IN THE MATTER OF THE LEGAL PROFESSION ACT (CAP 161, 2009 REV ED)
AND
IN THE MATTER OF LEE SUET FERN, AN ADVOCATE AND SOLICITOR OF THE SUPREME COURT OF THE REPUBLIC OF SINGAPORE

LAW SOCIETY OF SINGAPORE

(APPLICANT)

AND

LEE SUET FERN

(RESPONDENT)

OPINION

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1. I am instructed to advise Lee Suet Fern (LSF) as to whether the judgment of the court of three Judges (case citation [2020] SGHC 255) ("the Court"), whereby the Court found the Respondent, LSF, liable for professional misconduct and imposed a sanction of 15 months suspension from practice is based on sound and defensible legal principles as to the finding of liability for misconduct.

Introduction

2. LSF is an advocate and solicitor of the Supreme Court of Singapore of some 37 years' standing. She has been in practice as a Director of Morgan Lewis Stamford LLC, a Singapore law corporation, and until this judgment has had a distinguished and unblemished career[1]. She read law at Cambridge University graduating in 1980, and obtained a double first.

[1] I have noted that LSF is ranked as a leading lawyer in Mergers and Acquisition law by Chambers and Legal 500, has received numerous professional awards for her work and that she has served on the boards of public companies and public bodies.

3. By application dated 13th August 2020, the Law Society of Singapore (LSS), following a complaint by the Attorney-General Chambers, Singapore, applied to the Court, presided over by Sundaresh Menon CJ, for an Order striking LSF from the roll of solicitors pursuant to section 83(1)(a) of the Legal Profession Act (LPA).

4. By a judgment handed down on 20th November 2020, the Court declined to accede to the application to strike LSF from the roll. The Court found that, although there was no solicitor-client retainer as between the Testator, Lee Kuan Yew (LKY), the former Prime Minister of Singapore, and his daughter in law LSF, LSF nevertheless was - in the way she handled the arrangements for the execution of LKY's Last Will in December 2013 - guilty of professional misconduct. The Court imposed a sanction of 15 months suspension from practice. The Court acquitted LSF of all the allegations of deliberate impropriety and dishonesty brought by the LSS.

5. The context in which the misconduct is said to have arisen therefore involves the circumstances surrounding the making of LKY's Last Will which was executed on 17th December 2013 having been read carefully by LKY (the Testator) before he signed it in the presence of two witnesses[2]. The Testator/LKY received the Last Will the evening before he signed it[3], and received a copy and an original of the Last Will the same day he signed it[4]. At all times, he had immediate access to the Last Will which he instructed his personal assistant to keep in his office[5]. On 2nd January 2014, two weeks after executing the Last Will, LKY prepared and executed a codicil to it in which he

[2] Judgment of the Court para 26
[3] Judgment of the Court para 12
[4] Judgment of the Court para 31
[5] Judgment of the Court para 31

expressly stated that the codicil was to his Last Will dated 17th December 2013 and pursuant to which he bequeathed two carpets in his study and his bedroom to his son (the husband of LSF)[6]. The codicil, arrangements for which were made personally by LKY, was witnessed by two witnesses[7]. The draft and the executed Last Will were provided by LSF to LKY's solicitor who was uncontactable during the period when LKY executed the will[8]. Thereafter and until his death in March 2015 neither LKY nor his solicitor Kwa Kim Li (Ms Kwa) raised any concerns about the Last Will. Probate was taken out in October 2015. None of the beneficiaries of the Last Will voiced any concerns about it: indeed, they had agreed to the dispositions made under it in 2011. On these facts, the Court found LSF guilty of misconduct.

Summary of Conclusions

6. For the reasons which are set out in detail below, I have reached the conclusion that the judgment of the Court and its conclusion that LSF committed misconduct is flawed. The Court's reasoning in its judgment is legally unsound and falls into serious error.

Structure of Opinion, and Dramatis Personae

7. I structure this Opinion as follows:

I Summary of facts (paragraphs 8 to 26).

II The judgment of the Court (paragraphs 27 to 33).

III Misconduct unbefitting an advocate and solicitor (paragraphs 34 to 42).

IV The Court's errors (paragraphs 43 to 50).

[6] Judgment of the Court paragraphs 32-33

[7] Judgment of the Court paragraph 32.

[8] Judgment of the Court paragraphs 20-22. Note that the arrangements were principally made by the intended executors LHY and Dr LWL (her e-mail at 10.06pm on 16 December 2013 confirms the Testator's wish to go back to the 2011 Will, and execute it before a Notary Public not from Ms Kwa's firm, Lee and Lee.

V Misconduct sufficient to be unbefitting an officer of the Supreme Court or a member of an honourable profession and the Court's errors (paragraphs 51 to 55).

VII Conclusion (paragraph 56).

Dramatis Personae

I use similar nomenclature and abbreviations as the Court, as follows:

LKY: Lee Kuan Yew, former Prime Minister of Singapore, and the Testator.
LHL: Lee Hsien Loong, elder son of Lee Kuan Yew and a beneficiary of his estate.
LHY: Lee Hsien Yang, younger son of Lee Kuan Yew, an executor and beneficiary of his estate.
Dr LWL: Dr Lee Wei Ling, daughter of Lee Kuan Yew, an executor and beneficiary of his estate.
Ms Kwa: Kwa Kim Li, partner in Lee and Lee and Lee Kuan Yew's solicitor.
LSF: Lee Suet Fern, wife of Lee Hsien Yang, daughter-in-law of LKY, and a solicitor.
LSS: Law Society of Singapore.

I Summary of Facts

8. I set out below a summary of relevant background facts, all of which can be found in the judgment of the Court. In the course of preparing this Opinion, I have read all of the emails referred to in the Court's judgment.

9. LKY was an exceptional man, well known for his sharp intellect, commanding presence, decisive nature and forceful disposition. He graduated from Cambridge University with a starred double first, was called to the Bar by Middle Temple, and practised as a lawyer for a decade before becoming Prime Minister of Singapore. He was Prime Minister of Singapore for over 30 years, was a global statesman and as the papers demonstrate an authoritative figure throughout his life.

10. Between 20th August 2011 and 2nd November 2012, LKY as Testator executed six wills. A brief summary of these First to Sixth Wills is contained in paragraph 5 of the judgment. For present purposes it is sufficient to note that in the First Will of 20th August 2011 LKY granted a one-third share of his estate to each of his three children, LHL, Dr LWL and LHY – the Respondent's husband. Pursuant to an agreement reached between his three children in 2011 each would receive a specific property: 38 Oxley Road being bequeathed to LHL, with Dr LWL and LHY receiving other properties owned by LKY. Under this First Will, LKY's daughter, Dr LWL, was given the right to reside rent-free at the house at 38 Oxley Road (the Oxley Road House) for as long as she desired. The First Will also stipulated something which, from the papers had been much discussed by and was important to LKY – that the Oxley Road House should be demolished either upon his passing or after his daughter Dr LWL had moved out, whichever was later.

11. By the time of the Fifth Will which was dated 4th October 2012, importantly the demolition and right to live clause which had featured in the first four Wills was removed[9].

12. On 2nd November 2012, LKY executed his Sixth Will. This changed the shares in which his estate would be left to his children such that LHL and LHY would receive two shares each with Dr LWL receiving three shares. As with the Fifth Will, there was no demolition and right to live clause in the Sixth Will.

[9] Judgment of the Court at Paragraph 5(e).

13. The judgment makes only passing mention of a relevant part of the background concerning the demolition clause, and its removal from the Fifth and Sixth Wills. Although LKY was firmly of the view that the Oxley Road House should be demolished he had been given to understand that it was or would be "gazetted": purportedly the Cabinet wished to "gazette" the Oxley Road House – i.e. have it preserved under statutory powers as a monument[10]. Hence the removal of the demolition clause. However, the evidence demonstrates that LKY was firmly of the view that he did not want a monument and the Oxley Road House should be demolished on his passing or on his daughter ceasing to occupy it, and he removed the demolition and right to live clause in his Fifth and Sixth Wills not because his wish for it to be demolished had changed but in the belief that the Oxley Road House had been or was being gazetted.

14. Between September and October 2013, LKY was hospitalised for an extended period. The judgment records that his health had deteriorated markedly[11]. However, it is also clear from the judgment that although, following medical treatment in the latter part of 2013, LKY was physically frail, he was mentally robust (as the emails themselves demonstrate) and was not vulnerable. The Court does not suggest otherwise.

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[10] The Government Gazette is an archive maintained by the Singapore Government. It contains notices and orders issued by the Government which are required under specific Singapore statutory provisions to be published therein. "Gazetting" or "Gazetted" in relation to LKY's house at 38 Oxley Road means that under s11 of the Preservation of Monuments Act (Cap 239), the Minister, after consultation with the National Heritage Board, has identified the Oxley Road House as a "monument" as defined under the Act, and worthy of preservation and protection under the Act; to that end, the Minister has issued a preservation order to place the House under the protection of the National Heritage Board, and published it in the Government Gazette of the Republic of Singapore, as required under s 11(4) of the Act. Once "gazetted", the House is under the jurisdiction of the National Heritage Board, which has functions as defined under the Act, including to preserve and protect the House, subject however to the provision in s 12 of the Act: because the House is a "dwelling-house", the Board has to acquire the House under the Land Acquisition Act (Cap 152) within one year, failing which the preservation order will cease to have effect.

[11] Paragraph 7 of the Judgment

15. LKY started discussions with his long-serving solicitor, Ms Kwa, from approximately 29th November 2013 about making changes to his Sixth Will. Paragraphs 8 – 9 of the judgment give a brief summary of the discussions between LKY and Ms Kwa. These discussions included the topic of LKY's children's agreement in 2011 as to which specific properties would be left to each of them. LKY also raised the possibility that the Oxley Road House would be "de-gazetted" after his death[12]. On 12th December 2013 Ms Kwa wrote to LKY noting his wish to revert to leaving equal shares of his estate to each of his children: in other words, he had decided to revert to the agreement they had made in 2011. She noted his wish that a codicil be prepared to effect this. She also noted that there was reference at this time to thoughts about the Oxley Road House[13]: as became apparent from the events that ensued LKY decided to revert to his stated desire that the Oxley Road House should be demolished as had been agreed at the time of the First Will. LKY also stated on Friday 13th December 2013 by email at 10.50pm to Ms Kwa (which somewhat reinforces his ability to be robust late into the evening) that he wanted "the codicil [also] to specify that two carpets ... go to [LHY]".[14]

16. The Court notes that until this point (i.e. Friday 13th December 2013) the Respondent (LSF) had had no involvement in the 2013 discussions about changes to the Sixth Will. This reinforces the Court's conclusion that in the arrangements that ensued involving the execution of the Last Will LSF was not acting in a solicitor-client relationship.

17. LKY evidently decided that rather than carry out a series of amendments or codicils to his Sixth Will he would execute a further will (the Last Will) which would give effect

12 Paragraph 8 of the Judgement
13 Paragraph 9 of the Judgment.
14 Paragraph 10 of the Judgment.

to the 2011 agreement between the children. This was the context for LSF being asked by LHY to send to Ms Kwa and LKY a draft of the First Will which gave effect to the agreement. The Court made a finding[15] that LKY understood the document which LSF sent on 16th December (see below) to be in the exact form of the First Will. Whilst LSF honestly believed she was sending LKY the First Will as had been agreed by the siblings I do not consider the finding that LKY believed he was on 17 December 2013 signing an exact copy of the executed First Will was open to the Court, and particularly not where the Law Society bore the burden of proof, and had to establish essential facts to the criminal standard of proof. I revert to this point in more detail below, but I stress that even if the Court's finding of fact were to stand its conclusion that there was misconduct remains flawed.

18. On the evening of Monday 16th December 2013, LSF was due to leave for business meetings in Paris. Slightly earlier in the evening of 16th December her husband LHY was due to leave to go to Brisbane for business meetings. At 7.08pm on 16th December 2013, at the request of her husband (LHY)[16] LSF sent an email to the Testator (LKY) enclosing a copy of a draft of the First Will. Her email, which was copied to both Ms Kwa (LKY's solicitor) and LHY her husband stated, in full, as follows

"***Subject:***

FWD: signing of the Agreement and Will

Dear Pa Pa

This was the original agreed Will which ensures that all three children receive equal shares, taking into account the relative valuations (as at the date of demise) of the properties each receive.

[15] Para 105(d)-(e), and 107 of the Judgment

[16] Judgment para 92

Kim Li [Ms Kwa]

Grateful if you could please engross.

Kind regards

Fern".

19. A great deal of time was spent by the Court on whether or not LSF was forwarding an email from her husband or was forwarding with additional language an earlier email of her own to which she attached the document referred to in the e-mail. LSF stated that she was forwarding an e-mail and attachment provided by her husband. In my view, whilst a great deal of time was taken up on this issue, nothing of any substance actually turns upon it and the Court's finding that LSF forwarded an earlier email of her own (with the description which I have quoted above) is one I will treat, for the purposes of my analysis, as being correct, albeit not one which accords with LSF's recollection.

20. It is, however, relevant to note that LSF had been involved briefly in assisting her father in law with some suggested language for the demolition clause in the First Will in 2011. The First Will and the drafts of the First Will were all drafted by Ms Kwa, but at LKY's request, LSF by her email of 17th August 2011 timed at 11.21pm had provided draft language to deal with Dr LWL being allowed to live at the Oxley Road House for so long as she should choose, that the Oxley Road House should be demolished immediately after LKY's death or his daughter ceasing to live in the property, and that if it was not possible for the Oxley Road House to be demolished as a result of government intervention it should "never be open to others except my children and their families and descendants". In response to this email on 17th August 2011 at 11.23pm LKY wrote: "Thanks. Kim Li include this in my will please". The relevant email chain

ends (for present purposes) on 19th August 2011 at 11:06pm when LSF forwarded the third draft of the proposed First Will, an email which the Court quotes at paragraph 99 and by which LSF said to LKY and Ms Kwa: "I have done a wee bit of tidying up to papa's amended draft, to correct a few punctuation typos in the document as well as to read (sic) the unnecessary word "me" in the opening line".

21. It is obvious from the context that I have just described that by the email of 11.06 pm 19th August 2011 LSF considered that she was dealing with the final draft of her father in law's Will. Indeed, such a belief would have been entirely reasonable because as the Court found LKY executed the First Will the next day - 20th August 2011.

22. There is no evidence that LSF had any involvement in the drafting or execution of the Second to Sixth Wills. Nor is there any evidence that LSF was aware of any differences between the draft sent by her to LKY and Ms Kwa on the night of 19th August 2011 and the executed First Will. The Court notes at paragraph 15 of its judgment that there were differences between the draft forwarded and the executed First Will which were in my view modest.[17]

23. During the evening of 16th December 2013 and in the early part of the following day arrangements were made for LKY to execute his Last Will. The document which he executed on 17th December 2013 was in the form of the draft which was sent to him the night before by LSF. Before executing the Will LKY is recorded to have read it with care, he initialled every page, and his signing of the Will was witnessed by two

[17] Clause 4(a) of the executed First Will contained a "maintenance clause" which required LHL to pay the costs of maintenance of the Oxley Road House whilst Dr LWL lived there, and Clause 7 contained a "gift-over clause" so that in the event that Dr LWL predeceased LKY her share should go to LHL and LHY equally, or if they pre-deceased LKY their shares should go to their children. Neither clause was in the Last Will.

witnesses. As I have already recorded, approximately two weeks later on 2 January 2014 LKY himself prepared, executed and had witnessed a codicil to the Last Will leaving the two carpets in his study and bedroom to LHY.

24. Finally, I should record that LHY emailed his father LKY at 7.31pm on 16th December, and LKY responded at 9.42pm, as to how to proceed, given that Ms Kwa remained uncontactable, and Ms Kwa was not copied by LHY to his email[18]. Ms Kwa was not copied in to further emails between those who were making arrangements with LKY to enable him to execute the Last Will on 17th December. However, immediately after the Last Will was executed, LSF sent an email to Ms Kwa confirming that the Last Will had been engrossed and executed. Thus Ms Kwa as LKY's solicitor was put on notice on 16th December 2013 at 7.08pm of the draft Will which had been provided to LKY as being the "agreed" Will between LKY and his children, and was also informed on 17th December 2013 at 1.16pm immediately after the Last Will had been read and executed by LKY that it had been, being provided with a copy of the executed Will which Ms Kwa kept with her records.

25. LKY passed away on 23 March 2015. Probate was taken out in October 2015. In the period prior to his death, LKY gave no indication of any discontent with the Last Will as he had executed it. His solicitor, Ms Kwa, did not raise any concerns about it, and no attempts were made by any of the beneficiaries (nor indeed anybody else) to contest the Last Will.

[18] Paragraph 17 and 20 of the Judgment

26. The facts which I have recorded from the Court's judgment in paragraphs 18-25 above render untenable the Court's finding that LKY believed he was receiving from LSF the First Will as executed: with respect to the Court that finding is based on supposition reliant upon the Court's construction of the 7.08pm e-mail of 16 December 2013. Had the criminal standard of proof been properly applied the Court could not have reached this finding. The evidence demonstrates that LKY wanted to revert to the will agreed by the siblings: see (i) the e-mail at 7.08pm of 16.12.13 (para 18 above), (ii) the discussions LKY had with Ms Kwa in November-December 2013, and (iii) LKY's email on 17th December 2013 at 10. 39pm after LKY had signed the Last Will to his personal assistant: "Tell Kim Li this [is] the agreement between the siblings". Furthermore, (iv) LKY was an astute reader of documents and read the draft Last Will with care before executing it on 17 December 2013. Not only is this affirmed by the evidence of those who witnessed the Will, it can be seen from the fact that LKY signed every page of the document[19]. His solicitor also was provided with it, and had every opportunity to read it. She raised no concerns having been privy to the discussions with LKY about his desire to change his will earlier in December 2013. LKY made arrangements himself (without any solicitor or family involvement) to prepare and execute a codicil to the Last Will (i.e. of 17th December 2013) on 2nd January 2014 dealing with the carpets which were not in the draft which LSF sent: LKY appreciated from reading the Will that he needed to attend to this detail. Thereafter and until his death LKY raised no concerns about the Last Will. The suggestion that LKY was in any way misled as to what he was signing is, with great respect, without foundation.

[19] See paragraph 26 of the Court judgment and see the Last Will of 17 December 2013 which was before the Court.

II The judgment of the Court - Analysis

27. The Court summarises the charges which LSF faced in paragraph 37 of the judgment. The Law Society nominally brought two charges against LSF, although given the alternatives within each charge, LSF faced six charges when allowing for the Law Society's alternative charges within each category.

28. The primary and alternative formulation of the charges relied upon there being a solicitor-client relationship between LSF and the Testator/LKY. The third alternative charge within each category was brought the Court said on the basis that even if there was no solicitor-client relationship LSF:

> "*1[B]... Between 16th and 17th December 2013 .. failed to advance [the Testator's] interest unaffected by your interests and/or the interests of your husband ... such acts amounting to misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession within the meaning of section 83(2)(h) of the [LPA].*"

And the third alternative second charge 2[B] was:

> "*That you ... between 16th and 17th December 2013 acted in respect of a significant gift (a one third share in the [Testator's] estate) that [the Testator] intended to give by Will to your husband and failed to advise [the Testator] to be independently advised in respect of this significant gift ... such act amounting to misconduct unbefitting an advocate and solicitor [within the meaning of section 83(2)(h) of the LPA].*"

Both these charges track the language of Rules 25 and 46 of the Singapore Legal Profession (Profession Conduct Rules)[20] which apply only to situations where there is a solicitor-client relationship.

29. At paragraph 55 of the judgment, the Court listed four issues which had to be resolved:

    (1) Whether an implied retainer existed between the Respondent and the Testator;

    (2) If an implied retainer existed, whether the Respondent's conduct amounted to grossly improper conduct (charges 1 and 2) or improper conduct or practice as an advocate and solicitor (charges 1A and 2A);

    (3) If no implied retainer existed, whether the Respondent's conduct nevertheless amounted to misconduct unbefitting an advocate and solicitor as alleged in charges 1B and 2B;

    (4) If the Respondent was guilty of any of the charges, what was the appropriate sanction?

30. At paragraphs 56 to 127 the Court embarked upon an analysis as to whether or not there was an implied solicitor-client retainer, and in these paragraphs conducts a lengthy analysis of what the Court finds the position was from the Respondent's perspective. At paragraph 127 the Court concludes, having in the preceding paragraphs been critical of the Respondent's conduct, that once Ms Kwa had been dropped out by LHY of inclusion in the e-mails arranging execution "we do not think that a solicitor with the Respondent's level of seniority could reasonably think in these circumstances that there was no <u>implied</u> retainer, at least to the limited extent of locating a copy of the executed

[20] Revised edition published 31 May 2010, applicable in December 2013.

version of the First Will, checking the Draft Last Will against it and ensuring that the Draft Last Will was ready for execution". With respect, (and whilst it makes no difference to the legal analysis below) this is an untenable finding. First, because as the Court itself found LSF was simply obtaining a copy of the agreed Will at her husband's request. Second, because there is no communication with the putative client (LKY) beyond sending a draft. Third, since the Court also found that LKY did not consider LSF to be his solicitor it is difficult to understand why she should be required to reach the opposite conclusion on the basis of "implication".

31. The Court then proceeds in paragraphs 128 – 133 to examine the question of implied retainer from the Testator's point of view and concludes that the Testator did not regard the Respondent as being his solicitor for the purpose of the execution of the Will and hence "we hold that no implied retainer arose from the Testator's perspective" (Para 132). The Court held that "a retainer may be implied where, on an objective consideration of all the circumstances, an intention to enter into a contractual relationship ought fairly and properly to be imputed to all the parties" and that since "an implied retainer [could not] be imputed to *both* the putative solicitor *and* the putative client, such that a solicitor-client relationship arose between the Respondent and the Testator" no solicitor-client relationship arose.

32. At paragraphs 135 – 139 the Court held that since a solicitor-client relationship was the predicate for and underpinned charges 1, 1A, 2 and 2A none of those charges were made out and the Respondent should therefore be acquitted of them.

33. Before turning to the Court's dealing with charges 1B and 2B I ought here to observe:

(1) The Court rejected the prosecution case that there was an implied solicitor-client relationship, and did so on the ground that the Testator did not consider the Respondent to be acting as his solicitor and therefore objectively no implied solicitor-client relationship arose. This means that there was no solicitor-client relationship as the law knows it.

(2) However, in the process of making its determination, the Court made numerous findings as to LSF's subjective state of mind and was critical of her conduct as a solicitor. This was in connection with charges 1, 1A and 2/2A where an examination of the duties of a solicitor in the context of a solicitor-client relationship might be appropriate, but where different considerations apply in the absence of there being a solicitor-client relationship.

(3) Charges 1B and 2B were drafted by the LSS on the basis that LSF was bound to "*advance the testator's interests unaffected by your interests or those of [your] husband"* (1(B)), and to *" advise [LKY] to seek independent advice"* (2(B)). These charges and their drafting were potentially highly problematic: if, as these charges apparently presuppose there was no solicitor-client relationship such that the well-known solicitor-client duties (discussed below) did not arise, then the LSS and the Court were confronted with a critical question: by what legal duty was LSF bound "*to advance the testator's interests*", or "*to advise the testator to seek independent advice*"? This fundamental question was not confronted by the LSS, and nor did the LSS provide the Court with any principled basis upon which the Court could find such legal duties in the absence of a solicitor-client relationship. This failure may have led the Court into making the serious errors I identify below.

III The Court's findings as to allegations 1B and 2B: was the Respondent guilty of misconduct unbefitting an advocate and solicitor?

34. Before turning to the Court's findings it is helpful to set out the principal provisions of section 83 of the LPA which provides the Court with the jurisdiction to sanction advocates and solicitors for misconduct, and pursuant to which the Court was purporting to make its findings in respect of charges 1B and 2B. I note that much of the LPA is modelled upon the Solicitors Act 1974.

35. Section 83(1) of the LPA makes all advocates and solicitors subject "to the control of the Supreme Court and [they] shall be liable on due cause shown" to a range of sanctions extending from the most serious (striking off the roll) to censure or a combination of the penalties contained within the sub-section (see (e)). Section 83(2) contains subject to sub-section (7) how such due cause may be shown being proof (where relevant for present purposes) that an advocate and solicitor –

    (a) Has been convicted of a criminal offence, implying a defect of character making him unfit for his profession;

    (b) Being guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or guilty of such a breach of any of [rules relating to professional conduct] as amount to improper conduct for practice as an advocate and solicitor.

    (c) Has been adjudicated bankrupt ...

    (d) Has tendered or consented to retention [to improper payment/gratification

    (h) Has been guilty of such misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession;

(i) Carries on ... any trade, business or calling to detract from the profession of law or is ... incompatible with it.

(j) Has contravened any provisions of the Act .. such as to .. warrant disciplinary action or

(k) Has been disbarred, struck off, suspended ... as a legal practitioner .. in any other jurisdiction.

36. The Court was purporting to exercise the jurisdiction under section 83(2)(h). This sub-section falls within a section which, in order for "due cause" to be shown requires that a serious infraction of professional duty or other misconduct must occur see for example s.83(2)(a), (b), (c). Indeed, section 83(2)(h) requires before the jurisdiction to sanction arises that the person has been guilty of such (sic) misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession. In order for this jurisdiction to be invoked there must therefore be proved to the criminal standard both:

(1) Misconduct; and

(2) That the misconduct is sufficiently serious as to be "unbefitting .. a member of an honourable profession".

37. The language of s 83 of the DPA and authorities both in Singapore and England and Wales establish that where a solicitor is acting for a client and makes errors or mistakes in the course of so acting, professional misconduct does not occur unless and until the errors or mistakes can be described in terms such as being "manifestly incompetent" or similarly critical language. The most recent authoritative example of this is the judgment of the Court of Appeal in *Wingate and Evans v SRA and*

Malins v SRA [2018] 1 WLR 3969 at [106] where Jackson LJ, considering Principle 6 of the Solicitors Regulation Authority Code of Conduct 2011 (the successor to Rule 1(d) of the Solicitors' Practice Rules 1990) stated:

> "it is important not to characterise run of the mill professional negligence as manifest incompetence. All professional people are human and will from time to time make slips which a court would characterise as negligent. Fortunately, no loss results from most such slips. But acts of manifest incompetence engaging the Principles of professional conduct are of a different order".

38. The law categorises errors within the course of a retainer by a solicitor: an error may be free of fault, careless, or negligent, or reckless: for an error to constitute professional misconduct it needs to be more than simply negligent – see Jackson LJ referred to in paragraph 35 above. Negligent errors are ones which fall outside the range of errors which might be committed by reasonably competent practitioners. Put another way, a negligent error is one which no reasonably competent practitioner would commit: see for example *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, Bolitho v City and Hackney Health Authority 1997 4 All ER 771.*

39. It is important also to understand that where there is a solicitor-client relationship, duties are imposed upon solicitors which arise by virtue of that relationship. Thus, once there is a solicitor-client relationship, a solicitor is bound to act with reasonable care in the discharge of his/her professional duties (see *Bolam* and *Bolitho* above), and is also by virtue of that relationship the fiduciary of the client such that the solicitor is bound to act in the client's best interests and without there being a conflict of interest and duty whether between the solicitor and the client or between two clients – see the judgment of Millett LJ in *Bristol & West v Mothew [1998] CH1 at page 17.*

40. The duty not to be negligent/to act with reasonable care and the fiduciary duties which apply to solicitors ("the solicitor duties") arise not because they are members of a profession *per se* but because they are in a solicitor-client relationship. It is by virtue of the solicitor-client relationship that the law imposes duties which would not otherwise arise in normal day to day familial or other arenas even if one or more of the participants in the events is legally qualified. In a familial setting, the question of whether the legally qualified person (upon whom it is sought to impose the solicitor duties) is bound by such duties requires there to be an express or an implied retainer or solicitor-client relationship to be found. And if there is not such a relationship the duty of care and the fiduciary duties simply do not arise. For a discussion of this in the Singapore context see *Bom v Bok [2019] 1 SLR 0349 (SGCA)*: in that case, the Singapore Court of Appeal found that a husband who relied upon his legally qualified wife when she presented him with a deed of transfer was not in an implied retainer relationship with her. The facts upon which the implied retainer might have been found were far starker than the present case. The husband traditionally had relied upon his solicitor wife's legal skills and she drafted the Deed of Transfer where he relied upon her: but no such retainer was found by the Court of Appeal.

41. The fact that there are particular duties which apply to advocates and solicitors by virtue of the solicitor-client relationship does not mean that a solicitor or advocate in his/her private life can be free of sanction no matter the conduct simply because there is no solicitor-client relationship. However, in order for a solicitor/advocate to be guilty of misconduct in his/her private life which merits sanction under section 83(2) of the LPA, the conduct must be such as comprises either a criminal offence implying a defect of character - see 83(2)(a) or, such unbefitting misconduct that does not belong for a

member of an honourable profession – see 83(2)(h). There are numerous examples in reported judgments of solicitors and advocates being disciplined by their professional bodies for misconduct in their private life which damages their standing as members of an honourable profession. I give an example in the discussion in paragraph 50 below. However, the courts are careful outside of a solicitor-client or professional setting, or the commission of criminal offences, to ensure that concepts of private morality are not used as pegs upon which to hang judgments in order to sanction members of the legal profession where there is no justification in the rules of the profession nor in public tribunal or court judgments to do so: see the recent judgment of the Divisional Court in *Ryan Beckwith v SRA [2020] EWHC 3231 (Admin).* In *Beckwith* a married partner in a solicitor firm provided a departing female associate with alcohol at a farewell drinks event (and she became inebriated), before going back to her apartment, spending the night and having sex with her. The Tribunal found that although the sex was consensual, and the partner was not abusing his position as partner, he nevertheless lacked integrity because the public would condemn his behaviour. The court disagreed: in the absence of any rule or principle prohibiting such conduct or categorising it as unethical the lack of integrity charge had to be dismissed.

42. Turning to the judgment dealing with charges 1B and 2B the Court gives its reason for finding these charges proved at paragraphs 140 – 151 of the judgment. In essence (see in particular paragraph 149) the Court was critical of LSF in providing the Draft Last Will in the manner in which she did to LKY by (i) representing that it reflected his "testamentary wishes" (149(a) – (b)) without carrying out checks, (ii) where her husband was to her knowledge a significant beneficiary under the Last Will (149(c)), where "had there been a solicitor-client relationship between the Respondent and the

Testator" her conduct "would have constituted a grave breach of her duties as the Testator's solicitor, even without regard to the conflict of interest that would have arisen", where (iii) LSF permitted LKY to proceed to execute the Last Will despite knowing that his solicitor had been "excluded" from the process (149(e) – (f) – (g)) and where (iv) there were "divided loyalties" (149(h)).

IV The Court's Errors

43. The starting point for an assessment of this judgment is the analysis of the law as I have set it out above, and in part, as adopted by the Court itself. The Court had concluded prior to turning to charges 1(B) and 2(B) that there was not a solicitor-client relationship.

44. Therefore, when turning to LSF's conduct the Court needed to ensure that it was not assessing it by reference to duties which self-evidently could not and did not arise because there was no solicitor-client relationship. In other words, the Court needed to remind itself that in assessing LSF's conduct in relation to her assisting in a familial context with her father in law's will the duties which are imposed upon solicitors by virtue of the solicitor-client relationship did not here arise.

45. Whilst, nominally, the Court reminds itself for example at the beginning of paragraph 149 that there was an "absence of an implied retainer" what it then embarked upon doing is to assess LSF's conduct by reference to duties which would have applied to her had she been a solicitor retained by a client, as opposed to a member of LKY's family who in that capacity was providing him with some limited assistance. If LSF was not LKY's solicitor, no duty of care as a solicitor could possibly have arisen. The

imposition of duties qua solicitor (when no such solicitor-client relationship was found by the Court) underpins the Court's judgment and is its central flaw.

46. Thus, in paragraph 149(a) and (b) the conduct which the Court is describing is not the conduct of a family member assisting another family member with his Will but is, in fact, the conduct of a retained solicitor, which is indeed what the Court itself had been evaluating in the lengthy paragraphs concerned with the Respondent's subjective perception (paragraphs 56-127 of the judgment).

47. Paragraph 149(a) is critical of the conduct of the Respondent in respect of the representation she made in the email attaching the Last Will "even though she had not herself verified his instructions, and had not advised him that she was in no position to make those representations". The problem with this characterisation is that the duty to verify "instructions" and to give "advice" arises by virtue of a solicitor-client relationship and does not arise in the context of familial assistance which the Court had itself found to be the context here. Furthermore, as the Court had itself found, LKY did not treat LSF as his solicitor, and he had not communicated directly with LSF before or after executing the Last Will. He did not even reply to the email that LSF sent on 16th December 2013 at 7.08pm. All this made it clear that LSF did not regard herself as his solicitor and did not receive any instructions from him which she might have thought it necessary to "verify". The finding that she should somehow then have acted as his solicitor (with the duties which implicitly then arise) is with respect untenable.

48. Further, in paragraph 149(c) and 149(h), the Court is critical of the Respondent's conduct because of "the fact that her husband was a significant beneficiary" (149(c)) and that she had "divided loyalties" (149(h)). However, in the absence of a solicitor-

client relationship, there was no conflict of interest and there were no divided loyalties. This language used by the Court is the language which applies where a fiduciary duty exists as between solicitor and client such as to give rise to a duty of undivided loyalty to the client (see Millet LJ in *Bristol & West Building Society v Mothew – paragraph 39 above*). The Solicitor's Regulation Authority which is the Approved Regulator of solicitors in England and Wales pursuant to the Legal Services Act 2007 (and which operates also under the Solicitors Act 1974 upon which the LPA is in part modelled) in its 2019 Guidance "Drafting and Preparation of Wills"[21] to the profession makes it clear that a solicitor may, even where the parent has not taken separate advice, assist a surviving parent to draft a will where the solicitor is an equal beneficiary under the will with his/her siblings. Where, as here, the assistance comprises help in the form of the sending of a draft, assistance with execution and where the beneficial entitlements are agreed between the testator's siblings and the solicitor is not a beneficiary, the situation is a fortiori: it is expressly permitted under English rules.

49. The remaining sub-paragraphs of paragraph 149 indicate that the Court, despite having found that there was no solicitor-client relationship, nevertheless is imposing upon the Respondent, where she is not in a solicitor-client relationship, duties which the law imposes only by virtue of such a relationship: see for example paragraphs 149(e), (f), (g). These paragraphs deal with the failure to inform or check with Ms Kwa or to slow down the process of execution of the Will (which the Testator expressly said he wanted to carry on with), which are duties which may be implicit in the solicitor-client relationship but not outside of such a relationship. These paragraphs are in any event difficult to square with the fact that it was LKY who expressed his wish to his son LHY

[21] Guidance 25 November 2019, updating Guidance of 6 May 2014

and his daughter Dr LWL that he wanted to get on with execution of the Will fully in the knowledge that Ms Kwa was not on hand.

50. I should add that if there had been a finding that LKY was vulnerable or had been the victim of duress at the hands of his daughter in law – LSF – then there might have been a foundation for a finding of misconduct under s 83(2)(h) even though LSF was not his solicitor. This is because a solicitor abusing a person's vulnerability would, even in the absence of a retainer be committing unbefitting misconduct per s 83(2)(h). But there was no such finding, nor could there have been on the evidence before the Court. In this respect, the Court had a good example of such a case in *Bom v Bok* (see para 38 above) where the husband had acted under duress and the solicitor wife had exploited him, none of which applied here.

V Alternatively, were the breaches found by the Court serious enough as to warrant a finding of misconduct sufficient to be unbefitting an officer of the Supreme Court or a member of an honourable profession?

51. As I have already stated above the Court, in my opinion, fell into serious error by imposing upon LSF/the Respondent duties as a family member which have no validity in the absence of a solicitor-client relationship. However, the question may still arise as to whether the breaches of "duty" which the Court found can, on an objective analysis, constitute sufficiently serious misconduct as to be "unbefitting an officer of the Supreme Court" (Section 83(2)(h)).

52. It is helpful to repeat here some of the essential underlying facts. The email sent at 7:08pm on 16th December 2013 by the Respondent was sent to both LKY and Ms Kwa. Attached to it was a draft of the Last Will which reflected what the Respondent believed

was the will that reflected the agreement which had been reached between the three siblings/children of LKY ("the original agreed will"[22]). The evidence from the emails demonstrates that LKY considered that he was signing and executing the Will because it gave effect to the agreement between his children of 2011, it reflected his desire that the Oxley Road House should not be demolished, and that his daughter should be able to live in the Oxley Road House. The draft Will was obtained pursuant to a request from LKY's son and the Respondent's husband, who it should be noted was an executor under the Last Will in any event.

53. Prior to executing the Will LKY read it with care (see paragraph 26 of the judgment), initialled each page, executed it before witnesses, and some two weeks later added a codicil to the Will before new witnesses. LKY had been revisiting his Will frequently between 2011 – 2012 and had been discussing with his solicitor, Ms Kwa, the details of it in December 2013 (see paragraph 8 – 11 of the judgment) appears to have been content to leave the Last Will with its January 2014 codicil in place until his death on 23 March 2015. Further, there was no challenge to the Will, and probate was taken out in October 2015.

54. The Court in its judgment between paragraphs 140 – 150 in seeking to categorise the "breaches" as serious has in my view itself fallen into clear error. As to the categories of criticism, it is convenient to deal with them in turn as follows:

    (1) The Respondent represented in her email of 16th December at 7.08pm that the attached document contained the agreement between the siblings as contained in the First Will: this was true. Indeed, none of the siblings has suggested that

[22] Judgment para 12

the draft as sent did not fairly and accurately represent the agreement between the siblings which found its way into the First Will and the Last Will. Thus, any "misrepresentation" if such it be (i.e. that the draft represented the First Will as executed) is, against the background as set out above, minor. Had this been a solicitor-client relationship I consider it unlikely that the error would be such as to fall outside errors which might be made by reasonably competent solicitors acting for a client, but still less could this be categorised as a manifestly incompetent or egregious error. Since there was no solicitor-client relationship with the Testator a misconduct case on the basis of the misrepresentation found cannot get off the ground.

(2) As to the question of conflict of interest or divided loyalties, I disagree with the Court's approach. Whilst LHY was indeed a beneficiary under the Will, in the absence of a solicitor-client relationship LSF/the Respondent was entitled to accede to his request made on behalf of his father to send the draft Will under cover of her email to LKY, and to provide the assistance which she did to help with execution. It is important to note in this respect two things. First LHY was himself to be an executor of the Will and second, there was no conflict between the three sibling/beneficiaries of the Will: this is because the Last Will as sent through on the evening of 16th December 2013 accorded with their agreement. It follows that there were no divided loyalties or conflicts of interest in the situation as it prevailed, still less was the purported division of loyalties or conflict serious. Indeed, had this matter proceeded in England and had LSF been engaged by LKY to draft the will LSF would have been acting in a manner which was approved by the regulator: see para 48 above.

(3) As to the arrangements (the involvement of Ms Kwa – the arranging of the execution of the Will) it should be noted that the email at 7.08pm on 16 December 2013 was indeed sent to Ms Kwa, and LSF informed Ms Kwa promptly after execution the following day. Ms Kwa was thus made aware of the time frame of the arrangements for the execution of the Will. Also, specifically at LKY's request on 17th December 2013 Ms Kwa was provided with the executed Will which she kept in her records and as to which she had every opportunity to advise him, or he could take matters up with her had there been anything of concern to him. Neither happened. Reading these emails fairly an objective bystander would reach the conclusion that following the unavailability of Ms Kwa on the evening of 16th December arrangements were made at LKY's instructions (after she had been notified) for the Will to be executed and she was immediately informed when execution had occurred. Dr LWL (co-executor) having spoken to her father was involved in the arrangements made by e-mail. If and in so far as there were any errors in either not slowing down the process (which would have been contrary to the Testator's own express wishes) or in not seeking to involve Ms Kwa prior to the notification of execution I regard those errors as not falling into the bracket of negligence, let alone professional misconduct.

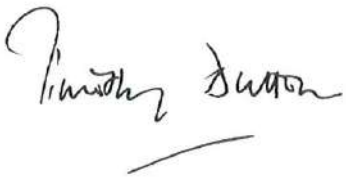
55. Finally, I note that the Court did not when approaching charges 1B and 2B carry out an analysis of the duties which apply to a family member who happens to be a solicitor[23], as compared to the duties which are imposed upon a solicitor by virtue of the solicitor-client relationship. What the Court has in fact done is to import into its analysis of

[23] With respect to a family member who happens also to be a barrister.

charges 1B and 2B duties which may be applicable to solicitors retained by a client, and it has wrongly categorised the breaches as serious, without making any allowance whatsoever for the fact that none of the purported duties in fact arose. It has imported into a family relationship the duties of a retained solicitor, and imposed a strict professional duty of care when none existed.

VI Conclusions

56. For the reasons which are set out in this Opinion, I regard the findings by the Court that Lee Suet Fern had committed misconduct unbefitting an officer of the Supreme Court or an honourable member of the profession to have been made as a result of serious legal error. I do not regard the mistakes made by LSF as found by the Court, which were made outside of a solicitor-client relationship, to cross the threshold into professional misconduct and the Court was plainly wrong so to find. In my view, such findings would not be sustained on any appeal were one to be available against the judgment of the Court. Further, since the findings of misconduct are untenable no sanction should have been imposed.



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