

Solicitors cannot repudiate solicitor-client relationship unless properly ended

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Litigation, Malaysia

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In *Gurbachan Singh Bagawan Sigh v Vellasamy Pennusamy* appeals arose in the context of claims brought by a number of purchasers against a solicitor for breach of fiduciary duty in a solicitor-client relationship in connection with property which the solicitor had purchased for himself instead of on behalf of his clients.

Facts

Syarikat Pembinaan Perusahaan Kemajuan Bhd (SPPKB) and the purchasers entered into agreements under which SPPKB agreed to sell plots and shares of land to the purchasers. However, the land was registered under the name of Simpat Empat Plantations Sdn Bhd (SEP). SPPKB and SEP had the same directors. In order to raise funds, SEP created a charge and debenture in favour of MBF Finance without the purchasers' knowledge. SEP subsequently defaulted on its loan and MBF Finance auctioned the land.

When the purchasers became aware of the auction, they approached the first appellant (an advocate and solicitor) to act on their behalf. Thereafter, the first appellant successfully bid at the auction in his own name. The first appellant then invited the purchasers to buy their allotted shares and land from him on the basis that he was not their lawyer and that he owned the land. The purchasers claimed that the first appellant was their solicitor when he made the bid for the estate land.

The purchasers brought an action against the first appellant claiming, among other things, that:

- the first appellant was at all material times the solicitor acting on behalf of the respondents and had a fiduciary duty; and
- the land had been purchased by the first appellant in trust for the respondents.

Decision

The High Court ruled in favour of the first appellant. The Court of Appeal reversed the High Court's decision and granted the declarations paid for by the purchasers.

Dissatisfied with the Court of Appeal's decision, the first appellant appealed to the Federal Court. The Federal Court granted leave and considered the following questions:

- Are the existence and scope of duties in a solicitor-client relationship determined only by reference to a retainer?

- Is a fiduciary entitled to restitution of expenditure incurred in securing a benefit subsequently determined to be due and payable to persons to whom the fiduciary owes duties?

In reply to the first question, the Federal Court held that whether a solicitor-client relationship exists must be determined based on the evidence provided. It is essential to consider whether the evidence adduced includes the words and conduct agreed between the parties. In the case at hand, the Federal Court held that there was a solicitor-client relationship between the parties and that the relationship subsisted until the first appellant declared that he was no longer acting as the purchasers' solicitor – something which he failed to do. As such, the first appellant was acting on behalf of the purchasers when he successfully bid for the land; hence, he had a fiduciary duty not to act in conflict with the interests of the purchasers and should not have profited from the trust placed in him. With regard to the second question, the Federal Court held that, on principle of equity, the expenditures incurred by the first appellant should be deducted from the assessed damages and profits, even though the fiduciary (ie, the first appellant) had breached his duty.

Comment

The Federal Court decision confirms that solicitors cannot repudiate or negate the existence of a solicitor-client relationship merely on the contention of the absence of a retainer. Thus, following this decision, solicitors should inform a client when they are ending their duties to act for or represent the client. Solicitors who fail to do so may find themselves liable for breach of fiduciary duty, as a unilateral belief that the relationship has ended or that no retainer was provided will not suffice as proof.

For further information on this topic please contact Gan Khong Aik at Gan Partnership by telephone (+603 2201 1130) or email (khongaik@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

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Gan Khong Aik