The Law Society of Singapore *v* Tay Choon Leng, John
[2012] SGHC 86

Case Number : Originating Summons 833 of 2011

Decision Date : 20 April 2012

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Tan Tee Jim SC and Sharon Yeow (Lee & Lee) for the applicant; Ang Cheng Hock SC, Tan Xeauwei and Paul Ong Min-Tse (Allen & Gledhill LLP) for the respondent.

Parties : The Law Society of Singapore — Tay Choon Leng, John

Legal Profession

20 April 2012 Judgment reserved

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This Originating Summons is initiated by the Law Society of Singapore ("Law Society") pursuant to s 94(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the LPA") praying that this court deal with the Respondent following the findings of the Disciplinary Tribunal ("DT") on certain disciplinary charges brought against him.

2 The disciplinary charges brought by the Law Society against the Respondent are the following:

(a) First Charge

That you, John Tay Choon Leng, an Advocate and Solicitor of the Supreme Court of Singapore, on or about 28 February 2009 and whilst practicing with the Firm of M/s John Tay & Co located at 171 Chin Swee Road, #08-09 San Centre, Singapore 169877, did pay the sum of $3,000.00 received by you from your client Teo Yeow Hock as a deposit to account of fees for you to act in D4476/2008/S and/or MSS941/2009 into the Office Account of the Firm instead of the Client Account and are thereby guilty of a breach of Rule 3(1) of the Legal Profession (Solicitors' Accounts) Rules, such breach amounting to improper conduct or practice as an advocate and solicitor within the meaning of Section 83(2)(b) of the Legal Profession Act (Chapter 161).

(b) Second Charge

That you, John Tay Choon Leng, an Advocate and Solicitor of the Supreme Court of Singapore, on or about 28 February 2009 and whilst practicing with the Firm of M/s John Tay & Co located at 171 Chin Swee Road, #08-09 San Centre, Singapore 169877, did pay the sum of $2,000.00 received by you from your client Teo Yeow Hock as a deposit to account of fees for you to act in D4476/2008/S and/or MSS941/2009 into the Office Account of the Firm instead of the Client Account and are thereby guilty of a breach of Rule 3(1) of the Legal Profession (Solicitors' Accounts) Rules, such breach amounting to improper conduct or practice as an advocate and solicitor within the meaning of Section 83(2)(b) of the Legal

Profession Act (Chapter 161).

(c) Third Charge

That you, John Tay Choon Leng, an Advocate and Solicitor of the Supreme Court of Singapore, from on or about 28 February 2009 and whilst practicing with the Firm of M/s John Tay & Co located at 171 Chin Swee Road, #08-09 San Centre, Singapore 169877, did fail to properly and/or adequately inform your client Teo Yeow Hock of the basis on which fees for professional services for acting for him in D4476/2008/S and MSS941/2009 would be charged and the manner in which it was expected that those fees and disbursements should be paid and are thereby guilty of a breach of Rule 35(a) of the Legal Profession (Professional Conduct) Rules, such breach amounting to improper conduct or practice as an advocate and solicitor within the meaning of Section 83(2)(b) of the Legal Profession Act (Chapter 161).

3 In short, the first two charges relate to the Respondent depositing the two sums received from one Mr Teo Yeow Hock ("the Complainant") into his office account in breach of Rule 3(1) of the Legal Profession (Solicitors' Accounts) Rules (Cap 161, R 8, 1999 Rev Ed) ("the SA Rules"). The third charge is for failing to adequately inform the Complainant of the basis on which his professional fees would be charged, in breach of Rule 35(*a*) of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 1990 Rev Ed) ("the PC Rules"). [note: 1]

Background facts

4 At all material times, the Respondent was the sole proprietor of the law firm of Messrs John Tay & Co. He was called to the Singapore Bar on 12 May 1982, an Advocate and Solicitor of 26 years' standing at the time of the alleged misconduct.

5 At around the end of February 2009, the Complainant engaged the Respondent to act for him in respect of ancillary matters in D4476/2008/S (a divorce proceedings between the Complainant and his wife) ("the Divorce Ancillaries") and MSS 941/2009 (an application by the Complainant's wife for maintenance) ("the Maintenance Summons").

6 It is not disputed that the complainant was a client of another advocate and solicitor, Mr Tan Ee Bin ("Mr Tan"), who handled the Complainant's divorce proceedings. However, as Mr Tan did not normally handle contentious divorce ancillaries matters, Mr Tan recommended the Respondent to the Complainant and they met at Mr Tan's office on 27 February 2009. The Respondent said that at that meeting he had informed the Complainant that his fees would be as follows:

(a) Upfront initial fee or advanced payment of $3,000 for handling the Divorce Ancillaries ("the Divorce Ancillaries Initial Upfront Fee");

(b) Additional fees would be payable and such fees would be discussed if the matter went for trial; [note: 2] and

(c) There would be a contingency fee of $3,000 in the event that the ancillary matters were transferred to the High Court ("the Divorce Ancillaries Contingency Fee") if the estimated matrimonial assets exceeded $1.5 million.

7 The following day, on 28 February 2009, the Complainant came to the Respondent's office in the morning when the latter was about to leave for a court hearing. The Complainant informed the Respondent that he had been served with the Maintenance Summons, and that he would also like the

Respondent to handle that matter. The Complainant had brought with him $2,000 in cash and a POSB cheque for $3,000, both of which he handed to the Respondent. The Respondent said that he told the Complainant that the $2,000 cash would be treated as part payment towards the Divorce Ancillaries Initial Upfront Fee and the cheque for $3,000 as the upfront fee for handling the Maintenance Summons. Their conversation lasted for only five minutes as the Respondent was in a hurry to attend court on another client's matter. A receipt was issued by the Respondent's firm in respect of the $2,000 cash payment. We would note that the receipt stated that the $2,000 cash payment was "initial payment for MSS941/2009", the Maintenance Summons.

8 Subsequently, the Complainant decided to appoint another set of solicitors to take over the conduct of both the Divorce Ancillaries and the Maintenance Summons. On 3 September 2009, the Complainant wrote to the Respondent asking for a refund of the $3,000 paid as the Divorce Ancillaries Contingency Fee. Initially, the Respondent did not agree to make any refund as he had done work for both the Divorce Ancillaries and the Maintenance Summons. Eventually, the Respondent agreed to refund $1,500, although this refund of $1,500 was never effected.

9 On 1 February 2010, the Complainant filed a complaint with the Law Society. After investigation, the Law Society preferred the three charges against the Respondent (see [2] above).

10 At the hearing before the DT, as against the first two charges, the Respondent raised the defence that the Complainant and Respondent had agreed that the $2,000 cash and the cheque for $3,000 were the Respondent's fees and therefore did not constitute "client's money" under r 2(*b*) of the SA Rules. [note: 3] The Respondent argued therefore that he was not obliged to deposit them into a client account (as set out and further discussed in [14] to [34] below).

Decision Below

11 The DT, after due hearing, found pursuant to s 93(1)(*c*) of the LPA that cause of sufficient gravity for disciplinary action existed under s 83(2)(*b*) of the LPA and ordered the Respondent to pay costs. In reaching this decision, the DT made the following findings of fact:

(a) The $3,000 by way of a POSB cheque ("the $3,000") and $2,000 cash were paid into the Respondent's office account; [note: 4]

(b) There was no agreement on account of an agreed fee between the Respondent and the Complainant because, *inter alia*: [note: 5]

(i) The Respondent's evidence given under cross-examination corroborated the Complainant's evidence that the payments made were only part of the Respondent's professional fees;

(ii) The Respondent's receipt for the $2,000 did not state that it was an agreed fee. It stated that it was "initial payment for MSS941/2009"; [note: 6]

(iii) The $3,000 was meant to be a deposit in the event that D4476/2008/S was transferred to the High Court, and no agreement was made to convert the $3,000 to agreed fees for MSS941/2009. [note: 7]

(a) In any case, the alleged fees agreement were not reduced into writing and signed by the complainant.

(c) The Respondent did not explain the basis and manner of his fees, and this was conceded during cross-examination; [note: 8] and

(d) The Respondent did not explain his charges to the Complainant even after the Complainant repeatedly asked for a refund of $3,000. Instead, the Respondent:

(i) Issued a bill on or about 3 September 2009 after the Complainant's first letter was faxed;

(ii) Did not explain the basis of his fees or when or how his fees or expenses would be incurred or should be paid;

(iii) Did not reply to any of the Complainant's letters; and

(iv) Agreed to a refund of $1,500. [note: 9]

12 The DT also found as a matter of law that an "agreed fee" was not valid unless it was evidenced in writing.

Issues before this Court

13 As seen from the above, the critical question in relation to the first and second charges is whether there was an agreement on fees between the Complaint and the Respondent. The DT found that there was in fact no such agreement. The DT also decided that in law, there could not, in any event, have been an "agreed fee" because the alleged agreements were not evidenced in writing signed by the client. Thus, on this matter there are really five issues which this court must address and we will deal with them in the following order:

(a) Whether or not an "agreed fee" under r 9(2)(*c*)(ii) of the SA Rules must be in writing;

(b) Whether or not an "agreed fee" must be for the entire transaction;

(c) Whether or not the totality of the evidence demands that this Court should overturn the DT's findings of fact, *ie*, that there was no agreed fee, in relation to the first two charges;

(d) Whether there is sufficient basis for the DT to find the Respondent guilty of the third charge; and

(e) The appropriate sanction in the event this court should find the Respondent guilty of any of the three charges.

Analysis

Issue 1: Whether or not an "agreed fee" must be in writing

14 This is a threshold issue. If this Court is to find that an "agreed fee" must be in writing to come into being, then as the alleged agreements here were not reduced to writing, the Respondent automatically fails to make out the defence of an "agreed fee" under r 9(2)(*c*)(ii) of the SA Rules. This answer will effectively resolve all the other issues relating to the three charges and what remains for this Court would be to determine the appropriate sanction which ought to be imposed on the Respondent.

15 As a general proposition, the formation and validity of an agreement on professional fees between a solicitor and his or her client ("fee agreement") is, like any other contract, governed by the common law. Such an agreement could be oral or in writing. This is, of course, subject to any relevant contrary provisions set out in the LPA and/or its attendant subsidiary legislation.

16 The DT seemed to think that for a valid "fee agreement" to exist, the agreement must be in writing. The DT stated (at [20] of its Report):

> Rule 9(2)(c)(ii) of the SA Rules is to be read with or subject to section 111 of the [Legal Profession] Act which requires any agreement between a solicitor and his client concerning his fee for contentious business to be "in writing" and "signed by the client".

Internal Architecture of Rule 9(2), Solicitors' Accounts Rules

17 We will begin our consideration of this question by first referring to the SA Rules which prescribe how a solicitor should handle client's money. Rule 2(1) defines "client's money" as:

> money held or received by a solicitor on account of a person for whom he is acting (in relation to the holding or receipt of such money) either as a solicitor, or in connection with his practice as a solicitor, an agent, a bailee or a stakeholder or in any other capacity, other than —
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> ...
>
> (b) money to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners in the firm...

18 Rule 3(1) lays down a mandatory requirement that every solicitor who holds or receives client's money "shall without delay pay such money into a client account".

19 Rule 9(2), however, provides a list of circumstances where a solicitor is not required to pay money held or received by him into a client account:

> 9(2) Notwithstanding the provisions of these Rules, a solicitor shall not pay into a client account, money held or received by him —
>
> (a) which the client for his own convenience requests the solicitor in writing to withhold from such account;
>
> (b) for or towards payment of a debt due to the solicitor from the client or in reimbursement of money expended by the solicitor on behalf of the client; or
>
> (*c*) *which is expressly paid to him —*
>
> (i) on account of costs incurred, in respect of which a bill of costs or other written intimation of the amount of the costs has been delivered for payment; or
>
> (*ii*) *as an agreed fee (or on account of an agreed fee) for business undertaken or to be undertaken.*
>
> [emphasis added]

20 The Respondent relies on r 9(2)(*c*)(ii) to contend that in respect of the two sums he received from the client on 28 February 2009 he was not required to deposit them into a client account because those two payments were agreed fees due to him for taking up the two briefs of the complainant. He is saying that these payments were really, in accordance with r 2(1), "money to which the only person entitled is the solicitor himself" and were thus not client's money.

21 It would be seen from r 9(2) quoted above (at [19]) that where writing is required, the Rules would expressly provide for such a requirement. We see two instances of this in r 9(2). First, r 9(2)(*a*) provides that where a client for his own convenience "requests the solicitor *in writing*" to withhold paying the money into a client's account then the solicitor would not infringe the rule if he complies with the request. Second, r 9(2)(*c*)(i) provides that where money is expressly paid to the solicitor on account of costs incurred, in respect of which "*a bill of costs or other written intimation*" has been delivered for payment, the solicitor will not be required to pay the sum into a client account. On the other hand, r 9(2)(*c*)(ii), which we are here concerned with, merely provides for "an agreed fee" without imposing any formal requirement as to writing. In this regard, it may be useful to note that, unlike r 9(2)(*c*)(ii), the equivalent English rule, r 19(5) of the English Solicitors' Accounts Rules 1998, expressly provides that "[a]n agreed fee must be evidenced in writing". In the absence of such express stipulation in r 9(2), the Respondent argued that the court should be slow to imply such a requirement.

Symbiosis between Rule 9(2)(c)(ii) and Section 111, Legal Profession Act

22 We now turn to consider s 111 of the LPA upon which the DT had placed much reliance to hold that for there to be a valid "fee agreement" the agreement must be evidenced in writing (see [16] above). For ease of reference, s 111 is quoted hereunder:

> (1) Subject to the provisions of any other written law, a solicitor or a law corporation or a limited liability law partnership *may make an agreement in writing* with any client respecting the amount and manner of payment for the whole or any part of its costs in respect of contentious business done or to be done by the solicitor or the law corporation or the limited liability law partnership, either by a gross sum or otherwise, and at either the same rate as or a greater or a lesser rate than that at which he or the law corporation or the limited liability law partnership would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to the provisions and conditions contained in this Part.
>
> [emphasis added]

23 The first point we would highlight is that s 111(1) provides that a solicitor "*may make an agreement in writing*" with a client for his fees in contentious business. It would be noted that the provision is couched in *permissive*, rather than *mandatory*, terms. It does not say that there could not be an oral fee agreement or that such an oral agreement would be invalid. In the absence of such an express stipulation, we see no reason why it should be so construed. In *Wee Soon Kim Anthony v Chor Pee & Partners* [2006] 1 SLR(R) 518 ("the *Chor Pee* case"), the Court of Appeal held at [26] that s 111(1) is "an enabling provision and is not intended to replace the common law". Similarly, Professor Tan Yock Lin, in *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998) ("*Tan Yock Lin*") at p 685 has opined that s 111 is "an empowering section".

24 What, then, are the effects and consequences of s 111? First, we note that by virtue of s 111(2), any fee agreement to be enforceable against the client must be signed by the client. This is

obviously for the protection of the client. In the *Chor Pee* case, the Court of Appeal stated at [26]:

> Indeed, s 111(1) essentially reflects much of the common law position. In a sense, it can be said that the provision is for the benefit of the solicitor as it means that upon the solicitor ensuring that the written agreement has the signature of the client, and in the absence of there being any vitiating factors, the solicitor will be able to enforce the agreement against the client. In another sense, one can also say that s 111 was enacted to protect the client, so that no agreement, not even a written agreement, would bind the client unless the client signified his consent thereto by his signature. However, the absence of the solicitor's signature would not preclude the client from enforcing it against the solicitor. Section 111(2) enshrines that position...
>
> In other words, a client can enforce an oral agreement against a solicitor but not the other way around.

25 The statutory consequences of a fee agreement made in writing in accordance with s 111 are found in ss 112(3) and 112(4):

> (3) Such an agreement shall be deemed to exclude any further claim of the solicitor or law corporation or limited liability law partnership beyond the terms of agreement in respect of any services, fees, charges or disbursements in relation to the conduct and completion of the business in reference to which the agreement is made, except such services, fees, charges or disbursements (if any) as are expressly excepted by the agreement.
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> (4) Subject to the provisions of this Part, the costs of a solicitor or law corporation or limited liability law partnership, in any case where there is such an agreement as is referred to in section 111, shall not be subject to taxation nor to the provisions of section 118.

26 It would be noted that the provisions of s 112(4) are expressly stated to be subject to "the provisions of this Part" and the following subsections of s 113 are germane and they show that even written fee agreements, enforceable against the client, are far from sacrosanct and could be reviewed and set aside.

> (2) Every question respecting the validity or effect of the agreement may be examined and determined, and the agreement may be enforced or set aside without suit or action on the application by originating summons of any person or the representatives of any person, party to the agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid the costs, fees, charges or disbursements in respect of which the agreement is made, by the court in which the business or any part thereof was done or a Judge thereof, or, if the business was not done in any court, then by the High Court or a Judge thereof.
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> (3) Upon any such application, if it appears to the court or Judge that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court or Judge by rule or order, in such manner and subject to such conditions (if any) as to the costs of the application as the court or Judge thinks fit.
>
> (4) If the terms of the agreement are deemed by the court or Judge to be unfair or unreasonable, the agreement may be declared void.

27 Finally, s 118, referred to in s 112(4), provides that:

> [N]o solicitor shall, except by leave of the court, commence or maintain any action for the

recovery of any costs due for any business done by him until the expiration of one month after he has delivered to the party to be charged therewith, or sent by post to, or left with him at his office or place of business, dwelling-house or last known place of residence, a bill of those costs.

28 Therefore, in the light of all the provisions mentioned above, a fee agreement in writing made in accordance with s 111 could give rise to, *inter alia*, the following effects, depending on the nature of the complaint and/or on whose initiative the issue is being brought before the court:

(a) the solicitor would be precluded from making any further claims for costs beyond the terms of the agreement and the agreed fees need not be taxed,

(b) the agreement could be declared to be unreasonable and void by the court, and/or

(c) the solicitor is not obliged to wait one month after sending a bill of costs to the client before commencing an action to enforce the fee agreement.

29 There is nothing in those provisions which could be read to suggest that an oral fee agreement is invalid. From s 111(2) it is clear that Parliament intended to draw a distinction between validity and enforceability and sought to accord greater protection to the client. This explains why, following from s 111(2), a client could enforce an agreement not signed by the solicitor (and this would include an oral agreement). This view was taken by the High Court, and we say rightly so, in *Re Nirumalam Kanapathi Pillai* [1999] 3 SLR(R) 1037, a case relied on by the Respondent, where Judith Prakash J reviewed an assistant registrar's taxation of a solicitor-client bill of costs tendered by the solicitor's firm. The taxing registrar did not take into account an express agreement between the solicitor's firm and the petitioner, one of 30 insurance companies, who had instructed the respondent on an express oral agreement that the respondent's costs would be shared according to their respective shares in the reinsurance risk.

30 The fee agreement, not having been expressed in writing, clearly fell outside the remit of s 111 and the other related provisions of ss 112, 113 and 118. Nevertheless, the judge held at [26] and [27] that:

> 26 I accept that as between petitioner and the respondent in this case, there was no agreement which fell within the bounds of s 111 of the [Legal Profession Act]. This means that the respondent firm was bound to tax its bill once taxation was asked for and ordered. It does not mean, however, that it had not agreed on a particular formula for computing the extent of the petitioner's liability for the legal costs incurred by the firm in acting for the petitioner and the other reinsurers in relation to the matter. Neither does it mean that the respondent firm was not bound by such agreement...
>
> 27 I see no reason in principle or in practice why the taxing Registrar should not have had regard to this agreement, even though it was not an agreement falling within s 111 of the [Legal Profession Act].

31 At this juncture, we think it useful to refer to another case where the Disciplinary Committee (the previous title of the current DT) had the occasion to address specifically the scope of r 9(2)(*c*)(ii) of the SA Rules: *The Law Society of Singapore v Chua Swee Keng* [2008] SGDSC 6 ("*Chua Swee Keng*"). There the DC ruled that r 9(2)(*c*)(ii) is not subject to s 111 of the LPA (at [11.5.6]). Following from the reasons based on a plain reading of r 9(2)(*c*)(ii), as well as the fact that where it was intended that the fee agreement should be in writing the SA Rules would expressly say so (rr 9(2)(*a*) and 9(2)(*c*)(i)), the DC elaborated at [11.5.6(b)]:

> ...the drafting convention adopted in rule 9 is expressly to require writing when it is needed. This convention makes the omission of a requirement of writing in rule 9(2)(c)(ii) of substantive significance.

32 Equally helpful in explaining the scope of s 111 are the following passages from *Tan Yock Lin* at p 685 where the author succinctly reviewed the previous position and the current position:

> Before the English statutory enactment, with which section 111 [of the LPA] is *in pari materia*, was enacted, a solicitor could make an oral agreement with his client as to remuneration for prosecuting contentious business. For example, he could orally agree to charge nothing for the services; but if he made an oral agreement for more than his proper costs in prosecuting or defending an action, that agreement could not be enforced by him. Section 111...was designed to enable a solicitor to enforce such agreements provided they are in writing.
>
> Section 111 has nothing to do with validity but is concerned only with enforceability by the solicitor. Being an empowering section, it does not affect the position of a client who sets up an agreement as to costs. Before the enactment of section 111, a client could enforce an oral agreement as to costs against his solicitor and that remains true after the enactment. Thus in *Clare v Joseph*, in an action brought to recover moneys received by a solicitor to the use of his client, the English Court of Appeal held that the client continued to be entitled, despite the enactment of the English equivalent of section 111, to set up an oral agreement by the solicitor to be paid less than usual costs. However, where a solicitor purports to set up an agreement as to costs, the agreement must be in writing for it to be enforceable.

33 We would hasten to emphasise that the client is not deprived of protection simply because there is an oral fee agreement. In *Wong Foong Chai v Lin Kuo Hao* [2005] 3 SLR(R) 74, Andrew Phang Boon Leong JC stated at [31] that:

> [N]o agreement for the payment of costs between client and solicitor is sacrosanct in the sense that it is conclusive and immune to, as well as impervious from, any investigation by the court itself. That such agreements can in fact be – and are – subject to the court's scrutiny, particularly from the perspective of reasonableness and fairness, is established in both local as well as English case law.

Indeed, if the Complainant here were to complain about the reasonableness of the fees charged by the Respondent, the latter would, by virtue of s 111(2), be precluded from relying on the oral fee agreement with the Complainant to justify the fee charged.

34 We would reiterate that all seeming difficulties or incongruity would vanish if r 9(2)(*c*)(ii) is viewed not as a provision concerned with the enforceability of a fee agreement, but only in determining whether there is an agreement between the solicitor and client which would permit the solicitor not to have to place money so received by him from a client into a client account. We find that is the proper reading of r 9(2)(*c*)(ii). The question, then, in this case, is whether or not there were, in fact, the alleged oral agreements between the Respondent and the Complainant on fees relating to the two matters which the Complainant had entrusted the Respondent to handle and which would warrant the Respondent depositing the two sums he received from the Complainant into the firm's account. As this would amount to the Complainant paying the Respondent in advance of work being performed, clear proof of the client's agreement must be established. In this regard, it is pertinent to note that when a solicitor has done work for a client and wishes to pay himself, he has to observe the following rules:

(i) Where the payment is to be taken from client's account – "money properly required for or towards payment of the solicitor's costs where a bill of costs or other written intimation of the amount of the costs incurred has been delivered to the client and the client has been notified that money held for him will be applied towards or in satisfaction of such costs" (see r 7(1)(a)(iv) of the SA Rules); or

(ii) Where the payment is from money held or received by him – "which is expressly paid to him on account of costs incurred, in respect of which a bill of costs or other written intimation of the amount of the costs has been delivered for payment" (see r 9(2)(c)(i) of the SA Rules).

Issue 2: Whether or not an "agreed fee" must be for the entirety of the transaction

35 We now move to the second issue as to whether an agreed fee could be in respect of part of the work to be undertaken by the solicitor on the contentious matter entrusted to him or if it must cover the entire work in relation to the engagement. The DT did not appear to have considered this issue as it had found that there was in fact no agreement on fees between the Complainant and the Respondent because in its view the $2,000 cash and $3,000 cheque were in fact deposit or initial payment. We do not see anything in r 9(2)(*c*)(ii) of the SA Rules which expressly or implicitly touches, or has a bearing, on this. However, s 111 of the Act states clearly that "a solicitor ... may make an agreement in writing with any client respecting the amount and manner of payment *for the whole or any part of its costs* in respect of contentious business". Thus, as an agreed fee in writing could be made in respect of the costs of part of the work to be undertaken by the solicitor, or up to a certain stage of the proceeding, we cannot see any reason why an oral agreement could not be similarly made. In this regard, we would underscore the need to differentiate between matters of principle and matters of evidence. One should not confuse the two. It may well be that where an oral agreement is involved, there could be difficulties in proving what the parties had exactly agreed on as fees, both in terms of the amount as well as the scope of work covered by that agreed fees. But the fact that there could be such evidential difficulties does not mean that there could not be an oral fee agreement touching on part of the work to be undertaken by the solicitor. This may explain why, as a matter of good practice, it is always desirable to reflect all fee agreements in writing.

36 Having said that, we would caution that solicitors have the obligation to make abundantly clear – both to the client and, if need be, to the court – which specific part (or up to which specific stage) of the transaction is covered by the agreed fees. For the protection of the client, a solicitor cannot be allowed to vary his agreed fees upwards at his will.

Issue 3: Whether or not there is any reason to overturn the DT's findings of fact with respect to the first two charges

37 We now turn to consider the issue as to whether the Complainant had agreed with the Respondent on an agreed fee in respect of each of the two matters, namely, the Divorce Ancillaries and the Maintenance Summons. The DT found that there was no agreement between them on fees. The law is clear that an appellate court should not seek to overturn a finding of fact which is based on oral evidence and the veracity or credibility of witnesses unless the lower tribunal had wrongly appreciated the facts or the finding is plainly wrong or against the weight of the evidence (see *Tat Seng Machine Movers Pte Ltd v Orix Singapore Ltd* [2009] 4 SLR(R) 1101 at [41] and *Yeo Chong Lin v Tay Ang Choo Nancy* [2011] 2 SLR 1157 at [42]). While we note that the principles established in these two authorities relate to findings of the lower courts which are up for consideration by the appellate court, there is no good reason why the same principles (of good sense and expedience) should not apply in the present context.

38 In the present case, the evidence is predominantly oral, essentially from cross-examination. There are only a few pieces of objective documentary evidence (*eg*, the receipt issued for the $2000 in cash was dated 28 February 2009) and the findings of the DT could be said to be based largely on witness credibility. There is, however, one observation of the DT which gives us cause for some concern and which we think warrants this court to review the evidence and the findings of the DT.

39 At [19] of its Report, the DT stated that the alleged agreement on fee "was not pleaded in the Defence and was also not referred to in the Respondent's Opening Statement". This comment showed that the DT thought that the defence of an agreed fee was an afterthought raised at the last minute at the DT hearing. With respect, the comment is erroneous. In the Opening Statement of the Respondent, it was averred that "the full details of the Respondent's Defence are spelt from paragraphs 4 to 29 of his Affidavit Evidence in Chief". In his Affidavit of Evidence in Chief ("AEIC"), the Respondent deposed at [11], in reference to the $2,000 cash payment, that "[t]he Complainant paid $2,000 as part of my agreed fees of $3,000 and he said that he would pay the balance of my fees after the matter is completed. I agreed." Again at [13], the Respondent stated "I submit that the Complainant was satisfied with my work and agreed to my fees of **$3,000**" (emphasis in original). As regards the $3,000 cheque payment, the Respondent stated at [18] that "**I told him that my fees [are] $3,000 for the maintenance summons** ... The Complainant agreed..." (emphasis in original). Given the above, we have to be satisfied that this erroneous perception of the Respondent did not unfairly colour the DT's assessment of the evidence of the Respondent.

40 Having said that, the burden is on the Respondent to prove that he had clearly and unambiguously informed the Complainant that the two sums paid would be his agreed fees for the two matters. As far as the Complainant was concerned, he thought that he was required to and so paid the two sums as deposits towards the account of the Respondent's fees in the two matters. However, even both the Respondent and Mr Tan (a witness for the Respondent) had described the sums as "only an advance or initial payment", [note: 10] "an initial fee for the maintenance", [note: 11] and "initial advance fee" [note: 12] etc, words which leave uncertainty as to what was exactly agreed. This is really the difficulty confronting the Respondent's case. Where an agreed fee is not for handling the entire matter, it is vitally important that what is covered by that fee should be explicitly set out and agreed. His confusion can be seen from the following cross-examination: [note: 13]

> Q No, no, no, that's not a question of whether he knows. I'm asking you, was there a discussion that your fee would be, let's say, $10,000 for the ancillary divorce matters? Was there a discussion along those lines?
>
> A No, because we---we are not at that point that we are not in the stage to tell the---the---the client how much would be the---the---the final fees lah, because the thing may go for trial, the thing may not. So we---we---we will tell him, "Look, if the thing don't go for trial, this is 3,000, we will cover. But if the thing go for trial, we will just inform you, see." If---if at that point in time we start telling him a sum, it---it---it will be an unrealistic sum, and it will be speculative sum. So we normally don't. Hmm?
>
> ...
>
> Q Yes, thank you, Mr Tay. So in short, you are saying that there was no agreement at that meeting as to the final sum---as to the final figure---final fee for handling the ancillary divorce matters. Is that correct?
>
> A No agreement at final, but there was an agreement that 3,000 initial fees should be paid

before---on---on and or be---on or before we start the case.

Q Yes.

A That is **towards** professional fee.

(emphasis added)

The First Charge

41 The DT found that the $3,000 was meant to be the Divorce Ancillaries Contingency Fee, and there was no subsequent agreement to convert the $3,000 into an agreed fee. [note: 14]

42 Although the DT did not specify what evidence on which it relied in making that determination, the cross-examination of the Respondent made clear that no agreement could have been reached as to the fees. The Respondent himself claimed that the meeting where the fee agreement was allegedly made lasted "less than 5 minutes" and took place when he "was walking out [of his] door" while the Complainant was going in. [note: 15] According to the Respondent, the way in which he described to the Complainant the conversion of the Divorce Ancillaries Contingency Fee of $3,000 into a fee agreement for the Maintenance Summons was as follows:

> *Look, if like that the hearing, the next one, 2 days I have to use this money to---the 3,000 for, er, the cheque for this other payment, you see...Then the other one I will---I will ask you later lah when the---when there's a need you see.*

43 It is difficult to understand what the above spiel was even meant to communicate, let alone come to an informed, reasoned fee agreement based on that. Indeed, the Respondent claims that in his hurry, he had erroneously written "initial payment for MSS941/2009" on the receipt for the $2,000 cash payment, [note: 16] when according to him he should have written that the payment was for the Divorce Ancillaries. The fact that the Respondent was in such a rush, that he made such a crucial mistake, the little time which he had talking to the Complainant and the lack of intelligibility and clarity in what he said to the Complainant, leave us in great doubt as to whether there could have been an informed and reasoned fee agreement made at the time.

44 Accordingly we do not think that it has been shown that the DT's finding with respect to the First Charge is erroneous. We would affirm it.

The Second Charge

45 In relation to the Second Charge, the DT made its finding on the basis of the following evidence:

(a) The receipt issued by the Respondent for the $2,000 stated that it was "initial payment" for "MSS941/2009", [note: 17] not an agreed fee;

(b) The Respondent's unsigned and undated Bill No. B09-26teo also did not state that the $2,000 was an agreed fee; [note: 18] and

(c) The Complainant stated in his AEIC that he was asked to pay the $2,000 as a deposit. [note: 19]

46 We note that in cross-examination the Complainant agreed that the "$2,000 is part-costs for the ancillary matter". [note: 20] But it could hardly follow from this admission that there was therefore an agreement between them as to a fixed fee for the Respondent handling the Divorce Ancillaries. There is a leap in logic. Even accepting, as the Respondent now alleges, that in issuing the receipt for the $2,000 cash payment he had wrongly stated the "cause" for which the payment was intended, *ie*, it should be the Divorce Ancillaries rather than the Maintenance Summons, this still leaves open the question as to why he did not state that that the payment was part payment of an agreed fee instead of stating that it was "initial payment", an expression which can hardly connote an agreed fee. Equally pertinent to note is that the Respondent's unsigned and undated Bill No. B09-26teo also did not state that the $2,000 was payment towards an agreed fee or part payment of an agreed fee. In this connection, we would hasten to add that a lay client would not likely know about the intricacies concerning the accounts of a solicitor and which particular account his payments to the solicitor should rightly be deposited into. It is clear that the SA Rules were promulgated to protect the interests of clients. It is vitally important that the solicitor should make it absolutely clear to the client as to the nature of the client's payment. The burden is on the Respondent to prove that the client understood the nature of the payment which the client was required to make to the solicitor.

47 In the result, we do not think that there is sufficient basis for us to disturb the DT's finding with respect to the Second Charge.

Issue 4: Whether the third charge has been made out

48 The Third Charge centred on the scope of r 35(*a*) of the PC Rules which reads:

> An advocate and solicitor shall inform the client –
>
> (a) of the basis on which fees for professional services will be charged and the manner in which it is expected that those fees and disbursements, if any, shall be paid by the client…

49 The question whether or not a solicitor has complied with r 35(*a*) of the PC Rules is very much a question of fact. It seems to us clear that the object behind the rule is to ensure transparency in the way a solicitor charges his client. In *Chua Swee Keng*, which concerned the payment of overtime fees, it was held by the DC that it was sufficient for the solicitor to have explained that overtime would be payable for her staff, stating her overtime rates, and providing a detailed breakdown of overtime charge.

50 In relation to the present case and the First Charge, for the reasons discussed at [41] to [44] above, the Respondent could not have adequately informed the Complainant of the basis on which his professional fees were or would be charged.

51 As regards the Third Charge, the DT reached its conclusion based , *inter alia*, on the following evidence:

(a) The Complainant's AEIC and oral evidence;

(b) The Respondent's concession that he did not explain the basis and manner of his fees; [note: 21]

(c) The Respondent's admission that he had not replied to any of the Complainant's letters. [note: 22]

52 The Respondent has not persuaded us as to why the DT's conclusion was wrong. The only explanation the Respondent provided for not having explained to the Complainant the basis on which his fees were charged were that the $3,000 was a lump sum payment, "there were no overtime charges or related fees which called for an explanation from the Respondent", and that no explanation of hourly rates were needed because "he did not have the practice of charging by the hour". [note: 23] This does not quite answer the question. The Respondent could have explained the breakdown of what fees were charged for each stage of the proceedings right up to just before trial, such as discovery of means and assets, preparation of AEIC and so on. All that the Respondent could say was that "$3,000 was a fixed fee for all the work to be done by the Respondent up to the resolution of the matter before trial". [note: 24] This is hardly transparent enough for a client to be sufficiently informed. Further, for the reasons which this court in [37] to [47] above has ruled that there was no agreed fees between the Complainant and the Respondent on the two matters entrusted by the Complainant to the Respondent, the Respondent's assertion that he had clearly explained the basis of his fee charge to the Complainant leaves us in considerable doubt as to the transparency of the explanation. Considered as a whole, we find the Respondent's evidence and explanations unsatisfactory.

53 Again, there is insufficient basis for this court to interfere with the DT's findings with respect to the Third Charge.

Issue 5: The appropriate sanction

54 The general sentencing standard for a breach of r 3 of the SA Rules is a suspension of one to two years, depending on the culpability of the solicitor and whether there was any element of dishonesty.

5 5 *Law Society of Singapore v Prem Singh* [1999] 3 SLR(R) 126 ("*Prem Singh*") described an omission to place client moneys in a client account as "*a serious breach of [the SA Rules]*" (at [22]). In that case a two-year suspension was ordered. In *Law Society v Tan Sok Ling* [2007] 2 SLR(R) 945 ("*Tan Sok Ling*") a one-year suspension was ordered as "*the breaches here were on the less culpable end of the continuum*" (at [26]). In *Law Society of Singapore v Tan Chwee Wan Allan* [2007] 4 SLR(R) 699 ("*Tan Chwee Wan Allan*"), the Court ordered the respondent to be censured and imposed an undertaking not to practice as a sole proprietor for two years, even though "there was no suggestion that the respondent had behaved dishonestly", "[n]o client had suffered any loss [because the] respondent had taken steps to put matters right almost immediately after actual notification" and "[t]he respondent had voluntarily ceased practice [for more than two years] after he became aware of the breaches" (at [53]).

56 At this juncture, we ought to highlight the fact that s 83(1) of the LPA, which prescribed the sanctions which the court could impose on a solicitor on due cause shown was amended in 2008 to provide for the additional sanction of a monetary penalty of up to $100,000 for disciplinary offences committed by solicitors. The amended version (which is the current version) of s 83 of the LPA provides as follows:

> **Power to strike off roll, etc.**
>
> **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*).

[emphasis added]

57 The first case which imposed monetary penalty upon a delinquent solicitor pursuant to s 83(1)(*c*) of the LPA was *Law Society of Singapore v Andre Ravindran Saravanapavan Arul* [2011] 4 SLR 1184 ("*Andre Arul*"), a seminal case where the court of three judges laid down important guidelines as to when a monetary penalty should be favoured over the more severe (and sometimes crippling) sanctions of suspension or disbarment. The misconduct in *Andre Arul* related to overcharging under s 83(2)(*b*) of the LPA (grossly improper conduct). The court explained at [36] that:

> This [monetary] penalty was introduced to enable the court of three judges to impose fines for disciplinary offences that are too serious to be punished with mere censures, but insufficiently serious to deserve the punishment of suspension from practice. In our view, the disciplinary offence of overcharging amounting to grossly improper conduct falls within this category of disciplinary offences, provided no deception or dishonesty is involved. *We hold that the starting point in imposing a proportionate penalty for overcharging amounting to grossly improper conduct should be a fine in the first instance, and not a suspension of the errant lawyer from practice.* A fine, especially a heavy fine, together with payment of the disciplinary tribunal's and the Law Society's costs in the proceedings, should generally be an adequate punishment for the errant solicitor. Repeat offenders will, of course, be penalised more severely.
>
> [emphasis added]

58 The court also provided guidance as to when suspension is warranted: where the offence in question is "*redolent of cheating or deceiving the client*" (at [38]). Further, striking the solicitor off the roll is justified only "*[i]n the most egregious cases where cheating is involved (such as where there are fabricated bills or invoices for work which has not in fact been done)*" (at [39]).

59 It is clear, therefore, that the distinguishing factor between an offence that warrants a monetary penalty and one that warrants suspension or disbarment is the element of *dishonesty* or *deceit*. Gross negligence may or may not be sufficient; it will have to depend on the overall circumstances. Do they come close to dishonesty? Where dishonesty or deceit on the solicitor's part is not made out, the starting point should be a monetary penalty.

60 Counsel for the Law Society relied heavily on *Prem Singh*, where the court of three judges imposed a two-year suspension for a solicitor's failure to place client moneys into a client account, as required under r 3 of the SA Rules. The court stated at [22]:

> 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 instil public confidence in solicitors... 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.

61 We agree that such omission to place client moneys into a client account constitutes a serious breach of the Rules, and may constitute grossly improper conduct under s 83(2)(*b*) of the LPA. The past precedents show that, prior to the 2008 amendment, the court would invariably, impose a suspension even where no dishonesty is proven or even alleged (*Tan Sok Ling*). The case of *Tan Chwee Wan Allan* is instructive. In that case, the court of three judges found at [53] that:

> There was no suggestion that the respondent had behaved dishonestly. This was essentially a case of professional oversight as a result of the respondent's sheer carelessness and inadvertence in relation to staff supervision and the management of his clients' accounts.

62 The court ordered the respondent to be censured and imposed an undertaking on the respondent not to practise as a sole proprietor for a period of two years. *Tan Chwee Wan Allan* is a perfect example of a case where the court, unarmed with the enhanced sentencing options under the new s 83 of the LPA, sought to temper justice with mercy by ordering only a censure and imposing an undertaking not to practise as a sole proprietor. The 2008 amendments were designed to bridge the cavernous gulf between a censure and suspension or disbarment.

63 In our view, this is an appropriate case to impose a monetary penalty. In the circumstances of this case, the Third Charge is really incidental to the First and Second Charges. While we note that the Respondent has not pleaded guilty to the charges, we are satisfied that he resisted the charges out of a bona fide conviction, although we have held his belief to be wrong, that he had reached an understanding with the client on fees. It was also clear that there was no dishonesty or deceit involved in what he did. If he had really thought that he had done wrong with regard to his treatment of the client's payments, he would have wasted no time to satisfy the demand of the client for a refund of the $3,000 which the client sought. Although failure to put client moneys into a client account is a serious breach, irrespective of the amount involved – and the two amounts here were small – in our judgment a monetary penalty in this case would be sufficient to satisfy the considerations of "the importance of protection of the public and maintaining public confidence in the manner in which client's money is to be handled and safeguarded by members of the legal profession" (*Prem Singh* at [24]).

64 In considering the appropriate quantum of monetary penalty to be imposed on the Respondent there is a need to address the gravity and nature of the Respondent's misconduct in contradistinction with the misconduct in *Andre Arul*. Even absent dishonesty or deceit, the misconduct of overcharging in *Andre Arul* involved the *intention* to charge a client more than what was fair and necessary. However, the situation here of the Respondent putting the two sums of client money into an office account is quite different in that it was borne of a mistaken belief, rather than an intention to do an act that is manifestly improper. Further, one other factor must also be borne in mind – the sums involved in *Andre Arul* and those of the present case. In *Andre Arul* the court accepted the DT's decision that a reasonable sum would have been about $75,000, while the solicitor in fact charged more than $226,000 – a differential of about $151,000 (at [40]). In this case, the wrong only involved two small sums of $2,000 and $3,000. Having regard to the *gravity* and *nature* of the misconduct, as well as the *potential loss or injury* to the client had the solicitor not been brought to task, it is clear to us that the gravity of the misconduct committed by the Respondent here is certainly lighter than that in *Andre Arul* where a penalty of $50,000 was imposed. Accordingly, we would impose a penalty of $15,000. This should suffice as a specific as well as a general deterrence.

Conclusion

65 In the result, cause having been shown, we order the Respondent to pay a penalty of $15,000. He shall also bear the costs of the Law Society.

[note: 1] The charges were brought by the Law Society on 14 March 2010, before the 2010 revised edition of the PC Rules came into operation.

[note: 2] Record of Proceedings ("RP") vol. 3 at p 654.

[note: 3] RP vol. 2 at p 375.

[note: 4] RP vol. 3 at p 756.

[note: 5] *Ibid.*

[note: 6] RP vol. 3 at p 757.

[note: 7] *Ibid.*

[note: 8] RP vol. 3 at p 761.

[note: 9] *Ibid.*

[note: 10] RP vol. 3 at p 653.

[note: 11] RP vol 3 at p 660.

[note: 12] RP vol. 3 at 661.

[note: 13] RP vol.3 at p 654.

[note: 14] RP vol. 3 at p 757.

[note: 15] RP vol. 3 at p 656.

[note: 16] Respondent's Submissions ("Res Subs") at p 10.

[note: 17] RP vol. 1 at p 103.

[note: 18] RP vol. 1 at p 89.

[note: 19] RP vol. 2 at p 344.

[note: 20] RP vol. 3 at p 610.

[note: 21] RP vol. 3 at pp 661 – 663.

[note: 22] RP vol. 1 at p 165; RP vol. 2 at p 369.

[note: 23] Res Subs at p 96.

[note: 24] *Ibid.*

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