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DOUBLE JEOPARDY AND ABUSE OF PROCESS IN PROFESSIONAL DISCIPLINARY PROCEEDINGS

Law Society of Singapore v *Edmund Nathan*[1]

In 1998, a court of three judges in *Law Society of Singapore* v *Edmund Nathan* held that the rule against double jeopardy does not prevent the Law Society from initiating a second set of professional disciplinary proceedings based on the same factual matrix as the first if the first had only terminated at the inquiry committee stage. In addition, it held that the initiation of a second set of proceedings based on the same factual matrix was not an abuse of process.

This article seeks to argue that the rule against double jeopardy should operate to prevent subsequent disciplinary proceedings even if the first set of proceedings had terminated at only the inquiry committee stage. It goes on to argue that the rule against double jeopardy should be triggered by subsequent proceedings based on the same evidence. Alternatively, it argues that the initiation of a second set of proceedings based on the same evidence should be considered as an abuse of process. It concludes by offering some suggestions for reform.

INTRODUCTION

SECTION 94A of the Legal Profession Act (Cap 161, 1997 Rev Ed) ("the Act") was always a particularly problematic provision. Introduced in 1993,[2] section 94A[3] directs the Law Society to apply for a show cause order where an advocate and solicitor ("solicitor") has been convicted of a criminal offence involving fraud or dishonesty. This provision, however, is silent on whether the solicitor can still be made to show cause if he had already been disciplined for his fraudulent or dishonest conduct prior to his conviction. The section admits at least three possibilities: (a) that the solicitor can use the doctrines of double jeopardy and abuse of process to prevent the second set of proceedings; (b) that the protection of the solicitor is entrusted to the sole discretion of the Law Society; or (c) that the doctrines of double jeopardy and abuse of process have been legislatively overridden.

1 [1998] 3 SLR 414.

2 Act 41/93. The Bill was passed on 12 November 1993 and assented to by the President on 23 November 1993. It came into force on 1 January 1994.

3 Unless specified otherwise, all provisions refer to the Legal Profession Act.

It is the submission of this article that the doctrines of double jeopardy and abuse of process do apply in the context of professional disciplinary proceedings. It is the further submission of this article that the two doctrines should prevent the initiation of a show cause order after the solicitor has been convicted of a criminal offence involving fraud or dishonesty if he had previously been disciplined on the same set of facts.

An opportune time to confirm this was presented in the recent case of *Law Society of Singapore* v *Edmund Nathan* ("the *Edmund Nathan* case"). Unfortunately, this case left several important questions unresolved. This article seeks to examine the decision and its implications in five parts. In order to set section 94A in context, this article will first outline the normal disciplinary process before discussing the difference in procedure when the section is involved. It then describes the *Edmund Nathan* case before focussing on its double jeopardy and abuse of process aspects. It will become apparent that the case's dicta have implications not just for those undergoing professional disciplinary proceedings but for all accused persons seeking to employ the doctrines of double jeopardy and abuse of process. In its concluding section, this article offers some suggestions for reform.

I. The Disciplinary Process

It must be pointed out that the disciplinary process outlined below applies only to practising solicitors. Legal officers and non-practising solicitors are subject to a "separate and less elaborate process".[4] They do not face the problems posed by section 94A. Henceforth, this article will focus solely upon the disciplinary process facing errant practising solicitors. All references to solicitors should thus be construed as references to practising solicitors.

Under section 83(2), a solicitor can be struck off the roll, suspended or censured if the Law Society is able to show due cause. Due cause may be shown in 11 situations.

A. *The Normal Three Stage Process*

The professional disciplinary process utilises a unique blend of domestic tribunals and court proceedings. Normally, the disciplinary process comprises a three-stage process: the inquiry committee stage, the disciplinary

[4] Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (2nd Ed, 1998), at 824. See also s 82A of the Act.

committee stage and the show cause stage. I gratefully adopt the summary of the procedure given in the *Edmund Nathan* case:[5]

> *The inquiry committee stage*
>
> (i) On the receipt of a complaint which in the first place is to be made to the Society, the Council will refer the complaint to the Chairman of the Inquiry Panel constituted under the Act (section 85(1)).
>
> (ii) The Chairman of the Inquiry Panel will then constitute an inquiry committee of two advocates and solicitors, one of whom will be designated the chairman of the inquiry committee, a lay person and a legal officer of not less than 10 years' experience to inquire into the complaint – section 85(6).
>
> (iii)(a) Where the inquiry committee is satisfied that there are no grounds for disciplinary action on the complaint, it will report accordingly to the Council and state its reasons for its decision – section 86(5).
>
> (iii)(b) But if the inquiry committee is of the opinion that the allegations contained in the complaint should be answered, the inquiry committee will send a copy of the complaint to the solicitor and invite him to give a written explanation and state whether he wishes to be heard by the inquiry committee – section 86(6).
>
> (iv) After considering the written explanation and hearing the solicitor, if he wished to be heard, the inquiry committee will report to the Council whether a formal investigation by a disciplinary committee is warranted and if a formal investigation is not warranted, recommend to the Council whether a penalty sufficient and appropriate to the misconduct should be imposed or the complaint be dismissed – section 86(7).
>
> (v) For the purposes of conducting the inquiry, the inquiry committee has the power to appoint any person to make or assist in making preliminary inquiries; require production of books, documents or papers which bear on the complaint; and to require the solicitor to give all information in relation to such books, documents or papers – section 86(12).
>
> It should be noted that the proceedings under the inquiry committee stage ... under the Act ...[are] not adversarial in nature. The complainant [does] not appear before the inquiry committee and evidence under

[5] *Supra*, note 1, at 421-423.

oath is not taken. The inquiry committee is not conducting a trial in any sense at all. There are no rules of procedure governing the inquiry...

On the receipt of the inquiry committee's report the Council will deliberate on it and come to its own determination: (a) that a formal investigation is not necessary; (b) that no cause of sufficient gravity exists for a formal investigation and the imposition of a penalty would suffice; (c) that a formal investigation is necessary; or (d) that the matter be adjourned for consideration or referred back to the inquiry committee for reconsideration and a further report – section 87(1).

However if the inquiry committee recommends that a formal investigation is warranted the Council must apply to the Chief Justice for the appointment of a disciplinary committee and even if the inquiry committee recommends that a formal investigation is not warranted, the Council can disagree with the inquiry committee and apply to the Chief Justice for the appointment of a disciplinary committee – section 87(2).

The disciplinary committee stage

The procedure before the disciplinary committee under the Act ... is embodied in the rules made by the Rules Committee regulating the hearing and investigation of matters before a disciplinary committee. A charge or charges [are] framed and served on the solicitor together with a statement of case. The Society is represented by counsel and presents the Society's case to the disciplinary committee. The solicitor [can] appear in person or through counsel before the disciplinary committee. The burden is on the Society to call the evidence to support the charge or charges from the complainant and such witnesses the Society chooses to call. After the complainant and his witnesses have given evidence the solicitor gives his evidence and calls his witnesses to answer the charge or charges. All evidence is taken on oath and writs of *subpoena ad testificandum* and of *duces tecum* can be sued out.[6] ... The proceedings before the disciplinary committee are truly adversarial.

After the conclusion of the hearing before the disciplinary committee, it is required to report its findings to the Council. [According to section 93(1) of the Act]:

6 See s 91(2) of the Act.

> After hearing and investigating any matter referred to it, a Disciplinary Committee *shall record its findings in relation to the facts of the case and according to those facts*[7] shall determine –
>
> (a) that no cause of sufficient gravity for disciplinary action exists under section 83...
>
> (b) that while no cause of sufficient gravity for disciplinary action exists under that section the advocate and solicitor should be reprimanded; or
>
> (c) that cause of sufficient gravity exists under that section.

The next step is for the Council to act on the disciplinary committee's report. If the report recommends that cause of sufficient gravity for disciplinary action exists then the Society is required without further ado to apply for an order to show cause but if the report recommends that no cause of sufficient gravity for disciplinary action exists the Society is not required to take any further action unless so directed by the court – section 94(1) and (2) of the Act...[W]here the report recommends that the advocate and solicitor be reprimanded the Council may, if it agrees with the report, reprimand the advocate and solicitor or if it disagrees straight away apply for an order to show cause – section 94(3).

The show cause stage

...[T]he show cause proceedings have always been heard by a court of three judges of the Supreme Court and since the abolition of appeals to the Privy Council no appeal lies from a decision of that court – see section 98(7). The burden is on the advocate and solicitor, the respondent, to show cause why he should not be struck off the roll, suspended or censured. This he must do on the basis of the findings of fact made by the disciplinary committee except when the show cause proceedings have been initiated under section 94A of the Act.

B. *The Section 94A Process*

The norm, then, is that the entire professional disciplinary process would involve three stages – the inquiry committee stage, the disciplinary committee stage and the show cause stage.

[7] Emphasis added by the court.

Where a solicitor is convicted of a criminal offence involving fraud or dishonesty, the first two stages are bypassed. The Law Society is required to make an application for a show cause order under section 98 of the Act. This is so whether the offence was disclosed as a result of an investigation by the inquiry committee under section 87(3)(b) or otherwise. If an appeal is pending, the application must be held in abeyance until the appeal has been withdrawn or deemed to have been withdrawn or disposed.

A conviction of a criminal offence involving fraud or dishonesty may constitute due cause under section 83(2)(a) because it could imply that the solicitor possesses "a defect of character which makes him unfit for his profession."[8]

II. *Law Society of Singapore* v *Edmund Nathan*: Facts and Decision

A. *The First Disciplinary Proceedings*

On 15 September 1994, the Registrar of the Supreme Court brought a complaint to the Public Prosecutor's and Law Society's attention. The Registrar had observed that affidavits filed by the vendors and purchasers of a property disclosed that they had executed two agreements for sale and purchase, one at a price of $135,000 and another at a price of $190,000, intending the real price to be $135,000. The purchaser had applied for and obtained a bank loan on the basis that the sale price was $190,000. Edmund Nathan, the solicitor for both the parties and the bank, had admitted that he was cognisant of these discrepancies.

An inquiry committee duly investigated the complaint. On 21 April 1995, the inquiry committee reported to the Council that it was satisfied that Nathan's conduct was "improper" but not fraudulent. It was of the opinion that a formal investigation by a disciplinary committee was not required and recommended that a penalty of $3,000 be imposed.

[8] In order to determine if due cause is established, the court will also take into account the sentence involved. This is because the penalty serves as a 'good indication of the moral obliquity or turpitude involved in the solicitor's conduct'. The nature of the offence, of course, remains a weighty consideration: *Ratnam* v *Law Society of Singapore* [1975-1977] SLR 39 at 52. See also, *Law Society of Singapore* v *Tham Yu Xian Rick* [1999] 4 SLR 168; *Law Society of Singapore* v *Wee Wei Fen* [2000] 1 SLR 234; and *Law Society of Singapore* v *Amdad Hussein Lawrence* [2000] 4 SLR 88. *Cf Law Society of Singapore* v *Edmund Nathan*, *supra*, note 1, at 420: 'A conviction of an criminal offence involving fraud or dishonesty would constitute due cause under s 83(2)(a) since it necessarily implies that the solicitor possesses "a defect of character which makes him unfit for his profession".'

On or about 8 May 1995 the Council accepted and adopted the inquiry committee's report and imposed a fine of $3,000,[9] which Nathan duly paid.

B. *The Criminal Proceedings*

On 30 May 1997, Nathan was convicted of attempting to cheat the bank.[10] The Court in the *Edmund Nathan* case acknowledged that the conviction was based on the very same facts on which the Council had penalised Nathan for improper conduct in the discharge of his professional duty.[11]

C. *The Second Disciplinary Proceedings*

Pursuant to section 94A, the Law Society applied to the High Court that Nathan be made to show cause why he should not be struck off the roll, suspended from practice or censured. It argued that his conviction for attempted cheating amounted to due cause under section 83(2)(a) of the Act.

Counsel for Nathan mounted essentially two arguments. His first argument was that section 94A was a directory and not a mandatory provision. He submitted that if the section were to be treated as a mandatory provision, it would expose convicted solicitors to 'double jeopardy' in situations where they had already been subject to the disciplinary process on the same facts. His second was that a second set of disciplinary proceedings based on the very same facts as the first exposed Nathan to 'double jeopardy'.

The Court rejected both arguments. In addition, it found that the show cause proceedings involved no abuse of process.

Nathan was struck off the roll of advocates and solicitors.

It is submitted that the Court was correct in rejecting the first argument. As the Court put it:

> If by the section being directory it is suggested that the Society is given a discretion as to which conviction of an advocate and solicitor involving fraud or dishonesty it will require cause to be shown and which it may not and thus the principle of *autrefois* is somehow preserved, such argument, in our view is fallacious. It is fallacious because this will amount to someone other than the tribunal charged with the duty of controlling the conduct of advocates and solicitors,

[9] Under its powers given by s 88 of the Act.
[10] *Edmund Nathan* v *PP* [1997] 3 SLR 782.
[11] *Supra*, note 1, at 418-419.

> *ie*, to show cause, deciding whether the plea of *autrefois* is available in any given case. In the context of the Act that tribunal is the court of three judges of the Supreme Court (see section 83(1) and section 89(7) (*sic*)[12]). It is clear from a reading of the whole of Pt VII of the Act that the legislature never intended the show cause proceedings to be heard by a tribunal other than the court of three judges and section 94A requires the Society 'to proceed to make an application in accordance with section 98' without further direction or directions, *ie*, to apply to the High Court 'for an order calling upon the solicitor to show cause'.[13]

Moreover, given the complexity of the double jeopardy doctrine, it is best if the determination of its applicability were left to a judicial body having the benefit of legal argument.

Henceforth, this article will focus on the Court's rulings on the double jeopardy and abuse of process aspects.

III. Double Jeopardy in Professional Disciplinary Proceedings

A. *Rationale for the Double Jeopardy Rule*

In essence, the rule against double jeopardy[14] prohibits a person from being tried for a crime[15] in respect of which he has been previously acquitted (*autrefois acquit*), or convicted (*autrefois convict*).[16]

The rule against double jeopardy serves five important functions:

- Protects the accused from harassment

[12] The Court probably meant to refer to s 98(7) of the Act.

[13] *Supra*, note 1, at 420.

[14] Double jeopardy can equally arise in subsequent prosecutions or in the same trial. The rule against double jeopardy is violated when a person is prosecuted again for an offence for which he has been already convicted or acquitted. It is violated in the same trial when he is subjected to multiple punishments for the same offence. This article concentrates on the successive prosecution scenario. See generally, George C Thomas III, "The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition" [1985] 71 Iowa Law Review 295, at 340; Aquannette Y Chinnery, "*United States* v *Dixon*: The Death of the *Grady* v *Corbin*,"Same Conduct" Test for Double Jeopardy" [1994] 47 Rutgers Law Review 247, at 254.

[15] As an aside, while this article uses terms common to the criminal process, it should be noted that the professional disciplinary process is not criminal in nature. The Legal Profession Act does not even use the word 'charges' (See Tan Yock Lin, *supra*, note 4, at 867). I use terms familiar to the criminal context simply for ease of exposition.

[16] Technically, the common law rule against double jeopardy also encompasses the pleas of *autrefois attaint* and former pardon. See Thomas, *supra*, note 14, at 329.

The learned Black J put it best in the US Supreme Court decision of *Green* v *United States*:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[17]

• Protects the accused from excessive punishment

It is only fair that the accused be punished just once for each wrongdoing.

• Ensures finality

The accused should be entitled to expect finality after he has expended his time, energy and resources defending himself against the charges in the first proceedings. He may not have "the resources or the stamina to defend a second charge effectively."[18] The prosecution will also possess an unfair advantage over the accused because it "will be able to study the transcript [from the first trial] to find apparent defects and inconsistencies in the defence evidence for use at the second trial."[19]

The prosecution must not be allowed to treat the first proceedings as a mere dress rehearsal. In the interests of time and conservation of judicial resources, the prosecution should direct all its efforts at the first proceedings.

While it may be true that this may allow otherwise guilty defendants to escape, the probability is too low[20] to justify putting factually innocent defendants at risk of a conviction.

• Prevents inconsistent verdicts

Inconsistent verdicts are bound to arise in a judicial system which allows successive prosecutions. Although inconsistent judgments are unavoidable in a process that depends on human judgment, each inconsistency raises doubts in the quality and integrity of the judicial system.

• Safeguards the integrity of the judicial system

The rule against double jeopardy helps to promote the legitimacy of the criminal judicial process. The latter wins the trust and confidence of the

[17] *Green* v *United States*, 355 US 184, 187-88 (1957).
[18] Andrew LT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993), at 17.
[19] Martin L Friedland, *Double Jeopardy* (1969), at 4.
[20] *Ibid*, at 5.

public when it is able to temper its prosecutorial function with fairness and discretion.

B. *The Applicability of the Doctrine in Disciplinary Proceedings*

It should not be lightly assumed that Parliament intended section 94A to deny the solicitor the protection of the doctrine. Indeed, Parliament seems to have envisaged that section 94A would be used merely to expedite proceedings, rather than as a means to subject the solicitor to a second round of disciplinary proceedings after his conviction.[21]

The applicability of the doctrine in professional disciplinary proceedings was recognised by the Privy Council in *Harry Lee Wee* v *Law Society of Singapore*.[22] This was reaffirmed by the Court in the *Edmund Nathan* case. The Court, however, pointed out that the Privy Council had dealt with the doctrine only because the lower court had "based its judgment on this principle".[23] While this may be true, it should be noted that the Privy Council entertained no doubts whatsoever on the applicability of the doctrine to professional disciplinary proceedings. This was in sharp contrast to the court below, which had merely worked on the assumption that the doctrine applied.[24]

Indeed, although the rule against double jeopardy is most prominent in the criminal process,[25] there is no reason why it cannot also apply in the professional disciplinary context. After all, the disciplinary bodies perform a quasi-judicial function by determining whether the solicitor has been guilty of misconduct and impose sanctions accordingly. The reasons underlying the application of the doctrine in the criminal process are equally cogent in the disciplinary context. A solicitor, too, should be entitled to expect finality after being subjected to the disciplinary process. While the punitive

[21] The predecessor of s 94A was s 89(b) which permitted proceedings to bypass only the inquiry committee stage. S 89(b) was introduced to prevent a situation where solicitors could be convicted in court, go to jail and serve their sentence even before the inquiry committee had completed its investigations and findings. (*Singapore Parliamentary Debates, Official Report*, 30 March 1979, col 305-306) It can thus be inferred that the section was introduced with a view to expediting proceedings. This is *a fortiori* the case with s 94A.

[22] [1982] 2 MLJ 293.

[23] *Supra*, note 1, at 426.

[24] *In the Matter of An Advocate and Solicitor* [1984] 1 MLJ 331, at 335.

[25] See Art 11(2) of the Constitution of the Republic of Singapore; s 239 of the Criminal Procedure Code (Cap 68); s 41 of the Interpretation Act (Cap 1). Although the Constitution only enshrines the rule against double jeopardy in the criminal context, there is no reason why a wider doctrine of double jeopardy cannot exist. It simply means that this wider doctrine is not constitutionally protected. See Kevin YL Tan, Thio Li-Ann, *Tan, Yeo and Lee's Constitutional Law in Malaysia and Singapore* (2nd Ed, 1997), at 733.

element may not be as prominent as the criminal process,[26] that is no reason to deny the solicitor the protection of the doctrine. He should not be forced to experience the stress and stigma associated with repeated disciplinary proceedings.

Moreover, public confidence in the integrity of the process would hardly be inspired by successive proceedings on the same matter and at times, even inconsistent findings.

It must be pointed out, however, that this article is not arguing that it would be inappropriate to discipline a solicitor after he has been convicted of a criminal offence or vice-versa.[27] Disciplinary sanctions perform a different function from criminal ones. As Bingham MR put it in *Bolton* v *Law Society*:

> It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension: plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence

[26] *In re Meagher* [1896] 17 NWSR 156, at 166; *Harvey* v *The Law Society of New South Wales* [1975] 49 ALJR 362, at 364; *Bolton* v *Law Society* [1994] 2 All ER 486, at 491; *Law Society of Singapore* v *Ravindra Samuel* [1999] 1 SLR 696, at 699; and *Law Society of Singapore* v *Lau See-Jin Jeffrey* [1999] 2 SLR 215, at 227.

[27] See *Mohamed Yusoff bin Samadi* v *Attorney General* [1972-1974] SLR 578.

> in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission.[28]

Therefore, bringing show cause proceedings following Nathan's conviction for attempted cheating would not violate the rule against double jeopardy if Nathan has not previously been sanctioned on a disciplinary charge based on the same events constituting the attempted cheating.

What this article is arguing, however, is that subjecting a person to two sets of *the same sort* of proceedings for the same wrong does expose him to double jeopardy. Thus subjecting a solicitor to two sets of disciplinary proceedings for the same wrong should violate the rule against double jeopardy. Consequently, the show cause proceedings based on the very same facts on which Nathan had earlier been penalised by the Council should have constituted a contravention of the rule against double jeopardy.

C. *The Scope of the Doctrine*

Prima facie, this argument draws strong support from the Privy Council case of *Harry Lee Wee*.[29] As the factual matrix of the *Harry Lee Wee* case has a close parallel to that of *Edmund Nathan*, it would be appropriate to recount in some detail the events culminating in the Privy Council appeal before examining the manner in which the Court in *Edmund Nathan* dealt with the double jeopardy argument.

1. *The Harry Lee Wee Disciplinary Proceedings*[30]

a. *The First Disciplinary Proceedings – "the Delay Proceedings"*

Harry Wee, an advocate and solicitor, employed a legal assistant named S Santhiran in his sole proprietorship. In February 1976, Wee discovered that Santhiran had misappropriated large sums of money from the firm's clients' account. He confronted Santhiran who admitted to misappropriating $298,270.75.

[28] *Supra*, note 26. See also *Re Knight Glenn Jeyasingam* [1994] 3 SLR 531; *Law Society of Singapore* v *Ravindra Samuel, supra*, note 26; *Law Society of Singapore* v *Tham Yu Xian Rick, supra*, note 8; *Law Society of Singapore* v *Wee Wei Fen, supra*, note 8; *Law Society of Singapore* v *Ng Chee Sing* [2000] 2 SLR 165; and *Law Society of Singapore* v *Amdad Hussein Lawrence, supra,* note 8.

[29] *Harry Lee Wee* v *Law Society of Singapore* [1985] 1 MLJ 1.

[30] See generally, Shelley Wright, "Double Jeopardy and the Saga of Harry Lee Wee" (1985) 27 Mal LR 375.

Notwithstanding Santhiran's admission, Wee did not report Santhiran to the police or to the Law Society, but continued to employ him as a legal assistant and entrust him with the firm's legal work on the understanding that Santhiran would make total restitution of the misappropriated moneys.

Only on 30 April 1977 did Wee in a letter marked private and confidential and for the attention of the vice-president of the Society disclose Santhiran's misappropriations of the firm's moneys. On 26 May 1977, Wee reported Santhiran's misappropriations to the police and on 27 May 1977, he made a formal complaint to the Law Society.

In March 1978 the Chairman of the inquiry committee appointed by the Council informed Wee that the inquiry committee acting on its own motion, had decided to enquire into his delay in reporting Santhiran's admitted defalcations of clients' moneys to the Society and his offer to Santhiran that his defalcations would not be reported to the police provided Santhiran made full restitution.

On 13 December 1978, a disciplinary committee was appointed to hear the delay charges. These charges were made under section 84(2)(b)[31] of the Act. On 19 November 1980, the disciplinary committee hearing the delay charges reported to the Council that there was cause of sufficient gravity for show cause proceedings to be taken.

On 16 March 1981, the show cause proceedings in respect of the delay charges came before a court of three judges and on 27 August 1981, the court found that cause was not shown. Wee was suspended from practice for two years.[32] The appeal to the Privy Council was dismissed on 13 July 1982.[33]

b. *The Conviction*[34]

On 7 November 1978, Wee was convicted of nine charges under section 213 of the Penal Code for obtaining or attempting to obtain restitution from Santhiran in consideration of concealing Santhiran's criminal breaches of trust. On appeal, the conviction in respect of one charge was set aside and the conviction of the remaining eight charges were confirmed. Leave to appeal to the Privy Council was refused by the Privy Council.

[31] The Act at this time was the 1970 edition (Cap 217). S 84(2)(b) is the equivalent of today's s 83(2)(b) which states that a solicitor who is guilty of *inter alia*, 'fraudulent or grossly improper conduct in the discharge of his professional duty' will give due cause under s 83(1) for a suspension, striking off or censure.

[32] *In the Matter of an Advocate & Solicitor* [1981] 2 MLJ 215.

[33] *HL Wee* v *The Law Society of Singapore* [1982] 2 MLJ 293.

[34] *Harry Lee Wee* v *Public Prosecutor* [1980] 2 MLJ 54.

c. *The Second Disciplinary Proceedings – "The Conviction Proceedings"*

On 13 December 1978, the same day on which a disciplinary committee was appointed to hear the delay charges, the Council referred the convictions to an inquiry committee.

It commenced investigations on 19 November 1980. On 6 January 1981 a disciplinary committee to hear the conviction charges was appointed. These charges were made under section 84(2)(a) of the Act.[35] On 26 August 1981 the disciplinary committee hearing the conviction charges reported to the Council that there was cause of sufficient gravity for show cause proceedings to be taken against Wee.

On 17 September 1982, the show cause order in respect of the conviction charges was made and in due course the show cause proceedings came before a court of three judges. The court ruled that he be suspended for a second term of two years.

Wee appealed to the Privy Council. In essence, his argument was that both sets of disciplinary proceedings arose from exactly the same conduct. The Privy Council summed up his argument thus:

> [A]lthough it was possible to attach a different label in each case to the particular form of professional misbehaviour alleged, the gravamen of the complaint against him in each case was either identical or so nearly so as to entitle him either to rely on the principle of *autrefois convict* or on the closely analogous principle, applicable alike to criminal and civil litigation, that the unnecessary duplication of proceedings is an abuse of process which the court has an inherent jurisdiction to restrain.[36]

The Privy Council unequivocally accepted the application of the rule against double jeopardy to professional disciplinary proceedings. However, it did not have to decide on the precise scope of the doctrine in disciplinary proceedings as it was able to dispose of the case on the basis that the second proceedings were an abuse of process.

[35] The Act at this time was the 1970 edition (Cap 217). S 84(2)(a) is the equivalent of today's s 83(2)(a) which states that due cause may be shown by proof that a solicitor 'has been guilty of a criminal offence, implying a defect of character which makes him unfit for his profession'.

[36] *Supra*, note 29, at 2.

2. *The ambit of the Privy Council's dictum on double jeopardy*

Section 94A did not exist at the time of the *Harry Lee Wee* case. The Court in *Edmund Nathan* however, correctly admitted that this was not enough to distinguish the case from the proceedings before it. Instead, the Court distinguished *Harry Lee Wee* on the basis that the first disciplinary proceedings in that case did not simply end at the inquiry committee stage. The proceedings went through all three stage of the disciplinary process. Accordingly, it could be said that Wee was 'convicted' of grossly improper conduct in the discharge of his professional duty within the meaning of section 84(2)(b) of the Act.

In contrast, the first proceedings in the instant case did not make it past the inquiry committee stage. The Court considered this significant because proceedings before an inquiry committee are not a trial. The proceedings are not adversarial, no charge or charges are framed and no evidence is taken. They are merely an informal inquiry to determine whether there is cause of sufficient gravity for a formal investigation. Hence, the second proceedings in the *Edmund Nathan* case did not expose Nathan to double jeopardy.

The Court's holding would mean that a solicitor would be protected by the rule against double jeopardy only if the first disciplinary proceedings concluded at, at least, the disciplinary committee stage. This is because it is only at the disciplinary committee stage that the proceedings become adversarial. The rule against double jeopardy would not apply even if the first proceedings terminated at the inquiry committee stage with a penalty. This would mean that, the possibility of the doctrine of abuse of process applying aside, the solicitor may be penalised repeatedly provided the proceedings never reach the disciplinary committee stage. This surely cannot be right.

It is submitted that there is in fact no rule of law that the rule against double jeopardy can operate only in an adversarial context. It is true that the doctrine operates most commonly in the adversarial context, but that is only because it is most prominent in a process that is primarily adversarial.[37] In the criminal justice system, the accused's guilt is decided by adversarial proceedings. Although a Preliminary Inquiry is required before an accused can be committed to stand trial before the High Court, it is not the function

[37] A number of authorities have emphasised that the rule against double jeopardy only applies in an adversarial context. See *eg, Mohamed Yusoff bin Samadi* v *Attorney General, supra*, note 27; *Lim Keng Chia* v *Public Prosecutor* [1998] 1 SLR 686; *Gunalan s/o Govindarajoo* v *Public Prosecutor* [2000] 3 SLR 431.

of the magistrate to decide or adjudicate on any issue. His role is purely that of an enquirer to satisfy himself that there is a *prima facie* case. He has no power to impose a penalty of any kind.[38]

Although the doctrine operates most commonly in the adversarial context, the norm should not be taken as the rule. As discussed above, there are cogent reasons why the doctrine should also apply in the professional disciplinary context.

It would be inappropriate, however, to directly transpose our understanding of the rule against double jeopardy in the criminal context to the professional disciplinary one because the disciplinary process is not wholly based on the criminal model.[39] As the US Seventh Court of Circuit Court of Appeals once put it:

> [D]isbarment and suspension proceedings are neither civil or criminal in nature but are special proceedings, *sui generis* ... Such proceedings are not lawsuits between parties litigant, but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice.[40]

The Singapore model utilises a unique blend of domestic tribunals and court proceedings; adversarial and non-adversarial proceedings. As such, modifications must be made to the rule against double jeopardy, as it is understood in the criminal context, before it can operate successfully in the disciplinary context. We should not be deterred from applying the rule against double jeopardy in a non-adversarial context if we are nevertheless of the opinion that an application of the rule in the circumstances would promote or safeguard the concerns that undergird the doctrine.

It is submitted that the protection against double jeopardy should attach to a solicitor once the Council has duly disposed of his case after the conclusion of inquiry committee proceedings. This should be the case even though proceedings at this stage have yet to become adversarial.

It is only natural that a solicitor expects finality after proceedings conclude at the inquiry committee stage.[41] One must not be unduly distracted by the

[38] *Public Prosecutor* v *Mary Shim* (1961) 27 MLJ 314; Eric L Teed, "Is a Second Preliminary Inquiry an Abuse of Process?" (1980-1981) 23 The Criminal Law Quarterly 239.

[39] Tan Yock Lin, *supra*, note 4, at 767.

[40] *In re Echeles* 430 F 2d 347 (7th Cir 1970).

[41] See also *infra* p 147..

non-adversarial nature of inquiry committee proceedings and deny a solicitor the protection of the rule against double jeopardy for that reason alone. Instead, we should focus on the role the inquiry committee plays in the professional disciplinary process as a whole. As discussed earlier, the inquiry committee is the first of a three-stage disciplinary process. The inquiry committee plays the role of a preliminary filter to determine whether a *prima facie* case for a formal investigation exists.[42] Even where the committee does not find *prima facie* due cause within the meaning of section 83, it is empowered to make a finding of 'mere' improper conduct[43] and recommend the imposition of a penalty. If the Council agrees with this finding, the solicitor will be ordered to pay a penalty under section 88.[44] In other cases where the committee recommends that the matter be dismissed, the Council has four other options. It can agree,[45] adjourn the matter for consideration or request the committee to reconsider.[46] Finally, it can disagree with the committee's recommendation and request the Chief Justice to appoint a disciplinary committee.[47] The Council is not even bound by the committee's findings in its deliberations. It is entitled to make other or further findings and make a determination based on the facts disclosed in the committee's report.[48]

Given this thorough filtering process, the solicitor should be entitled to assume that no *prima facie* case of due cause can be made against him if the matter terminates at the inquiry committee stage with a decision by the Council to either dismiss the complaint or impose a penalty.

One may attempt to rebut this point from three angles. First, it may be pointed out that private clubs often have the power to discipline their members internally. It may then be argued that a decision by the Council not to pursue the matter further with a formal investigation is a decision to keep the matter within the Law Society. It is analogous to a private club which has handled its disciplinary problems internally. The fact that a private club has chosen to handle its matters internally could not prevent criminal proceedings or professional disciplinary proceedings from subsequently being brought on the same set of facts. By parity of reasoning, the rule against double jeopardy

[42] Tan Yock Lin, *supra*, note 4, at 837. If the inquiry committee recommends that there should be a formal investigation, the Council is bound to determine accordingly. (s 87(2)(a)).
[43] S 86(7)(a).
[44] S 87(1)(b).
[45] S 87(1)(a).
[46] S 87(1)(d).
[47] S 87(2)(b).
[48] *Wong Juan Swee* v *Law Society of Singapore* [1994] 3 SLR 846, at 855.

could not prevent the Law Society from subsequently initiating show cause proceedings on the same set of facts.

It is submitted that this argument is fallacious. The power of a private club to discipline its members and impose sanctions arises by agreement. An internal agreement could not bind other parties. It follows, then, that the rule against double jeopardy cannot apply to prevent subsequent criminal or disciplinary proceedings. In contrast, the Law Society's powers to sanction are not derived from agreement but from law. The analogy between a private club and the Law Society is therefore not exact.

Indeed, if the first objection had any merit, it would follow that the rule against double jeopardy would not apply even if proceedings were to terminate after the conclusion of disciplinary committee proceedings. Since a disciplinary committee is also a domestic tribunal, it would be analogous to a private club which has chosen to handle its matters internally. Yet, the Court in *Edmund Nathan* appeared to accept that the solicitor would be accorded protection against double jeopardy if the proceedings reached at, at least that stage.

The second objection may be that the solicitor has no legitimate expectation that the proceedings should terminate once and for all after the matter is disposed of after the inquiry committee stage. Since inquiry committee proceedings are preliminary in nature, they are much more expeditious than either a hearing by the disciplinary committee or the High Court. A solicitor accused of disciplinary infractions would naturally prefer the matter to be disposed of at this stage. However, he must be willing to accept a trade-off. In return for speed and economy, he must accept that there is no finality and that the matter may be re-opened. If this argument were correct, it would mean that the rule against double jeopardy would not be able to prevent the solicitor from being penalised repeatedly after successive inquiry committee proceedings.

It is submitted that this objection fails to accord the role of the inquiry committee the importance that it is due. A charge of professional misconduct is a serious one. All the parties involved must be discouraged from treating inquiry committee proceedings as a mere dress rehearsal. A professional from a profession which is itself based on trust and confidence should be entitled and encouraged to canvass his 'innocence' thoroughly at the earliest opportunity notwithstanding the inquisitorial nature of inquiry committee proceedings.[49]

Further, it is submitted that the solicitor does have a legitimate expectation of finality once the matter is disposed of after all the relevant facts have

[49] I am indebted to Professor Tan Yock Lin for this point.

been brought to light before the inquiry committee. As mentioned above, the Council has multiple opportunities to pursue the matter in the event that it does not agree with the recommendation of the inquiry committee. The solicitor should be entitled to assume that it is the end of the matter if the Council chooses not to take advantage of those opportunities. A failure to accord the solicitor any protection against double jeopardy would expose him to the very evils that the rule against double jeopardy was designed to prevent. It would mean that the solicitor would live in "a continuing state of anxiety and insecurity"[50] that the matter may be re-opened repeatedly. It is only fair that the solicitor be subject only once to the ignominy of disciplinary proceedings and that he is only penalised once for his wrong-doing, if any.

A third objection may then be taken. The argument would go something like this. The primary object of the professional disciplinary process is to protect the public from unscrupulous or incompetent lawyers. The public should never be made to suffer on account of any failure by the Council to properly determine the gravity of the offence at the inquiry committee stage. It does not matter that it may take repeated proceedings to identify an errant solicitor and sanction him in a manner commensurate with his misconduct. To put it somewhat colloquially, it is a case of 'better late than never'. The solicitor may suffer grievously under the burden of duplicative proceedings but this is surely a case where solicitude for individual sensitivities must take a back seat to the interests of the public.

It is submitted that this is not a cogent argument in favour of denying or curtailing the protection against double jeopardy. It would hardly inspire public confidence in the quality of the legal profession if it took repeated (and at times, even inconsistent) disciplinary proceedings to mete out the appropriate sanction. The protective function of the disciplinary process could just as equally be well served if the Law Society were to marshal its resources into one directed and focussed investigation of the facts once it has cognisance of them.

On the facts in *Edmund Nathan*, it is not true that the Law Society would have lost its chance to discipline Nathan if it had stayed its hand until any criminal proceedings against him had been concluded. Although there is no general principle that the inquiry committee should stay its proceedings when criminal proceedings may be impending,[51] it should be the one to bear the risk that its findings may ultimately be inconsistent with that of the criminal court's. The solicitor should not be made to bear that risk.

[50] *Supra*, note 17, at 187.
[51] Tan Yock Lin, *supra*, note 4, at 850.

It may be argued that it would be unreasonable to expect the Law Society to have known that criminal proceedings for an offence involving fraud or dishonesty were a reasonable prospect. Indeed, there is no indication in the *Edmund Nathan* case that the inquiry committee conducted its proceedings at a time when the Law Society actually knew that criminal proceedings were pending or could have been brought.

It is submitted, however, that in cases such as these, it would not have been unreasonable for the Law Society to investigate the likelihood of criminal proceedings for fraud or dishonesty being commenced before bringing disciplinary proceedings. It would not have been unreasonable to expect the Law Society to seek legal advice when the Law Society itself is comprised of lawyers. While this may involve some time and expense, it is submitted that these are necessarily incurred in the name of justice. In any case, the argument from the economic standpoint cannot stand when the alternative scenario of repeated disciplinary proceedings would involve just as much, if not more expenditure.

The contention above would admit only two narrow exceptions. First, the Law Society would not be prohibited from subsequently initiating show cause proceedings under section 94A if the facts had been such that no reasonable lawyer could have advised that criminal proceedings for an offence involving fraud or dishonesty were a reasonable prospect.[52] Second, it would not be prohibited from commencing a second set of proceedings if it had initiated the first after a clear representation from either the police or the Attorney-General's Chambers that it did not intend to take any action on the complaint. The Law Society should not be made to bear the risk that either the police or the Attorney-General's Chambers would subsequently rescind its position.

In these two cases, the need to protect the public from errant solicitors should triumph over the need to protect the solicitor from double jeopardy because the Law Society could not have foreseen that criminal proceedings for fraud or dishonesty would be initiated. It is in these two situations that the public should not be made to suffer on account of any failure by the Council to properly determine the gravity of the offence at the inquiry committee stage.

It is thus the contention of this article that Nathan was in fact wrongly deprived of his protection against double jeopardy. In so far as the first

[52] It is expected that it would be very difficult to be able to procure a conviction for an offence involving fraud or dishonesty on facts that no reasonable lawyer could have advised that criminal proceedings for such an offence were a reasonable prospect. It may be asked if criminal proceedings had indeed been a reasonable prospect, how it could have been possible that the inquiry committee had not been alive to that possibility. The simple answer is perhaps that its mind had not been directed to this issue.

set of disciplinary proceedings were concerned, Nathan's actions would have constituted due cause under section 83 only if they amounted to "fraudulent or grossly improper conduct in the discharge of his professional duty" under section 83(2)(b) or "misconduct unbefitting an advocate and solicitor as an officer of the Supreme Court or as a member of an honourable profession" under section 83(2)(h).[53]

The inquiry committee, however, only found his conduct to be "improper" and recommended the imposition of a penalty. The Council agreed with this recommendation.

Thus it is safe to assume that the committee was unable to find a *prima facie* case of due cause within either of these two heads. Although it is true that no specific charges were formulated at the inquiry committee stage, it was the job of the committee to measure the conduct against the entire section 83(2) list of due causes to determine if *prima facie* due cause was made out. It is only if the facts amounted to improper conduct outside the list that the committee could recommend a penalty. If the facts were such as to fall or may arguably be said to fall within the section 83(2) list, it would have been obliged to recommend a formal investigation by a disciplinary committee.[54]

Counsel for Nathan argued that the inquiry committee's report was tantamount to a 'conviction'. He argued that Nathan had been found guilty under section 83(2)(b) of the Act of fraudulent or grossly improper conduct in the discharge of his professional duty, thus allowing Nathan to raise a plea of "*autrefois convict*".

This argument was correctly rejected by the Court:

> We can find nothing in the inquiry committee's report which suggests a finding of fraudulent or grossly improper conduct. Fraudulent conduct can be ruled out as the inquiry committee has expressly stated that the respondent's conduct was not fraudulent. The inquiry committee described the respondent's conduct as 'improper' not 'grossly improper'.[55]

It is submitted that a plea of "*autrefois acquit*" would have been more appropriate. On the facts, it would have been open to Nathan to argue that he had been investigated for conduct which arguably amounted to due cause.

[53] This paragraph examines the situation before Nathan's criminal conviction. His criminal conviction, would of course provide additional due cause under s 83(2)(a).

[54] Tan Yock Lin, *supra*, note 4, at 852.

[55] *Supra*, note 1, at 426.

Unable to find *prima facie* due cause falling within section 83(2)(b) and section 83(2)(h), the inquiry committee "convicted" him of the lesser disciplinary offence of improper conduct. He was "acquitted" of any wrongdoing which may have been caught by section 83(2)(b) or section 83(2)(h). In other words, when a person is accused of something more serious and is instead convicted of something less serious, he must be deemed to have been acquitted of the more serious.

3. *The definition of "same offence"*

It must now be examined whether Nathan was subsequently in fact "tried" for the same disciplinary offence(s) of which he was acquitted. The test as to what constitutes the "same offence" is of significance not just to a solicitor accused of professional misconduct, but to all accused persons seeking to employ the rule against double jeopardy.

Given the number of overlapping offences today, the question of what constitutes the "same offence" cannot be resolved by a "facial" analysis of the two offences. A difference in terminology does not necessarily mean that the offences are different. It is necessary to probe deeper, and determine if the offences are "in substance" the same. The best definition of "same offence" would allow a person to be tried for every distinct wrong he has committed but at the same time prevent him from being punished repeatedly for what is essentially the same wrong.

Since the scope of double jeopardy protection is not statutorily defined by the Act, one must look to the common law for guidance. In the *Harry Lee Wee* case, the Privy Council identified two models for the definition of "same offence".

The first was the "same evidence" test as laid down by Lord Morris of Borth-y-Gest in the House of Lords case of *Connelly* v *DPP*:

> (1) ...a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;
>
> (2)...
>
> (3) ...the same rule applies if the crime in respect of which he is being charged is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;
>
> (4) ...one test as to whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to

> the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;
>
> (5) ...
>
> (6) ...on a plea of *autrefois acquit* or *autrefois convict* a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted.[56]

Lord Morris, however, was at pains to point out that a plea of *autrefois* was not made out simply because the facts or the evidence in the second proceedings overlap with that in the first. At the risk of repetition, the test is whether the evidence *necessary* to support the second charge would have been sufficient to procure a legal conviction upon the first.

The Privy Council in the *Harry Lee Wee* case accepted that if this test were to be applied, Wee would be able to rely on the delay proceedings as a complete bar to the conviction proceedings. After all, the whole substance of the delay and conviction charges was his agreement to conceal Santhiran's defalcations in return for restitution.

Similarly, this test would mean that the show cause proceedings in the *Edmund Nathan* case exposed the solicitor to double jeopardy as the substance of the complaint in the first and second disciplinary proceedings was the same. Although it is true that the second proceedings required proof of the additional fact that Nathan had been convicted of a criminal offence involving dishonesty, it is submitted that this was insignificant. The conviction, after all, was itself based on the same wrongdoing that was the subject of the first proceedings.

The Privy Council in the *Harry Lee Wee* case also did not appear to consider that the additional fact of a conviction made any difference to the results of the "same evidence" test.[57]

The second model is the "facial comparison test" laid down by Lord Devlin in the same case:

[56] [1964] AC 1254, at 1305. Note, however, that this case is one that discussed the double jeopardy in the criminal context and not the disciplinary context. It is submitted, however, that the case applies to the disciplinary context by analogy.

[57] *Supra*, note 29, at 5.

> For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word offence embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law ...
>
> My noble and learned friend in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same ... I have no difficulty about the idea that one set of facts may be substantially but not exactly the same as another. I have more difficulty with the idea that an offence may be substantially the same as another in its legal characteristics; legal characteristics are precise things and are either the same or not.[58]

Applying this test, Wee would be unable to complain of double jeopardy as the legal characteristics of the delay and conviction charges were not the same. One would involve the proof of a criminal conviction while the other would not.

Similarly, Nathan would not be exposed to double jeopardy as the terminology of either sections 83(b) or 83(h) are different from that of section 83(2)(a).

Unfortunately for our purposes, the Privy Council did not state which version it favoured. In the *Edmund Nathan* case, the Court opined that Lord Devlin's stricter test was "jurisprudentially correct".[59] However, it did not give its reasons.

[58] *Supra*, note 56, at 1340. This test is the prevailing one in the UK. See *Regina* v *Beedie* [1998] QB 356. Malaysian authority appears divided over the question whether the 'same evidence' test applies or the 'facial comparison' test applies. For the 'same evidence' test: *Public Prosecutor* v *Sarjan Singh* (1939) 8 MLJ 109; *M Raman* v *Ayavoo* (1957) 23 MLJ 14; *PP* v *Lee Siew Ngock* [1966] 1 MLJ 225. For the 'facial comparison' test: *Jagit Singh* v *Regina* (1962) 28 MLJ 326; *Jamali bin Adnan* v *Public Prosecutor* [1986] 1 MLJ 162. The position in Singapore is not completely settled. The Chief Justice in *Gunalan s/o Govindarajoo* v *Public Prosecutor*, *supra*, note 37, simply applied the two tests in the alternative without pronouncing on their relative merits. It must be noted that all these authorities were concerned with the double jeopardy rule in the criminal context. The choice of the appropriate test would thus be circumscribed by any relevant statutory authority. For the relevant statutory authority in Singapore, see *supra*, note 25. Note that s 239 of the CPC appears to be more consistent with the 'same evidence' test than the 'facial comparison' test.

[59] *Supra*, note 1, at 428.

It is submitted that Lord Morris' same evidence test is far better. Lord Devlin's facial comparison test reduces the rule against double jeopardy to such a narrow ambit that it is practically useless. It ignores the actual similarities that may exist between offences arising from the same conduct and instead concentrates on the semantic differences in their terminology.[60] Lord Devlin's requirement that the offence be the "same both in fact and law" would only be satisfied where the second charge is identical. This situation, however, is comparatively rare. Far more commonly encountered is a case of overlapping offences.

The *Edmund Nathan* case is a prime example. There is a clear degree of potential overlap between a case of "grossly improper conduct in the discharge of ...professional duty" and a case involving a solicitor "convicted of an offence involving ... dishonesty". The former has been defined to mean conduct that is "dishonourable to him as a man and dishonourable in his profession".[61] Surely, one of the most dishonourable things he can do would be to commit a criminal offence involving dishonesty in the course of his professional duty.[62] *A fortiori*, it must be "misconduct unbefitting

[60] It may be thought that such a description of Lord Devlin's 'facial comparison' test is to put the case too strongly. From the standpoint of pure logic, it would seem that a more widely framed offence would be the same as a less widely framed offence. Thus, an offence of causing death by recklessness would be the same as an offence of causing death by negligence. However, Lord Devlin's judgment indicates that he envisaged that the two offences must be defined exactly in the same way before the doctrine of double jeopardy would apply. As he says at p 1358, "I cannot say that ... wounding with intent to cause grievous harm is the same offence as common assault....The facts may be substantially the same, but as offences, they are quite distinct: common assault is punishable by imprisonment for one year and wounding with intent by imprisonment for life."
Indeed, his judgment indicates that he intended to keep the doctrine of double jeopardy within narrow confines. As he puts it at p 1340: "If I had felt that the doctrine of *autrefois* was the only form of relief available to an accused who has been prosecuted on substantially the same facts, I would be tempted to stretch the doctrine as far as it would go, But, as that is not my view, I am inclined to favour keeping it within limits that are precise." Lord Devlin was referring to the availability of the doctrine of abuse of process. For a consideration of the desirability of using the doctrine of abuse of process instead of the doctrine of double jeopardy, see *infra* p 155.

[61] *Re David Marshall* [1972] 2 MLJ 221.

[62] It may be argued that if a solicitor commits an offence involving dishonesty in the course of carrying out his professional duties, he cannot be said to be guilty of "grossly improper conduct in the discharge of ... professional duty" because he is not even discharging his professional duty in the first place. This is based on the reasoning that the commission of an offence involving dishonesty is the direct antithesis of professionalism. It is submitted that this argument is entirely too semantic. The commission of an offence involving dishonesty by a solicitor in the course of carrying out his professional duties is a classic example of discharging one's professional duty in a grossly improper way. See for *eg*, *Law Society of Singapore* v *Venkata Chari Srinivasa Vardan* [1999] 2 SLR 229.

a solicitor as an officer of the Supreme Court or as a member of an honourable profession". Indeed, Parliament must have regarded it as so grossly improper that it required the Law Society to bypass the first two stages and apply for a show cause order directly.

It is conceded that it is possible to conceive of cases where sections 83(2)(a), (b) and (h) would not overlap. One can only tell if the actual offences overlap by comparing the evidence presented in both proceedings and determining whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction upon the first.

It can be seen that the same evidence test is far more "case sensitive". Ultimately, this is the most important criterion of any rule meant for the protection for the accused person. It matters not to the accused that the offences of which he stands accused are theoretically different because of differences in their terminology. The rule only becomes of practical utility when it is able to shield him from the spectre of multiple proceedings and punishments in cases where the offences are in substance the same.

While the accused may still find recourse in the doctrine of abuse of process even if Lord Devlin's test were to be applied, it is submitted that this protection would nevertheless not be as comprehensive as that offered by the "same evidence" test. This is because the doctrine of abuse of process applies as a matter of discretion, while the rule against double jeopardy applies as a matter of right. The end result would be that a fundamental purpose of the rule against double jeopardy – that of "protection of the individual from the government's use of the criminal justice system to harass and oppress" – would not be adequately served.[63]

IV. Abuse of Process in Disciplinary Proceedings

For sake of completeness, we must now examine the Court's rulings in the *Edmund Nathan* case on the applicability of the doctrine of abuse of process.

A court has the discretion, pursuant to its inherent jurisdiction,[64] to stay proceedings on the ground that they are an abuse of the court's process. As Lord Diplock put it in *Hunter* v *The Chief Constable:*

[63] Craig Albee, "Multiple Punishment in Wisconsin and the Wolske Decision: Is it Desirable to Permit Two Homicide Convictions for Causing a Single Death?" [1990] Wisconsin Law Review 533, at 572.

[64] Keith Mason, "The Inherent Jurisdiction of the Court", 57 Australian Law Journal 449; and IH Jacob, "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23.

> [Abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in such a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.[65]

This power is exercised only in exceptional situations.[66]

Since the modern restatement of the doctrine by the House of Lords in *Connelly* and *DPP* v *Humphrys*,[67] there appears to be no doubt as to the existence of the doctrine. There has been considerable uncertainty, however, over the precise scope of the doctrine.[68]

The Court in the *Edmund Nathan* case seemed to adopt a wide interpretation of abuse of process when it stated that a court has "a general discretionary power to quash or stay an indictment which to try would be oppressive to the accused".[69] It, however, found "nothing in the disciplinary process in the show cause proceedings ... remotely suggesting an abuse of process or that which would be oppressive to the respondent if the show cause proceedings were proceeded with".[70] Unfortunately, it did not give any reasons.

In so doing, the Court missed a prime opportunity to clarify the parameters of the abuse of process doctrine. In particular, it missed the chance to examine a line of authority that has permitted a stay on proceedings in circumstances where a continuation of those proceedings would violate the spirit of the rule against double jeopardy.[71] This principle has been applied in the disciplinary context by the Australian High Court in the case of *Walton* v *Gardiner*.[72]

65 [1981] 3 All ER 727, at 728.

66 *DPP* v *Humphrys* [1976] 2 All ER 497, at 510 and 534.

67 *Ibid*. See also *Hui Chi-Ming* v *R* [1991] 3 All ER 89; *Bennett* v *Horseferry Road Magistrates' Court* [1993] 3 All ER 138; and *R* v *Commissioner of Police of the Metropolis, ex parte Bennett* [1995] 3 All ER 248.

68 See Choo, *supra*, note 18, at 7.

69 *Supra*, note 1, at 428. The existence of the court's jurisdiction to award a stay proceedings for abuse of process was not questioned in *Gunalan s/o Govindarajoo* v *Public Prosecutor, supra,* note 37, at 436.

70 *Supra*, note 1, at 428.

71 See generally Rose Pattenden, "Abuse of Process in Criminal Litigation" (1989) 53 J Crim L 341, at 345-347; Rose Pattenden, "The Power of the Courts to Stay a Criminal Prosecution" [1985] Crim LR 175, at 181-183; Andrew LT Choo, "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited" [1995] Crim LR 864; and Choo, *supra*, note 18, at 16-28.

72 177 CLR 378. The facts of *Walton* v *Gardiner* provide a better analogy to the *Edmund Nathan* case than the *Harry Lee Wee* case due to the similarity in facts. The factual matrix giving rise to a finding of abuse of process in the *Harry Lee Wee* case will thus not be discussed.

This case involved acts of alleged professional misconduct by the respondents in the administration of a form of psychiatric treatment known as "deep sleep therapy" between 1973 to 1977. The first set of proceedings brought by the medical disciplinary tribunal in 1986 was held to be an abuse of process on account of the inexcusable delay in the initiation of the proceedings. The proceedings were permanently stayed.[73]

Fresh proceedings were initiated in 1991 after a Royal Commission report uncovered further evidence against the respondents. Although efforts were made to distinguish the second set of complaints from the first one, there was a substantial degree of overlap between the two. Although the first set of complaints focussed on the treatment of a few patients while the new ones were "directed to more general allegations of medical practice",[74] both in substance were critical of the respondents' general conduct in performing deep sleep therapy. The respondents thus applied to the Court of Appeal for a stay of proceedings on the ground of abuse of process. The Court awarded a stay, based on its assessment of the competing factors. In particular, it treated the rule against double jeopardy as relevant to the case.[75] The appellants appealed to the High Court.

A majority of the High Court held that whether the proceedings should be stayed for abuse of process depended on whether a continuation of the proceedings would involve "unacceptable injustice or unfairness".[76] This would involve an assessment of various competing factors and considerations. These included the "requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice".[77] The Court recognised that this test had to be duly adapted before it would work satisfactorily in the disciplinary context. In particular, it held that consideration had to be duly given to "the protective character of such proceedings and to the importance of protecting the public from incompetence and professional misconduct on the part of medical practitioners."[78]

Addressing itself to the facts at hand, the majority conceded that the second set of complaints did not infringe the letter of the rule against double jeopardy. The complaints were not precisely the same; neither had there

[73] *Herron* v *McGregor* (1986) 6 NSWLR 246.
[74] *Ibid*, at 388.
[75] *Gill* v *Walton* (1991) 25 NSWLR 190.
[76] *Supra*, note 72, at 392.
[77] *Supra*, note 72, at 396.
[78] *Ibid*.

been a full hearing of the merits on the earlier proceedings. Nevertheless, it found it significant that the second set of proceedings infringed the spirit of the rule against double jeopardy. There was a substantial overlap between both sets of proceedings and the fresh set of proceedings exposed the respondents to the same kind of vexation and oppression that the rule against double jeopardy was meant to prevent. The Court accordingly affirmed the decision of the court below.

Applying the reasoning in *Walton* v *Gardiner* to the facts of the *Edmund Nathan* case, it is submitted that there was a good arguable case that the institution of the second proceedings against Nathan constituted an abuse of process. In particular four factors pointed in favour of a stay of proceedings:

- The substantial degree of overlap between the first proceedings and the second.
- The degree of stress and trauma engendered by a second set of proceedings on what was substantially the same offence.
- The fact that Nathan had already been penalised for the offence.
- The fact that the inquiry committee chose to go ahead with the disciplinary proceedings despite the fact that it should have been cognisant of the fact that Nathan may have been guilty of a criminal offence.[79] The inquiry committee, not the solicitor, must bear the risk that its findings may ultimately be inconsistent with that of the criminal court's.

Thus if a stay were not ordered, it would retain the letter but not the spirit of the doctrine.

V. Conclusion

The rule against double jeopardy and the doctrine of abuse of process are important vanguards against the power of the State. It is in the interests of the accused that the parameters be delineated clearly. In so far as the rule against double jeopardy is concerned, it is submitted that the court should adopt a more case-sensitive approach. In addition, it is hoped that the court will take into account more wide-ranging considerations in the application of the abuse of process doctrine.

[79] There being no evidence that no reasonable lawyer could have advised that criminal proceedings for an offence involving fraud or dishonesty were not a reasonable prospect.

In the context of professional disciplinary proceedings itself, it is submitted that section 94A should be used merely as a tool to expedite proceedings, rather than as a means to have a second bite at the proverbial cherry. In particular, it is hoped that the following reforms will be adopted to obviate the problems posed by section 94A:

- The Legal Profession Act should be amended to specifically state that the rule against double jeopardy does apply to professional disciplinary proceedings. In addition, it should expressly delineate the scope of the rule. Precedent for this has already been set in the Singapore Armed Forces Act.[80]
- Whenever the Council receives a complaint that reveals that a criminal offence may have been committed, the Council should immediately report the matter to the police. Legal professional disciplinary proceedings should only be commenced after the conclusion of criminal proceedings. This would allow all matters

[80] See s 108 which provides:

'Person not to be tried twice.

108. —

(1) Subject to the provisions of this Act, where a person subject to military law has been acquitted or convicted of an offence by a subordinate military court or has had his conviction quashed by the Military Court of Appeal or the Armed Forces Council, he shall not be liable to be tried again by a subordinate military court or any civil court or a disciplinary officer in respect of that offence or for any offence based on the same facts.

(2) Where a person subject to military law has been acquitted or convicted of an offence by a disciplinary officer, he shall not be liable to be tried again by a subordinate military court or a disciplinary officer in respect of that offence or for any offence based on the same facts but he may be tried for the same offence or for an offence based on the same facts by a civil court which shall in awarding punishment have regard to any military punishment he may already have undergone as a result of his conviction by a disciplinary officer.

(3) Where a person subject to military law has been acquitted or convicted of an offence by a competent civil court, he shall not be liable to be tried in respect of that offence by a subordinate military court or a disciplinary officer.' (Cap 295, 1995 Rev Ed)

to be dealt with expeditiously in one disciplinary proceeding and avoid the perils of double jeopardy.[81]

- If, however, disciplinary proceedings have already commenced, the Council should stay the proceedings pending the conclusion of the criminal proceedings.

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[81] There is already some precedent for this in the form of s 94A(2) of the Legal Profession Act. This sub-section states that the Law Society should not make a show cause application under s 94A(1) until any appeal against the conviction is withdrawn or deemed to have been withdrawn or disposed by the appellate court. The aim of this sub-section is obviously meant to prevent inconsistent findings and ensure that all matters are dealt expeditiously in one disciplinary proceeding. It is submitted that this rationale should be followed through and provision be made for the commencement of disciplinary proceedings only after the solicitor has been prosecuted.

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