Lai King Lung
v
Perbadanan Pengurusan Anjung Hijau & Anor

Court of Appeal – Civil Appeal No. W-02(A)-2234-12/2019
Hanipah Farikullah, Azizah Nawawi and Hashim Hamzah JJCA

April 20, 2022

Professions *– Advocates and solicitors – Disciplinary Board – Appeal against order of Disciplinary Board ("DB") – Whether Disciplinary Committee's findings of appellant's misconduct and DB's order were manifestly perverse and warranted appellate interference – Whether DB had jurisdiction to order restitution – Legal Profession Act 1976, s 103C(2) – Legal Profession (Amendment) Act 2012, ss 15(c), 21*

The appellant was an advocate and solicitor and the owner of a unit at Anjung Hijau Condominium. The appellant had sued the first respondent for trespass due to the first respondent's attempt to relocate the appellant's air conditioner compressor from the outer wall into his balcony ("suit 242"). Subsequently, one of the residents filed a suit to remove the first respondent's existing council members. The appellant had acted for the said resident at that time. An interim administrator was then appointed until the full determination of suit 242. The High Court held in suit 242 that the by-laws relied on by the first respondent in its attempt to relocate the air conditioner compressor was unenforceable since they were not passed by any special resolution. The High Court gave judgment in favour of the appellant with damages and costs ordered to be assessed ("costs and damages orders"). The first respondent did not appeal against the costs and damages orders which were assessed. Thereafter, the first respondent and the appellant entered into a settlement agreement whereby the appellant agreed to accept a lesser sum than what was awarded. Although the first respondent paid 70% of the instalments, it defaulted on the remainder amount. The first respondent then filed a suit in the High Court against the appellant seeking to impeach the cost and damages orders ("suit 318"). This suit was struck out on the ground that the action disclosed no reasonable cause of action. On appeal, the Court of Appeal dismissed the appeal and the first respondent's attempt to appeal to the Federal Court failed as leave to appeal was not granted.

The first respondent also lodged a complaint against the appellant to the Advocates and Solicitors Disciplinary Board ("DB") pursuant to a complaint dated February 14, 2019 ("complaint") and upon hearing the complaint, the

DB found that the appellant had committed misconduct. The DB ordered the appellant to pay a fine of RM50,000 and to restitute RM398,000 to the first respondent within one month of the order, failing which the appellant was to be suspended from practising as an advocate and solicitor until full payment was made. Dissatisfied, the appellant appealed to the High Court which dismissed the appellant's appeal against the order of the DB. Hence this appeal to the Federal Court.

Issue(s)

1. Whether the Disciplinary Committee's ("DC") findings of the appellant's misconduct and the DB's order, affirmed by the High Court, were manifestly perverse and warranted appellate interference.

2. Whether the DB had jurisdiction to order for restitution.

Held, allowing the appeal with no order as to costs; High Court judge's and DB's decisions set aside

1. (a) Both the complaint and suit 318 were premised on the same facts and issues. The entire purpose of the complaint was to impeach the cost and damages orders, which the first respondent had failed to do in suit 318. The first respondent was trying to revisit the issue which was already decided in suit 318. [*see p 503 para 30*]

   (b) The High Court's decision was inconsistent and the judge fell into error because the alleged collusion or conspiracy to defraud was actually the basis for the first respondent's allegation of misconduct against the appellant in the first place. Other than conspiracy to defraud, the first respondent also alleged that the appellant had exercised deception and undue influence with regard to the settlement agreement. These issues were already raised and ventilated in suit 318. Decision was given in favour of the appellant and the said decision was also upheld on appeal. [*see p 504 para 34; p 504 para 36 - p 505 para 37*]

   (c) It was not the function of the DC or DB under the law to revisit any matters, issues or disputed which had been ventilated or determined by the court. The DC made four findings of misconduct against the appellant but a perusal of the appeal records revealed that the evidence against the appellant was highly speculative, inconclusive and largely hearsay and failed to meet the standard of proof. As such, the DC's findings of the appellant's misconduct and

the DB's order were manifestly perverse and warranted appellate interference. [*see p 505 paras 38-41*]

2. (a) Pursuant to s 103C(2) of the Legal Profession Act 1976 as amended by the Legal Profession (Amendment) Act 2012 ("Act A1444"), specifically s 21 of Act A1444, any complaints already lodged or any proceedings already pending before the coming into operation of Act A1444 was to be dealt with the previous principal Act. Since the present case was filed in 2016, after Act A1444 had come into force, the current amended s 103C(2) was applicable. [*see p 506 paras 46-48*]

(b) It was clear from a reading of s 103C(2) that the DB may make an order for restitution if it was established that such monies were held by the appellant in his professional capacity and the first respondent was entitled to the return of such monies thereof. However, the sum of RM398,000 ordered to be restituted by the DB was part of the order for damages. The sum was assessed and awarded by the court to the appellant as damages for trespass committed by the first respondent against him. The monies received by the appellant was in his personal capacity as a private litigant. Hence the issue of restitution to the first respondent did not arise at all. [*see p 507 paras 51-53*]

Case(s) referred to by the court

Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam – Intervener) [2018] 1 AMR 1; [2018] 2 CLJ 1, FC *(foll)*

Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd (and Another Appeal) [2019] 7 AMR 348; [2020] 1 CLJ 299, FC *(ref)*

Majlis Peguam v Cecil Wilbert Mohanaraj Abraham [2018] 5 AMR 252; [2018] 9 CLJ 622, CA *(ref)*

Majlis Peguam Malaysia v Rajehgopal Velu & Anor [2017] 1 MLJ 596; [2017] 2 CLJ 493, FC *(ref)*

Mogana Sunthari a/p Subramaniam v Khadijah bt Yusof & Anor [2009] 3 MLJ 111, HC *(foll)*

Legislation referred to by the court

Malaysia

Legal Profession Act 1976, s 103C(2)

Legal Profession (Amendment) Act 2012, ss 15(c), 21

Solicitors

Justin Voon Tiam Yu and *Pang Kwong Hang* (Justin Voon Chooi & Wing) for appellant
CP Mahendran (RR Chelliah Brothers) for first respondent
Joy Appukuttan and *Kelvynn Foo Wai Tzen* for second respondent

Appeal from High Court, Shah Alam – Civil Suit No. WA-17D-6-03/2019

Judgment received: April 22, 2022

Hashim Hamzah JCA

Introduction

[1] This is an appeal by the appellant against the decision of the learned High Court judge ("HCJ") delivered on November 27, 2019 in which the learned HCJ had dismissed the appellant's appeal against the order of the Advocates & Solicitors Disciplinary Board ("DB") in Complaint No. DC/16/0842 dated February 14, 2019 ("the complaint").

[2] In the said order, the appellant was ordered to pay a fine of RM50,000 and to restitute RM398,000 to the first respondent within one month from the date of the order and in default, the appellant is to be suspended from practising as an advocate and solicitor until full payment is satisfied.

Background facts

[3] Pertinent facts leading to the present appeal are set down below.

[4] On December 29, 2010, the appellant, an advocate and solicitor, and also the owner of a unit in Anjung Hijau Condominium had sued the first respondent in the Kuala Lumpur High Court for trespass due to the first respondent's attempt to relocate the appellant's air conditioner compressor from the outer wall into his balcony. The case was registered as Civil Suit No. S-22NCvC-242-2010 ("suit 242").

[5] On July 6, 2011, Dato' Han Joke Kwang, one of the residents in Anjung Hijau Condominium filed a suit to remove the first respondent's existing council members. On October 14, 2011, Dato' Han Joke Kwang successfully obtained an ex parte injunction order against the council members. The court had also appointed Dr Ho Ban Lee as interim administrator until full determination of the suit. The appellant acted for Dato' Han Joke Kwang at the time.

[6] The High Court in suit 242 held that the by-laws relied upon by the first respondent in its attempt to relocate the appellant's air conditioner compressor were unenforceable since they were not passed by any special resolution. On March 30, 2011, judgment was given in favour of the appellant, with damages and costs ordered to be assessed.

[7] On October 17, 2011, the first respondent through Dr Ho Ban Lee had appointed Messrs Davis & Low as its legal counsel. Messrs Arbain & Co, the first defendant's initial counsel was duly discharged.

[8] Costs were assessed by the court at RM198,078.50 inclusive of interest as can be seen in the court order dated October 19, 2011 ("the October 19, 2011 order"). Damages were assessed by the court at RM645,566 inclusive of interest as can be seen in the court order dated November 25, 2011 ("the November 25, 2011 order").

[9] The first respondent did not appeal against both orders. Costs were paid in full to the appellant.

[10] Pursuant to the above, the appellant and the first respondent entered into a settlement agreement on January 16, 2012 ("the settlement agreement") where it was agreed that the appellant would accept a lesser sum of RM449,475.18 from the first respondent and upon full receipt of RM449,475.18, the appellant agreed to return RM300,000 to the first respondent.

[11] However, the agreement was subject to a few conditions. It was expressly agreed, among others, that the payment of RM449,475.18 has to be paid in 15 instalments in the form of post-dated cheques. Fifteen post-dated cheques have been issued by the first respondent for this purpose.

[12] The 12th instalment sum was paid on December 21, 2012, leaving the balance sum payable to the appellant at RM81,475.18. As of this date, the first respondent had already paid RM398,000 to the appellant. The first respondent offered to settle the remaining balance in cash but it was rejected by the appellant. Then, the first respondent issued replacement cheques dated March 18, 2013 to comply with the time frame as agreed in the settlement agreement. The appellant tried to cash in the cheques but failed since the first respondent's bank account was frozen. Subsequently, the appellant terminated the settlement agreement and refused to return the RM300,000 to the first respondent. It was not disputed that the judgment sum in the November 25, 2011 order has not been paid in full either by way of cash or cheque.

[13] On May 30, 2016, the first respondent filed a suit in the Kuala Lumpur High Court against the appellant. The first respondent in this suit sought to impeach the October 19, 2011 order and the November 25, 2011 order. The suit was registered as Civil Suit No. WA-22NCvC-318-05/2016 ("suit 318").

[14] Suit 318 was struck out by the High Court on the grounds that the first respondent's action disclosed no reasonable cause of action, it was scandalous, frivolous or vexatious, or it was otherwise an abuse of the process of the court. The first respondent appealed to the Court of Appeal but the appeal was subsequently dismissed. The first respondent then applied for leave to appeal to the Federal Court but leave was not granted.

[15] Other than suit 318, the first respondent also lodged two written complaints against the appellant to the DB. For the purpose of this appeal, the relevant complaint would be the second complaint which was lodged on October 7, 2016 by way of Complaint No. DC/16/0842, i.e. the complaint. The complaint was heard before the Disciplinary Committee ("DC") and it was found that the appellant had committed misconduct.

[16] Based on the findings and recommendations by the DC, the DB ordered the appellant to pay a fine of RM50,000 and to restitute RM398,000 to the first respondent within one month from the date of the order and in default, the appellant shall be suspended from practising as an advocate and solicitor until the amount has been paid in full.

[17] Dissatisfied, the appellant filed an appeal to the High Court. The learned HCJ dismissed the appellant's appeal. The appellant then filed this appeal which was heard before us.

[18] We have gone through the appeal records and heard the submissions by all parties to the present appeals. We have come to a unanimous decision and our decision is as follows.

Principles

[19] First and foremost, we are guided by the principles enunciated in the case of *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam – Intervener)* [2018] 1 AMR 1; [2018] 2 CLJ 1, where Prasad Sandosham Abraham FCJ (as his Lordship then was) in delivering the judgment of the Federal Court, held:

> [23] We have considered the report of the DC and find there are no compelling grounds to interfere with its findings. *The courts should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances* ie.:
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> (i) when the *findings are manifestly perverse*;

(ii) *the DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case* and the conduct of the solicitor complained against; and

(iii) there had been *breach of natural justice*.

(Emphasis added.)

[20] It is trite that the standard of proof to establish misconduct is beyond reasonable doubt (see *Dinesh Kanavaji Kanawagi* (supra) and *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2018] 5 AMR 252; [2018] 9 CLJ 622, CA).

[21] Even though the standard of proof is beyond reasonable doubt, the disciplinary proceeding is not subject to the rigid and strict adversarial procedures in criminal trials. The disciplinary proceeding may be conducted in any method or manner deemed appropriate as long as it is not in breach of any specific provisions of the relevant statutes or regulations and does not result in a denial of natural justice to the member concerned.

[22] In the exact words of Ramly Ali FCJ (as his Lordship then was) in the Federal Court case of *Majlis Peguam Malaysia v Rajehgopal Velu & Anor* [2017] 1 MLJ 596; [2017] 2 CLJ 493:

> [31] At the outset, it must be stressed that *disciplinary proceedings against a solicitor under the LPA are not proceedings in a criminal court of law. The proceedings although quasi-judicial in nature need not emulate the strict adversarial procedure practised in a criminal court* (see *Jerald Allen Gomez v. Shencourt Sdn Bhd (Majlis Peguam, Intervenor)* [2006] 1 CLJ 88; [2006] 2 MLJ 343). On this point we agree with Abdull Hamid Embong J (as he then was), in *Jerald Allen Gormez* when His Lordship commented: "To say that, in the absence of such procedures, the disciplinary committee should adhere strictly to the procedures in the proceedings of a criminal court, would be implying some requirements not intended by statute".
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> …
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> [33] It is a trite principle that a disciplinary committee of a professional body is entitled to conduct its disciplinary hearing in respect of a member of the body *in whatever way it deems appropriate provided that the method or manner it adopts is not in breach of any specific provisions of the relevant statutes or regulations and does not result in a denial of natural justice to the member concerned*.
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> [34] In *Lim Ko & Anor v. Board of Architects* [1965] 1 LNS 96; [1966] 2 MLJ 80, the Federal Court held, inter alia, that the proceedings of disciplinary tribunals or committees conducting an inquiry are by no means bound by the strict rules which apply to criminal trials. A legalistic approach is not appropriate in those proceedings. The same principle was adopted by the Federal Court in *Tan Hee Lock v. Commissioner for Federal Capital & Ors* [1973] 1 LNS 152; [1973] 1 MLJ 238; *Tanjong Jaga Sdn Bhd v. Minister of Labour and Manpower & Anor* [1987] CLJ Rep 368; [1987]

2 CLJ 119; [1987] 1 MLJ 124; and by the Court of Appeal in *Haji Ali bin Haji Othman v. Telekom Malaysia Bhd* [2003] 3 CLJ 310; [2003] 3 MLJ 29.

(Emphasis added.)

[23] We now turn to consider the issues raised by the parties to the present appeal.

First issue: Whether the DC's findings of the appellant's misconduct and the DB's order affirmed by the learned HCJ were manifestly perverse and warranted appellate intervention

[24] The learned counsel for the appellant submitted that the DC's findings and the order of the DB, which were affirmed by the learned HCJ, were manifestly perverse and warranted appellate intervention.

[25] It was submitted that the facts and issues raised in the complaint were substantially the same as the facts and issues raised in suit 318.

[26] In suit 318, the first respondent primarily alleged that there was a collusion or conspiracy on the part of the appellant to defraud the first respondent and claimed for the following reliefs, among others, for:

26.1. a declaration that the October 19, 2011 order is null and void and of no effect;

26.2. a declaration that the November 25, 2011 order is null and void and of no effect;

26.3. the repayment of RM398,000 by the appellant to the first respondent; and

26.4. rescission of the settlement agreement on the grounds of "deception" and "undue influence".

[27] The issues to be tried as submitted by the first respondent to oppose the striking out application can be seen in the learned HCJ's grounds of judgment in suit 318 as follows:

Isu-isu fakta

a) adakah arahan oleh Defendan Keempat (semasa menjadi pentadbir sementara Plaintif) kepada kakitangan dan ahli sukarela Plaintif supaya memberikan segala bantuan yang diperlukan oleh Defendan Pertama sebagai satu rancangan untuk memfrodkan Plaintif;

b) adakah suatu fakta bahawa Defendan Pertama dan Ketiga sebagai rakan sekelas di universiti dan perancangan Defendan Pertama supaya Defendan

Ketiga dilantik sebagai peguamcara Plaintif sebagai sebahagian skim untuk memfrodkan Plaintif;

c) adakah suatu fakta bahawa hubungan rapat Defendan Pertama dan Keempat sebelum Defendan Keempat dilantik sebagai pentadbir sementara Plaintif mempunyai kaitan untuk memfrodkan Plaintif;

d) adakah pemberhentian Tetuan Arbain & Co. dari menjadi peguamcara Plaintif dan pelantikan Defendan Kedua dua hari sebelum pendengaran presiding semakan kos pada 19.10.11 telah membuka jalan dan melancarkan kepada a grand scheme of fraud;

e) adakah Defendan Kedua dan Ketiga menyembunyikan fakta bahawa kos sebenarnya dinaikkan kepada RM198,078.50 dan bukannya dikurangkan seperti yang dinyatakan secara palsu dalam surat kepada Plaintif bertarikh 29.11.2011;

f) adakah surat kepada Plaintif bertarikh 23.12.2011 dibuat oleh Defendan Pertama dengan menggunakan letter head Defendan Kedua;

g) adakah Defendan Kedua dan Ketiga menyokong permohonan taksiran gantirugi Defendan Pertama sebanyak RM645,566 di atas cadangan Defendan Keempat atau Defendan Kedua hanya mematuhi arahan Defendan Keempat;

h) adakah Defendan Ketiga sengaja dengan niat mengecualikan diri dari menghadiri perbincangan penyelesaian sebagai a grand scheme of fraud;

i) adakah salah satu terma perjanjian penyelesaian iaitu memberi sumbangan kepada badan kebajikan telah diikat kepada badan kebajikan yang diuruskan oleh Defendan Keempat;

j) adakah Defendan Pertama bertindak menghalang Plaintif dari melaksanakan tanggungjawab di bawah perjanjian penyelesaian;

k) adakah dengan tindakan kecil memindahkan kompresor penghawa dingin boleh mencapai kos dan gantirugi melampau sebanyak RM198,078.50 dan RM645,566;

l) telah berlaku bayaran bertindih untuk getting up bagi penghakiman bertarikh 30.3.2011 untuk pencerobohan;

m) bagaimanakah permohonan menaikkan kos di dalam semakan kos oleh Defendan Pertama (Enclosure 48) ditolak dan permohonan mengurangkan kos oleh Plaintif (Enclosure 47) dibenarkan sedangkan kos dinaikkan dari RM40,000 kepada RM198,078.50.

[28] Suit 318 was struck out by the High Court on the grounds that the first respondent's action disclosed no reasonable cause of action, it was scandalous, frivolous or vexatious, or it was otherwise an abuse of the process of the court. In so deciding, the High Court in suit 318 found:

28.1. with regard to the October 19, 2011 order:

> Berdasarkan kepada penelitian di atas, saya mendapati semua *prosedur bagi permohonan kos telah dibuat dengan betul dan dipatuhi. Tiada keterangan langsung yang boleh mengaitkan mana-mana Defendan berkonspirasi dalam mendapatkan perintah tersebut secara frod.*
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> ... saya mendapati ianya tidak ujud unsur-unsur menipu atau menyembunyikan fakta atau frod oleh Defendan-Defendan hanya disebabkan tidak dinyatakan kos RM40,000 sebelum ini. *Saya berpendapat adalah normal dan suatu kebiasaan apabila Defendan Kedua memaklumi award kos terkini yang dikurangkan dari award kos asal.*
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> Penukaran peguamcara Tetuan Arbain & Co. kepada Defendan Kedua (firma) *dua hari sebelum pendengaran* kajian semula kos di hadapan YA HMT pada 19.10.2011, *saya berpendapat adalah suatu perkara biasa untuk klien menukar peguam*;

28.2. with regard to the November 25, 2011 order:

> Plaintif mendakwa bahawa perintah mahkamah ini diperolehi secara frod kerana terdapat konspirasi oleh Defendan-Defendan. *Alasan yang diberikan Plaintif ialah kegagalan Defendan Ketiga hadir sendiri dalam prosiding bagi mewakili Plaintif, seorang peguamcara muda dihantar untuk prosiding itu, tiada bantahan dibuat oleh peguamcara Plaintif terhadap permohonan gantirugi Defendan Pertama dan tiada affidavit difailkan bagi membantah permohonan tersebut.*
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> Saya telah meneliti Salinan minit mahkamah bertarikh 25.11.2011 (eksibit CYS-4) dan mendapati peguamcara Plaintif tidak mempunyai bantahan kepada permohonan Defendan Pertama (Lampiran 53 dan 54 kes berkenaan). *Peguamcara Defendan Pertama telah mengemukakan 17 eksibit yang ditandakan oleh Mahkamah sebagai Ikatan A bagi menyokong permohonan mereka.*
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> Saya berpendapat (*berdasarkan kepada amalan biasa), walaupun tidak ada bantahan kepada permohonan tersebut, PKP masih akan meneliti kepada permohonan dan keterangan sokongan yang ada sebelum memberikan keputusan*;
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> and

28.3. with regard to other allegations by the first respondent:

v) lain-lain dakwaan Plaintif

> Dengan meneliti kepada keseluruhan latarbelakang dan keterangan kes ini, *saya berpendapat Plaintif adalah terlalu spekulatif apabila menimbulkan pembabitan Defendan-Defendan dalam kes ini. Saya dapati Plaintif akan mengaitkan apa sahaja keadaan atau perbuatan Defendan-Defendan yang tidak memihak (favourable) kepada Plaintif* sebagai suatu *grand scheme of fraud, conspiracy, concealment, deceit and misrepresentation* oleh Defendan-Defendan.

[29] It is pertinent to note at this juncture that the High Court's decision in suit 318 was upheld on appeal.

[30] In comparison, we found both the complaint and suit 318 were substantially premised on the same facts and issues. As such, we agree with the learned counsel for the appellant that the whole purpose of the complaint was to impeach the relevant court orders, which the first respondent had attempted to do in suit 318, but failed. We also agree that the first respondent was trying to revisit the issues already decided by the High Court in suit 318.

[31] However, as contended by the learned counsel for the first respondent, the learned HCJ disagreed with the appellant on this issue. The learned HCJ held that the issue before the DC was regarding the appellant's misconduct and not conspiracy or fraud. The following is observed:

> [78] The Appellant contended that the High Court in the 318 Suit had decided on what the DC is now revisiting is misplaced. *The issue before the High Court was conspiracy and defraud. Whereas the issue before the DC pertains to the professional conduct* of the Appellant in carrying out his professional duties in his capacity as a solicitor or otherwise and there was grounds of judgment written. This court agree with the 1st Respondent's submission that disciplinary proceedings are quite distinct and dissimilar from court proceedings in that their purpose is to discipline solicitors for acts of misconduct in their professional capacity or otherwise which amounts to grave impropriety. *The DC was not concerned with conspiracy to defraud.* The DC were concerned with the conduct of the Appellant leading up to the granting of the order for costs and damages and the Settlement Agreement thereafter. The DC in having the benefit of the new evidence found as a fact that the Appellant had misconducted himself.

[32] However, the learned HCJ took a contrary stand when she held that there was actually ample evidence before the DC to show that the appellant and Dato' Davis Yee Fei Churn ("YFC") from Messrs Davis & Low did in fact

collude or conspire to defraud the first respondent. The following is observed:

> [73] *There was ample direct and circumstantial evidence to point towards the fact that the Appellant and YFC did in fact colluded and/or conspire with each other to defraud the 1st Respondent*. The DC found that there was collusion between YFC and the Appellant and since YFC did not appeal the DB decision, therefore, YFC accepting the DC's finding that there was indeed such collusion. In such circumstances this court agree with the 2nd Respondent's submission that the Appellant appeal could not stand.

[33] For the sake of completeness, the exact finding of the DC is reproduced below:

> After careful consideration and after scrutinizing all the evidence, documents and also listening to all the witness and taking into account the demeanour of the 1st Respondent and the 2nd Respondent during the Hearing, we made a finding of fact that *there was clearly an obvious reasons that both the 1st and 2nd Respondent colluded with each other and thus had committed misconduct*.

[34] Indeed, we found that the learned HCJ's decision was inconsistent. The learned HCJ fell into this error because the alleged collusion or conspiracy to defraud was actually the basis for the first respondent's allegation of misconduct against the appellant and YFC in the first place. In the complaint and before the disciplinary proceeding, the first respondent alleged that the appellant had colluded with the appellant to defraud the first respondent which led to excessive cost and damages awarded by the court since YFC did not object to the appellant's cost and damages hearing.

[35] This can be seen even in the summary of the complaint in the record of investigation proceeding of the disciplinary committee report which states:

> Complainant alleged that both 1st and 2nd Respondent had *conspired with each other to defraud the Complainant*. 1st Respondent was the Plaintiff and 2nd Respondent was the solicitor for the Complainant (Defendant). During the Hearing the 2nd Respondent solicitor never objected or argued the case against the Plaintiff and as such higher cost and damages was awarded to the Plaintiff (1st Respondent).

[36] Other than conspiracy to defraud, the first respondent also alleged that the appellant had exercised deception and undue influence with regard to the settlement agreement. Again, issues pertaining to the settlement agreement and the proposed payment by cash were already raised and ventilated before the High Court in suit 318.

[37] Although summarily, decision has already been given in favour of the appellant by the court, and the same decision was upheld even on appeal.

The issue was made known by the appellant in the disciplinary proceeding as can be seen in the DC's notes of proceedings, but it was never addressed by the DC.

[38] We are of the view that it is not the function of the DC or the DB under the law to revisit any matters, issues or disputes which have been ventilated and determined by the court.

[39] In addition to the above, the DC made four findings of misconduct against the appellant which were: (1) conflict of interest, (2) double claim in the assessment of damages, (3) the settlement agreement, and (4) false claim in the garnishee proceeding.

[40] We have gone through the appeal records and found the evidence against the appellant was highly speculative, inconclusive and largely hearsay, and did not meet the required standard of proof.

[41] Therefore, we agree with the overall submission by the appellant that the DC's findings of the appellant's misconduct and the DB's order which were affirmed by the learned HCJ were manifestly perverse and warranted appellate intervention.

Second issue: DB's order for restitution

[42] Learned counsel for the appellant submitted that the DB in the present case has no jurisdiction to order for the restitution of RM398,000 against the appellant under s 103C(2) of the Legal Profession Act 1976 [Act 166] ("LPA 1976").

[43] The current s 103C(2) of the LPA 1976 reads:

> (2) The Disciplinary Committee may in appropriate cases in addition to its recommendation of an appropriate penalty or punishment recommend that the Disciplinary Board make an order of restitution by the advocate and solicitor *of the complainant's monies if it is established that such monies were or are held by the advocate and solicitor in his professional capacity and the complainant is entitled to the return of such monies or part thereof*;

[44] Section 103C(2) was amended through s 15(c) of the Legal Profession (Amendment) Act 2012 [Act A1444] ("Act A1444") which came into force on June 3, 2014 through PU(B) 262/2014.

[45] Prior to the amendment, the provision reads:

> (2) The Disciplinary Committee may in appropriate cases in addition to its recommendation of an appropriate penalty or punishment recommend that the Disciplinary Board make an Order of restitution by the advocate and solicitor of *any sum found due and owing to the complainant*.

[46] Learned counsel for the first respondent on the other hand contended that the current provision of s 103C(2) of the LPA 1976 is not applicable to the facts of the present case since the alleged misconduct was committed before the current law came into force. According to learned counsel for the first respondent, the previous s 103C(2) of the LPA 1976 is applicable.

[47] On this issue, we refer to s 21 of Act A1444, a saving and transitional provision, which reads:

> (4) Where *on the date of coming into operation of this Act, disciplinary proceedings were pending* before the Disciplinary Board, the proceedings shall continue under the provisions of the principal Act applicable to those proceedings immediately before the date of coming into operation of this Act and *the Disciplinary Board may make such order or decision as it could have made under the authority vested in it under the principal Act immediately before the date of coming into operation of this Act*.
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> (5) *Any written application or complaint* concerning the conduct of any advocate and solicitor or of any pupil referred to the Disciplinary Board *before the date of coming into operation of this Act shall be dealt with under the provisions of the principal Act* applicable to disciplinary proceedings *immediately before the date of coming into operation of this Act*.

[48] It is therefore apparent to us that it was intended under s 21 of Act A1444 for any complaints already lodged or any proceedings already pending before the coming into operation of Act A1444 to be dealt with the previous principal Act. Since the complaint in the present case was filed in 2016, after Act A1444 has come into force, the current provision is applicable to the facts of the present case.

[49] In the case of *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd (and Another Appeal)* [2019] 7 AMR 348; [2020] 1 CLJ 299, Idrus Harun FCJ (as his Lordship then was) in delivering the judgment of the Federal Court, held:

> The trite general principle is that an Act of Parliament is not intended to have a retrospective operation unless a contrary intention is evinced in express and unmistakable terms or in a language which is such that it plainly requires such a construction.

[50] Noraini Abdul Rahman JC (as her Ladyship then was) in the case of *Mogana Sunthari a/p Subramaniam v Khadijah bt Yusof & Anor* [2009] 3 MLJ 111 had to deal with similar issue pertaining to the earlier amendment of the LPA 1976. Her Ladyship opined, to which we agree, that:

> [29] After hearing the submissions, the court is of the opinion that it need to determine the issue of when the complaint was made against the appellant. *If the complaint was made prior to the coming into force of Act A1269, then the decision of the*

DB is ultra vires. If the complaint was made after the coming into force of Act A1269, then the decision of the DB is intra vires.

(Emphasis added.)

[51] Reverting to the facts in the present case, it is clear from the reading of the current provision of s 103C(2) of the LPA 1976 that the DB may make an order for restitution if it is established that such monies are held by the appellant in his professional capacity and the first respondent is entitled to the return of such monies thereof.

[52] It is imperative to note that the sum of RM398,000 ordered to be restituted by the DB was a part of the total RM645,566 judgment sum in the November 25, 2011 order. The judgment sum was assessed and awarded by the court to the appellant as damages for trespass committed by the first respondent against him. The money was purported to be received by the appellant in his personal capacity as a private litigant.

[53] As such, we are of the view that the issue of restitution to the first respondent does not arise at all based on the facts in the present case.

Conclusion

[54] In conclusion, based on the foregoing reasons, we found that there are merits in the appellant's appeal. We hereby allow the appellant's appeal with no order as to costs. The learned High Court judge's decision and the DB's decision are set aside.