

# Stricter confidentiality obligation on lawyers

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## Introduction

Section 126 of the Evidence Act 1950 imposes a legal obligation on all solicitors to protect and keep confidential any information obtained from their clients, including any legal advice that has been proffered.

The significance of the legal professional privilege afforded to clients has long been recognised and it is well settled that this privilege is absolute and remains so until expressly waived by the privilege holder (ie, the client).

However, as much as the importance of this privilege is understood and embraced, it may still have come as a surprise when the Federal Court in *Tan Chong Kean v Yeoh Tai Chuan*(**1**) decided that a breach of this privilege by solicitors could entail a legal action against said solicitors.

This no doubt imposes a more stringent obligation on solicitors to uphold the confidentiality duty owed to their clients. At the same time, it is advantageous to the public at large because, in addition to lodging a complaint with a disciplinary board, clients now have a legal avenue to pursue in the event that their solicitor breaches this privilege.

This update examines *Tan Chong Kean* and the reasoning behind the Federal Court's ruling.

## Facts

The plaintiff commenced an action in the high court against the defendants (partners in a legal firm), alleging breach of their responsibility as solicitors under Section 126.

The breach arose from the disclosure of a trust deed by the defendants, which they had prepared based on the plaintiff's instruction. The plaintiff had not paid legal fees to the defendants for the trust deed or other works done.

The trust deed was disclosed by the defendants when disputing a monetary claim against them to seek indemnity from the plaintiff by way of a third-party notice in relation to the unpaid legal fees.

The high court decided in the plaintiff's favour.

The defendants appealed to the Court of Appeal, which reversed the high court's decision. Among others things, the Court of Appeal allowed the appeal on the following grounds:

- The plaintiff had failed to plead the cause of action with particulars.

- A breach of solicitor-client privilege without the consent of the client can be the subject matter of a complaint made before the advocates' disciplinary board, but it does not entitle the plaintiff to anchor a cause of action.

## **Federal Court decision**

Among other things, the full bench was faced with two paramount leave questions:

- Does a solicitor's breach of Section 126 of the Evidence Act on legal professional privilege give rise to a cause of action against him or her by the client in order to obtain an injunction, preventing said solicitor from disclosing any confidential information? Alternatively, and as stated by the Court of Appeal, is the client confined to make a complaint before the Advocates and Solicitors Disciplinary Board?
- With regard to a cause of action in the courts for breach of solicitor-client privilege, is it sufficient for the client to plead that a breach has occurred without disclosing the contents of the privileged documents?

### ***First leave question***

The full bench agreed with the plaintiff's submissions that Section 126 is not a mere rule of evidence but a principle of fundamental justice.

It has been a longstanding principle in common law that the public must have access to the justice system and be guaranteed protection for all solicitor-client communication.

Hence, the full bench unanimously ruled that a breach of such fundamental principle must entitle an aggrieved party to commence an action, including a request for an injunction to safeguard confidentiality of the solicitor-client communication.

### ***Second leave question***

The full bench held that it was unnecessary for the plaintiff to disclose the contents of the trust deed in his pleadings, as to do so would have been construed as him having abandoned his privilege.

As such, it was sufficient that the plaintiff merely mentioned in his pleadings those documents which he claimed were covered by legal professional privilege in order to sustain his cause of action.

Thus, the plaintiff's appeal was upheld with costs.

## **Comment**

*Tan Chong Kean* has not only reiterated the importance of legal professional privilege, but also served as the main impetus for its strict compliance and practice allowing clients to pursue litigation claims against their solicitors.

After all, it is a fundamental condition on which the administration of justice rests.

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## **Endnotes**

(1) 2017 1 LNS 1947.

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