NG YEE HONG v. MALAYSIAN INSTITUTE OF ACCOUNTANTS

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
RAVINTHRAN PARAMAGURU JCA
MOHD SOFIAN ABD RAZAK JCA
[CIVIL APPEAL NO: W-02(IM)-2232-12-2019]
20 NOVEMBER 2020

LEGAL PROFESSION: *Conflict of interest – Professional conduct – Application for recusal of solicitor from firm representing client in judicial review proceedings – Preliminary objections – Whether issues raised academic – Whether there was live controversy existing between parties – Whether objectivity of firm in defending charge at judicial review hearing open to question – Whether there was apparent conflict of interest*

The applicant ('appellant') was a professional accountant and a member of the Malaysian Institute of Accountants ('MIA') which was set up under the Accountants Act 1967 ('AA'). He audited the accounts of a corporation known as 1MDB for the financial years 2013 and 2014. In respect of this audit, two complaints were lodged with the MIA. The Investigation Committee ('IC') of the MIA investigated both complaints and at the conclusion of the investigations, the IC preferred disciplinary charges in respect of both complaints against the appellant before the Disciplinary Committee ('DC') of the MIA pursuant to s. 20(1) of the AA. The parties referred to the disciplinary proceedings as NYH-1 and NYH-2. The DC made a finding against the appellant in NYH-1, which was concluded earlier. The applicant filed an appeal to the Disciplinary Appeal Board of the MIA ('DAB'), which appeal was still pending. Subsequently, the appellant applied for dismissal of the charge in NYH-2 before the DC on the ground that the charge under it was the same as the charge in NYH-1. The DC dismissed this application. Dissatisfied with the decision of the DC not to dismiss NYH-2 on the ground of *res judicata*, the appellant filed a judicial review application to quash the said decision. The first respondent was the DC and the second respondent was the MIA. Mr T Sudhar ('Sudhar') and Miss Tania Edward of Messrs Steven Thiru & Sudhar Partnership ('STSP') appeared for the MIA at the judicial review proceedings. Sudhar also appeared for the IC at the disciplinary hearing before the DC, *ie*, in NYH-1 and NYH-2. The appellant filed an application (encl. 21) to recuse any lawyer from the firm of STSP from representing the MIA as either solicitor or counsel in the judicial review proceedings. The appellant argued that, *inter alia*, by representing the IC before the DC and at the same time representing the MIA in the judicial review proceedings and DAB, STSP would be 'engaged pre-emptively with members of the DC and DAB on matters relating to NYH-1 and NYH-2'. The High Court found that the affidavit of the Executive Director of the Surveillance & Enforcement Division of MIA,

Dato Hj Muhammad Redzuan ('Muhammad Redzuan'), contradicted this contention and affirmed the affidavit on behalf of MIA stating that the IC, DC and DAB were autonomous and independent committees and that the council of the MIA was not involved in matters falling within their respective purviews. The High Court thus found that STSP was not in a position of conflict of interest by representing the MIA in the judicial review proceedings and dismissed the recusal application. Hence, the appellant appealed. At the outset of the appeal, Sudhar for the second respondent raised a preliminary objection and argued that after the High Court had dismissed the recusal application, the appellant filed the instant appeal. However, the appellant did not apply to stay the judicial review proceedings pending the outcome of the appeal. The judicial review proceedings continued and concluded in favour of the respondents, thus, according to Sudhar, the instant appeal was academic. On the other hand, the appellant argued that as the appeal against encl. 21 was still pending before the court, a matter in actual controversy existed between the parties and therefore, the instant appeal was plainly not academic.

Held (allowing appeal)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) Notwithstanding the reference 'herein' in 'proceedings herein' in prayer (2) of encl. 21, 'proceeding' must be read broadly to include any application in relation to the judicial review matter and any appeal arising from it. The appeal against the judicial review decision was still pending and STSP was still representing the second respondent. Therefore, by pursuing the appeal in the instant case, the appellant could not be said to be pursuing a purely advisory opinion. (paras 13 & 14)

(2) No application to stay the proceedings was made. Nonetheless, no authority was cited by Sudhar that stated the entire proceeding in the lower court would be expunged if opposing counsel was later disqualified at the appellate level. This was a matter that must be addressed in the judicial review appeal hearing. Sudhar was also unable to cite any authority that stated that failure to apply for stay of proceedings upon losing an application to recuse opposing counsel would disentitle the appellant from proceeding with the appeal against the said recusal decision. In any event, regardless of whether the legal consequences was that the judicial review proceeding was expunged if the appellant was successful in the instant appeal, the appeal against the judicial review decision had not been decided as yet. Hence, the instant appeal was not academic as the appeal against the judicial review decision was still pending. Furthermore, STSP was still representing the second respondent. There was thus a live controversy that still existed between the parties in relation to the recusal application. The preliminary objection was dismissed. (para 16)

(3) The primary issue in the judicial review proceedings was the propriety of the decision of the DC not to dismiss the charge in NYH-2. As the IC was the investigator/prosecutor, the objectivity of STSP in defending the charge at the judicial review hearing would be open to question as they represented the IC at the DC hearing. In other words, STSP could very well be defending their own earlier advice to the IC at the judicial review proceeding. As lawyers are officers of the court, apart from advancing the cause of their client, they have an overriding duty to the cause of justice. It could not be denied that there was an appearance of a conflict of interest. (para 29)

(4) The argument that STSP was in a better position to represent the MIA as it was acquainted with the facts and evidence relating to the disciplinary proceedings was also not tenable as this court noted that the DC appointed a different law firm to represent it in the judicial review proceeding. It must be borne in mind that the impugned decision which was the subject of the judicial review proceeding was that of the DC and not the IC. The relevant disciplinary proceeding documents could have been made available easily to any law firm instructed to represent the MIA. Thus, given the apparent conflict of interest, this court could not see why MIA must appoint STSP who represented the IC at the prosecution stage before the DC. (para 30)

(5) Any other law firm appointed to represent the MIA would not have appeared for the IC at the DC hearing. Thus, they would be able to represent the MIA at the judicial review hearing objectively and impartially without being preoccupied with the question whether they had given the correct advice to the IC in respect of the charge in NYH-2. From a legal standpoint, there were only two respondents in the judicial review proceeding, *ie*, the DC and the MIA. Therefore, the question of the IC having carriage of the proceedings should not arise. (para 31)

(6) The right to counsel of choice is not a trifling matter. The court should not flinch from striking a fair balance between the competing considerations of the right to counsel of choice and the broader interests of the administration of justice. The continued representation of the MIA by STSP in the judicial review proceeding would lead to the perception that STSP had placed itself in a position of conflict of interest. It could also, at the same time, demolish the ethical wall between the three disciplinary committees that had been carefully constructed by the AA and the rules made thereunder. (para 32)

Case(s) referred to:

Ahmad Saidi Md Isa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors [2006] 1 CLJ 977 CA ***(refd)***

AmBank (M) Bhd v. Razshah Enterprise Sdn Bhd [2010] 3 CLJ 137 FC ***(refd)***

Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener) [2018] 10 CLJ 129 FC ***(refd)***

Black v. Taylor [1993] 3 NZLR 403 ***(refd)***

Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 1 LNS 1837 CA ***(refd)***

Denis O'Brien, Applicant v. The Tribunal of Inquiry into Payments to Messrs Charles Haughey and Michael Lowry, (sole member Mr Justice Michael Moriarty, Respondent) [2016] IESC 36 ***(dist)***

Geveran Trading Co Ltd v. Skjevesland [2003] 1 All ER 1 ***(refd)***

Grimwade v. Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd [1995] 1 VR 446 ***(refd)***

Kooky Garments Ltd v. Charlton [1994] 1 NZLR 587 ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

Quah Poh Keat & Ors v. Ranjit Singh Taram Singh [2009] 4 CLJ 316 CA ***(refd)***

Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram [2000] 4 CLJ 870 FC ***(refd)***

Legislation referred to:

Accountants Act 1967, ss. 8, 20(1)

Courts of Judicature Act 1964, s. 3

For the appellant - Malik Imtiaz Sarwar, Chan Wei June & Wong Min Yen; M/s Malik Imtiaz Sarwar

For the respondent - T Sudhar & Tania Edward; M/s Steven Thiru & Sudhar Partnership

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: WA-25-446-10-2019 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] This is an appeal against the decision of the High Court that dismissed the application of the appellant to recuse a law firm from representing the second respondent in the judicial review application filed by the appellant.

Background Facts

[2] The applicant is a professional accountant and a member of the Malaysian Institute of Accountants ('MIA') which is set up under the Accountants Act 1967 ('AA'). He audited the accounts of a corporation

which is known as 1MDB for the financial years 2013 and 2014. In respect of this audit, two complaints were lodged with the MIA. One complaint was lodged by Mr Andrew Anand Solomon a/l Devesahayam on 31 March 2015. The other complaint was lodged by YB Mr Tony Pua Kim Wee on 26 May 2015.

[3] The Investigation Committee ("IC") of the MIA investigated both complaints. At the conclusion of the investigations, the IC preferred disciplinary charges in respect of both complaints against the appellant before the Disciplinary Committee ("DC") of the MIA pursuant to s. 20(1) of the AA. The parties have referred to the disciplinary proceedings as NYH-1 (complaint dated 31 March 2015) and NYH-2 (complaint dated 26 May 2015). The two proceedings were registered around the same time but NYH-1 was concluded earlier. The DC made a finding against the appellant on 5 September 2019 in NYH-1. The appellant filed an appeal to the Disciplinary Appeal Board of the MIA ("DAB"). The appeal is still pending. Subsequently, the appellant applied for dismissal of the charge in NYH-2 before the DC on the ground that the charge under it is the same as the charge in NYH-1. But on 23 September 2019, the DC dismissed this application.

[4] The appellant was dissatisfied with the decision of the DC on 23 September 2019 not to dismiss NYH-2 on the ground of *res judicata*. He filed a judicial review application to quash the said decision. The first respondent is the DC and the second respondent is the MIA. Mr T Sudhar and Miss Tania Edward of Messrs Steven Thiru & Sudhar Partnership ("STSP") appeared for the MIA at the judicial review proceedings. Mr T Sudhar had also appeared for the IC at the disciplinary hearing before the DC, ie, in NYH-1 and NYH-2. The appellant filed an application (encl. 21) to recuse any lawyer from the firm of STSP from representing the MIA as either solicitor or counsel in the judicial review proceedings.

Decision Of High Court

[5] The grounds of the application to recuse STSP as summarised by the learned High Court Judge are as follows:

(i) STSP represents the IC in the pending appeal before the DAB in regard to the decision of the DC on the NYH-1 proceedings.

(ii) The judicial review application will involve an examination of the NYH-1 and NYH-2 proceedings.

(iii) By representing MIA in the appeal before the DAB and in the judicial review proceedings, STSP would be engaged pre-emptively with members of the DC and the DAB on matter relating to the NYH-1 and NYH-2 proceedings.

(iv) As MIA and its funds are managed by the MIA Council, STSP would purportedly be taking instructions from the Council, which comprises of members of the IC, DC, and the DAB in relation to the NYH-1 and NYH-2 proceedings.

[6] Based on the decision of this court in *Quah Poh Keat & Ors v. Ranjit Singh Taram Singh* [2009] 4 CLJ 316; [2009] 4 MLJ 293, the learned High Court Judge directed himself that the appellant must establish a strong case based on affidavit evidence. His Lordship referred to the basic argument of the appellant, ie, that by representing the IC before the DC and at the same time representing the MIA in the judicial review proceedings and DAB, STSP would be "engaged pre-emptively with members of the DC and DAB on matters relating to NYH-1 and NYH-2". He found that the affidavit of the Executive Director of the Surveillance & Enforcement Division of MIA, Dato' Hj Muhamad Redzuan bin Abdullah contradicted this contention. Dato' Hj Muhamad Redzuan bin Abdullah who affirmed the affidavit on behalf of MIA stated that the IC, DC and DAB are autonomous and independent committees and that the council of the MIA is not involved in matters falling within their respective purviews. He thus found that STSP was not in a position of conflict of interest by representing the MIA in the judicial review proceedings. The recusal application was dismissed by the High Court on 28 November 2019. The instant appeal is from this decision of the High Court.

Preliminary Objection To Appeal

[7] At the outset of the appeal, Mr T Sudhar for the second respondent raised the following preliminary objection. It is as follows. After the High Court dismissed the recusal application (encl. 21), the appellant filed the instant appeal against the decision on 2 December 2019. However, the appellant did not apply to stay the judicial review proceedings pending the outcome of the appeal. The judicial review proceedings continued and concluded in favour of the respondents on 26 February 2020.

[8] The argument of Mr T Sudhar is that the instant appeal is academic because the High Court has already heard and dismissed the judicial review. The main prayer in encl. 21 was to recuse STSP from appearing as solicitors or counsel in "the proceedings herein". And since, the appellant did not apply for stay of proceedings but was content to reserve his rights in respect of his appeal against the decision of the High Court, Mr T Sudhar argued that upon conclusion of the said proceedings, the appeal has become academic.

[9] On the other hand, counsel for the appellant (Dato' Malik Imtiaz Sarwar) argued that the matter has not become academic. He pointed out that upon dismissal of encl. 21, he intimated to the court and Mr T Sudhar that his client would be filing an appeal against the decision. He also indicated that he would not apply for stay of proceedings to enable the matter to proceed expeditiously. His law firm wrote a letter to the solicitors of the respondents to state that his client reserved all his rights in respect of the appeal. Counsel for the appellant also submitted that as the appeal against encl. 21 is still pending before this court, a matter in actual controversy exists between the parties and therefore, the instant appeal is plainly not academic.

Decision On Preliminary Objection

[10] Mr T Sudhar argued that our courts do not act in vain and waste time in answering academic questions which have no effect on the position between the parties. In support, he cited the cases of *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener)* [2018] 10 CLJ 129; *Ambank (M) Bhd v. Razshah Enterprise Sdn Bhd* [2010] 3 CLJ 137; [2010] 2 MLJ 585; and *Ahmad Saidi Md Isa v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [2006] 1 CLJ 977; [2006] 3 MLJ 208. In respect of the test to be applied to determine whether an appeal has become academic, Mr T Sudhar cited the following passage from the oft-quoted Federal Court case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113.

> The test, therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic.

[11] Counsel for the appellant did not disagree with the principles laid down in the above-mentioned cases. However, he disputed the argument that the matter is academic as the appeal from the decision in the judicial review is still pending before another panel of this court.

Ambit Of "Proceedings Herein"

[12] Mr T Sudhar referred to the prayer in encl. 21 that refers to "proceedings herein". His argument is that these are limiting words that confined the recusal application to the judicial review proceedings in the High Court only. Counsel for the appellant submitted that the term "proceedings" should be read broadly to include appeals. He cited *Black's Law Dictionary* (11th edn, Thomson Reuters, quoted in Edwin E Bryant, *The Law of Pleading Under the Codes of Civil Procedure*) which defines "proceeding" to include "the taking of appeal". He also cited s. 3 of the Courts of Judicature Act 1964 that defines "proceeding" as follows"

> "proceeding" means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding;

[13] We are of the view that notwithstanding the reference "herein" in "proceedings herein" in prayer (2) of encl. 21, "proceeding" must be read broadly to include any application in relation to the judicial review matter and any appeal arising from it. Otherwise, even if the appellant had been successful in the recusal application before the High Court, he would be required to make further recusal applications on the same grounds at the Court of Appeal and the Federal Court.

Whether Relief Would Be Nugatory?

[14] In arguing that the appeal has become nugatory, Mr T Sudhar referred us to the Irish Supreme Court case of *Denis O'Brien, Applicant v. The Tribunal of Inquiry into Payments to Messrs Charles Haughey and Michael Lowry, (sole member Mr Justice Michael Moriarty, Respondent)* [2016] IESC 36 (SC No. 38 of 2011). In that case, the appeal in question was in respect of a ruling pertaining to cross-examination of a witness in an inquiry. The Irish Supreme Court applied the doctrine of mootness and held that a live controversy had to be present. We agree with counsel for the appellant that the facts of the said case are materially different from the instant case. In the above-mentioned case, the subject matter of the appeal pertained to rulings made in relation to cross-examination of a witness. Since the inquiry had been completed, it goes without saying, any appeal on the issues in respect of cross-examination of a particular witness would be moot. Furthermore, the Irish Supreme Court noted that the report in respect of the inquiry had been published and there was no judicial review application to challenge it. Therefore, any relief granted would be nugatory. In the instant case, the appeal against the judicial review decision is still pending and STSP is still representing the second respondent. Therefore, by pursuing the appeal in the instant case, the appellant cannot be said to be pursuing a purely advisory opinion.

Other Issues

[15] We are mindful that parties had canvassed also other issues and had devoted lengthy submissions to them. Mr T Sudhar submitted that the purpose of the appeal is to overturn the decision of the High Court in the judicial review case. We find that the motive of the appellant in pursuing the appeal is not a relevant consideration. It is not the function of this court to delve into the mind of the appellant and speculate on the strategies he may adopt to succeed in the appeal against the judicial review decision. The effect of our decision herein on the judicial review decision of the High Court must be dealt with by the Court of Appeal panel that hears the judicial review appeal. Mr T Sudhar submitted that the appellant should have applied to stay the proceedings in the High Court upon failing to recuse STSP. Otherwise, the High Court proceedings would be wasted. In support, he cited the case of *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465; [2005] 3 MLJ 132. In that case, the application to recuse the learned Judicial Commissioner by the defendant failed. The defendant then applied for a stay of proceedings at the Court of Appeal. In allowing the stay of proceedings, the Court of Appeal observed as follows:

> We have also taken into consideration the fact that in the event that a stay a proceedings was not granted and the learned JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allows the

> appeal the whole proceedings conducted by the learned JC would have to be completely expunged. In the circumstances it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed.

[16] In the instant case, as we said earlier, no application to stay the proceedings was made. Nonetheless, no authority was cited by Mr T Sudhar that states that the entire proceeding in the lower court would be expunged if opposing counsel is later disqualified at the appellate level. The above-mentioned case was in respect of disqualification of the presiding judge as opposed to disqualification of counsel. As we have said earlier, this is a matter that must be addressed in the judicial review appeal hearing. Mr T Sudhar was also unable to cite any authority that states that failure to apply for stay of proceedings upon losing an application to recuse opposing counsel would disentitle the appellant from proceeding with the appeal against the said recusal decision. In any event, regardless of whether the legal consequence is that the judicial review proceeding is expunged if the appellant is successful in the instant appeal, the appeal against the judicial review decision has not been decided as yet. Therefore, the more pertinent issue in regard to the preliminary objection is this, ie, whether there exists a live issue between the parties in relation to the recusal application. It is plain to us that the instant appeal is not academic as the appeal against the judicial review decision is still pending. Furthermore, STSP is still representing the second respondent. For this reason, we find that a live controversy still exists between the parties in relation to the recusal application. Therefore, we do not propose to address all the other issues canvassed by the parties. We shall unanimously dismiss the preliminary objection and proceed to hear the appeal on the merits.

Recusal Application

[17] We shall first refer to the existence of the inherent power of the court to control the right of audience and bar lawyers who appear to be in a conflict of interest position for the greater good of the administration of justice. In *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870, the Federal Court recognised this inherent power. The Federal Court cited with approval the New Zealand Court of Appeal decision of *Black v. Taylor* [1993] 3 NZLR 403 which held that the court has inherent power to prevent a barrister from acting as counsel in a matter in which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done. Richardson J in explaining the inherent jurisdiction of the court to bar counsel who find themselves in a conflict of interest position said as follows:

> I respectfully agree with the approach of the Ontario Court. Disqualification will ordinarily be the appropriate remedy where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other. The decision to disqualify

A is not dependent on any finding of culpable conduct on the lawyer's part. Disqualification is not imposed as a punishment for misconduct. Rather it is a protection for the parties and for the wider interests of justice. The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice. Where the integrity of the judicial process is perceived to be at risk from the proposed or continuing B representation by counsel on behalf of one party, disqualification is the obvious and in some cases the only effective remedy although considerations of delay, inconvenience and expense arising from a change in representation may be important in determining in particular cases whether the interests of justice truly demand disqualification.

C **[18]** The other authority cited by counsel for the appellant is the case of *Grimwade v. Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd* [1995] 1 VR 446 which is a decision of the Supreme Court of Victoria (cited recently by this court in the case of *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] 5 MLJ 623). The view expressed in *Black v. Taylor* D (*supra*) was echoed by the Supreme Court of Victoria in the *Grimwade* case (*supra*). The relevant passage reads as follows:

> It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of E professional conduct made by the legal profession and is not limited to cases where the rules are breached. The issue here is not whether or not the rule was breached, or whether the solicitor worked for the government. Nor is it solely whether the patient lost confidence in the process. The issue is whether the fair minded reasonably informed member of the public would conclude that the proper administration of F justice required the removal of the solicitor … The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public …
>
> The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice … G

[19] Therefore, the right to counsel of choice is not absolute and has to give way in appropriate cases to the overriding principles of fairness and justice.

[20] We shall now recapitulate the essential facts that underlie the recusal application. Mr T Sudhar represented the IC at the disciplinary hearing H before the DC in NYH-1. Upon conclusion of NYH-1, the appellant sought to dismiss the charge in NYH-2 on ground of *res judicata*. The DC refused to dismiss the charge. The appellant then launched judicial review proceedings to seek relief.

I **[21]** Before proceeding further, in order to fully appreciate the complaint of the appellant, we shall set out briefly the disciplinary mechanism under the AA. The AA set up the MIA to regulate the practice of accountancy in Malaysia. The council that runs the MIA consists of 25 to 30 members

(see s. 8). For the purpose of regulating disciplinary matters, the Act provides for the setting up of three independent committees (the IC, DC and DAB) that consist of five council members each. The MIA is also empowered by the AA to make rules to regulate disciplinary proceedings. The IC investigates complaints against members and refers to the DC for action if there are sufficient grounds. The DAB hears appeal from the decision of the DC. The IC is entitled to appoint an advocate and solicitor to appear on its behalf at the hearing before the DC. The DC can also appoint an advocate and solicitor to advise it at the disciplinary proceedings. Thus, the Act and the rules made by the MIA have provided for disciplinary matters to be dealt with by three independent committees that function as investigator/prosecutor, first instance court and appellate court. However, it is crucial to note that all the members of the said committees are drawn from the ranks of the council of the MIA.

[22] The appellant sued the DC and the MIA which is the body corporate under the AA in the judicial review proceeding. The decision that is the subject of challenge in the judicial review proceeding is the decision of the DC. The IC is not a party. Mr T Sudhar of STSP who represented the IC at the disciplinary hearing before the DC, is now representing the MIA in the judicial review proceeding. The DC is represented by another law firm.

[23] Counsel for the appellant argued that, firstly, the clear boundaries between the various disciplinary committees would be erased if any lawyer from STSP is allowed to represent the MIA. This is because the members of the IC, DC and DAB come from the ranks of the council of the MIA. Therefore, STSP can pre-emptively engage with the members of the council in taking instructions as they are representing the MIA. The second argument is that STSP cannot be objective in the judicial review proceeding as they would have an interest in defending their own advice to the IC in maintaining the prosecution of the charge in NYH-2.

[24] The argument of Mr T Sudhar on the first issue is as follows. STSP is only taking instructions from the IC in the judicial review proceeding. The MIA does not have "carriage of the proceedings" but that the IC does. In the premises, the question of the lawyers of STSP interacting with the council members of the MIA does not arise. The MIA relied heavily on the affidavit of its Executive Director of the Surveillance & Enforcement Division, Dato' Hj Muhamad Redzuan bin Abdullah that we referred to earlier. He deposed in the said affidavit that all the said disciplinary committees are autonomous and that the council of MIA is not involved in matters that come within their respective purviews.

[25] As we have said earlier, the decision of the learned High Court Judge to dismiss encl. 21 is based entirely on the above-mentioned affidavit. He found that Dato' Hj Muhamad Redzuan bin Abdullah was well versed with the scheme of the AA. His Lordship accepted the averment in the affidavit

A that only the IC has carriage of the proceedings in the judicial review matter and that the contention of the appellant that STSP would engage with the MIA in taking instructions is speculative. He also warned himself that the court should be slow to interfere with a litigant's choice of counsel.

Decision

B

[26] In our opinion, the learned High Court Judge erred in relying almost exclusively on the affidavit of Dato' Hj Muhamad Redzuan bin Abdullah in making several findings that led him to conclude that there was no conflict of interest if STSP continued to represent MIA in the judicial review proceeding. We also find that the learned High Court Judge did not address C the question of appearance of conflict of interest and unfairness as opposed to actual conflict of interest and unfairness.

[27] As we emphasised earlier, the learned High Court Judge accepted the averments in the said affidavit as Dato' Hj Muhamad Redzuan bin Abdullah D is well versed with the disciplinary scheme under the AA. To our mind, the factual averments to the effect that there would not be interference in the workings of the said the IC, the DC and the DAB cannot conclude the issue at hand. In fact, the scheme of the AA provides for the independence of the IC, DC and DAB and it can be presumed that by the requirement of the law, there should be no interference in their workings. However, the issue at hand E is whether STSP by representing the MIA, had placed itself in a conflict of interest position or otherwise would lead a reasonable person to perceive that it is unfair for the law firm to act for the MIA. Thus, the issue of appearance of conflict of interest and unfairness as opposed to actual conflict of interest must be addressed. The said affidavit only rules out actual conflict of interest. F In *Geveran Trading Co Ltd v. Skjevesland* [2003] 1 All ER 1 which was cited by counsel for the appellant, the English Court of Appeal said as follows:

> Furthermore, it was not necessary for the party objecting to an advocate to show that unfairness would actually result, and in many cases it would be sufficient that **there was a reasonable lay apprehension that that was** G **the case**. (emphasis added)

[28] We are mindful that based on the said affidavit, the learned High Court Judge found that the IC has full carriage of the judicial review proceedings and that for this reason, STSP would not be taking instructions from the MIA. However, only the DC and the MIA are named as H respondents in the cause papers. The IC could have intervened in the judicial review proceedings but failed to do so. In the premises, regardless of whatever arrangement is made behind the scenes in respect of "carriage of the proceedings", from the standpoint of the rules of court, STSP is the advocate and solicitor for the MIA. In fact, by arguing that the IC has I "carriage of the proceedings", Mr T Sudhar has given the impression that the retainer granted to his law firm by the MIA is being used as a vehicle to make the IC a shadow respondent in order to circumvent the rules of court that requires the IC to be added as an intervener to achieve the same result.

[29] As the IC did not intervene, they have no right to claim that they have full carriage of the proceedings on behalf of the MIA and that STSP is actually representing them. In fact, the said argument also runs counter to the disciplinary scheme set up under the AA and the rules made thereunder that we have discussed earlier. The elaborate statutory provisions speak to the independence and autonomy of the separate disciplinary committees. As the members of the three committees are drawn from the council of the MIA, STSP could potentially liaise with any of the members of the IC, DC or DAB. It must not be forgotten that the charge in NYH-2 was not dismissed and therefore can potentially come before the DAB. We hasten to add that we are not suggesting for one moment that Mr T Sudhar or STSP will act unprofessionally by discussing any appeal before the DAB with any of the members of the council of the MIA. However, it cannot be denied that there is an appearance of a conflict of interest at the very least. The primary issue in the judicial review proceedings is the propriety of the decision of the DC not to dismiss the charge in NYH-2. As the IC is the investigator/prosecutor, we agree with counsel for the appellant that the objectivity of STSP in defending the charge at the judicial review hearing would be open to question as they represented the IC at the DC hearing. In other words, STSP could very well be defending their own earlier advice to the IC at the judicial review proceedings. As lawyers are officers of the court, apart from advancing the cause of their client, they have an overriding duty to the cause of justice. This is the reason that the court can rightfully expect a measure of independence and objectivity from them in the conduct of their duty (see *Kooky Garments Ltd v. Charlton* [1994] 1 NZLR 587 that was cited by counsel for the appellant).

[30] The argument that STSP is in a better position to represent the MIA as it is acquainted with the facts and evidence relating to the disciplinary proceedings is also not tenable as we note that the DC appointed a different law firm to represent it in the judicial review proceeding. It must be borne in mind that the impugned decision which is the subject of the judicial review proceeding is that of the DC and not the IC. The relevant disciplinary proceeding documents could have been made available easily to any law firm instructed to represent the MIA. Thus, given the apparent conflict of interest, we cannot see why the MIA must appoint STSP who represented the IC at the prosecution stage before the DC.

[31] We also disagree with the opinion of the learned High Court Judge that any other law firm that is appointed to represent the MIA would be similarly conflicted as STSP. Any other law firm appointed to represent the MIA would not have appeared for the IC at the DC hearing. Thus, they would be able to represent the MIA at the judicial review hearing objectively and impartially without being preoccupied with the question whether they had given the correct advice to the IC in respect of the charge in NYH-2. We

would again emphasise that from the legal standpoint, there are only two respondents in the judicial review proceeding, i.e. the DC and the MIA. Therefore, the question of the IC having carriage of the proceedings should not arise.

[32] Finally, we must perforce state that we are mindful of the cautionary advice of Arden LJ in *Geveran Trading Co Ltd v. Skjevesland* (*supra*) that a judge should not too readily accede to an application to remove opposing counsel lest it is used for tactical reasons to cause inconvenience and delay. The right to counsel of choice is not a trifling matter. However, the court should not flinch from striking a fair balance between the competing considerations of the right to counsel of choice and the broader interests of the administration of justice. In the instant case, for the reasons given above, we are of the view that the continued representation of the MIA by STSP in the judicial review proceeding would lead to the perception that STSP had placed itself in a position of conflict of interest. It could also at the same time demolish the ethical wall between the three disciplinary committees that had been carefully constructed by the AA and the rules made thereunder. This could become an issue as we noted earlier that the charge in NYH-2 was not dismissed and could potentially come before the DAB by way of appeal.

[33] For all the above reasons, we shall unanimously allow the appeal, grant order in terms of prayers (1) and (2) of encl. 21 and set aside the decision of the High Court dated 28 November 2019 with costs of RM15,000 here and below which shall be subject to payment of allocatur.

Postscript

[34] After this judgment was prepared and two days before the decision was delivered, STSP wrote to the court saying that the DAB dismissed the appeal of the appellant on 9 November 2020 in NYH-1. However, we decided not to invite further arguments from the parties in the light of this development as it does not have any significant impact on our decision.