gazette: Search & Sight* (October 2009):

> There is no guidance in the PCR on the test to be applied in determining whether one matter is 'related' to another matter within the meaning of r 31(1). The Committee's view is that two matters are clearly related if any information which the former client previously imparted in confidence to you for the purposes of the earlier matter is relevant to the later matter. This, it seems to the Committee, strikes the right balance between protecting the interest of the former client in having his confidences preserved and the interest of the current client in being permitted to engage her choice of counsel.
>
> …
>
> **Conclusion**
>
> Whether a solicitor may act against a former client under r 31 depends on whether the current matter is the 'same' as or 'related' to the former matter.
>
> This is always a question of substance, not form, and must therefore depend on the circumstances of each case. It will usually be obvious whether two matters are the 'same' by reason of an identity or overlap of parties, legal or factual issues or subject-matter. The more difficult question is when two matters are 'related'. *In this regard, the 'confidential information' test provides a useful yardstick. However, in an area where substance prevails over form, this is perhaps not the only yardstick.* Members should therefore be aware that there could be other

considerations that a court may take into account in applying this test, for example, the solicitor's knowledge of the disposition of the former client which is neither confidential information nor information which is directly relevant to the subject-matter of the later matter.

[emphasis added]

76 In *Vorobiev Nikolay*, Lee J added a further gloss to this issue, observing that for two matters to be related, it is not necessary that the solicitor in question had received confidential information relevant to the subsequent suit. Indeed, the proscription in r 31(1) of the PCR extends to other lawyers in the same firm even though they may not have personal knowledge of the initial matter. As stated in *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509, this is because:

> … the proximity and relationship of partners and legal assistants in the same firm is too close for comfort to ensure that a conflict of interest will not be practised… it is ingrained in our legal system that: Justice must not only be done but must be seen to be done.

77 Whether the two suits constitute related matters must be viewed in light of the mischief that r 31 seeks to prevent. Clearly, where confidential information was provided in the former suit that is also relevant to the later suit, the rule is engaged. There is a clear interest in guarding against the disclosure of confidential information to a new client as well as the perceived disclosure of such information. Beyond this, it is clear as mentioned several times, that r 31(1) can be engaged even if no confidential information at all was supplied. The lawyer should not be placed in a position where he cannot adequately represent the new client. In *MacDonald Estate v Martin* [1991] 1 WWR 705, Sopinka J described the situation as follows (at 725):

> … The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about person matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship. …

78 As was observed by the Ethics Committee in the excerpt that I have set out at [75], one useful (albeit not necessarily determinative) yardstick by which one can measure the relatedness of two matters is the confidentiality test: whether there is a real risk that the confidential information would be passed on to the subsequent client. This would presumably turn on whether the information obtained from the former client would be relevant to the subject matter of the subsequent retainer.

79 In *Vorobiev Nikolay*, Lee J found it helpful (at [23]) to refer to r 3.01 of the UK Solicitors' Code of Conduct 2007 ("UK Code") which provided *inter alia* that a "related matter will always include any other matter which involves the same asset or liability." That said, it was recognised that the UK Code was different in that the prohibition in the UK Code was limited to cases of conflict of interest. Reference was also made to r 1.9 of the American Bar Association Model Rules of Professional Conduct where the commentary provides *inter alia* that matters are substantially related if they involve the same transaction or legal dispute.

80 In the present case, I do not think that the Personal Injury Suit and the Defamation Suit constitute related matters within the meaning of r 31 of the PCR. *First*, with respect to the Personal Injury Suit, Mr Balachandran was not engaged to prove that Mr Boey had acted responsibly and professionally. *Second and in any case*, the events relied upon in the Personal Injury Suit had

absolutely no bearing on the issues in the Defamation Suit and there was consequently, no risk that Mr Balachandran would pass on confidential information belonging to Mr Boey in respect of the Personal Injury Suit (third party proceedings). The Personal Injury Suit (third party proceedings) concerned a one-off event that occurred in March 2011 *viz*, whether or not the insurers were informed of the accident at Petro Centre. In contrast, the defence of justification in the Defamation Suit was founded on allegations pertaining to events that occurred between September 2012 and June 2013. The allegations are as follows:

(a) On or about 5 September 2012, Mr Boey wrongly advised a subsidiary proprietor of Petro Centre that its management corporation would be responsible for the cleaning and maintenance of the common toilets to be rented to the said subsidiary proprietor.

(b) In the month of December 2012, Mr Boey failed to attend site at Selanting Green as required under Exceltec's contract with Selanting Green.

(c) On or about 19 February 2013 and on or about 26 February 2013, Mr Boey failed to keep proper records/reports of his inspection of Orion Condominium.

(d) On or about 8 March 2013, Mr Boey neglected to renew three insurance policies for Mint Residence. When he subsequently renewed the said insurance policies, he did so without obtaining the prior approval of the management council.

(e) On or about 18 April 2013, Mr Boey had repair works carried out and incurred costs on behalf of the management corporation of Orion Condominium without obtaining its prior approval.

(f) In or before May 2013, Mr Boey allowed wheel clamps belonging to the management corporation of LW Technocentre to be taken away without its knowledge.

(g) Prior to 27 June 2013, Mr Boey stated the wrong billing months in the agenda to be approved at the annual general meeting ("AGM") of Mint Residences on 27 June 2013.

(h) On 27 June 2013, Mr Boey allowed a person to submit a proxy form for voting at the AGM of Mint Residence, even though it was stated on the proxy form that such form must be signed and returned not less than 48 hours before the commencement of the AGM.

81 As may be readily observed, the events relied upon in the Personal Injury Suit has completely no relevance to the Defamation Suit. Thus, I am satisfied that the two suits did not constitute related matters within the meaning of r 31(1) of the PCR.

The third complaint

82 The basis for Mr Boey's third complaint is r 53A of the PCR which reads:

Relations with third parties

53A. An advocate and solicitor shall not take unfair advantage of any person or act towards anyone in a way which is fraudulent, deceitful or otherwise contrary to his position as advocate and solicitor or officer of the Court.

83 Mr Boey's complaint is that Mr Balachandran had taken unfair advantage of him in the course of preparing a particular AEIC for the Personal Injury Suit. He appears to have two main complaints. In essence, Mr Boey asserts that Exceltec demanded and coerced him to sign an AEIC prepared by Mr

Balachandran, failing which he was to be suspended from his duties.

84 Against that, Mr Balachandran said that Mr Boey had failed to disclose the true state of affairs in his complaint. Mr Boey had only attached the cover page of the draft AEIC in question. But had he annexed the full draft AEIC, it would be apparent that the draft was marked up with queries and comments that were to be clarified by and discussed with him. The queries and comments bore no trace of coercion.

85 I agree with the Committee's finding that Mr Boey had selectively provided documents in his complaint that made it appear as though Mr Balachandran was coercing him or taking advantage of him in making him sign an AEIC without giving him any choice. The one page of the AEIC that he submitted was only a discussion draft and not intended to be signed (nor could it have been signed in that state). An example extracted from para 20 of the draft AEIC illustrates this clearly:

> In or about March 2011, I sent by way of facsimile a copy of the Incident Report to the Insurer. [***R & W: Why did you choose to give notice in March 2011?***]
>
> [emphasis added in bold italics]

86 In the circumstances, I find no reason to disturb the decision of the Council that was made upon the recommendations of the Committee.

Conclusion

87 For the reasons I have set out above, I find that Mr Boey's complaints are without merit and dismiss the application accordingly. In particular, I have found that:

(a) The third party proceedings in the Personal Injury Suit as well as the Defamation Suit do not constituted related matters within the meaning of r 31(1) of the PCR.

(b) Mr Balachandran did not take unfair advantage of Mr Boey. No coercive pressure was exerted on Mr Boey in the course of preparing the AEIC for the third party proceedings in the Personal Injury Suit.

88 I should add that I would have been prepared to find, in relation to the first complaint, that Mr Boey was not a person "involved in or associated with" the client within the meaning of r 31(1) of the PCR. That said, I stress that my decision did not turn on that issue.

89 As a final note, it has come to my attention that the Legal Profession (Professional Conduct) Rules 2015 ("PCR 2015") has recently come in force on 18 November 2015, superseding the earlier PCR (the provisions of which has been considered above). I should mention that only the provisions of the earlier PCR are relevant to the present application. I make no comment about the scope and application of the equivalent provisions in the PCR 2015, which are questions better left to be decided at an appropriate juncture.

Costs

90 The present application is the second application by Mr Boey against Mr Balachandran. The first application was made on 18 March 2014. It was summarily dismissed by a Review Committee on 23 April 2014. The substance of the first application was the same or substantially the same as the present application which was made in July 2014. [note: 9] Before the second Inquiry Committee set up

by the second Review Committee, Mr Balachandran asserted that the present application was vexatious and oppressive and that the principle of *autrefois acquit* applied. The Inquiry Committee was of the view that the doctrine did not apply on the basis that the role of the Review Committee was to act as a first filter in ensuring that the complaints were not without substance, frivolous or vexatious.

91 The Inquiry Committee also noted that solicitor who is faced with repeated complaints, after a previous complaint has been dismissed by a Review Committee has a remedy in asking the Inquiry Committee to order a hearing under s 85(19)(a) of the LPA for an order that the complainant pay costs. [note: 10] No such application was made to the Inquiry Committee.

92 I further note that the court has power to order the payment of such costs as appears just under s 96(4) of the LPA. However, I note that counsel for the Law Society did not ask for an order of costs. Thus, I make no order as to costs.

[note: 1] Affidavit of Joseph Liow, p 22.

[note: 2] Affidavit of Richard Boey, p 6.

[note: 3] Affidavit of Joseph Liow, p 14.

[note: 4] Affidavit of Joseph Liow, p 13.

[note: 5] Affidavit of Joseph Liow, p 16.

[note: 6] Affidavit of Joseph Liow, p 18.

[note: 7] Affidavit of Joseph Liow, p 15.

[note: 8] Mr Boey's Affidavit, para 20.

[note: 9] Affidavit of Joseph Liow, p 19.

[note: 10] Affidavit of Joseph Liow, p 21.