Intention Necessary to Prove Charge of Lawyer Being Party to or Assisting Client in Suppressing Evidence, Court of Three Judges Rules

Rule 10(3)(a) of the Legal Profession (Professional Conduct) Rules 2015 (**PCR**) requires a legal practitioner, to the extent that he is able, to prevent his client from, to not be a party to, and to not assist the client in, suppressing evidence (**Rule 10(3)(a)**). In *Law Society of Singapore v de Souza Christopher James* [2023] SGHC 318, the Court of Three Supreme Court Judges (**C3J**), overturning the decision of the Disciplinary Tribunal (**DT**) and dismissing the application of the Law Society of Singapore (**Law Society**) for a legal practitioner to be sanctioned under section 83(1) of the Legal Profession Act 1996 (**LPA**) for breaching Rule 10(3)(a), held that: (a) intention is a necessary ingredient of a charge brought under Rule 10(3)(a); and (b) there was no evidence that the legal practitioner here intended to assist his client to suppress evidence and that the charge was not made out.

Our Deputy Chairman Tan Chee Meng, SC and Associate Calvin Ong successfully defended the legal practitioner before the C3J.

Our Comments

The decision of the C3J is a welcomed one. It not only provides timely explanation on the interpretation of Rule 10(3)(a), but also offers guidance on the interaction between the various ethical obligations owed by a legal practitioner to both his client and to the court. In this regard, the Law Society had argued before the DT that the legal practitioner had breached his paramount duty to the court by failing to disclose his client's breach at a pre-trial conference (**PTC**). While this allegation was not the subject of the charge before the C3J, the court agreed with the legal practitioner's submission that he had no duty to disclose his client's breach at the PTC itself. The C3J emphasised that the legal practitioner owed a duty of confidentiality to his client, and was not at liberty to unilaterally disclose the fact of the breach in the absence of permission to do so.

The C3J's findings illustrate the importance of the duty of confidentiality owed by a legal practitioner to his client. This is in line with recent decisions, where this duty had been pitted against other ethical rules. For example, in *Tan Ng Kuang v Jai Swarup Pathak* [2022] 3 SLR 788, the Court of Appeal held that the duty of confidentiality owed by a legal practitioner to his client was a fundamental and critical obligation. The legal practitioner therefore could not tell the opposing party of his client's intention to breach an agreement, notwithstanding any duties the legal practitioner may have towards it. In the present case, the finding by the C3J that the legal practitioner could not have unilaterally disclosed matters without his client's instructions, even when the recipient was to have been the court itself, further emphasises the integral role that the duty of confidentiality plays *vis-à-vis* the genus of ethical obligations. The paramount duty owed by legal practitioners to the court is thus not the be-all-and-end-all, and its application must be tempered with other – equally – important obligations owed by a legal practitioner.

This update takes a look at the C3J's decision.

Background

Mr Christopher James de Souza (**Mr de Souza**) was, at the time the events took place, a legal practitioner practising with, and a partner of, M/s Lee & Lee (**L&L**).

In February 2018, two companies, Amber Compounding Pharmacy Pte Ltd and Amber Laboratories Pte Ltd (collectively, **Amber**), commenced a High Court suit against six defendants. Amber claimed that the defendants had misappropriated Amber's confidential information and/or trade secrets for the benefit of one of the defendants. Amber was represented by Dodwell & Co LLC (**Dodwell**) at that time.

In March 2018, Amber obtained search orders under which two of the defendants were to disclose to Amber all email correspondence in their email accounts, all data processing devices, and all documents relating to Amber's trade secrets and/or confidential and/or proprietary information (**Search Orders**). In turn, Amber expressly undertook not to "*use any information or documents obtained as a result of the carrying out of [the] Order except for the purposes of these proceedings or to inform anyone else of these proceedings until the trial or further order*" (**Search Order Undertaking**).

While reviewing the documents obtained through the Search Orders, Amber formed the view that certain documents (**Documents**) showed that two of the defendants had committed certain serious offences. In July 2018, a representative of Amber, Mr Samuel Sudesh Thaddaeus (**Mr Sudesh**), in breach of the Search Order Undertaking, used ten of the documents to make reports (collectively, **Reports**) to various government authorities (collectively, **Authorities**).

In November 2018, Amber instructed L&L to prepare and lodge reports with law enforcement and regulatory agencies, as it believed that its confidential information had been stolen by the defendants. In December 2018, L&L took over conduct of the High Court suit from Dodwell.

In late December 2018, the L&L team, including Mr de Souza, learned through their review of the documents that Amber had, in breach of the Search Order Undertaking, used some of the Documents to make the Reports. L&L and Mr Sudesh corresponded on the issue of Amber's breach of its Search Order Undertaking between 20 December 2018 and 23 January 2019.

On 29 January 2019, Amber filed an *ex parte* application for orders that documents it had obtained under the Search Orders be preserved and that it be entitled to use those documents to make reports to law enforcement agencies (**Application**). Mr Sudesh affirmed an affidavit dated 29 January 2019 (**Sudesh's Affidavit**) in support of the Application. Mr de Souza was involved in the preparation of Sudesh's Affidavit and also personally amended it.

The defendants learned that Amber had used and intended to use the Documents for the extraneous purpose of making criminal reports to the authorities when, on the court's orders, Amber served the Application and Sudesh's Affidavit on the defendants on 12 February 2019.

On 4 September 2019, L&L discharged itself as Amber's solicitors. Mr de Souza and the L&L team came to realise that Mr Sudesh had again lodged a further report using documents obtained from the Search Orders. When Mr Sudesh refused to accede to the advice of the L&L team for a fresh application to be made, Mr de Souza (together with Mr Tan Tee Jim, SC) discharged themselves from acting for Amber. As a consequence, L&L did not represent Amber before the Court of Appeal.

On 30 October 2019, the High Court sanctioned the retrospective and prospective disclosure of the documents pertaining to the defendants' possible commission of offences under the Employment of Foreign

Manpower Act (**EFMA Documents**) to the Authorities, but refused Amber leave to disclose documents purportedly connected to other offences. On appeal, the Court the Appeal dismissed Amber's appeal for leave to disclose those documents and reversed the High Court's decision to grant Amber retrospective and prospective leave to disclose the EFMA Documents to the Authorities, being satisfied on the evidence before it that the Application had been motivated by an improper purpose.

Following the Court of Appeal's decision, the Deputy Registrar of the Supreme Court referred information bearing on Mr de Souza's conduct to the Law Society under section 85(3)(a) of the LPA. The Inquiry Committee (**IC**) found that Mr de Souza's alleged omissions were not borne of an intent, and that he did not knowingly or attempt, to mislead the court. However, the IC found that he had failed to place his duty to the court above that to his clients and was therefore guilty of misconduct under section 83(2)(h) of the LPA. The IC suggested that Mr de Souza be fined $2,000 and did not consider it necessary for a DT to be convened.

Disagreeing with the IC's findings, the Council of the Law Society sought the appointment of the DT to formally investigate Mr de Souza's conduct. Before the DT, the Law Society preferred five charges, each with alternative charges, against Mr de Souza.

The DT found Mr de Souza guilty of only the fourth charge, i.e., that Mr de Souza was a party to and assisted Amber in suppressing evidence in breach of Rule 10(3)(a) because he had prepared and filed Sudesh's Affidavit without exhibiting the Reports or supporting documents made to certain agencies by Amber which, if exhibited in Sudesh's Affidavit, would have revealed that Amber had breached its Search Order Undertaking (**Fourth Charge**). Pertinently, the DT did not consider the subjective state of mind of the legal practitioner to be relevant. It instead took the view that "*once actual knowledge of material facts to be disclosed is proven, the question of whether there was breach of [the] duty to disclose should be considered objectively, and not based on the subjective view of the legal practitioner*". Having found that Mr de Souza was aware that Amber had breached the Search Order Undertaking and that Sudesh's Affidavit did not make full and frank disclosure of that breach, the DT concluded that Amber had suppressed evidence in Sudesh's Affidavit and that, by filing the affidavit, Mr de Souza was a party to, and had assisted in Amber's suppression of evidence. The DT further found that Mr de Souza's breach of Rule 10(3)(a) amounted to improper conduct and practice and constituted a breach of sufficient gravity for him to show cause before the C3J.

The Law Society then commenced Originating Application No 7 of 2022 (**OA 7**) under section 98 of the LPA for Mr de Souza to be sanctioned under section 83(1) of the LPA.

In determining whether the Fourth Charge was made out, the C3J addressed the following:

(a) Whether intention was a necessary ingredient of the Fourth Charge and if so, whether the DT erred in its analysis by treating the question of intent as irrelevant;

(b) If intention was a crucial element of the Fourth Charge, whether Mr de Souza's alleged omissions as identified and framed in the Fourth Charge were borne of an intent to assist his client suppress its breach of the Search Order Undertaking from the court; and

(c) Whether Sudesh's Affidavit had suppressed Amber's breach of its Search Order Undertaking from the court.

The C3J's Decision

The C3J dismissed OA 7 on 31 July 2023 and, on 7 November 2023, handed down the grounds of decision of the majority (**Majority Decision**) comprising Belinda Ang Saw Ean JCA and Woo Bih Li JAD (**Majority**) as well as the concurring decision (**Concurring Judgment**) of Kannan Ramesh JAD (**Concurring Judge**).

Majority Decision

Disagreeing with the DT, the Majority found that intention was a necessary ingredient of the Fourth Charge, reasoning as follows:

(a) The Fourth Charge was highly specific in accusing Mr de Souza of both being a party to, and assisting Amber in, Amber's suppression of its breach of the Search Order Undertaking from the court. A high degree of participation in Amber's suppression of evidence was alleged on Mr de Souza's part, as he was said to have done so in order to bolster Amber's chances in its Application. Such alleged conduct was inherently goal-oriented and intentional.

(b) The Law Society therefore had to not only prove that: (i) Amber had suppressed its breach of its Search Order Undertaking from the court because it did not exhibit the Reports or supporting documents to Sudesh's Affidavit; but also (ii) that Mr de Souza did so *intending* to assist Amber to suppress the breach from the court for the purposes of obtaining a favourable outcome for Amber.

The Majority found that the DT erred in its analysis of the Fourth Charge by treating the question of intent as irrelevant. It considered the DT's analysis of the Fourth Charge incomplete, and noted that the DT ought to have assessed whether the non-disclosure of the Reports as exhibits was *intentionally* facilitated by Mr de Souza. In the Majority's view, the DT fell into this error by conflating a legal practitioner's duty under Rule 10(3)(a) with his duty under another rule under the PCR, which the DT considered had in turn embodied the common law duty to make full and frank disclosure, especially in *ex parte* applications.

As for the documents disclosed, the Majority saw no evidence at all that would support a conviction on the Fourth Charge. On the contrary, the Majority found – as best evidenced by the drafting history of Sudesh's Affidavit – that Mr de Souza and the L&L team consistently intended to disclose Amber's breach of its Search Order Undertaking to the court and persisted to do so despite Amber's intransigence. In particular, the internal comments preceding the final draft of the affidavit captured the discussion of the L&L team on the semantics with which Mr Sudesh sought to play, with Mr de Souza agreeing that the client had to be fully forthright to the court. In light of the evidence, the Majority noted that the Law Society's case would have meant either that: (a) the entire L&L team was party to the ploy to conceal evidence; or (b) Mr de Souza had gone off on a frolic of his own. The evidence clearly did not support either scenario.

The Majority also found that, in any event, Sudesh's Affidavit did disclose Amber's breach of its Search Order Undertaking. It considered it important that the Search Order Undertaking prohibited the use of *both* information gathered from the Search Order documents and the dissemination of such documents, and that Mr Sudesh maintained that he had not forwarded the documents themselves to the Authorities, but merely disclosed information contained in the documents to the Authorities.

The Majority took the view that the more important question was whether the body of the Sudesh's Affidavit had already revealed Amber's breach of its Search Order Undertaking, and not merely whether the Reports and supporting documents were exhibited to it. This was in line with established case law on the manner in

which disclosure had to be made: not buried within the exhibits disclosed, but stated within the body of the affidavit. The Majority found that Sudesh's Affidavit sufficiently admitted that Amber had in fact made prior use of information from the Documents in breach of its Search Order Undertaking. No suppression of this fact could thus be found.

In the circumstances, the Majority held that the Fourth Charge had not been proved against Mr de Souza beyond reasonable doubt and dismissed OA 7. As to costs, the Majority ordered the Law Society to refund Mr de Souza the sum of $32,394.12 he had paid the Law Society following the conclusion of the DT proceedings and that each party was to bear its own costs of OA 7.

Concurring Judgment

The Concurring Judge agreed with the Majority that the Application should be dismissed and also with its decision on costs. In effect, the only area in which the Concurring Judge differed from the Majority was on the extent of disclosure required, and consequently whether sufficient disclosure had been made.

While the relevant paragraphs of Sudesh's Affidavit might have disclosed the fact of a prior breach of the Search Order Undertaking by Amber, the Concurring Judge was of the opinion that this did not sufficiently disclose to the court *how* Amber had breached it, i.e., that excerpts of the documents had been given to the Authorities and to what extent. To the Concurring Judge, the key point was that Amber was seeking *ex parte* retrospective and prospective leave. In the Concurring Judge's view, Sudesh's Affidavit did not make full and frank disclosure of Amber's breach.

Nevertheless, the Concurring Judge accepted, on the evidence presented, that Mr de Souza believed that Amber had effectively disclosed what was required *via* Sudesh's Affidavit. As such, he was satisfied that Mr de Souza did not intend to assist with, or be party to, the wrongful non-disclosure by Amber. The Concurring Judge also accepted that Mr de Souza did not intend to obscure the fact that the excerpts of some documents had been disclosed to the Authorities, and that he resisted an attempt by Mr Sudesh to create a wrong impression in this regard. L&L's own version of the relevant paragraph was far from sufficient evidence to show beyond reasonable doubt that Mr de Souza knew that the final version of Sudesh's Affidavit was misleading, and that he filed it in spite of this knowledge. Without this, it could not be said that Mr de Souza intended to assist, or be party to, Amber's suppression of evidence, which he was able to prevent.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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