Law Society of Singapore *v* Top Ten Entertainment Pte Ltd [2011] SGCA 11

Case Number	: Civil Appeal No 20 of 2010
Decision Date	: 07 April 2011
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Thio Shen Yi SC and Wee Yu Ping Nicole (TSMP Law Corporation) for the appellant; Bajwa Ragbir Singh (Bajwa & Co) for the respondent.
Parties	: Law Society of Singapore — Top Ten Entertainment Pte Ltd

Legal Profession – Disciplinary Procedures

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 1 SLR 291.]

7 April 2011 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by the Law Society of Singapore ("the Law Society") against an order of costs made by the judge ("the Review Judge") in Originating Summons No 1048 of 2008 ("the OS") against it arising out of disciplinary proceedings against an advocate and solicitor, *viz* Andre Arul ("Arul") on the complaint of Top Ten Entertainment Pte Ltd ("Top Ten") (see *Top Ten Entertainment Pte Ltd v Law Society of Singapore* [2011] 1 SLR 291 ("the GD")).

2 The Law Society was ordered to pay 50% of Top Ten's costs in the OS brought pursuant to s 96(1) of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the 2001 LPA") to review the decision of the Council of the Law Society ("the Council") not to initiate a formal investigation against Arul. The Council had accepted the recommendation of the Inquiry Committee ("IC") to dismiss Top Ten's complaint against Arul. This appeal raises an important costs principle in relation to the role of the Law Society in disciplinary proceedings against advocates and solicitors, as well as the question of whether there is a right of appeal from the decision of a Judge in such a review application.

The Facts

3 The material facts are as follows. Arul is an advocate and solicitor of the Supreme Court of Singapore, and is a partner in the firm of Messrs Arul Chew & Partners. On 29 January 2007, Top Ten filed a complaint to the Law Society against the conduct of Arul, who had represented Top Ten in litigation. Due to a procedural irregularity, the complaint was re-lodged on 19 April 2007 ("the Complaint"). The Complaint made the following allegations:

(a) that Arul had rendered exorbitant bills of costs contrary to agreed costs at $25,000; and

(b) that he had acted contrary to strict instructions from Top Ten not to transfer any money from the client's account by transferring sums of $54,909 and $32,000 from the client's account to satisfy his bills of costs which were disputed by Top Ten.

4 The Complaint was inquired into by an IC which recommended to the Council (a) to dismiss the Complaint as having no merit, but (b) to impose a fine of $500 on Arul for breaching the Society's Practice Directions in relation to Rule 7(1)(*a*)(iv) of the Legal Profession (Solicitors' Accounts) Rules (Cap 161, R8, 1999 Rev Ed) ("Solicitors' Accounts Rules") in failing to give adequate notice to Top Ten of the transfer of its money from the client's account. The Council accepted the findings of the IC and decided that a formal investigation by a Disciplinary Committee ("DC") was unnecessary and dismissed the Complaint.

5 Top Ten applied for review of the Council's decision under s 96(1) of the 2001 LPA. In its application, Top Ten alleged, among other things, (a) that Arul had breached his express instructions by transferring the sum of $114,440.97 into his firm's client's account rather than to it directly; and (b) that Arul had wrongfully placed the sum of $10,000 in his firm's office account rather than the client's account. At the hearing before the Review Judge, Top Ten produced an email dated 7 July 2006 containing express instructions to Arul to transfer party and party costs received after Top Ten's litigation (*ie*, the sum of $114,440.97) directly to Top Ten and not to the firm's client's account. The Law Society resisted Top Ten's application mainly on the ground that the email of 7 July 2006 was not produced to the IC and it was not part of the Complaint. However, a later email dated 24 August 2006 making the same allegation *was* before the IC.

Decision of the Review Judge

6 At the conclusion of the hearing, the Review Judge held that although there was no fee agreement between Top Ten and Arul, there was sufficient material to justify an investigation into the Complaint. By then, the 2001 LPA had been amended by the Legal Profession (Amendment) Act 2008 (Act 19 of 2008) such that the DC was renamed as the Disciplinary Tribunal ("DT") – otherwise the provisions relevant to this matter remained the same. The amended version will hereinafter be called the LPA. Accordingly, the Review Judge directed the Law Society to apply to the Chief Justice under s 96(4)(*b*) of the LPA to appoint a DT to investigate two matters:

(a) whether Arul was in breach of his professional duties by paying the sum of $114,440.97 (received as party and party costs) into the client's account contrary to Top Ten's instructions as contained in the two emails dated 7 July 2006 and 24 August 2006, and also in transferring money from the client's account in payment of solicitor's fees; and

(b) whether Arul was in breach of the Solicitors' Accounts Rules by placing the sum of $10,000 which he received on 11 August 2006 as party and party costs into Messrs Arul Chew & Partners' office account instead of the client's account.

7 On the question of costs of the review, the Review Judge ordered the Law Society to pay 50% of Top Ten's costs in the proceedings on the following grounds: (a) that the Law Society had partly succeeded as it showed that there was no agreement between Top Ten and Arul on the legal fees; and (b) that Top Ten had contributed to the errors made by the IC and the Council by presenting its Complaint in a "messy way" and in not attending the IC proceedings. She rejected the Law Society's submission that in principle no costs order should be made against the Law Society when it participated in litigation under a public duty. The Law Society's case rested primarily on the decision of the English Court of Appeal in *Baxendale-Walker v Law Society* [2008] 1 WLR 426 ("*Baxendale-Walker*") which laid down what we will refer to as the "*Baxendale-Walker* principle".

8 The Review Judge held that the court's discretion under s 96(4) of the LPA was unfettered, and that Top Ten's application fell into the usual rule for civil cases, which is that costs will follow the event, subject to the overall aim of fairly allocating costs. In coming to this finding she referred to

(*inter alia*) the cases of *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 ("*Tullio Planeta*") and *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR(R) 709. She found that the Law Society did not raise any legal question of public interest in the application that could justify the making of no order of costs against it.

9 The Review Judge distinguished *Baxendale-Walker* on the basis that, unlike in that case where the Law Society of England and Wales ("LSEW") was *prosecuting* a solicitor before a disciplinary tribunal, here the Law Society was *defending* a decision made by its Council. She held that such a defence should be treated as in the Law Society's private interest only. She found that where the Law Society was made a party to an application under s 96 of the LPA, it had no public duty to resist that application since it had the option of taking a neutral position, following the decision of the High Court in *Re Shankar Alan s/o Anant Kulkarni* [2007] 2 SLR(R) 95 ("*Re Shankar Alan (costs)*"). She also found that no legal question of public interest was raised in the case.

Law Society's appeal on costs

10 The Law Society's appeal is only against the costs order. As s 96(4) of the LPA provides that the costs in the review proceedings are what the Judge thinks just, this appeal will fail unless the Review Judge can be shown to have erred in principle and not merely based on our opinion as to the degree of "justness" involved. An appellate court would not interfere with the exercise of discretion unless its exercise was manifestly wrong or it was exercised on wrong principles (see *Tullio Planeta* at [22]).

11 In this appeal, the Law Society argued that the Review Judge was wrong in law in not applying the *Baxendale-Walker* principle as it acts as a regulatory body in disciplinary matters under the LPA. In carrying out this public function, the Law Society has no private interest to advance or protect. The Law Society submitted that the Review Judge erred in principle in applying the "costs follow the event" rule used in civil proceedings, as she should have applied the *Baxendale-Walker* principle as the starting point to determine whether the Law Society should be ordered to pays costs. The Law Society argued that disciplinary proceedings are not civil proceedings.

12 Counsel for Top Ten argued in support of the Review Judge's approach and reasoning and relied on the following authorities: *Ang Boon Kong Lawrence v Law Society of Singapore* [1990] 2 SLR(R) 783, *Law Society of Singapore v Ang Boon Kong Lawrence* [1992] 3 SLR(R) 825 ("*Ang Boon Kong Lawrence (CA)*"), *Re Lim Chor Pee* [1990] 2 SLR(R) 117, *Re Shankar Alan (costs)*, *Chia Shih Ching James v Law Society of Singapore* [1985–1986] SLR(R) 209 ("*James Chia*") and *Jeyaretnam Joshua Benjamin v Law Society of Singapore* [1988] 2 SLR(R) 470 ("*Jeyaretnam*"). Before we address the authorities we will set out and consider the relevant statutory provisions.

Our decision

The costs regime in the LPA and the Baxendale-Walker principle

13 Section 96 of the LPA provides as follows:

> **96**. —(1) Where a person has made a complaint to the Society and the Council has determined —
>
> (*a*) that a formal investigation is not necessary; or
>
> (*b*) that no sufficient cause for a formal investigation exists but that the advocate and solicitor concerned should be ordered to pay a penalty,

that person may, if he is dissatisfied with the determination of the Council, apply to a Judge under this section within 14 days of being notified of the determination.

(2) Such an application shall be made by originating summons and shall be accompanied by an affidavit or affidavits of the facts constituting the basis of the complaint and by a copy of the complaint originally made to the Society together with a copy of the Council's reasons in writing supplied to the applicant under section 87(4).

(3) The application accompanied by a copy of each of the documents referred to in subsection (2) shall be served on the Society.

(4) At the hearing of the application, the Judge may make an order —

(a) affirming the determination of the Council; or

(b) directing the Society to apply to the Chief Justice for the appointment of a Disciplinary Tribunal,

and such order for the payment of costs as may be just.

(5) If the Judge makes an order directing the Society to apply to the Chief Justice for the appointment of a Disciplinary Tribunal, the applicant shall have the conduct of proceedings before the Disciplinary Tribunal and any subsequent proceedings before the court under section 98, and any such proceedings shall be brought in the name of the applicant.

14 It may be noted that the provision under s 96(4) that the Judge may order such costs as may be *just* is also the same as those in ss 95(3), 97(4)(*b*) and 100(6). In addition to these specific provisions on costs, there is an umbrella provision in s 103 of the LPA covering certain specified proceedings which provides as follows:

103.—(1)(Deleted by Act 19 of 2008)

(2) (Deleted by Act 19 of 2008)

(3) The costs of and incidental to all proceedings under section 97, 98, 100 or 102 shall be in the discretion of the Judge or of the court before whom the hearing has taken place.

(4) Such costs may include the costs of the Society or Disciplinary Tribunal and may be ordered to be paid by the solicitor by or against whom or by the person by whom any complaint was made or was intended to be made or partly by the solicitor and partly by the other person.

It should be noted that s 103(3) makes a distinction between "the Judge" and "the court" before whom the hearing takes place. These two terms are defined in s 2 of the LPA, but as we shall see, it does not follow that those definitions apply when the terms are used in Part VII of the LPA. The reason is that the definitions in s 2 of the LPA are subject to the context in which they are used (see [44]–[45] below).

15 Although the costs framework in Part VII of the LPA is somewhat disorganised, the underlying principle is clear: costs are to be awarded where it is just to do so or in the discretion of the Judge or of the court before which the hearing takes place. In our view, there is no difference between the two formulations. Costs are at the discretion of the Judge or the court, to be awarded whenever and

against whom it is just to do so. However, these provisions do not address the issue raised in this appeal, *ie*, whether, as a matter of legal policy, the Judge or the court should treat the Law Society differently from ordinary parties in ordinary civil proceedings on the ground that where it appears in disciplinary proceedings under the LPA, it is discharging a regulatory function. This is an important issue of principle. Public bodies exercising disciplinary functions do so in the public interest. This is the rationale of the *Baxendale-Walker* principle.

16 The Law Society argued that the Judge or the court, when considering whether or not to award costs in disciplinary proceedings to or against the Law Society should apply the *Baxendale-Walker* principle as the starting point, rather than the general rule in civil proceedings that "costs follow the event" as embodied in O 59 r 3(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court"). It accordingly was argued that the Review Judge was wrong in applying the rule that "costs follow the event" to the Law Society in the present case, notwithstanding the many previous decisions which appear to support her approach.

17 In the English Divisional Court proceeding of *Baxendale-Walker v Law Society* [2006] 3 All ER 675, the LSEW was ordered by the Solicitors Disciplinary Tribunal to pay 30% of a solicitor's costs before the tribunal where the solicitor had successfully defended one allegation against him. In setting aside the tribunal's costs award against the LSEW and awarding 60% of the costs of the hearing to the LSEW, the Divisional Court held that the LSEW was performing a public function, and should not, ordinarily, be made to pay costs. At [43] of his judgment, Moses LJ said:

> The question thus arises as to whether the order that the Law Society should pay a proportion of the appellant's costs and that no costs should be paid by the appellant was correct, as a matter of law. The principles, in relation to an award of costs against a disciplinary body, were not in dispute. A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged.

18 In affirming the judgment of the Divisional Court, the English Court of Appeal in *Baxendale-Walker* (per Sir Igor Judge P, as he then was) said at [27], [34] and [39]:

> 27 Section 47(2) of the Solicitors Act 1974, as substituted, provides:
>
> > "on the hearing of any application or complaint made to the tribunal under this Act ... *the tribunal shall have power to make such order as it may think fit*, and any such order may in particular include provision for any of the following matters ... (i) *the payment by any party of costs or a contribution towards costs of such amount as the tribunal may consider reasonable*."
>
> ...
>
> 34 Our analysis must begin with the Solicitors Disciplinary Tribunal itself. This statutory tribunal is entrusted with wide and important disciplinary responsibilities for the profession, and when deciding any application or complaint made to it, *section 47(2) of the Solicitors Act 1974*

undoubtedly vests it with a very wide costs discretion. An order that the Law Society itself should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly discouraged by section 47(2)(i). *That said, however, it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings*. Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in *Bolton's* case [1994] 1 WLR 512 makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. …The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. *The normal approach to costs decisions in such litigation– dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party– would appear to have no direct application to disciplinary proceedings against a solicitor*.

...

39 … Unless the complaint is improperly brought, or, for example, proceeds as it did in *Gorlov's* case [2001] ACD 393, as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The "event" is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage. …

[emphasis added]

19 The *Baxendale-Walker* principle has recently been endorsed and refined by the English Court of Appeal in *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] 1 WLR 1508 ("*Perinpanathan*"). In *Perinpanathan*, Stanley Burnton LJ enunciated seven propositions as follows (at [40]–[41]):

40 I derive the following propositions from the authorities to which I have referred. (1) As a result of the decision of the Court of Appeal in *Baxendale-Walker v Law Society* [2008] 1 WLR 426, the principle in the *Bradford* case 164 JP 485 is binding on this court. Quite apart from authority, however, for the reasons given by Lord Bingham CJ I would respectfully endorse its application in licensing proceedings in the magistrates' court and the Crown Court. (2) For the same reasons, the principle is applicable to disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest: see *Baxendale-Walker v Law Society*. (3) Whether the principle should be applied in other contexts will depend on the substantive legislative framework and the applicable procedural provisions. (4) The principle does not apply in proceedings to which the CPR apply. (5) Where the principle applies, and the party opposing the order sought by the public authority has been successful, in relation to costs the starting point and default position is that no order should be made. (6) A successful private party to proceedings to which the principle applies may none the less be awarded all or part of his costs if the conduct of the public authority in question justifies it. (7) Other facts relevant to the

exercise of the discretion conferred by the applicable procedural rules may also justify an order for costs. It would not be sensible to try exhaustively to define such matters, and I do not propose to do so.

41 Lord Bingham CJ stated that financial prejudice to the private party may justify an order for costs in his favour. I think it clear that the financial prejudice necessarily involved in litigation would not normally justify an order. If that were not so, an order would be made in every case in which the successful private party incurred legal costs. Lord Bingham CJ had in mind a case in which the successful private party would suffer substantial hardship if no order for costs was made in his favour. …

20 Proposition (2) qualifies the application of the *Baxendale-Walker* principle to first instance hearings before the tribunal, having regard to the decision of the Privy Council in *Walker v Royal College of Veterinary Surgeons* [2008] UKPC 20 ("*Walker v Royal College*") that in the case of a successful appeal against a decision of a disciplinary tribunal, different considerations may apply.

21 Propositions (1) and (4) in the above passage (see [19] above) were also endorsed by Lord Neuberger of Abbotsbury MR in the same case where he said (at [73]):

… The effect of the reasoning [in *Baxendale-Walker*] is that, just because a disciplinary body's functions have to be carried out before a tribunal with a power to order costs, *it does not follow that there is a presumption that the tribunal ought to order the disciplinary body to pay the costs if it is unsuccessful*, and that, when deciding what order to make, the tribunal should approach the question by reference to Lord Bingham CJ's three principles. It is hard to see why a different approach should apply to a regulatory or similar body carrying out its functions before a court – *unless the rules of that court have any presumptive principle inconsistent with those principles, such as CPR r 44.3(2)(a). …* [emphasis added]

It bears mentioning that r 44.3(2) of the English Civil Procedure Rules 1998 (SI 1998 No 3132) or "CPR" is in substance the same as O 59 r 3(2) of our Rules of Court. It states:

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

22 Proposition (3) requires the court to consider the substantive legislative framework and the applicable procedural provisions when deciding whether the principle should be applied in other contexts.

Role of the Law Society in disciplinary proceedings

23 In the local context, the questions to consider are: (i) whether the *Baxendale-Walker* principle should be applied to the Law Society in performing functions in disciplinary proceedings; (ii) if so, whether the principle is inconsistent with the costs structure in Part VII of the LPA; (iii) if not, whether the limitations to the principle as refined in *Perinpanathan* and *Walker v Royal College* in the context of the LPA should apply; and (iv) whether in the specific context of the instant case, the Review Judge should have ordered the Law Society to pay Top Ten 50% of the costs of the review proceedings. We will now consider each of these questions in turn.

(i) Is the Baxendale-Walker principle applicable to the Law Society?

24 In our view, the answer to this question is "yes" if the Law Society is acting as a regulatory body under Part VII of the LPA. In so doing, it would be protecting the integrity of the profession and its members which would be in the interest of the public. Disciplinary proceedings are not the same as civil proceedings, and the Law Society should not be equated with an ordinary litigant who litigates to enforce or protect his or her private interests. We agree with the reasoning so clearly articulated by Sir Igor Judge P in *Baxendale-Walker* (see [18] above). When performing regulatory functions which they are charged to do, public bodies should be protected from having to pay costs unless they are proved to have acted in bad faith or are guilty of gross dereliction. In our view, *Baxendale-Walker* enunciates a salutary principle.

25 The question before us therefore is whether the Law Society was acting as a regulator in performing its functions under ss 87 and 96 of the LPA. The Review Judge held that it was not acting as a regulator under s 96, and she distinguished *Baxendale-Walker* on this basis. The Review Judge gave three reasons for her decision, as follows:

(a) the Law Society's function under s 96 (the discharge of which would be in the public interest) was to lay before the court its full reasons for its decision, and not to oppose a challenge of its decision "regardless of whether it was legitimate or reasonable for it to do so" (see the GD at [17]);

(b) the Law Society did not act as a regulator in the present proceedings because it was not the complainant, unlike the LSEW in *Baxendale-Walker*, and there were substantial differences between the disciplinary framework under the English Solicitors Act 1974 (c 47) (where the Solicitors Regulation Authority initiates most disciplinary proceedings against solicitors) and the LPA (where the Law Society does not initiate such proceedings) (see the GD at [19]–[24]); and

(c) the Law Society did not participate in the hearing before the Review Judge in its capacity as a regulator of the legal profession, but rather, in its capacity as the maker of its decision to dismiss Top Ten's complaint and with a view to defending its own decision. It was not acting in the public interest but its own private interests (see the GD at [42]).

26 In our view, the Review Judge has interpreted the role of the Law Society too narrowly by focusing only on s 96 of the LPA and limiting its role thereunder to that of laying before the court the full reasons for its decision, rather than to oppose a challenge of its decision regardless of the merits of the IC's recommendations or the dissatisfied complainant's case. In our view, the Law Society's appearance in an application under s 96 is at the tail end of a role which begins at s 87 under which the Council is required to consider the report of the IC after it has completed its inquiry on the complaint against an advocate and solicitor. If, under s 88, the Council determines that no cause of sufficient gravity exists for a formal investigation (as was the case here), it may impose a penalty on the advocate and solicitor (as was the case here). In carrying out these functions, the Law Society is performing a statutory role as a regulator, and not promoting or protecting its private interests as a society.

27 However, s 96 gives a complainant who is dissatisfied with the decision of the Council a right to apply to a Judge to review its decision. Since the Law Society is named effectively as a defendant in such proceedings, it would be odd if the Law Society is not allowed to defend its Council's decision before the Judge, but only to explain the reasons for its decision. In substance, there is no difference between giving the reasons for a decision and justifying a decision by giving the reasons for it. In our view, there is no reason why the Law Society, in opposing the complainant's case by justifying its

Council's decision, is no longer performing a regulatory function. Its role in s 96 is merely a continuation of its role in s 87. When the Law Society opposes the complainant's case "regardless of whether it was legitimate or reasonable for it to do so", it does not mean that it is no longer performing a regulatory role. What it means in such a situation is that it is performing it unreasonably or recklessly or even wilfully.

28 In *Perinpanathan*, Lord Neuberger MR addressed the analogous issue of the police assisting a court as opposed to taking an active part in the proceedings. He said (at [67] and [68]):

> 67 Mr Keith QC, in the course of his well presented argument for the claimant, contended that the combined effect of those three decisions is that one must distinguish between cases where the police simply assist the court (and should not be at risk on costs), and cases where they take an active part in the proceedings (and should be at risk on costs). …
>
> 68 Further, Mr Keith's contention strikes me as somewhat inconsistent and inconvenient. It is a little inconsistent to say that the police should not be liable for costs if their actions require a person to incur the expense of seeking relief from the court and they turn up to assist the court, but that they should be liable for costs if they go a little further and oppose the grant of the relief. The reason for not making a costs order in the former case is that the police are reasonably performing their duty, but, if that is right, I find it hard to see why it should not also apply in the latter case. The inconvenience, if Mr Keith's contention is right, arises from the fact that assisting the court and opposing the application can sometimes merge or overlap: the police might be neutral, while seeing it as their duty to produce evidence and arguments against the claimant in order to assist the court.

29 In the same case, Stanley Burnton LJ also said (at [45]):

> I therefore agree with what was said by Goldring LJ in the Divisional Court 173 JP 379, paras 29–33:
>
> > "29. … I accept that there is a difference between administrative decisions such as those referred to in the *Bradford* case and the present case. The distinction is limited, however. In one case a police officer (at possible risk to someone's livelihood) is saying that the person will not have an on-licence, for example. In the other, he is saying the person will not have his (or in this case her) money returned. In taking both decisions, it is crucial that the police act honestly, reasonably, properly, and on grounds that reasonably appear to be sound. *In both cases there is a need to make* ***and stand by*** *honest, reasonable and apparently sound decisions in the public interest without fear of exposure to undue financial prejudice*, ***in one case if the decision is successfully challenged, in the other if the application fails*** . …
>
> [emphasis added in italics and bold italics]

30 These two passages show that the English Court of Appeal did not consider that any distinction should be drawn between opposing an application and assisting the court. In the present case, the Council having made a decision against Top Ten, the Law Society perforce had to defend its Council's decision when it was made a defendant in the review proceedings. In this connection, the local case law is not consistent. The Review Judge referred to *Re Shankar Alan (costs)* where the applicant, a solicitor, applied for an order of *certiorari* to quash a decision of the DC that he was guilty of professional misconduct. The Law Society opposed the application on the ground that there was an alternative remedy, in that the matter should be referred to a court of 3 Judges of the Supreme Court. Sundaresh Menon JC ("Menon JC") held that the decision of the DC was subject to judicial

review, and quashed the decision of the DC and awarded costs against the Law Society on the ground that under O 59 r 3(2) of the Rules of Court, the court had full discretion to award costs and that the general principle was that costs would follow the event. At [10] of his judgment, Menon JC said:

> … As to the application for the quashing order, I do not consider that there was any duty or obligation upon the Law Society to *oppose* that application simply so as to present the court with an alternative position. To some degree, it is almost invariably the case in an adversarial system that the court in arriving at its decision finds the greatest assistance in a vigorously contested argument. However, that does not mean a prospective litigant is obliged to contest a position simply to facilitate this, or that he can avoid the usual consequence of being made liable for costs if he is unsuccessful in his efforts to persuade the court. [emphasis in original]

31 As Menon JC had decided in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Re Shankar Alan (review)*") that the decision of the DC was amenable to judicial review under O 53 of the Rules of Court, it was not unexpected that he would apply O 59 r 3(2) on the question of costs. However, we would suggest that if the Law Society did not step in to defend the decision of the DC, the DC would be left unrepresented and the court would not have had the benefit of its arguments. In those circumstances, we are unable to see why the Law Society should be penalised in costs if it supported the DC's decision in its role as a regulator of the legal profession in disciplinary matters. Additionally, we may also add that the *Baxendale-Walker* principle did not feature in that case as it had not yet been firmly established under English law.

32 In contrast to *Re Shankar Alan (costs)*, the High Court in *Chew Kia Ngee v Singapore Society of Accountants* [1988] 2 SLR(R) 597 ("*Chew Kia Ngee*") decided not to award costs in favour of an accountant who had successfully appealed against the decision of the Disciplinary Committee of the Singapore Society of Accountants convicting him of professional misconduct. L P Thean J held at [24]:

> I now turn to the question of costs. Clearly, in view of what I have decided, there should be no order as to costs before the Committee. The only question is whether the appellant should be awarded costs of the appeal. *I refrain from making this order, and my reason is this. The society has to discharge its duty under the Act; it has not acted improperly or vexatiously as against the appellant*. The Committee at their inquiry had made a finding and given their decision against the appellant. *Upon appeal by the appellant it seems to me that it is incumbent on the society, in this case at any rate, to resist the appeal and present its argument to court to assist the court in arriving at its decision*. Having regard to all the circumstances, I make no order as to costs here and below. [emphasis added]

In *Re Shankar Alan (costs)*, Menon JC distinguished *Chew Kia Ngee* on the ground that in the case before him, it was not incumbent on the Law Society to resist the application, whereas Thean J had found that it was incumbent on the Singapore Society of Accountants to resist the application. Interestingly, even though O 59 r 3 of the Rules of Court (which prescribes that costs follow the event) was applicable to the case (since it was an appeal to the High Court under s 54 of the Accountants Act (Cap 2, 1985 Rev Ed)), Thean J did not apply the principle that costs follow the event. His decision effectively foreshadowed the establishment of the *Baxendale-Walker* principle in England in 2008.

33 For the above reasons, we would disagree with the Review Judge in the present case that the Law Society (through the Council) was not acting as a regulator with respect to the report of the IC and in its subsequent defence of the Council's decision in accepting the recommendation and findings

of the IC. The *Baxendale-Walker* principle merely provides that, as a starting point, costs should not be awarded against a regulator performing a public duty. The Review Judge could, and should, have applied this principle as a starting point in the present case, and not the principle that costs follow the event. If the Law Society was derelict in performing its public functions, the Review Judge could still order costs against it as stated in proposition (6) in the judgment of Stanley Burnton LJ in *Perinpanathan* (see [19] above).

(ii) Is the Baxendale-Walker principle inconsistent with Part VII of the LPA?

34 In relation to this question, we do not think Part VII of the LPA affects the rationale of the *Baxendale-Walker* principle or its application to the Law Society in any way, unless O 59 r 3(2) of the Rules of Court governs the issue of costs with respect to proceedings under Part VII. In our view, disciplinary proceedings against advocates and solicitors under the LPA are specialised forms of inquisitorial proceedings with adversarial elements (before the IC and the DT) and judicial proceedings (before the Judge and the court of 3 Judges of the Supreme Court) to which the Rules of Court are not applicable because they are not civil proceedings as defined in those Rules. Hence, O 59 r 3(2) does not apply to Part VII of the LPA. In any case, it is not necessary to apply O 59 r 3(2) because Part VII of the LPA provides a comprehensive framework for disciplinary proceedings, and provides in ss 93(2A), 95(3), 96(4), 97(4), 100(6) and 103(3) a comprehensive costs regime with respect to such proceedings. This issue is discussed further in connection with the Law Society's right of appeal (see [44]–[45] below).

(iii) Is the review under s 96 a first instance hearing for the Law Society?

35 The decision in *Perinpanathan* has limited the application of the *Baxendale-Walker* principle to regulatory bodies to a first instance hearing ("the *Perinpanathan* limitation") on the ground that an appeal is subject to different considerations. Assuming that we accept this limitation, what would be a first instance hearing for the Law Society, insofar as costs are concerned? In our view, a review hearing before the Judge under s 96 (or s 95) would be a first instance hearing as far as the Law Society is concerned. The reason is that the Law Society would not have been involved in any other previous hearing prior to the review. The Council's consideration of the IC report under s 89 cannot be regarded as a hearing for the purpose of determining who has to pay the costs of the hearing, as no issue of costs arises in that consideration. For the same reason, a review hearing before the Judge under s 97(2) where the Law Society is served with the review application by an advocate and solicitor is in the nature of a first instance hearing as no costs can be awarded against the Law Society where the DT dismisses a complaint. For the same reason too, an application by the Law Society made to the court of 3 Judges of the Supreme Court under s 98 for an order to strike an advocate and solicitor off the rolls is also in the nature of a first instance hearing as far as the Law Society is concerned.

36 In any case, we would add that even if any hearing is not a first instance hearing under ss 95, 96, 97 or 98 of the LPA, it would not matter as under ss 95–97 the Judge may make such order for the payment of costs as may be just, and under s 103 of the LPA, the costs payable under ss 97, 98, 100 or 102 are in the discretion of the Judge or the court. These costs provisions do not exclude the rationale of the *Baxendale-Walker* principle or prevent it from applying. The only difference between the *Baxendale-Walker* principle and the "costs follow the event" principle in O 59 r 3(2) of the Rules of Court is that the former shifts the burden of proving the Law Society should pay costs in the proceedings to the complainant or the solicitor concerned.

37 It may be noted that the LPA does not contain any provision for an appeal against any order made by a Judge under ss 95, 96 or 97 (or a decision by the court of 3 Judges of the Supreme Court

under s 98). To the extent that there is no appeal against the decision of the Judge or the court of 3 Judges of the Supreme Court under Part VII of the LPA, the *Perinpanathan* limitation would have no application to proceedings under that Part. We are aware that there are existing decisions of the Privy Council and of the Court of Appeal that there is a right of appeal from the decision of a Judge under s 95 of the LPA (and therefore by analogy also the decisions of a Judge under ss 96 and 97 of the LPA). As we shall show (see [41] below and the following paragraphs), the correctness, and therefore authority, of these decisions is doubtful and they should not be followed. In any case, these are pre-*Baxendale-Walker* decisions and are no longer relevant.

(iv) Was the Review Judge correct to order the Law Society to pay 50% of the costs?

38 We have earlier stated that the *Baxendale-Walker* principle does not require the Judge to immunise the Law Society from having to pay costs in any circumstances. The principle merely states that, as a starting point, a public body performing a regulatory body should not be made to pay costs. Proposition (6) in Stanley Burnton LJ's judgment in *Perinpanathan* (see [19] above) states that a successful private party to proceedings to which the principle applies may nonetheless be awarded all or part of his costs if the conduct of the public authority in question justifies it. In the present case, the Review Judge proceeded from a different starting point in that she held that costs should follow the event. We have held that O 59 r 3(2) of the Rules of Court does not apply to disciplinary proceedings in Part VII of the LPA, and therefore the Review Judge should not have proceeded on the basis that costs follow the event.

39 However, on the facts of this case, even if the Review Judge had applied the *Baxendale-Walker* principle as the starting point, she might well have come to the same conclusion on the issue of costs, having regard to the conduct of counsel for the Law Society in taking the technical points against Top Ten. At [44] of the GD, the Review Judge noted that the Law Society's "strenuous opposition" was based largely on the argument that Top Ten's s 96 application raised matters outside the original scope of the Complaint considered by the IC when the evidence was before the IC and also before the Council. In other words, the Review Judge was of the view that the Council as the regulator of professional discipline should have considered the substance of the Complaint and not its procedural flaws, as it could give (and in the present case, probably did give) Top Ten the impression that it was trying to shield one of its own from disciplinary sanctions. In principle, we agree with the approach of the Review Judge on this issue. But the Law Society's appeal fails in any event since there is no right of appeal against the decision of a Judge made under s 96 of the LPA and also, by analogy, under ss 95 and 97 of the LPA, as our analysis of these sections of the LPA will show.

Right of appeal

40 The Law Society has proceeded on the basis that it had a right of appeal. This was not challenged by counsel for Top Ten. We are not surprised by this as the existing case law, including a Privy Council decision and a decision of the Court of Appeal, supports the position that there is a right of appeal. We think they were wrongly decided, and should not be followed in future cases. We will discuss these cases now.

(a) Why there is no right of appeal from the decision of a Judge under ss 95, 96 and 97 of the LPA

41 The proposition is a simple one. A right of appeal is exclusively a statutory right (see [58] below), but nothing in the LPA provides for such a right with respect to the decision of the Judge under ss 95, 96 or 97. In *Hilborne v Law Society of Singapore* [1977–1978] SLR(R) 342 ("*Hilborne (PC)*"), the Privy Council decided there was a right of appeal to the Court of Appeal from a decision of the Judge made under s 95 of the Legal Profession Act (Cap 217, 1970 Rev Ed) ("1970 LPA") (which

corresponds to s 95 of the LPA). We shall discuss this decision at [46] below and the paragraphs that follow.

42 We start our analysis by considering the civil jurisdiction of the Supreme Court under ss 16 and 17 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). The Supreme Court consists of the High Court and the Court of Appeal (see Art 94(1) of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution") and s 3 of the SCJA). Section 16 of the SCJA provides for the general jurisdiction of the High Court with respect to *in personam* actions, and s 17 sets out the specific areas of law within its jurisdiction. The general powers of the High Court are set out in the First Schedule to the SCJA. None of these provisions refers to disciplinary proceedings. The ordinary meaning of an *in personam* action does not include a disciplinary action. In short, the civil jurisdiction of the High Court does not include jurisdiction over any disciplinary matter under Part VII of the LPA. If the High Court has no jurisdiction over disciplinary matters, it follows that the Court of Appeal also has no jurisdiction over such matters as s 29A(1) of the SCJA provides that:

> The civil jurisdiction of the Court of Appeal shall consist of appeals from any judgment or order of the High Court in any civil cause or matter whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.

43 We next consider the Rules of Court made under the SCJA to regulate civil proceedings. Order 57 of the Rules of Court sets out the rules of practice relating to appeals to the Court of Appeal. Rule 1 provides that:

> This Order applies to every appeal to the Court of Appeal (including so far as is applicable thereto, any appeal to that Court from any tribunal from which an appeal lies to that Court under any written law) not being an appeal for which other provisions is made by these Rules.

Rule 1 requires us to consider whether the Judge hearing a review under s 96 of the LPA is a "tribunal from which an appeal lies to [the Court of Appeal]" within the meaning of the Rules of Court and whether the LPA provides for an appeal to the Court of Appeal.

44 In our view, Part VII provides a self-contained disciplinary framework outside the civil proceedings framework. There is no express provision in Part VII or in any other part of the LPA that provides for an appeal from a decision of a Judge under ss 95, 96 or 97. Section 2 of the LPA defines the term "Judge" to mean "a Judge of the High Court sitting in chambers". But this definition is not apt to refer to a Judge hearing a review under s 96 as that section does not require the hearing to be in chambers, nor is there any reason to specify such form of hearing. The definition is intended to refer to a Judge of the High Court exercising civil jurisdiction under other provisions of the LPA, such as s 22 (application to a Judge to reverse a decision of the Board of Legal Education), s 23 (application for admission before a Judge), s 25B (appeal to a Judge against a Registrar's refusal to issue an unconditional practising certificate), s 25C (application to a Judge for an order that a solicitor submit to a medical examination), s 27A (application to a Judge for imposition of conditions on a practising certificate), s 27B (application to a Judge for referral to a Disciplinary Tribunal and suspension of a practising certificate), s 28 (application to a Judge to cancel a practising certificate) and s 32(3) (application to a Judge to allow an unqualified person to appear in court).

45 However, the term "Judge" is defined in the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act") (as well as s 2 of the SCJA) to mean "a Judge of the High Court and includes any person appointed to exercise the powers of a Judge." This definition is more appropriate in denoting the functions of a Judge exercising judicial power under s 96 which prescribes a special form

of judicial proceedings with respect to disciplinary matters. In the context of ss 95, 96, and 97 of the LPA, a "Judge" as defined under s 2 of the Interpretation Act is simply a Judge of the High Court exercising disciplinary jurisdiction under Part VII of the LPA, and not a Judge of the High Court exercising civil jurisdiction under ss 16 and 17 of the SCJA. Hence, because the decisions of a Judge under Part VII of the LPA are not decisions in civil proceedings, they do not fall within the appellate jurisdiction described in s 29A(1) of the SCJA. In short, the SCJA does not confer any right of appeal on any person dissatisfied with the decision of the Judge on a review made under ss 95, 96 or 97 of the LPA.

(b) The decision in Hilborne (PC)

46 We have earlier referred to *Hilborne (PC)* where the Privy Council held that there was a right of appeal to the Court of Appeal from a decision of the Judge in review proceedings under s 95 of the LPA. Section 95 provides that an advocate and solicitor who is dissatisfied with an order of the Council that he/she pay a penalty may apply to a Judge to set aside the penalty, such application to be heard in chambers (which is not the case for a s 96 or a s 97 application). However, this anomaly makes no difference to the fact that these are disciplinary proceedings and not civil proceedings. Section 96 provides a similar right to a dissatisfied complainant who wishes to set aside a decision of the Council. Save for these two differences, s 95 and s 96 operate in the same way *vis-à-vis* the absence of any right of appeal to the Court of Appeal. Hence any discussion of the decision in *Hilborne (PC)* will apply equally to s 96 (and also s 97).

47 In *Hilborne (PC)*, the advocate and solicitor ("Hilborne") was ordered by the Council to pay a penalty of $250 under s 89 (1) of the 1970 LPA. His application to the Judge under s 95 was dismissed. He appealed to the Court of Appeal (see *Hilborne v Law Society of Singapore* [1971–1973] SLR(R) 685 ("*Hilborne (CA)*")). The Court of Appeal dismissed the appeal on the merits, and additionally expressed doubts on its jurisdiction to hear the appeal. At [3] and [18]–[20], Wee Chong Jin CJ (delivering the judgment of the court) said:

> 3 A preliminary question arose as to the competence of such an appeal to the Court of Appeal in the absence of any specific provision to this effect in Pt VII of the Act which relates to disciplinary proceedings affecting members of the legal profession. Further, it seemed to us that a doubt arose as to whether the order made under s 95 of the Act was an order made in the exercise of the original civil jurisdiction conferred on the High Court by s 29 of the Supreme Court of Judicature Act (Cap 15, 1970 Rev Ed) having regard to the subject matter of the appeal and the context of the situation in which the action of the respondent was originally invoked …
>
> …
>
> 18 With regard to the question of jurisdiction on which we reserved our opinion, we are of the view that, although s 95 of the Act empowers an application such as the appellant's to be made by way of originating summons to a judge to set aside the Council's order, the order made herein is not an order made by the High Court in a civil matter either in the exercise of its original or of its appellate jurisdiction. Section 29 of the Supreme Court of Judicature Act confers jurisdiction on the Court of Appeal to hear and determine an appeal only in such cases.
>
> 19 Moreover, the doubts we had in this matter as earlier expressed have not in any way been dispelled.
>
> 20 The provisions of Pt VII of the Act clearly contemplate a special procedure in respect of disciplinary proceedings affecting the profession. One has only to consider the position that would

arise should a person who had made a written complaint to the Society have been dissatisfied with the Council's action. Such a person could apply to a judge by way of originating summons under s 96 of the Act and the only orders a judge could make would be to affirm the Council's decision or to direct the Society to apply to the Chief Justice for the appointment of a Disciplinary Committee. Surely it cannot be successfully contended that an appeal would lie in such circumstances to the Court of Appeal. As the Act provides, if a Disciplinary Committee makes a finding adverse to the advocate and solicitor the procedure prescribed under s 98 of the Act would apply and the matter would eventually go before a court of three judges and not before the Court of Appeal.

48 Hilborne appealed to the Privy Council, which dismissed the appeal. Both parties ignored the Court of Appeal's decision that it had no jurisdiction and conceded that issue before the Privy Council. Even with the effluxion of time since that appeal, we find the Law Society's concession most unusual, if not self-serving. This made it necessary for the Privy Council to address that issue without the benefit of counsel's arguments. On the issue of jurisdiction, the Privy Council said (per Lord Russell of Killowen) at [33]:

> There is one final matter. The Court of Appeal held in the alternative that there was no right of appeal to it in such a case. *The respondent did not seek to support that view before this Board, but since it is a question of jurisdiction the question must be dealt with*. Their Lordships are of the opinion that there is no sufficient ground for excluding from s 29 of the Supreme Court of Judicature Act (Cap 15, 1970 Rev Ed) as "*any judgment or order of the High Court in any civil matter*" the decision of a High Court judge on an originating summons such as in the present case. There is no provision in the statute (Legal Profession Act) excluding such appeal, and it is not to be found among the non-appealable matters in s 34 of the former Act. The fact that by s 98(6) of the latter Act it is expressly provided in the serious cases where a special court of three judges is to be concerned that there is to be no appeal therefrom to the Court of Appeal but only to the Judicial Committee of the Privy Council suggests to their Lordships that the Legislature was not minded to forbid appeal to the Court of Appeal in a case such as the present one.
>
> [emphasis added]

49 In our view, the reasoning of the Privy Council is flawed on two grounds. The first is that, as shown in the above passage, the Privy Council proceeded on the basis that disciplinary proceedings under the LPA were civil proceedings under the Supreme Court of Judicature Act (Cap 15, 1970 Rev Ed) ("the 1970 SCJA") which for our purposes is similar to the SCJA. This assumption is incorrect. As we have pointed out at [42]–[45] above, disciplinary actions under the LPA are not civil actions under the SCJA. The second flaw is the wrong assumption that the absence of a provision in the LPA excluding such appeal and the fact that disciplinary proceedings were not to be found among the non-appealable matters in s 34 of the SCJA could have given rise to a right of appeal, *by implication*, from a Judge's decision made under s 95 (or ss 96 or 97) to the Court of Appeal. Nor was the express provision that there should be no right of appeal from a special court of three judges to the Court of Appeal a logical basis for implying a right of appeal from s 95 proceedings. It is established law that a right of appeal is statutory in nature and must be expressly provided for (see [58] below).

50 In our view, the Court of Appeal's decision in *Hilborne (CA)* correctly interpreted s 29 of the 1970 SCJA (s 29A of the SCJA) and we would disagree with the Privy Council's decision to the contrary. However, *Hilborne (PC)* was subsequently approved by the Court of Appeal in *Wong Juan Swee v Law Society of Singapore* [1994] 3 SLR(R) 619 ("*Wong Juan Swee (CA)*") on an additional ground not mentioned by the Privy Council in *Hilborne (PC)*. We will now discuss this decision.

(c) The decision in Wong Juan Swee (CA)

(c) The decision in Wong Juan Swee (CA)

51 In this case, Wong Juan Swee ("Wong"), an advocate and solicitor, applied under s 95 of the Legal Profession Act (Cap 161, 1990 Rev Ed) ("1990 LPA") to set aside the penalty the Council had ordered her to pay. Lai Siu Chiu JC dismissed her application (see *Wong Juan Swee v Law Society of Singapore* [1993] 1 SLR(R) 429 ("*Wong Juan Swee (HC)*")) and she appealed. Counsel for the Law Society raised the objection that the Court of Appeal had no jurisdiction to hear the appeal. The Court of Appeal (by a majority) held (at [9]–[11]):

> 9 ... Before the Privy Council [in *Hilborne (PC)*], the question of jurisdiction was conceded by the Law Society and was not argued. Nonetheless Lord Russell of Killowen said … [see passage reproduced at [47] above]
>
> 10 It is true that Lord Russell's opinion [in *Hilborne (PC)*] on the question of jurisdiction was *obiter*. That notwithstanding, we have grave doubts whether the decision of this court in *Hilborne* [(CA)] on the issue of jurisdiction was right. Since that decision, this court had at least on two occasions entertained appeals from the decisions of the High Court: see [*Ang Boon Kong Lawrence (CA)*] and *Whitehouse Holdings Pte Ltd v Law Society of Singapore* [1994] 2 SLR(R) 485.
>
> 11 The proceedings below were commenced under s 95 of the Act by an *originating summons – one of the four modes of beginning civil proceedings in the High Court*. In hearing the application under s 95, the judicial commissioner was exercising a form of *appellate but supervisory jurisdiction*, and her judgment thereon was a judgment of the High Court given *in exercise of the appellate jurisdiction* in a civil cause or matter. Under s 29A(1) (which was then s 29(1) when the appeal was filed) of the Supreme Court of Judicature Act (Cap 322) ("the SCJA"), this court has jurisdiction to hear and determine appeals from any judgment or order of the High Court in any civil cause or matter whether made in exercise of its original or appellate jurisdiction. Further, there is nothing in the Legal Profession Act to say, expressly or by implication, that the judgment or order of a judge given under s 95 of the Act is final, and such judgment or order "is not to be found among the non-appealable matters" in s 34(1) of the SCJA. We are therefore firmly of the view that there is a right of appeal to this court from a judgment or order made by a judge under s 95 of the Act.
>
> [emphasis added]

52 We are unable to agree with the reasoning in the above passages for the following reasons. First, the issue of jurisdiction was not raised in *Ang Boon Kong Lawrence (CA)* and *Whitehouse Holdings Pte Ltd v Law Society of Singapore* [1994] 2 SLR(R) 485 ("*Whitehouse Holdings*"), and therefore they do not reinforce the authority of *Hilborne (PC)* or the reasoning in that case.

53 Secondly, the Court of Appeal appeared to have placed some significance on the application to set aside the Council's order as having been commenced by originating summons by describing it as one of the four modes of commencement of civil proceedings in the High Court. That this mode was used was not surprising as s 95 of the 1990 LPA specifically provided for it, and also that the hearing be in chambers. Furthermore, the express provision in s 95 regarding this procedure would imply that the Rules of Court had no application to disciplinary proceedings and that they were therefore not civil proceedings.

54 Thirdly, the Court held that Lai JC was exercising "a form of *appellate but supervisory jurisdiction*" [emphasis added], and therefore her judgment "was a judgment of the High Court given *in exercise of the appellate jurisdiction* in a civil cause or matter" [emphasis added]. There are two

problems with this ground. The first is that the Privy Council did not rely on this ground to support its decision in *Hilborne (PC)* and that, in itself, raises a doubt as to its materiality. The second is that, although the review jurisdiction of the Judge under s 95 is of a supervisory nature, and is also appellate in the sense that it is reviewing a decision of a subordinate body, a review is not an appeal, and it is not a civil proceeding. The Privy Council in *James Chia* appeared to have characterised the review as an appeal, but only tentatively, in stating "[t]he point of principle in the case is whether the appeal (or review) procedure established by s 97 is available to the Society" (see *James Chia* at [7]). But, this statement was made on the assumption that disciplinary proceedings are civil proceedings under the SCJA.

55 In the review proceedings in *Wong Juan Swee (HC)* (at [14] of her judgment), the Judge referred to the statement of Chan Sek Keong JC in *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 ("*Anthony Wee*") as follows:

> The court here is exercising its appellate jurisdiction over the defendants as an administrative tribunal (see the decision of Chan ... JC ... in [*Anthony Wee*].

In *Anthony Wee*, what Chan JC said at [16] of his judgment was as follows:

> … In my view, s 93(4) [which corresponds with s 96(4) of the LPA] does not vest in a judge an original jurisdiction to hear a complaint against an advocate and solicitor. Section 93(4) does not contemplate such a hearing. His jurisdiction is supervisory or appellate in nature. …

56 However, the statement in the above passage was directed towards the point (made at [17] of *Anthony Wee*) that a Judge hearing an application under s 93 (s 96 of the LPA) did not have an original jurisdiction to inquire into the conduct of an advocate and solicitor where the IC had not done so. It was not directed towards the question of whether the Judge was exercising any supervisory or appellate jurisdiction of the High Court under the SCJA. Chan JC did not in his judgment refer to the Judge as exercising civil jurisdiction as a Judge of the High Court. Chan JC's statement was also quoted and approved by the Court of Appeal in *Whitehouse Holdings* (at [38]) without it realising that the statement was made in the context of disciplinary proceedings and not meant to describe the High Court's supervisory jurisdiction in civil proceedings under the SCJA.

57 In our view, the Court of Appeal in *Wong Juan Swee (CA)* was too deferential in accepting the Privy Council's reasoning in *Hilborne (PC)*, *ie* that because the 1990 LPA did not say that the order of a Judge given under s 95 of the Act is final, and because such judgment or order "is not to be found among the non-appealable matters" in s 34(1) of the SCJA, Parliament "was not minded to forbid appeal to the Court of Appeal in a case such as the present one".

58 As we have pointed out earlier, a right of appeal is a statutory right, and has to be expressly conferred by the SCJA or the LPA in this case. It is only necessary to cite the following passage from the judgment of Andrew Phang Boon Leong JA in *Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR(R) 529, where he said at [24]:

> ... [I]t is trite law that there is no inherent right to appeal from judicial determinations made by our courts: see, for example, the Straits Settlements Supreme Court decision of *Chop Sum Thye v Rex* [1933] MLJ 87 and the Malaysian Federal Court decision of *Kulasingam v Public Prosecutor* [1978] 2 MLJ 243. A right of appeal must, therefore, have its source in legislative authority: see, for example, *Knight Glenn Jeyasingam v PP* [1998] 3 SLR(R) 196 at [13] and *Ting Sie Huong v State Attorney-General* [1985] 1 MLJ 431. As Lord Goddard CJ poignantly observed in the English decision of *R v West Kent Quarter Sessions Appeal Committee [ex parte Files]* [1951] 2 All ER

728 at 730:

> It is most elementary that no appeal from a court lies to any other court unless there is a statutory provision which gives a right to appeal. The decision of every court is final if it has jurisdiction, unless an appeal is given by statute.

Meaning of "court of 3 Judges of the Supreme Court" and its powers

59 Although this issue does not arise in the present appeal, we consider it desirable that we clarify the meaning of this phrase in Part VII of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("2009 LPA"). Section 83 of the 2009 LPA provides for the jurisdictional powers of the Supreme Court over all advocates and solicitors as follows:

> **83**.—(1) All advocates and solicitors shall be subject to the control of the Supreme Court and shall be liable on due cause shown —
>
> (*a*) to be struck off the roll;
>
> (*b*) to be suspended from practice for a period not exceeding 5 years;
>
> (*c*) to pay a penalty of not more than $100,000;
>
> (*d*) to be censured; or
>
> (*e*) to suffer the punishment referred to in paragraph (*c*) in addition to the punishment referred to in paragraph (*b*) or (*d*).

60 The term "Supreme Court" is not defined in the 2009 LPA, but it is defined in s 2 of the Interpretation Act as follows:

> "Supreme Court" means the Supreme Court of Singapore constituted under any written law for the time being in force relating to the courts and includes the High Court.

61 The Supreme Court is constituted under Art 94(1) of the Constitution which provides as follows:

> The Supreme Court shall consist of the Court of Appeal and the High Court with such jurisdiction and powers as are conferred on those Courts by this Constitution or any written law.

It follows from this provision that a Judge of the Supreme Court may be a Judge of the High Court or a Judge of Appeal of the Court of Appeal.

62 Section 98(7) of the 2009 LPA provides for the exercise of the jurisdictional powers under s 98(1) of the 2009 LPA as follows:

> The application under subsection (1) shall be heard by a court of 3 Judges of the Supreme Court, and from the decision of that court there shall be no appeal.

The exercise of the jurisdictional powers of the court of 3 Judges of the Supreme Court may be invoked under s 98(1) by the Law Society following an adverse finding by the DT against an advocate and solicitor under s 93(1)(*c*) of the 2009 LPA.

63 Having regard to the various definitions we have referred to, the expression "court of 3 Judges

of the Supreme Court" does not mean "court of 3 Judges of the High Court" or "court of 3 Judges of the Court of the Appeal". It is a special court constituted under Part VII for the purposes of Part VII. Currently, the practice of the Supreme Court is for applications under s 98(1) to be heard by a court of 3 Judges of Appeal.

64 In this connection, it is convenient to mention the Privy Council decisions which referred to the "court of three judges" in the relevant statutes on this subject as the "High Court". It started with *Lau Liat Meng v Disciplinary Committee* [1965–1967] SLR(R) 64, where the Privy Council (per Lord Hodson) said at [1] of the judgment:

> This is an appeal from the decision of the High Court of Singapore constituted under s 30(7) of the Advocates and Solicitors Ordinance (Cap 188, 1955 Rev Ed) dated 28 February 1966 ordering that the appellant be struck off the roll of advocates and solicitors of the High Court of Singapore.

65 It should be noted that s 30(7) of the Advocates and Solicitors Ordinance (Cap 188, 1955 Rev Ed) ("the 1955 Ordinance") did not refer to the High Court, but simply "a court of three judges". That provision read:

> The application to make absolute and the showing cause consequent upon any order to show cause made under [ss] (1) and (2) shall be heard by a court of three judges of whom the Chief Justice shall be one and from the decision of that court there shall be no appeal to any court. For the purposes of an appeal to Her Majesty in Council an order made under this subsection shall be deemed to be an order of the Court of Appeal.

However, s 25 of the 1955 Ordinance provided for advocates and solicitors to be under the control of the Supreme Court, and s 26 provided that "[a]ny application by any person that the name of a solicitor be struck off the roll or that he be otherwise dealt with *by the Supreme Court* under s 25 ..." [emphasis added], and s 27 provided that "[t]he Supreme Court or any Judge thereof may at any time refer to the Bar Committee any information touching on the conduct of a solicitor in his professional capacity ...". These three provisions would suggest (a) that the "court of three judges" in s 30(7) of the 1955 Ordinance would refer to Judges of the Supreme Court rather than of the High Court, and (b) that a "Judge" would similarly refer to a Judge of the Supreme Court.

66 The same description of the court of three judges as the "High Court" was given by the Privy Council in *James Chia* (see [1] of the judgment) and also *Jeyaretnam* (see [1] of the judgment). In both of these cases, the relevant section of the relevant revised editions of the Legal Profession Act referred to the court as a "court of three judges", *ie*, in terms identical to the reference in s 30(7) of the 1955 Ordinance. However, s 29(c) of the Legal Profession (Amendment) Act (Act 41 of 1993) replaced that term with "a court of 3 Judges of the Supreme Court" to signify that the court of 3 Judges would include not only Judges of the High Court but also Judges of Appeal. This is the current wording in s 98(7) of the 2009 LPA, and therefore the correct name for the final appellate court in disciplinary matters is "the court of 3 Judges of the Supreme Court", and not "the court of three judges" or "the court of 3 Judges of the High Court", or "3 Judges sitting as the High Court".

67 We now discuss the disciplinary powers of the court of 3 Judges of the Supreme Court. Section 98 of the 2009 LPA provides as follows:

> **98**.—(1) An application for an order that a solicitor —
>
> (*a*) be struck off the roll;

(*b*) be suspended from practice for a period not exceeding 5 years;

(*c*) pay a penalty of not more than $100,000;

(*d*) be censured;

(e) suffer the punishment referred to in paragraph (*c*) in addition to the punishment referred to in paragraph (*b*) or (*d*); or

(f) be required to answer allegations contained in an affidavit,

shall be made by originating summons.

(2) If the solicitor named in the application under subsection (1) is believed to be outside Singapore, an application may be made by summons in the same proceedings for directions as to service.

(3) If the solicitor named in the application under subsection (1) is or is believed to be within Singapore, the provisions of the Rules of Court (Cap. 322, R 5) for service of writs of summons shall apply to the service of the application.

(4) A copy of the affidavit or affidavits in support of the application under subsection (1) shall be served with the application upon the solicitor named in the application.

(5) There must be at least 8 clear days between the service of the application under subsection (1) and the day named therein for the hearing.

(6) Any order on an application under subsection (1) that is made in any case where personal service of that application has not been effected may be set aside on the application of the solicitor on good cause being shown.

(7) The application under subsection (1) shall be heard by a court of 3 Judges of the Supreme Court, and from the decision of that court there shall be no appeal.

(8) The court of 3 Judges —

(*a*) shall have full power to determine any question necessary to be determined for the purpose of doing justice in the case, including any question as to the correctness, legality or propriety of the determination of the Disciplinary Tribunal, or as to the regularity of any proceedings of the Disciplinary Tribunal; and

(*b*) may make an order setting aside the determination of the Disciplinary Tribunal and directing —

(i) the Disciplinary Tribunal to rehear and reinvestigate the complaint or matter; or

(ii) the Society to apply to the Chief Justice for the appointment of another Disciplinary Tribunal to hear and investigate the complaint or matter.

(9) The Chief Justice or any other Judge of the Supreme Court shall not be a member of the court of 3 Judges when the application under subsection (1) is in respect of a complaint made or

information referred to the Society by him.

(10) Subject to this section, the Rules Committee may make rules for regulating and prescribing the procedure and practice to be followed in connection with proceedings under this section and under sections 100 and 102, and in the absence of any rule dealing with any point of procedure or practice, the Rules of Court may be followed as nearly as the circumstances permit.

68 The term "Rules Committee" in s 98(10) is defined in s 2 of the 2009 LPA as follows:

"Rules Committee" means the Rules Committee constituted under any written law for the time being in force with the power to make rules regulating procedure in the Supreme Court.

The Rules Committee is constituted under s 80(3) of the SCJA. However, to date the Rules Committee has not made any procedural rules pursuant to s 98(10) of the 2009 LPA. This provision reinforces our conclusion that the Rules of Court have no application to Part VII of the 2009 LPA. However, it should be noted that s 98(10) also provides that in the absence of any rule dealing with any point of procedure or practice, the Rules of Court may be followed as nearly as the circumstances permit. In our view, the circumstances regarding the role of the Law Society in disciplinary matters concerning advocates and solicitors in Part VII of the 2009 LPA do not call for the "costs follow the event" rule in O 59 r 3(2) of the Rules of Court but rather the *Baxendale-Walker* principle.

69 It is clear from these provisions that Part VII of the 2009 LPA provides a comprehensive code of substantive law and procedure relating to disciplinary matters concerning advocates and solicitors. It is also clear from s 98(3) that the Rules of Court in their application to civil proceedings do not apply to disciplinary proceedings under this Part, as otherwise that subsection would not be necessary.

70 To conclude our analysis of the disciplinary process under Part VII of the 2009 LPA, we might mention that as early as 1878, the Courts Ordinance (SS Ord No 3 of 1878) ("the 1878 Ordinance") had codified the law on this subject. Section 50 of the 1878 Ordinance read:

50 The Advocates and Solicitors shall be subject to the control of the Supreme Court, and shall be liable, on due cause shown, and subject to such Rules and Orders of Court as may be made under Section 81, to be suspended from practice, or struck off the Rolls of the Court, by the Judges of the Court or by a majority of them.

The relevant portion of s 81 (as amended by SS Ord No 19 of 1889) stated:

81– (1) The Judges of the Supreme Court or any two of them of whom the Chief Justice shall be one may from time to time make Rules and Orders :–

...

(b) Prescribing the practice and procedure of all Courts of Justice as well in their appellate as in their original civil and criminal jurisdiction.

(c) Regulating the admission of Advocates and Solicitors of the Supreme Court and suspending them from practice or striking them off the Rolls of the Court.

71 Accordingly, when these provisions were re-enacted in subsequent statutes, the strict demarcation between the Supreme Court's disciplinary proceedings and the Supreme Court's civil proceedings was preserved. The passing of separate legislation regulating the profession from the first

Advocates and Solicitors Ordinance (Ord No 32 of 1934) to the 2009 LPA has only reinforced the separation of disciplinary proceedings from the normal civil process, which is now governed by the SCJA. There have been some misconceptions in the past that disciplinary proceedings under Part VII of the 2009 LPA (and its predecessor legislation) were civil proceedings under the SCJA. Hereafter, there should be no further misunderstanding, and consequentially, disciplinary proceedings under Part VII should not be treated as such and not as civil proceedings.

Conclusion

72 For the reasons given above, although we do not disagree with the Review Judge's award of costs, we are of the view that the *Baxendale-Walker* principle is the correct test to be applied as a starting point in determining whether or not, and to what extent, the Law Society should have been made to pay the costs of Top Ten. In any event, since the Law Society has no right of appeal against the decision of a Judge made under s 96(4) of the LPA, we dismiss its appeal. Each party will pay its own costs, with the usual consequential orders.

Copyright © Government of Singapore.