IN THE COURT OF THREE JUDGES OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 84

Originating Summons No 5 of 2021

Between

Andrew Loh Der Ming

… *Applicant*

And

Koh Tien Hua

… *Respondent*

JUDGMENT

[Legal Profession — Disciplinary proceedings]
[Legal Profession — Show cause action — Fraudulent or grossly improper conduct — Appropriate sanction]
[Legal Profession — Solicitor-client relationship — Duty of honesty]

Loh Der Ming Andrew
v
Koh Tien Hua

[2022] SGHC 84

Court of Three Judges — Originating Summons No 5 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
21 January 2022

14 April 2022 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This case demonstrates how fundamentally important it is for the legal practitioner to communicate openly and honestly with her client. Although it is the legal practitioner's training, expertise in the law and legal judgment that are typically engaged, the role she fulfils is a representative one. The legal practitioner *acts for* her clients, and no two clients will be the same. When engaged in litigation, some clients will require much by way of assurance, guidance and counsel, while others may expect little more than to be kept apprised of key milestones. Some will have strong views as to how their matter should be strategised and conducted, while others may be comfortable leaving all this in the hands of the legal practitioner. The mark of the adept professional is her ability not only to identify and provide what each client needs, but to do so in a manner tailored to that client's needs and suited to address his concerns,

all while ensuring her own independence as counsel is preserved and her paramount obligation to the court is fulfilled. This is no easy feat. Challenging cases, difficult clients, as well as time and other pressures often hinder the legal professional's ability to strike a good balance. However, as we will explain shortly, none of these constraints excuse – much less justify – the respondent's conduct in *this* case, which veered from an initial mismanagement of his client into conduct that was wanting in integrity.

2 This is an application made under s 98(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) (the "Act") for the respondent, Mr Koh Tien Hua ("Koh"), an advocate and solicitor of the Supreme Court of Singapore, to show cause as to why he should not be made to suffer sanctions under s 83(1) of the Act. In this regard, he faces four charges – three under s 83(2)(*h*), and one, which implies an allegation of dishonesty, under s 83(2)(*b*). The applicant, Mr Andrew Loh Der Ming ("Loh"), is the complainant, and he brings this action in respect of Koh's misconduct whilst representing him in divorce proceedings during a brief period from July to August 2015.

3 Before turning to the four charges before us, we will set out, in some detail, the underlying facts. As will become apparent in the course of our judgment, proper characterisation is necessary to appreciate the severity of Koh's misconduct. It is therefore important that we place the charges in their full context.

Facts

4 Koh is a Partner with Harry Elias Partnership LLP (the "Firm") and Co-Head of its Family and Divorce Practice Group. At the material time, Koh was an advocate and solicitor of 21 years' standing, and by any measure, a seasoned family law practitioner.

Pre-hearing correspondence from 7 to 26 July 2015

5 On 7 July 2015, Loh retained Koh to act for him in divorce proceedings involving Loh's then-wife and her co-defendant, a neighbour with whom, Loh alleged, his wife had been in an adulterous relationship. By the time Koh was retained on 7 July, Loh's wife had withdrawn her defence to adultery, and it was only the co-defendant who was contesting the allegation. In this connection, the co-defendant filed two applications against Loh, seeking: (a) a gag order prohibiting the disclosure of the identities of witnesses or parties to the divorce proceedings ("SUM 2128"); and (b) an order to strike out Loh's claim against him entirely, or alternatively, to strike out portions of Loh's Statement of Particulars ("SOP") ("SUM 2009"). These applications were scheduled to be heard on 27 July 2015.

6 When Koh was retained by Loh, some 20 days prior to the scheduled hearing, he also received his first set of instructions as to how Loh wished his case to be run. Loh specifically noted that it was important to him to establish that the co-defendant was the initiator of the adulterous affair. The notes of this meeting reflect that Loh's desire to establish this stemmed from his view that this would help him get a sense of personal closure, and also help him explain to his children that the co-defendant had enticed their mother, so that the proceedings would not cast her in a bad light. Koh seemed to have recognised the importance of this point to Loh. Towards the end of the meeting, he is noted as observing that although the SOP drafted by Loh needed to be "reworked", they needed to "prevent [Loh's then-wife and the co-defendant] from getting a moral victory".

7 From this point until the hearing on 27 July 2015, the flow of communications between Loh and Koh was entirely one-sided. On 8 July, Loh

sent an e-mail to Koh setting out the arguments in support of his case that it was the co-defendant who had enticed Loh's wife. Koh did not respond to this e-mail. On 14 July, Loh then sent a detailed e-mail to Koh, setting out his "first cut" responses to SUM 2009. From this e-mail, it would have been clear to Koh which particulars Loh wished to defend, and which he did not object to being struck out or amended. However, it may be noted that Loh prefaced this e-mail as follows:

> Dear Mr Koh,
>
> To assist you, I have prepared a first cut of what can possibly be amended below as a concession (highlighted in blue), in response to the requests made by opposing counsel. I would defer to your counsel on the final list.
>
> Thank you, Andrew

Koh, again, did not respond.

8 On 15 July, Loh received an e-mail from Koh's paralegal, attaching a notice from the Family Justice Courts ("FJC"). The court directed, by this notice, that the skeletal submissions for SUM 2009 and SUM 2128 were to be filed by 24 July. On the next day, 16 July, Loh e-mailed Koh, asking what he intended to put forth in the written skeletal submissions that the court had directed be filed. Loh wrote that there was "[n]o rush", and asked Koh to extend him a copy of the submissions whenever they were ready. Koh did not respond.

9 On 24 July, Loh wrote to Koh again. In this e-mail, Loh referred to his meeting with Koh on 7 July, where the latter had suggested that he might be in touch with opposing counsel on the amendment of pleadings before the upcoming case conference. Querying whether Koh had acted on this suggestion since 7 July, Loh asked, "[a]re there any developments? What is our strategy?" There was, again, no response.

10 On 26 July, *a day before the hearing*, Loh sent yet another e-mail which, again, drew no reply Koh. In this, he wrote:

> Dear Mr Koh,
>
> While I have followed your advice to focus 100% on my children, and to leave the matter in your hands, I cannot help feeling anxious over the Court Hearing on Monday.
>
> The co-defendant and his entourage of lawyers, has pulled out all the dirty tricks, and I am fearful there may be more.
>
> *I want my pleadings to remain in the SOP, as much as possible*, so that my children can know the truth of the matter, and not to allow the co-defendant to twist the truth to suit his own purposes. As I have reiterated, it is harmful to my children, if they grow up to learn their mother was entirely complicit, rather than her being a victim of our neighbour, as shown in my full pleadings.
>
> *Please call me anytime during the Court Hearing, if any issues come out, which require more instructions from me.*
>
> Thank you, Andrew
>
> [emphasis added]

11 It is apposite to highlight at this point that Koh subsequently conceded – under cross-examination during proceedings before the disciplinary tribunal – that he did not speak to Loh at all between 7 and 27 July 2015. Hence, there were no meetings, calls or conversations which need to be interposed into the sequence of foregoing e-mails, and inferences may be drawn from them with this in mind.

Hearing on 27 July 2015

12 On the morning of 27 July 2015, Koh attended the hearing of SUM 2009 and SUM 2128 before Assistant Registrar Eugene Tay ("AR Tay") at the FJC. At the hearing, Koh made certain representations to AR Tay regarding his instructions from Loh. The first was that he had spoken to counsel for the co-defendant, Mr Nicholas Narayanan ("Mr Narayanan"), and that they were trying

to reach a settlement "in terms of pleadings". However, as he had been "unable to get [Loh's] confirmation", they would be proceeding with the hearing of the striking-out application. The second was made in response to AR Tay's follow-up question further into the proceedings as to whether Loh was then contesting "everything that [the co-defendant's counsel had applied] to strike out". To this, Koh said, "Yes. No instructions to agree".

13 Neither representation was true. First, as the one-way nature of Loh and Koh's correspondence in the 20 days preceding the hearing shows, there was no question of Koh having been "unable" to secure confirmation. He had just not made any effort to seek any instructions from Loh. Second, Loh had made it clear to Koh that he did not object to the striking out of certain paragraphs. Therefore, it was not the case that Koh did not have *any* instructions to agree. For example, in one paragraph of the SOP, Loh had averred, amongst other things, that the co-defendant was "not only a liar and an adulterer" but also of a "vindictive nature". In Loh's e-mail to Koh on 14 July 2015, his remark in respect of this paragraph was "[w]e can strike this one out as a concession". As regards another paragraph, in which Loh had made averments which were wholly irrelevant, he indicated in his 14 July e-mail that "[w]e can strike out [the] portions they want".

14 In any event, notwithstanding what Koh said to AR Tay, as the hearing progressed, Koh agreed to numerous paragraphs of Loh's SOP being struck out by consent. In total, Koh agreed to 19 paragraphs (or parts thereof) being struck out by consent. Fourteen of these were paragraphs which Loh expressly *did not* consent to being struck out. Indeed, Loh's instructions as regards some of these paragraphs could not, in our view, have been any clearer. To illustrate, in relation to a paragraph in which he averred that the co-defendant had received

and kept certain compromising photos of his ex-wife, Loh's instruction was, "[n]o to striking out. This is proof of [a] sexual affair".

15 After the hearing, Koh called Loh to inform him that AR Tay had ruled against him in respect of both SUM 2009 and SUM 2128. Although Koh and Loh agree that this conversation took place, their respective accounts as to the precise content of that conversation differ on one salient point. Koh claims that he informed Loh he had *conceded* – as opposed to "consented" – to the striking out of various parts of the SOP. Loh, on the other hand, contends that he asked Koh to inform him which particulars had been struck out, but Koh was unable to recall because of the number of paragraphs they had dealt with. On Loh's account, Koh never mentioned conceding to the striking out of any of the particulars in question.

Post-hearing correspondence on and after 28 July 2015

16 On the following day, 28 July 2015, Loh was informed in writing by Koh's paralegal of the particulars that had been struck out by AR Tay. Conspicuously, the e-mail to Loh did not mention that the assistant registrar's orders relating to certain paragraphs (or sub-paragraphs) had been made by consent. Instead, particulars which had been struck out by consent were captured under the heading, "To be strike [*sic*] out unless otherwise stated as per submitted by the Co-Defendant". We are mindful that on 31 July 2015, Koh's paralegal sent another e-mail to Loh enclosing: (a) the draft orders of court from the co-defendant's counsel; and (b) Koh's letter responding with the endorsed orders. The first order made in respect of SUM 2009 was as follows: "That by consent, the paragraphs set out at Annex A herein, as submitted in the Co-Defendant's Submissions filed on 24 July 2015, be struck out". Annex A is correspondingly titled, "Struck out by consent". However, we note that the fact

and impact of the consent orders were not specifically called to Loh's attention. Indeed, as we will set out momentarily, the subsequent exchanges between Loh and Koh suggest that the former did not appreciate that the orders had been made by consent.

17 After the first update on 28 July 2015 and prior to 11 August 2015, Loh stated in *21* e-mails that he was unhappy with the result of the hearing and wished to appeal AR Tay's orders in respect of both SUM 2009 and SUM 2128. In seven of these 21 e-mails, Loh asked specifically that he be sent a copy of the court's notes of argument. To illustrate their tone, one of Loh's e-mails, sent on 4 August, reads as follows:

> Dear Mr Koh,
>
> *I want to be very clear on my instructions to appeal against the orders of the court (including striking out).*
>
> This is an RA appeal, which costs around $135 to file, with no security costs. I understand it is not an RAS or DCA.
>
> The deadline is coming up. I do not want to miss the deadline to file my appeals and also ask for the notes of argument (Court Notes).
>
> Please carry out my instructions.
>
> Thank you, Andrew
>
> [emphasis added]

Koh did not respond to this e-mail. In fact, as was the case with the pre-hearing correspondence, Koh also did not respond to most of Loh's e-mails sent on or after 28 July.

18 We highlight in particular an exchange of e-mails that took place between 6 and 11 August 2015. By 6 August, Loh had already instructed Koh, on several occasions, to file appeals against the orders made by AR Tay in both SUM 2009 and SUM 2128. On that day, Koh filed an appeal in respect of

SUM 2128. However, no appeal was filed for SUM 2009. When Loh asked why the latter appeal had not been filed, Koh responded on 7 August, stating that it "[might] prove to be a superfluous exercise given that [they were] amending the SOP". Koh added, "[i]n any event I am not confident that you will succeed in the [a]ppeal given that submissions and opinions and evidence are not allowed to stand as pleadings". Loh acknowledged Koh's explanation but reiterated later that same day that his instructions were, nevertheless, to file an appeal. There was no response from Koh, and it was only after Loh involved the Firm's managing partner on 11 August 2015 that Koh prepared the appeal papers for SUM 2009, and sent them to Loh for his review and approval.

19 The appeal against the orders made in SUM 2009 was eventually filed within time, on 11 August 2015. Even so, despite the appeal having been filed, there is nothing in writing showing that Koh informed Loh that some of the striking-out orders had been entered into by consent, much less that Koh had advised Loh that, because of this, it would likely be impossible to succeed on appeal. Furthermore, Koh did not provide Loh with a copy of the notes of argument that he had been seeking since 28 July 2015. Loh ultimately obtained these notes on 2 September 2015 by applying directly to the FJC, after he had discharged Koh and started representing himself on 12 August 2015.

20 On the day after Loh obtained the notes of argument, 3 September 2015, Loh e-mailed Koh asking six questions which concerned Koh's handling of his matter. We set out only two of these six questions, which are salient for present purposes. First, Loh asked why Koh had failed to act promptly on his repeated instructions to file an appeal against the orders made by AR Tay in SUM 2009. Second, and more pertinently for present purposes, Loh asked why Koh had failed to disclose that certain particulars had been struck out by consent, and further, when his consent for such a course had been secured.

21 Koh did not respond to this e-mail, and also seemingly ignored chasers sent by Loh on 13 and 29 January 2016. Finally, on 5 February 2016, after Loh again involved the Firm's managing partner, Koh responded. He claimed not to have seen Loh's e-mails, which allegedly "went into [his] junk mail folder". In response to Loh's first question, Koh wrote that he was "under the impression that [Loh] wanted to move the divorce proceedings along so that [he] could proceed with the ancillary matters". We digress to note that this could not in any meaningful way be seen as a response to the question that Loh had asked, which was specifically why Koh had not acted promptly on his express instructions to file the appeal. Even if Koh generally believed that Loh wished for his divorce to proceed expeditiously, that does not answer why, in the face of repeated and clear instructions to file an appeal in SUM 2009, Koh did not act on the specific instructions that Loh had conveyed.

22 As to the second question, Koh replied, "I had told you that there were certain para[graph]s that would be struck out and I *exercised my discretion as counsel to* ***consent*** *to the obvious ones in order to try and mitigate the issue of costs*" [emphasis added in italics and bold italics]. Loh's question and Koh's response are significant. The very fact that Loh asked this question on 3 September 2015, and repeatedly prompted Koh to respond, is telling. It undermines the latter's claim (see [15] above) that he informed Loh about this fact immediately after the hearing. Indeed, the tenor of Koh's own response suggests that this was the first time he was addressing this with Loh. Furthermore, it confirms that Koh had acted of his own volition, and not on the basis of Loh's instructions, in agreeing to at least some of the particulars being struck out.

23 The exchanges continued. From 12 to 24 February 2016, Loh confronted Koh with several inconsistencies in his responses, and suggested that Koh had

not responded to Loh's post-hearing e-mails and queries to "conceal the truth of what really happened on 27 July 2015". Specifically, Loh alleged that Koh had been negligent in the conduct of his matter, and had deliberately delayed filing his appeal because doing so "would have opened [his conduct during the hearing] up to scrutiny". The last reply sent by Koh did not address these suggestions or allegations. Instead, Koh simply remarked that he regretted that their relationship had deteriorated to such an extent. Again, Koh said nothing that would suggest that he had, immediately after the hearing, informed Loh what had transpired and, as he would later claim in the proceedings before the disciplinary tribunal, that he had nothing to hide because he was acting within the scope of Loh's instructions.

24 We should also mention another noteworthy event that took place in the background. On 23 September 2015, Loh proceeded with his appeal against the orders made by AR Tay in SUM 2009. The district judge who heard the appeal reinstated around seven pages of particulars which had been struck out by AR Tay, though none of these included the 19 paragraphs (or parts thereof) which had been struck out by consent. It also appears from the record that the district judge highlighted to Loh that even though many of the striking-out orders had been made by consent, he would nevertheless consider the substantive merits of Loh's appeal in respect of those orders, rather than decline to consider them on the basis that they had been consented to.

25 Against that backdrop, we outline the procedural history of the matter.

Procedural history

26 The route to the Court of Three Judges ("C3J") in this instance has been a protracted one. In May 2016, Loh lodged various complaints against Koh with the Law Society of Singapore (the "Law Society"). Since then, his complaints

have been examined and re-examined by an inquiry committee, a disciplinary tribunal, and several judges sitting in the High Court as well as the Court of Appeal, each arriving at a somewhat different conclusion as regards the extent, character and severity of Koh's misconduct.

The inquiry committee

27 Loh's original set of complaints against Koh, made under s 85(1) of the Act, fell within seven heads: (a) perjury, knowingly misleading the court, and breach of duty in court; (b) dishonesty and lying; (c) acting against instructions and deception concerning consent orders; (d) acting against the client's interest; (e) acting in conflict of interest; (f) wasting the court's time; and (g) lack of fairness and courtesy to the judge and to the client. For present purposes, the third head is the most salient. Loh's complaint, with more particularity, was that Koh had acted against his instructions *and* deliberately concealed from him, after the hearing on 27 July 2015, the fact that 14 consent orders had been consented to contrary to his instructions.

28 An inquiry committee (the "IC") was formed on 1 August 2016 under s 85(10) of the Act to examine Loh's complaints. In February 2017, the IC concluded that *only* the aforementioned third head of complaint was made out, and even then, only in part. The IC found that Koh did act against Loh's express instructions, but it was not satisfied that there was sufficient evidence to suggest that Koh *intended* to conceal the fact of the consent orders from Loh. The IC was mindful of the fact that no "consent orders" were mentioned in the e-mail to Loh on 28 July 2015. However, it accorded weight to the fact that, on 31 July 2015, Koh's paralegal had sent Loh an e-mail enclosing the endorsed order of court, from which Loh could glean that there were particulars which had been struck out by consent (see [16] above). The IC accepted that these e-mails gave

rise to "some confusing signals", but on the whole, in light of the latter e-mail and its enclosures, it took the view that Koh did not possess the intention to conceal the consent orders from Loh.

29 Given its conclusion that Koh only acted against Loh's instructions, the IC concluded that no formal investigation by a disciplinary tribunal was necessary. Instead, it recommended that Koh be made to pay a fine of $2,500. The Council of the Law Society (the "Council") accepted this recommendation and conveyed this to Loh on 14 March 2017.

Application under s 96(4)(b) of the Act

30 Dissatisfied with this outcome, Loh applied under s 96(4)(*b*) of the Act for an order directing the Law Society to apply to the Chief Justice to appoint a disciplinary tribunal. Woo Bih Li J (as he then was) heard Loh's application and concluded that there were ten charges, falling within two broad heads of complaint, which merited further investigation. These were (*Loh Der Ming Andrew v Law Society of Singapore* [2018] 3 SLR 837 ("*Andrew Loh (HC) (No 1)*") at [170]):

> (a) First, that Koh had knowingly misled the court and/or failed to discharge his duty to be honest and truthful to the court by making three untrue statements to AR Tay at the hearing on 27 July 2015.
>
> (b) Second, that Koh had acted against Loh's instructions by entering into the consent orders, and that Koh had subsequently sought to deliberately suppress from Loh the fact that the consent orders had been made, as well as the effect of such consent on the viability of Loh's appeal in SUM 2009.

31 Crucially, in respect of the question of whether Koh had deliberately concealed the fact of the consent orders from Loh, the learned judge observed that the IC failed to accord sufficient weight to Koh's failure to mention the implications of the consent orders on Loh's intended appeal, as well as Koh's delay in, and attempts to dissuade Loh from, filing an appeal in SUM 2009. In his view, these considerations were sufficient to give rise to a *prima facie* case of an ethical breach of sufficient gravity to warrant further investigation (see *Andrew Loh (HC) (No 1)* at [104]–[113]). As such, for these – amongst other reasons – Woo J granted the order sought, and a disciplinary tribunal comprising Dr Stanley Lai SC and Ms Tan Gee Tuan was constituted on 25 October 2017 (the "DT").

Disciplinary tribunal proceedings

32 The proceedings before the DT lasted two days, taking place on 12 March and 14 May 2018, and three witnesses were called: Loh, Koh, and counsel for the co-defendant at the hearing on 27 July 2015, Mr Narayanan. Written closing and reply submissions were filed between June and July 2018, and a year later, on 24 July 2019, the DT released its report (see *The Law Society of Singapore v Koh Tien Hua* [2019] SGDT 9 (the "DT's Report")).

33 In sum, the DT found that only two charges under s 83(2)(*h*) of the Act had been established against Koh, both of which pertained to misrepresentations Koh had made to AR Tay at the hearing on 27 July 2015 (these representations are set out at [12] above). Viewing matters in totality, the DT concluded that the misconduct underlying these two complaints did not disclose cause of sufficient gravity to warrant advancing the matter to the C3J. It therefore recommended that Koh be fined $10,000, or such sum as the Council shall determine under s 94(3)(*a*) of the Act, as sufficient and appropriate to sanction his misconduct.

In arriving at this conclusion, the DT bore in mind our observation in *Law Society of Singapore v Jasmine Gowrimani d/o Daniel* [2010] 3 SLR 390 ("*Jasmine Gowrimani*") at [24] that "only the *most serious cases*" [emphasis in original] should be referred to the C3J, and placed substantial weight on the fact that Koh did not act dishonestly, which the DT found was the case. The DT was nevertheless mindful that the lack of dishonesty did not in itself mean that there was no cause of sufficient gravity, and emphasised that its decision was reached in the round (see the DT's Report at paras 131–134).

34 As regards the complaint that Koh acted against Loh's instructions, which the IC earlier found to have been made out, the DT focused on two e-mails which we have referenced at [7] and [10] above. The first, sent on 14 July 2015, contained Loh's instructions on the specific particulars forming the subject of SUM 2009 but also the line, "I would defer to your counsel on the final list". The second, sent on 26 July 2015, contained the line, "[w]hile I have followed your advice to focus 100% on my children, *and to leave the matter in your hands* …" [emphasis added]. Relying quite substantially on these e-mails, the DT concluded that Loh had afforded Koh "some latitude" as to how he would handle the case and that Koh did not exceed this (see the DT's Report at paras 84–88).

35 In light of its finding that Koh did not act contrary to Loh's instructions, there was no need to even consider whether Koh had acted intentionally to conceal the consent orders from the latter. However, the DT nevertheless went on to address the two points which had persuaded Woo J in *Andrew Loh (No 1)* that the matter warranted closer investigation (see [31] above), and accorded less weight to them than the learned judge had. First, the DT accepted Koh's explanation that he had not realised that he was entering into consent orders in respect of the 19 paragraphs, and that he only intended to "concede" to them

being struck out. The DT also accepted Koh's contention that he did not appreciate the distinction between "consenting" to an order and "conceding" a point. It bears emphasising that the DT accepted this explanation notwithstanding its own observation that it was "inexplicable" that a lawyer of Koh's standing did not perceive the distinction. Second, the DT found that Koh's reluctance in filing the appeal for SUM 2009 was explicable on the ground that it was his view that the appeal would likely fail, and therefore that it was not in Loh's best interests to pursue it. For these reasons, the DT was not satisfied that the evidence bore out these complaints beyond reasonable doubt (see the DT's Report at paras 92–95).

Application and appeal under s 97(1) of the Act

36 Unsurprisingly, Loh was not satisfied. So, on 8 August 2019, he applied under s 97(1) of the Act for a High Court judge to review the DT's determination. This was heard by Valerie Thean J on 6 November 2019, and her decision was delivered on 25 November 2019 (see *Andrew Loh Der Ming v Koh Tien Hua* HC/OS 1015/2019 (25 November 2019) ("*Andrew Loh (HC) (No 2)*")).

37 In sum, the learned judge agreed that the two charges found by the DT to have been established (see [33] above) were in fact made out. Additionally, however, she found that a further two charges under s 83(2)(*h*) of the Act had also been established. The first additional charge was for acting outside Loh's instructions. We have set out the crucial portions of the DT's reasoning on this point at [34] above. Thean J examined the same two e-mails from Loh, sent on 14 and 26 July 2015, and found that the inference which the DT drew therefrom – that Loh had given Koh some latitude in the conduct of his matter – was not reasonable (see *Andrew Loh (HC) (No 2)* at [14]–[16]).

38 As regards the second additional charge, this concerned whether Koh had intentionally concealed the fact of the consent orders from Loh. The learned judge found that the DT's reasoning (set out at [35] above) failed to address the concerns which Woo J had expressed in *Andrew Loh (HC) (No 1)* at [104]. In particular, she observed that, given the DT's own observation that Koh's failure to appreciate the distinction between "consent" and "concession" was inexplicable, the "logical inference" was that there was intentional concealment (see *Andrew Loh (HC) (No 2)* at [20]–[23]). She concluded, however, that this only amounted to conduct unbefitting an advocate and solicitor, falling within s 83(2)(*h*) of the Act, within the meaning ascribed to this in *Law Society of Singapore v Ng Chee Sing* [2000] 1 SLR(R) 466 ("*Ng Chee Sing*") at [40]–[42]. It was not, in her view, "grossly improper conduct" under s 83(2)(*b*), the meaning of which we restated in *Law Society of Singapore v Ezekiel Peter Latimer* [2019] 4 SLR 1427 ("*Ezekiel Peter Latimer*") at [37] (see *Andrew Loh (HC) (No 2)* at [24]–[27]).

39 In *Ng Chee Sing* at [40], it was observed that s 83(2)(*h*) captures misconduct which does not fall within any of the other grounds specifically enumerated in s 83(2), but is nevertheless unacceptable. A practical test for ascertaining this, the court suggested at [41], is to ask whether a reasonable person, upon hearing about what the solicitor had done, would have said without hesitation that he should not have done it. As to s 83(2)(*b*), in *Ezekiel Peter Latimer* at [37], we affirmed that "grossly improper conduct" is "conduct [which] is dishonourable to the solicitor concerned as a man and dishonourable in his profession". Broad as this may seem to be, its contours are generally well understood. At one end, simple negligence or want of skill is typically unlikely to constitute "grossly improper conduct", though this will depend on the character and gravity of the negligent act, viewed in context and considered in all the circumstances of the case (*Re Lim Kiap Khee; Law Society of Singapore*

v Lim Kiap Khee [2001] 2 SLR(R) 398 at [19]). At the other end, fraudulence, which constitutes a separate limb of s 83(2)(*b*), is not required to establish "grossly improper conduct". However, "grossly improper conduct" can and has been found in cases where a solicitor prefers her or another's interest over that of her client (see, for example, *Ng Chee Sing* at [36]; *Law Society of Singapore v Khushvinder Singh Chopra* [1998] 3 SLR(R) 490; and more recently, *Law Society of Singapore v Tan Chun Chuen Malcolm* [2020] 5 SLR 946).

40 Thean J concluded that Koh's conduct did not fall within s 83(2)(*b*) of the Act for three reasons (see *Andrew Loh (HC) (No 2)* at [27]). First, Koh did not receive any financial advantage from the concealment of the fact of the consent orders. Second, his advice that the appeal lacked merit was not inaccurate, and this can be gleaned from the district judge's ultimate orders following Loh's appeal (see [24] above). Finally, the appeal was eventually filed in time, which showed that Koh had not preferred his desire to conceal the information over Loh's instructions to appeal.

41 Even with these two further charges, however, she – like the DT – was not satisfied that the totality of Koh's misconduct was sufficiently serious to warrant the matter being advanced to the C3J. Her reason for this conclusion was simply that the "entire context of the case" showed that it was of insufficient gravity. Having regard to the two further charges, she ordered that the penalty recommended by the DT be increased from $10,000 to $12,500 (see *Andrew Loh (HC) (No 2)* at [30]–[32]).

42 Loh then filed an appeal against her decision, and in response, Koh applied to strike out the appeal on the authority of *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279. His application was held in abeyance pending the Court of Appeal's decision in *Iskandar bin Rahmat v Law*

Society of Singapore [2021] 1 SLR 874 ("*Iskandar*"), where a five-judge panel of the court held that there is a right of appeal against the decision of a High Court judge made under ss 95, 96 or 97 of the Act. Once the decision in *Iskandar* was handed down, Koh's striking-out application was dismissed and the appeal was allowed to proceed (see *Loh Der Ming Andrew v Koh Tien Hua* [2021] 1 SLR 926). On 1 July 2021, we heard and allowed Loh's appeal (see *Loh Der Ming Andrew v Koh Tien Hua* [2021] 2 SLR 1013 ("*Andrew Loh (CA) (No 2)*")), and held that the matter should proceed to the C3J.

43 We will not restate here our reasoning in *Andrew Loh (CA) (No 2)*, even though several of the issues we dealt with there overlap with the issues that are before us in the present application. Indeed, it is specifically because of this overlap that a preliminary point was raised by Koh's counsel, Mr Narayanan Sreenivasan SC ("Mr Sreenivasan"), which we will address at [47]–[54] below.

44 Briefly, however, the *outcome* of the appeal was as follows. We set aside Thean J's order on the ground that a judge hearing an application under s 97 of the Act does not have the power to vary the penalty recommended by a disciplinary tribunal. Instead, the orders a judge may make under s 97, following an assessment that a disciplinary tribunal made incorrect findings and determinations, are limited to: (a) advancing the matter to the C3J; (b) remitting the matter to be reheard and reinvestigated by the constituted disciplinary tribunal; or (c) directing that a new disciplinary tribunal be appointed to hear and investigate the complaints (see *Andrew Loh (CA) (No 2)* at [32]–[36]). Thus, in making the order that she did, we considered that Thean J acted outside the scope of her powers under the provision in question (see *Andrew Loh (CA) (No 2)* at [37]).

45 Turning to the substance of the complaints against Koh, we agreed with Thean J that the four heads of complaints that she found had been made out against Koh were indeed made out, and that three of them amounted to conduct unbefitting a solicitor under s 83(2)(*h*) of the Act. We disagreed, however, that Koh's intentional concealment from Loh of the fact that several of the orders had been made by consent only fell within s 83(2)(*h*). Given that Koh had acted outside Loh's instructions in consenting to the striking out of certain portions of the latter's SOP, the *essence* of the concealment, we observed, "was to deceive and mislead Loh … as to what had transpired in the conduct of his own matter before AR Tay". Having regard to what was set out in *Law Society of Singapore v Nor'ain bte Abu Bakar and others* [2009] 1 SLR(R) 753 ("*Nor'ain bte Abu Bakar*") at [46], namely, that a solicitor may act fraudulently not only by making an explicit false representation, but also by intentionally seeking to create a false impression through his concealment of the truth, it appeared to us that Koh had acted *fraudulently*. We considered this to be grave because it struck at the heart of the solicitor-client relationship (see *Andrew Loh (CA) (No 2)* at [68] and [76]). Taken together with some other considerations that we outlined (*ibid* at [77]–[81]), we found there was sufficient cause for the matter to be advanced to the C3J.

46 We therefore directed that Loh take out the present application in respect of the four charges which Koh now faces. The full text of the charges are as follows:

> THE FOURTH CHARGE
>
> On 27 July 2015 at the hearing of FC SUM 2128 of 2015 and FC SUM 2009 of 2015 before District Judge Eugene Tay, the Respondent conducted himself in a manner that amounted to misconduct unbefitting of an advocate and solicitor and officer of the Supreme Court or as a member of an honourable profession within the meaning of section 83(2)(*h*) of the Act by misrepresenting to the court that he had sought but been

> unable to secure the Complainant, Mr Andrew Loh Der Ming's confirmation on the issue of settlement with respect to FC SUM 2009 of 2015 (the "fourth charge").
>
> THE SIXTH CHARGE
>
> On 27 July 2015 at the hearing of FC SUM 2128 of 2015 and FC SUM 2009 of 2015 before District Judge Eugene Tay, the Respondent conducted himself in a manner that amounted to misconduct unbefitting of an advocate and solicitor and officer of the Supreme Court or as a member of an honourable profession within the meaning of section 83(2)(*h*) of the Act by misrepresenting to the court that his instructions in relation to FC SUM 2009 of 2015 were to contest the application in its entirety when these were not the instructions which were received from the Complainant, Mr Andrew Loh Der Ming (the "sixth charge").
>
> THE EIGHTH CHARGE
>
> On 27 July 2015 at the hearing of FC SUM 2128 of 2015 and FC SUM 2009 of 2015 before District Judge Eugene Tay, the Respondent conducted himself in a manner that amounted to misconduct unbefitting of an advocate and solicitor and officer of the Supreme Court or as a member of an honourable profession within the meaning of section 83(2)(*h*) of the Act by entering into Consent Orders at the hearing against the instructions received from the Complainant, Mr Andrew Loh Der Ming (the "eighth charge").
>
> THE NINTH CHARGE
>
> Subsequent to the hearing of FC SUM 2128 of 2015 and FC SUM 2009 of 2015 on 27 July 2015 before District Judge Eugene Tay, the Respondent conducted himself in a manner amounting to fraudulent or grossly improper conduct in the discharge of his professional duty, within the meaning of section 83(2)(*b*) of the Act by deliberately and/or intentionally concealing from the Complainant, Mr Andrew Loh Der Ming, that Consent Orders had been entered into at the hearing, in relation to FC SUM 2009 of 2015 (the "ninth charge").

Relevance of *Andrew Loh (CA) (No 2)*

47 Before going further, it is necessary to address the preliminary issue mentioned at [43] above. The issue, in essence, pertains to whether the ninth charge has been made out.

48 As will be seen from [46], the gravamen of the ninth charge is that Koh *intentionally concealed* from Loh information which bore directly on Loh's legal position. Inherent in this allegation is the suggestion – though we accept, not an unavoidable one – that Koh acted dishonestly. This is important given that we have repeatedly emphasised that misconduct involving dishonesty will often lead to an order for striking off (*Law Society of Singapore v Udeh Kumar s/o Sethuraju and another matter* [2017] 4 SLR 1369 ("*Udeh Kumar*") at [104]). Indeed, in *Law Society of Singapore v Chia Choon Yang* [2018] 5 SLR 1068 ("*Chia Choon Yang*") at [39]–[40], we emphasised that where the solicitor's dishonesty is indicative of a character defect which renders her unfit to remain in the profession, or where it undermines the administration of justice, she will ***almost invariably*** be struck off the roll.

49 Dishonesty being the import of the ninth charge, it is unsurprising that, although Koh does not contest the fourth, sixth and eighth charges (see [57] below), he vigorously disputes the ninth charge. This dispute, however, gives rise to the question as to what we, sitting as a court constituted under s 98(7) of the Act, should make of our earlier findings on the ninth charge when we were constituted as the Court of Appeal. Mr Sreenivasan urges upon us that we are "not to consider" our findings in *Andrew Loh (CA) (No 2)*. It is his submission that, in our present capacity, we should only take into consideration the findings of the DT as set out in its report, as we would have done had the case been referred to us directly by the DT. Any other approach, he says, would be "severely prejudicial" to Koh.

50 At the hearing before us, Mr Sreenivasan pressed this submission with some force. When asked why we should or how we could ignore or disregard the observations we had made in *Andrew Loh (CA) (No 2)*, which were gleaned from and based on the underlying *objective* facts and documents, he returned to

the bare assertion that the DT was "better placed" to determine the facts, having had the opportunity to observe Koh under cross-examination by Loh's then-counsel, Mr Lim Tean. Mr Sreenivasan also cites, in his written submissions, our observations in *Law Society of Singapore v Lim Cheong Peng* [2006] 4 SLR(R) 360 ("*Lim Cheong Peng*"), to the effect that "an appellate court does not lightly interfere with findings of fact by a lower court or a disciplinary committee unless their conclusions are clearly against the weight of evidence" (at [13]), this being a point that has been restated in numerous cases (see, for example, *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [27]; *Law Society of Singapore v Manjit Singh s/o Kirpal Singh and another* [2015] 3 SLR 829 ("*Manjit Singh*") at [41]).

51 With respect, we are not moved by these submissions. We accept that the observations of the High Court and even of the Court of Appeal – made in the context of disposing of an application or appeal made under s 97 of the Act – *do not bind us* now, sitting in the C3J. This much should be clear from the recent decision in *Iskandar*, where the Court of Appeal explained, in considerable detail, that the C3J's jurisdiction is unique and distinct from the civil jurisdiction of the High Court or Court of Appeal under s 97 of the Act. Indeed, the court specifically remarked, "[t]o the extent that disbarment or suspension proceedings are *sui generis*, the proceedings before the High Court and the Court of Appeal *do not encroach on the jurisdiction of the C3J*" [emphasis added] (*Iskandar* at [86]).

52 That said, contrary to Mr Sreenivasan's argument, it is one thing to say that the High Court and Court of Appeal's observations are not *binding* on the C3J, and quite another to suggest that where observations have been made, the C3J should, artificially, shut its mind to those observations or disregard them altogether. In assessing applications and appeals under s 97 of the Act, the High

Court and Court of Appeal would have been mindful of their duty not to interfere with the findings of the DT without a proper basis. As such, where the court *has* disturbed the DT's conclusions on the facts, counsel is obliged to consider why the court has done so, and it is incumbent upon them to persuade the C3J that the court acted incorrectly. Unfortunately, Mr Sreenivasan did not do so, preferring, as we have observed, to approach the matter on the unrealistic footing that nothing to this effect had transpired. Mr Sreenivasan also did not seem to appreciate the significance of the fact that, in *Andrew Loh (CA) (No 2)*, we did not disturb the DT's findings of objective facts. Rather, we disagreed with the *inferences* drawn by the DT *from* those objective facts. It is pertinent that, just one paragraph after the passage cited by Mr Sreenivasan (see [50] above), the court in *Lim Cheong Peng* specifically distinguished between the two situations as follows (at [14]):

> Different considerations arise in the case of inferences of fact that are drawn by the lower court from the circumstances of the case. It is clear that an appellate court is just as competent as the court below in the drawing of such inferences: see *Yap Giau Beng Terence v PP* [1998] 2 SLR(R) 855 at [24]. In the present case, the [Disciplinary Committee] made a number of mistakes in its inferential findings which led it to disbelieve the respondent's case.

53 This too is a well-recognised principle of appellate intervention but, unfortunately, it seems to have gone unappreciated in this case. As a result, the bulk of the written submissions made by Mr Sreenivasan in *this* application mirrored those made earlier in *Andrew Loh (CA) (No 2)*, without meaningful refinements to address the specific points which had obviously troubled us in *that* appeal. To ensure that Koh had the opportunity to put his best case forward, we impressed firmly upon Mr Sreenivasan at the hearing that our minds remained open to the possibility that the inferences we had drawn from the facts and documents, whilst sitting in the Court of Appeal, were erroneous. We invited him to make more targeted submissions to this effect, but he generally

retreated to his basic position that the DT should be accorded deference as the primary finder of fact, and failed to provide any basis for us to conclude that the inferences drawn in *Andrew Loh (CA) (No 2)* were inappropriate. We will address these submissions in detail from [90] below, when we come to consider the ninth charge.

54 For now, it is sufficient to reiterate that, though observations of the High Court or the Court of Appeal in connection with applications and appeals under s 97 do not bind the C3J, it would generally be wrong to ignore them. In disciplinary matters, the C3J is the apex court and, for that reason, it is not bound by what the DT or other courts have said. But where the High Court or Court of Appeal has interfered with a DT's determination, neither the solicitor nor her counsel can ignore that, and a failure to address the findings and conclusions of a court in those circumstances will invariably lead the C3J to conclude that nothing was said because there was nothing useful to be said. In *Andrew Loh (CA) (No 2)*, we took the trouble to set out precisely the matters which concerned us and the basis upon which we came to our conclusions. Notwithstanding that advance notice had been given of the issues that should have been addressed before us, nothing was put forward to even try to persuade us that we had been mistaken.

55 With this out of the way, we turn to the substantive issues before us.

The issues

56 There are, as with all disciplinary cases involving an application under s 98(1) of the Act, two broad issues before us. The first is whether due cause for disciplinary action within the meaning of either s 83(2)(*b*) or s 83(2)(*h*) has been established in relation to the four charges which Koh faces. If so, the second,

consequential issue is the appropriate sanction to be meted out to Koh under s 83(1) of the Act.

Our decision

57 As alluded to at [49] above, in the present application, Koh only denies liability in respect of the *ninth* charge. He accepts that the elements of the other three charges are made out and he admits that his management of Loh as a client could and should have been better.

58 This being his position, although we need not scrutinise the factual elements of the fourth, sixth and eighth charges, we must determine whether the conduct alleged in these charges is "unbefitting an advocate and solicitor" under s 83(2)(*h*) of the Act. Further, as observed in *Jasmine Gowrimani* at [35], a finding that the conduct in question falls within s 83(2) is a necessary but not a sufficient condition for establishing "due cause" (restated in *Udeh Kumar* at [30]). As such, notwithstanding Koh's plea, we need to be satisfied, on the totality of the circumstances, that the misconduct reflected in those charges is sufficiently serious to warrant the imposition of a sanction or sanctions under s 83(1).

The fourth charge

59 The test for determining whether conduct is "unbefitting" an advocate and solicitor, as set out in *Ng Chee Sing*, has been stated at [39] above. Simply put, the issue turns on whether a reasonable person, upon hearing what the solicitor had done, would have said without hesitation that he – as an advocate and solicitor – should not have done it (*Ng Chee Sing* at [41]; see also *Ezekiel Peter Latimer* at [38]). This is a useful analytical construct to aid in the *court's* assessment of the conduct. In *Law Society of Singapore v Heng Guan Hong*

Geoffrey [1999] 3 SLR(R) 966 at [24], we emphasised that the yardstick or standard for assessing the solicitor's misconduct under s 83(2)(*h*) should be understood to reflect the assessment of the court, and not that of the solicitor's peers.

60 The fourth charge pertains to Koh's misrepresentation to AR Tay that he had sought but was unable to obtain Loh's instructions on resolving issues regarding the particulars of the SOP on a consensual basis. The question for us is how we ought to characterise the fact that Koh made this false representation; specifically, whether he did so negligently, recklessly, or dishonestly.

61 We referred to the exchange between AR Tay and Koh at [12], but as its full context will bear on our characterisation of Koh's misconduct (in particular, see [68]–[75] below), we set it out here:

> 9.37am – only [Mr Narayanan] present.
>
> 9.50am – only [Mr Narayanan] present.
>
> …
>
> Ct: Co-Defendant Counsel, what time were you present?
>
> [Mr Narayanan]: About 9.35am.
>
> Ct: Have you been able to contact other solicitors?
>
> [Mr Narayanan]: I tried to contact Mr Koh Tien Hua on his handphone. No response. I also got my office to contact his secretary to ascertain his whereabouts. His secretary said she was unable to contact him, but will contact us back, as soon as she reaches him.
>
> …
>
> Ct: Please wait outside for a while.
>
> [Mr Narayanan]: I have hard copies of my submissions with bundle of authorities.
>
> Ct: Tender.
>
> ([Mr Narayanan] tenders written submissions and bundle of authorities and leaves Court room)

> …
>
> 10.10am – [Koh] present.
>
> [Koh]: Apologies. I thought it was 2.30pm.
>
> Ct: Not a satisfactory reason.
>
> [Koh]: I accept that.
>
> Ct: [Koh], submissions?
>
> [Koh]: ***I spoke to my Learned Friend. Trying to reach settlement in terms of pleadings. But I am unable to get my client's confirmation. We can proceed. I will make oral submissions***.
>
> Ct: Directions given for skeletals to be filed.
>
> [Koh]: I was hoping my client would agree with my proposed course of action. The way I read the file, there is really no need to go into a full blown litigation, just on question of pleadings.
>
> Ct: 2 summonses today. Let's deal with [SUM 2009], followed by the other [SUM 2128]. …
>
> [The hearing then proceeds.]
>
> [emphasis added in bold italics]

62 In *Udeh Kumar* at [34]–[36], we held that the test laid down in *Derry v Peek* (1889) 14 App Cas 337 for determining whether a representation is made fraudulently (and thus, dishonestly), applied also to misrepresentations made to the court. If a false statement is made to a court by a solicitor: (a) knowing it is false; (b) without belief in its truth; or (c) recklessly, without caring whether it is true or false, this would constitute a breach of the solicitor's most basic duty not to deceive or mislead the court. Loh suggests that the misstatement here was intentional and aimed at covering up Koh's lack of preparation for the hearing. Loh therefore submits that Koh's conduct under the fourth charge should be viewed as deceitful and thus, dishonest.

63 Mr Sreenivasan contends otherwise on three grounds. First, he submits that Koh did not in fact represent that he had sought Loh's instructions; only

that he had not been able to obtain such instructions. Second, Mr Sreenivasan submits that just prior to the hearing, Koh did in fact speak to his opposing counsel, Mr Narayanan, and as such, the statement was true to that extent. Third, he contends that the fact that Koh could have obtained instructions beforehand does not render his conduct fraudulent or dishonest.

64 The first two submissions are contrived. Our first task is to ascertain how the statement would reasonably be understood, and this will turn on construing it in its context. In context, Koh was indicating that he and Mr Narayanan had discussed the matter *earlier*, that they saw some prospect for resolving SUM 2009 amicably, but that Koh had either not been able to reach Loh to secure his agreement or had not been able to persuade him to agree. On either footing, Koh was impliedly representing that he had attempted to get such agreement. Simply put, the statement that Koh was unable to obtain Loh's instructions is pregnant with the implicit assertion that he had attempted to do so. Mr Sreenivasan's attempt to suggest otherwise does not withstand even slight scrutiny. And, while it is true Koh did speak to Mr Narayanan, that is irrelevant because that is not the subject of the complaint. The complaint is simply that Koh misrepresented to AR Tay that he "had sought but [had] been unable to secure" Loh's instructions.

65 We also do not accept Mr Sreenivasan's third submission. It is plain to us, from the pre-hearing correspondence set out from [5]–[11] above, that Koh *knew* the statement he made to the assistant registrar was false. He was well aware, particularly from Loh's 24 July 2015 e-mail (see [9]), that the latter was ready, willing and able to give instructions in respect of any potential settlement to be attempted in respect of SUM 2009. Instead, it was *Koh* who failed even to respond to Loh's query about a potential settlement, much less specifically seek his instructions.

66 This leads us irresistibly to the conclusion that Koh's misrepresentation to AR Tay was, quite simply, dishonest. He *knew* that the statement being made was false, and yet he made it anyway. In line with the approach adopted in *Udeh Kumar*, there is no room to suggest otherwise.

67 Equally, there is no room to suggest that such conduct was not unbefitting of an advocate and solicitor within s 83(2)(*h*) of the Act. A solicitor's paramount duty is owed to the court, and it is imperative that she "*never* communicates information, makes submissions, presents evidence or facts which would mislead the court" [emphasis added] (see Jeffrey Pinsler, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* (Academy Publishing, 2007) at para 04.001). This duty is also clearly enshrined in the Legal Profession (Professional Conduct) Rules 2015, where r 9(2)(*b*) provides that a solicitor must not, in conducting any proceedings before a court or tribunal, "fabricate any fact or evidence in any communication with, or representation or submission to, the court or tribunal". We therefore reiterate, as we have in numerous cases (see, for example, *Nor'ain bte Abu Bakar* at [89]–[90], and *Bachoo Mohan Singh v Public Prosecutor and another matter* [2010] 4 SLR 137 at [113]–[114]), that the court will take a stern view of errant solicitors who fail to abide by this duty of candour. Where a solicitor *knowingly* makes a statement to the court which she knows to be false, as is the case here, such conduct will, at the very least, be seen as conduct unbefitting an advocate and solicitor under s 83(2)(*h*) of the Act. Indeed, there is no doubt in our minds that a reasonable person would not hesitate to suggest that Koh should not have done what he did. We therefore find, in respect of the fourth charge, that due cause has been made out against Koh under this provision.

68 However, before we go further, we need to characterise Koh's dishonesty, in light of the observations we made in *Chia Choon Yang*.

69 In *Udeh Kumar* (at [101]–[104]), which we affirmed in *Chia Choon Yang* at [18]–[20], we rejected the argument that dishonesty could be described as being merely "technical" in nature, and in this vein, we also did not accept that there was a "spectrum of dishonesty" inviting a corresponding spectrum of punishment. A solicitor either conducts herself honestly, or she does not. However, as we stated in *Chia Choon Yang* (at [20]), it is relevant to inquire whether the solicitor's dishonesty is "indicative of a character defect rendering [her] unfit for the profession, or if it undermines the administration of justice". If the solicitor's dishonesty carries such indication, or if it has such effect, the sanction to be imposed is "almost invariably" an order for striking off, and it is only in "extremely rare" cases that the court will depart from this to impose a lesser sanction (see *Law Society of Singapore v Ong Cheong Wei* [2018] 3 SLR 937 ("*Ong Cheong Wei*") at [7]). In this connection, there are three broad categories of misconduct in respect of which it can ***typically*** be said that such indication or effect is present: see *Udeh Kumar* at [105]–[108]; see also *Chia Choon Yang* at [19].

70 The first is where the errant solicitor has been convicted of a criminal offence involving dishonesty that implies a defect in character rendering her unfit for the profession. This might include a tax evasion offence under the Income Tax Act 1947 (2020 Rev Ed) (as in *Ong Cheong Wei*); theft or related offences (as in *Law Society of Singapore v Choy Chee Yean* [2010] 3 SLR 560); or most commonly, breach of trust under the Penal Code 1871 (2020 Rev Ed) (as in *Law Society of Singapore v Junaini bin Manin* [2004] 4 SLR(R) 539, *Law Society of Singapore v Loh Wai Mun Daniel* [2004] 2 SLR(R) 261, or *Law Society of Singapore v Ezekiel Caleb Charles James* [2004] 2 SLR(R) 256 ("*Caleb Ezekiel*"). It bears emphasising that although dishonesty is the usual marker of a defect in character rendering the solicitor unsuitable to remain in the profession, it is not the only marker. And exceptionally, it may not be seen

as a conclusive marker. As observed in *Law Society of Singapore v Tham Yu Xian Rick* [1999] 3 SLR(R) 68 (at [13]–[18]), apart from the nature of the offence, the court may examine all the circumstances of the offence to consider whether the relevant defect in character is implied.

71 The second category concerns cases where the errant solicitor fails to deal appropriately with her client's money or her firm's accounts. A clear example of this would be *Law Society of Singapore v Rasif David* [2008] 2 SLR(R) 955, where the offending solicitor abused the trust of his clients and absconded with more than $10m of their monies, deposited in his firm's client account. This second category of cases would also include instances where the solicitor has been dishonest in her dealings with the client such that there is a violation of the relationship of trust and confidence that inheres in the solicitor-client relationship. In *Chia Choon Yang* (at [22]), we cited several cases as examples falling within this category. First, we referred to *Law Society of Singapore v Ravindra Samuel* [1999] 1 SLR(R) 266 ("*Ravindra Samuel*"), a case where the errant solicitor failed on two occasions to deposit client monies he received in cash, into the firm's client account. Next, we referred to *Law Society of Singapore v Wee Wei Fen* [1999] 3 SLR(R) 559, a case where the errant solicitor forged a court order which her clients had instructed her to obtain under the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed), but which she failed to. And finally, we referred to *Law Society of Singapore v Quan Chee Seng Michael* [2003] SGHC 140 ("*Michael Quan*"), a case where the errant solicitor, amongst other things, dishonestly preferred the interests of third parties, and caused his clients to enter into unfavourable loan transactions with those third parties.

72 We would add to this an aspect of *Caleb Ezekiel*, though the case was not dealt with on this basis. There, the respondent solicitor negligently settled

an insurance claim beyond his mandate. His client was the insurer of the defendant in a fatal road accident claim and authorised him to settle the suit for not more than $50,000. In the event, he settled it for $130,000 and in addition, agreed to the payment of costs and disbursements. Instead of admitting his error and seeking to undo it, the respondent solicitor, an equity partner, used his access to the firm's omnibus client account to pay the settlement sum. Although he made full restitution to the account, he was charged with and convicted of criminal breach of trust and was subsequently struck off the roll. Had the circumstances of this case differed, and had he not been prosecuted and convicted for an offence involving dishonesty, this might well have been a case falling within the second category. His use of client monies alone would have placed it squarely within the second category, but we would suggest that *even if* he had used his own money from the outset to conceal the fact that he acted beyond his mandate – without recourse to the firm's client account – that would still have undermined the trust and confidence which inheres the solicitor-client relationship. Solicitors may from time to time make mistakes. However, an honest solicitor would not and should not take steps to conceal those mistakes, quite apart from whether in doing so, she has or has not misused her client's funds.

73 The third category concerns cases where the errant solicitor is fraudulent in her dealings with the court or breaches her duty of candour and violates her obligations as an officer of the court. A solicitor's paramount duty is owed to the court, with a view to the effective and efficient administration of justice. Koh's misconduct in the fourth charge, at least *prima facie*, falls within this category. However, bearing in mind the context of the exchange set out at [61] above, in our judgment, the dishonesty reflected in Koh's misrepresentation to AR Tay to the effect that he had sought, but had not been able to obtain, Loh's instructions, does not indicate a defect in character which renders him unfit to

be in the profession, nor did it undermine the administration of justice. Two aspects of his exchange with AR Tay underlie this conclusion.

74 First, the content of the misstatement was irrelevant to the query made by AR Tay. The assistant registrar had simply asked for Koh's submissions, and the latter's misstatement was made as a wholly unnecessary preface to his effective answer that he would "make oral submissions". He was, in our view, simply trying to downplay his obvious failure to comply with the assistant registrar's directions to file written skeletal arguments (see [8] above). In fact, after Koh uttered the misstatement, AR Tay called attention to his directions. Koh's reaction was to shift the blame to Loh for his alleged refusal to agree to his "proposed course of action". The implication of this follow-up response was that if Loh had agreed to this course of action, there would not even have been a need for SUM 2009 to be heard, which in turn explained why Koh did not file written skeletal arguments. This suggests to us that Koh was simply attempting to downplay or excuse his failure to comply with the court's directions, which brings us to our second observation, namely, that Koh's misstatement was of ultimately no consequence as far as the court was concerned. Indeed, the exchange set out at [61] shows that Koh's remarks were, essentially, ignored by the assistant registrar, who proceeded to hear SUM 2009 as he would have with or without Koh's misstatement.

75 Framed by these observations, though Koh acted dishonestly in making the statement he did to AR Tay, we do not view his conduct as revealing a defect in character rendering him unfit to remain a member of the profession. Instead, Koh's dishonest misstatement reveals to us a lack of willingness to accept responsibility for, or criticism on account of, his own failings. We recognise the pressures of legal practice and can appreciate that there will – inevitably – be occasions when a solicitor may not be able to stay atop the work expected of

her. Although the court pursues the efficient administration of justice, it does not do so doggedly, and where a solicitor fails – on legitimate and reasonable grounds – to comply with directions, understanding can and is typically accorded. However, where *no* such legitimate or reasonable grounds exist, an ethical solicitor would be forthright about her failure. She might face some reprimand as a result, but even against this likelihood, she should not attempt to deflect responsibility for her failings to others, particularly to those not before the court to speak for themselves, and even more particularly to her client. Koh's misstatement was unbecoming of an advocate and solicitor, but it does not rise to the level of rendering him altogether unfit to practise.

Apparent contradiction between the sixth and eighth charges

76 Before we turn to consider whether due cause has been made out against Koh in respect of the sixth and eighth charges, we digress to address an issue his counsel, Mr Sreenivasan, raised in relation to these two charges.

77 Notwithstanding Koh's acceptance of each of the elements of the fourth, *sixth*, and *eighth* charges, Mr Sreenivasan contends that there is an "inherent contradiction" between the sixth and eighth charges. It is not entirely clear what he wishes us to make of this submission. If indeed there is a contradiction, should we decline to accept his admission of improper conduct? Or should we take the alleged contradiction into account when determining the appropriate sanction to be imposed? Or should we just note the point? These matters, unfortunately, were left unaddressed.

78 In any event, having considered the two charges, we are satisfied that there is no contradiction. By the sixth charge (see [46] above), Koh is accused of misrepresenting to AR Tay that he had instructions to contest the entirety of SUM 2009. We have quoted their exchange at [61] above. Koh does not dispute

that this was a falsehood because Loh had in fact conveyed to Koh that he was prepared to agree to the striking out of certain particulars by his e-mail on 14 July 2015. By the eighth charge, however, Koh is accused of entering into the consent orders against Loh's instructions. The apparent contradiction is that, on one hand, Koh is accused of misleading the court that he had been instructed to contest everything, while the conduct forming the subject of the eighth charge suggested that he did consent to certain orders.

79 In our judgment, the two allegations do not give rise to any inconsistency which affects either charge. It is not necessarily inconsistent for Koh, in one moment, to represent falsely to the court that he did not have *any* instructions from Loh to agree to *any* of the particulars being struck off (when he did in fact have instructions to that effect), and in the next moment, agree to consent orders being made seemingly beyond his mandate. We say these two positions are not necessarily inconsistent because it was not for AR Tay to question Koh, when his position changed, as to whether he was or was not acting within instructions. In this regard, we agree with Woo J's observation in *Andrew Loh (HC) (No 1)* that instructions "are usually matters exclusively within the knowledge of the client and the lawyer; no one else would know or be able to verify these instructions, and all parties including the court have to rely on the lawyer to communicate them" (at [135]). By way of illustration, a client may withhold agreement to certain positions while also allowing counsel to take certain other positions based on how the matter was progressing before the court. Accordingly, we do not accept Mr Sreenivasan's argument that there was an inherent contradiction between the sixth and eighth charges. Ultimately, this is an issue of no consequence in so far as Koh's liability is concerned, and we turn, accordingly, to consider whether due cause is made out for the sixth charge.

The sixth charge

80 Our analysis of the sixth charge, to a large extent, mirrors that in respect of the fourth charge set out at [59]–[75] above. In sum, Koh made a statement to AR Tay to the effect that Loh was unwilling to agree to any particulars in the SOP being struck out. This was, as Koh accepts, untrue; and in view of the e-mail Loh had sent to him on 14 July 2015 (see [7] and [13] above), it seems to us that he subjectively *knew* this to be the case at the material time. Accordingly, on the basis of *Udeh Kumar* and *Derry v Peek* as explained at [62] above, it follows that Koh made this statement dishonestly.

81 Once again, Mr Sreenivasan urges us against this conclusion. He calls to attention Koh's evidence that he did not recall Loh's specific instructions, and on this basis, he submits that Koh *honestly* believed his statement to be true. Mr Sreenivasan even contends in his submissions that, "[g]iven the vehemence with which [Loh] wanted the particulars to be maintained, [Koh's] statement was understandable". With respect to Mr Sreenivasan, this submission is wholly contradictory to the position Koh himself has taken in these proceedings. In an attempt to mitigate the severity of his misconduct in the eighth charge – which concerns Koh acting outside of Loh's instructions (see [86]–[89] below) – Koh claims to have believed, "*at all material times*, that he was acting within the authority given to him by [Loh] to use his own judgment and run [Loh's] case as [he] saw fit" [emphasis added].

82 However, if Koh believed that he was acting within authority in entering into various *consent* orders, the logical consequence would be that Koh believed that Loh was willing to enter into – or at least, would not object to – those consent orders. Yet, even if we take Koh's case at its highest, and accept that he did not recall every one of Loh's instructions, his asserted belief that he had

been granted wide latitude as to how he would conduct the case runs counter to his misrepresentation to AR Tay that he had "[n]o instructions to agree" (see [12] above). He may not have remembered Loh's specific instructions in relation to specific particulars, but he never thought, and certainly had no reasonable basis for thinking, that he was free to consent to many of the particulars being struck out. Equally, he did not think and had no reasonable basis for thinking that Loh was not agreeable to *any* of the particulars being struck out.

83 Accordingly, when AR Tay asked, "[f]or the record, contesting everything that Co-Defendant Counsel is intending to strike out?", and Koh responded that he had "[n]o instructions to agree", we do not see how it is permissible to conclude that Koh made this misstatement with any state of mind other than dishonesty. Taking Koh's case at its highest, this was a misstatement which Koh made recklessly, without regard for whether it was true or false, and this satisfies the test in *Derry v Peek*.

84 That said, as with the fourth charge, Koh's dishonesty here does not, in our judgment, reveal a character defect which renders him unfit to remain a member of the profession, and again it did not undermine the administration of justice. Indeed, notwithstanding his misstatement to AR Tay, Koh nevertheless went on to consent to the orders, which, as mentioned at [24], were upheld on appeal despite being reviewed on their merits. Koh's misstatement was therefore devoid of consequence. As such, though he again breached his duty of candour, we do not read into this a fundamental character defect. Instead, it appears to us simply to be an extension of his misstatement in the fourth charge.

85 Nevertheless, the fact that Koh's misstatement did not impact the decision of AR Tay does not detract from a finding of dishonesty. The question

of whether or not a solicitor has been dishonest is directed at determining her mental state. Irrespective of the impact of the solicitor's dishonesty, the fact that dishonesty infects the solicitor's conduct *at all* is serious. As we observed in *Law Society of Singapore v Ravi s/o Madasamy* [2016] 5 SLR 1141 ("*Ravi s/o Madasamy*"), the central calling of the legal profession is the administration of justice, and *any* dishonesty "attacks the very core of the trustworthiness and integrity of [the] solicitor, and in a broader sense, the integrity of the profession and the legitimacy of the administration of justice" (at [48]). We are therefore satisfied that due cause is made out under s 83(2)(*h*) of the Act in respect of the sixth charge.

The eighth charge

86 The eighth charge can be dealt with quite simply. As mentioned at [57] above, Koh no longer disputes that he acted contrary to Loh's instructions by consenting to the striking out of 14 particulars in the SOP (see [14] above). As such, the only question is whether this was misconduct unbefitting an advocate and solicitor under s 83(2)(*h*) of the Act. It should go without saying that it is not acceptable for a solicitor to act against her client's express instructions. Even if the client's instructions cannot reasonably be pursued, it is improper for the solicitor to decide, unilaterally, to depart from those instructions.

87 Of course, the solicitor is and must be free to exercise independent legal judgment as to what is or is not legally tenable. She is certainly not an unthinking mouthpiece for her client. The paramount obligation owed by the solicitor is to the court, *not* to her client, and the effective and efficient administration of justice relies heavily on the preservation of her freedom to exercise such independent judgment. The point was aptly made by Mason CJ in

Giannarelli and others v Wraith and others (1988) 81 ALR 417 in the context of a negligence suit against barristers (at 421–422):

> … It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. …

88 This freedom, however, is not at odds with the solicitor's duty to her client. As we explained at the very outset of *Andrew Loh (CA) (No 2)*, the plain and obvious way for a solicitor to manage any potential conflict between her client's wishes on the one hand, and her duty to the court on the other, is through open and honest communication (at [1]). This should invariably be the first port of call when a solicitor takes the view that the position which her client wishes to pursue is untenable. Thereafter, if the client remains adamant in his position, the solicitor should then consider carefully, given her paramount duty to the court, whether it would be best to discharge herself.

89 Koh failed even to take the first step in this course, much less the second. Instead, despite Loh's evident willingness to communicate, take advice and give instructions, Koh curiously took it upon himself to decide on positions that were contrary to Loh's express instructions. This was plainly imprudent and improper. We are mindful, of course, that Koh was not necessarily wrong in his views as to the merits of the positions that Loh wanted him to take. Indeed, as

stated at [24] above, although the district judge hearing Loh's appeal did reinstate some of the particulars which had been struck out, this did not include any which had been struck out by consent. In the final analysis, however, this does not detract from the clear professional failing that forms the subject of the eighth charge. Koh had ample time to communicate any concerns to Loh between 7 and 27 July 2015, and considering his utter failure even to attempt to do so, we are satisfied that due cause in respect of the eighth charge is made out within the meaning of s 83(2)(*h*) of the Act.

The ninth charge

90 As stated previously, Koh denies the ninth charge, and, as we mentioned at [49]–[50] and [53] above, Mr Sreenivasan relies heavily on the DT's findings of fact to support Koh's case. This approach, unfortunately, does not address the issues which troubled us in *Andrew Loh (CA) (No 2)*. Two issues, in particular, continue to concern us.

91 First, Koh argued before the DT that he did not apply his mind to the distinction between agreeing to a "consent" order and "conceding" a point when pressed. In *Andrew Loh (CA) (No 2)*, we highlighted that irrespective of whether Koh believed himself to be "consenting" to certain orders or "conceding" that the relevant portions of Loh's SOP were untenable, the legal consequence was that the points which he conceded, or in respect of which consent orders were made, would generally not be appealable. This is a trite point and Mr Sreenivasan himself accepted it (see *Andrew Loh (CA) (No 2)* at [53]). There being no relevant legal distinction between "consent" and "concession", the question which then arises is why, when Loh expressed his dissatisfaction with the outcome of SUM 2009 and indicated that he wanted to appeal AR Tay's orders, Koh did not explain at once that they were essentially not appealable

because he had conceded what he thought to be untenable points. Koh did not do this, as we have set out at [16]–[19] above. Accordingly, even assuming Koh *genuinely* did not appreciate the difference between giving "consent" and making a "concession", it does not explain his conduct after the hearing; and, in particular, his failure to inform Loh that an appeal was not viable because of the stance he had taken.

92 Mr Sreenivasan offers no submission to address this issue. Instead, he focuses singularly on convincing us that Koh did *in fact* fail to appreciate the distinction. This is unhelpful, and in any event, we are not satisfied that Koh in fact failed to appreciate the difference between "consenting" to an order and "conceding" a point. As set out at [22] above, in response to Loh's question as to why certain orders had been entered into "by consent", Koh stated unambiguously that he had exercised his discretion to "*consent* to the obvious ones" [emphasis added]. Nothing about this response suggests that Koh was labouring under a confusion that conceding a hopeless point and consenting to an order were the same thing. To the contrary, he was quite precise in his e-mail that he consented because he thought the position was "obvious". Before us now, Koh accepts – in connection with the eighth charge – that he did not have the authority to so act, and this further undermines his claim that he had been confused between conceding a point and consenting to the order being made. And, finally, as set out in *Andrew Loh (CA) (No 2)* at [54], the notes of argument of the hearing on 27 July 2015 show that on each occasion, AR Tay asked Koh if the relevant order could be made *by consent* and Koh responded in the affirmative. By our count, there were *15* such instances. In the face of this, we do not see how it is possible for Koh to maintain that he did not appreciate the distinction. As the DT observed, despite finding in Koh's favour on this point, it was quite simply "inexplicable" that a solicitor of such seniority did not appreciate this distinction.

93 The second issue which troubled us in *Andrew Loh (CA) (No 2)* concerns whether Koh *intentionally concealed* the consent orders from Loh, or whether his failure to bring them to Loh's attention should be attributed to inadvertence or even incompetence. On this, four facts, in particular, led us to the view that Koh had acted intentionally (*ibid* at [60] and [63]–[65]):

(a) Koh eventually filed the notice of appeal in respect of SUM 2009 *without* explaining to Loh that consent orders had been entered.

(b) Koh persistently failed to send the notes of argument to Loh.

(c) Koh delayed in filing the notice of appeal and made repeated attempts to dissuade Loh from pursuing the appeal, all the while not mentioning the fact or the significance of the orders having been made by consent. We reiterate the sequence of events set out at [18] above.

(d) When Loh was informed on 28 July 2015 of the outcome of the hearing, Koh conspicuously identified three categories of orders made by AR Tay in respect of SUM 2009 *but did not mention* any "consent orders". We note, as we set out at [16] above, that Koh sent the endorsed orders of court which showed that 19 orders in SUM 2009 had been entered "by consent". This, however, was not called to Loh's attention, and as the subsequent exchanges between Loh and Koh show (see [20]–[23] above), Loh did not appreciate that these orders had been entered.

94 In the present application, Mr Sreenivasan submits, in respect of the first point, that Koh did not even realise that consent orders had been entered into. He suggests on this basis that, in Koh's mind, there was nothing to disclose. He also refers to the conversation between Loh and Koh on 27 July 2015 mentioned at [15] above, during which Koh claimed to have informed Loh that he *conceded*

to portions of the SOP being struck out. We have already explained at [92] that we do not accept that Koh did not appreciate the difference between entering into a "consent" order and "conceding" a point. Further, we do not accept that Koh's account of the conversation on 27 July should be preferred over Loh's. There are two reasons for this. First, we have explained at [91], in so far as the question of pursuing an appeal is concerned, the legal consequences of "consenting" to an order and "conceding" a point are much the same. Thus, if Koh had been so forthcoming in his conversation with Loh, it is inexplicable that he never told Loh that an appeal would be futile because he had conceded points and would not be allowed to revisit them on appeal. Koh gave numerous excuses for not pursuing the appeal, but not this. Second, Koh's own eventual explanation of what had transpired at the hearing, as we set out at [20]–[23] above, seriously undermines his present contention.

95 As to the second point, Mr Sreenivasan submits that Koh did not intentionally refuse to extend a copy of the notes of argument to Loh. The problem, we were told, is that Koh "had not applied to the court [for them]". This is a hopeless point. AR Tay uploaded his notes on the very *day of* the hearing, 27 July 2015; and in the face of Loh's repeated requests for the notes (see [17] above), Koh offers no explanation for why he did not take any steps to obtain a copy of the notes and send them to Loh. His unexplained failure to do so again points to his desire to avoid Loh discovering what had in fact transpired before the assistant registrar, since it is inescapable that Loh's reason for asking for the notes was precisely to ascertain what had transpired at the hearing.

96 On the third point, Mr Sreenivasan contends that Koh was so focused on "fixing the [SOP]" that it distracted him from taking steps to file the appeal more promptly. As we noted at [17] above, Loh conveyed to Koh his desire to

file an appeal in respect of SUM 2009 a total of *21* times. Loh's insistence on the appeal being filed could not have escaped Koh, no matter how busy he was with the effort to amend the SOP. Loh even made his concern regarding Koh's delay in filing the appeal explicit when he wrote to Koh on 5 August 2015, as follows:

> … On the matter against the striking out orders, my instruction to you is to also appeal. But I sense that there is some hesitation on your part. I am waiting for an explanation from you, so long as we do not miss the deadline to appeal.

97 Koh's response to this was that the appeal might prove to be "superfluous" given that they were working on amending the SOP, and that he was "not confident" in any event that it would succeed. But he never mentioned the fact that any appeal would be severely hampered by the fact that Koh had consented to the orders in question. He also failed to address the fact that Loh had not been persuaded to go down the route of amending the SOP and had wanted to pursue the appeal. When one looks at matters in the round, it becomes evident that, while Koh knew that Loh wanted to pursue the appeal, he also knew that his own conduct at the hearing made it unviable to pursue the appeal regardless of any question of the merits of the appeal. Faced with this conundrum, Koh delayed filing the appeal and tried his best to persuade Loh to follow a different path that would avoid his having to confront the fact that he had acted contrary to Loh's instructions.

98 Mr Sreenivasan here points to the DT's finding (at para 93 of the DT's Report) that "the reluctance with which [Koh] filed the appeal [was] explicable, considering [his] view that an appeal would be unlikely to succeed and contrary to [Loh's] interests", and not because he was trying to hide that the consent orders had been entered into. To this, we reiterate that questions of intent are "pre-eminently a matter for inference" (*Tan Joo Cheng v Public Prosecutor*

[1992] 1 SLR(R) 219 at [12]). The DT has no advantage over, and therefore commands no deference from, us when it comes to drawing inferences from established, objective facts. Based on the correspondence that was exchanged between Loh and Koh, the DT's inference was not reasonable. The foremost consideration in assessing the viability of an appeal would have been the fact that the orders in question that Loh was objecting to had been made by consent without Loh's knowledge or consent. That was the simple fact that Koh studiously avoided mentioning in his communications with Loh.

99 In relation to the fourth point, Mr Sreenivasan relies on Koh's evidence that the 28 July 2015 e-mail was not prepared by Koh himself, but rather by his paralegal. When reviewing this e-mail, Koh claims to have overlooked the fact that "consent orders" had not been referred to, once again turning to his failure to apply his mind to the distinction between "consent" and "concede". We have already explained why this position is neither factually tenable nor legally meaningful. We also note that the one thing that was *not* highlighted in that e-mail was the fact that the orders had been made by consent. Instead, these orders were described simply as "[t]o be [struck] out unless otherwise stated …".

100 Finally, Mr Sreenivasan makes a broader point that there was "no reason" for Koh to intentionally conceal the consent orders from Loh. He submits that, until 12 August 2015, the date on which Loh filed a notice of intention to act in person, Koh remained Loh's counsel. Thus, when he filed the appeal on 11 August, he still faced the prospect of having to argue Loh's appeal. This being the case, he would have had to face the difficulties in the appeal and, had he realised that consent orders had been entered, he would have brought those difficulties to Loh's attention.

101 There are two points that undermine this submission. First, there is no real doubt that Koh acted contrary to Loh's instructions and admitting this fact to Loh would have crystallised this issue. While concealing the position, Koh was striving to find a way to avoid the issue, for instance, by persuading Loh to agree to the pleadings being amended. Second, and more pertinently, in the face of the correspondence exchanged between Loh and Koh, there are only two possible ways to account for Koh's failure to act on Loh's instructions to appeal against AR Tay's orders in SUM 2009: either he was hoping to conceal his misconduct, or he was so incompetent as to not appreciate Loh's instructions. Having considered the matter in the round, there is no basis to conclude that it was the latter because, to put it very simply, there was no mistaking Loh's instructions.

102 This brings us to the most crucial question in respect of the ninth charge. Was Koh's misconduct "fraudulent or grossly improper" within the meaning of s 83(2)(*b*) of the Act, and connectedly, was it "dishonest"? The meaning of "fraudulence" has been addressed at [62] above, in relation to the fourth charge. In essence, where *positive* representations are concerned, the test applied is that used for identifying fraudulent misrepresentations in the tortious sense as set out in *Derry v Peek*. Where *negative* withholding of information is concerned, it was observed in *Nor'ain bte Abu Bakar* (at [46]) that:

> … An advocate and solicitor will be held to have acted fraudulently or deceitfully if he has acted with the intention that some person, including the judge, be deceived and, by means of such deception, that either an advantage should accrue to him or his client, or injury, loss or detriment should befall some other person or persons. He need not make an explicit false representation; it is fraudulent if he intentionally seeks to create a false impression by concealing the truth: *suppressio veri, suggestio falsi*.

We note that *Nor'ain bte Abu Bakar* concerned solicitors withholding salient information from *the court*. However, there is no logical reason in our judgment – nor did Mr Sreenivasan suggest that there was any – to take a different view of fraudulence in the context of the solicitor-client relationship.

103 Applying this understanding, we are driven to conclude that Koh acted fraudulently in concealing the consent orders from Loh. At the risk of repetition, it bears reemphasising the six crucial findings, in sequence, which have led us to this conclusion. First, Koh *knew* that he was entering into *consent* orders, not merely that he was "conceding" points (see [92] above). Second, Koh *knew* that he was not authorised by Loh to enter into said consent orders. This is evident not only from Loh's e-mail on 14 July 2015 (see [7] above), which Koh would have read and understood, but also his concession in the present proceedings. Third, after the hearing on 27 July 2015, Loh stated in 21 separate e-mails that he wished to appeal AR Tay's orders in SUM 2009, and in seven that he wanted to examine the notes of argument (see [17] above). There was simply no mistaking the fact that Loh wanted to be apprised of what transpired during the hearing, and that he wanted to file an appeal. Fourth, as the correspondence set out at [18] shows, Koh was reluctant to file the appeal in SUM 2009. It took the involvement of the Firm's managing partner to push him to act on Loh's clear and simple instructions. Fifth, the law renders unappealable orders which have been entered into by consent, and there can be no doubt that Koh, a senior practitioner with more than two decades of experience, knew this to be the case. As such, in the face of Loh's clear and persistent instructions to appeal the orders made by AR Tay in SUM 2009, Koh should have advised Loh of this particular consequence of the orders having been made by consent. We find it revealing that *even after* the appeal had been filed, Koh still did not inform Loh about the fact of the consent orders, much less advise him as to their legal effect, or provide the court's notes of argument. Finally, it was only after Koh's retainer

had ended, and after Loh had obtained and reviewed AR Tay's notes of arguments for himself, that Koh finally acknowledged having consented to the various orders at the hearing. Laid out in this way, the facts, in our judgment, point irresistibly to the conclusion that Koh's failure to inform Loh about the consent orders went well beyond inadvertence. Rather, his actions were calculated to conceal from Loh the fact of the consent orders, *because* he *knew* he had entered into them against Loh's instructions. This was fraudulent and dishonest, and we are accordingly satisfied that due cause is made out against Koh in respect of the ninth charge, under s 83(2)(*b*) of the Act.

104 The question this prompts is whether Koh's dishonesty in the context of this charge reveals a character defect which renders him unfit to be a member of the profession, or whether it undermined the administration of justice. Although Koh's misconduct *prima facie* appears to fall within the second category of cases from which these conclusions *typically* follow (see [71] above), in our judgment, it falls somewhat short of meeting that threshold. The orders that Koh consented to concerned particulars which patently contravened the basic rules of pleading. We have reviewed the particulars ourselves and are satisfied of this. Accordingly, although, as we have explained at [88] above, it was improper for Koh to deviate from Loh's instructions in the manner he did, his legal judgment on this issue was not unsound. In this sense, he did not undermine the administration of justice. We are mindful that there were other particulars of the SOP which had been struck out (not by consent), which were reinstated on appeal. In this light, it seems that Koh's attempts to dissuade Loh from filing an appeal *entirely*, were motivated by the desire to conceal the fact that *some* orders had been entered into by consent. As to this, however, Koh ultimately filed the appeal, and Loh was successful on those points. In that sense, there is no evidence that Loh ultimately suffered any prejudice as a result of Koh's failures.

105 In concluding that these violations fall short of justifying Koh being struck off the roll of advocates and solicitors, we have considered two cases in particular. The first is *Law Society of Singapore v G B Vasudeven* [2019] 5 SLR 876, where the respondent was struck off the roll for deceiving his client into believing that bankruptcy proceedings – which he had been instructed to commence against a third party – were in progress. To maintain this deception, the respondent prepared a fictitious court document and fictitious affidavits, and forged the electronic seal of the Supreme Court as well as the signature and stamp of a Commissioner for Oaths. The second is *Caleb Ezekiel*, the facts of which we have summarised at [72] above. The solicitors in these cases were struck off – in the case of *Caleb Ezekiel*, pursuant to an application under s 98(5) of the Legal Profession Act (Cap 161, 2001 Rev Ed) (the "2001 Act"). Notably, these cases involved misconduct that went beyond a failure to disclose the truth. The solicitors there took active steps to forge documents, and in the latter case, even to misuse client monies to maintain the deception.

106 In comparison, while Koh tried hard to avoid disclosing what had happened at the hearing before AR Tay, he did eventually file the appeal, and he was always aware that Loh could and would eventually be able to obtain the notes of argument for the hearing. Furthermore, his assessment that it would be inappropriate to include many of the particulars was largely correct. Finally, there was no real prejudice that Loh suffered in the final analysis. There were undoubtedly means by which Koh *could* have embarked on a more elaborate attempt to conceal the consent orders. It is precisely because he did not that we do not read into his misconduct a more fundamental defect in character. Instead, as with the fourth charge, it reveals to us the same lack of moral courage, the same appalling management of the client relationship and a lack of judgment in this context. Simply put, he wished to avoid being confronted with the consequences of his failure to abide by basic client-management practices. In

all the circumstances of *this* case, we think it falls somewhat short of revealing such a defect in character as to render Koh unfit to remain a member of the profession.

107 In that light, we turn to consider the appropriate sanction which should be imposed on him.

Appropriate sanction

108 The principles which guide the determination of an appropriate sanction to be imposed on an errant advocate and solicitor are well-known: (a) to uphold public confidence in the administration of justice and in the integrity of the legal profession; (b) to protect the public who are dependent on solicitors in the administration of justice; (c) to deter similar offences being committed by the errant solicitor, or for that matter, by other like-minded solicitors; and (d) to punish the errant solicitor for her misconduct (see *Ezekiel Peter Latimer* at [45]; *Udeh Kumar* at [86]; *Ravi s/o Madasamy* at [31]; and *Chia Choon Yang* at [16]).

109 Each of these principles may pull the court in different directions, and the paramount consideration to which the sanction must ultimately give effect is the *public interest*. As we observed in *Ezekiel Peter Latimer* at [46], citing *Ravi s/o Madasamy* at [32]–[34] and *Chia Choon Yang* at [17]:

> … [T]he principal purpose of sanctions is not to punish the errant solicitor but to protect the public and uphold confidence in the integrity of the legal profession, and a particular sanction that might appear excessive when assessed solely from the perspective of the errant solicitor's culpability may nonetheless be warranted to protect the public and uphold confidence in the profession. For this reason, personal mitigating factors carry less weight in disciplinary proceedings than in criminal proceedings; but factors which aggravate the errant solicitor's personal culpability, which would generally tend also to aggravate the adverse impact on the public's confidence in the

> administration of justice, would tend to be of particular relevance …
>
> [citations omitted]

110 Connected to the fundamental importance of giving effect to the public interest is our firm stance against dishonest conduct, and we have, at [69]–[73] above, already set out the relevant principles applicable to dealing with such conduct. To reiterate, the overarching principle is that solicitors who conduct themselves dishonestly will, presumptively, be struck off the roll, *if* their dishonest conduct indicates a character defect rendering them unfit to remain in the profession, or if such conduct undermines the administration of justice (*Chia Choon Yang* at [20]). At [40] of *Chia Choon Yang*, we also set out ***other*** (non-exhaustive) factors which the court should consider in determining whether the sanction of striking off is warranted: (a) the real nature of the wrong and the interest which has been implicated; (b) the extent and nature of the deception; (c) the motivations and reasons behind the dishonesty and whether it indicates a fundamental lack of integrity on the one hand or a case of misjudgment on the other; whether the errant solicitor benefited from the dishonesty; and (d) whether the dishonesty caused actual harm, or had the potential to cause harm which the errant solicitor ought to have or in fact recognised.

111 We have already dealt with most of these considerations in our foregoing analysis. First, as stated at [75], [84] and [106] above, Koh's dishonest conduct that is reflected in the fourth, sixth and ninth charges does not, in our view, indicate a character defect rendering him unfit to remain a member of the profession, and also did not undermine the administration of justice.

112 Second, the real nature of Koh's wrong, in our judgment, is his woefully inadequate management of Loh as his client. In the precise context of this case, what this resulted in was the prejudice to Loh's right to be apprised of and

advised on his legal position and on how his case had been or would be conducted. It bears reiterating that, as *none* of the particulars struck out by consent were reinstated upon Loh's appeal, Loh's *actual* legal position in the divorce was not compromised by Koh's actions. Indeed, we note that shortly after Loh's appeal against both SUM 2009 and SUM 2128, the co-defendant withdrew his defence to adultery, and Loh's divorce proceeded on an uncontested basis.

113 Third, as we suggested at [74]–[75] and [85] above, Koh's deceptions in respect of the fourth and sixth charges ultimately were of no consequence. They had no bearing on the proceedings before AR Tay and amounted to nothing more than vacuous statements which the assistant registrar noted without any effect or significance. As to the ninth charge, though the nature and extent of Koh's deception were certainly more severe, we have summarised our assessment of that conduct at [106] above.

114 Fourth, Koh did not benefit from his dishonesty. Had Koh simply been honest from the outset, he would likely not have found himself in these proceedings before us, facing the possibility of a severe disciplinary sanction.

115 Lastly, Koh's dishonest conduct did not, in the end, cause Loh any harm. That said, as we noted at [104], Koh's attempts to avoid filing an appeal in SUM 2009 *could* have affected Loh's legal position, given that some particulars were reinstated. In this regard, though Loh did not suffer actual harm, we do consider the *potential* harm he could have suffered, which Koh ought to have recognised. Beyond the 19 particulars struck out by consent, there were an additional *40* which AR Tay had struck out on a contested basis. In the face of this, Koh must have appreciated that it was at least possible that some of these particulars may have merited reconsideration on appeal.

116 For all of these reasons, we find that striking off is not warranted here. We do not, however, view Koh's misconduct lightly. He has acted dishonestly, and as we observed in *Chia Choon Yang*, in such circumstances, "it would be a rare case in which a mere censure or fine would be sufficient" (at [41]). Mr Sreenivasan's submission that Koh should only suffer a fine, *even if* he is found guilty of the ninth charge, is therefore wholly out of step with established principles and does not merit serious consideration. In our judgment, a substantial period of suspension is warranted. In reviewing the authorities, we have not found cases that are obviously or directly analogous to the present. In so far as Koh's dishonesty in the ninth charge might be categorised as being concerned with hiding one's mistake from one's own client, there is some similarity with *Caleb Ezekiel*; however, we have explained the difference between that and the present case at [105]–[106] above. Instead, we turn to some other precedents: *Law Society of Singapore v Chung Ting Fai* [2006] 4 SLR(R) 587 ("*Chung Ting Fai*"), *Law Society of Singapore v Sum Chong Mun and another* [2017] 4 SLR 707 ("*Sum Chong Mun*"), and *Michael Quan* (see [71] above).

117 In *Chung Ting Fai*, the errant solicitor ("Chung") represented the complainant ("Lim") in divorce proceedings. In the course of these proceedings, an ancillary order was made in relation to Lim's matrimonial home. After the order had been made, there was some misunderstanding between the parties as to the consequence of the order. Chung only raised the possibility of resolving the misunderstanding by appealing the order, *after* the time for filing an appeal had lapsed. In applying for an extension of time, Chung drafted an affidavit for Lim's affirmation, which falsely placed the blame for the delay on Lim, who refused to endorse the affidavit, and proceeded to lodge a complaint against Chung. In deciding to suspend Chung for one year, the court took into account its determination that the affidavit was not drafted in this manner to shield

himself from a potential suit for professional negligence. Instead, it was motivated by a "misplaced zealousness in order to obtain an extension of time to appeal on behalf of his client" (at [35]).

118 By contrast, in *Michael Quan*, the errant solicitor ("Quan") was struck off the roll. Quan had caused his clients to acknowledge receipt of a sum of $138,895.16 even though a substantial part of this had been paid to third parties whose interest he had preferred. In the course of giving evidence before the disciplinary tribunal, Quan referred to this document to support his story that the full sum had indeed been paid to his clients. This conduct was viewed seriously. The court observed that by his conduct, Quan was seeking not only to "let him[self] off the hook" in relation to the payments made to the third parties, but he had also made it difficult for his clients to prove the exact amount they had received (*Michael Quan* at [26]). In short, there was real prejudice to the client.

119 In our judgment, the severity of Koh's misconduct falls somewhere between these two cases. Unlike Chung, we have found that Koh's dishonest conduct in the ninth charge was not directed at furthering Loh's interests, but at concealing his own failings and breach of the duty he owed to his client. However, unlike Quan, Koh did not ultimately cause real harm or prejudice to his client. In fact, once Koh filed the appeal, he would have known that it was only a matter of time before Loh would discover what he had done.

120 The situation of Koh's misconduct between these two ends of the spectrum, in considering cases involving misconduct in dealing with one's client, suggests that a *substantial* period of suspension is necessary. We also consider some other somewhat analogous cases that resulted in a suspension. In *Sum Chong Mun*, one of two errant solicitors ("Kay") procured another ("Sum")

to make a false attestation that he had witnessed the signature of a donor of a lasting power of attorney ("LPOA"). The donor was a man with whom Kay's sister had been cohabiting, and Kay's sister was to be the donee of the LPOA. Kay was therefore unable to attest to the signature herself as she was related to the donee of the power. We viewed Kay's conduct as being of greater severity and imposed a suspension for a period of 30 months. Sum was suspended for a shorter period of just one year. In determining the appropriate sanction for the two, we observed that Kay had displayed "not a modicum of remorse" for her conduct (at [72]). Throughout the proceedings, she had continued to assert that Sum's breach of duty was due to his "misinterpretation" of her conduct (at [74]). In our judgment, there is a parallel between Koh's position and that of Kay. First, she was found to have falsely represented to Sum that she had witnessed the donor's signature (at [67]), and this was done to procure Sum's false attestation that he had witnessed the donor's signature personally. We are mindful that Kay was not explicitly found to be "dishonest". However, this does not detract from the comparison; and indeed, to the extent that we have *specifically* found Koh to have been dishonest in respect of the fourth, sixth and ninth charges, his misconduct is of a graver character.

121 Second, at the hearing before us, we asked Mr Sreenivasan whether Koh had, at any point, apologised to Loh for the manner in which he had handled his case. Prefaced by an excuse that an opportunity never arose, the long and short of Koh's answer was simply, that he *did not*. Indeed, much like Kay, all throughout the proceedings before the IC, the DT, Woo J in *Andrew Loh (HC) (No 1)*, Thean J in *Andrew Loh (HC) (No 2)*, and us in *Andrew Loh (CA) (No 2)*, Koh contested some or other aspect of the complaints. Indeed, even before us, although Koh accepts that he has acted improperly in respect of the fourth, sixth and eighth charges, he continues to vigorously dispute the ninth and most serious charge, albeit ineffectively. Thus, we find ourselves, nearly seven years

after his misconduct took place, determining the appropriate sanction which ought to be imposed on him.

122 In all the circumstances and considering, in particular, our findings as to Koh's dishonesty, and the need to maintain public confidence in the administration of justice and in the integrity of the legal profession, we consider that the appropriate sanction to be imposed on Koh is a three-year term of suspension.

123 We were cognisant of Koh's submission that he has – in the course of his legal career – undertaken substantial public service. However, we place no weight on this because:

(a) we have found Koh to have acted dishonestly in various ways;

(b) the paramount interests in sentencing solicitors are the protection of the public and the standing of the profession, and personal mitigating circumstances carry little weight (see *Chia Choon Yang* at [17]; *Ravi s/o Madasamy* at [33]; *Ravindra Samuel* at [14] referencing *Bolton v Law Society* [1994] 1 WLR 512 at 518; and *Manjit Singh* at [77]); and

(c) as we explained in *Ang Peng Tiam v Singapore Medical Council and another matter* [2017] 5 SLR 356 at [93]–[94] and [105]–[106], such a record of public service will have limited weight where other sentencing considerations are in play.

Conclusion

124 For the foregoing reasons, we find that Koh's conduct in respect of the ninth charge was fraudulent within s 83(2)(*b*) of the Act; and in relation to the other three charges, that Koh's conduct was unbefitting of an advocate and

solicitor under s 83(2)(*h*). We are satisfied that due cause has been shown against him under s 83(1) of the Act and find that the appropriate sanction to be imposed on him is a three-year term of suspension. As Loh was not represented, he incurred no costs. However, we order that he is entitled to recover reasonable disbursements incurred in taking out this application. Such disbursements will be fixed by us if they cannot be agreed within two weeks of the date of this judgment.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

The applicant in person;
Narayanan Sreenivasan SC and Ranita Yogeeswaran (K&L Gates Straits Law LLC) for the respondent.