DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
**DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA **
[SAMAN PEMULA NO: BA-17D-12-08/2023]

Dalam perkara mengenai Seksyen-seksyen 99, 103C, 103D dan 103E Akta Profession Undang-Undang 1976;

Dan

Dalam perkara mengenai Aduan No. DC/19/0947 yang dibuat oleh Ho Shen Lee

(M) Sdn. Bhd., Tan Ken Meng dan Khoo Chun Fun terhadap Lim Kien Huat;

Dan

Dalam perkara mengenai Lim Kien Huat yang beramal sebagai seorang rakan kongsi di dalam firma Tetuan Lee & Lim di B3, Bangunan Khas, Jalan 8/1E, 46050 Petaling Jaya, Selangor Darul Ehsan;

Dan

Dalam perkara mengenai Perintah Lembaga Tatatertib Peguambela dan Peguamcara yang bertarikh 10.8.2023;

Dan

Dalam perkara mengenai Kaedah-Kaedah Profession Undang-Undang (Prosiding Tatatertib) (Rayuan) 1994.

ANTARA

LIM KIEN HUAT
(NO. K/P: 690526-08-5469) … PERAYU

DAN

1. HO SHEN LEE (M) SDN BHD
(DALAM LIQUIDASI)
(NO. SYARIKAT: 594315-M)

2. TAN KEN MENG
(NO. K/P: 750610-01-6177)

3. KHOO CHUN FUN
(NO. K/P: 760116-01-6584)

4. MAJLIS PEGUAM MALAYSIA

… RESPONDEN-RESPONDEN

JUDGMENT

Introduction

[1] This is an appeal by way of Originating Summons in Enclosure 1 ("Appeal") against the entire findings and decisions of the Advocates and Solicitors Disciplinary Board ("DB") dated 10 August 2023 in Complaint No.: DC/1/0947 which ordered the appellant to be suspended for six (6) months and to pay a fine amounting to RM50,000.00 ("DB Order").

Facts

[2] The brief facts are as follows. Pursuant to a complaint lodged by the first respondent, second respondent and third respondent against the appellant and one legal assistant, Tang Keen Cheong, the Disciplinary Committee ("DC") found that the appellant has breached paragraph 94(3)(o) of the Legal Profession Act 1976 ("LPA

1976") in that the appellant had deliberately disobeyed the stay order to the detriment of the first respondent, second respondent and third respondent ("Findings No. 1").

[3] The DC also found that the appellant has breached paragraph 94(3)(d) of the LPA 1976 and Rule 18 of the Legal Profession (Practice and Etiquette) Rules 1978 in that the appellant should have submitted documentary evidence by affidavit and exhibits as oppose to by way of a police report ("Findings No. 2").

[4] The DC recommended the appellant be suspended for 6 months. The DB amplified the 6 months suspension by imposing a maximum fine of RM50,000.00.

Factual Background Leading to Complaints

[5] The appellant acted as one of the main solicitors handling a winding-up suit in the Seremban High Court (NA-28NCC-30-06/2018) against Ho Shen Lee (M) Sdn Bhd, the first respondent. The complainants, who were the second respondent and third respondent in the winding-up suit, are also the second respondent and third respondent in this Appeal.

[6] On 11 April 2019, the learned Judge in the winding-up suit issued an order to wind up the first respondent, with both the appellant and the respondents' solicitors from Messrs. Josephine, L K Chow & Co ("JLKC") present.

[7] Following the Winding Up Order, JLKC requested an oral stay of execution of the order, pending the disposal of an appeal to be filed by the first respondent.

[8] The learned Judge granted an interim stay of execution and directed that a formal application for a stay be filed by 19 April 2019 ("Interim Stay Order").

[9] The appellant was aware of the Interim Stay Order but failed to act

on the interim stay of execution, which was granted pending appeal. Despite knowing about the stay, the appellant did not inform his client and continued actions as if the stay didn't exist, leading to damage and embarrassment for the first respondent, second respondent and third respondent. These actions included circulating the Winding Up Order, appointing a liquidator without disclosing the stay, and not informing relevant parties.

[10] Around November 2019, the respondents filed a complaint with the DB against the appellant, citing that his unprofessional conduct and misconduct in handling the winding-up and Interim Stay Orders had caused them damage, inconvenience, and embarrassment ("Complaint No. 1").

[11] Following the Interim Stay Order, the respondents formally applied to stay the Winding Up Order ("Enclosure 80") on 19 April 2019, and also filed an application to stay the ex-parte order for leave to commit ("Enclosure 96") in the Seremban High Court.

[12] On 18 July 2019, the appellant sent a letter dated 18 July 2019 ("LL Letter") to the Seremban High Court, alleging that the respondents and one Mr. Wong Tee Ming had engaged in asset dissipation.

[13] L & L filed the LL Letter to request that the hearing date for Enclosure 80 and Enclosure 96 be brought forward.

[14] Even after JLKC sent a clarification letter to the court dated 22 July 2019, the appellant responded by issuing another letter dated 26 July 2019 maintaining his position.

[15] Due to the appellant's highly unprofessional and improper actions, the respondents filed an additional complaint with the DB against the appellant ("Complaint No. 2").

The DC and DB Order

[16] After the conclusion of the hearing on 26 May 2022, the DC

concluded that the respondents had proven their cases against the appellant beyond a reasonable doubt, recommending a six months suspension from legal practice. The DC highlighted the appellant's serious misconduct in disobeying a court order and taking unfair advantage against opposing counsels.

[17] On 11 July 2023, the DB reviewed the DC's findings. While the DB upheld the appellant's liability, it found the recommended 6 months suspension insufficient and considered imposing a harsher penalty, including a fine, due to the appellant's failure to inform the liquidator of the Interim Stay Order and breach of legal practice standards.

[18] The appellant was given an opportunity to respond and submitted further explanations on 25 July 2023. However, on 10 August 2023, the DB issued an order suspending the appellant for 6 months and imposed a RM50,000 fine. The appellant filed an Originating Summons ("OS") and an ex-parte application on 21 August 2023.

Grounds of Appeal

[19] The appellant in this appeal had put forth the following grounds:

(i) that the DB and DC failed to address first respondent, second respondent and third respondent's "Response Received From The Complainants" dated 19 February 2021 as a defective document due to its lack of affirmation on translation and/or jurat;

(ii) the appellant's duty of care to his client throughout relevant proceedings;

(iii) the first and second complaints tantamount as an abuse of the court's process;

(iv) the first and second complaints were claims caught by the doctrine of *Res Judicata* and hence were raised in an incorrect

forum;

(v) the DB and DC failed to realise that the second complaint was an obviously unsustainable complaint;

(vi) the first respondent, second respondent and third respondent does not have locus to proceed with the DB proceeding due to first respondent's wound up status;

(vii) the appellant's statutory right to be heard at the DB Hearing was denied; and

(viii) balance of Justice tilts towards the appellant.

Principles pertaining to an Appeal against the DB Order

[20] In the case of *Dinesh Kanavaji A/L Kanawagi & Anor v. Ragumaren A/L N Gopal (Majlis Peguam, Intervener)* [2018] 2 MLJ 265 the Federal Court held as follows:

"(1) … The court should only interfere with the finding of facts and recommendations of the DC:

(i) when the findings were manifestly perverse;

(ii) the DC/DB had failed as right-thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(iii) there had been a breach of natural justice…

(2) The DC and/or like bodies, being a collegiate of peers, must be allowed to make findings of fact based on their experience in the profession under any given circumstances. The court must not substitute itself in the position of the DC in its review role. It was not for the court to say on the facts that the offending solicitor was guilty of professional misconduct or otherwise. Arguments on the merits should not be enunciated by the court

and strong credence must be given to the findings of the DC, which, after all, was subject to review by the DB which also consisted of peers (see para 22)"

[21] Founded on the case of *Dinesh Kanavaji (supra)*, this court should consider whether:

(i) the findings were manifestly perverse;

(ii) DC/DB had failed as right-thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(iii) there had been a breach of natural justice.

Finding and Decision

[22] At the outset of this grounds of judgment, it must be stated that the appellant had in the appellant's' submissions and affidavit in support of this originating summons, included the factual background of this appeal. Nonetheless, this court is of the view, much of what was included in unnecessary and did not relate to the appeal at hand.

[23] This court will now proceed to consider the grounds of appeal raised by the appellant.

(i) The DB and DC failed to address first respondent, second respondent and third respondent's "Response Received From The Complainants" dated 19 February 2021 as a defective document due to its lack of affirmation on translation and/or jurat.

[24] It was argued by the appellant that the first respondent, second respondent and third respondent's 'Response Received From The Complainants' dated 19 February 2021 ("the Response") as exhibited in Enclosure 18, page 8 to 18, was a defective document. Reference was made by the appellant to the case of *Lim Goh Huat v. Saw Keng*

See [1998] 6 MLJ 600 pertaining to the absence of such acknowledgment and/or jurat. In this regard, and bearing in mind the principles of the case of *Dinesh Kanavaji A/L Kanawagi (supra)*, this court is of the considered view this ground is not unrelated to the essence of the DB Order which deals with the complaints per se. The document in question is not an affidavit and neither is it required to comply with any requirements for a jurat under the Rules of Court 2012.

(ii) The appellant's duty of care to his client throughout relevant proceedings.

[25] According to the appellant, the dissemination of the Winding Up Order to first respondent's initial liquidator vide an email dated 23 April 2019 was unfortunately made by one Ms. Khor Chai Hoong ("Khor") who was the appellant's former legal assistant in L & L. It was submitted by the appellant that Khor's action was *bona fide* and/or genuine mishap that was not initially known by the appellant.

[26] Nonetheless, the appellant contended that it is the duty and a normal practice of the petitioner's solicitor (for a winding up petition) to serve the Winding Up Order, in accordance with Order 42 Rule 10(4) of the Rules of Court 2012.

[27] The facts of this case are that following the Winding Up Order, JLKC orally applied for a stay of execution of the Winding Up Order, pending the disposal of an appeal that will be filed by first respondent.

[28] The learned High Court Judge hearing the winding up petition granted an interim stay of execution of the Winding Up Order and directed for a formal stay of execution application to be filed on or before 19 April 2019 ("Interim Stay Order"). Despite the interim stay of execution granted by the learned High Court Judge, the appellant failed to inform parties, as the provisional liquidator about the interim stay.

[29] In this regard, the appellant had stated that he is a partner in L & L and that the act was committed by the legal assistant of his firm. Hence, it was argued that as the partner of L & L, the appellant should not be liable for the acts of the legal assistant.

[30] Respectfully, this court is unable to agree with this contention. While it may be (this has yet to be ascertained) that Ms Khor was the person in charge of the winding up petition, the fact is that the appellant is a partner of the legal firm L & L which was in charge of the winding up petition. This court cannot comprehend and finds it appalling that the appellant would even suggest that the proper person to be taken action against is Ms Khor. Surely as a partner as a legal firm, the appellant is not absolved of all responsibility. [See: Section 12 of the Partnership Act 1961 and the position in *Tunku Ismail Bin Tunku MD Jewa & Anor v. Tetuan Hashim Sobri bin Kadir* [1989] 2 MLJ 489]

[31] In relation to the liability of a partner pertaining to the actions of a legal assistant, the case of *Tunku Ismail Bin Tunku MD Jewa & Anor v. Tetuan Hisham, Sobri & Kadir (supra)*, the court stated:

> "The liability had already incurred and the defendants would continue to be liable to the plaintiffs despite the sale. The private arrangement among the partners of the defendant firm as to their respective interest in the firm and in the branch also does not affect the liability of the defendants on the undertaking. It is for the partners themselves to determine who among them should bear the liability. It is not for the court to determine the issue on this application to enforce the undertaking."

[32] Therefore, founded on the above paragraph, this court is of the view the appellant must take responsibility for the conduct of his staff and personnel in L & L.

(iii) The first and second complaints tantamount as an abuse of the

court's process.

[33] The appellant argued that the first and second complaints tantamount as an abuse of the court's process, based on the following:

(a) the first and second complaints were claims caught by the doctrine of *Res Judicata* and hence were raised in an incorrect forum;

(b) the DB and DC failed to realise that the second complaint was an obviously unsustainable complaint; and

(c) the first respondent, second respondent and third respondent does not have locus to proceed with the DB proceeding due to first respondent's wounded up status.

[34] In the considered view of this court, the appellant's argument is unfounded. The respondents filed Complaint No. 1 and Complaint No. 2 with the DB as aggrieved parties who experienced significant operational challenges, embarrassment, and the loss of their business, name, and reputation due to the appellant's misconduct as an advocate and solicitor. Therefore, this court finds there is no abuse of the court process, especially when the matter was brought before the DB and not the court.

(iv) The first and second complaints were claims caught by the doctrine of Res Judicata and hence were raised in an incorrect forum.

[35] The appellant submitted that the DB was an incorrect forum for the first respondent, second respondent and third respondent to raise their complaints.

[36] The complaints raised by the first respondent, second respondent and third respondent at the DB were matters that had already been adjudged by the Seremban High Court. To this end, the appellant cited the case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti*

Sdn Bhd [1995] 3 MLJ 189.

[37] In this regard, reference is made to section 99 of the LPA 1976 which provides:

> "Complaint against advocate and solicitor or pupil
>
> 99. (1) **Any complaint concerning the conduct of any advocate and solicitor** or of any pupil **shall be in writing and shall in the first place be made or referred to the Disciplinary Board** which shall deal with such complaint in accordance with such rules as may from time to time be made under this Part."
>
> [Emphasis added]

[38] As the DB complaint was not heard at the Seremban High Court, this court fails to see where the issue of *Res Judicata* may arise. There is clearly no issue of res judicata in this appeal.

(v) The DB and DC failed to realise that the second complaint was an obviously unsustainable complaint.

[39] The appellant contended that the second complaint was an obviously unsustainable complaint. [See: *Bandar Builder Sdn Bhd & Ors. v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36]

[40] The appellant argued that both the first and second letters were addressed to the secretary of the learned Judge, not to the learned Judge himself. This indicates that the contents of these letters were only brought to the attention of the secretary and not the learned Judge. Therefore, the second complaint, alleging that the appellant intended to mislead the learned High Court Judge and/or the Seremban High Court as claimed by the first respondent, second respondent and third respondent is baseless.

[41] Respectfully, this court cannot agree with the appellant's argument.

The fact that the letters were addressed to the secretary of the learned High Court Judge does not mean or indicate the matter was not brought to the learned High Court Judge's attention. In fact, this court is of the view, it is unacceptable for letters to be written or addressed directly to judges. This ground is without merit and this court takes the view that the appellant is clutching at the proverbial straws in this appeal.

(vi) First respondent, second respondent and third respondent does not have locus to proceed with the DB proceeding due to first respondent's wound up status.

[42] The appellant stressed that despite the Winding Up Order dated 11 April 2019 had been set aside by the Court of Appeal on 25 October 2021, it is an established fact that first respondent was eventually wounded up on 26 April 2023 at the Seremban High Court through consent judgment.

[43] On 26 April 2023, the Jabatan Insolvensi Malaysia Cawangan Negeri Sembilan as the Official Receiver was appointed as first respondent's liquidator ("OR/appointed liquidator").

[44] However, the facts of this case further proved that second respondent and third respondent had not obtained the necessary sanction from the OR and/or leave of court to continue with their complaints at the DB after 26 April 2023, as mandated by subsection 483(2) of the Companies Act 2016 ("CA 2016") which essentially explained that once a company is wound up, its assets and liabilities vest in the liquidator. It is upon the liquidator to decide whether to institute, continue or defend any relevant legal proceedings.

[45] See: *HLE Engineering Sdn Bhd v. HTE Letrik Bumi JV Sdn Bhd.* [2015] 2 MLJ 661 and subsection 483(1) and (2) of the CA 2016.

[46] In this regard, this court observes that the complainants have filed the complaint against the appellant in their individual capacities and

names (the second respondent and third respondents). Hence, it is this court's view, the second respondent and third respondent do not need any sanction from a liquidator to pursue or maintain a disciplinary complaint as aggrieved parties. The appellant's submission is clearly without merit.

(vii) The appellant's statutory right to be heard at the DB Hearing was denied.

[47] The appellant argued that prior to the disposal of rights of parties in the complaints made, an advocate and solicitor ought to be afforded the right to be heard at the DB hearing.

[48] The appellant submitted that amongst others that the appellant was simply afforded the opportunity to mete out his possible DB punishments, without being able to make any submissions pertaining to the finding of his liabilities. That being said, the appellant submitted that his right to be heard was not properly accorded by the DB.

[49] In paragraph 40 in the affidavit in support, the appellant deposed as follows:

"40. Pada 10.8.2023 saya langsung tidak dibenarkan untuk didengar berkenaan dapatan liabiliti. Saya hanya sekadar dibenarkan untuk memberi mitigasi berkenaan hukuman yang akan diberikan oleh LT."

[50] In this regard, subsection 103D(4) of the LPA 1976 provided as follows:

"**Consideration by the Disciplinary Board of the report of the Disciplinary Committee**

103D. (4) Before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under subsection (2) or (3), it shall notify the advocate and solicitor of its intention to do

so **and give him a reasonable opportunity to be heard.”**

[Emphasis added]

[51] The hearing on 10 August 2023 at the DB was not to determine liability but to give the appellant an opportunity to be heard regarding a potentially harsher penalty than that recommended by the DC, as per subsection 103D(2) and (4) of the LPA 1976. The appellant’s liability had already been established by the DC’s findings and recommendations, with no further right to be heard on liability itself. Additionally, the DB complied with subsection 103D(4) of the LPA 1976 by notifying the appellant via the DB Letter, to which the appellant responded with further explanations, ensuring the appellant was given and took the opportunity to be heard.

[52] Thus, this court is satisfied the appellant had been given the right to be heard and this ground is without merit.

(viii) Balance of Justice tilts towards the appellant.

[53] The appellant argued that this court ought to weigh the interest of parties. The appellant argues that the balance of convenience favors rejecting or setting aside the DB Order for several reasons. Firstly, the first respondent, second respondent and third respondent did not suffer any prejudice from the dissemination of the Winding Up Order dated 11 April 2019. First respondent’s bank accounts were frozen since the filing of the winding up petition, and second respondent’s failure to respond to the appellant’s query about first respondent’s value during the investigation further indicates no prejudice. Additionally, the DB did not consider that the Winding Up Order was neither gazetted nor published in newspapers. The appellant asserts that while the first respondent, second respondent and third respondent were not prejudiced, the appellant would suffer severe prejudice if the DB Order is not set aside.

[54] Pertaining to this ground, the principle of balance of convenience is not a principle to be considered when it comes to the determination of the OS. Moreover, it appears to this court that the appellant has ignored or failed to acknowledge the first respondent, second respondent and third respondent had suffered losses and as a result of the appellant's misconduct. This court therefore finds this contention without merit.

(ix) Appellate Intervention from the High Court in the DB's Decisions.

[55] Appellant submited that appellate intervention of this court is warranted against the DB Order. In *Dinesh Kanavaji a/l Kanawagi & Anor v. Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265. Prasad Sandosham Abraham FCJ (as His Lordship then was) held:

"[23] The courts should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances ie:

(i) when the findings are manifestly perverse;

(ii) the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(iii) there had been breach of natural justice."

[56] The DB had enhanced the finding of facts and recommendations made by the DC to punish the appellant for his misconduct. Such enhancement in the view of this court goes to demonstrate the seriousness of the appellant's unprofessional acts/impugned conducts/behaviour/omissions which begets disrepute to the legal profession.

[57] Moreover, this court has found nothing to suggest that:

(i) the DC had made the findings are manifestly perverse;

(ii) the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and

(iii) there had been breach of natural justice.

Conclusion

[58] For the aforementioned reasons, this court dismisses this appeal. Costs of RM2,500.00 to be paid to each respondent second respondent and third respondent subject to allocator. No costs awarded to fourth respondent.

[59] As Enclosure 1 is dismissed, Enclosure 4 (stay) in the view of this court has become academic and is hereby struck out.

Dated: 5 AUGUST 2024

(SHAHNAZ SULAIMAN)
Judge
High Court of Malaya,
Shah Alam

Counsel:

For the appellant - Lim Kien Huat; B3, Bangunan Khas; Jalan 8/1E, 46050 Petaling Jaya; Selangor; cantabiz@gmail.com; +6 012 366 1098

For the 2nd and 3rd respondents - Megan Choo Wen Shin, Cyndi Chow Li Kian; M/s Josephine, L K Chow & Co; Advocates & Solicitors; B-03-06, 6th Floor; 3 Two Square; No. 2, Jalan 19/1; 46300 Petaling Jaya. Selangor; lawyerspj@josephinelkchow.com; +6 03 7960 9030

For the 4th respondent - Chong Joo Tian; M/s JT Chong Associates; Advocates & Solicitors; N-4-10, Gamuda Biz Suites; No. 12, Jalan Anggerik Vanilla 31/99; Kota Kemuning, Seksyen 31; 40460 Shah Alam.

Selangor; jtchonglaw@gmail.com; +6 03 5131 3433