

Conflicts in Legal Representation:

Law Society of Singapore v Lee Suet Fern (alias Lim Suet Fern) [2020] SGHC 255

I. EXECUTIVE SUMMARY

It is not surprising that the law regulates the conduct of lawyers, especially when it comes to the lawyer's duty to the client. In such relationships, lawyers are placed in positions of trust, with clients relying on them for their expertise, integrity, and judgement. The law thus obliges lawyers to act with utmost loyalty and care in dealing with their clients.

Such duties are not restricted to situations where a lawyer expressly enters into a retainer agreement¹ with a client (i.e. an express retainer). For example, where an *express* retainer is not established, but the parties nevertheless act in a manner which conveys a lawyer-client relationship, a retainer may still be *implied*, with similar duties imposed on the lawyer. Further, even if no retainer is established, a lawyer can still be sanctioned if his/her conduct is found to be unbefitting of a lawyer.

This strict standard was recently illustrated in *Law Society of Singapore v Lee Suet Fern (alias Lim Suet Fern)* [2020] SGHC 255. The case centres around Mrs Lee Suet Fern's ("Mrs LSF") participation in the preparation and execution of the last will (the "**Last Will**") of her father-in-law, the late Mr Lee Kuan Yew² (the "**Testator**"). Following a complaint filed by the Attorney-General's Chambers, the Law Society brought two main charges against Mrs LSF. The first charge related to the alleged breach of her duty to advance the Testator's interest unaffected by her interest or the interest of her husband and the Testator's second son, Mr Lee Hsien Yang ("**Mr LHY**"), who was a significant beneficiary under the Last Will. The second charge related to her alleged failure in advising the Testator to seek independent advice regarding the preparation of the Last Will, despite her husband's interest in the Last Will.

Although the Court of Three Judges (the "**Court**") found no retainer (whether express or implied) between Mrs LSF and the Testator, it held that she was nonetheless guilty of misconduct unbefitting an advocate and solicitor. As such, it suspended her from practising as a solicitor for 15 months.

II. MATERIAL FACTS

A. Background

Prior to executing the Last Will, the Testator executed six wills from August 2011 to November 2012. In amending these wills, the Testator would often change his mind about the disposition of his assets (including his house at Oxley Road) to his children. For instance, his first will granted all 3 of his children equal shares of his assets (the "**First Will**"). This was altered in his third will, where his daughter Dr Lee Wei Ling ("**Dr LWL**") was granted an additional share. Each of these wills, save for the Last Will, was prepared by Ms Kwa Kim Li ("**Ms Kwa**"), a partner in the law firm, Lee & Lee. The critical wills in discussion here are the First Will and the Last Will.

The key events occurred towards the end of 2013, much of which were illustrated through emails between the relevant parties. From around 29 November 2013 to 13 December 2013, the Testator discussed with Ms Kwa some changes which he wished to make to his sixth will ("**Sixth Will**"). As of 13 December 2013, his professed intention was to execute a codicil to his Sixth Will that would: (a) revert to leaving his estate to his three children in equal shares;³ and (b) make provision for two carpets to be bequeathed to Mr LHY.

Sometime between 13 and 16 December 2013, the Testator decided to reinstate the First Will, rather

¹ A retainer agreement is a work-for-hire contract typically entered into to secure a lawyer's services. It establishes a solicitor-client relationship between parties.

² Mr Lee Kuan Yew was the first Prime Minister of Singapore.

³ Unlike what had been provided for in the Sixth Will, Dr LWL would not be left an additional share.

than execute a codicil to his Sixth Will. On December 16 2013, at 7.08pm, Mrs LSF sent an email (the “**7.08pm email**”) to the Testator, copying Mr LHY and Ms Kwa. The email included a copy of a draft will (the “**Draft Last Will**”). In this email, Mrs LSF informed the Testator that this was the First Will and requested Ms Kwa to engross it. *However*, the Draft Last Will differed from the First Will in a number of important respects. Also, the circumstances which led to Mrs LSF sending this email, and the means by which she obtained the Draft Last Will, were the subject of much dispute and would have to be later resolved by the Court.

Shortly after at 7.31pm, Mr LHY emailed (the “**7.31pm email**”) Mrs LSF, copying the Testator and his personal secretary, but removing Ms Kwa from the list of addressees. In this email, Mr LHY told the Testator that he couldn’t get in touch with Ms Kwa, and believed she was away. He thought that it was not wise to wait until she got back to execute the will. He then suggested that Mrs LSF could get one of her law firm partners to execute and witness the will. At 8.12pm, before the Testator responded to Mr LHY’s suggestion, Mrs LSF sent an email to the Testator’s personal secretary, copied to Mr LHY, to arrange for the execution of the Last Will. Mr LHY then departed on a pre-arranged trip to Brisbane, Australia around 9.15pm. Subsequently, at 9.42pm, the Testator wrote to Mr LHY, Mrs LSF, and his secretary, agreeing to Mr LHY’s proposal to proceed without waiting for Ms Kwa.

Around midnight, Mrs LSF departed on a pre-arranged trip to Paris, France. While on the flight, she was actively in contact with Mr LHY and some colleagues concerning the engrossing and execution of the Last Will. The next morning, on 17 December 2013, after arriving in Brisbane, Mr LHY also continued making arrangements for the prompt execution of the Last Will.

At or about 11.00am, just one day after the first email was sent, the Last Will was duly executed and witnessed by Mrs LSF’s colleagues. One of the lawyers present noted that the Testator “read through every line of the will and was comfortable to sign and initial at every page, which he did in our presence”. Mrs LSF was later informed about the execution of the will, and duly updated Mr LHY.

About two hours after the execution, at 1.16pm, Mrs LSF emailed Ms Kwa, informing her that the Last Will had been signed and “dealt with”. Ms Kwa had not been included in any of the email correspondence since the initial 7.08pm email.

On 2 January 2014, two weeks after the Last Will was executed, the Testator himself prepared and executed a codicil to it, which bequeathed two carpets to Mr LHY (the “**Codicil**”). On 23 March 2015, about a year after the Last Will was executed, the Testator passed away. Probate of the Last Will was conducted without opposition in October 2015.

However, in July 2016 a Ministerial Committee (“**MC**”) was formed to consider possible options concerning the disposition of the Testator’s house at Oxley Road, given its historical significance as his residence. The MC sought his children’s views regarding his thinking in this regard. This ultimately led to concerns over Mrs LSF’s involvement in the preparation and execution of the Last Will.

B. Charges against Mrs LSF

The Law Society brought two main charges against Mrs LSF. The *first charge* related to her alleged failure to advance the Testator’s interests, unaffected by her own and/or her husband’s interest. It argued that this amounted to “grossly improper conduct” in her discharge of her professional duty, under section 83(2)(b) of the Legal Profession Act (Cap 161, 2009 Rev Ed) (“**LPA**”). It also brought an *alternative* charge based on her alleged “improper conduct or practice as an advocate and solicitor” under section 83(2)(b) of the LPA, as well as a *further alternative* charge on the grounds of “misconduct unbefitting an advocate and solicitor” under section 83(2)(h) of the LPA.

The *second charge* related to Mrs LSF's alleged conduct in (a) acting in connection with the significant gift that the Testator intended to give her husband by will; and (b) failing to advise the Testator to be independently advised with respect to that gift. Such conduct was similarly argued to have amounted to "grossly improper conduct" in her discharge of her professional duty under section 83(2)(b) of the LPA. Similar to the first charge, there was also an *alternative* charge based on her allegedly "improper conduct or practice as an advocate or solicitor" under section 83(2)(b) of the LPA, as well as a *further alternative* charge on the grounds of "misconduct unbefitting an advocate and solicitor" under section 83(2)(h) of the LPA.

After due proceedings, the Disciplinary Tribunal ("DT") concluded that all charges against Mrs LSF were proven beyond a reasonable doubt, and that there was cause of sufficient gravity for disciplinary action to be taken against her. The Law Society then sought for the Court to dispose of the matter, through a striking off order against Mrs LSF pursuant to section 83(1)(a) of the LPA.

III. ISSUES

The Court considered the following four issues:

- (a) whether there was an implied retainer between Mrs LSF and the Testator;
- (b) if so, whether the *main* or *alternative* charges were made out;
- (c) if no implied retainer existed, whether the *further alternative* charges were made out; and
- (d) if Mrs LSF was guilty of any of the charges, what was the appropriate sanction.

A. Whether there was an implied retainer between Mrs LSF and the Testator

The main and alternative charges could only be made out if a solicitor-client relationship existed between Mrs LSF and the Testator. Such a relationship requires either an *express* or *implied* retainer. Given that no *express* retainer existed, the question was whether there was an *implied* retainer. An implied retainer between a lawyer and another arises if the manner in which the lawyer conducts himself towards that person gives rise to such a relationship. Indeed, a lawyer who acts *pro bono* for another, i.e. with no expectation of receiving any fee, is nonetheless in a solicitor-client relationship with such a person.

To determine if an implied retainer exists, the courts will consider whether, on an objective analysis of the circumstances, an intention to enter into a solicitor-client relationship should be attributed to the parties, based on the perspective of *both* the putative solicitor and client. This is regardless of whether the parties had entered into a formal contract. If so, the parties should be taken to have understood and believed that they were in a solicitor-client relationship. In such cases, an implied retainer will be imputed, regardless of whether the requirements for the formation of a contract have been satisfied. The Court thus assessed the situation from the perspectives of Mrs LSF and the Testator.

(1) Perspective of Mrs LSF

To assess the situation from her perspective, the Court examined two further matters: (a) what led her to send the 7.08pm email; and (b) how she obtained the Draft Last Will attached to that email.

(a) What led Mrs LSF to send the 7.08pm email. Mrs LSF gave two conflicting explanations: (1) the Testator gave her direct instructions to revert to the First Will; or (2) he gave those instructions to Mr LHY, who then asked Mrs LSF to make the arrangements. The first explanation was advanced by Mrs LSF during the MC proceedings, while the second explanation was advanced during the DT proceedings.

On balance, the Court found that the *second* explanation was in fact the true position. *First*, there was no reason for the Testator (who regarded Ms Kwa as his solicitor for estate matters) to abruptly approach Mrs LSF to convey his wishes. *Second*, if the Testator gave Mrs LSF direct instructions,

there would have been no reason for her to have copied the email to Mr LHY and involved him in carrying out the Testator's instructions. There would also be no reason to copy the 7.08pm email to Ms Kwa and seek her assistance to engross the Draft Last Will. *Third*, if the Testator had given direct instructions to Mrs LSF, then further communications between them would have been expected. However, there was no such direct communication. All further communication was between the Testator and Mr LHY instead.

(b) How Mrs LSF obtained the Draft Last Will. Mrs LSF claimed that she had received the Draft Last Will from Mr LHY, which she then forwarded to the Testator without first reading it. However, the Court found that the Draft Last Will had *come from Mrs LSF herself*. The evidence indicated that she had access to prior drafts of the First Will (upon which the Last Will was meant to be based). In fact (while she may not have appreciated this) Mrs LSF was the party who had emailed out the version that became the actual First Will. Conversely, no evidence was tendered to support Mr LHY's assertion that he had been "privity to some drafts" of the First Will.

The Court then found that Mrs LSF made no effort to establish that the version of the First Will she forwarded to the Testator was indeed the same as the executed version of the First Will. Instead, she assumed this to be so, and represented it as such to the Testator in the 7.08pm email. However, she was in no position to say so, as the executed version of the First Will was never in her hands.

(c) Assessment of Mrs LSF's perspective. The Court then assessed Mrs LSF's perspective based on her actions as of the 7.08pm email, and then thereafter. As of the 7.08pm email, the Court held that from Mrs LSF's perspective no implied retainer had arisen. This is because Mrs LSF had included the Testator's regular solicitor, Ms Kwa, in the list of addresses in the email she sent, and also asked Ms Kwa to see to the engrossing of the Draft Last Will (attached to that email). Thus, Mrs LSF likely believed that Ms Kwa would: (1) duly confirm the Testator's instructions; (2) check that the Draft Last Will was indeed the document that he wished to sign; and (3) resolve any outstanding issues before actually engrossing it for execution. Here, Mrs LSF's representations about the Draft Last Will would not have been relied upon by the Testator, and no implied retainer could have arisen.

However, the situation changed when Mr LHY sent the Testator the 7.31pm email, as it excluded Ms Kwa from the list of addressees. Mrs LSF would have known that with this exclusion, the Testator was being asked to proceed on the basis of the representations she made in her 7.08pm email (i.e. that the Draft Last Will was the First Last Will and could be used for execution). The Court pointed out that in doing so, Mrs LSF:

- erroneously represented that the Draft Last Will was the First Will that the Testator wished to sign, despite knowing that she was unable to verify this fact on her own;
- made arrangements for the Last Will to be executed before her colleagues, while personally monitoring the arrangements closely;
- saw to the safekeeping of an original copy of the Last Will after it was executed; and
- subsequently told Ms Kwa the Last Will was executed, without alerting her to the circumstances under which it had been done. Thus, any cause for concern pertaining to the accuracy of Mrs LSF's representations about the Draft Last Will would not have been evident to Ms Kwa.

The Court thus found it implausible that Mrs LSF could reasonably think that there was no implied retainer between the Testator and her. The Court also rejected her assertion that she was merely assisting the Testator with the "administrative task of finding witnesses for its execution". It found that she knew or must have known that the Testator wanted confirmation that the Last Will was indeed the First Will. A solicitor with Mrs LSF's level of seniority could not have thought that there was no implied retainer, at least regarding her participation in the Testator's execution of his Last Will.

(2) *Perspective of Testator*

However, the Court held that the Testator himself did not regard Mrs LSF as his solicitor for the preparation and execution of the Last Will. Indeed, the Testator had never ceased to regard Ms Kwa as his solicitor, at least where estate matters were concerned. Instead, the Testator agreed to proceed with the execution of the Last Will in the above manner because of his son's advice. In fact, before signing the Last Will, the Testator asked one of the lawyers present which party had actually drafted the document. While the lawyer was unsure about this point, he mentioned that Ms Kwa was involved, following which the Testator signed the will. This suggested that the Testator drew some assurance from the indication of Ms Kwa's involvement.

Thus, while the Court accepted that Mrs LSF should objectively have appreciated that she was acting as the Testator's solicitor for the preparation and execution of the Last Will, the same could not be said of the Testator. As such, no implied retainer existed between Mrs LSF and the Testator.

B. Whether the *main* and *alternative* charges were made out

The *main* and *alternative* charges were based on the existence of a solicitor-client relationship between Mrs LSF and the Testator. Since there was no express or implied retainer, there could be no solicitor-client relationship. As such, both the *main* and *alternative* charges could not be made out.

C. Whether the *further alternative* charges were made out

Although the main and alternative charges could not be made out, the Court held that the *further alternative* charges were made out. In particular, it found Mrs LSF guilty of misconduct unbefitting an advocate and solicitor, based on the following actions:

- She put forth the Draft Last Will to the Testator and represented to him that it reflected his wishes and could be executed as his will. This was even though she had not verified his instructions and had not advised him that she was in no position to make those representations;
- She acted in such a manner even though the Testator would have believed and relied on her representations about the Draft Last Will;
- Her husband was, to her knowledge, a significant beneficiary under the Last Will;
- Had there been a solicitor-client relationship between Mrs LSF and the Testator, her conduct would have constituted a grave breach of her duties as his solicitor, even without regard to the conflict of interest that would have arisen;
- She allowed the Testator to proceed to execute the Last Will despite knowing that Ms Kwa (the only person who could check and verify the representations) had been excluded from the process;
- Even after finding out that the Testator had asked twice about the drafter of the Last Will, she did not take any steps to clarify the position with him. This was in spite of her own submission that the Testator's questions demonstrated a desire on his part to ensure that the Last Will was indeed the First Will;
- After the Last Will was executed, Mrs LSF did not apprise Ms Kwa fully and frankly of all that had transpired.

The Court also noted that Mrs LSF's loyalties were clearly divided. On the one hand, she was loyal to her husband who was a significant beneficiary under the Last Will and who was evidently keen to rush its execution. On the other hand, she had a responsibility to ensure that the Testator (who she should have reasonably regarded as her client) was fully apprised of the situation before executing the Last Will.

The Court then reiterated the importance of risk avoidance in conflict of interest situations (where the solicitor preferred her own interests over those of a client). Here, it held that Mrs LSF not only failed to act with prudence, but indeed acted with complete disregard for the interests of the Testator, failing at all stages to notify him that the representations she had made about the Draft First Will (on which

he was relying) were unverified. She also failed to put a stop to her husband's efforts to procure the execution of the Last Will with unseemly haste, and blindly followed his directions, though he was a significant beneficiary under the very will whose execution she helped rush through. As such, the Court found that even though there was no retainer between herself and the Testator, she was guilty of misconduct unbecoming an advocate and solicitor.

D. Appropriate sanctions to impose

The Court held that this situation would be treated severely: it involved a conflict of interest, which could be analogised to a case of a solicitor preferring her own interests over those of a client. This would be an abuse of trust inimical to the solicitor's foundational duty of undivided loyalty to a client, and correspondingly revealed a serious character defect. However, while striking off would be the presumptive penalty in cases of such conflict of interest, given the absence of a solicitor-client relationship, the Court held that imposing such a penalty would be disproportionate. Nonetheless, it stated that the sanction imposed should reflect both Mrs LSF's *culpability* and the *harm* caused by her conduct.

(1) Mrs LSF's culpability

The Court held that the following factors weighed *in favour* of a heavier sentence:

- (a) **Mrs LSF's motivation for the misconduct:** She was singularly focused in achieving what her husband wanted, oblivious to the interests of the Testator.
- (b) **Planning and coordination:** There was considerable involvement on her part in ensuring the expeditious execution of the Last Will. This was in contrast with the remarkable lack of diligence on her part in ensuring that the Testator's wishes were properly ascertained and carried out, and that he was fully apprised of all the facts.
- (c) **Level of expertise:** She was a solicitor of more than 30 years' standing with significant experience. This rendered her conduct wholly unacceptable and inexcusable.

However, the Court found that the following factors weighed *against* a heavier sentence:

- (a) **The extent to which Mrs LSF acted in breach of a position of trust:** Since there was no implied retainer, the degree of trust which the Testator placed in Mrs LSF was somewhat attenuated.
- (b) **Lack of dishonesty in her dealings with the Testator:** On the evidence, she did not know that she was making false statements to the Testator, and thus was not acting dishonestly.

The Court concluded that Mrs LSF's culpability was at least moderately high.

(2) The harm caused

The material harm caused was that the Testator ended up signing a document which was not that which he had indicated he wished to sign. The fact that the Last Will and the First Will were materially similar was fortuitous, and did not discount the fact that the potential harm could have been far more severe than the actual harm that eventuated. On the other hand, while the Testator had previously changed his wills several times, he was content after signing the Last Will. He lived more than a year after executing it and did not revisit it, apart from providing for the bequeathment of two carpets to Mr LHY in the Codicil.

Overall, the Court considered that the harm caused in this case was at the lower end of the moderate range, and a substantial period of suspension was warranted. It decided that a suspension of 15 months was the appropriate sanction to impose.

IV. LESSONS LEARNT

This case reiterates the high standards required of lawyers, even if no formal solicitor-client relationship is entered into. This is especially so in situations involving conflicts of interest. As the

Court very aptly put it, “the rule of thumb for a prudent solicitor is this – ‘*when in doubt, don’t.*’”

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