CHAPTER V

PUBLIC PROTECTION

The primary existence of the legal profession is to serve the public. And it is for this reason that the public is exposed to exploitation by the more unscrupulous members of the profession, who in the discharge of their professional duties had no conscience of going against the many forms of restrictions imposed on them. The public needs to be protected from such deviations as it would ultimately harm the public and it is the legal profession's paramount task to afford the necessary protection.

(i) Admission into the Profession

Control of the admission into the profession is one method of ensuring that the members of the legal profession is not made up of persons with questionable characters. It is to be noted that it is not sufficient for a person to become an advocate and solicitor if he wishes to hold himself as such, ready and willing on his own behalf to assist clients in a professional capacity. He must, first and foremost, have his name on the Roll of advocates and solicitors, and must have in force a valid practising certificate. The essential requirement of admission is good character. Further qualifications are further imposed that the person should be free from a conviction of criminal offence, from bankruptcy or certain other offences under the Bankruptcy Act, 1967, any such acts, if in England, a barrister or solicitor would have been liable for disciplinary proceedings and also free from any disciplinary action in any other country.[1] Such conditions serve as a

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1. S.11, Legal Profession Act, 1976

preliminary filter against persons to be admitted into the profession on the grounds that he or she is not a fit and proper person to be admitted into practice. Persons who had displayed early deviant tendencies are thereby prohibited from getting admitted from the outset. In such matters, the Bar Council is entrusted with the power of screening out potentially immoral or unethical applicants. As the guardian of the profession, the Bar Council is highly concerned with the honour and reputation of the Malaysian Bar as the members would, in turn, further reflect the reputation of the legal profession.

S.14 (1)(2) provides that the Bar Council and the State Bar Committees could make such inquiry into the character of the petitioner and henceforth submit its findings to the Chief Justice. Further emphasis of good character is provided in S.15 (3)(b), where for an application of admission under the section, the petitioner has to file an affidavit exhibiting two recent certificates as to his good character. However, these provisions as to good characters is subject to S.10, where discretion is vested in the High Court to admit any qualified person or any articled clerk as an advocate and solicitor of the High Court. The exercise of discretion by the court was put into play in the case of Re SRC Augustin.[2]

In this case, the petitioner applied for admission as an advocate and solicitor and his petition was strenously opposed by the Solicitor-General, the Malayan Bar Council, and the Bar Committee of Selangor. The petitioner had been sentenced by the Thai Military Court in 1962 for carrying opium without legal authority. As a result

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2. (1973) 1 MLJ 208.

of the conviction, he was subsequently dismissed from the police force in Malaysia. Since 1964, there was nothing known to discredit the petitioner and he had been called to the English Bar in 1969. The question that arose was whether the petitioner was a fit and proper person to be admitted into practice.

In treating the misconduct, Ong C.J. was of the opinion that it was of a serious nature where the facts cannot be glossed over. There is the public interest to be considered. The clients of a legal practitioner are often illiterate and simple people. Would the petitioner be able to look after their interests with scrupulous honesty and fidelity. If not, what of the high reputation for integrity in the profession he seeks to enter? Would not the mere fact of his admission tarnish the reputation of the body as a whole?[3]

In answering the question, the judge relied on the discretion conferred on him by S.4 of the Advocates and Solicitors Ordinance 1947.[4] He took a sympathetic attitude towards Mr. Augustin's plight and weighed the matter in the light of the present circumstances. He took the view that a misconduct committed ten years ago should not be taken to be an incurable defect of character and if the court took the stand to blight the man's future prospects, Mr. Augustin would be faced with a bleak future regarding employment. In arriving at the decision, Ong. C.J. had relied on the judgement of Lord Esher M.R. in the case of Re Weare,[5]

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3. Op Cit, at p.208

4. Which says, "subject to the provision of this Ordinance, the Court may, at its discretion, admit and enrol as an advocate and solicitor,
   (a) any qualified person or
   (b) any articled clerk who is qualified under this Ordinance."

5. (1893) 2 QB 439 at p.447.

"I know how terrible that is (striking a solicitor off the Roll). It may prevent him from acting as a solicitor for the rest of his life, but it does not necessarily do so. He is struck off the roll but if he continues a career of honourable life for so long a time as to convince the court that there has been a complete repentance and a determination to persevere in honourable conduct, the court will have the right and the power to restore him to the profession."

The same considerations were applied in the present case. In cases of striking off the roll and refusal of admission, it is a question of character and fitness. Certificates of Mr. Augustin's good character had been given by practitioners of seven years standing. Another factor which the court laid serious consideration was that the blot on his record did not obstruct his call to the English Bar. As the English Bar did not raise any objection as to the petitioner's past, it follows that there is no real harm if he is also admitted to the Malaysian Bar. This seems to be in line with the provision of S.11 (b)(iii), where an act done in England which warrants disbarment, removal or suspension would also have an adverse effect in Malaysia when seeking admission. Therefore, having regard to the circumstances of the case, the court exercised its discretion and allowed the petition.

Where there is power to admit persons into the profession, the power of reinstatement is similarly vested in the hands of the court. Where there is an application to be replaced on the Roll of

Advocates and Solicitors, the power of restoration is provided for by S.107. The difference between admission and reinstatement is that in the former, application is made to the High Court, whereas in the latter, the power of restoration lies in the discretion of the Federal Court.

Striking off the roll does not in all cases constitute a perpetual disability. Sometimes, it is only meant as a punishment and may be considered in the nature of a suspension from practice. The court had exercised its discretion in an application for replacement under S.34 of the Advocates and Solicitors Ordinance, 1947, in the case of Re Chin Swee Oon[6]. There was no objection from the State Bar Committee but the Bar Council and the Attorney-General objected on the grounds that there was no affidavits filed regarding the applicant's financial position.

In dealing with the case, Barahbah C.J. did not differ much in attitude as Ong C.J. in Augustin's case, for in this case, it also had to be considered in the light of its own facts. The issue was whether good cause has been shown for his reinstatement, not the question as to the gravity of the offence which had led to the applicant being struck off the Roll. The judge was of the opinion that the humiliation and exclusion from practice of his profession had taught him an unforgettable lesson and he had expiated from his wrongdoing. The court was also satisfied that there will be no risk of a repetition

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6. (1964) 30 MLJ 124.

of the offence or any other offence and as such, no prejudice to public interest. The circumstances taken into consideratioin were the age of the applicant (he was 59 years old), that he had made full restitution, that he had been truly penitent, that he has the good name of the family to consider (he also had a daughter in practice), and had lived a blameless life for the last six years. The court, therefore, reposed its trust in the applicant and was confident that he would not betray such trust.

However, subsequent blameless conduct does not automatically render him eligible to be restored. Where an applicant's name had been struck off the Roll for misconduct, the grounds for that order should be disclosed on the application for restoration and it could be held to be a ground for rejection even if the applicant's subsequent conduct had been blameless.[7]

Still, an order for restoration of the name of the advocate and solicitor to the roll does not of itself, conclude the question of the advocate and solicitor's ability to resume practice, for the Bar Council has a discretion to issue him a practising certificate.[8] This discretion is, however, further subjected to an appeal to a judge who may make an order as he thinks fit.[9]

In cases of advocates and solicitors who had been admitted to the English Bar, had been struck off the rolls for having committed an offence, whether in or outside England, and was further struck off

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7. Re Hawdons (1841) 9 Dowl. 970.
8. S.33 (1)(2)
9. S.33 (2)

in Malaysia, chances of reinstatement to the Malaysian Bar would be difficult. This follows the reasoning that, having been struck from the English Bar, the person so struck would no longer come under the definition of a "qualified person" under S.3 and therefore, not eligible to be readmitted. Reinstatement would only be considered if the person so struck had earlier been readmitted to the English Bar.

In the control of admission into the profession, it is the writer's view that there should not be so strict controls as it is an individual's basic right to choose what profession he wants to be in. It is not for anyone to defeat or control this basic right. For, if a crook wishes to be an advocate and solicitor, the door should not be slammed in his face before he steps in. The door should only be closed to him once he had proven himself to be unworthy of being in the ranks of an advocate and solicitor. To rake a man's past is distasteful, especially if he had repented, and to prescribe a punishment before even he joins the profession is unfair. It had been seen that even persons with spotless characters had proven to have adopted deviant attitude after entering the profession. It is therefore, the writer's view that a person should or be judged for the commission of the offences while they were already in the profession rather than to look back into his past,before he was admitted into the profession. It is, no doubt, an anxiety on the part of the profession to maintain and uphold the reputation of the profession as well as the maintenance of public confidence, but it is also a matter of public interest that a person should be given a chance to prove himself before condemning him. Of

course, it is arguable that since lawyers play such an important role in the administration of justice, it follows that entry into the legal profession must be restricted and controlled by a high standard of admission, and later of professional practice.

(ii) Legal Training

Unethical behaviour is also explained as the product of inadequate training and a failure of the legal education. Emphasis should be laid in the professional curriculum where the subjects taught should be one method of instilling a sense of commitment to professional norms and values in students. The feeling of legal fraternity and brotherhood should be considered as part of the training. A school of legal education should not be one where students get so highly competitive to reach the peak of academic achievements. If such is the case in the early stage of legal education, it would not be surprising that these future practitioners would resort to similar methods of stiff competition once they get into practice. This is an undesirable situation for intense competition would ultimately lead to an equally intense professional rivalry, eventually resulting in misconduct discussed in Chapter Three.

The remedy for such a problem would be to reform the professional curriculum. It is assumed that the commitment to professional norms and values could be sowed and planted in the early stages of academic training and that armed with this firm commitment, the practitioner will be disposed to confirm to ethical standards. However, such elements of professional ethics and proprietary should not make up a

total course by itself, for that would impinge too much of academic time. Suffice as it is to include it as part of a subject, e.g., as part of the subject of the Malaysian Legal System of the First Year course, thereby instilling the sense of propriety at so early a stage. To leave such training only during the period of pupillage is not an effective method as by that time, having caught by the rat race, it would be too late a training as the pupils would have been too exposed and hardened to the facts of practice to have ethics embedded in them. However, where such practice and training is undertaken during the student days, it would be more effective as it is during that stage that students are more receptive and vulnerable to influence as they are less orientated towards the benefits of professional practice but more of getting a degree.

(iii) <u>Social Conditions</u>

Another means of public protection is to regulate the social organisation of the profession. The market conditions need to be controlled. The balance of supply and demand of legal services must be considered so as to ensure that there will be no excess of supply so as to reduce the cost of services. Such a step may seem to be the preservation of the self-interest of the profession, but if no such steps are taken or other such constructive measures taken to channel the resources, an influx of practitioners into the field would not benefit the public either. In competing for jobs, coupled with the insecurity of legal practice, a practitioner may not be able to survive the rigours of competitive practice, thus bringing their moral

integrity crumbling together with them.

The situation today is that the concentration of practitioners is centred in the larger towns. The statistics referred to in TABLE A reflect the uneven distribution of services for the people. Almost half of the total population of practitioners are concentrated in the city of Kuala Lumpur. With the exception of Kangar, Perlis and the new capital of Shahalam,[10] Selangor, the capital towns of the various states have high concentration of practitioners. As the situation now stands, legal services are not readily available to the rural areas and therefore, legal services seem to be accessible by the rich only. With an increase in the membership of the profession, it is probable that an optimum would be reached in the major towns, so much so practitioners would be forced to spread into the rural areas. However, this is not a very practical idea as to wait for economic and social forces to drive practitioners into the rural areas. A more positive action needs to be taken in order to achieve a well-distributed means of rendering legal services to the entire population.

One of the ways is through the Legal Aid Bureau. It was only lately with the setting up of the scheme that more rural folks are getting the taste of cheap legal services. It is therefore, the writer's view that more legal services should be channelled through the Legal Aid. The scheme should be expanded and be located in rural areas and with it, more lawyers should be incoporated into the scheme. Apart from correcting the distribution imbalance, the existence of such institutions would instil the sense of awareness among the rural public who are still

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10. Kuala Lumpur, the old capital still retain the bulk of business.

ignorant of their legal rights. Without this awareness, the rural folks would serve as a fertile ground for exploitation and with greater chances for the exploiter to get away scot-free. A better sense of duty and propriety would therefore be instilled in the practitioners.

(iv) Statutory Provisions

Another statutory means of ensuring public protection was recently introduced in the Legal Profession Act, 1976. It is the Compensation Fund which is to be maintained and administered by the Malaysian Bar.[11] Its creation was meant to compensate or reimburse those who have been defrauded by lawyers. The fund is a new scheme in the legal profession in Malaysia, but such schemes are already in existence in England, Australia, New Zealand and Singapore. The object of the fund is to enable the making of grants in the circumstances as set out in S.80 (8)(9). The discretion of the Bar Council to make grants could only be exercised where the claimants have satisfied the Council that he has suffered loss and that the loss is due to the dishonesty of a solicitor or an employee of a solicitor. As the disposal of the Fund is at the discretion of the Bar Council, there can be no legal claim or right to a grant whatever may be the circumstances. Great care should be exercised in scrutinising the application for grants out of the Fund as there would be tendencies of frivolous and ungeniune claims.

The collection of the Fund is derived from the annual contribution made by the advocates and solicitors when they apply for practising certificates. No specific amount has yet been prescribed

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11. S.80.

and the contribution is from time to time determined by the Bar Council. Contribution varies in the length of time of the practising certificate, for, if the certificate is valid for less than six months, contribution would be equally reduced by half.[12] The power of handling the Fund is vested in the Malaysian Bar. The moneys which are not immediately required for any other purposes may be invested.[13] Any investments of the Fund may be charged by way of security for loans[14] and also the insuring of the Fund with any registered insurance business in Malaysia.[15] The cost of maintaining and administering the Fund shall be derived out of the Compensation Fund itself and also other costs that are incidental in the maintenance of the Fund.

The primary aim of the Fund is to relieve hardship of those who have suffered loss because of the dishonesty of an advocate and solicitor or his clerk or his servant in his practice or in his capacity as a trustee in managing trust funds. Such grants may also be made where the advocate and solicitor has died or has been struck off the rolls or has ceased to practise. It is hoped that this provision will operate as a security against loss to a client as a result of the dishonest conduct of an advocate and solicitor. Any person who receives a grant under this provision cannot claim against the advocate and solicitor concerned.

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12. S.80 (2)
13. S.80 (3)
14. S.80 (4)
15. S.80 (5)

In administering the Compensation Fund, the Bar Council should always enquire what alternative action, if any, should the applicant first take or has taken to recoup his loss. If the dishonest practitioner was practising under a firm of partnership, they should be informed as to what extent recourse has been taken against his partner or partners. No application for grants out of the Fund should be approved in cases where other partners are liable, unless the circumstances clearly absolve such partners from all responsibility. The Council should also consider grants in order for the applicant to initiate civil or criminal proceedings.

In cases where the applicant could be indemnified against loss by an insurance, no grants would be made. This is based on the proposition that a person should not be afforded with an indemnity twice. In cases where personal loans are made to the practitioners, and there had been a default in payment, the Bar Council should not make any grants to such applications. This follows because grants would only be made under S.80 (8), where there has to have been "a loss in consequence of dishonesty on the part of any advocate and solicitor." This explains why a grant will not be made out of the Compensation Fund in respect of a loan made to the advocate and solicitor personally.

The situation in England regarding the payments of grants is that where a grant is made, it is made by a cheque payable to the applicant personally. The Law Society's cheque is marked "Compensation Fund Account", and it goes direct to the client who has lost the money so

that he realises that it is not his solicitor who is refunding the money but the profession collectively who is recouping his loss.

The Compensation Fund aims at improving the collective image of the profession with a message to convey to the public that the legal profession is a noble profession and that even if there is a black sheep among the members, they stand by and protect the interests of the public, so that confidence can be reposed in the profession as a whole. Members of the profession should not regard that it is an act that impinges their pockets and that it would not be fair for them to subsidise the fraud or dishonesty of fellow members of the Bar. The establishment of the Fund is indeed a big step undertaken in ensuring the protection of the public.

Another protection accorded by the new Act is S.84, which provides that where an advocate and solicitor acts for a housing developer in a sale of immovable property, neither he nor anyone in his firm shall, in the same transaction, act for the purchaser of the property. A written agreement prepared by the developer's advocate and solicitor will have to be scrutinised by an advocate and solicitor acting for the purchaser. The developer and purchaser has each to pay the fees of its own advocates and solicitors. This provision has been taken almost in extenso but with some exceptions from a similar law in Singapore[16] where housing development have been going on in a great scale.

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16. S.80 of the Singapore Legal Profession Act, 1966.

The reason for introducing this provision is that developers are in a dominating position to instruct their lawyers to put in whatever terms they want in the agreement and the buyers of these houses are relatively in a passive or weaker position. They need houses badly and they do not have adequate funds to pay and they are just without option but to sign on the dotted lines. Under the general doctrine that the parties must be fairly equal in making an agreement and a balance of bargaining power, the provision aims to see that the agreement drafted contains fair provisions. If the vendor's lawyer in this case also acts for the purchaser, he is in a position often to provide adequate protection to safeguard the interest of the vendor and the purchaser sometimes feels that there are not enough provisions protecting his interest. The massive fees usually collected by the vendor's solicitors also could cause hardship to the purchaser. If there is one lawyer acting for both, the burden of the fee will be transferred on the shoulders of the buyer and the buyer has to pay the entire fee and the fee goes to one lawyer. With the new provision, apart from the protection it affords, there will be some degree of equitable distribution of fees so that more people can share the cake rather than one person. It is, therefore, seen that the provision has been introduced to check against oppressive or unfair terms in housing agreements on the part of a housing developer who is usually the dominant party and provide the protection to buyers.

The philosophy that underlines the principle that solicitors should not act for both vendor and purchaser is stated by Scrutton L.J.

in the case of Moody v Cox and Hall,[17]

"Solicitors who try to act for both vendor and purchaser must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relations put upon them."

The danger that hovers over such relationship is that, since the solicitor is representing opposite interests, there may arise a conflict in which the dual function of the solicitor would be affected. The message was once again reiterated in an obiter by Dankwerts J. in Goody v Baring.[18]

"It seems to be practically impossible for a solicitor to do his duty to each client properly when he tries to act for both vendor and purchaser."

The dicta seems to suggest that where a solicitor is instructed by both parties and a conflict of interests either arises or seems to arise, he should at once determine his retainer for one party if not both. On the other hand, there are a good many conveyancing transactions in which the possibility of a conflict of interests between vendor and purchaser is remote and rarely experienced in practice. There is actually nothing inherently improper in a solicitor acting for a vendor and purchaser.

This provision, however, relates only to sale of property through housing developers' transactions and does not cover any other transactions which is of similar transactions too, like that of a solicitor acting for a bank or finance company. It is a common

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17. (1917) 2 Ch. 64 at p.91
18. (1956) 1 WLR 448.

practice for banks and finance companies to have their own lawyers and when a prospective purchaser of a house comes to the bank for a loan, he is directed to consult the bank's lawyer which is normally a firm of practising lawyers, and it finally ends that the purchaser has to pay an exorbitant bill. In this circumstances, the purchaser has little or no option but to go ahead and see the particular lawyer. It is often the policy of a bank that if the purchaser wishes to get a loan, the latter has got to consult that particular bank's lawyers. In such circumstances, it is unfair for the purchaser to be deprived of the choice of his own lawyer and having to pay the fees of a lawyer who is enjoying an upper bargaining power in charging the fees. An element of fair dealing is lacking in such cases of charges executed in favour of banks when they lend money to borrowers. It has also become fashionable for banks and insurance companies having standard agreements and persons seeking benefits under such schemes are thereby dictated by the terms of the banks and companies. The applicants are most of the time not placed in a strong, happy position to give his opinion as to what terms he would like to include in the agreement.

Therefore, in order to afford more protection of the public, S.84 should be further extended to include such other circumstances as mentioned above. Limiting the provision merely to vendors and purchasers of a housing development transaction is to afford protection in a small area and does not really serve as a protection to a greater section of the public. In most cases, the buying of houses involves the making of loans from banks and other sources, before coming to the

stage of making agreements with housing developers. The stage of making the loan to enable the housing transaction is equally a desirable area to be protected so as to prevent excessive charging of fees on the borrower. It is, therefore, an area that also needs statutory control in order to ensure fair dealing between both borrowing and lending parties.