DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. 02-1-2006(W)

ANTARA

SELVARATNAM A/L VELLUPILLAI … PERAYU

DAN

DR. JAYABALAN KARRUPIAH … RESPONDEN

KORAM: ZAKI TUN AZMI, CJ
ABDUL AZIZ MOHAMAD, FCJ
HASHIM DATO' HJ. YUSOFF, FCJ

JUDGMENT OF ZAKI TUN AZMI, CJ

1. The Appellant is an advocate and solicitor of the High Court of Malaya practising under the name of Messrs. V. Selva & Associates. There was referred to the Disciplinary Board under the Legal Profession Act 1976[1] a complaint against him of using client's money wrongfully. He had acted as solicitor in a Sale and Purchase Agreement entered into between the Respondent and a pair of husband-and-wife government servants in respect of a purchase of a single storey terrace house. The money that he was alleged to have wrongfully used was part of the purchase price which the Respondent had paid him for payment to the vendors as settlement of part of the purchase price.

2. He was found guilty by the Disciplinary Board and ordered to be suspended for six months. He failed in his appeal to the High Court.

[1] Act 166

The High Court consisted of three judges empanelled pursuant to section 103E of the Legal Profession Act 1976. He now appeals to this court pursuant to the same section. By virtue of section 35 of the Legal Profession (Amendment) Act 2006, section 103E and all other provisions prior to the amendment apply to him.

FACTS LEADING TO DISCIPLINARY ACTION

3. The price of the property sold was RM80,000. The purchaser, that is the Respondent, paid an advance of RM40,000 on execution of the Sale and Purchase Agreement. The balance of RM40,000, when paid, was to be utilised by the vendors towards redemption of a housing loan from Ministry of Finance Incorporation Malaysia ("MOF Inc."). The loan was taken by the couple from MOF Inc. since they were government servants. According to the statement of account from MOF Inc., as on 30.3.1998 the redemption amount would be RM41,896.52. Therefore, less the amount of RM40,000 to be paid by the Respondent, there would remain a shortfall of RM1,896.52 which the vendors had to pay.

4. The Sale and Purchase Agreement was entered into on 8.12.1997. On 7.1.1998, about two months later, the Respondent paid a further sum of RM21,223.83. This payment was clearly indicated on the receipt issued by the Appellant as "payment of redemption sum for Mr. Nadarajah a/l Velu", one of the vendors. On 26.2.1998 the Appellant requested the vendors to pay a sum of RM1,896.52 to make up the difference between the redemption sum and the amount of RM40,000 to be paid by the Respondent/purchaser. The vendors failed to do so. The Respondent had paid RM21,223.83 earlier and had to pay, which he did not, a further sum of RM18,776.17 to settle the property's full price of RM80,000.00.

5. One year later, on 25.2.1999, the Appellant wrote to the Respondent to discharge himself from acting for the Respondent. At the same time, the Respondent was owing to the Appellant a sum of money for fees and disbursements relating to other matters in which the Appellant had been acting for the Respondent.

6. The Appellant claimed that the Sale and Purchase Agreement was terminated for failure of the vendors to pay the shortfall in the redemption sum. As will be shown later, this does not seem to be so. The vendors also by letter of 27.9.1999 discharged the Appellant from acting for them. All documents were then forwarded to Thevin, Chandran & Wong, the new solicitors appointed by the Respondent to act for him in the Sale and Purchase Agreement.

7. The Appellant sought to utilise the amount of RM21,223.83 in the hands of the Appellant towards settlement of the fees and disbursements due from the Respondent to the Appellant. The Appellant claimed that the Respondent was owing to him a total of RM26,038.00. This means that even setting off the amount of RM21,223.83, which the Appellant claimed, the Respondent would still be owing him an amount of RM4,814.17.

8. The Appellant wrote to the Bar Council seeking advice as to whether he had the right to set off the sum held by him on behalf of the Respondent towards settlement of monies due to him from the Respondent. The Bar Council however replied that the information provided by him was insufficient. The Appellant provided some more information to the Bar Council. The Bar Council remained silent and did not respond to him. So, on 14.4.2000 the Appellant decided to utilise RM21,223.83 which was in the client's account to set off the fees and disbursement owed by the Respondent to him.

DISCIPLINARY ACTION

9. On 17.4.2000 the Respondent lodged a complaint to the Bar Council alleging that the Appellant had misappropriated the funds in the client's account and also had not acted in a professional manner. The Investigating Tribunal dismissed the complaint but the Disciplinary Committee set up to hear the complaint found the charges against him proven.

10. The Disciplinary Committee found the Appellant guilty of misconduct under section 94(3)(d), (n) and (o) of the Act and concluded, pursuant to section 103C(c) (cited as “103(c)(1)(c)” by the Disciplinary Committee) that there was sufficient merit in the complaint. Its report to the Disciplinary Board was as follows:

> “His failure to pay the money to the newly appointed “stake-holder” and his unilateral and upper-handed mode of settling his bills raised after he chose to discharge himself from acting for the Complainant amounts to professional misconduct. Accordingly, the Disciplinary Committee finds him guilty of misconduct under Section 94(3), (d), (n) and (o), and concludes, pursuant to Section 103(c)(1)(c) that there is sufficient merit in the complaint.
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> In view of the foregoing, the Disciplinary Committee recommends that the Respondent be suspended from practice for a period of six (6) months”.

11. Section 94(3)(d), (n) and (o) reads:

> "For the purpose of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes-
>
> (d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise;
>
> (n) gross disregard of his client's interests; and
>
> (o) being guilty of any conduct which is unbefitting of an advocate and

solicitor or which brings or is calculated to bring the legal profession into disrepute."

12. And Section 103C(c) provides for the making of the following recommendation by the Disciplinary Committee to the Disciplinary Board:

> "that there is sufficient merit in the complaint and that the advocate and solicitor should be subject to one of the following disciplinary actions:
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> (i) imposition of a fine upon the advocate and solicitior for such sum as the Disciplinary Committee deems just;
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> (ii) suspension of the advocate and solicitor concerned from practice for such period as the Disciplinary Committee deems appropriate in the circumstances; or
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> (iii) striking off the Roll of the advocate and solicitor concerned."

13. The Disciplinary Board, pursuant to powers conferred under section 103D of the Legal Profession Act 1976, decided that the Appellant be suspended from practice as an advocate and solicitor of the High Court of Malaya for six months from the date of the order, 27.6.2003.

14. In respect of the report and recommendation of the Disciplinary Committee and the order of the Disciplinary Board, several technical errors were committed.

15. The report and recommendation of the Disciplinary Committee to the Disciplinary Board dated 22.1.2003 was not signed by the chairman of the Committee. This omission was objected to by the Appellant. Another report duly signed by all the members was later sent to the Disciplinary Board.

16. Subsequently the order issued by the Disciplinary Board dated 8.7.2003 (more than 3 years after the complaint by the Respondent

to the Bar Council) also contained a clerical error. The order stated that the Disciplinary Board after considering the report of the Disciplinary Committee made its order on 27.7.2003 (July) when it should have been 27.6.2003 (June). This was subsequently rectified by the Disciplinary Board by issuing an amended order and explaining that it was a typographical error.

17. Be that as it may, another error appeared in the rectified order. This time the date of the order was not written in. To correct that mistake another order was issued with the error corrected. Yet another error occurred in this amended order, which by letter dated 29 July 2003 (and received on 31 July 2003) was sent to the Appellant. This time the order stated that he was to be suspended for six months effective twenty-one days from the date of the order, which was 8 July 2003. This meant that the twenty-one days had lapsed by the time he received it.

18. Needless for me to say, this is a most unhappy state of affairs. The Disciplinary Board being a body for disciplining lawyers should itself not have committed such negligent acts - occurring not once but repeatedly.

19. At the hearing of this appeal, the Appellant contended that the first order issued by the Board was a nullity because, according to the order, the Disciplinary Board considered the report of the Disciplinary Committee on a wrong date. A corrected order again contained other errors.

20. The High Court held that the correction done to the order was in fact only a correction of a clerical error. What is important is that the Board had properly considered the report and recommendation of the Disciplinary Committee. Suriyadi Halim Omar J. (as he then was)

said in his judgment:

> "… There was no prejudice suffered by the appellant, with the contents of the order being in accordance with the Disciplinary Committee's report."

21. Shorn of all rhetorics the principal issue before this court is whether the errors committed by the Disciplinary Board in anyway prejudiced the Appellant. The errors were committed after the hearing was completed by the Disciplinary Committee. At the Disciplinary Committee hearing there was no complaint by the Appellant that he had been prejudiced or that the hearing was unfairly conducted against him. It is clear, when reading the report and recommendation made by the Disciplinary Committee to the Disciplinary Board, that the signature of the chairman of the Disciplinary Committee did not appear on the report. But to me this is pure oversight. The errors appearing on the face of the documents are very obvious and patent. The Appellant was not misled in any way by those errors. This oversight could be and was subsequently rectified. This omission could be corrected by getting the chairman of the Disciplinary Committee to sign it. It is not as if that Committee could not make that decision. The report was only a communication from the Committee to the Board.

22. The errors committed by the Disciplinary Board also cannot however make the orders issued by it void and unenforceable. The errors committed by the Board in this present case are also very obvious. Such errors could therefore be corrected.

23. The other errors appeared in the order by the Disciplinary Board. Again what the Disciplinary Board committed were also clerical errors, which were patent on the face of the order. Firstly, the date written in the order as that on which the Disciplinary Board

considered the Appellant's case was later than the actual date. This could not be correct. It is so obvious. The second time, the date of the order did not appear on the order. This must again be a clerical omission.

24. If at all, the last order should be made to read as six months effective from twenty-one days after the receipt of the order. The order, according to the Appellant, was received on 31.7.2003. The six months must then be calculated from 21.8.2003. These errors in the circumstances of this case cannot make the order a nullity. Had errors being committed during the hearing at the Disciplinary Committee or the hearing of the Disciplinary Board, which errors had caused prejudice to the Appellant, then this argument that the order became null and void may perhaps be supported.

25. In my opinion, unless the legislation requires it to be signed by the members, anyone can sign the letter accompanying the report. After all, the order was only declaring the decision of the Board. The decision itself was not wrong or even challenged by the Appellant – only the way it was conveyed to the Appellant. Even the Criminal Procedure Code provides that "... a clerical error may be rectified any time ..." It must therefore be concluded that these errors, being only clerical errors, notwithstanding they are repeatedly committed, but not prejudicial to the Appellant, cannot nullify the order.

26. I now come to the second issue. The answer to this second issue depends on whether the amount of RM21,223.83 belongs to the Respondent/purchaser or does it belong to him for so long as the Sale and Purchase Agreement remains alive, to use the words of Suriyadi, J. (as he then was).

27. The question that the Court must answer is:

> Whether in the circumstances of this case, the Appellant may utilise the sum of RM21,223.83 in the client's account towards settling the amount due to the Appellant from the Respondent for services rendered by the Appellant to the Respondent not relating to the Sale and Purchase Agreement?

28. The Appellant in this case was a stakeholder. He was therefore duty bound to hold the sum for the purpose of redemption. It was not available to him for as long as the Sale and Purchase Agreement remained alive. He was to hold it for the benefit of both parties to the Sale and Purchase Agreement, that is the Respondent as well as the vendor couple. He had no authority to utilise the sum for payment of his bills.

29. The Appellant submitted that since he was discharged as a solicitor by the Respondent and the vendors, the Sale and Purchase Agreement became terminated. The Appellant also admitted at the inquiry that his fees for this sale and purchase transaction had been paid. The file, including all documents relating to the transaction, was delivered to the new solicitors. The basis of the Appellant's argument that he had rights to utilise the deposit by the Respondent for settling his bills with the Respondent was that he had a lien over the Respondent's money. He denied any misappropriation and in fact claimed RM4,814.17 still due to him. However, Suriyadi J. said (as he then was):

> "… So long as the SPA was still alive, the appellant had a duty to hold it for the purpose of the required redemption, and not utilize that sum for the payment of his bills."

30. I agree that the Sale and Purchase Agreement had not been terminated. And I do not see any purpose in the handing over of the file to the new solicitors if the Sale and Purchase Agreement had been terminated. This is consistent with the finding of the Disciplinary Committee:

> “1.[8] In the absence of any written or oral evidence to the contrary, the DC finds that the agreement between the Vendors and the Purchaser had not been terminated at this point in time. This finding is consistent with the fact that both parties had by then retained Messrs. Thevin Chandran and Wong to act for them.”

31. The reason why the file was transferred to other solicitors was to continue with the deal.

32. In *Vije & Co v Co-operative Central Bank Ltd*[2], VC George J had this to say in respect of monies paid by the purchasers (who were government servants) to the plaintiff, a law firm, for onward payment to the developer:

> "Accordingly even if the money paid in by the loan division to be paid to the developer became, on the instructions of the developer, money to be paid to the defendant and in spite of the metamorphosis continued to be trust money, the beneficiary of the money now being the defendant, the plaintiffs had the right of recourse (in respect of the fees owed by the defendant) by way of, inter alia, set-off against the money <u>standing to the credit of the defendant</u>. 'Set-off' here is not to be limited to a set-off pleaded in a statement of defence but has reference to the right of setting off the amount owed against the amount held. In the context such setting off means the settling of the account between the parties and, in my judgment, can be implemented by drawing on the amount due as was done here." (Underlining mine)

[2] [1991] 3 MLJ 432 at 438

33. The facts in that case were however different. In *Vije & Co.* (*supra*), the monies were paid by the government servants who were purchasers of properties from a developer. In that case, monies were paid to the Plaintiff's advocate and solicitor's firm. He was to forward these monies to the developer. The developer owed some money to the defendant bank. It was agreed between the developer and the defendant bank that the sum be paid directly to the bank.

34. How do we compare the facts in *Vije & Co.* (*supra*) against the facts before us? In the facts before us, the Appellant was acting for both the vendors and purchaser. He therefore owed a duty to both parties to ensure that the monies held by him were used for the very purpose for which he was holding them, that is, that they be utilised towards redeeming the property from MOF Inc. As such the following authorities are more relevant to the case before us. These authorities were cited by Hashim Yeop A. Sani SCJ (as he then was) in the case of *Toh Theam Hock v. Kemajuan Perwira Management Corporation Sdn Bhd*[3]. In that case, what was in dispute was whether the interest that was earned on the deposit placed by the solicitor in the bank pending payment to the vendor belonged to the vendor. Hashim Yeop A. Sani SCJ held that:

> "Where money is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, incluing any written documents, in which capacity the third party receives the

[3] [1988] 1 MLJ 116

money."

35. Hashim Yeop A. Sani SCJ held that the interest on the deposit did not accrue to the parties because there was nothing in the agreement to indicate that it should be paid to either party. And secondly, such entitlement to the interest was also not consistent with the Solicitors' Accounts Rules 1967. He discussed the meaning of "stakeholding". This is relevant to the present case. He said:

> 'What is in essence stakeholding? The word "stake" is in common parlance used to <u>apply to any money to be disposed of in accordance with what may happen in future</u>: and <u>whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.</u>
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> In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrell v. Finch* who repeated what was said in *Maloney v. Hardy*:
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> > "The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ..."
>
> In any particular case of sale and purchase, <u>whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole.</u> The learned judge concluded that in this case the <u>appellant received the deposit as agent for the respondents in a fiduciary capacity and therefore on general principles he would be accountable.</u>
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> In *Burt v. Claude Cousins & Co. Ltd.* Lord Denning M.R. in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrel v. Finch*. He said:

> "If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder," he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v. Trustee of Property of Reed* [(1967) 2 All E.R. 1286 at 1289], per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harington v. Hoggart* [(1830) 1 B. & Ad. 577]. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v. Kingsman* [(1818) 1 B. & Ad. 683] and *Hampden v. Walsh* [(1876) 1 Q.B.D. 189]. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it."

Pennycuick V.C. in *Potters v. Loppert* at page 661 considered the law in relation to contract deposits. Where money is placed *in medio* in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

In the present case no doubt the appellant was retained as solicitor by the respondents during the material period. In the absence of any agreement to the contrary it would be easy to conclude that the appellant would have received the deposits on behalf of the respondents as their agent or trustee. …' (Underlining mine)

36. So from these it can be concluded that whether the Appellant held the money as stakeholder (or trustee) or not depends on the terms of the agreement between him and his clients. We must not forget here that the Appellant was acting as stakeholder for both the vendors

and purchaser. Both were his clients. It is not as if he was acting only for one party to the transaction. That sum was held by him not just for the benefit of the Respondent alone but rather for the vendors as well. He was therefore a trustee for both parties. The money he was holding in the client's account was meant to be paid to MOF Inc. to redeem the property in question. He was holding the monies to await the vendors to pay him the difference and thereafter to pay MOF Inc. to enable the property to be redeemed or if the agreement was later repudiated, he was to refund the money to the Respondent. In this case, he was discharged from acting for the vendors and he was required to transfer the file to the new solicitors. He was also terminated by the vendors as their solicitors. The fact that the file was to be transferred to the new solicitors and his appointment to act for the vendors was terminated, does not make the Sale and Purchase Agreement to come to an end. In fact, I agree with the conclusion arrived at by Suriyadi J, that the Sale and Purchase Agreement was still alive. It therefore means that the money that was held in the client's account was still trust money. On the other hand, had the Sale and Purchase Agreement been terminated, it would depend on the terms of the Sale and Purchase Agreement how such sum held in the client's account was to be disposed of. If it was to be refunded to the Respondent, and the vendors ceased to be his clients, then perhaps that money may be utilised pursuant to Rule 7(a) to settle the debt due to him from the Respondent.

37. On the contrary, the Appellant drew out the sum of RM21,223.83 from his client's account towards settlement of debts due to him from only one of his clients, namely, the Respondent.

38. The Appellant also relied on Rule 7 of the Solicitors' Account Rules 1990 that monies in client's account could be used for "payment of

the solicitor's costs where a bill of costs or other written intimation of the amount of the costs incurred has been delivered to the client and the client has been notified that money held for him will be applied towards or in satisfaction of such costs".

39. The major distinction between just money in the client's account and the money held in trust is that the money held in trust, as explained in the cases above, does not belong to the client. It is to be held by the solicitors for the benefit of other parties as well.

40. In my opinion the more relevant provision is Rule 7(b) relating to trust money. Rule 7(a)(v) only provides that the client's money could be used for certain purposes mentioned therein. Rule 7(b) is for payment in execution of the particular trust, in this case payment to the vendor or for the purpose of redeeming the property from MOF Inc.. Rule 17 is also related to use of client's money. What could happen in future to the case before us was that the vendors would pay the balance to make up the redemption sum for payment to MOF Inc..

41. The Appellant also contends that until he receives the full amount, he is not deemed to be a stakeholder. But that cannot be so. Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilized for that purpose. The money remains to be in trust.

42. There are many instances where money is held in client’s account on behalf of that client alone. It is in these circumstances that the solicitor is permitted to utilize that money towards payment of money due to him from that client.

43. I find that the Disciplinary Committee and the Disciplinary Board had not erred in finding that the charges against the Appellant were proven. I dismiss the appeal.

44. For the above reasons, the appeal is dismissed but I would make no order as to costs.

45. As regards punishment to be imposed on the Appellant, I am sympathetic with him. After all, he did something to seek the advice of the Bar Council. The Bar Council ignored him. He did what he thought was his right.

46. As such, I have no alternative but to order a token suspension. I therefore set aside the order of suspension of six months and substitute it with a suspension of one month. He had already served his suspension from 28.10.2005, until the Federal Court stayed the order on 21.2.2006. His suspension shall therefore be considered to have been served.

47. I make no order as to costs.

48. My learned brother Hashim bin Dato' Hj. Yusoff, FCJJ, has seen this judgment in draft and expressed his concurrence.

Dated : 4 December 2008

ZAKI TUN AZMI
Chief Justice
Malaysia

Counsel for the appellant:	V.S. Viswanathan
Solicitors for the appellant:	V.S. Viswa & Co.
Counsel for the respondent: (Disciplinary Board)	Thiru Mangai Krishnan
Solicitors for the respondent: (Disciplinary Board)	Jeyaratnam & Co.
Counsel for the Bar Council:	Balan Nair
Solicitors for the Bar Council:	Seah Balan Ravi & Co.