BUSINESS TRANSACTIONS BETWEEN SOLICITORS AND THEIR CLIENTS

LAW SOCIETY OF SINGAPORE V TAN CHUN CHUEN MALCOLM [2020] SGHC 166

Introduction

It is trite that lawyers owe fiduciary duties to their clients and one such duty is to "[avoid] any financial or personal arrangements with his client or related persons which would adversely affect his duty to act in the best interests of his client".[1] In the recent disciplinary decision of *Law Society of Singapore v Tan Chun Chuen Malcolm* [2020] SGHC 166 (***Tan Chun Chuen Malcolm***), the Court of Three Judges (**the Court**) ordered the respondent to be struck off the rolls for procuring the complainant to enter into a solicitor-client relationship with him under false pretences, so as to further his own financial interests in transacting with the complainant on two investment schemes.

In a five-paragraph coda to this decision,[2] the Court provided important guidance on the potential pitfalls of legal practitioners engaging in business transactions with their clients. It deserves close reading by legal practitioners in all practice areas. This case note focuses on the salient points of the coda. However, legal practitioners are strongly encouraged to review the coda in full.

Brief Facts

The respondent, who practised in a law corporation (**the Law Practice**) at the material time, was concurrently the sole shareholder and director of a company that provided business management consultancy and real estate agency services (**the Company**).

The complainant signed two letters of engagement with the Law Practice, each pertaining to an investment scheme promoted by the respondent. With regard to the first investment scheme, the scope of the Law Practice's instructions included acting as a trustee for the complainant in the handling of his investment monies as well as overseeing his investment monies in the Company's account. The respondent falsely represented to the complainant that the Company would soon be licensed by the Monetary Authority of Singapore. In addition, the respondent had assured the complainant that the profits would be guaranteed by "his professional indemnity insurance as a lawyer".[3] The second investment scheme was similarly structured except that the monies would be invested in a different company.

Although it was envisaged that the complainant would pay the aggregate investment sum for both schemes into the Law Practice's client account, this sum was paid to the Company instead, on the respondent's assertion that it was "for ease of transaction and it would be the same as issuing the cheque to [the Law Practice]".[4]

The respondent was charged under section 83(2) of the Legal Profession Act with, *inter alia*:

a. making false and fraudulent representations to the complainant for the purpose of soliciting the latter's engagement of his and/or the Law Practice's services in respect of the investment sum (**1st charge**);
b. procuring the complainant's execution of the two letters of engagement under improper and dishonest circumstances (**2nd charge**); and
c. placing himself in a position in which his duty to serve the complainant's best interests conflicted with his own interests when he procured and/or instructed the complainant to pay the investment sum to the Company, and failing to take the necessary steps to obviate the conflict (**5th charge**).

Holding

The Court held that due cause had been established for the three above-mentioned charges. As a preliminary point, the Court rejected the respondent's contention that the complainant "had set out to engage, or knew that he had in fact engaged, [the respondent] *not* as a solicitor but purely as a business advisor".[5] The Court found that the letters of engagement entered into between the complainant and the Law Practice had clearly established a solicitor-client relationship in connection with the two investment schemes.

Objectively speaking, the complainant had been given the impression that "his interests would be protected by [the respondent] as his solicitor pursuant to the terms of the letters of engagement".[6] The Court specifically observed in this case that the respondent's previous counsel had conceded before the Disciplinary Tribunal that the complainant would not have invested his monies in the two investment schemes promoted by the respondent without the assurance that a firm of lawyers, specifically the Law Practice, would supervise his investments.[7]

Turning to the three charges, the Court's key findings are summarised below.

1st Charge

The Court found that the respondent had fraudulently represented that the promised returns from the investment scheme were guaranteed by his professional indemnity insurance, as it was "simply inconceivable" that the respondent could have honestly believed that this was true.[8] In addition, the respondent had falsely and fraudulently represented that he was "qualified and able to provide the relevant services, including investment advice, in his capacity as an advocate and solicitor with [the Law Practice]".[9]

2nd Charge

The Court found that the respondent had, from the start, never intended to comply with the terms of the letters of engagement, given that the investment sum was not paid to the Law Practice's client account and "it was unclear how [the respondent] could seriously have intended to supervise investments made by his client in his own private company".[10] In sum, the Court found that the respondent had dishonestly procured the complainant's engagement of the Law Practice, "so as to give him the false assurance that his investments would thereby be protected".[11]

5th Charge

Last year, the Court held in *Law Society of Singapore v Ezekiel Peter Latimer* [2019] 4 SLR 1427 (***Ezekiel Peter Latimer***) that cases involving a solicitor who preferred his own interests over those of his client would presumptively involve more serious misconduct, since such a solicitor who prefers his own interests inevitably abuses the trust and confidence reposed in him.[12] That

Court further observed that an abuse of trust may occur "where a solicitor enters into a transaction with his client on terms that may be more favourable to the solicitor's own interests".[13]

Consistent with the judicial observations in *Ezekiel Peter Latimer*, the Court found in this case that there was "a very serious conflict of interest and an abuse of trust"[14] and that the respondent had been "single-minded in his pursuit of his own interests over those of [the complainant]".[15] In particular, the respondent had failed to comply with the requirement of full and frank disclosure under Rule 22(3) of the Legal Profession (Professional Conduct) Rules 2015 (**PCR**). The purpose of this requirement is to ensure that the client, after being informed of "the nature, extent and implications of the conflict of interest", can decide whether to obtain independent legal advice.[16] If the client decides not to seek independent legal advice, the client should "not [be] under the impression that the legal practitioner is protecting the client's interests".[17]

In this regard, the Court emphasised that "whether independent legal advice has been sought cannot be viewed in a technical manner".[18] Although the complainant had consulted a "lawyer friend" over a meal about the letters of engagement, this was "woefully inadequate" and did not constitute "adequate independent legal advice" as the complainant had not been "placed in a position to assess whether he should allow the conflicted solicitor to continue acting for him".[19]

Importantly, the onus was on the respondent to disclose the critical fact that the Law Practice would not supervise the complainant's investments and to ensure that the complainant was not under the impression that the respondent would protect his interests.

Given that the respondent had promoted the two investment schemes to the complainant on false premises that were not corrected, it was clear that the respondent had not adequately disclosed his conflict of interest to the complainant. The Court further observed that the "this conflict was so fundamental that [it was] difficult to see how it could have been resolved at all".[20]

Coda

The essence of the coda to this decision is succinctly encapsulated in the Supreme Court's case summary of this decision, under the heading "Pertinent and significant points of the decision", as follows:

> "As a general rule, it is inadvisable for solicitors to enter into business transactions with their clients since this will often have a real potential to give rise to a conflict of interest. In that light, a solicitor who invites a prospective client to consummate a solicitor-client relationship with him in order to then deal with that client as a principal in a separate business transaction is courting professional disaster."[21]

The Court observed that "[a]s a matter of prudence, solicitors would be well-advised to steer clear of such situations …".[22] In addition, the Court noted that although the PCR identified "examples of conduct which would generally be incompatible with a solicitor's obligation as a fiduciary to advance his client's best interests unaffected by those of his own" (such as borrowing or receiving gifts from clients), it was not exhaustive.[23]

Significantly, the Court endorsed Australian authority[24] cited in a previous disciplinary case[25] that where a solicitor makes a deliberate proposal that his client deal with him, it is immaterial that "the transaction is with a company in which he has an interest".[26] In such a case, the fact that the solicitor had advised his client to seek independent legal advice may not negate "the objection to the solicitor having proposed, invited or encouraged the client to deal with him or his company in the proposed transaction".[27] The reason for this proscription was first elucidated in *Law Society of Singapore v Khushvinder Singh*

Chopra[28] that the Court cited with implicit approval:

> "***The price of being a member of an honourable profession***, whose duty to his client ought not to be prejudiced to any degree, is that ***a solicitor is denied the freedom to take the benefit of any opportunity to deal with persons whom he has accepted as clients***. Therefore he ought neither to promote, suggest, nor encourage a client to deal with him, but rather should take all reasonable steps positively to avoid dealing directly, or indirectly, with his client."[29] [emphasis added]

The Court concluded the coda by cautioning the legal profession against the "disgraceful and appalling conduct" in *Tan Chun Chuen Malcolm*, where in facilitating a business transaction, the respondent had used "his professional status to give the prospective client some sort of assurance that the client's interests will thereby be safeguarded" and had made such assurances "falsely and fraudulently".[30]

Conclusion

The coda in *Tan Chun Chuen Malcolm* is a salutary reminder to legal practitioners to exercise an abundance of prudence and caution when considering whether to enter into business transactions with their clients. The words of the Honourable the Chief Justice Sundaresh Menon cited earlier bear reiterating: "… *as a general rule, it is inadvisable for solicitors to enter into business transactions with their clients since this will often have a real potential to give rise to a conflict of interest.*"[31] As such, save in exceptional circumstances, legal practitioners should give such transactions a wide berth, especially given the "predominant considerations" of "[t]he need to protect the public and uphold public confidence in the legal profession" in such conflict of interest situations.[32]

Legal practitioners should also be mindful that entering into a business transaction with a client may put the transaction at risk of being impugned under the law on undue influence. Under "Class 2A" undue influence, solicitor-client relationships are "*irrebuttably*" presumed to give rise to a relationship of trust and confidence.[33] As observed above, the Court in *Ezekiel Peter Latimer* had pointed out that "a solicitor who prefers his own interests *inevitably* abuses the trust and confidence reposed in him".[34] The rationale for this strict position is the solicitor's position of ascendancy and influence over the client in a solicitor-client relationship, as well as "the solicitor's familiarity with the law and with the client's private affairs".[35] In such a case, it would be an uphill task to rebut the presumption that the lawyer has exerted undue influence over the client.

Legal practitioners who find themselves in an invidious position as to whether to transact with a client in a non-solicitor capacity would do well to seek the guidance of the Advisory Committee first by writing in to the Law Society's Legal Research and Development department (the Secretariat to the Advisory Committee) at lrd@lawsoc.org.sg. At all times, legal practitioners should remain steadfast not only in discharging their fiduciary duties to their clients, but also in adhering to their wider responsibilities as members of an honourable profession.

Authors: Gregory Vijayendaran, SC and Alvin Chen

First published in the November 2020 issue of the Singapore Law Gazette

Endnotes

1 Jeffrey Pinsler SC, *Legal Profession (Professional Conduct) Rules 2015: A Commentary* (Academy Publishing, 2016) at (22.004).
2 (2020) SGHC 166 at (55)-(59).
3 (2020) SGHC 166 at (4).
4 (2020) SGHC 166 at (6).
5 (2020) SGHC 166 at (9).
6 (2020) SGHC 166 at (11).
7 (2020) SGHC 166 at (13).
8 (2020) SGHC 166 at (19).
9 (2020) SGHC 166 at (22).
10 (2020) SGHC 166 at (28).
11 (2020) SGHC 166 at (32).
12 (2019) 4 SLR 1427 at (60) and (63).
13 (2019) 4 SLR 1427 at (63).
14 (2020) SGHC 166 at (38).
15 (2020) SGHC 166 at (43).
16 (2020) SGHC 166 at (40).
17 (2020) SGHC 166 at (40).
18 (2020) SGHC 166 at (40).
19 (2020) SGHC 166 at (40).
20 (2020) SGHC 166 at (41).
21 The case summary was published on the Supreme Court's website on 7 August 2020: see <https://www.supremecourt.gov.sg/news/case-summaries/law-society-of-singapore-v-tan-chun-chuen-malcolm-2020-sghc-166-originating-summons-no-1-of-2020> (accessed on 21 August 2020).
22 (2020) SGHC 166 at (58).
23 (2020) SGHC 166 at (55).
24 *Law Society of New South Wales v Harvey* (1976) 2 NSWLR 154.
25 *Law Society of Singapore v Khushvinder Singh Chopra* (1998) 3 SLR(R) 490.
26 (2020) SGHC 166 at (55), citing Street CJ in *Law Society of New South Wales v Harvey* (1976) 2 NSWLR 154 at 171B.
27 (2020) SGHC 166 at (55), citing Street CJ in *Law Society of New South Wales v Harvey* (1976) 2 NSWLR 154 at 171B.
28 (1998) 3 SLR(R) 490.
29 (2020) SGHC 166 at (55), citing Street CJ in *Law Society of New South Wales v Harvey* (1976) 2 NSWLR 154 at 171B.
30 (2020) SGHC 166 at (59).
31 (2020) SGHC 166 at (55).
32 (2020) SGHC 166 at (52).
33 *BOM v BOK* (2019) 1 SLR 349 at (101).
34 (2019) 4 SLR 1427 at (63).
35 (2019) 4 SLR 1427 at (62)-(63).