CPD Course: Reassessing the ethical principles of the legal profession: the case for updating the Code of Ethics for Attorneys

Resource Persons: Mr. Rajesh Bucktowonsingh SA and Mr. Paul Ozin Q.C.

Attendees: Law Practitioners and Legal Officers

Date: 24th October 2019

Time: 14.00- 16.00

The Institute for Judicial and Legal Studies welcomed Mr. Rajesh Bucktowonsingh SA and Mr. Paul Ozin Q.C. to deliver a CPD lecture on 'Reassessing the ethical principles of the legal profession: the case for updating the Code of Ethics for Attorneys'. This course sought to provide a background to the current frameworks regulating attorneys in Mauritius as well as in England and Wales. The current Code of Ethics (made by the Council of the Mauritius Law Society under Section 17 (1) of The Mauritius Law Society Act) was examined against the background of the alternative models in England and Wales and consideration was also given to whether the current Mauritian code meets the changing needs of the legal sector.

Brief overview:

Mr. Bucktowonsingh SA-

- Background of the current Mauritian Code of Ethics;
- Changes in the landscape of the legal profession; and
- Lacuna in the current code and why it needs reassessing.

Mr. Ozin Q.C.-

- Case study derived from a real SRA case;
- The current solicitors disciplinary scheme in England and Wales;
- The wider England and Wales regulatory landscape;
- Mauritius wider regulatory framework;
- Charges- Mauritius current model;
- Appeals in England and Wales; and
- The Mauritian appeal model.

Mr. Bucktowonsingh SA began this session by stating that the current code of ethics for Attorneys is being revised. As such, he explained that the purpose of his lecture was not to list the current provisions of the code and to provide analysis. Instead, he stated that he would focus on the lacunas of the current code and how it is not coping with the changing needs of the legal sector. He encouraged the audience to make it an interactive session so that he could have a broader notion of which provisions need reassessing within the code. Moving on, he referred to the objective of the code which was to set up standards, requirements and rule of conduct so that Attorneys could honour their professional duties which were to preserve the dignity of the legal profession, the administration of justice and the public at large.

Next, Mr. Bucktowonsingh referred to the changes in the landscape of the legal profession. He stated that the code of ethics was formulated taking into account a sole practicing Attorney as this was the only form of practice back in day. However, new forms of practice have emerged since then and Mr. Bucktowonsingh stated that it was against these new forms that we have to reassess the effectiveness of the current ethical rules and develop measures to increase the awareness of and adherence to the professional ethical rules.

The current forms of practice as laid down by Mr. Bucktowonsingh is as follows:

- Individual Law Practitioner;
- Law Firms (Attorneys & Barristers);
- Law Chambers (Attorneys & Barristers); and
- Attorneys in the employ of another Attorney, Law Firms or other Institutions.

Additionally, further justification was provided as to why the code needed reassessing. It was stated that the code was here to protect as well as guide attorneys and third parties who felt that an attorney fell below the required standards. Mr. Bucktowonsingh also stressed on the fact the current code of ethics is narrowly focused on basic ethical principles only as it does not cater for issues such as complaints against poor service on behalf of an attorney. It was stated that attorneys need to be held to account for conduct that falls short not only of the ethical standards our peers expect of us but also the standards of competence and diligence members of the public are entitled to expect.

Lastly, Mr. Bucktowonsingh, for his part, provided some ethical issues which needed readdressing:

- Conflicts of interest;
- Opposing a former client;
- Confidentiality;
- assisting the court and not to mislead the court;
- The Giving of Undertakings; and
- professional misconduct or unprofessional conduct.

In the second part of the course, Mr. Ozin referred to the case of ***Solicitors Regulation Authority v Good [2019]***[1] so as to illustrate the practice in England and Wales against ethical misconduct on behalf of Solicitors. In this case, the Solicitors Regulation Authority (SRA) alleged that G's firm, to his knowledge, charged grossly excessive fees in clinical negligence cases (£400/hr, almost 4 times the going rate, plus a 100% success fee, both of which were excessive) and that he thereby acted dishonestly, without integrity (**Principle 2 of the SRA**

[1] Solicitors Regulation Authority V Good [2019] EWHC 817

Principles 2011) and failed to maintain the trust of the public (**Principle 6 of the SRA Principles 2011**). ***Good*** was not found to be dishonest (despite the SDT finding allegations proven) by the Solicitors Disciplinary Tribunal (SDT) because he believed he was entitled to "test the rate", and that the bills would be subject to scrutiny of the courts/costs experts. The SDT imposed a sanction of a fine.

However, the SRA appealed against the decision of the SDT to the High Court (statutory right of appeal of under section 49 of the Solicitors Act 1974) where SDT's finding (of no dishonesty could not be justified) was quashed. The divisional court held that there was a missing ingredient in SDT's reasoning that Good genuinely believed that he was entitled to charge those fees; and in any event, given his knowledge, even a genuine belief would not be enough to prevent Good from being dishonest (on the current ***Ivey***[2] test). In addition, the sanction of a fine imposed by the SDT was quashed and substituted by striking off the Roll.

Next, Mr. Ozin turned towards the current SRA principles and Code of 2011 (last updated 2018). He stated that the Code of Conduct is divided into **Mandatory non-exhaustive "Outcome" provisions** – more specific do's and don'ts developing the objectives of the principles and **Non-mandatory non-exhaustive "Indicative behaviours" and "notes"** - more specific dos and don'ts giving examples of the application of outcomes. Additionally, it was stated that there are more specific rules in England and Wales such as the 'Account Rules'. Mr. Ozin also stipulated that a new SRA "Standard and Regulations" will replace the current SRA Handbook by the end of November 2019. The new model will have the same basic model of principles and codes but it will be more streamlined and less prescriptive for it to adapt to the changing needs of the legal sector (such as online services and increased Solicitor rights of audience in the UK).

Following the explanation of England and Wales' disciplinary schemes, Mr. Ozin turned his attention towards the wider regulatory landscape of both England and Wales as well as Mauritius. He stated that the Legal Services Act 2007 (no equivalent piece of legislation in Mauritius) had a major influence in the creation of the Legal Services Board as the 'super regulator' and that it is tasked to regulate the legal services 'approved regulators', i.e. the SRA and the BSB (Bar Standards Board, the regulatory arm of the Bar Council). Furthermore, reference was made to the different limbs of the Law Society (after it was split in 2007): The Law Society (the 'trade union' of Solicitors), the SRA (the regulator- brings proceedings before the SDT) and the Legal Complaints Service (clients' complaints-now defunct).

Likewise, Mr. Ozin referred to Mauritian wider regulatory framework with regards to Attorneys. He divided them into four routes and they are as follows:

- **Route 1**: ss13 & 14 Law Practitioners Act 1984 – **SC hearing on initiation by AG** (Applicable test= "act of such a nature as to call for the institution of disciplinary proceedings")- Mr. Ozin noted that the AG has wide discretionary powers with regards to deciding disciplinary actions.

[2] Ivey v Genting Casinos UK Ltd [2017] UKSC 67

- **Route 2:** under The Mauritius Bar Association Act 1957, s13 and Mauritius Law Society Act 2005, s18; and Court Act, s18 (confers jurisdiction on SC) – **BC/LS reprimands or referral to SC for serious breach of Code (+ power to suspend)**
- **Route 3: inherent jurisdiction of SC** to deal with matters of professional discipline for law practitioners (expressly preserved by s13(6) LPA)
- **Potential route 4:** s22(1)(b) LPA: **Regulations can be made by the A-G** in relation to disciplinary proceedings against Law Practitioners. Appears to relate to route 1; none made. Mr. Ozin raised a question under this route as to whether the AG can provide for an independent tribunal (such as the SDT in England and Wales) for regulatory purposes or is there a need for more formal proceedings such as legislations.

Additionally, emphasis was placed on the current model with regards to the way charges against an Attorney is dealt in Mauritius. Mr. Ozin raised some pertinent points with regards to the restrictions imposed on Attorneys in Mauritius, more specifically in relation to 'advertising' and deemed them to be out of date. The case of ***Good*** (supra) was used as a basis and the current provisions of the Code of Ethics (Mauritius) was applied. The relevant provisions to were as follows**:**

- § 17 – fair and reasonable fees, including 17(4) contingency
- § 38 – breach of Code [route 2 consequences]

Next, comparisons were drawn between the appeal setup in England and Wales against Mauritius. Mr. Ozin highlighted that that the appeal mechanisms were far more developed in England and Wales as compared to Mauritius. He referred to the presence of a statutory right of appeal to the High Court and potentially further appeals to the Supreme Court of Appeal as compared to Mauritius' appeal mechanism which include a 'special general meeting' of the Mauritian Law Society under S.18 (5) of the Mauritian Law Society Act 2005. If the party is still unsatisfied with the outcome, appeals can also be made to the SC by way of judicial review under S.18 (6) of the Mauritian Law Society Act 2005. Mr. Ozin went on to highlight the higher level of consideration provided in England and Wales through their appeal setup. For instance, reference was made to the judgment of ***Good*** (supra).

Furthermore, Mr. Ozin made a comparison between the Mauritian model and the England and Wales' model:

- **No independent tribunal** (although Regulations could be made under route 4)
- **Appeal from Supreme Court of Mauritius** disciplinary decisions (routes 1-3) to UKPC?
- **Appeals against route 2 action by LSM unnecessarily cumbersome**?
- **Appropriate to adopt the England and Wales wider regulatory landscape model, i.e. 'super regulator'** regulating separate regulators for the professions?
- **Appropriate to adopt the Solicitor hierarchy of rules** i.e. principles, Codes etc?

Lastly, the resource persons dealt with questions sent by the participants. Mr. Bucktowonsingh, whilst answering the questions, applied the Mauritian Code of Ethics and the current practice. On the other hand, Mr. Ozin made reference to the practice in England and Wales and provided suggestions as to how the Mauritian Code of Ethics can be amended. The following questions were dealt with:

- Do the same principles (within the Mauritian Code of Ethics) apply to in-house Attorneys?
- What new amendments are being brought to bring in line the issue of articleship?
- It was brought forward that an increasing number of Barristers are now registering marks on behalf of clients. Is this not a breach of the Mauritian code of ethics whereby it is the Attorneys who should have direct contact with the clients and represent them?

Additionally, two case scenarios were dealt with by the resource persons. They contained the following issues:

<u>Case scenario 1:</u>

- You are in Court and your case is about to be called; you represent a defendant and your fellow attorney represents a co-defendant.
- You speak to your colleague appearing for the co-defendant and the latter agrees with you that if the plaintiff and his legal advisers were not present when the case is called, you will both move that the matter be struck out, with costs. This would save your client from facing this substantial claim.
- The matter is called and neither the Plaintiff nor his legal advisers are in attendance. The Attorney for the co-defendant stands up and states: can we maintain this matter maybe the plaintiff and/or his legal advisers are on their way.
- Surprised, you do not join the request but you stay quiet. The Court maintains the matter.
- The attorney for the co-defendant leaves the courtroom with a mobile phone in the hand.
- Since you were meant to attend a different courtroom where another of your cases was scheduled (Counsel was already dealing with it) you decide to leave the Courtroom as well and see how Counsel is getting on.
- As you walk out, you see the attorney for the co-defendant on the mobile phone and you overhear the conversation; it was clearly a conversation with Counsel for the Plaintiff.
- Surprised again you think nothing about it. You come back to the Courtroom minutes later after having attended your other matter. The case is called again and no plaintiff and no legal advisers for the plaintiff in attendance. As you are about to make your motion to have the case struck out, another colleague of yours who was sat in the

courtroom stood on his feet and replaced plaintiff's attorney. There was an exchange in court and eventually the case was postponed.

- You go up to the co-defendant's attorney (no you did not punch!) and ask whether a call was made to the plaintiff's legal adviser. The answer was yes and the attorney turned around and left.

Case scenario 2:

- Failure to communicate written submissions (speaking notes) which were sent (misunderstanding between Counsel and Instructing Attorney) to the Presiding Judge but not to the opposing counsel.

As a conclusion, both the resource persons stressed on the importance of a code of ethics to regulate the solicitors/attorneys so as to maintain the standards of professionalism within the legal profession. The seminar was a tremendous success insofar as it enabled members of the legal profession have been able to familiarise themselves with the core ethical values that underpin the profession.