The Law Society of Singapore v Devadas Naidu
[2001] SGHC 7

Case Number : OS 1104/2000

Decision Date : 10 January 2001

Tribunal/Court : High Court

Coram : Chao Hick Tin JA; Lai Kew Chai J; L P Thean JA

Counsel Name(s) : Lawrence Quahe and Carolyn Tong (Harry Elias Partnership) for the applicant.; Jimmy Yim SC and Suresh Divyanathan (Drew & Napier) for the respondent.

Parties : The Law Society of Singapore — Devadas Naidu

Legal Profession – Solicitor – Client relationship – Transactions with client -Prohibited borrowing transaction – Nature of solicitor and client relationship – Absence of independent legal advice – Legal Profession (Professional Conduct) Rules 1998 r 33(a) – s 83(2)(j) Legal Profession Act (Cap 161, 1997 Ed)

(delivering the grounds of judgment of the court): ***Introduction***

The abovenamed, Devadas Naidu (`the respondent`), is an advocate and solicitor of the Supreme Court, and was ordered to show cause before us why he should not be dealt with under s 83 of the Legal Profession Act (Cap 161, 1997 Ed) (`the Act`). These proceedings arose from a determination by the disciplinary committee (`the Committee`), appointed by the Chief Justice under s 90 of the Act, that in relation to a complaint dated 22 December 1998 made by one Mr Hau Tau Khang (`Mr Hau`) to the Law Society of Singapore (`the Law Society`), cause of sufficient gravity for disciplinary action existed under s 83 of the Act. The determination of the Committee was made on the basis of a charge (which we shall set out in a moment) framed by the Law Society, which the respondent admitted before the Committee. At the conclusion of these proceedings, we held that cause had been shown and ordered the respondent be suspended from practice for a period of two years. We now give our reasons.

The facts

The respondent is an advocate and solicitor of 13 years standing and was, at the material time, the sole proprietor of the firm of Naidu & Co. On or about 8 July 1998, Mr Hau met the respondent in the evening at the latter`s office and consulted him about instituting divorce proceedings against Mr Hau`s wife. Upon the respondent`s request, Mr Hau agreed to hand over all the original documents pertaining to his divorce matter to the respondent for his safekeeping. Mr Hau claimed that the respondent also asked him to prepare a list of his assets, but this request was disputed by the respondent. However, nothing turned on this point.

Thereafter, a second meeting took place about a week later, when Mr Hau saw the respondent at the latter`s office and handed the original documents to the respondent and one Mr Nalpon, one of the respondent`s colleagues. After perusing the documents and advising Mr Hau on his options, the respondent expressed the need for them to meet a few more times.

Following that Mr Hau arranged another appointment with the respondent and that was scheduled for the evening of 12 August 1998. They accordingly met at the appointed time and discussed Mr Hau`s divorce matter. Mr Hau alleged that during this meeting the respondent began to confide his personal financial and marital problems in Mr Hau. Without revealing the precise sum involved, the respondent informed Mr Hau that he had lost a lot of money in the stock market and also in the course of a legal

battle against his wife. The respondent did not dispute the fact that he told Mr Hau that he had to sell all his properties as a result of his financial and matrimonial problems.

Thereafter, Mr Hau did not meet with the respondent again until 23 September 1998, when the respondent called Mr Hau and asked Mr Hau to see him at his office after 6pm on the same day. They met as scheduled, and it was at this meeting that the respondent orally requested a loan in the sum of $28,000 from Mr Hau. The latter initially hesitated and informed the respondent that he was already relying on overdraft facilities for his own expenses. However, the respondent persisted in his request saying that he only needed the money for six weeks, and that he would compensate Mr Hau for the interest incurred by Mr Hau as a result of taking the loan from his overdraft facilities. Eventually, Mr Hau acceded to the request and agreed to make the loan. Mr Hau drew a cheque for $28,000, which was dated 24 September 1998 and made payable to `Naidu & Company`, and handed it to the respondent. Although this was a personal loan, the respondent orally requested that the cheque be made payable to his firm and not to him.

Mr Hau alleged that he trusted the respondent as an advocate and solicitor, and further, as the respondent was handling his divorce matter, he was afraid that the respondent would not do a good job, if he denied the respondent`s request for financial assistance. This was disputed by the respondent. However, it was not disputed that Mr Hau was not advised by the respondent to seek independent legal advice on the loan and the terms and conditions of the loan. The respondent also did not offer to provide Mr Hau with any security for the loan, nor did Mr Hau ask for it.

Following the loan transaction, the respondent began avoiding Mr Hau`s telephone calls and failed to appear at appointments fixed by Mr Hau to obtain advice regarding his divorce matter. The respondent did not repay the loan to Mr Hau within the time as agreed. After the expiry of the period of six weeks, on 7 November 1998, Mr Hau made an appointment to meet the respondent the following day. However, the respondent cancelled the meeting at the last minute. Subsequently, the respondent cancelled three scheduled meetings. On each of these occasions, it was the respondent`s secretary who informed Mr Hau of these cancellations half an hour or one hour before the appointed time.

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As a result, there was no progress in the conduct of Mr Hau`s divorce matter. Consequently, on 12 November 1998, Mr Hau engaged another firm of solicitors to take over the conduct of his divorce matter from the respondent and to commence an action against him, namely, MC Suit 31582/98, to recover the money loaned to the respondent. On 14 January 1999, judgment in default of appearance was entered against the respondent. Only on 3 February 2000, did the respondent make payment to Mr Hau of a sum of $33,003.61 in cash in full satisfaction of the judgment sum, interest and costs.

The proceedings of the Committee

In the meanwhile, on 22 December 1998, Mr Hau made a complaint to the Law Society against the respondent. The complaint was inquired into and eventually was heard before the Committee. The charge against the respondent as framed by the Law Society was as follows:

> *That Devadas Naidu is guilty of a contravention of r 33(a) of the Legal Profession (Professional Conduct) Rules 1998 within the meaning of s 83(2)(j) of the Legal Profession Act (Cap 161, 1997 Ed) in that he, on 24 September 1998, did enter into a prohibited borrowing transaction by borrowing a sum of*

S$28,000 from his client, one Hau Tau Khang.

The respondent admitted to the charge. However, he disputed certain allegations in the statement of facts prepared and presented by the Law Society. Accordingly, before the Committee, both counsel for the Law Society and the respondent urged the Committee to conduct a ***Newton*** hearing for the purposes of determining ***how*** the offence was committed. It was no longer a question of whether the offence was committed, as the respondent stood by his admission. What the respondent sought to show were the relevant circumstances surrounding the request of the loan by him and the grant of the loan by Mr Hau, which were highly relevant on the question of the appropriate penalty to be imposed.

The Committee`s findings of fact

Both the respondent and Mr Hau gave evidence before the Committee. In relation to the circumstances in which the prohibited transaction was entered into, the Committee made the following findings. First, Mr Hau was, at the material time, a businessman with 15 years of experience and had, by then, dealt with no less than three firms of lawyers in relation to corporate and commercial matters and was familiar with how files were transferred between law firms and the availability of the taxation procedure for disputing any costs charged by solicitors. Second, for a period between one and two months after he had first consulted the respondent, Mr Hau was aware of the respondent`s financial difficulties and marital problems. Third, the respondent did not exert `any overt pressure` on Mr Hau to make the loan. The Committee did not accept that Mr Hau had a genuine fear that either (i) the respondent might not do a good job if he did not agree to the respondent`s request for financial assistance by way of a loan; or, (ii) if Mr Hau changed solicitors, the respondent would not return all Mr Hau`s documents to him or would charge Mr Hau a high fee before doing so. More importantly, the Committee found as follows at [para] 4.3.2 of the report:

(e) ...

Mr Hau struck the Committee as an organised and careful businessman (keeping a diary, carrying his cheque book in his briefcase, ensuring that a photocopy of his cheque to Naidu & Company together with the respondent`s name card and mobile phone number was kept in his safe). It appeared to the Committee that Mr Hau already suspected that the respondent might not do a good job, loan or no loan, since he had contemplated changing solicitors. Mr Hau also knew that if the respondent charged him a high fee, he could have the respondent`s bill taxed.

(f) At the time of the prohibited loan transaction, Mr Hau and the respondent had known each other for some time, having originally met in 1995 and subsequently meeting socially by chance, as well as professionally. They confided their marital and other problems in each other. The Committee believes that Mr Hau is more likely to have lent the respondent the money because of what might be described as `social` pressure in the sense that he found it socially difficult or awkward to decline the request for financial assistance, rather than as a result of any fears which he might have had in relation to the conduct of his divorce matter or the fees payable to the respondent for the matter or its transfer.

In conclusion, the Committee was of the opinion that, notwithstanding its findings on the circumstances of the prohibited transaction, cause of sufficient gravity for disciplinary action against the respondent existed under s 83(2)(j) of the Legal Profession Act. Arising from this determination of the Committee, the Law Society applied for and obtained an order directing the respondent to show cause why he should not be dealt with by this court under s 83 of the Act.

Show cause

We now turn to the rules which the respondent had contravened. The Legal Profession (Professional Conduct) Rules 1998 (the `Professional Conduct Rules`) came into force on 1 June 1998. The subject transaction, being entered on 24 September 1998, was the first instance of a reported violation of r 33. That rule provides as follows:

> *Prohibited borrowing transaction*
>
> *33 Subject to rule 34, an advocate and solicitor shall not -*
>
> *(a) enter into a prohibited borrowing transaction;*
>
> *(b) instruct, procure, secure or arrange for an associated party to enter into a prohibited borrowing transaction; or*
>
> *(c) knowingly allow an associated party to enter into a prohibited borrowing transaction if it is within his power to prevent it.*

Rule 32 defines a `prohibited borrowing transaction` to mean `any transaction under or by virtue of which money or valuable security is borrowed (directly or indirectly and whether with or without security) by an advocate and solicitor from his client or by an associated party from that client unless the client is an excepted person`. Further, `associated party` is defined to include `(a) any member of the immediate family of the advocate and solicitor or of his partner or partners or of his employees; and (b) any corporation, partnership, syndicate, joint-venture or trust in which the advocate and solicitor or any member of his immediate family or any member of the immediate family of his partner or employee has or have any beneficial interest whether vested or contingent`.

The terms of Rule 33 are very similar to those of r 7 of the Australian Guide to Professional Conduct and Etiquette (`the Australian Guide`) issued by the Council of the Law Society of Australia. That rule has been in force in Australia for some time, having been first enacted on 17 February 1984. In this regard, counsel for the respondent cited the case of **Re Fabricius and MacLaren** (Unreported) The case involved two solicitors, Fabricius and MacLaren, who were then in practice in partnership. Prior to the commencement of their partnership, Fabricius had handled a matter for a Mr Cole while he was articled as a law clerk with his employer. Although the evidence did not clearly establish who initiated the loan transaction, it was undisputed that Cole lent A$20,000 to Fabricius` partnership at ten per cent interest. The court was satisfied on the evidence that when Cole approached the solicitors with the sum of A$20,000 for investment purposes, he did so as a client of Fabricius within the meaning of r 7 of the Australian Guide. The court found that the solicitors should not have entered into the prohibited borrowing transaction with Cole without suggesting to the client to seek

independent legal advice. They found this to be a serious departure from proper professional standards. However, the court found that the legal practitioners did not act disgracefully or dishonourably and that the errors arose from their inexperience and general lack of understanding of a solicitor`s duties to his client. On the subject of penalty, the court took into account the attempts by the practitioners to make amends and the fact that neither practitioner was in private practice. Fabricius was a salaried public servant while McLaren was a full-time student. Both were suspended from practise for a period of two years.

Before us, counsel for the respondent submitted that the present case involved a loan transaction, where the respondent, having developed a social and friendly relationship with his client, sought the client`s help in his moment of financial desperation. On the basis of the findings of the Committee, Mr Hau had made the loan `either out of sympathy or out of a degree of social awkwardness`. Furthermore, counsel submitted that there had been no suggestion of trickery, misrepresentation or dishonesty on his client`s part, and the Committee found that no overt or undue pressure had been exerted on Mr Hau. The respondent had not sought any moneys from Mr Hau to be paid to account of fee in advance.

Counsel further submitted that the present case was to be distinguished from **Re Shan Rajagopal** [1994] 3 SLR 524 . In that case, the solicitor concerned took the moneys given to him by a client in support of the client`s application for permanent residence status, and failed to re-pay or account for it and falsely claimed that the client had offered the money to him as a loan. The court found that the heart of the matter lay in the conduct of the solicitor at the time of the transaction. He took the money that had been deposited in his firm`s client account for his personal use. These funds had been specially repatriated from India for a particular purpose, namely, to make formal application for permanent residence status in Singapore, and were deposited in the firms` client account for that particular purpose. Yet the solicitor, on the day following their deposit, withdrew these funds for his personal use and failed to repay it to his client on request. The court said at p 529:

> *The gravamen of the second charge was that the respondent stood in a fiduciary relationship with the complainant, that he used the complainant`s money for his own purposes and that in doing so he acted in a grossly improper manner in the discharge of his professional duty which amounted to improper conduct as an advocate and solicitor and came squarely within the provisions of s 83(2)(b) of the Legal Profession Act.*

Later the court said at p 530:

> *... In this case the money borrowed was money which the complainant had paid to the respondent for a particular purpose; money to be refunded to the complainant`s Central Provident Fund account to show the bona fides of the complainant`s application for the reinstatement of his permanent residence status which he had lost when he withdrew his Central Provident Fund moneys and returned to India. The $35,000 held by the respondent in his client account was held in trust for the complainant for that particular purpose. This was not a borrowing from the complainant as in a normal case of borrowing but a borrowing from the complainant of funds which he had specially repatriated from India for a particular purpose and which were deposited with the respondent for that particular purpose.*
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> *... The facts as found by the disciplinary committee, particularly the finding that - `on the day scheduled for the commencement of these disciplinary proceedings, the respondent proposed to make payment of the remaining*

outstanding sum to Muthu (the complainant) on the basis that Muthu would `withdraw both his complaint to the Law Society and to the police`` in our judgment, exacerbates rather than mitigates the respondent`s misconduct.

Having regard to such impropriety of conduct on the part of the solicitor the court ordered him to be struck off.

Counsel for the respondent submitted that such a situation was far removed from the present facts as found by the Disciplinary Committee. In particular, it had found that the respondent did not exert any undue pressure on Mr Hau and the loan had been extended out of `social pressure`. This court accepted the findings of the Committee and also accepted that this case was far removed from Rajagopal. That having said, the fact remains that, quite apart from r 33, the respondent stood in a fiduciary relationship with his client, Mr Hau, and in any transaction made with his client the law requires him to act with utmost good faith. In entering into the particular transaction, the respondent had provided no opportunity to his client to take independent legal advice and he had thus breached his fiduciary duty to his client. Rule 33 expressly forbids such a transaction and under r 34 such a transaction is only allowed if the client receives independent legal advice before the transaction is entered. The underlying principle of this rule is the special position of influence and proximity an advocate and solicitor has over his client. In **Law Society of New South Wales v Moulton** [1981] 2 NSWLR 736, Hope JA said:

[A] solicitor stands in a fiduciary relationship to his clients. If he is to have business dealings with them on his own account, and in particular if he is to borrow money from them, the requirements of the law are rigorous. The need for that rigour is obvious. Commonly to a great extent, always to some extent, the solicitor is in a position of special influence in respect of his client. Clients must be able to rely upon the professional advice of their solicitor and to place in him the fullest confidence that he will protect them and handle their affairs in their interests. Where a solicitor wishes to borrow from a client, the client must be put in a position to make a free and informed decision about the proposed transaction. Since in these circumstances the interests of the client and of the solicitor can and generally must conflict, the best and easiest way to achieve this result is to insist that the client have independent and informed advice. If this does not happen, a heavy burden indeed lies upon the solicitor to show that he has done everything in his power to protect the interests of his client and to ensure that the client is aware of every circumstance that is or might be relevant to his decision ...

... in a dealing with a client, and in considering the gravity of that misconduct, the fact that the client, in the ultimate event, suffers no loss is of little, if any, relevance. If the acts or omissions of a solicitor constitute professional misconduct, they do so at the time when they occur. Their character is not changed by the fact that subsequently a loss, or no loss, is sustained. The presence or absence of loss may throw light on the propriety of action taken to ensure the adequacy of a security for a loan, but that propriety is to be found primarily in the steps taken at the time the loan is made, and not by what happens some years later ... they are expressive of a standard of behaviour which members of the public should be entitled to expect without recourse to legal precedent of those whose probity as well as skill has been certified by the court. It is no answer to a charge of professional misconduct in relation to transactions with his clients` money that the solicitor did not appreciate that what he was doing constituted misconduct.

The need for a rigorous regime of law to guard the solicitor`s fiduciary relationship to his client is obvious. If a solicitor wishes to use his client`s money, it is crucial that the client be adequately protected with independent advice. No such protection was offered to the Mr Hau in the present case.

It should be noted also that after the respondent had taken the loan, his conduct as a solicitor for Mr Hau left much to be desired. He repeatedly avoided seeing Mr Hau, and for over six weeks no progress was made on the matter concerning Mr Hau`s divorce, in respect of which he was engaged as the solicitor. Eventually Mr Hau had to engage a new firm of solicitors to take over the matter.

Conclusion

In view of the foregoing and in light of the Committee`s findings, we had to take a somewhat serious view of the breach of the Rules committed by the respondent and ordered that the respondent be suspended from practice for a period of two years.

Outcome:

Order accordingly.