



**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE STATE OF FEDERAL TERRITORY KUALA LUMPUR
[CIVIL SUIT NO.: WA-22NCVC-251-05/2017]**

BETWEEN

1. HIGH EARNINGS SDN BHD

(Company No.: 507345-V)

2. TAN CHEEN TECK

(NRIC No.: 691204-10-5265)

3. WONG WAI SIONG

(NRIC No.: 730204-14-5469)

... PLAINTIFFS

AND

JOHN HENRY LOUIS A/L A. S. LOUIS

(beramal di atas nama Firma Guaman

Tetuan John & Associates)

... DEFENDANT

GROUND OF JUDGEMENT

A. INTRODUCTION

[1] The Plaintiffs filed this suit against the Defendant, an Advocate and Solicitor for damages and losses suffered by the Plaintiffs because of the Defendant's negligence pertaining to a conveyancing transaction regarding a purchase of property by the Plaintiffs.



- [2] At the conclusion of the trial, this Court found that the Plaintiffs had successfully proved their claims and allowed the same with cost of RM18,000.00.
- [3] Dissatisfied, the Defendant had filed an appeal to the Court of Appeal.
- [4] These are the grounds for that decision.

B. BACKGROUND FACTS

- [5] The First Plaintiff is a company incorporated under the Company's Act 1965. The Second and Third Plaintiffs are the Directors of the First Plaintiff.
- [6] The Defendant is at all material times an Advocate and Solicitor, High Court of Malaya practicing under the name and style of Tetuan John and Associates.
- [7] One, Soo Chee Ming (also known as Benny Soo), the Plaintiffs' Manager met one of the Defendant's staffs by the name of Peter around April 2015. The Plaintiffs have been the Defendant's client for almost 5 years for their business matters.
- [8] Peter told Benny Soo that there was a 2 storey shop house for sale at RM800,000.00 which was below market value. The First Plaintiff was interested and directed Benny Soo to follow up with Peter for further details.
- [9] According to Benny Soo, Peter informed him that the owner of the property was a client of the Defendant's firm. Peter then gave a copy of the title/grant on which Peter himself wrote the address of the said property. The address was Lot 1075, Jalan 17/27, 46400 Petaling Jaya. On 13th April 2015, Benny Soo went



to the said address to check out the property as well to see if it was a viable place to invest in and took photos of the same to show to the Second and Third Plaintiffs. (See the photos of the 2 storey shop house at pages 45 – 48 of B1).

[10] Pursuant to that, the First Plaintiff appointed the Defendant to handle all the relevant transactions to purchase the said property. Up to this point, the Plaintiffs have yet to meet the owner/vendor, Madam Yoong Sin Joo.

[11] Therefore a Sale and Purchase Agreement (S & P) was signed by the Second and Third Plaintiff on 21st April 2015. They were also advised to sign blank Transfer Form ie,. Form 14A, which they duly did. (See the Sale and Purchase Agreement at **pages 29 – 41 of B1** and Borang 14A dated 28th April 2015 **at pages 244 of B2**)

[12] It was followed with a payment of the full sum of RM800,000.00 in the form of cheques and cash forwarded to the Defendant (see page 42 – 44 of B2), who was aware that the money could only be forwarded to the vendor only upon completion of the said transfer.

[13] On 10th June 2015, the Defendant informed Benny Soo that the said transfer had been completed and that the full sum of RM800,000.00 had been released to the vendor. The vendor had acknowledged receipt of the full sum by signing off a payment voucher and witnessed by the Defendant himself. (See page 243 of B2).

[14] The Defendant told Benny Soo that a tenant is still occupying there who needs time to vacate. Every time Benny Soo enquired from the Defendant, the Defendant gave the same excuse.



- [15] As the First Plaintiff was not happy, upon his instruction, around 20th April 2016 Benny Soo went to the said property and met one, Mr. Wong. Benny Soo was shocked to be informed that Mr. Wong was the owner of the said property (the 2 storey shop house) and that there was no one by the name of Madam Yoong Sin Joo known to him.
- [16] The following day ie,. on 22nd April 2016 Benny Soo went to meet Madam Yoong Sin Joo at the address as stated in her NRIC. Benny Soo was shocked to be informed that she was not aware of any Sale and Purchase Agreement and that she was neither the owner of the shop house nor had idea who the Defendant or Mr. Peter was.
- [17] Benny Soo then contacted the Defendant. It was only then that the Defendant exposed that Madam Yoong Sin Joo was not their client but one, Encik Emran's contact. Encik Imran was also their client. The Defendant also told Benny Soo that Madam Yoong Sin Joo had never executed the Sale and Purchase Agreement in the Defendant's presence but instead the agreement and related documents were passed on to purportedly Madam Yoong Sin Joo's relative who was supposed to take them to Madam Yoong Sin Joo for her execution.
- [18] Another shocking news was awaiting Benny Soo when he later discovered that the RM800,000.00 purchase price was released to a third party and not to Madam Yoong Sin Joo directly. This was despite the fact that the Defendant had earlier informed him that the sums were released to Madam Yoong Sin Joo personally and that they had obtained her acknowledgement accordingly.
- [19] Yet another shock "befell" on Benny Soo when he discovered further that the Defendant had transferred a completely different property to the First Plaintiff ie,. a residential property with



address No. 9, Jalan SS2/27, 47300 Petaling Jaya, Selangor Darul Ehsan which belonged to Madam Yoong Sin Joo instead of the 2 storey shop house. He also discovered that the Defendant negligently stated in the Transfer Forms 14A that that purchase price was RM1.2 mil and not RM800,000.00.

[20] To compound the situation further, Madam Yoong Sin Joo who felt that she was unnecessarily dragged into this problem lodged a police report on 23rd April 2016.

[21] Thereafter she filed a suit at the Shah Alam High Court (Suit No. BA-22NCVC-402-07/2016) where the 3 Plaintiffs were sued for fraud, together with the Defendant.

[22] To add salt to the injury, the Defendant had purportedly struck a deal with Madam Yoong Sin Joo and entered into a Consent Judgment, not to enter his defence without discussing with his co- Defendants ie., the 3 Plaintiffs, (see the draft Consent Judgment at page 67-68 of “B1”). According to the Plaintiffs, because of the Defendant’s action, they were greatly prejudiced and eventually the Court decided against them alone.

[23] On 9th June 2016, the Defendant wrote to Madam Yoong’s Solicitors purportedly on behalf of the First Plaintiff, a letter agreeing to transfer the said house back to Madam Yoong Sin Joo. The Plaintiffs vigorously denied that this letter was sent with the Plaintiffs’ consent. The Plaintiffs stand firm that they also had no knowledge of the said letter. This is because by that time the Plaintiffs had already changed their Solicitors to Messrs K. Sugu & Associates in early May 2016.

[24] Following that, Messrs K. Sugu & Associates wrote to the Defendant on 22nd August 2016 and informed him of the same and demanded for explanation as to who gave the authority to



the Defendant to issue the letter dated 9th June 2016 to Madam Yoong's Solicitor when the Defendant was no longer representing the Plaintiffs. Several reminders were given but no explanation was forthcoming.

[25] The Plaintiffs had suffered losses and damages. Apart from the RM800,000.00 for the purchase price, the Plaintiffs had paid RM38,400.00 for stamp duty and RM53,233.20 for legal fees paid to the Plaintiffs' Solicitors ie,. Messrs K. Sugu & Associates to defend the Plaintiffs in the suit filed by Madam Yoong at the Shah Alam Court.

[26] The reputation of the Second and Third Plaintiff have been greatly jeopardized following the suit filed by Madam Yoong. Both of them were blacklisted by CTOS, whereby their loans and dealings with banks are greatly jeopardized.

[27] Hence the Plaintiffs submitted that the Defendant had committed professional negligence whereby the Defendant had breached his duty of care and standard of care resulting in the Plaintiffs suffering losses and damages.

[28] For the foregoing reasons, the Plaintiffs had filed a claim for damages and losses as at para 25 as manifested in their Statement of Claims (see the Statement of Claims).

C. THE LAW ON PROFESSIONAL NEGLIGENCE

[29] In a normal negligent case or negligent simpliciter the Plaintiff has to prove that the Defendant owes a duty of care to him; that the Plaintiff has breached that duty, and as a result of that breach, the Plaintiff suffered damages (causation).

[30] However it is trite, that in a professional negligence case one extra element is present, ie., the breach of the standard of care. In the Court of Appeal decision of *Shearn Delamore & Co v. Sadacharamni Govindasamy* [2017] 2 CLJ 665 the Court said thus:

“(3) In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. In negligence case, there are three elements which need to be pleaded and established. However, in professional negligence case there is a fourth element which must be pleaded and proved and that is related to standard of care.”

D. ANALYSIS AND FINDING OF THIS COURT

[31] This Court has heard witnesses from both sides and hence have the audio and visual advantage of assessing their credibility including the demeanour of each witnesses.

The Plaintiffs’ Case

[32] The Plaintiffs had called 2 witnesses to prove their case. The first witness was Madam Yoong Sin Joo (SP1), the original owner of the property, the subject matter of this case. The second witness was Mr. Benny Soo Chee Ming, the Manager of the First Plaintiff and gave evidence for the Plaintiffs.

[33] Madam Yoong (SP1) who, although 78 years of age, was firm and consistent with her testimony. This Court opined that looking at the evidence of SP1 in totality, she was well aware of the issues at hand and managed to unfold the Plaintiffs’ case

clearly and consistently and was not shaken under cross examination. Her evidence was logical and highly probable. She did not display any attributes as an interested witness but was impartial. She was a subpoenaed witness. Hence this Court has no reason to doubt the truthfulness of her testimonies.

[34] She testified that she had never at any point of time sold her property and entered into any Sales & Purchase Agreement to sell her property at No. 9, Jalan SS2/27, Petaling Jaya, Selangor Darul Ehsan (the said property) to the First Plaintiff. She also confirmed that she had never received any purchase price of RM800,000.00 for the sale. She confirmed that she has never met the Defendant before. She confirmed that she only met the Defendant for the first time in Court during the trial.

[35] She also confirmed that she did not sign any transfer forms (Borang 14A) to transfer the said property to the First Plaintiff, neither did the Defendant witnessed the signing. The signature on the Borang 14A was not hers even though is almost similar.

[36] The second witness for the Plaintiff (SP2) was Mr. Soo Chee Ming, also known as Benny Soo. This Court also had the audio and visual advantage of assessing his credibility and demeanour in Court. Assessing his evidence in entirety vis a vis the totality of the evidence of the whole case, this Court opined that his evidence is logical and highly probable.

[37] He was firm, and consistent in his testimony and was not shaken under cross examination. There is no reason for this Court not to believe him. He is a witness of truth.

[38] SP2 testified that around April 2015, one of the Defendant's staff by the name of Peter informed him of a 2 storey shop house on sale at RM800,000.00, below the market value because the



owner was eager to sell it off due to financial constraints. The First Plaintiff was interested to buy. Peter gave him a copy of the title/grant on which Peter had personally written the address of the said property ie,. Lot 1075, Jalan 17/27, 46400 Petaling Jaya (see Question and Answers 5 and 6 of SP2's statement).

[39] SP2 then went to the address and took photographs (see also the pictures of the 2 storey shop house at page 45 to 48 Bundle B1). The First Plaintiff agreed to buy the said property and appointed the Defendant to handle the relevant transactions for the purchase. Up to this point, the Plaintiffs have yet to meet the owner/vendor, Madam Yoong Sin Joo.

[40] According to SP2, the Sale and Purchase Agreement was signed by the Second & Third Plaintiffs as Directors of the First Plaintiff on 21st April 2015. They were also advised to sign blank transfer Form ie,. Form 14A which they duly did. The full sum of RM800,000.00 was then forwarded to the Defendant via cash and cheques. The Defendant was well aware that the said sum was to be forwarded to the vendor only upon full completion of the said transfer. (See SP2's witness statement Question and Answer No. 9 & 10)

[41] When asked whether the transfer was completed, SP2 testified that it was transferred around 10th June 2015. He was informed such by the Defendant and that the full sum of RM800,000.00 had been released to the owner/vendor and that the owner/vendor had purportedly signed off on a payment voucher acknowledging receipt of the said full sum and this was witnessed by the Defendant himself.

[42] However up to February 2016 the First Plaintiff had yet to get vacant possession. According to SP2, every time he inquired from the Defendant he was told that there was a tenant and that

the tenant required more time to move out. Hence he went to the said property and met the Tenant. This was what he testified in his Witness Statement:

“A14: Around 20th April 2016, I went to the said property and met with one Mr. Wong, whom I thought at first as the said Tenant. I was shocked to be informed that Mr. Wong was the owner of the said property and that there was no one by the name of Yoong Sin Joo known by him.”

Q15: Mr Soo, What did you do next?

A15: Around 22nd April 2016, I went to meet Madam Yoong Sin Joo at the address as stated in her NRIC. I was shocked to be informed that she was not aware of any Sale and Purchase Agreement, that she was not the owner of the shop-house and that she had no idea who the Defendant and/or Mr Peter was. I then quickly contacted the Defendant’s firm and was only then informed that Madam Yoong Sin Joo had never executed the Sale and Purchase Agreement in the Defendant’s presence but instead the agreement and related documents were passed on purportedly to Madam Yoon Sin Joo’s relative who was supposed to take them to Madam Yoong Sin Joo for ther execution.

[43] SP2 further discovered further shocking discoveries. This was what he said:

“A16: Well, I was further shocked to discover that the said purchase price of RM800,000.00 was released to a third party and not to Madam Yoong Sin Joo directly despite the fact the Defendant had earlier informed me that the

sums were released to Madam Yong Sin Joo personally and that they had obtained her acknowledgement.”

“I further discovered that the Defendant had transferred a completely different property to the First Plaintiff ie., a residential property bearing postal address No. 9, Jalan SS2/27, 47300 Petaling Jaya, Selangor Darul Ehsan which belonged to Madam Yoong Sin Joo. I also discovered that the Defendant negligently stated in the Transfer Form 14A that the purchase price was RM1.2 mil and not RM800,000.00.”

[44] SP2 further testified that Madam Yoong who was dissatisfied with what transpired and lodged a Police Report & later filed a suit against the three Plaintiffs and also the Defendant for fraud at the Shah Alam High Court.

[45] This was what he said regarding the suit:

“A18 In the said Suit, when the Plaintiff filled separate applications to strike out the 3 Plaintiff’s defence and the Defendant’s defence, we proceeded to defend the matter. The Defendant however, entered into a consent order with Madam Yoong Sin Joo and made no attempts to defence the said application. Because of his actions, the Court also decided against us accordingly in the application we were defending.”

[46] SP2 was asked what did the Defendant do once the Shah Alam suit was over. He said:

“A19 The Defendant on his own accord wrote a letter dated 9th June 2016 to Madam Yoong Sin Joo’s Solicitors purportedly on behalf of the First Plaintiff agreeing to

transfer the said house back to Madam Yoong Sin Joo. I firmly state that this letter was not sent with the Plaintiffs' consent and the Plaintiffs had no knowledge of the said letter. The Plaintiffs had already changed their Solicitors to Messrs K. Sugu & Associates in early May 2016."

[47] As alluded to earlier, this Court found SP2's evidence as tenable, consistent, truthful and highly probable.

The Defendant's Case

[48] The Defendant had called 3 Witnesses.

[49] The main evidence for the Defendant comes from the Defendant himself and supported by Peter Low Ah Chai ("Peter") the Manager of the Defendant's firm and Emran Ishak, a part time real estate agent.

[50] The Defendant's evidence was a bare denial and inconsistent with the Plaintiff's evidence. He said that it was the Plaintiffs' Benny Soo and the nephew of the purported Vendor/Owner by the name of 'Khor' who "initiated" the sale when it was the Plaintiff's case that Peter was the one who recommended to Benny to buy the 2 storey shop house. This was what he testified:

"Plaintif menyatakan hasrat untuk memberli hartanah tersebut. Wakil Plaintiff Pertama, Encik Benny dan individu bernama Khor yang mengakui beliau adalah anak saudara Penjual telah bersetuju bahawa untuk menjual hartanah tersebut serta telah mencapai sepakat dengan harga yang telah ditawarkan. Individu-individu ini juga telah melawati lokasi hartanah

tersebut. Mereka semua telah bersetuju dengan terma-terma yang telah dibincangkan dalam pertemuan tersebut.”

[51] The Defendant testified that the purchase price agreed was RM1,200,000.00 and not RM800,000.00. The owner was “Yoong Sin Joo”.

[52] SD1 testified through his “Witness Statement” that everything was done above board, and that the property was properly transferred to the Plaintiff and that he was not negligent in discharging his duties. This was what he said:

“17. J. Sudah, hartanah tersebut telah dipindah milik kepada Plaintiff Pertama. Hartanah tersebut telah didaftarkan atas nama Plaintiff sejak 10/6/2015 lagi oleh itu sehingga sekarang hartanah tersebut adalah milik Plaintiff dan Plaintiff menikmati hak-haknya di atas hartanah tersebut.

18. S. Jika sudah selesai mengapa Plaintiff-Plaintif mengambil tindakan terhadap anda?

J. Plaintiff-Plaintif menyatakan saya cuai dalam menjalankan tanggungjawab saya sebagai peguamcara yang dilantik.

19. S. Apakah kecuaiian yang dikatakan tersebut?

J. Terdapat kekeliruan terhadap alamat hartanah tersebut dan harga jualan adalah RM800,000.00 sahaja dan bukannya RM1,200,000.00.

20. S. Adakah anda bersetuju dengan Pernyataan Plaintiff-Plaintif tersebut?

J. Saya tidak bersetuju sama sekali, saya telah menjalankan tugas saya sebagai peguamcara Plaintiff-Plaintif dengan baik. Berkenaan alamat hartanah tersebut, wakil Plaintiff, Encik Benny sendiri yang memberikan alamat tersebut kepada saya dan lain-lain document yang berkaitan. Wakil-wakil dari pihak Plaintiff, Encik Benny dan wakil Penjual sendiri telah melawat alamat tersebut dan bersetuju untuk membelil hartanah tersebut. Jika kecuiaan berlaku bukanlah atas kesalahan saya tetapi wakil Plaintiff- Plaintiff sendiri.”

[53] This Court observed that the Defendant insisted that the price was RM1,200,000.00 and not RM800,000.00 as envisaged in the Sale and Purchase Agreement, “Borang 14A” (Transfer Form) and “Notis Taksiran dan Sijil Setem” issued by “Lembaga Hasil Dalam Negeri”, despite being challenged by the Plaintiffs.

[54] The Defendant also referred to the suit filed by Madam Yoong at the Shah Alam High Court and referred to the Consent Judgment entered. Amongst others, he said, the Plaintiffs had consented to his entering into a consent judgment with Madam Yoong, when in actual fact neither were the Plaintiffs informed and discussed about this by the Defendant nor have any knowledge about it. In fact the Plaintiffs were greatly prejudiced by it.

[55] This was what the Defendant said in his Witness Statement:

“... J. Kes tersebut telah diselesaikan dengan satu Penghakiman Persetujuan bertarih 19 Januari 2017 yang mana Penjual menarik kesnya terhadap saya yang merupakan Defendan Keempat dalam Tindakan tersebut.

28. S. Apakah kesnya dalam tindakan Plaintiff pada hari ini?”

J. Ini jelas bahawa saya tidak melakukan apa-apa kecuiaan terhadap Plaintiff-Plaintif dan ini diakui oleh Penjual sendiri. Plaintiff-Plaintif adalah di estop dari mengambil tindakan ini terhadap saya kerana prinsip res judicata terpakai kerana tindakan dan pihak- pihak yang sama telah dibawa ke Mahkamah pada sebelum ini.”

[56] Even though the Plaintiffs were firm in their stand that they were not inform nor have any knowledge, nor were consulted about it, or consented to it, the Defendant said otherwise. This was what he said:

“29. S. Adakah Penghakiman Persetujuan tersebut dibantah oleh Plaintiff-Plaintif pada ketika itu?

J. Tidak.”

[57] Peter Low Ah Chai’s evidence went almost exactly along the same line with the Defendant, denying the Defendant’s professional negligence. This Court found that Peter Low is an interested witness. His evidence was to be treated with caution. He came to Court to support his employer, the Defendant.

Finding

[58] Having the advantage of seeing and hearing the Defendant whilst giving his evidence and also his demeanour, this Court found that the Defendant is, with respect not a credible and truthful witness. His defence obviously contradicts the Plaintiffs’ evidence but most importantly are not tenable and highly improbable. SP1 in her testimony had testified that she, in the first place, did not sign the Sale and Purchase Agreement (SPA) and also the Transfer Form in “Borang 14A” at all. SP1



also confirmed that she did not receive any forms of payment from the First Plaintiff for the purchase of the property. She also confirmed that she did not meet the Defendant before. The day she gave her evidence in Court was the first time she saw the Defendant.

[59] How could the Defendant claimed that he witnessed the execution of the Sale and Purchase Agreement executed by Madam Yoong Sin Joo? No corroborative evidence was adduced by the Defendant to support his testimony that he did in fact witness the execution of the said agreement by Madam Yoong Sin Joo.

[60] The Defendant was questioned as to how many times he would have met Madam Yoong Sin Joo during the course of the said transaction, and he replied 2 times.

[61] This Court agreed with the Plaintiff that this cannot be true. If we were to follow the Defendant's version of the chronology of facts, the Defendant should have met Madam Yoong Sin Joo at least 4 times as follows:

- (i) 21st April 2015: during signing of the S & P Agreement;
- (ii) 28th April 2015: during signing of the Borang 14A;
- (iii) 23rd April 2015: during forwarding the cash of RM400,000.00;
- (iv) 2nd June 2015: during forwarding cash of RM400,000.00.

[62] However after persistent cross examination, he finally agreed that it would be 4 times. Be that as it may, the fact remains that Madam Yoong did not meet him at any time and hence this Court opined that during the 4 transactions above Madam Yoong



was not present. This is logical and consistent with Madam Yoong's evidence that she has never met the Defendant before. This shows that the Defendant was not a witness of truth as the ensuing paragraphs will further show.

[63] The Defendant had claimed that there were 2 Sale and Purchase Agreements executed by the parties, purportedly the first one reflecting the purchase price of RM800,000.00 and the second one reflecting the purchase price of RM1.2 mil. According to the Defendant, this was on the instructions of the Plaintiffs although this was strictly denied by the Plaintiffs from the very beginning. However the Defendant was unable to produce the original copy of the second S & P even though was vigorously challenged by the Plaintiffs' Counsel. Hence the photostated copy which was earlier marked as IDD3 has no evidential value and hence has to be disregarded.

[64] What was more was that the Defendant was also unable to adduce any evidence that the Plaintiffs had purportedly agreed to sign the second S & P Agreement for the sum of RM1.2 mil, although this was strictly denied by the Plaintiffs from the very beginning.

[65] The Defendant also failed to explain convincingly, in the event the first S & P Agreement was to be disregarded, why did both agreements get executed and stamped on the same day. This was what he testified under cross examination.

"Plaintiffs' Counsel: Now Mr John, why did you stamp both agreements on the same day, if you have already decided that the first agreement was not relevant?"



Defendant/John: All this is through the instructions of the client.

Plaintiffs' Counsel: So they wanted both to be signed and ..both to be signed and stamped?

Defendant/John: Precisely.

Plaintiffs' Counsel: Ok, this is not what you have pleaded, Mr John. Is this anywhere in your pleadings that they wanted both agreements to subsist at the same time?

Defendant/John: No, It is not but let me

Plaintiffs' Counsel: Is it yes or no?

Defendant/John: No.”

[66] This Court also observed that, prior to the preparation of the said S & P Agreement, the Defendant as their Solicitor failed to bring to the attention of the Plaintiffs that the title of the said property refers to a “bangunan kediaman” and in no way reflects a 2 storey shop lot although he was well aware that the First Plaintiff was informed that it was a 2 storey shop lot and was looking forward to purchasing such.

[67] In fact, during cross examination, the Defendant admitted that he was aware of the discrepancies in the title but felt it was not necessary to bring it to the Plaintiffs' attention. This is in breach of his professional duty to his clients – the Plaintiffs.

[68] The Court also observed that the Defendant was not telling the truth about the mode of payment. Despite the cheques given by the First Plaintiff to the Defendant was not a cash cheque but an account payee cheque, the Defendant claimed that he could



purportedly cash out the cheque on the same day. Under cross examination this was what he testified:

“Plaintiffs’ Counsel: Would you agree with me that the cheque dated 2nd of June, there are two cheques here in fact, amounting RM430,000.00 would not be cleared on the same day for you to make this cash payment?”

Defendant/John: It was cash. It was a cash payment.

Plaintiffs’ Counsel: Mr. John, you are not listening to the question. The clients ... Yang Arif, if I may proceed with some additional questions? Yes, the cheque given by the client to be banked into your account is dated 2nd of June, both the cheques at page 143. To be banked into hou account only on the 2nd of June, yet you purportedly gave RM400,000.00 dollars in cash to an individual on the 2nd of June. I am putting it to you that it’s impossible for the cheques to be banked in and cleared on the same day and for you to withdraw and hand over the money to an individual on that same day.

Defendant/John: I disagree.

Court: Witness seems to be quite evasive. His demeanour shows he doesn’t want to give truthful answers.”



[69] This Court agreed with the Plaintiffs' Counsel that this does not make sense especially so when the Defendant himself agreed during cross examination that it would take up to 3 days for a cheque to clear. This was what the Defendant had testified:

"Plaintiffs' Counsel: Mr. John, how long does it take, I mean lawyers like you and me, we deal with cheques all the time. How long does it take for a cheque to clear?"

Defendant/John: About three days, if it's not cash payment."

[70] Further, the Defendant, in breach of his professional duty, had released the balance of the purchase price in cash when this is totally against Rule 8 (3) of the Solicitors' Account Rules 1990. No explanation was given. Further, there was no evidence adduced by the Defendant to show that the Plaintiffs gave instructions to forward to the Vendor/Owner RM800,000.00 in cash.

[71] **Rule 8 (3) Solicitors' Account Rules 1990** states as follows:

"(3) No money shall be drawn from a client account by a cash cheque or a bearer cheque except for payment of disbursement expended or advanced specifically for a transaction or matter for which the Solicitor has been retained to act by a client."

[72] The Defendant was also unable to explain convincingly why the balance purchase price of RM400,000.00 was released purportedly to Madam Yoong Sin Joo on 2nd June 2015 ie., before the transfer of the property was registered on 10th June 2015.



[73] This Court would now like to address the Defendant's subsequent conduct which is relevant under Section 8 of the Evidence Act to refer to his credibility. It is pertinent to recollect that on 9th June 2016, the Defendant on his own accord wrote a letter dated 9th June 2016 to Madam Yoong's Solicitor purportedly on behalf of the First Plaintiff agreeing to retransfer the property back to Madam Yoong. Although earlier the Defendant claimed that this was with the Plaintiffs' consent but after heavy cross examination, the Defendant finally agreed that he did not get the Plaintiffs' consent, because it was not necessary. This was what he testified:

"Plaintiffs' Counsel: Now, did you get instructions in writing from the First Plaintiff before issuing this letter, 9th of June letter?"

Defendant/John: There's a familiarity with the Plaintiff.

Plaintiffs' Counsel: No, I'm asking did you get instructions in writing.

Defendant/John: It was not necessary. It was not necessary because we deal with the Plaintiff so many cases.

Plaintiffs' Counsel: Did you get instructions in writing?"

Defendant/John: No."

[74] The Defendant insisted that everything was in order but unable to explain why in that letter of 9th June 2016, there was no mention about the return of the RM800,000.00. Did he willy nilly cover it up? This was what he testified:



“Plaintiffs’ Counsel: Now, let’s have a look at the letter again, shall we, Mr. John? Question 49, Yang Arif, Now why did you write this letter when you hold firm that the transaction was in order as you stated earlier? You said it’s in order. So why are you writing a letter to return the property back to Madam Yoong Sin Joo?”

Defendant/John: We were just acting on instructions of the Plaintiffs.

Plaintiffs’ Counsel: Question 50. Now, let’s just assume for a moment that the First Plaintiff did in fact agree to transfer back the property, then why is there no mention about the return of the RM800,000.00 since according to you, the transaction was in order? When you returned the property, shouldn’t you get back your RM800K back? So, why is there no mention here about the return of the RM800K?”

Defendant/John: I cannot remember, Yang Arif. This is ...there must have been some discussion.”

[75] This Court opined that the Defendant did not reveal the truth. What was more was that, the letter of 9th June 2016 was written by the Defendant when he was no longer being engaged by the Plaintiffs, as the Plaintiffs have by then engaged Messrs K. Sugu and Associates since early May 2016.

[76] The new Plaintiffs’ Solicitors, ie., Tetuan K. Sugu and Associates then wrote a strong letter to the Defendant, asking to



be given the copy of that letter of 9th June 2016 and had also demanded the Defendant to explain why did he write the letter and thereafter transferred the property without the Plaintiffs' permission when he was no longer engaged by the Plaintiffs. The Defendant did not reply even though numerous reminders were sent to him.

[77] This Court opined that these subsequent conducts of the Defendant displayed bad faith by the Defendant and a breach of the Defendant's professional duty and breach of the standard of care.

[78] Finally, this Court would like to address further the issue of the Consent Judgment entered between the Defendant and Madam Yoong Sin Joo as Plaintiff to strike out the Defendant's defence in the Shah Alam's suit. The Plaintiffs took the position that by consenting to such an application, the Defendant is deemed to agree with Madam Yoong Sin Joo that the Defendant in fact has no defence. Whilst this Court is not in a position to determine whether this was so as this matter should have been ventilated at the Shah Alam High Court, what was clear was that contrary to what the Defendant claimed, the Plaintiffs were not even consulted nor was given the opportunity to discuss, with the Defendant as Co- Defendants. This Court opined that this was bad faith on the part of the Defendant, and lack of professionalism and transparency as the Plaintiffs were left being Defendants "alone" in that suit.

[79] Whilst this Court do not wish to discuss on the outcome of that Consent Judgment, of pertinence was that Madam Yoong in her evidence testified that she did not agree to any consent judgment neither did she signed the same. A look at the Consent Judgment shows cogency in her testimony. It was signed by her Counsel



and the Defendant's Counsel. There was a clear absence of her signature which called into question of its legitimacy.

[80] The Plaintiffs' assertion that they were greatly prejudiced by these developments and the conduct of the Defendant because at the end of the day they lost the case, was hence understandable.

[81] For completeness, this Court would now look at the evidence of the Defendant's other witness that was Encik Emran also known as "Azman". He is a property agent. Basically his evidence generally did not support much for the Defendant.

[82] On the contrary he supported the Plaintiffs' case. The Defendant in its letter dated 9th June 2016 to Madam Yoong's Solicitors which had the effect of retransferring the property back to Madam Yoong which it claimed was with the consent of the Plaintiff was vigorously denied by the Plaintiff. The Defendant claimed that Azman (SD3) was acting for the First Plaintiff. The letter reads as follows:

*"We refer to the above whereby we apologize for the delay replying you letter dated 16th May 2016 and we act for "Encik Azman" on behalf of **HIGH EARNINGS SDN BHD.** (Company No. 507345-V)*

We further refer to the telephone conversation between your Mr. Raymond Choo and our client, Encik Azman recently. We give to understand that your good self and Encik Azman come to a conclusion over the settlement that Encik Azman will undertake to transfer back the abovementioned property to your client."

[83] The Defendant had used "Azman" as being acting for the First Plaintiff in giving instruction and involved in negotiation for the First Plaintiff when Azman in his evidence under cross

examination confirmed that he wasn't acting as such, thereby supporting the Plaintiffs' case. The Defendant's other witness ie,. Peter Low also confirmed that Azman was not authorized to represent the First Plaintiff.

[84] This Court will assess the totality of the evidence, both the Plaintiffs' and the Defendant's case in a manner required of the usual "judicial appreciation of evidence".

[85] This Court opined that as an Advocate and Solicitor engaged by the Plaintiffs, the Defendant has a duty of care towards the Plaintiffs in representing the Plaintiffs professionally. Together with this comes the duty of the Defendant having to maintain the standard of care required ie,. not as a reasonable man would perceived but it requires the Plaintiffs to show that the error/negligence/mistake/inaction was one which no reasonably competent member of the relevant profession would have made – (See *Arthur J. S. Hall & Co v. Simons* [2002] 1 AC 615). In other words the standard of care expected is that of a reasonable practitioner in that profession and not merely that of a reasonable man – See *Shalini Kanagaratnam v. Pusat Perubatan Universiti Malaya & Anor* [2016] 6 CLJ 225; *Shearn Delamore & Co (supra)*.

[86] Thus the standard of care expected of an Advocate and Solicitor is a reasonable degree of care and skill judged according to what a reasonably competent practitioner would have done. (See *Shearn Delamore & Co (supra)*). He is to be judged according to the standard of lawyers of his own standing and seniority – *Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co* [2010] 1 MLJ 284.

[87] From the totality of the evidence adduced, it showed that the Defendant was motivated by bad faith and self interest in almost



all his actions in representing the Plaintiffs in this conveyancing transaction. Further, the Defendant had on numerous occasions failed to discharge his duty of care to the Plaintiffs as his clients. He lacked diligence, commitment and professionalism as he failed to discharge his duties on a standard and level of Advocates and Solicitors of his own standing and seniority.

[88] The Defendant also had failed to adduce any cogent evidence to explain the numerous errors/mistakes/negligence and discrepancies. An explanation of “acting under the client’s instruction” is not sufficient enough because as a professional, his duty is to advise and protect the client’s interest.

[89] If such explanation by the Defendant were to be accepted, then professionals like the Defendant will be easily absolved from their negligent acts and finally the client will have to suffer, when their very duty amongst others as mentioned earlier, is to protect the client’s interest. Towards that end, the judgment of the Court in the case of *Lai Foh & Sons Sdn Bhd v. Skrine & Co* [2001] 1 LNS 324 is of pertinence thus:

“If solicitors can be absolved of all liabilities because they cannot be said to be able to foresee that a third party will commit fraud or forgery as a result of the solicitor’s negligently handing over land titles to a third party, then the retainer of a solicitor to handle a conveyancing matter would serve no useful purpose, as members of the public would be better off handling their conveyancing transactions by themselves.”

[90] What was more was that under cross examination when demanded, the Defendant was unable to prove or adduce evidence to prove that the Plaintiffs did in fact give such instructions regarding the transfer. The answer was obvious that the Defendant was not telling the truth. In most occasions as

alluded to earlier, the Plaintiffs were kept in the dark and were not even consulted. Even Madam Yoong (SP1) was not spared. She almost lost her property for good.

[91] This Court also opined that not only has the Defendant committed professional negligence, but his actions are as alluded to earlier, motivated by bad faith and self-interest apart from being deliberate and not exercising his professionalism according to a standard of care expected of an Advocate and Solicitor of his standing and seniority. For example, the letter dated 9th June 2016 purportedly allowing the retransfer of the property back to Madam Yoong (SP1), it clearly indicates that the negotiations and instructions were given by Encik Emran @ Azman purportedly acting on behalf of the First Plaintiff. By so doing the Defendant has obviously breached his duty of care by taking instructions from an unrelated party instead of taking instructions from his client directly especially for matters of this magnitude.

[92] Further, at the end of the day, it was proven that Encik Emran @ Azman (SD2) admitted that he has never acted on behalf of the Plaintiffs and has no authority to do so. This was also confirmed by another of Defendant's witness, Mr. Peter Low. Hence it was obvious that the Defendant was not telling the truth.

[93] Again, not only has the Defendant committed professional negligence but his actions were deliberate, done not in good faith and for self-interest. The RM800,000.00 was still missing. Again, here it is evidently clear that in discharging his duties, he also did not display his commitment on a standard of care expected of an Advocate and Solicitor of his standing and seniority.



E. CONCLUSION

[94] For the foregoing reasons this Court held that the Plaintiffs had, on a balance of probabilities, proved their claims against the Defendant with cost and hence their prayers are allowed with some variation that the duration of time allowed for the reliefs to be executed was expanded to 2 ½ months instead of 14 days. Cost of RM18,000.00 to the Plaintiffs.

Dated: 15 APRIL 2020

(AHMAD BACHE)
Judge
Civil High Court NCvC 3
Kuala Lumpur

COUNSEL:

For the plaintiffs' - S Vasanthi; M/s K Sugu & Associates

For the defendant's - Asmawi Ismail; M/s I Asmawi & Co

Legislation referred to:

Evidence Act, s. 8

Solicitors' Account Rules 1990, r. 8 (3)