MAJLIS PEGUAM

v.

CECIL WILBERT MOHANARAJ ABRAHAM

Federal Court, Putrajaya
Richard Malanjum CJ, David Wong Dak Wah CJSS, Ramly Ali, Balia Yusof Wahi, Mohd Zawawi Salleh FCJJ
[Civil Application No: 02(f)-12-03-2018 (W)]
29 March 2019

Legal Profession: *Disciplinary proceedings — Complaint by Bar Council to Disciplinary Board against the respondent advocate and solicitor for professional misconduct — Allegation that the respondent advocate and solicitor was involved in or responsible for drafting of statutory declaration (SD) — Whether letter of complaint amounted to complaint under Legal Profession Act 1976 — Whether evidence met threshold of beyond reasonable doubt test — Whether there was proper appreciation of circumstantial evidence — Whether the respondent advocate and solicitor drafted or was involved in the drafting of SD2 — Whether misconduct proved — Whether disciplinary body acted fairly and judicially — Whether Bar Council proved case against the respondent advocate and solicitor — Legal Profession Act 1976, ss 94(3), 99(1)*

The late Balasubramaniam ("Bala") was a prosecution witness in the murder trial of one Altantuya Shaaribu ("Altantuya"). Bala had on 1 July 2008 signed a statutory declaration implicating that the then Prime Minister Datuk Seri Najib Tun Razak was, among other things, in a relationship with Altantuya ("SD1"). SD1 was made public by way of a press conference on 3 July 2008. Americk Singh Sidhu ("Americk") who was, at all material times Bala's solicitor, had drafted SD1. The very next day, Bala signed another statutory declaration retracting the entire contents of SD1 on the grounds that it was signed under duress. SD2 was made public vide a press conference on the same day. On 14 December 2012, at Renaissance Hotel Kuala Lumpur, the respondent had allegedly admitted before Tommy Thomas, Lim Chee Wee, Darryl Goon and Dato' Johari Razak and their respective spouses that the respondent had drafted or was involved in the drafting of SD2. Given what had transpired, the Malaysian Bar (appellant) wrote to the respondent and Sunil Abraham ('Sunil') to enquire whether they had any knowledge of the allegations made regarding the preparation of SD2. The respondent and Sunil, through their solicitors, informed the appellant that their clients were unable to assist the appellant premised on the ground of solicitor-client privilege. The respondent's involvement regarding the drafting of SD2 again surfaced in a suit filed by Deepak against Datuk Seri Najib where the respondent was identified in the statement of claim as one of the solicitors involved in the drafting and preparation of SD2. In a news report appearing in Malaysiakini, it was reported that Americk had disclosed at the Malaysian Bar's Annual General Meeting held on 16 March 2013 (AGM) that two weeks prior to the

AGM, he had met the respondent with one Saheran Suhendran Sockanathan ("Socks") and at that meeting the respondent admitted that he had drafted SD2 on the instructions of Datuk Seri Najib. He also informed that the respondent had purportedly apologised for it to Americk. The above events then prompted the appellant, the Malaysian Bar, to begin inquiry and to ultimately lodge a complaint with the Disciplinary Board (DB) about the alleged misconduct on the part of the respondent through a letter dated 4 April 2013. The Disciplinary Committee ("DC"), after hearing the testimony of 14 witnesses, advised the DB to dismiss the complaint. The DC, in essence, found that the evidence was not sufficient to make out a case for disciplinary action to be taken against the respondent. The DB affirmed the finding of the DC. At the High Court, the judge found that there was no good reason to interfere with the decision of the DC and the DB; hence, the complaint of the respondent was dismissed. The appellant's appeal to the Court of Appeal was dismissed. The Court of Appeal also affirmed the findings of the DC premised on the ground that the evidence analysed in its entirety did not cross the threshold standard of proof in making up a case of professional misconduct. The appellant now appealed to this court. The issues before the Federal Court were (i) whether the letter of complaint dated 4 April 2013 amounted to a complaint under the Legal Profession Act 1976 ("LPA"), and (ii) whether the respondent drafted or was involved in the drafting of SD2.

Held (dismissing appeal with no order as to costs):

(1) It is trite law that in interpreting or construing any document, as in the letter of complaint, in this case, to obtain the intent and purpose of the same, courts must read that document in its entirety. Taking that approach, the letter of complaint was a complaint meeting the requirement of s 99(1) of the LPA. The reason being, firstly, complaints made under the LPA are made by lay people who are not very well versed to legalism. Thus, taking a narrow and strict interpretation in construing a complaint letter would defeat the purpose of the LPA which undoubtedly is a piece of legislation aimed to ensure complainants' access to justice is not unduly hampered. Secondly, the heading of the said letter reads like a letter of complaint which goes to show that the only intent of writing the letter is to make a complaint relating to the alleged misconduct of the respondent. Thirdly, a reasonable reading of the letter of complaint and the manner in which the complaint was framed leaves no doubt that the complaint against the respondent is simply that he would be liable for misconduct within the meaning of s 94(3) of the LPA if, after the appropriate inquiry is made, he is found to have committed all the alleged acts listed in the letter of complaint. The Court of Appeal erred in taking up or dealing with the issue of whether the letter of complaint amounted to a complaint in the context of the LPA. There was no appeal by the respondent, neither a cross-appeal on this issue at the Court of Appeal. (paras 29-33)

(2) In disciplinary proceedings in the context of the LPA, the burden is on the appellant to prove what is alleged in the complaint and the standard of proof is one of beyond reasonable doubt similar to that of in the realm of criminal

law. That being the case, the respondent, like an accused in a criminal trial, is fully entitled to call upon his armoury of defence available in law to protect himself against the allegation made. Here the respondent invoked the privilege of solicitor-client which, any solicitor and advocate would normally and is fully entitled to invoke if it relates to queries concerning work done by the firm of the solicitor and advocate and in this case, Zul Rafique & Partners of which the respondent is a partner. Hence, there was no error on the part of the Chairman of the DC, though initially found puzzling, in accepting the respondent's reliance on solicitor-client privilege when it was explained to him that the respondent's firm had given advice on SD2 which warranted invoking the solicitor-client privilege. The respondent in claiming the solicitor-client privilege is a legal right available to him and his firm. It is at the very best or worst a neutral stand which infers nothing adverse against the respondent. (paras 36-43)

(3) From the evidence of Christopher Leong and Richard Wee, the then President and Secretary of the Malaysian Bar respectively, there is no any indication that they had personal knowledge as to who had instructed to the drafting of SD2 and who had a hand in the preparation of SD2. Bearing in mind the charge against the respondent was simply that he was responsible for the drafting of SD2, neither the evidence of the President or Secretary advanced the case for the appellant against the respondent. Their evidence at best is formal. (para 46)

(4) As for the evidence of Tommy Thomas ('Thomas') relating to the gathering at Renaissance Hotel Bar, there were nine people present, and only Thomas had testified that the respondent had divulged to the people present at the gathering that he was the one who had drafted SD2. Thomas's assertion naturally was flatly denied by the respondent at the DC hearing. Thomas's assertion appeared to be at odds with the evidence of four fellow advocates and solicitors, namely Johari Razak and Darryl Goon. The personalities above testified that at no time did the respondent say that he had anything to do with SD2. Johari had also written a letter to deny the version of Thomas's recollection of what was said by the respondent. As rightly found by the Chairman of the DC, in the face of denials by the three witnesses as mentioned earlier, even though such denials are in the form of not remembering that the respondent admitted, the benefit of the doubt was to be given to the respondent. (paras 49-53)

(5) Americk's primary evidence was that the respondent had expressly confessed to him that he was the one responsible for the drafting of SD2 on the instruction of Datuk Seri Najib. That was what he also said at the Malaysian Bar AGM, and that was that the respondent had confessed to him and even apologised for having done so. And it was for those utterances by Americk that the appellant lodged a complaint against the respondent. However, when confronted with the statutory declaration of Socks which stated that at no time at that meeting did the respondent confess or apologise, Americk said that what Socks said was correct technically and the confession and apology

were 'inferences' and 'assumptions'. An express confession could not by any stretch of the imagination be equated with an 'assumption'. If indeed there was an assumption, there was no need for a confession by the respondent. His testimony had also neutralised the evidence of Americk by giving two versions of the event which could not be reconciled. Under such circumstances, the party which bears the burden of proof will suffer the consequence of not having proven its case. Herein, the burden was on the appellant. (paras 58-60)

(6) As for the evidence of one Arulampalam Mariam Pillai, there was no value to it simply that he did not know about the allegation made against the respondent. The same could be said of one Zulkifli Sulong who had interviewed Deepak Jaikishan (Deepak) wherein Deepak allegedly mentioned the respondent's name in regard of the preparation of SD2, but Deepak never came to testify before the DC. Hence, at best, the evidence was hearsay as Zulkifli had said that he had no personal knowledge of the allegation against the respondent. As for the evidence of the remaining two witnesses from Harakah daily, namely Mohd Nazri Abdullah and Majdan Yahya, their evidence was similar to that of Zulkifli in that they were hearsay evidence. In regard of the evidence of Sivarasa Rasiah who had acted for Deepak to file a suit against Datuk Seri Najib, Sivarasa had testified that he had no personal knowledge; hence his evidence was also of no value to the allegation made against the respondent. (paras 61-64)

(7) Sitting in an appellate level and in this case, in its fifth tier, this court must have exceptional reasons to disturb findings of four level of tribunals. The respondent was judged by his peers in the forms of the DC and the DB, and they saw it fit to conclude that the evidence had not met the threshold of the beyond reasonable doubt test. Not only that, both the High Court and the Court of Appeal also saw no reason to disturb the findings of the DC and DB. The evidence of Thomas and Americk, which had been neutralised by contrary evidence, were relied heavily on by the appellant and given this court's analysis of the same, this court could not accede to the submission proffered by the appellant. Hence, there was no failure on both the High Court and Court of Appeal in appreciating the circumstantial evidence. It had not been shown to this court that there was a failure by the disciplinary body in acting justly and judicially in carrying out its duties and that the hearing was conducted without due deliberation and understanding given to the facts of the complaint. There was no blatant error in the application of the law to the factual circumstances. There were too many loose ends in the appellant's case premised on circumstantial evidence. The appellant had failed in proving a beyond reasonable doubt case. (paras 68-70)

Case(s) referred to:

Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 6 MLRA 373 (refd)

Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham [2018] 5 MLRA 241 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s 78(1)

Legal Profession Act 1976, ss 94(3), 99(1)

Counsel:

For the appellant: Bastian Vendargon (Anne Vendargon, Lai Chee Hoe & Lim Soo Chong with him); M/s Chee Hoe & Associates

For the respondent: Rishwant Singh (Shahul Hameed Amirudin with him); M/s Cecil Abraham & Partners

[For the Court of Appeal judgment, please refer to Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham [2018] 5 MLRA 241]

JUDGMENT

David Wong Dak Wah CJSS:

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal in dismissing its appeal against the decision of the High Court in which the learned judge had affirmed the Disciplinary Board's (DB) decision in dismissing the appellant's complaint against the respondent for professional misconduct.

[2] We have heard the appeal and reserved our decision. We have since further considered the submissions of respective counsel and now give our decision and grounds.

[3] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Dato' Sri Balia Yusof Haji Wahi has since retired.

Background Facts

[4] The appellant is the Bar Council of Malaysia, a statutory body tasked, among others, with overseeing the conduct of its members who are advocates and solicitors practicing in Peninsular Malaysia.

[5] The respondent is a member of the Malaysian Bar and had a complaint made against him by a letter dated 4 April 2013 to the DB of the Malaysian Bar. The circumstances in which the complaint was made were these.

[6] Balasubramaniam Perumal (Bala) was a prosecution witness in the murder trial of Altantuya Shaaribuu (Altantuya) and had, on 1 July 2008, signed a statutory declaration (SD1) where he had, *inter alia*, implicated Datuk Seri Najib Tun Razak (Datuk Seri Najib) in a relationship with Altantuya. Americk Singh Sidhu (Americk), then Bala's solicitor, had drafted SD1 on Bala's

instructions. In a press conference on 3 July 2008, SD1 was made known to the public.

[7] Bala, however, on 4 July 2008, signed another statutory declaration (SD2) disavowing the entire contents of SD1 and at the same time alleged that SD1 was signed under duress. In a press conference on 4 July 2008, SD2 was made known to the public.

[8] On or around 12 November 2009, Bala in a three-part video interview which was made known to the public alleged that he signed SD2 under duress.

[9] In a video interview with TV PAS, on or around 12 December 2012, one Deepak Jaikishan (Deepak) identified the solicitors involved in the preparation of SD2 but during the broadcast, that part of the interview was deleted/ muted. Speculation ran rife as to the respondent's involvement regarding the preparation of SD2.

[10] At a wedding function meeting at Renaissance Hotel Kuala Lumpur on 14 December 2012, where the respondent's wife; Tommy Thomas and his wife; Lim Chee Wee; Darryl Goon and his wife and Dato' Johari Razak and his wife were present, the respondent had allegedly confirmed that he was the solicitor who had been involved with the drafting of SD2.

[11] In view of what had transpired, the appellant on 21 January 2013 wrote to the respondent and Sunil Abraham (Sunil) to enquire whether they had any knowledge of the allegations made regarding the preparation of SD2. The relevant part of the letter reads:

> "As both of you may be aware, ... there had been speculation and allegations in various media, of your involvement with regard to the preparation of the SD2.
>
> In view of the allegations of potential misconduct, we are duty-bound to enquire into whether any aspects of the matter have any implications on any issue of professional misconduct.
>
> As such, we would be obliged if you could furnish us with any information with regard to the preparation of SD2 and whether you have any knowledge of the same."

[12] The respondent and Sunil, through their solicitors, by a letter dated 23 January 2013, informed the appellant that their clients were unable to assist the appellant premised on the ground of solicitor-client privilege.

[13] The respondent's involvement regarding the drafting of SD2 again surfaced on or around 22 February 2013 in a suit filed by Deepak against Datuk Seri Najib where the respondent was identified in the statement of claim as one of the solicitors involved in the drafting and preparation of SD2. In view of what was stated in the aforesaid statement of claim, the appellant, on 11 March 2013, wrote to Sivarasa Ramiah, Deepak's solicitor,

requesting for a copy of the statement of claim and seeking information as to how Deepak knew the identity of the solicitors who prepared the SD2. However no information was obtained by the appellant as the aforesaid suit was withdrawn before the close of pleadings.

[14] In a news report appearing in Malaysiakini on 17 March 2013, it was reported that Americk had disclosed at the Malaysian Bar's Annual General Meeting held on 16 March 2013 (AGM) that two weeks prior to the AGM, he had met the respondent with one Saheran Suhendran Sockanathan (Socks) and at that meeting, the respondent admitted that he had drafted SD2 on the instructions of Datuk Seri Najib. He also informed that the respondent had purportedly apologised for it to Americk.

[15] On 27 March 2013, Socks affirmed a statutory declaration stating as follows:

(i) I met with Mr Americk Sidhu (Americk) for lunch on about 27 February 2013. He told me that his client Mr Balasubramaniam (Bala) was considering filing a police report in relation to the Second Statutory Declaration affirmed by him on 1 July 2008 (SD2), which could implicate Tan Sri Dato' Cecil Abraham (Tan Sri Cecil) and Mr Sunil Abraham.

(ii) At about 9.15am the following morning, I met with Tan Sri Cecil at the Kuala Lumpur City Centre and told him that Americk informed me that Bala was considering filing the said police report. I asked whether he would be prepared to meet Americk on a private and strictly confidential basis. Tan Sri Cecil agreed.

(iii) At about 11.00am that morning, Tan Sri Cecil, Americk and I met at Jarrod & Rawlins at the AmpWalk Mall on Jalan Ampang, a restaurant near Americk's office. The meeting lasted about 20-30 minutes. Only the three of us were present throughout the meeting.

(iv) I hereby state that in the course of this meeting:

- at no time did Tan Sri Cecil say that he had personally drafted SD2;

- at no time did Tan Sri Cecil say that he had drafted SD2 on the instructions of the Prime Minister or that the Prime Minister was his client.

[16] The appellant by a letter dated 12 March 2014 by Messrs Lee Hishammudin Allen & Gledhill wrote to Darryl Goon, Tommy Thomas, Dato' Johari Razak and Lim Chee Wee to inquire as to whether it is true that the respondent had at the wedding function at Renaissance Hotel confirmed

that he was responsible or involved for the drafting of SD2. Respective replies were given by the persons named above.

[17] The above events then led to a formal letter of complaint dated 4 April 2013 being filed against the respondent with the DB.

[18] Hearing was conducted by the Disciplinary Committee (DC) which consisted of three members with the Chairman one Mr Foo Kai Yuen. The DC in essence found that the evidence was not sufficient to make out a case for disciplinary action to be taken against the respondent. The finding of the DC was affirmed by the DB by a letter dated 14 March 2016.

The High Court

[19] The learned judge applied the well trusted principle that in an appeal where the complaint was largely premised on findings of facts and in this appeal by two sets of tribunal in the DC and DB, an appellate court would be slow in overturning those findings especially when those findings were anchored solely on the credibility of witnesses on disputed matters of fact coupled with the fact that there was no contemporaneous document to be considered.

[20] The learned judge also relied on the well trusted principle that in matters of professional discipline, it is best left in the hand of the profession and its members themselves to determine what is the best practice which must be adhered to and that the courts of law will not interfere unless and until the aforesaid practice runs contrary to common sense and unsupported by any cogent reason.

[21] Applying the aforesaid principles of law, the learned judge found that there was no good reason to interfere with the decision of the DC and the DB, hence dismissing the complaint of the respondent.

The Court Of Appeal

[22] The Court of Appeal mainly dealt with two issues, namely, whether there was in fact a "complaint" against the respondent in the letter of complaint dated 4 April 2013 and whether a case has been made out for disciplinary action by the appellant against the respondent.

[23] In regard to the letter of complaint dated 4 April 2013, the Court of Appeal found as follows:

> "[34] To recapitulate, the appellant's letter dated 4 April 2013 as expressed in its heading, was a complaint. Indeed that was the evidence of Christopher Leong, ie, that the letter was regarded as a complaint. However, from the contents of the said letter, we found no actual complaint or allegation or assertion of any facts pointing to any misconduct of the respondent as such, in relation to SD2. There were no facts stated as to what the respondent had done or had omitted to do which constituted misconduct. Rather, by the said letter, the appellant was in effect seeking to obtain information. In other

words, by the said letter, the DC was "requested" to "formally investigate" whether there is any basis for a complaint against the respondent."

[24] In regard to the case against the respondent for professional misconduct, the Court of Appeal affirmed the findings of the DC premised on the ground that the evidence analysed in its entirety did not cross the threshold standard of proof in making up a case of professional misconduct. In short, it was found by the Court of Appeal that the DC's conclusion was grounded on reasons which could not be displaced by an Appellate Court.

Our Grounds Of Decision:

[25] Before us from the outset, respective counsel agreed that there are only two issues which require our deliberation and they are as follows:

1. Whether the letter of complaint dated 4 April 2013 amounts to a complaint as envisaged by the Legal Profession Act (LPA)?

2. Whether the respondent drafted or was involved in the drafting of SD2?

Issue 1 - Letter Of Complaint

[26] For clarity, we reproduce the letter of complaint herein:

"Complaint against Cecil Wilbert Mohanaraj Abraham of Zul Rafique & Partners

1. We wish to lodge a complaint for the Disciplinary Board's investigation against Cecil Wilbert Mohanaraj Abraham (CA)

...

2. The facts and chronology leading to the complaint against CA and the documents referred to in it are the enclosed bundle marked 'Appendix A'.

3. In view of the said facts and chronology, and the documents referred to therein, we request the Disciplinary Board to formally investigate:

3.1. Whether CA drafted or was responsible for or involved in the drafting of the statutory declaration signed by one Balasubramaniam Perumal (Bala) on 4 July 2008 (SD2) to retract a previous statutory declaration drafted by Bala's lawyer, and signed by Bala on 1 July 2008 (SD1);

3.2. If CA drafted or was responsible for or involved in the drafting of SD2, the circumstances in which SD2 was signed by Bala before the Commissioner for Oaths, Zainal Abidin Muhayat, including:

(a) Whether CA met or was instructed by Bala, in regard to the drafting of SD2;

(b) Whether CA knew or had reason to believe that Bala was at the material time represented by a lawyer with respect to matters

addressed in or relating to or connected with SD2, bearing in mind that Bala was represented by a lawyer with respect to SD1 which was sought to be contradicted by SD2;

(c) If so, whether CA informed Bala's lawyer of what CA was doing or intended to do with respect to SD2 and/or sought the consent of Bala's lawyer to do so;

(d) Whether CA had in any way verified or confirmed with Bala the contents of SD2 and that it reflects Bala's instructions, before it was signed by Bala;

(e) Whether CA had, prior to its signing, explained the contents and nature of SD2 to Bala;

(f) Whether CA had, prior to its signing, explained to Bala the consequences and risks involved of signing SD2;

(g) Whether CA satisfied himself that Bala understood the contents and nature of SD2, and understood the consequences and risks involved of signing SD2;

(h) Whether CA had ascertained or satisfied himself that Bala was not acting under duress in signing SD2 given the circumstances, including but not limited to an ongoing criminal trial at the time which SD2 and SD1 may have a bearing on, and that SD2 states that SD1 was signed under duress; and/or

(i) Whether CA had informed or advised Bala that he could and/or should obtain independent legal advice with respect to the contents and signing of SD2 prior to signing it.

4. CA is liable for misconduct within the meaning of s 94(3) of the Legal Profession Act 1976 if it is found by the Disciplinary Board/Disciplinary Committee that CA drafted or was responsible for or involved in the drafting of SD2, and:

(a) Did not meet with or was not instructed by Bala with regard to the drafting of SD2;

(b) Knew or had reason to believe that Bala was at the material time represented by a lawyer with respect to matters addressed in or relating to or connected with SD2, but failed to inform Bala's lawyer that he had been instructed to draft SD2 for Bala to sign, and/or seek the consent of Bala's lawyer to do so;

(c) Failed to verify or confirm with Bala the contents of SD2 and that it reflects Bala instructions;

(d) Failed to explain to Bala the contents and nature of SD2 and the consequences and risks involved of signing SD2, prior to its signing;

(e) Failed to satisfy himself that Bala understood the contents and nature of SD2 and the consequences and risks involved of signing SD2;

(f) Failed to ascertain and/or satisfy himself that Bala was not acting under duress in signing SD2 given the circumstances;

(g) Failed to inform or advise Bala he could and/or should obtain independent legal advice with respect to the contents and signing of SD2 prior to signing it;

(h) Failed in all circumstances to discharge his duty to Bala as an advocate & solicitor notwithstanding that Bala may not be his client; and/or

(i) In all the circumstances, acted in a manner unbefitting of an advocate & solicitor or which brings or is calculated to bring the legal profession into disrepute, and/or failed to uphold the interest of justice and/or the dignity and high standing of the legal profession."

[27] Learned counsel for the respondent, apart from relying on the reasoning of Court of Appeal, submits that in the complaint made against the respondent, there must be a positive assertion of facts by the appellant as opposed to a request for an exercise to determine whether there is any basis for the complaint. This is necessary for the reason that the respondent is entitled to know exactly what case he has to meet. Failure on the part of the appellant to make such assertions amounted to a breach of the principle of natural justice. In short, the letter of complaint was not a complaint at all.

[28] Learned counsel also relied on the testimony of the author of the letter of complaint, then Chairman of the appellant, Christopher Leong where in cross-examination he said as follows:

"Q: In fact do you agree that the Bar Council (BC) has not in its letter at p 1 specifically alleged that the respondent had anything to do with SD2

Chairman Again?

[Repeats question]

A: Yes.

Q: That is correct isn't it?

A: Yes.

Q: So isn't it correct to say that the BC is not actually complaining or alleging that the respondent had anything to do with SD2 but is merely requesting an investigation into it by the Disciplinary Board (DB)?

A: Correct."

And at pp 407 to 408 CB1:

"Q: A complaint has to translate into an allegation and you are suggesting that the allegation is somewhere in there and we have to sift it out, is it?

A: If you look at p 3 sorry para 3, in view of the said facts and chronology, and the documents referred to, we request the DB to formally investigate. These are the specific allegations investigate these and if you find yes this is the case then we believe...

Q: What is the investigation? Whether?

A: Yes, sure.

Q: So it is not an allegation that the respondent did?

A: Yeah.

Q: It is a request whether?

A: Yes.

Q: To discover?

A: Yes.

Q: Rather than an allegation?

A: That's always the case for the DB. Always enquire as to whether the allegation of the one side is borne out.

Q: I would suggest that in essence, in substance, both, in substance and form, this is not a complaint. There is no allegation. It's a request for an inquiry. Supported by a series of facts which the BC itself cannot verify or had not verified on oath.

A: Yeah, we don't have personal knowledge, yes, certainly."

[29] In interpreting or construing any document, as in the letter of complaint in this case, to obtain the intent and purpose of the same, courts must read that document in its entirety. That is trite law. Taking that approach, we have no hesitation in concluding that the letter of complaint was in fact a complaint meeting the requirement of s 99(1) of the LPA and our reasons are these.

[30] Firstly, one must not lose sight of the fact that complaints made under the LPA are mostly made by lay people and if one is to take a strict and narrow approach in determining whether a letter written by someone not well versed to legalism would in our view defeat the purpose of the LPA which undoubtedly is a piece of legislation aimed to ensure complainants' access to justice is not unduly hampered.

[31] Secondly, we must give some meaning to the heading of letter of complaint which simply reads "COMPLAINT". It also begs the question - "why should the complainant write to the DC in the first place?". The answer surely is that the only intent is to make a complaint relating to the alleged misconduct of the respondent. As to how the complaint is framed, they should not be construed in a manner which may make one's constitutional right to access to justice erroneous. Hence with respect there was no necessity to seek solace in the Oxford Dictionary to determine what the word "complaint" means in the context of the LPA.

[32] Thirdly, the manner in which the complaint was framed in our view leaves no doubt in our minds that the complaint against the respondent is simply

that he would be liable for misconduct within the meaning of s 94(3) of the LPA if, after the appropriate inquiry is made, he is found to have committed all the alleged acts listed in the letter of complaint. To say that the contents of the letter of complaint do not amount to a complaint with respect would run contrary to a reasonable reading of it.

[33] Finally we see some merit in the appellant's complaint concerning the Court of Appeal's taking up or dealing with the issue of the letter of complaint not amounting to a complaint in the context of the LPA as a preliminary issue where there was no finding in the High Court on this issue plus the fact that there was no appeal by the respondent on this issue at the Court of Appeal. The law set out by this court in *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 6 MLRA 373 is quite clear and that is where the respondent wants to reverse or set aside part of a finding, decision or judgment of the lower court which was not appealed in the appellant's notice of appeal, it is incumbent on the respondent to file an independent and separate notice of appeal, rather than a notice of cross-appeal. Here, the respondent at the Court of Appeal neither filed a cross-appeal or separate appeal.

[34] For reasons stated above, we with respect disagree with the finding of the Court of Appeal on this issue.

Issue 2- The Respondent's Involvement In The Drafting Of SD2

[35] Learned counsel for the appellant in his submission list three main complaints of the decision of the Court of Appeal and they are these:

(i) Failure to appreciate and evaluate the drastic change in defence.

(ii) Failure to appreciate the strong circumstantial evidence.

(iii) Failure to apply the proper test for appellate intervention in disciplinary appeals.

[36] Before we deal with the above complaints, we wish to reiterate that in disciplinary proceedings in the context of the LPA, the burden is on the appellant to prove what is alleged in the complaint and the standard of proof is one of beyond reasonable doubt similar to that of in the realm of criminal law. (See *Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham* [2018] 5 MLRA 241). The requirement of the beyond reasonable doubt burden as opposed to on a balance of probabilities burden is understandable as it concerns to the right of livelihood of the advocate and solicitor. Any other standard would not be consonant to the sacrosanct right to livelihood.

[37] Another point which we must mention is that the LPA places the primary burden on the disciplinary tribunal in the form the disciplinary committee and the Bar Council to oversee the conduct of advocates and solicitors. It is a matter of peers judging peers premised on standard of conduct determined

by themselves. The court's role is one of review in a form of hearing appeals from any aggrieved party by the order of the DB. With that we now move to the substance of the appeal.

[38] To recapitulate, the substance of the complaint was that whether the respondent was responsible in the drafting of SD2.

[39] From the submission of the learned counsel for the appellant, it can be surmised that their complaint against the decision and grounds of the DC, learned judge of the High Court and the Court of Appeal is simply that there was a lack of consideration of the events or conducts of the relevant parties prior to the official complaint made in the letter of complaint dated 4 April 2013.

[40] The first point of contention made by learned counsel is that the DC, learned judge of the High Court and the Court of Appeal gave no due or adequate consideration to the fact that there was no reasonable explanation given by the respondent as to why his initial reliance on solicitor-client privilege in refusing to answer the appellant's queries and then a "diametrical" shift to a complete denial defence.

[41] To support the aforesaid contention, learned counsel refers to various letters exchanged between the appellant and the respondent. The sum of those letters was simply that the respondent had sought refuge under the cover of solicitor-client privilege and never expressly denied the allegation that he had anything to do with SD2. The question at this juncture which we need to ask ourselves is simply whether the stand taken by the respondent at that particular time is a reasonable one or one which a solicitor and advocate would take under the circumstances without drawing any negative inference of guilt against himself.

[42] As alluded earlier, the standard of proof in disciplinary matters before the BC is one of beyond reasonable doubt similar to that of a criminal proceeding. That being the case, the respondent, like an accused in a criminal trial, is fully entitled to call upon his armoury of defence available in law to protect himself against the allegation made. Here the respondent invoked the privilege of solicitor-client which, in our view, any solicitor and advocate would normally and is fully entitled to invoke if it relates to queries concerning work done by the firm of the solicitor and advocate and in this case, Zul Rafique & Partners of which the respondent is a partner. Hence, we see no error on the part of the Chairman of the DC, though initially found puzzling, in accepting the respondent's reliance on solicitor-client privilege when it was explained to him that the respondent's firm had given advice on SD2 which warranted invoking solicitor-client privilege.

[43] The respondent in his evidence through cross-examination had said that the crucial letter of denial is that of the letter dated 18 March 2013. Can we say then that this denial is "diametrically different" to that claiming solicitor-client

privilege? With respect, we answer that question in the negative. As said in the last paragraph, the respondent in claiming solicitor-client privilege is a legal right available to him and his firm. It is at the very best or worst a neutral stand which infer nothing negative against the respondent.

[44] Learned counsel also submits that there was a failure on the part of the DC, learned judge of the High Court and Court of Appeal to appreciate the circumstantial evidence in that those evidence is such that when viewed collectively "can be woven together to form a rope" sufficiently to find the respondent of misconduct under the LPA. These are the evidence listed by learned counsel:

(a) CW1 - Christopher Leong Sau Foo, then President of the Bar Council & Malaysian Bar;

(b) CW2 - Richard Wee Thiam Seng, then Secretary of the Bar Council & Malaysian Bar;

(c) CW3 - Tommy Thomas, one of the personalities at the Renaissance Hotel function on 14 December 2012;

(d) CW4 - Americk Sidhu, P I Bala's solicitor who prepared SD1;

(e) CW5 - Arulampalam Mariampillai, the solicitor who was present with P I Bala at the press conference on 4 July 2008 when SD2 was made public;

(f) CW6 - Zulkifli Sulong, the interviewer of Deepak's on 12 December 2012 interview with PAS TV;

(g) CW7 - Mohd Nazri Abdullah, News Editor and Head of Division for videos and texts with Harakah Daily;

(h) CW8 - Majdan Yahya, Assistant Editor for articles with Harakah Daily and the videographer of Deepak's on 12 December 2012 interview with PAS TV; and

(i) CW9 - Sivarasa Rasiah, Deepak's solicitor in the civil action (Case No: 23NCVC-22-02-2013) against then Prime Minister, Dato' Seri Najib Razak.

(j) SD2 was in existence. Bala executed it and it was witnessed by a Commissioner for Oaths, Zainal Abidin Muhayat.

(k) SD2 retracted all negative material statements in SD1 relating to the Prime Minister, Dato' Seri Najib Tun Razak.

(l) Bala executed the same (SD2), without knowing who prepared or had been involved with its preparation.

(m) Bala had executed SD1, and SD1 had been prepared by Americk on his (Bala's) instructions.

[45] From the outset of our analysis, let us state the obvious and that is the best evidence in the whole scheme of thing is that of Bala who had signed both SD1 and SD2 but unfortunately, he had passed on well before the disciplinary hearing and hence was not a witness at the disciplinary hearing. Without his evidence, it can be said that the other evidence before the disciplinary hearing substantially are hearsay in nature. Hence it is understandable for the appellant's learned counsel to rely on circumstantial evidence to prove his case. The law on circumstantial evidence is trite. Suffice for us to say that these circumstantial evidences must form an unbroken chain of evidence leading to only one inference and that is the misconduct of the respondent as a solicitor and advocate. With that, we now examine those circumstantial evidences.

[46] We deal first with the evidence of Christopher Leong and Richard Wee, then President and Secretary of the Malaysian Bar respectedly. From our reading of the evidence given by them, we cannot find any indication that they had personal knowledge as to who had instructed to the drafting of SD2 and who had a hand in the preparation of SD2. Bearing in mind the charge against the respondent is simply that he was responsible for the drafting of SD2, neither the evidence of the President or Secretary in our view advance the case for the appellant against the respondent. Their evidence at best is formal in nature.

[47] As for the submission regarding "the respondent caught in the middle of a cross fire", the President clarified as follows:

> "A Mr Chairman, my feeling, now this is my personal feeling, I can't speak for the other members of the BC, my feeling is that I know that people who appears to have first hand knowledge of this, for example, Deepak or AS, they have not saw fit themselves to file a complaint directly. In fact at the AGM and I am recalling this from memory, AS was specifically asked by someone from the floor that he should then proceed to file a police report and or a complaint. And AS addressed, took the microphone, and said no, that was not his intention that morning. His intention that morning was to reveal who was the client that instructed the lawyer. That his focus was the client. That was what AS said. Therefore he categorically made it clear that he would not be filing a police report or a complaint. So in my mind, what that means is that there are certain parties more interested in knowing who is the person who instructed the lawyer to draft the statutory declaration. And therefore the lawyer is therefore really caught in the cross fire. It does not mean that the lawyer was not involved. Really the main interest was not in the lawyer. The main interest was in this case, the allegation was Najib. That it was Najib that instructed the lawyer. Therefore, the fact that the lawyer is allegedly Tan Sri is just secondary to that objective. That is what I meant."

[48] With respect, we find no merit in the attempt by learned counsel in putting a negative spin on the phrase "caught in the cross fire" by linking SD2 to the respondent.

[49] As for the evidence of Tommy Thomas (Thomas), his crucial evidence relating to the gathering at Renaissance Hotel Bar is this:

> "9. After dinner, at about 10.00pm, Cecil, Johari and I, and our wives adjourned for drinks at the Renaissance Hotel bar. We were joined by Mr Darryl Goon and his wife, Yet, and Mr Lim Chee Wee. I cannot recall if Chee Wee's wife was also present.
>
> 10. Whilst having drinks, Betty Abraham brought up the subject of SD2. She complained about the extensive publicity given to it because of Deepak's revelations.
>
> 11. After his wife had introduced the issue, Cecil told the rest of us of his involvement in the matter. He said that he had drafted SD2.
>
> 12. The rest of us were sympathetic to Cecil's plight. None of us spoke much about the matter. It was only Cecil and Betty who talked about it."

[50] There is no dispute that there were nine people present at the gathering and only Thomas had testified that the respondent had divulged to the people present at the gathering that he was the one who had drafted SD2. Thomas's assertion naturally was flatly denied by the respondent at the DC hearing.

[51] Thomas's assertion appears to be at odds with the evidence of four fellow advocates and solicitors, namely, Johari Razak (Johari), Darryl Goon (Darryl), Foo Yet Ngo (Ngo) and Lim Chee Wee (Chee Wee). The aforesaid personalities save and except Johari all testified that at no time did the respondent say that he had anything to do with SD2. Learned counsel for the appellant however submits that Mr Darryl Goon, Ms Foo Yet Ngo and Mr Lim Chee Wee were all interested witnesses in that they are close personal friends of the respondent and hence their evidence should not overshadow or cast any doubt as to the veracity of the evidence of Thomas. This is set out in details at pp 33-39 in the appellant's submission and suffice for us to say that we have taken account of it in our deliberation.

[52] As for Johari who is the fourth lawyer present at the Renaissance Hotel, he had written a letter dated 17 March 2014 to deny the version of Thomas's recollection of what was said by the respondent. Learned counsel for the appellant submits that the Court of Appeal had erred when they did not take into account of the fact that Johari was never called by the respondent to give evidence at the DC. With respect, we find no merit in such submission for two reasons. Firstly, the respondent is fully entitled to call anyone or not call anyone as he wishes to do so. That right is solely within the discretion of the respondent to exercise. Secondly, the burden is on the appellant to prove its case against the respondent, hence it had every right and should have subpoenaed then to testify. When the appellant did not do that, it took the risk of not having proven its case.

[53] Before we leave the Renaissance event, we note that the Chairman of the DC could not make any definitive finding, and this is how he rationalised it:

"...Without casting any aspersion on Tommy Thomas, in the face of denials by the aforesaid three witnesses, even though such denials are in the form of not remembering that the respondent actually admitted, the benefit of the doubt is to be given to the respondent."

(See para 2 p 4 CBJ)

[54] We now come to the evidence of Americk Sidhu (Americk) who had a meeting with the respondent and one Saheran Suhendran Sockanathan (Sock) on 28 February 2013 at Jarrod & Rawlins, Ampang. Americk's evidence came in the form of a letter and a witness statement dated 29 March 2013 (p 127 CBD) and 13 February 2014 (p 263 CBD) respectively.

[55] In substance, Americk's evidence was that at the meeting dated 28 February 2013 with Sock and the respondent, the respondent had confessed to him that he had drafted SD2 on the instruction of a "we all know who" client meaning Dato' Seri Najib and had said that he was sorry for the inconvenience caused.

[56] His evidence as submitted by learned counsel for the respondent is contradicted by the statutory declaration of Sock. This was put to Americk in cross-examination and for clarity we set out the relevant part which read as follows:

RISH.S You said there were other witnesses Mr Sidhu. You are aware that Socks was present at this meeting?

AMERICK Yes he was.

RISH.S And he has affirmed a statutory declaration.

AMERICK Which is technically correct.

RISH.S Which says that he heard no such thing of what you said. Yes Mr Sidhu?

AMERICK He didn't say that exactly. I suggest you read his statutory declaration again.

RISH.S Lets read the statutory declaration Mr Sidhu. Members of the tribunal can I please refer the tribunal to the record of complaint at p 129? Saheran Suhendran Sockanathan is Socks Mr Sidhu?

AMERICK Yes.

RISH.S Paragraph is the relevant paragraph.

AMERICK Yes.

RISH.S Paragraph 3 speaks about the meeting. On the 27th of February yes Mr Sidhu?

AMERICK Correct.

RISH.S Paragraph 4, I read. I hereby state in the course of this meeting at no time did Tan Sri Cecil say that he had personally drafted SD2.

AMERICK Correct.

RISH.S 4.2, at no time did Tan Sri Cecil said that he had drafted SD2 on the instructions of the Prime Minister or that the Prime Minister was his client.

AMERICK Correct.

RISH.S So we only have out of three people at that meeting, we only have your word that we have to believe, yes Mr Sidhu?

AMERICK No.

RISH.S We only have only three people at the meeting.

AMERICK Yes.

RISH.S Only you maintained what you now maintain, yes?

AMERICK Yes.

RISH.S The other two say otherwise.

AMERICK I disagree.

[57] Faced with the apparent contradiction by Socks in his statutory declaration, Americk explains the contradiction in re-examination as follows: [p 609 line 17 - 610 line 8 CB2]

DATO BV Thank you. Page 129. Ok this is the statutory declaration Suhendran Socks. And you were referred to this and you were asked to read among other things para 4 where he says, hereby states that in the course of this meeting 4.1 at no time did Tan Sri Cecil say the he had personally drafted SD2 4.2 at no time did Tan Sri Cecil say that he had drafted SD2 on the instructions of the Prime Minister or that the Prime Minister was his client and you had said that yes, that is correct this paragraph. Is there anything else you wish to add?

AMERICK Yes, as I said Socks is technically correct. Because you must understand that when this arrangement was made to meet the respondent I had not requested for this meeting. It was Socks who said why don't you meet with the respondent and sort it out. The assumption was before this meeting was held that the respondent did in fact draft SD2. So that is the reason why the meeting was held to basically accept the apology and persuade Bala not to lodge a police report. So when that meeting started there wasn't any questions about did you or did you not draft SD2. The implication there was it was drafted by me and reasoning given was you know you get instructions from clients

> to draft documents. We don't know what they are used for. We draft them then we hand them back to the client. What they do with it is their business. So that assumption was already there. That SD2 was drafted by the respondent. So when Socks says at no time did Tan Sri Cecil say that he had personally drafted SD2, that is absolutely correct. Secondly as far as Prime Minister or Deputy Prime Minister is, I said who asked you to this? We all know who. I said Najib? That's all. Socks is technically correct when he says at no time did Tan Sri say he had drafted SD2 or the Prime Minister was his client. That's absolutely correct. I have no issue with that."

[58] From the transcripts set out above, it is quite clear to us that Americk's primary evidence is that the respondent had expressly confessed to him that he was the one responsible for the drafting of SD2 on the instruction of Dato' Seri Najib. That was what he also said at the Malaysian Bar AGM on 16 March 2013 (p 854 CB2) and that is the respondent had confessed to him and also apologised for having done so. And it was for those utterances by Americk that the appellant lodged a complaint against the respondent.

[59] However, when confronted with the statutory declaration of Socks which states that at no time at that meeting did the respondent confess or apologise, Americk said that what Socks said was correct technically and the confession and apology were "inferences" and "assumptions". With respect, an express confession cannot by any stretch of imagination be equated with an "assumption". If indeed there was an assumption, there was no need for a confession by the respondent. Hence, we are not surprised with the conclusion of one Jadadish Chandra, a member of the DC which found that:

> "14 ... He [Americk] further agreed with Sock's evidence that the respondent did not say that he had personally drafted SD2 nor that the Prime Minister was his client. In effect, Americk agreed in cross-examination that there was no confession by the respondent."

[60] It is also our view that the evidence of Americk has been neutralised by his own testimony by giving two versions of the event which cannot be reconciled. Our view is similar to that of the Chairman of the DC where he said "I am reluctant to conclude that either Americk or Saheran is not telling the truth". Under such circumstances, the law is clear, the party which bears the burden of proof will suffer consequence of not having proven its case. In the case before us, the burden is on the appellant.

[61] As for the evidence of one Arulampalam Mariam Pillai, there is no value to it simply that he had no knowledge of the allegation made against the respondent.

[62] The same could be said of one Zulkifli Sulong who had interviewed Deepak Jaikishan (Deepak) wherein Deepak allegedly mentioned the respondent's name in regard of the preparation of SD2, but Deepak never

came to testify before the DC. Hence, at best the evidence is hearsay as Zulkifli had said that he had no personal knowledge of the allegation against the respondent. Furthermore, there is merit in the complaint by learned counsel for the respondent that the videotape produced before the DC was not the original but an edited version and there was no evidence by the editor of what was edited and was not edited. Hence to rely on such evidence would be wrong in law.

[63] As for the evidence of the remaining two witnesses from Harakah Daily, namely Mohd Nazri Abdullah and Majdan Yahya, their evidence is similar to that Zulkifli in that they are hearsay evidence.

[64] In regard of the evidence of Sivarasa Rasiah who had acted for Deepak to file a suit against Dato' Seri Najib where in the statement of claim Deepak had pleaded that the respondent had drafted SD2. But this suit had been settled and the suit was withdrawn. Also, Sivarasa had testified that he had no personal knowledge, hence his evidence is also of no value to the allegation made against the respondent.

[65] A point which was not much argued by learned counsel for the appellant is the point made by one member of the DC, Dr Kuladeva Retnam and it is this:

> "I am not sure whether the respondent drafted SD2. If he had done so it was not wrong as he prepared it for a client. However, it would have been pertinent to advise the party who is making the declaration because of the conflict involved arising from SD1. I do not think it is unethical if the respondent had prepared SD2 as he did it for a client and not for the deponent." [p 7 CBJ]

[66] Sitting in an appellate level and in this case in its fifth tier, this court must have exceptional reasons to disturb findings of four level of tribunals. Again, we reiterate that the respondent was judged by his peers in the forms of the DC and the DB and they saw it fit to conclude that the evidence had not met the threshold of the beyond reasonable doubt test. Not only that, both the High Court and the Court of Appeal also saw no reason to disturb the findings of the DC and DB. For us to do so as urged by learned counsel would require us to take a diametrical stand in which would include completely ignoring the audio and visual advantage enjoyed by the DC. We are aware that we are entitled to do so in law but in the circumstances of this case, there are no reasons for us to do so.

[67] We certainly concur with the manner in which the Court of Appeal had come to its decision as reflected in this part of their grounds:

> "[63] To conclude, we found that the evidence against the respondent was inconclusive and largely hearsay and did not meet the required standard of proof. Given Christopher Leong's evidence that the mere drafting of SD2 itself is not a misconduct under the LPA and that the appellant was being 'used', and in the light of the real agenda of Americk in revealing the issue

of SD2, we found that the evidence was unsafe to warrant a finding of misconduct within s 94 of the LPA against the respondent, even assuming for a moment that the drafting of the SD2 may amount to misconduct."

Conclusion

[68] This is a case where we could say that when we look at all the surrounding circumstances, we cannot find a series of undersigned, unexpected coincidences that a reasonable tribunal would find that those circumstances lead to one and only inference. As pointed out by us earlier, the evidence of Thomas and Americk had been neutralised so to speak by contrary evidence. The evidence of Thomas and Americk are relied heavily by the appellant's counsel and in view of our analysis of the same, we could not accede to the submission proffered by learned counsel for the appellant. Hence there was no failure on both the High Court and Court of Appeal in appreciating the circumstantial evidence as set out by the learned counsel for the appellant.

[69] This is definitely not a case where the appellant had made out a case where we can depart from the well settled principle that as a general rule, the policy is that the courts do not interfere in matters of professional discipline, but to leave matters of discipline to the body entrusted by Parliament to regulate and discipline members of the profession. It had not been shown to us that there was failure by the disciplinary body in acting fairly and judicially in carrying out its duties, and that the hearing was conducted without due deliberation and understanding given to the facts of the complaint. There was no blatant error in the application of the law to the factual circumstances.

[70] Though not required of us sitting as an Appellate Court, we took the trouble of analysing the evidence in its totality as they appear in the cold print of the notes of proceedings and after having done so, we still find that the appellant had failed in proving a beyond reasonable case against the respondent. There are too many loose ends so to speak in the appellant's case premised on circumstantial evidence.

[71] In the circumstances, we dismiss the appeal with no order as to costs as agreed.

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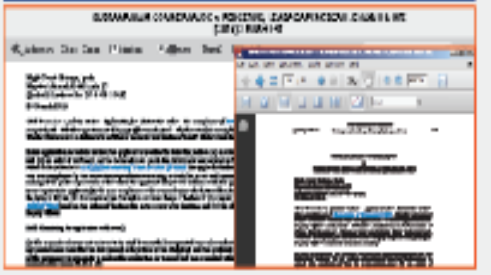

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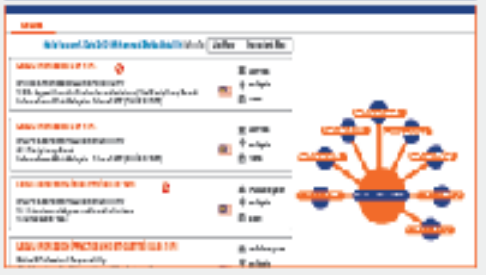

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