DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO. W-04-1324-2008

ANTARA

MAJLIS PEGUAM … PERAYU

DENGAN

MOHINDER KAUR D/O BALBIR SINGH DEOL … RESPONDEN

[Dalam Perkara mengenai Rayuan No. R1-17B-7-2005
Dalam Mahkamah Tinggi di Kuala Lumpur

Antara

Mohinder Kaur d/o Balbir Singh Deol … Perayu

Dengan

Majlis Peguam … Responden]

CORAM:

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ALIZATUL KHAIR BINTI OSMAN KHAIRUDDIN, JCA

JUDGMENT

This appeal arose from the decision of the High Court Kuala Lumpur which had allowed the appeal of the Respondent (the Appellant in the court below) against the order of the Disciplinary Board dated 16.3.2005 suspending the Respondent from practice as an advocate and solicitor of the High Court of Malaya for three (3) years with effect from 5.3.2005.

We had, after hearing submissions from both counsel allowed the appeal. Our reasons are set out below.

Brief Background

The Respondent, an advocate and solicitor, was found guilty of misconduct under s. 94(3)(n) of the Legal Profession Act 1976 (LPA) (for gross disregard of client's interest) and under s.94(3)(o) of the LPA (for conduct unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute).

Pursuant to the aforesaid findings, the Disciplinary Board (DB) on 16.3.2005 made an order suspending the Respondent from practice for 3

years with effect from 5.3.2005 (said Order). The Respondent was suspended from 5.3.2005 to 6.5.2005 after which the Respondent obtained an Order for a stay of execution. The Respondent appealed against the said Order to the High Court. The sole ground of appeal before the High Court was that the punishment of suspension of 3 years was excessive and harsh.

On 23.10.2008, the learned Judge after hearing submissions from both the Appellant and the Respondent made the following order:

> "In my view bearing in mind the fact the Appellant has been suspended for 2 months (5.3.2005-.6.5.2005) and after taking into account the facts and circumstances of this case, the court is of the opinion that the order of 3 years suspension be varied in the following manner i.e. the Appellant be ordered to pay to the Discipline Fund a fine of RM30,000.00 within one (1) month." (page 19-20 of the RA)."

It is against this Order that the Appellant is now appealing.

The Appeal

At the outset of the appeal, learned counsel for the Respondent raised the following preliminary objections:

(i) The court has no jurisdiction to hear this appeal;
(ii) There was a delay of 2 years and 6 months in the filing of the Appeal Records.
(the P.O.'s)

However learned counsel for the Respondent conceded, after hearing Appellant's counsel's submission, that the P.O.s were without merit and he accordingly withdrew both P.O.s.

Before us, the Appellant submitted that the appeal against the learned judge's decision should be allowed for the following reasons:

(a) It was undisputed that there had been improper dealing with the Respondent's client's monies. These monies were not maintained in the client's account and the Respondent had to repay these monies to her client through instalments.

(b) The appellate courts have held that courts should be slow in interfering with the decisions of the DB as it is primarily for the members of the Bar to weigh the seriousness of the professional misconduct.

To fully appreciate the gravity of the Respondent's misconduct, it is necessary to set out the chronology of events leading to the DB's findings. This chronology of events was based on the documentary evidence before the Disciplinary Committee (DC) and was admitted to by the Respondent's counsel at the hearing. They are as follows-

(a) Pursuant to a Consent Order dated 24.12.1993 obtained in Kuala Lumpur High Court Civil Suit No. S4-24-157-1991, Teguh Consolidated Sdn Bhd ("TCSB") had deposited a sum of

RM480,000.00 with Messrs Mohamed Salleh & Associates ("MSA") on trust, pending the disposal of a suit between the litigants, TCSB and Yata Development Sdn Bhd ("Yata"). The Respondent was a partner of Messrs Mohamed Salleh & Associates at the material time.

(b) By letters dated 24.1.1994 and 16.5.1994, MSA confirmed receipt of the sum of RM480,000.00 and that the monies had been deposited into a fixed deposit account.

(c) Sometime in December 1994, MSA was dissolved and the two partners, En. Mohamed Salleh and the Respondent, went their separate ways. Soon thereafter, the Respondent formed a new partnership, Messrs Nora Hayati Deol & Partners. When the fixed deposit account of RM480,000.00 matured on 19.4.1995, a new fixed deposit was issued in the name of Messrs Nora Hayati & Partners for the sum of RM486,954.00 and not RM516,000.00 (which was the sum inclusive of accrued interest). A sum of RM29,046.00 was missing without any reasons being provided.

(d) On 11.5.2000, a Consent Order was recorded wherein this sum of RM480,000.00 was to be distributed at 60% to TCSB and 40% to Yata.

(e) On 21.6.2000, a copy of this Order was served on both the former partners of MSA, being En. Mohamed Salleh and the Respondent.

(f) On 4.7.2000, En. Mohamed Salleh replied that he discovered that the fixed deposit amount had been placed with the Bank of Commerce in favour of MSA on 10.1.1994 and maturing on 19.4.1995. Upon the dissolution of MSA, all the files including both office and client's accounts were taken over by the Respondent.

(g) On 25.9.2000, the Respondent provided a written undertaking to TCSB that she would settle the outstanding amount owing to TCSB through instalment payments.

(h) On 14.10.2002, TCSB issued a letter to the Respondent setting out the above chronology of events, and also setting out that the Respondent had breached her written undertaking dated 25.9.2000. TCSB stated that the Respondent "*ha[s] also admitted to our Mr. Tan Ah Tong that your firm has utilized the fund from the aforesaid Fixed Deposit Receipt with some reasons which was not concern to our company*." The Respondent failed to reply to this letter. TCSB lodged a complaint with the Bar Council on 20.4.2004.

(i) Pursuant to the complaint and in response to the Bar Council's letter dated 29.4.2004 the Respondent via her letter dated 10.5.2004 enclosed a cheque for RM79,991.83 drawn from her personal account and explained that she had not settled the matter earlier as she was seeking a discount on the interest levied.

(j) On 6.8.2004, the Bar Council submitted a complaint to the DB in accordance with s. 99(3) of the LPA after the Respondent failed to

provide a satisfactory explanation as to why there was a delay in releasing the stakeholder sum and why the cheque for the settlement sum had not been issued from her client's account. The Respondent had also failed to furnish any bank statements to show that the stakeholder sum had been maintained in her client's account from 19.4.1995 when the monies were transferred from MSA to her present firm.
(Pages 86-88, Jld. 2 RA).

(k) In reply to the letter, the Respondent reiterated her earlier explanation that she had entered into a settlement agreement with TCSB, and had made repayment except for a sum of RM79,991.83 which said sum upon TSCB's refusal to give a reduction, she had subsequently paid in full.
(See the Respondent's letter dated 13.9.2004, page 129-132, Jld.2 RA).

(l) The Disciplinary Board pursuant to section 103A(a) of the LPA appointed the DC to inquire into the matter.

(m) On 20.1.2005 the DC issued a report recommending that the Respondent be suspended for 3 years.
(See Report of the Disciplinary Committee dated 20.1.2009, page 134-139, Jld.2 RA).

(n) Based on the DC's report, the DB made the Order dated 16.3.2005 suspending the Respondent from practice for 3 years with effect from 5.3.2005.

Improper Dealings With Clients Monies

Learned counsel for the Appellant submitted that the undisputed evidence before the DC, revealed the following facts-

(i) When the new fixed deposit was issued in the name of Messrs Nora Hayati Deol & Partners, it was for the sum of RM486,954.00 and not RM516,000.00 (which was the sum inclusive of accrued interest). A sum of **RM29,646.00** was missing without any reasons being provided;

(ii) There was improper dealing by the Respondent of her client's money and she was unable to repay the full amount as she had to give a written undertaking dated 25.9.2000 to repay the client's money in instalments;

(iii) The Respondent had failed to maintain her client's money in her client's account as she issued cheques for the instalment payments using her personal account;

(iv) The Respondent had defaulted in making her instalment payments. In the respondent's own letter of explanation dated 13.9.2004, she

stated that she has now entered into a settlement agreement with TCSB, and had made repayment except for the sum of RM79,991.83;

(v) Further evidence that the Respondent had failed to maintain her client's money in the client's account is that the final sum of RM79,991.83 paid by the Respondent to her client was again drawn from her personal bank account.

As mentioned earlier, the Defendant's counsel had already conceded before the DC that the Respondent's misconduct constituted a breach of s. 94(3)(n) and s. 94(3)(o) of the LPA.

In addition, the Respondent had also contravened Rule 7 of the Solicitors' Account Rules 1990.

Interference with Discretion of DB

With regard to this issue, it was the Appellant's submission that the learned Judge had wrongly interfered with the DB's discretion when she reduced the period of suspension from 3 years to 2 months.

Citing the Federal Court decision of **Keith Sellar v Lee Kwang Tennakoon v Lee Kwang** [1980] 2 MLJ 191 (FC); the Court of Appeal decision of **Gana Muthusamy v LM Ong & Ors** [1998] 3 MLJ 341 (CA); and the English Court of Appeal decision of **Bolton v Law Society** [1994] 2 AER 486 (CA), the Appellant maintained that it is a well entrenched

principle of law that a court should only interfere the exercise of discretion of the DB in rare and exceptional circumstances.

Our Findings

The sole issue before us was whether the learned Judge acted correctly when she decided to vary the order of the DB by setting aside the order of suspension of 3 years and substituting it with an order of a fine of RM30,000.00 to be paid to the Discipline Fund within one (1) month.

On this issue, we agree firstly, with the Appellant's submission that based on the unchallenged evidence before the DC, it has been proven beyond reasonable doubt that the Respondent had engaged in improper dealings of her client's monies, namely the said stakeholder sum of RM480,000.00 deposited initially with MSA. The facts set out in (i)-(v) (supra) bear testimony to this finding.

It goes without saying that the duty of a solicitor to keep a separate account of his client's money is not just a moral imperative but a legal imperative. As stated in the case of *Re Cashin* [1998] 1 MLJ 380 this is a rule which every practicing solicitors ought to know and the breach of it per se amounts to improper conduct. Thus improper dealing with client's monies as was done here by the Respondent constituted a breach of Rule 7 of the Solicitors' Accounts Rules 1990.

Rule 7 states in no uncertain terms as follows-

"7. Drawing money from client account. There may be drawn from client account-

(a) in the case of client's money

(i) money properly required for a payment to or on behalf of a client."

(emphasis added)

The effect of Rule 7 was explained by the Court of Appeal in the case of **Gnanasegaran a/l Pararajasingam v Public Prosecutor** [1997] 3 MLJ 1 (*Gnanasegaran*).

Here, the Respondent an advocate and solicitor, accepted a sum of money in his client's account to be held on trust for the complainant. The Respondent had subsequently utilized those funds in the client's account. The court held as follows-

"The complainant's money (RM133,000) was paid with the bank client's account. The effect of Rule 7(a)(i) is that this money could only be taken out to pay the complainants or their order. To use one client's money to settle solicitor's liability to some other client is a criminal offence."

(emphasis added)

In the present case, there is no dispute that the Respondent had misappropriated her client's money as apparent from TCSB's letter dated

14.10.2002 in which it stated that the Respondent "… have also admitted to our Mr. Tan Ah Tong that your firm has utilized the fund from the aforesaid Fixed Deposit with some reason which was not concern to our company." (See page 114, Jld. 2 RA).

The Respondent eventually repaid the money in question, but the payment was made from her personal account. In the case of **Re S Fung, A Solicitor** [1941] 10 MLJ 142 (*Re S Fung*) the court declared that-

> "If a solicitor does not keep his client's money intact and if he uses some of it for purposes which do not concern the client then there is a misappropriation at least for a time of at least part of the client's money even though later on the full amount due to the client is paid to him. This amounts to a professional misconduct."
>
> (emphasis added)

As pointed out by learned counsel for the Appellant, Respondent's solicitor Datuk Jagjit Singh had in fact conceded before the DC that the Respondent's conduct constituted a breach of s. 94(3)(n) and (o) of the LPA.

A misconduct under s. 94(3) of the LPA means conduct or omission by an advocate or solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes in this case, under paragraph (n) "gross disregard of his client's interest" and under paragraph (o) "being guilty of any conduct which is unbefitting of an advocate and solicitor or which bring or is calculated to bring the legal profession into disrepute."

By conceding that the Respondents conduct amounted to a breach of s. 94(3)(n) and (o) of the LPA, learned counsel for the Respondent had therefore conceded that the Respondent was guilty of professional misconduct of a serious nature.

In the circumstances we are unable to agree with the learned Judge that the suspension order of 3 years imposed by the DB was harsh or excessive. On the contrary, given the gravity of the misconduct committed we find the punishment imposed to be fair and appropriate.

The sum of RM30,000 ordered by the High Court to be paid by the Respondent in place of the suspension order of 3 years is, in our view, grossly disproportionate to the Respondent's transgression even taking into account the 2 months suspension (from 5.3.2005 – 6.5.2005) already served by the Appellant.

Whilst it is true that the DC did not make a positive finding that the Respondent's conduct was dishonest and fraudulent ("The Respondent may have been dishonest and fraudulent" - see page 156 of RA), nevertheless, as illustrated by the case of **Law Society of Singapore v Prem Singh** [1999] 4 SLR 157, the Singapore High Court had held that although there was an absence of dishonesty or lack of probity, improper dealing with client monies justified a suspension from practice for 2 years.

As aptly put by LP Thean JA when considering the appropriate penalty to be imposed-

> "Counsel for the Respondent urged this court to impose a light penalty on the ground that what the Respondent had committed was merely a 'technical offence'. We were unable to agree. Rule 3 of the Legal Profession (Solicitors' Accounts) Rules prescribes a mandatory requirement that the client's funds be placed into a separate account. The purpose of this rule is to protect the public and to instill public confidence in solicitors. If a member of the public is going to deposit his funds with a solicitor, there has to be some form of assurance that his funds will be well protected in a separate client account and will not be misappropriated. In our opinion the respondent's omission to place the funds in his client account was a serious breach of the Legal Profession (Solicitors' Accounts) Rules."
>
> (emphasis added)

In determining the appropriate penalty to be applied LP Thean JA also took into consideration the principles enunciated by Yong Pung How CJ (as he then was) in the case of **Law Society of Singapore v Ravindra Samuel** [1999], SLR 696, which principles were referred to and quoted by the learned Judge in the present case. (see page 16-17, RA).

The learned Judge nevertheless considered, erroneously, in our view, that in spite of the fact that the Respondent had committed an act of grave impropriety (improper dealing with client's monies) on "the facts and circumstances of the case", an order of suspension of 3 years was not justified.

On the second reason for allowing this appeal we agree with the Appellant's submission that in varying the suspension order imposed by the DB, the learned Judge failed to abide by the established principle of law that it is only in rare and exceptional circumstances that a court should interfere with the discretion exercised by the Disciplinary Board. The rationale behind this principle of law was succinctly explained by Hashim Yeop A Sani J (as he then was) in the Federal Court decision of **Keith Sellar v Lee Kwang Tennakoon v Lee Kwang** [1980] 2 MLJ 191, where his Lordship held-

> "We feel bound to reiterate here that the legal profession is an honourable profession whose members are expected to conduct themselves honourably. The appellants here were dealt with in a proceeding by virtue of a statue enacted to govern the conduct of members of their profession. Morever, they were tried by their own peers. Members of the Disciplinary Committee were senior members of the profession who made firm findings of fact and they concluded that the appellants were guilty of misconduct in their practice as advocates and solicitors. The Chief Justice state in Au Kong Weng's case that statutes relating to the legal profession now entrust the supervision of advocates and solicitors' conduct to a committee of the profession, for it knows and appreciates better than anyone else the standards which responsible legal opinion demands of its own profession."

In arriving at his judgment, his Lordship referred to and adopted the decision of the Privy Council in *Colin Kenneth McCoan v General Medical*

Council [1964], 1 WLR 1107 which held that it would require a very strong case to interfere with sentence "because the Disciplinary Committee are the best possible people for weighing the seriousness of the professional misconduct."

Applying the aforesaid principle to the facts of the present case we are unable to find, with due respect to the learned Judge, any basis for interfering with the punishment imposed by the DB.

Learned counsel for the Respondent sought to impress upon us the following mitigating factors which he said the learned Judge took into account in varying the order imposed by the DB. They are, *inter-alia*, the following-

(i) there was no wrongful loss by the complainant (TCSB) and no wrongful gain by the Appellant;

(ii) the Respondent had suffered a personal loss as she had made full restitution of the monies taken (both principal and interest);

(iii) the Respondent had been practicing as a solicitor for 25 years and save for this incident had unblemished conduct and character;

(iv) the Respondent was not charged by the police for any criminal offence; and

(v) by conceding to the complaint the Respondent had saved time and expense.

We are unable to agree with learned counsel for the Respondent. We find that the DC had taken into consideration the above mitigating factors, in particular the fact that the Respondent had paid back the money to her client. (page 77 AR – Note of Proceedings of Disciplinary Committee). Yet the DC in this case was resolute in its view that as the Respondent had abused her position as an advocate and solicitor she ought to be suspended from practice for a period of 3 years.

In this regard as submitted by the Appellant's counsel the law takes a very serious view of improper dealings with client's money and in many cases, as for example in the case of **Re G.H. Conaghen** [1967] 27 MLJ 81, the more severe sanction of striking off the rolls was ordered.
Thus the order of suspension in this case was wholly justified.

By way of emphasis, we reproduce below the following excerpt from the book entitled "The Law of Advocates and Solicitors" (Second Edition) by Tan Yock Lin at page 801 which sets out the reasons for the court's uncompromising stance in dealing with cases of this nature-

> "Generally, one may expect the court to take a serious view of misconduct in relation to client's moneys for this simple reason:
>
> > … the highest standard of rectitude is required of a solicitor, especially in dealing with the money of his client's. We agree that **without this high standard the profession cannot enjoy the confidence of the public which it serves**[1].

[1] Per McElwaine CJ in *Re S Fung*

Again, as was said in *Re A Solicitor*:

> There are three interests to be considered in such cases as this – the interest of the practitioner, the interest of the profession and the interest of the public. Of all these three interests, if there be any conflict, **the interest of the public must be paramount**."
>
> (emphasis added)

For the above reasons we allowed the appeal, set aside the High Court decision and reinstate the punishment imposed by the DB, less the 2 months suspension already served. The fine of RM30,000.00 imposed by the High Court is refunded. We also ordered the deposit to be refunded and make no order as to costs.

Dated this 25th August 2011.

ALIZATUL KHAIR BINTI OSMAN KHAIRUDDIN
Judge
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