CACV 60/2012

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL

CIVIL APPEAL NO. 60 OF 2012

(ON APPEAL FROM THE ORDER OF THE SOLICITORS DISCIPLINARY TRIBUNAL DATED 7TH MARCH 2012)

IN THE MATTER OF A SOLICITOR

and

IN THE MATTER OF THE LEGAL PRACTITIONERS ORDINANCE CAP. 159 ("the Ordinance")

BETWEEN

A SOLICITOR — Appellant

and

THE LAW SOCIETY OF HONG KONG — Respondent

Before: Hon Stock VP, Kwan and Barma JJA in Court

Date of Hearing: 11 December 2012

Date of Judgment: 11 December 2012

Date of Reasons for Judgment: 21 December 2012

REASONS FOR JUDGMENT

Hon Stock VP:

1. I agree with the Reasons provided by Kwan JA.

Hon Kwan JA:

2. This is an appeal brought by a solicitor ("the Solicitor") against the findings ("the Findings") of the Solicitors Disciplinary Tribunal on 12 December 2011 and the order on penalty and costs made on 7 March 2012. The Tribunal found that the Solicitor was in breach of Principle 6.04 of the Hong Kong Solicitors' Guide to Professional Conduct ("the Guide") by failing to give prompt and satisfactory explanations or replies to the Law Society's enquiries by its letters of 17 August 2009 and 23 September 2009 ("the Revised Request") concerning his professional conduct or to explain his conduct when required to do so by the Law Society. The Tribunal ordered the Solicitor to pay $25,000 as a penalty and $450,000 by way of contribution to the costs of the Law Society of the disciplinary proceedings.

3. The Solicitor gave two grounds in refusing to answer the Law Society's enquiries. Firstly, he claimed the privilege against self-incrimination. Secondly, he asserted that the matter was *res judicata* in that the question in the Revised Request had been decided by the Investigation Committee in dealing with another complaint against him in 1997.

4. At issue in the disciplinary proceedings and in this appeal is whether the Solicitor's refusal to answer the Law Society's enquiries was in all the circumstances reasonable. As his refusal was based on the two

legal grounds as specified, it would be necessary to consider if these legal grounds were reasonably arguable. The Tribunal found that they were not, hence the refusal to answer was unreasonable.

5. We dismissed the appeal at the conclusion of the hearing and these are the reasons for our judgment.

The background

6. At the disciplinary hearing before the Tribunal, the Law Society called the Director of Compliance and the complainant Chan Cho Nam ("Mr Chan") as witnesses. They produced affidavits and gave oral evidence. The Solicitor did not produce any evidence. The relevant background matters, taken from the documents adduced by the Law Society, may be stated as follows.

7. By a letter dated 12 June 1997, one Lee Kai Yuen ("Mr Lee") made a complaint against the Solicitor ("the 1997 Complaint"). Mr Lee did so as the chairman of the Owner's Committee of Dynasty Square, a property development in Yanbu Town, Nanhai County, Guangdong Province. It was alleged that the Solicitor's firm of solicitors, which was appointed as the notary public, had acted in favour of the developers to the detriment of the purchasers in handling the sale and purchase of the units in Dynasty Square and the relevant legal documents. Among other things, Mr Lee complained about misleading and false information in the advertisement of the development, the delay in delivering possession of the units, the issuance of a certificate of completion when work had not been completed, the overcharging of the deed tax and high management fees. Mr Lee requested the Law Society to invite the Solicitor to explain

and to negotiate with the developers regarding the payment of compensation to the purchasers.

8. The Law Society wrote to the Solicitor on 26 June 1997 enclosing a copy of the 1997 Complaint and requested him to give an explanation. The Solicitor did so by his letter dated 10 July 1997, stating that "the notary matter" concerning the development was handled by him. He refuted each of the complaints made by Mr Lee, and pointed out it had repeatedly been explained to the purchasers that his firm was only responsible for issuing the notarised contract and that the scope of his firm's services did not include the investigation of the authenticity of the documents.

9. On 29 October 1997, the Law Society wrote to the Solicitor regarding the 1997 Complaint and informed him that the Investigation Committee had considered the matter and it had been resolved that "the complaint is not substantiated".

10. By a letter dated 9 September 2008, Mr Chan made a complaint to the Law Society against the Solicitor in respect of the Solicitor's conduct in the sale and purchase of units in Dynasty Square in 1994 ("the 2008 Complaint"). He did so on his own behalf and on behalf of 61 other purchasers. He alleged that in addition to being the China appointed attesting officer ("CAAO"), the Solicitor was acting for both the purchasers and the developer and had collected service charges from the purchasers in the capacity as a Hong Kong solicitor. He requested the Solicitor to return various amounts to the purchasers being the occupational fees (which the Nanhai District People's Court had ruled in favour of the purchasers that the developer was not entitled to charge)

and the overcharged deed tax, and to provide to those purchasers without premises permits various supporting documents which they would require to obtain such permits. He also alleged negligence of the Solicitor in that the sale and purchase agreement returned to the purchasers had not been affixed with a transaction tax stamp and that the Solicitor had collected payment of the purchase price for the developer without informing the purchasers that the actual area of their units was 30% less than the area specified in the premises permits.

11. Mr Chan followed up the 2008 Complaint with further letters to the Law Society, requesting the latter to look into the conduct and integrity of the Solicitor in the sale and purchase of units in Dynasty Square. In his letter dated 24 September 2008, he reiterated that the Solicitor was not only a CAAO, the Solicitor was at the same time representing both parties in the sale and purchase in the capacity of a Hong Kong lawyer. The Solicitor had received service fee from the purchasers, and had collected the purchase price, deed tax and other fees, these were matters that would not be dealt with by a CAAO. In his letter dated 9 October 2008, he pointed out that the Solicitor had refused to confirm if the deed tax and occupational fees collected on behalf of the developer had been remitted and requested the Solicitor to give a clear account of the whereabouts of the monies collected.

12. On 10 October 2008, the Law Society provided copies of Mr Chan's letters dated 9 September 2008 and 9 October 2008 to the Solicitor. On 10 November 2008, the Law Society sought an update on the position from the Solicitor. He replied on 24 November stating that he relied on *res judicata* to say that (1) the matter had been decided by the Law Society in 1997; (2) the matter had been decided by a court of

law in Mainland China; and (3) the matter had been referred to the Liaison Office of the Central People's Government in Hong Kong and no fault was found.

13. Mr Chan wrote to the Chief Judge of the High Court on 22 October 2008 requesting him to convene a Solicitors Disciplinary Tribunal under section 9A of the Legal Practitioners Ordinance, Cap 159. On 27 November 2008, the Chief Judge wrote to the Law Society asking for the reasons of the Law Society's decision not to set up a Solicitors Disciplinary Tribunal to look into Mr Chan's complaint against the Solicitor. Following the letter from the Chief Judge, the Law Society appointed another Investigation Committee.

14. By its letter dated 13 January 2009, the Law Society informed the Solicitor of Mr Chan's aforesaid request to the Chief Judge and requested the Solicitor to provide an explanation whether he acted for Mr Chan and 61 other purchasers in the property transactions in his capacity as a CAAO or as a solicitor. Depending on his reply as to the capacity in which he acted, he was asked to explain his conduct accordingly.

15. In his reply by letter dated 4 February 2009, the Solicitor offered an explanation about the payments of the deed tax and other expenses to the developer and asserted *res judicata* applied in that all issues had been dealt with by a court of law in Mainland China. He also drew the attention of the Law Society to his reply dated 10 July 1997. He did not answer the four specific enquiries in the letter of the Law Society dated 13 January 2009.

16. On 5 February 2009, the Law Society wrote to the Solicitor noting that the explanation in his letter of 4 February did not specifically relate to the enquiries raised. The Law Society referred to Principle 6.04 of the Guide and requested him to give his specific explanation to the four queries in its letter of 13 January as well as a copy of his letter dated 10 July 1997.

17. The Solicitor replied by letter dated 19 February 2009 reiterating that all the complaints of Mr Chan and the other purchasers had been dealt with by the judges in Mainland China and that the Law Society had conducted investigation in 1997 and had reached a conclusion at that time. As for Principle 6.04 of the Guide, he asserted that this could not be used to force him to answer specific questions of the Law Society and relied on the Hong Kong Bill of Rights Ordinance, Cap 383 and the Basic Law for the right not to answer self-incriminating questions. At the end of his six-page letter, he enclosed a copy of his letter dated 10 July 1997.

18. The Law Society responded by letter on 20 February stating that the fact that the complaints were dealt with by judges in Mainland China would not prevent the Law Society from investigating into the 2008 Complaint. Furthermore, the issues of the investigation conducted by the Law Society in 1997 were different from the issues raised in the 2008 Complaint. The Law Society referred to its articles of association, by which the Solicitor was "absolutely bound" as a member, and stated that its authority to seek explanations from the Solicitor was contained in article 6. The Solicitor was told that if he declined to provide the requested explanation, the matter would be referred to an Investigation Committee that he had breached Principle 6.04.

19. The Solicitor repeated his reliance on *res judicata*, the Hong Kong Bill of Rights Ordinance and the Basic Law in his reply to the Law Society of 6 March 2009. He asserted that he had complied with Principle 6.04.

20. There followed a substantial break until the Law Society issued to the Solicitor the first letter of the Revised Request dated 17 August 2009, in which the Law Society stated it had understood from the documents received from Mr Chan that the Solicitor acted as a CAAO for Mr Chan. The Law Society requested the Solicitor to confirm whether, in his view, he had also acted for Mr Chan as a solicitor in the property transaction.

21. The Solicitor replied by letter dated 28 August 2009, reiterating his stance that the Law Society had no reason to re-open the matter by reason of *res judicata*.

22. By the second letter of the Revised Request dated 23 September 2009, the Law Society informed the Solicitor that his reply of 28 August was not an answer to the question raised in the first letter of the Revised Request. The Law Society referred to Principle 6.04 and again requested the Solicitor to answer the question in the Revised Request.

23. The Solicitor wrote a three-page letter to the Law Society on 6 October 2009 stating that he considered he had already answered all its questions.

24. The Revised Request and the Solicitor's responses to the Revised Request formed the basis of the charge against him.

Principle 6.04 of the Guide

25. Principle 6.04 provides as follows:

> "A solicitor is obliged to deal promptly with correspondence from a client or a former client or on their behalf, and with inquiries from the Law Society."

26. It is common ground that a breach of this principle constitutes professional misconduct.

27. It is not alleged by the Law Society that the Solicitor had failed to be prompt in dealing with the Revised Request, but that he had declined to answer a simple inquiry in the Revised Request. The Solicitor had declined to answer on two grounds: privilege against self-incrimination and *res judicata*. As mentioned earlier, whether he had acted reasonably in refusing to answer a simple enquiry on those legal grounds would depend on whether those grounds could be regarded as reasonably arguable. It would not be enough he had a bona fide belief that his legal argument was correct. Mr Jonathan Wong, who appeared for the Solicitor throughout, did not contend otherwise. What he submitted was that the objective standard of a reasonably competent and diligent solicitor should be applied. It did not appear to me that the Tribunal had not sought to apply an objective standard.

28. Mr Wong also submitted that the Law Society did not explain why the Solicitor's reasons in refusing to answering a simply enquiry were invalid so that the Solicitor could deal with the Law Society's objections. There is nothing in this point. The Law Society had explained succinctly why the Solicitor's reasons were invalid in its letter dated 20 February 2009. This merely attracted an intemperate response from the Solicitor on 6 March 2009 accusing the Law Society of

not knowing the meaning and effect of *res judicata* and the effect of the provisions of the Hong Kong Bill of Rights Ordinance and the Basic Law. I agree with the Tribunal that the onus is on a solicitor declining to answer an enquiry to provide reasonably arguable grounds for so declining, and that there is no obligation on the Law Society to provide counter arguments[1].

Privilege against self-incrimination

29. The Tribunal rejected the Solicitor's argument that in answering the Revised Request, the Solicitor would expose himself to punishment, penalty or forfeiture. The Tribunal reasoned that if the Solicitor had answered that in his view he did act as a solicitor for Mr Chan, at worst there would then need to be further investigation of what actually occurred to ascertain whether Mr Chan's complaint was made out and whether the Solicitor might be charged with a disciplinary offence. If the Solicitor had answered "no", there might again be further investigation, although this would be less likely. Hence, the Tribunal held that the privilege against self-incrimination was not available to the Solicitor in this situation.[2]

30. The Tribunal's reasoning is obviously right. Mr Wong's argument to the contrary that any answer to the Revised Request is "clearly self-incriminating" is just untenable.

31. In view of the finding that the Solicitor could not claim privilege against self-incrimination in this situation, it was not strictly

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[1] The Findings, para 11d

[2] The Findings, para 10b, sub paras i and ii

necessary to deal with other arguments advanced by Mr Wong on this issue. Nevertheless, the Tribunal went on to hold[3], even if the privilege against self-incrimination were relevant here, the Solicitor had waived the privilege by virtue of his membership of the Law Society and had become bound by the provisions of the Guide[4], including Principle 6.04. The Tribunal applied and followed these English decisions: *R v The Institute of Chartered Accountants of England and Wales, ex parte Nawaz* [1997] PNLR 433 and on appeal in [1997] CLY 1; *Holder v The Law Society* [2006] PNLR 10; and *Allan Macpherson v The Law Society* [2005] EWHC 2837 (Admin).

32. It would suffice just to quote this passage in the judgment of Leggatt LJ in *Nawaz*:

> "When a person enters a profession he accepts its duties and liabilities as well as its rights and powers. Similarly, he may acquire or surrender privileges and immunities. Nevertheless, the principle that privilege is not to be regarded as having been abrogated, except by express words or necessary implication, applies also to waiver. In my judgment, acceptance of a duty to provide information demanded of an accountant constitutes a waiver by the member concerned of any privilege from disclosure. It is plainly in the public interest, as well as the interests of the profession, that the Institute should be enabled to obtain all such information in the possession of its members as is relevant to complaints of their professional misconduct."

33. This reasoning applies squarely to refute any argument that in the course of an investigation by the Law Society of a complaint of professional misconduct against a solicitor, that solicitor may invoke the privilege against self-incrimination to refuse to provide information to the

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[3] The Findings, para 10b, sub para iii

[4] Article 6 of the Articles of Association of the Law Society provides: "Every Member shall be absolutely bound by the Articles of Association and all Practice Directions, rules and regulations from time to time of the Society … and each Member shall be deemed to have given an undertaking to the Society to abide by all such Practice Directions, rules and regulations and the Articles of Association."

enquiries of the Law Society. This reasoning is obviously correct. If it were otherwise, the powers of the Law Society to investigate complaints of professional misconduct would be severely compromised. As McCombe J had stated in *Holder v The Law Society* at para 33:

> "We are not here concerned with the self-incrimination of a defendant with regard to an actual or potential criminal charge. We are concerned with the powers of a professional body to investigate the affairs of its members in the public interest and to discipline such members for breaches of the rules that apply to such professions."

34. Lord Collins of Mapesbury JSC made this observation in *R (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146 at para 60:

> "The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour: see e.g. *Bolton v Law Society* [1994] 1 WLR 512, 518 per Sir Thomas Bingham MR; *Gupta v General Medical Council* [2002] 1 WLR 1691, para 21, per Lord Rodger of Earlsferry."

35. Similar observations were made by A Cheung J (as he then was) in *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114 at para 54.

36. The Tribunal is plainly correct to hold that Principle 6.04 is important as part of the self regulatory powers of the solicitors' profession vested in the Law Society and that the remarks of the English Court of Appeal in *Nawaz* as to waiver as being in the public interest are also apposite in the Hong Kong context[5]. As a matter of common sense and logic, there is no reason why the position relating to the solicitors' profession in Hong Kong should be any different.

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[5] The Findings, para 10b, sub para iv

37. Mr Wong attempted to make out a case that the argument on the privilege against self-incrimination in this situation may be regarded as reasonably arguable by relying on dicta in other situations. He cited *Au Wing Lun William v Law Society of Hong Kong*, HCMP 1378/2001, 18 July 2001, in which Woo JA (as he then was) in refusing leave to a solicitor to appeal against the findings and order of the Solicitors Disciplinary Tribunal out of time said *obiter* at para 34 that the applicant "may be entitled to claim the privilege against self-incrimination in the proceedings before the Tribunal either under s 65 or s 10 of the Evidence Ordinance."

38. Woo JA was not dealing with the powers of the Law Society at the investigation stage, nor had he considered the question of waiver of privilege by the solicitor in that case. I cannot see how his statement could assist Mr Wong's argument that there may be "tensions" with the authorities in Hong Kong or that there would be "anomalies" if the English decisions followed by the Tribunal should be adopted here. The Solicitor asserted he could claim privilege against self-incrimination in refusing to answer an enquiry at the investigation stage. That was the question regarding privilege against self-incrimination before the Tribunal. There was no need to consider whether such privilege could be claimed, depending on what use would be made by the Law Society of the Solicitor's answer, in other situations.

39. Mr Wong also cited a sentence in the judgment of Bokhary PJ in *Fu Kin Chi v Secretary for Justice* (1997-1998) 1 HKCFAR 85 at 102E that the privilege against self-incrimination was not to be taken as lost merely by joining a disciplined service (this was in the context of a police disciplinary enquiry). It seems to me that statement was taken

out of context, as Bokhary PJ went on to say at 102F to G that whether the privilege against self-incrimination exists "in turn depends on whether it has been abrogated by the statutory regime governing the disciplined service concerned. Such abrogation may be either express or by necessary implication." It does not provide any support for the Solicitor's contention that his assertion of a privilege against self-incrimination was reasonably arguable.

40. Mr Wong referred to section 8B(2) of the Legal Practitioners Ordinance which provides that documents required by the Council of the Law Society under section 8A or by an inspector under section 8AA shall be produced or delivered notwithstanding any claim of solicitor-client privilege but documents that are subject to a solicitor-client privilege may only be used for the purposes of an enquiry or investigation under the Ordinance. He submitted that as the Ordinance expressly provides for the partial abrogation of solicitor-client privilege in section 8B(2) but is silent on the privilege against self-incrimination, it must be reasonably arguable that the latter is preserved.

41. The Tribunal was clearly right to reject this submission for the reason that the legislature in dealing with solicitor-client privilege for the purposes of sections 8A and 8AA cannot be said to have changed other obligations imposed on solicitors as members of the Law Society[6].

42. Mr Wong alluded to further arguments in a footnote of his written submission that the waiver of the privilege against self-incrimination may violate the freedom of choice of occupation and the freedom of association in Articles 33 and 27 of the Basic Law. As

[6] The Findings, para 10b, sub para v

he did not develop these arguments before the Tribunal or in this court, it is unnecessary to deal with them in any detail except to express my agreement with Mr Abraham Chan, who appeared for the Law Society on appeal, that it is impossible to see how freedom of choice of occupation or freedom of association is engaged, in that waiver involves a free exercise of choice, see Leggatt LJ in *Nawaz*, and in any event, given the public interest considerations, the restriction in question is plainly legitimate and proportionate.

Res judicata

43. It is not in dispute that the principles of *res judicata* apply to disciplinary proceedings (*R (Coke-Wallis) v Institute of Chartered Accountants* [2011] 2 AC 146) and that the constituent elements in a case based on cause of action estoppel are as set out in *Spencer Bower & Handley on Res Judicata*, 4th ed, para 1.02, which are as follows:

> "(i) the decision, whether domestic or foreign, was judicial, in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was – (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem."

44. Although the decision of the People's Court of Nanhai District was mentioned in the Solicitor's correspondence with the Law Society, this did not form the basis of the *res judicata* argument advanced on his behalf in the Tribunal[7] or in this appeal. He relied only on the decision of the Investigation Committee on the 1997 Complaint as constituting cause of action estoppel.

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[7] The Findings, para 10a, sub para v

45. The Tribunal found that these constituent elements were not established:

(1) Element (i)

46. The decision of the Investigation Committee on the 1997 Complaint was not a judicial decision. In respect of the 1997 Complaint, the Investigation Committee merely endorsed the result of an investigation rather than acting as a tribunal deciding specific issues between defined parties[8].

47. Further, the 1997 Complaint did not actually raise the relevant question in the Revised Request in the 2008 Complaint, namely, whether or not the Solicitor acted for Mr Chan as a solicitor in Mr Chan's purchase of a property at Dynasty Square. The 1997 Complaint against the Solicitor was in his capacity as a representative of the developer. Hence, the Investigation Committee did not need to deal with the relevant question in the Revised Request[9].

(2) Element (iv)(a)

48. It was not a final decision in that the investigation could have been reopened, for instance, by the submission of new evidence by the complainant[10].

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[8] The Findings, para 10a, sub paras iv(e), (f)

[9] The Findings, para 10a, sub para iv(a)

[10] The Findings, para 10a, sub paras iv(d), (f)

(3) Element (vi)

49. The parties were not the same in the 1997 Complaint and the 2008 Complaint, nor could it be said that they were privies. The Tribunal accepted the evidence of Mr Chan that he did not know Mr Lee until 2007 and hence was not aware of nor was he a party to the 1997 Complaint. And although Madam Chung Lai Fun and Madam Chan Siu Yung appeared to be complainants in the 1997 Complaint and the 2008 Complaint, Mr Chan cannot be said to be their "privy" as described in para 9.38 of *Spencer Bower & Handley* so as to be bound by any estoppel based on *res judicata*[11].

50. For the above reasons, the Tribunal concluded that the Solicitor has not established a reasonably arguable case on *res judicata*.

51. Mr Wong submitted it is reasonably arguable that the decision of the Investigation Committee in respect of the 1997 Complaint was final and on the merits. I fail to see how that could be the case. Quite apart from the fact that its decision was not judicial (being an investigation process to gather evidence for disciplinary proceedings if they are held and to filter out unmeritorious complaints), by no stretch of the imagination could its decision be said to be final. There is clearly nothing to preclude an Investigation Committee from reopening an investigation if further information should become available. I consider the Tribunal's reasoning unassailable.

52. Mr Wong had complained of unfairness in that the Solicitor had asked for disclosure relating to the 1997 Complaint but was refused

[11] The Findings, para 10a, sub para iv(c)

and surmised that if disclosure were given, it is possible that the 1997 Complaint was found unsubstantiated on the basis that the Solicitor only acted as a CAAO. As noted by the Tribunal, at a preliminary hearing when the Solicitor was represented by leading counsel, his former counsel had stated that it would only be necessary for the Tribunal to look at the 1997 Complaint and the 2008 Complaints and hence the Tribunal refused the Solicitor's application for disclosure of all the documents in the possession of the Law Society relating to the two complaints. I am unable to see any unfairness in procedure. It is not necessary to deal with the surmise of Mr Wong.

Penalty and costs

53. Before the Tribunal decided on the penalty, it gave the Solicitor a last chance to deal with the Revised Request properly and invited him to provide a simple "yes" or "no" answer to the query in the Revised Request within 30 days of receiving the Findings. The Solicitor had duly complied with this.

54. The Tribunal accepted there was no suggestion of dishonesty or moral turpitude on the part of the Solicitor who genuinely but mistakenly believed he had good reasons for declining to deal with the Revised Request. It had regard to penalties imposed in disciplinary proceedings relating to breach of Principle 6.04, which varied between $12,000 and $30,000. It considered a penalty of $25,000 appropriate in all the circumstances[12].

[12] The Order dated 7 March 2012, para (3)(a)

55. The Tribunal did not find the Law Society's costs of approximately $870,000 to be excessive and considered it appropriate for the Solicitor to contribute to the net sum of approximately $710,000 ($870,000 less the costs incurred prior to 5 October 2010 when the disciplinary proceedings were instituted) plus the clerk's costs of $195,000, making a total of $905,000[13]. The Tribunal could not ignore the Solicitor's ill-founded suspicion that the Law Society was guilty of unfair means in pursuing the complaint against him, which led to an escalation in the costs of the proceedings. Furthermore, the Solicitor's reasons for declining to answer the Revised Request were of no real substance and a great deal of time and expense could have been saved by the Solicitor answering the simple question in the Revised Request at the time the request was made. All in all, the Tribunal considered it fair and reasonable for the Solicitor to contribute $450,000 towards the costs of the proceedings[14].

56. Mr Wong referred us to *A Solicitor v The Law Society of Hong Kong* [2005] 4 HKC 290, in which the Court of Appeal observed at 299D that where a solicitor sought advice from counsel and followed that advice, and has acted at all times reasonably, honestly and in good faith, any professional misconduct committed on his part (if any) would largely fall under the lowest end of the scale of culpability. In that case, the Court of Appeal reduced the fine from $100,000 to $5,000 and the contribution to the estimated costs of $1,200,000 from $400,000 to $75,000. Mr Wong submitted that having regard to that decision, the penalty and costs contribution imposed by the Tribunal here are clearly excessive to warrant interference by this court.

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[13] The Order dated 7 March 2012, para (3)(b)

[14] The Order dated 7 March 2012, para (3)(c)

57. The circumstances in the case cited above are entirely distinguishable in that the solicitor in that case had acted on the advice of leading and junior counsel in refusing to comply with a direction of the Council of the Law Society to produce certain documents for inspection until he had sight of the Council's direction authorising the notice for inspection. The solicitor had acted reasonably, honestly and in good faith in seeking and then following counsel's advice.

58. There is no evidence that the Solicitor was acting on counsel's advice when he refused to answer the question in the Revised Request. Nor did he act reasonably in declining to give an answer to the question.

59. It has not been shown that the penalty and costs contribution imposed by the Tribunal was plainly or obviously wrong. There is no basis to interfere with the decision of the Tribunal on these matters.

60. As there are no merits in any of the grounds of appeal, we dismissed the appeal with costs to the Law Society.

Hon Barma JA:

61. I agree with the Reasons for Judgment of Kwan JA.

(Frank Stock)	(Susan Kwan)	(Aarif Barma)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Jonathan Wong, instructed by C C Partners, for the Appellant

Mr Abraham Chan, instructed by Sit, Fung, Kwong & Shum, for the Respondent