

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 39 OF 2016**

BETWEEN

Y Applicant

and

THE LAW SOCIETY OF HONG KONG Respondent

Before: Hon Au-Yeung J in Court

Date of Hearing: 25 January 2017

Date of Judgment: 28 April 2017

J U D G M E N T

Introduction

1. Y wrote to the Law Society (“LS”) to enquire if he needed to disclose his spent convictions involving dishonesty (which he disclosed) in his intended application for traineeship. LS replied in the affirmative.

Without Y's consent, LS published 2 circulars to members (**"the 2 Circulars"**) identifying Y as a person who might not be employed by a solicitor without prior permission of LS because of his convictions involving dishonesty.

2. Y challenges LS's decision to publish the 2 Circulars insofar as they contain his spent convictions. This judicial review is a rolled up hearing for leave and the judicial review itself. Y does not challenge the procedural propriety or rationality of LS. The sole ground for seeking judicial review is unlawfulness.

3. LS's case is that a conviction of dishonesty is never spent for a person who wants to become a solicitor, trainee solicitor or a solicitor's employee. Section 53(3) of the Legal Practitioners Ordinance, Cap 159 (**"LPO"**) contains a "disqualification, disability, prohibition or other penalty" within the meaning of section 3(1)(c) of the Rehabilitation of Offenders Ordinance, Cap 297 (**"ROO"**), which specifically deprives Y of the benefit of having the convictions spent. In its role as regulator and pursuant to sections 58(1) and (2) of the Personal Data (Privacy) Ordinance, Cap 486 (**"PDPO"**), LS was entitled to publish Y's convictions.

4. The issues are:

- A. Whether Y's convictions are spent under section 2(1) ROO (**"the Rehabilitative Provision"**);
- B. Whether section 53(3) LPO makes Y subject to a "disqualification, disability, prohibition or other penalty"

within the meaning of ROO so as to make the Rehabilitative Provision inapplicable; and

C. Whether LS has power to publish details of Y's convictions.

Undisputed facts

5. In 2006, Y was a university student. He was convicted of 6 charges of accessing a computer with dishonest intent to gain, contrary to section 161 Crimes Ordinance, Cap 200. A magistrate ordered him to perform community service.

6. Y worked as a solicitor's clerk, legal assistant or paralegal in 6 different firms after the convictions. He did not disclose his convictions to his employers as he believed that the convictions were spent when he took up employment.

7. Y began a PCLL course in 2015. He wrote to LS on 7 September 2015 asking (i) whether his spent convictions would be a bar to his application for admission as a solicitor or registration as a trainee solicitor; and (ii) whether he was required to disclose such spent convictions to the potential employers, when he would be employed as a clerk, a trainee solicitor or a solicitor. He disclosed to LS his convictions and his previous employment by solicitors' firms.

8. On 16 September 2015, LS informed Y by letter that, amongst others, when he were to apply for registration as trainee solicitor, he had to disclose the convictions. LS referred to section 53(3) LPO.

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9. Separately, LS found online press articles concerning Y’s conviction. Without consent of Y, LS contacted the Director of Public Prosecutions and the Eastern Magistracy to verify the details of the convictions and sentence.

10. Subsequently, LS published details of Y’s convictions in the 2 Circulars, reminding solicitors not to employ staff convicted of an offence involving dishonesty without written permission of LS.

11. On 11 February 2016, Y filed Form 86 seeking leave to apply for judicial review. Form 86 was later re-amended.

Convictions and common law

12. At common law, an employee has no duty to disclose his conviction but the employer is entitled to ask about it. If the employee chooses to answer, he must do so truthfully. The position has been summarized in the case of *R(T) v Chief Constable of Greater Manchester and ors* at §§67-68. in the context of the law before the enactment of legislation similar to ROO in UK:

“67 If a person applies for a job, the employer is entitled under the common law to ask whatever questions of the applicant he considers relevant, and the applicant is obliged, if he chooses to answer them, to do so truthfully. If therefore he is asked about his criminal record, he can decline to answer the question, in which event he may of course not be considered further for the position. If he chooses to answer the question, however, he is under an obligation to do so truthfully. If he lies about his past, a resultant contract of employment will be regarded as having been induced by a fraudulent misrepresentation. If the deceit is discovered, the employer is in principle entitled to have the contract set aside. A person who

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obtained employment by means of deceit is also in principle liable to prosecution.

68 The position of a person applying for appointment to certain offices, such as judicial office, or for admission to certain professions, such as accountancy or the legal profession, or for permission to carry on certain other regulated activities, such as providing financial services or operating a casino, is broadly analogous. At common law, the applicant may again be asked about his criminal record. If he chooses to answer the question, he is again under a duty to do so truthfully, and his failure to do so will expose him to the risk of adverse consequences under both the civil and the criminal law.”

13. In respect of Y, his employers did not ask him and he had not volunteered the information about his convictions to his employers.

Rehabilitation of Offenders Ordinance

14. ROO, enacted in 1986, changes the common law. According to its long title, its purpose is “to rehabilitate offenders who have not been reconvicted for 3 years, to prevent unauthorized disclosure of their previous convictions and for connected purposes.”

15. ROO allows persons with spent convictions to conceal them from employers with no consequences, unless they fall within the exceptions in sections 3 and 4 of ROO.

16. ROO provides as follows:

“2(1) Where—

- (a) an individual has been convicted in Hong Kong (before or after the commencement of this Ordinance) of an offence in respect of which he was not sentenced to imprisonment exceeding 3 months or to a fine exceeding \$10,000;

(b) he has not been convicted in Hong Kong on any earlier day of an offence; and

(c) a period of 3 years has elapsed without that individual being again convicted in Hong Kong of an offence,

then-

(i) subject to section 3(3) and (4), no evidence shall be admissible in any proceedings which tends to show that that individual was so convicted in Hong Kong;

(ii) any question asked of that individual or any other person relating to, or any obligation imposed on that individual or any other person to disclose, that individual's previous convictions, offences, conduct or circumstances shall be treated as not referring to that conviction; and

(iii) that conviction, or any failure to disclose it shall not be a lawful or proper ground for dismissing or excluding that individual from any office, profession, occupation or employment or for prejudicing him in any way in that office, profession, occupation or employment.”

“3(1) Nothing in section 2 shall affect—

(a) the recovery of any fine or other sum adjudged to be paid;

(b) any proceedings in respect of a breach of a condition or requirement imposed following a conviction; or

(c) the operation of any law under which the individual is subject to any disqualification, disability, prohibition or other penalty.” (Emphasis added)

17. Section 4 ROO recognises that spent convictions may not be spent in some situations. It specifically excludes lawyers (but not solicitor’s clerks) from the benefit of the Rehabilitative Provision:

“4(1) Section 2(1) and (1A) shall not apply to—

(a) proceedings in respect of a person's admission as, or disciplinary proceedings against a person practising as, a barrister, a solicitor or an accountant;

...

- (c) proceedings relating to a person's suitability to be granted, or to continue to hold, any licence, permit or dispensation, or to be registered, or continue to be registered, under any law;

...

- (2) Section 2(1) and (1A) shall not apply to any question asked by or on behalf of any person, in the course of the duties of his office or employment, or any obligation to disclose information to that person in the course of those duties, in order to assess the suitability of another person—

- (a) for admission as a barrister, solicitor or accountant;
- (b) for the grant of, or to continue to hold, any licence, permit or dispensation, or for registration, or to continue to be registered, under any law; or
- (c) for appointment to any prescribed office [in Schedule 1 of ROO];

...

- (f) to act as the employees of authorized institutions as defined in the Banking Ordinance (Cap. 155);

...

- (3) Section 2(1) and (1A) shall not apply to any dismissal or exclusion of an individual from practising as a barrister, solicitor or accountant or from any prescribed office.”
(Emphasis added)

18. It is of interest to note that under section 4(2) ROO, there is no mention of *employees* of a solicitor in limb (a) but there is reference to employees in limb (f). Under limb (c), these appear to be people of managerial grade (except for those in disciplinary forces).

19. Under section 6(1) ROO, unless the person whose conviction is spent authorizes disclosure under sub-section (5), disclosure of information contained in records kept by a public officer is an offence.

20. Compare ROO with the UK Rehabilitation of Offenders Act 1974 (“**the UK Act**”), on which ROO is based. The excepted provisions in sections 2 and 3 of ROO are contained in Orders which can be amended from time to time. Admission and employment as a solicitor are excepted under the UK Act: Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (1975 No. 1023). *Legal executives* (but not other kinds of employees of solicitors) are included later: Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) Order 2002, Amendment of Schedule 1, paragraph 5 (2002 No. 441). The UK Act also includes provisions like section 3(1)(c) ROO.

The Legal Practitioners Ordinance

21. The relevant provisions of LPO were enacted well before ROO:

“2(2) For the avoidance of doubt, it is hereby declared that any conduct of a trainee solicitor or employee of a solicitor which would reasonably be regarded as disgraceful, dishonourable or discreditable by a solicitor of good repute shall be deemed misconduct.” (Emphasis added)

“53(3) No solicitor or foreign lawyer shall, in connection with his practice as a solicitor or foreign lawyer, without written permission of the Society, which may be given for such period and subject to such conditions as the Society may think fit, employ or remunerate any person, who, to his knowledge, has been convicted of a criminal offence involving dishonesty.” (Emphasis added)

22. In its role as regulator, LS has a continuing duty to protect the integrity and reputation of the solicitors’ profession and the public. LS must ensure that the profession and the persons through whom it operates, irrespective of standing, are those that can be trusted to the ends

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B of the earth. After all, a profession's most valuable asset is its collective
C reputation and the confidence which that inspires: *Bolton v Law Society*
D [1994] 1 WLR 512, 519A, Sir Thomas Bingham MR.

E 23. Section 53(3) LPO is a tool used by LS to maintain public
F trust and confidence in the profession and its employees. A solicitor who
G knowingly employs a person convicted of an offence of dishonesty
H without LS's permission is liable to be struck off the roll or suspended
I from practice: section 53(5) LPO. The solicitor has a right of appeal to
J the Chief Judge of the High Court over issues of permission and
K conditions under section 53(3) LPO but the prospective employee has
L none. See section 53(4) LPO.

M 24. LS regulates not only the conduct of solicitors but also
N employees of the solicitors: section 9A(1) LPO.

O 25. Y does not dispute LS's regulatory role and duties. In fact,
P his letter acknowledged the existence of a trust and confidence
Q relationship between a solicitor and a client:

R "Also, as a matter of intention, I consider that I am morally,
S even if not legally, obliged to disclose my spent conviction to
T the potential employers if I was employed as trainee solicitor or
U solicitor, given the fact that the trust and confidence
V relationship between me and the potential employer and the
potential client as a solicitor or trainee solicitor would call for
such disclosure."

26. Publication of the 2 Circulars was consistent with a long-
standing practice of LS in line with its regulatory duties. The circulars
are published weekly and solicitors are expected to read them. They are

not accessible to the public and access to the Members' Zone requires a login ID and password.

Issue A: whether Y's convictions are spent under section 2(1) ROO

27. There is no issue that Y's convictions have been spent under section 2(1) ROO because 3 years since conviction has elapsed without reconviction.

Issue B: Whether section 53(3) LPO makes section 2(1) ROO inapplicable because section 53(3) LPO makes Y subject to a "disqualification, disability, prohibition or other penalty" within the meaning of ROO?

28. This issue has to be resolved by considering the principles of interpretation and the purpose of section 53(3) LPO.

29. Section 53(3) LPO should receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance: section 19 of the Interpretation and General Clauses Ordinance, Cap 1.

30. When the true position under a statute is to be ascertained by interpretation, it is necessary to read all the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting. Furthermore, it is necessary to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them. See *Medical Council of Hong Kong v Chow Siu Shek* (2000) 3 HKCFAR 144, 154B-C.

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B 31. It is important to interpret a statute having regard to the B
C public good: *Chow Siu Shek*, at 155B-D, Bokhary PJ: C

D “...as Lord du Parcq said in delivering the advice of the Privy D
E Council in *Bombay Province v. Bombay Municipal Corp* [1947] E
F AC 58 at p.63, "Every statute must be supposed to be 'for the F
G public good', at least in intention". And qualification and G
H competence are not the only qualities in a professional person H
I that matter to the public. Integrity too is vitally important. And I
J this means integrity both in general and in regard to J
K professional matters in particular. If maintaining integrity K
L within a profession involves the exclusion of certain persons L
M who are otherwise qualified and competent to practise, then that M
N is a price that has sometimes to be paid. At the end of the day, a N
O balance has to be struck.” O

I 32. Regulatory interests cannot, in themselves, found a basis for I
J penalties, disqualifications and disabilities not spelt out in legislation: J
K *Sin Chung Yin Ronald & ors v The Dental Council of Hong Kong*, K
L FACV 6/2016, 4 November 2016, §§75-76. L

L 33. If section 53(3) LPO does not clearly create L
M a “disqualification, prohibition, etc”, it cannot do so by implication. M

N 34. A doubtful law should not be construed to penalize a person: N
O section 271 of *Bennion on Statutory Interpretation* (6th ed). O

P 35. The principles governing limits to implied powers in P
Q the disciplinary context are set out in *Man Hing Medical Suppliers Q
R (International) Limited v Director of Health* [2015] 3 HKLRD 224, §39. R

S “(1) The common law permits authorities to undertake tasks S
T that are ‘reasonably incidental’ to the achievement of the T
U purposes of a legislation, provided that they do not contradict U
V any express statutory power. V

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(2) The implications are only legitimate when it is ‘what is necessarily or properly implied’ by the language used in the statute.

(3) In this respect:

(a) Whether a particular incidental power is to be implied must be considered in the context of the facts of each case, and that the provisions of the statute which confer and limit functions must be considered and construed.

(b) A power is not incidental merely because it is convenient or desirable or profitable.

(c) The implication thus needs to be ‘necessary’ in that it is ‘reasonably required’ for the effective exercise of the power or jurisdiction expressly conferred upon authority.

(d) Further, if it is a penal enactment, the penalty will not fall to be imposed unless the implication is clear and obvious, especially considered under the principle against doubtful penalisation.

(e) It may also be improper to imply a power when it imposes onerous burdens.”

36. Mr Dykes SC (counsel for Y) submits that against the background at common law and applying the principles of interpretation, Y is not subject to any “disqualification, disability, prohibition or other penalty” within the meaning of section 53(3) LPO:

(a) Section 53(3) LPO does not “disqualify” Y from taking employment with a solicitor and the employment contract is not illegal in its formation on 2 bases: (i) after disclosure of a relevant conviction and LS consents; or (ii) the prospective employer, not seeking disclosure of conviction, employs “without his knowledge”. Further, disqualification is effective only if there is sanction for contravention, eg sanction for driving whilst disqualified. And yet section

53(3) LPO imposes sanction on the solicitor employer only but not the employee. This is unlike the UK Act.

(b) Section 53(3) LPO imposes no “disability” on Y taking employment with a solicitor as he is not required to seek permission from anyone to take up such employment. It does not change the common law of positively requiring a prospective employee to disclose previous conviction. The contract of employment is not illegal in its formation.

(c) It does not “prohibit” Y from seeking employment with a solicitor. A statute prohibiting employment is unusual and it can do so only in express terms. See eg section 33A of the Prevention of Bribery Ordinance, Cap 201, enabling a court to prohibit an individual from employment in certain fields. A prohibition also requires a sanction for contravention, which is lacking in section 53(3) LPO.

(d) It does not impose a “penalty” on Y in taking up employment with a solicitor.

37. I am unable to agree. The intention behind section 53(3) LPO is to prevent the employment in solicitors’ offices of persons who had been proved to be dishonest and may use their positions to defraud clients or members of the public. It is in itself serious but it also has the effect of bringing the profession into disrepute: *A Solicitor v The Law Society of Hong Kong*, CACV 2/1993, 7 May 1993, Penlington JA, p13.

38. Legal clerks are subject to the same requirements of honesty, integrity and utmost trustworthiness as solicitors. This is because legal

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B clerks may be entrusted with client’s money and title deeds, take
C instructions, visit clients in prison or handle files. *In re a Solicitor’s*
D *Clerk* [1966] HKLR 99, 108, Hogan CJ explained the rationale as follows:

E “A solicitor has got to do a substantial part of his work through
F others – he has to work through an office in which other people
G will be taking responsibility. Those who enter such an office
H do, as a result, participate in the activities of the profession, and
I can reasonably be expected to show that degree of
J responsibility necessary to maintain the standards which the
K public may fairly expect of a solicitor and those who act on his
L behalf. This, I think, justifies the expectation of a reasonably
M high standard of propriety and responsibility in the discharge of
N those duties which a clerk carries out as part of a solicitor’s
O staff.”

I 39. Having regard to the intention behind section 53(3) LPO,
J I accept Mr Wood’s submission that a conviction involving dishonesty is
K never spent with regard to an individual seeking employment with or
L admission as a solicitor. Section 53(3) LPO constitutes a disqualification
M or prohibition for the purposes of section 3(1)(c) ROO as regards that
N individual. The disqualification or prohibition applies to a legal clerk as
O much as it does to a qualified solicitor. It automatically arises on
P conviction of dishonesty, in contrast to the prohibition ordered by the
Q court upon application of the prosecution or on the court’s own motion
R under s.33A of the Prevention of Bribery Ordinance.

Q 40. The disqualification or prohibition is removed where the
R solicitor employer knows about the conviction and LS exercises
S discretion on a case by case basis to give written permission to employ.

S 41. There is nothing in LPO or ROO that requires
T a disqualification or prohibition to be absolute, or be effective only if
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B there is a sanction. The ordinary meaning of disqualification or
C prohibition from employment only means that the individual is not
D qualified to take up the job, not that he has any sanction to face. I do not
E find section 53(3) LPO to be doubtful law. In any case, the sanction is
F that the individual may not recover his remuneration. Applying the *Man*
G *Hing Medical Suppliers* case (paragraph 35 above), the disqualification or
H prohibition is necessary for the effective exercise of LS's regulatory
I powers. It does not impose onerous burdens on people like Y.
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H 42. To interpret section 53(3) LPO otherwise would defeat the
I purpose of the section and encourage solicitor-employer to be less than
J prudent. A prudent solicitor who cares to ask an intended employee
K whether he had any previous convictions for dishonesty may receive half-
L truth if the Rehabilitative Provision applies. The prudent solicitor would
M be exposed to the risk that an employee with convictions of dishonesty
N would present to the public, the profession and the solicitor himself.
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M 43. This interpretation does not prevent Y from relying on the
N Rehabilitative Provision to find employment in another field not excepted
O by ROO.
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P 44. LS's interpretation on LPO and ROO is correct. LS has
Q correctly told Y that he has to disclose his convictions when the time
R shall come for him to apply for traineeship and admission.
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Issue C: Whether LS has power to publish details of Y's conviction?

45. Mr Dykes SC submits that publication of Y's convictions in the 2 Circulars was not authorized by any provisions in ROO or "any other law".

46. LS claims that Y did not place a restriction on the use of the information contained in his letter. To the extent that there was any implied condition on the use of that information, such condition could not override LS's overarching duty to protect the interests of the profession and the public. In any event, there was no misuse of personal data by virtue of sections 58(1) and (2) of PDPO, the "other law" that LS relies on.

47. According to Data Protection Principle 3 ("DPP3") under PDPO:

"(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose."

"New purpose" is defined in section 3(4) of Schedule 1 as follows:

"new purpose, in relation to the use of personal data, means any purpose other than—

- (a) the purpose for which the data was to be used at the time of the collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a)."

"Use", defined in s 2(1) of the PDPO:

"in relation to personal data, includes disclose or transfer the data."

"Prescribed consent", defined in s 2(3) of the PDPO:

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B “(a) means the express consent of the person given voluntarily; (emphasis added) B

C (b) ...” C

D 48. Under section 58 PDPO: D

E “(1) Personal data held for the purposes of— E

F (a) the prevention or detection of crime; F

G (b) the apprehension, prosecution or detention of offenders; G

H (c) the assessment or collection of any tax or duty; H

I (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons; I

J (e) the prevention or preclusion of significant financial loss arising from- J

K (i) any imprudent business practices or activities of persons; or K

L (ii) unlawful or seriously improper conduct, or dishonesty or malpractice, by persons; L

M (f) ascertaining whether the character or activities of the data subject are likely to have a significantly adverse impact on anything— M

N (i) to which the discharge of statutory functions by the data user relates; or N

O (ii) which relates to the discharge of functions to which this paragraph applies by virtue of subsection (3); or O

P (g) discharging functions to which this paragraph applies by virtue of subsection (3), P

Q is exempt from the provisions of data protection principle 6 and section 18(1)(b) [both of which entitles a data subject to make a data access request to a data user] where the application of those provisions to the data would be likely to— Q

R R

S (i) prejudice any of the matters referred to in this subsection; or S

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(ii) directly or indirectly identify the person who is the source of the data. (Emphasis added)

...

(2) Personal data is exempt from the provisions of data protection principle 3 in any case in which –

(a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data is held for any of those purposes); and

(b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters.”

49. Section 2(9) PDPO deems “any conduct by virtue of which a person ceases, or would cease, to be a fit and proper person” to be “seriously improper conduct”.

50. On a proper interpretation of these provisions, a criminal record could constitute personal data within the meaning of section 2 PDPO. Data about a spent conviction cannot be collected or published except in the limited circumstances provided for in sections 3, 4 and 5 ROO. I agree with Mr Dykes SC that if an exception does not exist under ROO, then PDPO does not provide some other channel to publish that spent conviction. The regulatory duties of LS could not be so “overarching” as to violate ROO.

51. The relevant part of Y’s letter states as follows:

“whether I was required to disclose such spent conviction to the potential employers, either when I would be employed as Legal Clerk, trainee solicitors (sic) or solicitors (sic).”

52. LS’s case is that the unlawful or seriously improper conduct or dishonesty that LS was attempting to prevent includes the risk that Y would be *re-employed* in the profession (as a legal clerk if he could not find a position as a trainee solicitor) without its consent.

53. LS’s concern was understandable and this court does not question LS’s good faith in publishing the 2 Circulars. After all, Y’s convictions has escaped the attention of LS and his solicitor employers for 6 years between November 2009 and September 2015.

54. However, that concern alone was not, in my view, sufficient to justify LS’s publication of Y’s convictions.

55. Firstly, Y’s letter was in the nature of an enquiry on a matter of principle. In that regard, he was no different from a person with convictions of dishonesty or who had never worked in a solicitors’ office before.

56. Secondly, an inquirer’s intentions may be equivocal. He may decide not to enter the solicitor’s field after weighing up the pros and cons of his convictions being exposed to the profession. In that scenario, LS has no right to publish his convictions.

57. Thirdly, Y was asking about *future* employment. There was nothing to show that he was still employed as a legal clerk on the date of

A the letter and there was no pending application for re-employment in the
B profession. He has not yet secured a trainee contract and he was
C expecting interviews with law firms only. In fact, LS itself stated in the
D letter that “the Law Society has not yet received your applications for
E registration as a trainee solicitor, admission as a solicitor or employment
F in a law firm.”. LS was unable to comment on the merits of the
G application until all the supporting documents have been considered by its
H Consents Committee. Accordingly, any regulatory authority which LS
I may exercise over a person with convictions involving dishonesty has not
arisen. That the LS could have investigated Y and his employers in
respect of the *past* employments was a different matter.

J 58. Fourthly, that LS has separately verified Y’s convictions
K with the DPP and the Magistracy concerned could not alter the position.
L The data (though not marked “confidential”) was not provided by Y to LS
M with a view to communication to third parties. It was not open for LS to
N say that Y did not lay down any restriction on the use of information.
The purpose of that letter defined the restriction. Consent of Y to use the
data for other purposes had to be express: section 2(3) PDPO.

O 59. Fifthly, the fact that press reports on Y’s convictions were
P still available on the net was irrelevant. Many convictions involving
Q dishonesty are reported in the press. LS simply has no right to (and I trust
R that it would not) publish all those convictions (spent or not spent)
S regardless of whether the persons convicted want to become, or be
employed by, a solicitor.

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60. Whatever fair, large and liberal interpretation one gives to section 53(3) LPO and LS's duties arising thereunder, one must apply common sense. There is a balance to strike between competing interests – one to protect personal data, the other to ensure that the highest integrity and reputation of the solicitors' profession is maintained and that the public's interest is not harmed.

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61. A line should be drawn between mere intention to enter the solicitor's field (such as exploring possibilities) and intention supported by conduct (such as application for traineeship or permission of LS). It may not be easy to define when the former becomes the latter but common sense will recognize that line. It is the latter that would be caught by section 53(3) LPO. An inquiry of the kind that Y made fell into the realm of the former.

62. LS took 2 months from receiving Y's letter to publication of the 2 Circulars. I could discern no reason why LS could not have made use of the 2 months to tackle the issues under PDPO that balances the competing interests in paragraph 60 above by eg confirming if Y wanted to enter or re-enter the profession; asking for his consent or giving him a warning before issuing the 2 Circulars.

63. On a separate note, I notice that in the 2 Circulars, some persons' convictions dated as far back as 40 years. Whether it is necessary to keep such information for so long is an issue for the Privacy Commissioner and I say no more.

Findings and reliefs

64. A conviction involving dishonesty is never spent insofar as a person is to become a solicitor, a trainee solicitor or employee of a solicitor. That person is subject to a disqualification or prohibition under section 53(3) LPO. He is not entitled to the protection of the Rehabilitative Provision under section 2(1) ROO in connection with his employment or application for employment with a solicitor. LS is entitled to publish his conviction in the circulars. However, an inquirer may still be entitled to the protection of the Rehabilitative Provision until his intention to join the solicitor's profession goes beyond merely exploring possibilities.

65. Accordingly, I grant leave to apply for judicial review and treat this hearing as the judicial review itself.

66. Y asks for a declaration that the publication of the 2 Circulars was unlawful to the extent that it disclosed his convictions, which was not authorized under any of the disclosure exemptions under section 4 ROO or by any other law.

67. This sort of relief will be useful as a future guide to LS and reduces the prejudice to Y pending his application for traineeship. I find it just and convenient to grant the relief sought and I so declare. That part of LS's decision to publish the 2 Circulars identifying Y should thus be quashed.

68. On a *nisi* basis, LS should bear the costs of Y.

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69. I thank counsel and the solicitor advocates for their great assistance.

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(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

Mr Philip J Dykes, SC, instructed by Boase, Cohen & Collins, for the applicant

Mr James Wood (Solicitor Advocate) & Ms Suchita Bhojwani (Solicitor Advocate) of Lipman Karas, for the respondent