CaseAnalysis
[2013] 5 MLJ 640 | [2013] MLJU 714; [2013] 1 LNS 445; [2013] 4 AMR 802

Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640

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FEDERAL COURT (PUTRAJAYA)

ARIFIN ZAKARIA CHIEF JUSTICE, HASHIM YUSOFF, AHMAD MAAROP, HASAN LAH AND JEFFREY TAN FCJJ

CIVIL APPEAL NO 02–80 OF 2011(W)

17 June 2013

Case Summary

Legal Profession — Liability as fiduciary — Stakeholding — Acting in manner unbefitting of advocate and solicitor — Solicitor breached duty as stakeholder of monies in conveyancing transaction — Unauthorised payment made out from stakeholder sum — Whether breach of stakeholder undertaking not merely contractual breach but breach of fiduciary duty — Whether stakeholder in position of trustee — Whether breach of undertaking and stakeholding absent dishonourable conduct still amounted to misconduct — Legal Profession Act 1976 s 94(3)(o)

The appellants, who were partners in a firm of solicitors ('the firm'), were found guilty by the disciplinary committee ('DC') under the Legal Profession Act 1976 ('the LPA') of misconduct under s 94(3)(o) of the LPA for breaching their duties as stakeholders of monies in a conveyancing transaction. The appellants were fined RM5,000 each for the misconduct. The DC's finding and fine were endorsed by the disciplinary board ('DB') under the LPA. The appellants' appeals against that decision both to the High Court and then to the Court of Appeal failed. The firm had acted for the vendor in the sale of its property and it was not disputed that the firm released part of the stakeholder sum to the managing director (MD) of the vendor instead of to the vendor itself and that later, by a consent judgment recorded in court, the appellants were ordered to reimburse the purchaser for the amount that was so disbursed. Although this settled the purchaser's complaint, which was withdrawn, the respondent on its own motion lodged a complaint against the appellants to the DB which led to a formal investigation by the DC. The DC ruled that although there was no element of dishonesty or dishonest intent in the appellants' actions, their failure to deal with the stakeholder monies in accordance with the entrustment of monies set out in the terms of the stakeholder was a conduct unbefitting of an

advocate and solicitor under s 94(3)(o) of the LPA. The appellants did not contest the fact that they had committed a breach of a stakeholder term. They, however, argued that breach of duty as stakeholder was a mere contractual breach; that no loss was occasioned to the purchaser and that at the time of the breach they had not offended any specific rule of practice governing stakeholder duties. The High Court's holding, inter alia, that the breach of duty as stakeholder was not merely a contractual breach but a breach of a fiduciary duty, as the appellants were in the position of trustees, was upheld by the Court of Appeal ('CA'). In their appeal to the Federal Court the appellants contended,

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inter alia, that: (i) natural justice and procedural fairness had been violated as the DC failed to secure for its enquiry the attendance of the purchaser, the MD of the vendor, and relevant witnesses of the respondent to ensure the complaint against the appellants had been proved; (ii) a real danger of bias existed as the person who signed the complaint for the respondent was a member of the DB; (iii) the CA failed to consider there was no element of dishonesty on the appellants' part; (iv) there was no evidence to show the first appellant was complicit in the breach; (v) civil liability for the breach as evidenced by the consent judgment did not amount to misconduct under the LPA; and (vi) the CA was wrong to have refused the appellants' request for adjournment of their appeal hearing to enable them to engage counsel.

Held, dismissing the appeal:

(1) The breach of the undertaking and stakeholding by the appellants was conducted in a professional capacity that amounted to grave impropriety. Undoubtedly, the appellants were guilty of misconduct within the meaning of s 94(3) of the LPA (see para 59).

(2) When solicitors held funds as stakeholders, they held those funds as trustees and not in a contractual or quasi-contractual capacity. Therefore it was beyond argument that a stakeholder was a trustee and that the breach of a stakeholding term was not just a breach of undertaking but also a breach of trust (see para 31).

(3) The breach of an undertaking was prima facie to be regarded as misconduct even if no dishonourable conduct was involved as it was the breach, and breach alone, that was of the essence. Once there was a clear case, both as to the undertaking and as to its breach, the breach of undertaking 'is itself misconduct and a serious dereliction of duty' (see paras 29 & 35).

(4) In the instant case the appellants did not dispute the breach of undertaking. Proof of the breach was complete. It was alleged the monies were inadvertently released to the vendor's managing director and not to the vendor as intended. But that so-called inadvertence was not that sort of negligence that could be excused for purposes of disciplinary action, for even if the money was released to the vendor as intended it would still have been misconduct. The undertaking was that no monies were to be released before redemption of the land. On the facts, it was a conscious breach of the undertaking and, as such, the pleas of negligence could not be heard (see paras 22 & 40).

(5) There was not a strand of evidence that the first appellant was not complicit or was not at fault. The respondent's complaint was against both appellants as partners of the firm. In

their joint explanation the appellants were mum as to their roles. They both admitted that 'we have

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inadvertently released the sum of RM195,199.94' and 'we have released the said monies to our client'. The DC was not told the first appellant was not complicit and it was not an issue at the disciplinary hearing. The DC found both appellants were involved. That finding was not challenged in the intermediate appeals. Given further that there was no evidence of 'no fault', it could not be argued that the first appellant was not at fault. Even if the first appellant had delegated all conduct of the business of the firm to the second appellant, the rest would still have been the same (see paras 53–54).

(6) There was no procedural non-compliance or breach of natural justice at the disciplinary hearing as alleged. The complainant was the respondent and not the purchaser and both the appellants and the respondent were present and/or represented by counsel at the disciplinary hearing. Both parties agreed to rely on documents, the truth of which was not disputed, and to dispense with oral evidence which meant they agreed not to cross-examine on the complaint (see paras 17–18).

(7) The appellants were not denied the right to legal representation at the Court of Appeal. They should have been ready with counsel if they wanted legal representation and could not have expected an automatic adjournment to enable them to engage counsel. They had time enough (from dismissal of their appeal at the High Court to hearing of the appeal at the Court of Appeal) to instruct counsel. Given that it was all down to their own doing that they were without counsel, the Court of Appeal was more than warranted to refuse adjournment (see para 18).

(8) On the issue of bias in that the individual who signed the complaint for the respondent was also a member of the DB, that issue was not raised at the disciplinary hearing or before any of the courts below, nor was it raised in the memorandum of appeal. Although a new point might be allowed to be raised at the appellate stage if there were facts admitted or proved to support it, in the instant case there were not even asserted facts, let alone facts admitted or proved, on the record, to support the new point of bias. There was simply no material for the exercise of discretion to permit the new point of bias to be raised (see paras 19 & 21).

Perayu-perayu, yang merupakan rakan-rakan kongsi dalam firma guaman ('firma tersebut'), telah didapati bersalah oleh jawatankuasa tatatertib ('JT') di bawah Akta Profesyen Undang-Undang 1976 ('APU') untuk salah laku di bawah s 94(3)(o) APU kerana melanggar kewajipan mereka sebagai pemegang kepentingan wang dalam transaksi pemindahakan. Perayu-perayu masing-masing telah didenda RM5,000 kerana salah laku itu. Penemuan JT dan denda itu telah diindorskan oleh lembaga tatatertib ('LT') di bawah APU. Rayuan-rayuan perayu-perayu terhadap keputusan tersebut di Mahkamah

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Tinggi dan juga di Mahkamah Rayuan telah gagal. Firma tersebut bertindak bagi pihak penjual dalam jualan hartanahnya dan adalah tidak dipertikaikan bahawa firma tersebut telah melepaskan sebahagian daripada jumlah pegangan kepentingan itu kepada pengarah urusan ('PU') penjual itu dan bukan kepada penjual itu sendiri dan bahawa berikutan itu, melalui

penghakiman persetujuan yang direkodkan di mahkamah, perayu-perayu telah diperintahkan untuk membayar balik pembeli jumlah yang telah dibayar itu. Walaupun ini menyelesaikan aduan pembeli yang telah ditarik balik, responden atas usulnya sendiri telah membuat aduan terhadap perayu-perayu kepada LT yang membawa kepada siasatan rasmi oleh JT. JT memutuskan bahawa meskipun tiada elemen ketidakjujuran atau niat tidak jujur dalam tindakan perayu-perayu, kegagalan mereka untuk mengurus wang pemegang kepentingan menurut amanah yang diletakkan ke atas wang itu sebagai pemegang kepentingan adalah perbuatan yang tidak wajar peguambela dan peguamcara di bawah s 94(3)(o) APU. Perayu-perayu tidak mencabar fakta yang mereka telah melakukan pelanggaran terma pemegang kepentingan. Mereka, bagaimanapun, berhujah bahawa pelanggaran kewajipan sebagai pemegang kepentingan hanya pelanggaran kontraktual; bahawa tiada kerugian berlaku kepada pembeli dan bahawa pada masa perlanggaran itu mereka tidak melanggar apa-apa peraturan spesifik amalan yang mengawal kewajipan pemegang kepentingan. Keputusan Mahkamah Tinggi, antara lain, bahawa pelanggaran kewajipan sebagai pemegang kepentingan bukan semata-mata pelanggaran kontraktual tetapi pelanggaran kewajipan fidusiari, kerana perayu-perayu dalam kedudukan sebagai pemegang amanah, telah dikekalkan oleh Mahkamah Rayuan ('MR'). Dalam rayuan mereka kepada Mahkamah Persekutuan perayu berhujah, antara lain, bahawa: (i) keadilan asasi dan keadilan prosedural telah dilanggar kerana JT gagal menjamin siasatannya tentang kehadiran pembeli, PU penjual, dan saksi-saksi relevan responden bagi memastikan aduan terhadap perayu-perayu telah dibuktikan; (ii) bahaya sebenar berat sebelah wujud kerana orang yang menandatangani aduan bagi pihak responden merupakan ahli LT; (iii) MR gagal mengambil kira bahawa tiada elemen ketidakjujuran di pihak perayu-peayu; (iv) tiada keterangan untuk menunjukkan perayu pertama bersubahat dalam pelanggaran itu; (v) liabiliti sivil kerana pelanggaran itu sebagaimana dibuktikan oleh penghakiman persetujuan tidak membentuk salah laku di bawah APU; dan (vi) MR adalah salah kerana menolak permohonan perayu-perayu untuk penangguhan perbicaraan rayuan mereka bagi membolehkan mereka melantik peguam.

Diputuskan, menolak rayuan:

(1) Pelanggaran akujanji dan pegangan kepentingan oleh perayu-perayu adalah perlakuan dalam kapasiti profesional yang membentuk ketidakwajaran yang serius. Tidak diragui, perayu-perayu adalah bersalah kerana salah laku dalam maksud s 94(3) APU (lihat perenggan 59).

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(2) Apabila peguamcara memegang wang sebagai pemegang kepentingan, mereka memegang wang tersebut sebagai pemegang amanah dan bukan dalam kapasiti kontraktual atau kuasi-kontraktual. Oleh itu tidak boleh dihujahkan bahawa pemegang kepentingan adalah pemegang amanah dan bahawa pelanggaran terma pegang kepentingan bukan sahaja pelanggaan akujanji tetapi juga pelanggaran amanah (lihat perenggan 31).

(3) Pelanggaran akujanji adalah prima facie boleh dianggap sebagai salah laku jikapun tiada perlakuan ketidakjujuran kerana ianya pelanggaran itu, dan pelanggaran itu sahaja, yang penting. Setelah terdapat kes yang jelas, tentang akujanji dan juga pelanggarannya, pelanggaran akujanji itu 'is itself misconduct and a serious dereliction of duty' (lihat perenggan 29 & 35).

(4) Dalam kes ini perayu-perayu tidak mempertikaikan pelanggaran akujanji. Bukti pelanggaran adalah lengkap. Adalah dikatakan wang itu tidak sengaja dikeluarkan kepada pengarah urusan penjual dan bukan penjual seperti mana yang diniatkan. Namun ketidaksengajaan tersebut bukan jenis kecuaian yang boleh dimaafkan bagi tujuan tindakan tatatertib, bahkan jika wang itu dikeluarkan kepada penjual sebagaimana diniatkan ia masih salah laku. Akujanji adalah bahawa tiada wang patut dikeluarkan sebelum penebusan tanah tersebut. Berdasarkan fakta, ia merupakan pelanggaran akujanji yang disengajakan, dan oleh itu pli untuk kecuaian tidak boleh didengar (lihat perenggan 22 & 40).

(5) Tiada keterangan langsung bahawa perayu pertama tidak bersubahat atau tidak bersalah. Aduan responden adalah terhadap kedua-dua perayu sebagai rakan kongsi firma tersebut. Dalam penjelasan bersama mereka perayu-perayu berdiam diri tentang peranan mereka. Kedua-dua mereka mengakui bahawa ‘we have inadvertently released the sum of RM195,199.94’ and ‘we have released the said monies to our client’. JT tidak diberitahu yang perayu pertama tidak bersubahat dan ia bukan menjadi isu semasa perbicaraan tatatertib itu. JT mendapati kedua-dua perayu terlibat. Penemuan tersebut tidak dicabar dalam rayuan-rayuan perantaraan. Tambahan pula tiada keterangan ‘no fault’ yang mana tidak boleh dihujahkan bahawa perayu pertama tidak bersalah. Walaupun perayu pertama telah mengagihkan semua pengendalian perniagaan firma tersebut kepada perayu kedua, keputusannya tetap sama (lihat perenggan 53–54).

(6) Tiada ketidakpatuhan prosedural atau pelanggaran rukun keadilan semasa perbicaraan tatatertib sebagaimana dikatakan. Pengadu adalah responden dan bukan pembeli dan kedua-dua perayu dan responden hadir dan/atau diwakili oleh peguam semasa perbicaraan tatatertib itu. Kedua-dua pihak bersetuju untuk menggunakan dokumen-dokumen, yang mana kebenarannya tidak dipertikaikan, dan untuk tidak

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menggunakan keterangan lisan yang bermaksud mereka telah bersetuju untuk tidak memeriksa balas pengadu (lihat perenggan 17 & 18).

(7) Perayu-perayu tidak dinafikan hak untuk diwakili peguam di Mahkamah Rayuan. Mereka patut bersedia dengan peguam jika mereka ingin wakil perundangan dan tidak boleh menjangkakan satu penangguhan automatik bagi membolehkan mereka melantik peguam. Mereka mempunyai masa yang mencukupi (daripada penolakan rayuan mereka di Mahkamah Tinggi kepada perbicaraan rayuan di Mahkamah Rayuan) untuk mengarah peguam. Berdasarkan ini adalah perbuatan mereka sendiri tanpa peguam, adalah wajar untuk Mahkamah Rayuan menolak penangguhan (lihat perenggan 18).

(8) Berhubung isu berat sebelah di mana individu yang menandatangani aduan bagi pihak responden adalah juga ahli LT, isu tersebut tidak dibangkitkan semasa perbicaraan tatatertib atau di hadapan mana-mana mahkamah bawahan, mahupun ia dibangkitkan dalam memorandum rayuan. Walaupun perkara baru mungkin dibenarkan untuk dibangkitkan di peringkat rayuan jika terdapat fakta yang dikemukakan atau dibuktikan untuk menyokongnya, dalam kes ini bukan sahaja tiada fakta yang dihujahkan, bahkan tiada fakta dikemukakan atau dibuktikan, atas rekod, untuk menyokong perkara baru berat sebelah ini. Tiada bukti untuk melaksanakan budi bicara bagi membenarkan perkara baru tentang berat sebelah ini dibangkitkan (lihat perenggan 19 & 21).

Notes

For cases on stakeholding, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1610–1613.

Cases referred to

A Solicitor, Re [1972] 2 All ER 811, CA (refd)

A Solicitor v The Law Society of Hong Kong [1996] HKCU 0528, CA (refd)

Alimand Computer Systems Ltd v Radcliffes & Co, (1991) Times, 6 November, QBD (refd)

Alliance Bank Ltd v Tucker (1867) 17 LT 13 (refd)

An Advocate and Solicitor, Re [1950] 1 MLJ 113 (refd)

Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)

Bentley and another v Gaisford and another [1997] 1 All ER 842, CA (refd)

Bhanabhai v Auckland District Law Society [2009] NZAR 282, HC (refd)

Biggs v Bree (1882) 51 LJ Ch 263, CA (refd)

Bolton v Law Society [1994] 2 All ER 486, CA (refd)

Briggs v Law Society Awoloye Kio v Law Society [2005] EWHC 1830, QBD (refd)

Burt v Claude Cousins & Co Ltd [1971] 2 QB 426, CA (refd)

Clarke v Couchman (1885) 20 L Jo 318 (refd)

Cleather v Twisden (1884) 28 Ch D 340, CA (refd)

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Connecticut Fire Insurance Co v Kavanagh [1892] AC 473, PC (refd)

Countrywide Banking Corporation Ltd v Kingston [1990] 1 NZLR 629, HC (refd)

Dato' Seri Au Ba Chi & Anor v Malayan United Finance Bhd & Anor; Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor [1989] 3 MLJ 434; [1989] 2 CLJ 801, HC (refd)

Datuk M Kayveas & Anor v Bar Council [2012] 9 CLJ 689, CA (refd)

Dick v Piller [1943] 1 All ER 627, CA (refd)

Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana [1982] 1 MLJ 77, FC (refd)

Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55, FC (refd)

HA Grey, In re [1892] 2 QB 440, CA (refd)

Han Ngiap Juan, Re [1993] 2 SLR 81, HC (refd)

Hammond v Hamlin High Court, Wellington, CP 66/92, 3 April 1992 (unreported), HC (refd)

Howard E Cashin, Re [1989] 3 MLJ 129, HC (refd)

John Bolster v Law Society of New South Wales NSWCA No 233 of 1982 (unreported), CA (refd)

Johnston and Re Legal Practitioners Ordinance 1970, Re (1979) 32 ACTR 37, SC (refd)

Keith Sellar v Lee Kwang Tennakoon v Lee Kwang [1980] 2 MLJ 191, FC (refd)

Kuldip Singh & Anor v Lembaga Letrik Negara & Anor [1983] 1 MLJ 256 (refd)

Law Society of Singapore v Ahmad Khalis bin Abdul Ghani [2006] 4 SLR 308, HC (refd)

Law Society of Singapore v Arjan Chotrani Bisham [2001] 1 SLR 684, HC (refd)

Law Society of Singapore v Heng Guan Hong Geoffrey [2000] 1 SLR 361, HC (refd)

Law Society of Singapore v Ong Ying Ping [2005] 3 SLR 583, HC (refd)

Law Society of Singapore v Singham Dennis Mahendran [2001] 1 SLR 566, HC (refd)

Law Society of Singapore v Tan Chwee Wan Allan [2007] 4 SLR 699, HC (refd)

Law Society of Singapore v Zulkifli bin Mohd Amin and another matter [2011] 2 SLR 620, HC (refd)

Lee Ah Tee v Ong Tiow Pheng & Ors [1984] 1 MLJ 107, FC (refd)

Lim Kiap Khee; Re, Law Society of Singapore v Lim Kiap Khee [2001] 3 SLR 616, HC (refd)

Mayes and the Legal Practitioners Act, Re (1974) 1 NSWLR 19, CA (refd)

McCaughey and Walsh (Re) [1883] OJ No 192, HC (refd)

McDonic Estate v Hetherington (Litigation Guardian of) [1997] OJ No 51, CA (refd)

Moscow Narodny Bank Ltd v Ngan Ching Wen [2005] 3 MLJ 693, FC (refd)

Myers v Elman [1939] 4 All ER 484, HL (not folld)

Myers v Rothfield [1939] 1 KB 109, CA (refd)

Norton v Cooper, Re Manby and Hawksford, ex parte Bittlestone (1856) 3 Sm & G 375 (refd)

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OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134; [2000] 1 CLJ 71, CA (refd)

Phosphate Sewage Co v Hartmont (1877) 5 Ch D 394, CA (refd)

Pont v Wilkins (1992) 4 NZBLC 102,894 (refd)

Rajasooria v Disciplinary Committee [1955] 1 WLR 405 (refd)

Rew v Lane (1856) 5 WR 110 (refd)

Rhina Bhar v Koid Hong Keat [1992] 2 MLJ 455, HC (refd)

Ridehalgh v Horsefield and another; and other appeals [1994] 3 All ER 848, CA (refd)

Rowe v Lindsay [2001] EWHC Admin 783 (refd)

Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah [2009] 1 MLJ 794; [2009] 1 CLJ 872, FC (refd)

Shan Rajagopal, Re [1994] 3 SLR 524, HC (refd)

Skinner v The Trustee of Property of Reed and Others [1967] 2 All ER 1286; [1967] Ch 1194, Ch D (refd)

Sorrell v Finch [1977] AC 728, HL (refd)

Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116; [1987] 2 CLJ 26, SC (refd)

Udall v Capri Lighting Ltd [1987] 3 All ER 262, CA (refd)

United Bank of Kuwait Ltd v Hammoud and others [1988] 1 WLR 1051, CA (refd)

United Mining and Finance Corpn Ltd v Becher [1910] 2 KB 296, KBD (refd)

Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd [2011] 2 MLJ 141, FC (refd)

W v Auckland Standards Committee 3 of the New Zealand Law Society [2012] NZCA 401, CA (refd)

Legislation referred to

Advocates and Solicitors (Diciplinary Enquiry) Procedure Rules 1970 r 8

Evidence Act 1950 s 73A

Legal Profession Act 1976 ss 94(3), (3)(o), 99(3), 100(5), (8), (9), 103D, s 103E(5), 103H

Legal Profession Act (Cap 161, 2009 Rev Ed) [SG] s 83(2)

Legal Profession Act (Cap 161) [SG] s 83(2)(h)

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 rr 22, 23

Partnership Act 1890 [UK] s 5

Partnership Act 1961 s 7

Rules of the Federal Court 1995 rr 47(4), 57(1), (2)

Solicitors' Account Rules [SG]

M Menon (V Mugunthan with him) (Jaffar & Menon) for the appellants.
Rabindra S Nathan (Lukas Lim with him) (Shearn Delamore & Co) for the respondent.
Peter Skelchy (Joycelyn Teoh with him) for the Disciplinary Board.

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Jeffrey Tan FCJ:

[1] This is an appeal by the partners ('the appellants') of Blanche Kayveas & Co, a firm of solicitors, against the finding of the disciplinary committee ('DC') established under Part VII of the Legal Profession Act 1976 ('the Act') that the appellants had breached their duties as stakeholders of monies held by them and were therefore guilty of misconduct within the meaning of s 94(3)(o) of the Act, for which the appellants were each ordered to pay a penalty of RM5,000 to the disciplinary fund established under s 103H of the Act. Finding of misconduct and fine were both endorsed by the disciplinary board ('DB') acting under s 103D of the Act.

[2] Section 103E of the Act provides that 'any party aggrieved by any decision or order made by the Disciplinary Board under subsection 100(5), (8) or (9) or section 103D shall have the right to appeal to the High Court within one month of the receipt of the notification of the decision or order complained against; and no appeal shall lie against any other decision or order made by the Disciplinary Board' (in contrast, any appeal against the decision of the High Court in an application to restore to the Roll the name of an advocate and solicitor, is made directly to the Federal Court). The appellants appealed, but found no success at the High Court and Court of Appeal. Hence this appeal (see s 103E(5) of the Act).

[3] The following background facts are not in dispute. By agreement dated 3 May 1996 ('the agreement'), one Avacado Corporation Sdn Bhd ('the vendor') agreed to sell, and one Jordone Corporation Sdn Bhd ('the purchaser') agreed to purchase land held under Geran Mukim 453 for Lot 1910 Mukim of Cheras, District of Ulu Langat ('the land') at the sale and purchase price of RM2,048,000.60. Preamble 5 to the agreement specified Blanche Kayveas & Co as the vendor's solicitors and Faeizah Kerk Bong & Associates as the purchaser's solicitors. The purchaser paid a 10% deposit to the vendor upon execution of the agreement. For the purposes of completion of the purchase, the purchaser had obtained a loan of RM1,222,000 from Bank Bumiputra Malaysia Bhd. There was a differential sum of RM621,200.54 between the sale price (after deduction of the 10% deposit of RM204,800.06) and the loan sum. In relation to that differential sum, cl 2 of the agreement provided that:

Clause 2(1)

The balance of the purchase price amounting to RINGGIT ONE MILLION EIGHT HUNDRED AND FORTY THREE THOUSAND TWO HUNDRED AND SEN FIFTY-FOUR (RM1,843,200.54) only (hereinafter referred to 'the Balance Purchase Price') shall be paid or caused to be paid by the Purchaser(s) to the Vendor(s)'s Solicitors as stakeholders within NINETY (90)days from the date of this Agreement (hereinafter referred to as 'the Completion Date').

Clause 2(4)

The Vendor(s)'s Solicitors are hereby authorised to utilize part of the balance purchase price to redeem the said property from the Chargee and thereafter to release the Balance Purchase Price less the retained sum referred to in Clause 6 below to the Vendor(s) Fourteen (14) days after presentation of the Transfer in favour of the Purchaser(s).

[4] Suffice it to say that the completion date was extended. On 23 August 1996 (see p 137 of the appeal record), Faeizah Kerk Bong & Associates forwarded the differential sum to Blanche Kayveas & Co.

[5] Preamble 4 to the agreement stated that the land had been charged to the Hongkong Bank Malaysia Bhd ('Hongkong Bank'). To effectuate the intended transfer of the said land to the purchaser, the vendor had to obtain a discharge of the land from the Hongkong Bank. But the vendor could not reach agreement with the Hongkong Bank on the redemption sum. By letter dated 31 October 1996 (see 138AR), Blanche Kayveas & Co informed Faeizah Kerk Bong & Associates that the vendor had received a redemption statement for the sum of RM4,136,718.66 but that the vendor 'does not agree with the redemption statement'. The standoff on the redemption sum remained quite unresolved until months later, when by letter dated 17 April 1996 (see 146AR), Faeizah Kerk Bong & Associates informed Blanche Kayveas & Co that they (Faeizah Kerk Bong & Associates) 'at the request of our client and your client had successfully negotiated with the Hongkong Bank to accept a sum of RM2,100,000.00 for the release of the said property'.

[6] But even with the redemption sum set at RM2.1m that was yet a shortfall. In the first place, the purchase price was less than the redemption sum. And what with 10% of the purchase price already paid to the vendor, the balance purchase price was still short of the redemption sum by RM256,799.46 (RM2.1m less RM1,843,200.54). The solution was provided by the purchaser who agreed to advance that RM256,799.46. By letter dated 17 April 1997 (see 146AR), Faeizah Kerk Bong & Associates wrote to Blanche Kayveas & Co as follows:

FAEZAH KERK BONG & ASSOCIATES

17th April, 1997

URGENT

M/s Blanche Kayveas & Co.,

Dear Sirs,

Re: Purchaser: Jordone Corporation Sdn. Bhd.

Vendor: Avacado Corporation (M) Sdn. Bhd.

Property: Geran Mukim 452 Lot 1910 Mukim Cheras

The above matter refers.

We write to inform you that at the request of our client and your client we have successfully negotiated with Hongkong Bank Malaysia Berhad to accept a sum of RM2,100,000.00 for the release of the said property.

Copies of the various correspondence between the parties hereto are enclosed herewith for your attention.

In the circumstances kindly arrange to let us have the sum of RM621,200.54 being the difference between the loan sum and the full purchase price together with all accrued interest to enable us to attend to the release of the said property.

Upon our receipt of the said differential sum from you our client will arrange to advance on behalf of your client such shortfall as are required to make up the full redemption sum as are due to Hongkong Bank Malaysia Berhad to secure the Document of Title and the relevant documents for the release of the said property.

……..(illegible)……

Yours faithfully,

Sgd.

[7] Faeizah Kerk Bong & Associates called on Blanche Kayveas & Co to return the differential sum together with the accrued interest, so that the purchaser would have the same towards the discharge of the land. A further letter dated 5 May 1997 (see 147AR) was issued to Blanche Kayveas & Co to return the differential sum together with the accrued interest. 147AR informed that the redemption date was 24 May 1997. Then things took a different direction. Consensus was reached on 16 May 1997 to allow Blanche Kayveas & Co to attend to the discharge of the land (see 149AR). On 19 May 1997, Faeizah Kerk Bong & Associates forwarded a banker's cheque for RM255,799.46 to Blanche Kayveas & Co, to cover the shortfall (see 150AR). On the same day, 19 May 1997, Blanche Kayveas & Co confirmed that they would attend to the discharge of the said land. But Blanche Kayveas & Co also made a request to the purchaser 'to advance a further sum of RM143,200.54' plus the shortfall of RM256,799.46. That request was made in letter dated 19 May 1997 (see 151AR) which read as follows:

BLANCHE KAYVEAS & CO.

Date: 19th May 1997

Messrs. Faeizah Kerk Bong & Associates

Dear Sirs

Re: Property: Geran Mukim 452 Lot 1910 Mukim Cheras

Purchaser: Jordone Corporation Sdn Bhd

Bhd Vendor: Avacado Corporation (M) Sdn. Bhd.

We refer to the above matter and your fax dated 16th May 1997 which was received by us on 19th May 1997.

2. We wish to put on record that our client has neither contacted us nor instructed us to redeem the said Property till to date.

3. Nevertheless, we are prepared to attend to the discharge of charge if your clients could advance a further sum of RM143,200-54 (hereinafter referred to as 'the further sum') excluding the sum of RM256,799-46 which is already advanced to you by your client since we have already released the further sum to our client as per our client's instructions.

4. Kindly forward us the total sum of RM400,000-00 to enable us to proceed further.

Yours faithfully,

Sgd.

c.c. 1. Client

[8] By 151AR, Blanche Kayveas & Co revealed for the first time that RM143,200.54 had been released to the vendor 'as per our client's instructions' from the differential sum. The purchaser would not have been amused by that revelation. By letter dated 22 May 1997 (see 152AR), Faeizah Kerk Bong & Associates put Blanche Kayveas & Co on notice to account for the loss of that RM143,200.54, with the undertone being that Blanche Kayveas & Co had breached their undertaking. 152AR reads as follows:

FAEZAH KERK BONG & ASSOCIATES

22nd May 1997

M/s Blanche Kayveas & Co.,

Dear Sirs,

Re: Property Geran Mukim 452 Lot 1910 Mukim Cheras

Purchaser Jordone Corporation Sdn. Bhd.

Vendor Avacado Corporation (M) Sdn. Bhd.

We refer to your fax of 19th instant received by us on the 20th and have taken our clients' instruction in respect of same.

2. In respect of 2nd Para thereof our clients wish to point out that it is envisaged and has been provided in the Agreement that such balance purchase price in your hand as stakeholder has to be utilized to redeem the said Property so as to render same free from encumbrances.

---------- ***[2013] 5 MLJ 640 at 652***

3. In respect of 3rd Para thereof our clients note with regret the unauthorized dissipation/appropriation of a sum of RM 143,200.54 out of the total stakeholder sum of RM621,200.54 entrusted to you on or about 23/8/96. In this respect our clients observed that by letter of …(illegible)… you have confirmed that only the first 10% under the Agreement have been released to your client.

4. Our clients further regret to observe that such dissipation/appropriation of part of the stakeholder sum wrongful and unauthorized in our clients' …(illegible)… was not disclosed by you earlier, in view of the …(illegible)… deadline for redemption and in view of our earlier letter to you on …(illegible) instant to arrange to forward us such stakeholder sum for redemption purposes.

5. Due to constraint of time for which you are and were at all material times aware of, our client has since made available a further cashier order SCB 225539 for RM 143,200.54 favouring HSBC to make up the dissipated stakeholder sum as enclosed herewith.

6. Upon receipt from us of the above cashier order we put you on notice that you are required to immediately confirm with the end-financing Solicitors M/s Shaik Mohamed & Co that the difference between the approved loan sum and the full purchase price has been settled and that all shortfall towards the redemption sum has been attended to.

7. Our clients required and indeed demand that you render your utmost cooperation in order not to further aggravate the harm or loss that has been needlessly occasioned.

Yours faithfully,

Sgd.

[9] Nonetheless, the purchaser forwarded a banker's cheque for the requested RM143,200.54 to Blanche Kayveas & Co. But in the end, it was Faeizah Kerk Bong & Associates who had to attend to the discharge of the land. There was then no further reason for Blanche Kayveas & Co to hold on to whatever moneys. On 23 May 1997 (see 157AR), Blanche Kayveas & Co returned the banker's cheques, both intact, to Faeizah Kerk Bong & Associates. The shortfall and RM143,200.54 were returned in full. But the differential sum was not returned in full; only RM426,000.60 were returned to the purchaser. Blanche Kayveas & Co claimed that RM426,000.60 was 'the balance purchase price held by us towards redemption of the property' (see 157–158AR). But by stating so, the truth was out. Blanche Kayveas & Co had released more than the stated RM143,200.54 from the differential sum, for when it was returned, the differential sum was short of RM195,199.94 (see 159AR). On 1 July 1997 (see 159AR), the purchaser demanded payment of that sum. By letter dated 11 July 1997 (see 161AR), Blanche Kayveas & Co informed that the RM195,199.94 was released to the vendor 'to pay for his living expenses and other overheads before the sale is completed' in two tranches, the first on 12 September 1996

---------- ***[2013] 5 MLJ 640 at 653***

and the second on 18 October 1996. On 30 July 1997 (see 155AR), Blanche Kayveas gave an undertaking to the purchaser that they would repay that RM195,199.94.

[10] It ought to be pointed out that contrary to the assertion in 161AR, it is not in dispute that Blanche Kayveas had released that RM195,199.94 to one Ahmad Naslizan Baharuddin, the managing director of the vendor, and not to the vendor as claimed. It is also not in dispute that pursuant to a consent judgment dated 15 April 1998, the appellants were jointly and severally ordered by the Kuala Lumpur Sessions Court to pay to the purchaser the sum of RM195,199.94 together with interest at the rate of 8%pa from 13 November 1997 to date of realisation. That closed the chapter on the civil liability of the appellants. It would seem that insofar as the purchaser was concerned, that also settled its complaint, which was eventually withdrawn by the purchaser on 13 July 1997. A year later, the Bar Council lodged complaint to the DB against the appellants (s 99(3) of the Act empowers the Bar Council or a State Bar Committee to make a complaint on its own motion to the DB against an advocate and solicitor or a pupil). On 7 August 2002, the investigating tribunal recommended formal investigation by the DC.

[11] In its report, the DC ruled that 'the crux of the complaint is that the [appellants] received moneys paid under the agreement as stakeholders but did not release the same in accordance with the terms set out in clause 2 of the agreement' (see 185AR), that it was not disputed that moneys were paid to the appellants as stakeholders, that the appellants 'were under an obligation to act within the terms of the agreement', and that dishonesty and or dishonest intent are not necessary ingredients to make out the instant complaint. The DC then made the following recommendation:

The Disciplinary Committee noted that the date of the redemption statement was 23 October 1996 barely one month after the moneys were released to Encik Ahmad Naslizan. The Respondents' counsel did not give any basis for the belief by the Respondents that the redemption sum was less than the balance purchase price other than reliance on statement of the

managing director of Avacado Corporation. Had the Respondents taken the usual prudential practice of obtaining the redemption statement from Hongkong Bank in order that they would have been in a position to discharge their duty as set out in Clause 2(4) of the [agreement], the Respondents would have been aware that the redemption sum in respect of the property far exceeded the balance purchase price.

The Disciplinary Committee is of the view that the duty of a solicitor to act in accordance with the entrustment of moneys set out in the terms of the stakeholder is one of the cornerstones of good professional behaviour, the breach of which amounts to conduct unbefitting of an advocate and solicitor and accordingly will render the solicitor to disciplinary action. Accordingly, the Disciplinary Committee finds the [Appellants] guilty of misconduct in breach of Section 94(3)(o) of the Act. Having regard to the fact that the [Appellants] themselves have, as a result of

---------- ***[2013] 5 MLJ 640 at 654***

releasing moneys prior to obtaining a redemption statement, suffered a loss of RM195,199.94, the Disciplinary Committee recommends that each of the [Appellants] be fined RM5,000.00.

[12] As said, that recommendation was first endorsed by the DB and then upheld by the High Court and Court of Appeal for reasons, the salient of, which could be paraphrased as follows.

[13] In the disciplinary hearing, it was not disputed that monies were paid to Blanche Kayveas & Co as stakeholders. And in the appeal at the High Court, it was conceded by the appellants that 'there was a breach of stakeholder term' (see 76C of the appeal record). Yet all the same, it was submitted by learned counsel for the appellants at the disciplinary hearing and at the High Court that breach of duty as a stakeholder is a breach of contract, that the instant purchaser suffered no loss, and that the appellants could not be found guilty under s 94(3)(o) of the Act. In 1997, the Bar Council came out with the Bar Council Conveyancing Practice Rules 1997, which specifically provides that 'A solicitor acting as a stakeholder for 2 or more parties must strictly adhere to the terms of the stakeholding at all times. No money or document by a solicitor as stakeholder shall be released, utilized, applied or otherwise dealt with by such solicitor except in accordance with the terms of the stakeholding or with the express consent of all relevant parties' (see cl 26). Now given that there was no such specific rule in 1996, it was contended by the appellants at the disciplinary hearing and later at the High Court that the appellants could not have breached a non-existent rule at the material time. To that, the DC answered that 'the general law is clear that there was an obligation on the part of the Appellants to act in accordance with their obligations as stakeholders as set out in the agreement'. The High Court held that even in the absence of a specific rule, there was yet common law relating to stakeholders. As for the argument that the breach of duty as a stakeholder is a breach of contract, the High Court held that 'the breach of duty as a stakeholder is not only … contractual but also fiduciary …

[14] The argument of the first appellant who represented himself (the second appellant was conspicuously absent) at the Court of Appeal was 'the learned judge of the High Court erred in holding that they were liable'. Given that general submission, the Court of Appeal per Low Hop Bing JCA, delivering the judgment of the court, appositely held that the sole question was 'Given the factual background, was the learned judge of the High Court correct in finding the appellants liable for professional misconduct unbefitting of advocates and solicitors under s 94(3)(o), thereby warranting the imposition of the fines on the appellants respectively' (see *Datuk M Kayveas & Anor v Bar Council* [2012] 9 CLJ 689). In tandem with the High Court, the Court of Appeal also found 'that the appellants did not dispute their breach of the terms

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of the stakeholding' and that 'the breach was further evidenced by the consent judgment'. And in accord with the view of the High Court that breach of a stakeholding is a breach of a fiduciary duty, Low Hop Bing JCA fell back on *Toh Theam Hock v Kemajuan Perwira Management*

Corporation Sdn Bhd [1988] 1 MLJ 116; [1987] 2 CLJ 26, *Dato' Seri Au Ba Chi & Anor v Malayan United Finance Bhd & Anor; Dato' Au Development Sdn Bhd v Malayan United Finance* [1989] 3 MLJ 434; [1989] 2 CLJ 801, *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256, *OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal* [2000] 1 MLJ 134; [2000] 1 CLJ 71 and *Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872, and said:

> In our view, the factual background attracts the application of the principles of law regulating stakeholders. The breach of duty by the appellants as stakeholders is not a mere breach of contract. The relationship between the appellants (stakeholders) and the vendor and the purchaser is fiduciary in nature, existing between trustees and beneficiaries. Therefore, the appellants' breach of duty as stakeholders is a breach of duty as trustees. It is a breach of fiduciary duty.
>
> The above authorities made it abundantly clear that stakeholders such as the appellants herein are duty bound to hold the monies as trustees for both the vendor and the purchaser to await the outcome of the event ie, the payment towards the redemption sum and the discharge of charge for the property. Pending the outcome of that event, the appellants as stakeholders may not part with the monies without the consent of both the vendor and the purchaser.

[15] Before us, it was orally submitted by learned counsel for the appellants that civil liability does not amount to misconduct, that there was a breach of r 8 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 in that the DC failed to secure the attendance of the original complainant or Bar Council at the enquiry, and that there was no evidence that the first appellant was involved in the matter. In his written submission, learned counsel for the appellants raised a host of other issues, namely, (a) that there was failure to observe r 22 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 in that the Bar Council failed to give notice of the enquiry to the purchaser, (b) that without the testimony of the purchaser at the enquiry, there was no prima facie case against the appellants, (c) that the appellants were denied the right provided by r 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 to cross-examine the purchaser, (d) that by the non-observance of the aforesaid rr 22–23, the DC failed to observe the rules of natural justice and thereby denied a fair hearing to the appellants, (e) that there was a real danger of bias, in that the person (Hj Sulaiman Abdullah) who signed the complaint for the Bar Council was also a member of the DB and there was no evidence that he had not participated in the decision of the DB to lodge complaint against the

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appellants, (f) that the Court of Appeal failed to consider that without the evidence of the managing director of the purchaser in accordance with s 73A of the Evidence Act 1950, the DC failed to discharge the burden of proving the contents of the complaint against the appellants, (g) that witnesses from the Bar Council were not called to testify, and without those witnesses, the DC could not find guilt beyond a reasonable doubt, (h) that the Court of Appeal failed to consider that there was no element of dishonesty on the part of the appellants, (i) that the first appellant was not complicit in the breach of cl 2 of the agreement, which breach could be attributable only to the second appellant, (j) that the consent judgment did not amount to admission of misconduct under the Act, and (k) that the appellants were denied the right to legal representation, in that the Court of Appeal refused the adjournment sought by the appellants when the matter was called for hearing.

[16] We see it fit to first address the alleged breach of procedural fairness or natural justice, alleged bias, and the alleged denial of the right to legal representation.

[17] Rule 8 provides that 'the complainant shall be liable to be cross-examined by the [Appellants] … before he is permitted to call his witnesses …' and r 22 provides that 'when on

the date fixed for hearing and investigation of the complaint the complainant or the advocate and solicitor concerned or both fail or fails to attend before the Disciplinary Committee, the Disciplinary Committee may, upon being satisfied that the notice of the hearing has been posted to the person or persons concerned, proceed to hear and investigate the complaint in the absence of such person or persons without further notice to such person or persons and make its determinations and recommendations to the Disciplinary Board'. Undoubtedly there was a right to the appellants to cross-examine on the complaint, and there was a stipulation to serve notice of (disciplinary) hearing on the parties concerned. But the contention that there was procedural non-compliance was absolutely bereft of merit in the light of the following facts. The complainant was the Bar Council and not the purchaser. And at the disciplinary hearing, both appellants and Bar Council were present and or represented by counsel. Since both parties were present, the notice of hearing was no longer important or critical when the DC proceeded to hear the complaint of the Bar Council. Notice of hearing to the purchaser was also not required, as the purchaser was not, or no longer, the complainant. Of course, the evidence of the purchaser at the disciplinary hearing to substantiate the truth of the complaint was another matter altogether. The respondent, who was not an immediate party and so had no firsthand knowledge, could not affirm to the truth of the complaint. But at the disciplinary hearing, both the appellants and respondent had agreed to rely on documents, the truth of which was not disputed (see 183AR), and to dispense with oral evidence, which would only mean and follow that both parties had

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also agreed not to cross-examine on the complaint. Hence, it could not be argued that the appellants were denied the right to cross-examination of the complainant. There was no breach of the rules or breach of natural justice as alleged at the disciplinary hearing.

[18] The appellants were also not denied the right to legal representation at the Court of Appeal. The appellants should have been ready with counsel if they wanted legal representation. They could not expect an automatic adjournment to enable them to engage counsel. They should have been ready to proceed with their appeal, for the '… power to grant an adjournment of the hearing or trial of any matter is wholly at the discretion of the court' (see *Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107; see also *Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana* [1982] 1 MLJ 77). An appellate court has the power to interfere with the judge's decision on the matter of the grant or refusal of an adjournment (see *Dick v Piller* [1943] 1 All ER 627). But given that the appellants had time enough (from dismissal of the appeal at the High Court to hearing of the appeal at the Court of Appeal) to instruct counsel, and given that it was all down to their own doing that they were without counsel, the Court of Appeal was more than warranted to refuse adjournment.

[19] In relation to the issue of bias, in that the individual who signed the complaint for the Bar Council was also a member of the DB at the same time, that was not raised at the disciplinary hearing or indeed at any of the courts below. Bias was also not raised in the memorandum of appeal. Learned counsel for the respondent submitted that fresh issues could not be raised for the first time at the appellate stage. On that, we wholly agree, for it is settled that a litigant in an appeal could not raise a point not raised or pleaded before the court of first instance. That was said on more than an occasion by this court. In *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141, the Federal Court per Gopal Sri Ram FCJ, delivering the judgment of the court, thus reminded:

> It is settled law that a litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance. The matter is really one of natural justice. The several authorities on the subject were collected and

discussed in the judgment of Jemuri Serjan SCJ in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428. We would also refer to *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 which sufficiently demonstrates the point.

It would be manifestly unjust for the appellants to succeed before us on a point not taken before the High Court. Thus, although leave was granted to the appellants, we find it unnecessary to answer the question posed. It has become academic by virtue of the way in which the case was placed before the High Court. We would add that in the very special circumstances of this case, the Court of Appeal's variation of the High Court's order has not produced an injustice to the appellants because of the way they put their case at first instance.

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[20] There are exceptions to the rule. Rule 57(2) of the Rules of the Federal Court 1995 provides that 'The appellant shall not at the hearing without the leave of the Court put forward any other ground of objection [to the decision appealed against]'. But at the same time, the latter rule also provides that 'the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant' (see *Moscow Narodny Bank Ltd v Ngan Ching Wen* [2005] 3 MLJ 693, where Abdul Malek Ahmad FCJ, as he then was, said 'that having regard to rr 47(4), and 57(1)–(2) of the Rules of the Federal Court 1995, the Federal Court has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice').

[21] A new point may be allowed to be raised at the appellate stage, if there are facts admitted or proved to support the new point (see *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55, where Thomson LP, delivering the judgment of the court, said that whether effect should be given to a new point is one for discretion to be exercised in accordance with the principles set out in *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 480 where Lord Watson enunciated that '(the new plea) ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which (the court is) asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea)'. But in the instant case, there were not even asserted facts, let alone facts admitted or proved, on the record, to support the new point of bias. There is simply no material for the exercise of discretion to permit the new point of bias to be raised.

[22] The rest of the submission for the appellants, which all touched, in one way or another, on the finding of misconduct, could be addressed together. As said, at the disciplinary hearing, the appellants and respondent agreed to rely on documents and to dispense with oral evidence. At every level of appeal, including the instant, the appellants did not dispute breach of undertaking. But by that — reliance on documents plus the fact that the content of the documents was not disputed — proof of breach of the undertaking was complete. As it were, the primary fact of breach was proved without oral evidence. Only the application of law to the undisputed facts was called for.

[23] It was argued that civil liability is not misconduct. In one sense that is correct. A breach of contract simpliciter is not misconduct. So *In Re An Advocate and Solicitor* [1950] 1 MLJ 113, where the solicitor did little or no work and steadfastly refused to take any steps to initiate the proceedings for which he was retained or to return the fee paid, Thomson J revealed that in all the cases that His Lordship had examined, where what were involved was the

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solicitor's relations with his client and where the courts held that professional misconduct existed, there had been present some element of fraud, dishonesty or deceit.

> In all the cases I have examined where what was involved was the solicitor's relations with his client and where the courts have held that professional misconduct has existed, there has been present some element of fraud, dishonesty or deceit. I can find no case where the simple failure to do work for which payment has been made or where neglect or even a refusal to pay money where there has been no question of fraud or misappropriation has been held to amount to professional misconduct.

[24] We agree with the statements of law in *Re An Advocate* (1950). However we are mindful that 'the standards of professional conduct change as time passes. What is entirely proper for one generation may be slightly irregular for the succeeding generation and highly improper for the next' (*A Guide to the Professional Conduct and Etiquette of Solicitors* by Sir Thomas Lund at p 1). We therefore reserve all judgment on the finding that the conduct of that solicitor who did little or no work and steadfastly refused to take any steps to initiate the proceedings for which he was retained or return the fee paid was not professional misconduct. Be that as it may, without fraud, dishonesty or deceit, a simple breach of contract is not professional misconduct. The following two appeals against the findings of the disciplinary committee upheld that position.

[25] In *Re Howard E Cashin* [1989] 3 MLJ 129, which concerned a dispute between a solicitor and his client over the legal costs recovered from the losing party, Wee Chong Jin CJ affirmed that a complaint concerning a civil dispute simpliciter, unaccomplished by any allegation of misconduct, does not constitute a complaint of professional conduct:

> It is, in our view, clear from these letters that there is a dispute between Murphy & Dunbar and the complainant as to the precise terms of the agreement which they had entered into. In our view, it was because of this dispute that the complainant sought recourse to the Law Society to ask for their 'guidance and help' and their 'advice'. In our opinion, there was no suggestion in these letters that the respondent ever intended to deprive her of anything which might be due to her. The respondent's claim to the taxed costs rested upon his view that there was no obligation on his part to pay the $35,521.75 to her. It is clear that this is a dispute which has to be resolved in a civil court, and the complainant's letter to the Law Society stating that there was an agreement as to costs which her solicitors dispute is, in our view, not such a 'complaint of the conduct' envisaged by s 82(1), much less a complaint of misconduct against the respondent personally. In our judgment, such an allegation of breach of contract simpliciter cannot in any way constitute an allegation of misconduct on the part of the respondent. As Thomson J remarked, 'If I were to hold otherwise, it would be unsafe for a solicitor to attempt to defend himself against any claim made against him by a client, however confident he was of the justice of his case'.

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[26] In *Rhina Bhar v Koid Hong Keat* [1992] 2 MLJ 455, Mohamed Dzaiddin J, as he then was, also drew a distinction between breach of contract simpliciter and a complaint concerning the conduct of a solicitor in his professional capacity:

> … in law, a complaint envisaged by that section must be a complaint 'concerning the conduct' of such advocate and solicitor 'in his professional capacity'. We also agree that a complaint purely for breach of contract and which concerns a civil dispute simpliciter, unaccompanied by an allegation of misconduct, does not constitute a complaint of the conduct of an advocate and solicitor within the meaning of … the Act — see Re Howard E Cashin.

[27] The complaint in *Rhina Bhar v Koid Hong Keat* stem from an alleged oral agreement that the complainant was to be paid 10% of the amount collected from the solicitor from clients in accident claims introduced by the complainant to the solicitor. The disciplinary subcommittee found that as the complainant's claim for moneys due was contractual, redress should therefore be sought from court. But the disciplinary subcommittee also recommended that a complaint would lie against the solicitor for breach of etiquette, that is, the employment of a tout. The complainant instituted a civil action for payment of his share of the fees collected by the solicitor.

As for the complaint, the disciplinary committee suspended the solicitor from practice for a period of three months, which on appeal was upheld.

[28] *Rhina Bhar v Koid Hong Keat* illustrates the dual character — breach of contract as well as misconduct — in some complaints. Breach of contract simpliciter is not misconduct. But breach of contract with elements of fraud, dishonesty or deceit, or with elements of contravention of professional rules is misconduct.

[29] However, in the case of a breach of an undertaking, it is breach and breach alone that is of the essence. Once there is a clear case, both as to the undertaking and as to its breach, the breach of undertaking 'is itself misconduct and a serious dereliction of duty' (*Countrywide Banking Corporation Ltd v Kingston* [1990] 1 NZLR 629 per Wylie J).

[30] That strict rule was borne out of necessity. 'The reasons for the rule, which requires the strict adherence to undertakings, are pragmatic. Undertakings are common throughout legal practice and the continued efficient working of legal practice requires that such undertakings be honoured regardless of other supervening circumstances. The additional reason for the strict application of the rule is to maintain the legal profession's integrity. Members of the profession must be seen as wholly trustworthy in that, once they have undertaken a particular course of action, they can be depended on to

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act accordingly. That the duty to honour undertakings is strict means even when a lawyer has erred or made an oversight, circumstances have changed radically, or for the lawyer to adhere to the undertaking will cause hardship, the lawyer must still adhere to the promises made' (*Bhanabhai v Auckland District Law Society* [2009] NZAR 282, quoting Professor Duncan Webb in *Ethics, Professional Responsibility and the Lawyer* (2nd Ed), 2006, para 15.9.17). 'Undertakings are the bedrock of our system of conveyancing. The recipient of an undertaking must be able to assume that once given it will be scrupulously performed. If property purchasers and mortgage lenders cannot have complete confidence in the safety of the money they put in the hands of a solicitor in the course of a property transaction our system of conveyancing would soon break down. The breach of an undertaking given by a solicitor damages public confidence in the profession and in the system of undertakings upon which property transactions depend' (*Briggs v The Law Society Awoloye Kio v Law Society* [2005] EWHC 1830; see also *United Mining and Finance Corpn Ltd v Becher* [1910] 2 KB 296, p 307, where a similar view was expressed by Hamilton J) and 'undermines the integrity of the profession and will bring it into disrepute' (*Re Lim Liap Khee; Law Society of Singapore v Lim Kiap Khee* [2001] 3 SLR 616 per Chao Hick Tin JCA).

[31] In our system of conveyancing, 'the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and 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' (*Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). 'Solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a contractual or quasi-contractual capacity' (*Halbury's Laws of England* (4th Ed), Reissue vol 44(1) para 126). '… the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe' (*Bentley and another v Gaisford and another* [1997] 1 All ER 842, at p 848 per Sir Richard Scott

V-C). When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or quasi-contractual capacity (see *Alimand Computer Systems Ltd v Radcliffes & Co,* (1991) Times, 6 November, QBD). '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 evidence: see *Skinner v The Trustee of Property of Reed and Others* [1967] 2 All ER 1286 at p 1287[1967] Ch 1194 at p 1200) 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 …' (*Burt v Claude Cousins & Co Ltd* [1971]

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2 QB 426 per Lord Denning MR in his dissenting judgment, which statement of the law was accepted by the House of Lords in *Sorrell v Finch* [1977] AC 728, and referred in *Kuldip Singh v Lembaga Letrik Negara & Anor*, *Dato Seri Au Ba Chi v Malayan United Finance Bhd & Anor* and *OCBC Bank (Malaysia) Bhd v Lee Lee Fah & Ors and another appeal*, amongst others). '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 utilised for that purpose. The money remains to be in trust' (*Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794 per Zaki Azmi CJ, delivering the majority judgment of the court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[32] And 'failure to honour an undertaking is prima facie evidence of professional misconduct …' (*Butterworth's Corderey on Solicitors* para 903). The breach of an undertaking has also been variously held as grossly improper conduct (*Law Society of Singapore v Lim Kiap Khee*), as misconduct (*Corderey on Solicitors* (8th Ed), at p 319), and as conduct unbefitting an advocate and solicitor (*Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89).

[33] In *Au Kong Weng v Bar Committee, Pahang*, the plaintiff had obtained judgment against Au Ah Wah (the defendant), an advocate and solicitor in the firm of Messrs Au Ah Wah & Co, for the sum of $16,271.56. Au Ah Wah was the father of Au Kong Weng (the appellant) who was his father's legal assistant. Solicitors for the plaintiffs rejected the defendant's proposal to pay the judgment sum by three instalments and demanded payment within 48 hours. When payment was not forthcoming, execution proceeded. On March 16, the bailiff called at the premises of Messrs Au Ah Wah & Co, to effect execution. The appellant as solicitor for the defendant telephoned the plaintiffs' solicitors and requested execution to be lifted on the undertaking that the full judgment debt would be paid on or before March 21. On that undertaking, the plaintiffs' solicitors agreed to lift execution. But after execution was lifted, the defendant's solicitors applied to court for the judgment sum to be paid in three instalments. The affidavit in opposition raised the fact of the undertaking by the appellant. The learned senior assistant registrar allowed the application. The plaintiffs' solicitors successfully appealed to the learned judge, who was critical of the appellant's conduct:

> The appellant counsel had made a very serious and grave allegation of dishonesty against Mr Au Kong Weng which was serious enough in my view to require a sworn reply to it but he had not done so. I could not but come to the conclusion that such an undertaking was in fact made. Besides the facts were not inconsistent with one having existed. The respondent had already had the execution writ in his hands and execution was in process and could have been completed in good time. Why should the appellant suddenly in the midst of completion stay his hands when he was not

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> obliged to, merely because the respondent was going to apply for a stay unless he was so stupid. The appellant had all to gain and nothing to lose by proceeding with execution. The circumstances clearly shows that he had done so only because

he had been given a categorical undertaking or assurance by the respondent that the money was immediately forthcoming. He found himself deceived instead.

I would have no hesitation in allowing this appeal with costs.

I would not end this matter without saying that the circumstances of this case clearly merit the Bar Committee taking the necessary steps to investigate into the possibility of a professional mis-conduct by counsel concerned.

The senior assistant registrar shall duly serve a copy of this judgment on the secretary of the Bar.

[34] The Bar Committee took up the matter, which was investigated by the disciplinary committee who found the appellant guilty of conduct unbefitting an advocate and solicitor …'. On appeal to the former Federal Court per Raja Azlan Shah CJ (Malaya), as HRH then was, delivering the judgment of the court, enunciated:

There are no closed categories of professional misconduct. One of the most fundamental duties of an advocate and solicitor, recognised for as long as the profession has been in existence, is that he must honour to the utmost the promise or undertaking given by him in a professional capacity to the court and to members of his profession and failure to honour it is regarded as a breach of professional conduct: see *In re Choe Kuan Him, Advocate and Solicitor* [1976] 2 MLJ 207. The honesty of officers of the court is very much the concern of the court: see *Re Hilliard, Ex parte Smith* (1845) 2 Dow & L 919; *Re a Solicitor, Ex parte Hales* [1907] 2 KB 539; *United Mining and Finance Corporation, Limited v Becher* [1910] 2 KB 296 at p 304 on appeal [1911] 1 KB 840;

… In our respectful view, it cannot be gainsaid that the members of the profession must be able to rely on the spoken word of each other and that a breach of this undertaking is a serious matter …

On the facts as disclosed and found by the committee, we could not see how the finding that the appellant was guilty of professional conduct unbefitting an advocate and solicitor could be successfully challenged before this court. Members of the Bar are officers of the court and are expected to comport themselves honourably, as befit members of the honourable profession. The appellant's failure to honour the undertaking by itself demonstrates his unfitness to belong to a profession where, in practice, his colleagues must insist upon the maintenance of the highest standards.

[35] The breach of an undertaking is prima facie to be regarded as misconduct, even if no dishonourable conduct were involved. That statement of law was made in the oft quoted case of *Udall v Capri Lighting Ltd* [1987] 3 All ER 262, where Balcombe LJ summarised the earlier cases as follows:

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Failure to implement a solicitor's undertaking is prima facie to be regarded as misconduct on his part, and this is so even though he has not been guilty of dishonourable conduct: see *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296; [1908-10] All ER Rep 876 and in particular the argument of the successful applicants in that case ([1910] 2 KB 296 at 301), and *John Fox (a firm) v Bannister King & Rigbeys (a firm)* [1987] 1 All ER 737 at p 742. However, exceptionally, the solicitor may be able to give an explanation for his failure to honour his undertaking which may enable the court to say that there has been no misconduct in the particular case: see *Fox's case* [1987] 1 All ER 737 at pp 742–743.

(see *Bentley and another v Gaisford and another* [1997] QB 627 and *Commissioner of Inland Revenue v Bhanabhai* [2006] 1 NZLR 797 where the dicta of Balcombe LJ in *Udall v Capri* was adopted).

[36] Professional misconduct need not be criminal. 'It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice … It need not involve personal obliquity' (*Myers v Elman* [1939] 4 All ER 484 per Wright LJ). '… the absence of dishonesty does not necessarily mean that there has been an absence of professional misconduct: *Re Han Ngiap Juan* [1993] 2 SLR 81 at pp 87–89, and *Re Lim Kiap Khee; Law Society of Singapore v Lim Kiap Khee* [2001] 3 SLR 616 (applying *Rajasooria v*

Disciplinary Committee [1955] 1 WLR 405). Indeed, professional misconduct infused with dishonesty would attract the harshest sanctions the court could impose — including striking the errant lawyer off the Roll of advocates and solicitors: see Ravindra Samuel; *Law Society of Singapore v Heng Guan Hong Geoffrey* [2000] 1 SLR 361; *Law Society of Singapore v Arjan Chotrani Bisham*; and *Law Society of Singapore v Ong Ying Ping* [2005] 3 SLR 583 (adopting the English decision of *Bolton v Law Society* [1994] 1 WLR 512 at p 518, per Sir Thomas Bingham MR)' (*Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR 308 per Andrew Phang Boon Leong JA).

[37] In *Bolton v Law Society* [1994] 2 All ER 486, where the solicitor did not place the loan sum into his clients' account, as was his duty, but disbursed the whole sum to the vendor of a flat, which disbursement the solicitor later made good, the English Court Appeal (per Sir Thomas Bingham MR, Rose and Waite LJJ with him) held that the solicitor's conduct, even if accepted as honest, represented a flagrant departure from the rules of conduct:

> I pause to observe that for my part I find no fault at all in the disciplinary tribunal's reasoning. Mr Bolton's conduct, even if accepted as honest, represented a flagrant departure from the elementary rules which bind anyone, most of all a solicitor, holding a sum of money on behalf of someone else. The fact that a close family relationship was involved made it more, not less, necessary to act with scrupulous propriety. There were a number of mitigating factors upon which Mr Bolton relied

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> and it is plain that the disciplinary tribunal gave those the fullest weight but nothing could disguise the fact that Mr Bolton's conduct was, indeed, as the tribunal held, 'wholly unacceptable'.
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> …
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> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust.

[38] Nevertheless, the absence of dishonesty is a mitigating factor (see *John Bolster v Law Society of New South Wales* NSWCA No 233 of 1982, and *Law Society of Singapore v Singham Dennis Mahendran* [2001] 1 SLR 566, amongst others).

[39] 'Negligence or want of professional skill … are not … themselves grounds for the exercise of disciplinary jurisdiction … [however] negligence may be of such a character and so aggravated as to merit either of those descriptions [professional misconduct or conduct unbefitting of a solicitor]' (*A Guide to the Professional Conduct and Etiquette of Solicitors* by Sir Thomas Lund at pp 61–62). A case in point was *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401, where it was held by the New Zealand Court of Appeal that negligence giving rise to a breach of an undertaking may still have a tendency to bring the profession into disrepute even if the practitioner is honestly mistaken about the scope of his responsibilities. In the opinion of Lord Denning MR in *Re a Solicitor* [1972] 2 All ER 811, 'negligence in a solicitor may amount to professional misconduct if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession'.

[40] Here, the alleged inadvertence was that monies were released to the managing director of

the vendor and not to the vendor as intended. But that so called inadvertence was not that sort of negligence that could be excused for the purposes of disciplinary action, for even if the money had been released to the vendor as intended, it would still be misconduct. The undertaking was that no

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monies were to be released before redemption of the land. On the facts, it was a conscious breach of the undertaking. Now given that it was a conscious breach, the pleas of negligence could not be heard.

[41] One point raised by the first appellant was that he was not personally complicit and so he could not be the subject of disciplinary proceedings. It was however not mentioned that the appellants were partners at the material time. That fact, which was not disputed, was also carried on the letterhead of Blanche Kayveas & Co with the first appellant as the principal partner (see *Hammond v Hamlin* High Court, Wellington, CP 66/92, 3 April 1992, where a salaried partner was held liable in respect of a post-retirement breach of undertaking given by his partner to another firm of solicitors which knew the former to have been a partner by virtue of the appearance of his name on the firm's letterhead both before and after his retirement, notice of which was given too late to prevent liability, and *Pont v Wilkins* (1992) 4 NZBLC 102,894, where the retired partner who had given no formal notice of retirement had taken no step to have his name taken out of the firm name and his name and qualifications continued to appear on the firm's letterhead, was held liable as a partner). 'Every partner is the agent of his partners for the purpose of the business of the partnership (Partnership Act 1890 s 5) (which is identical to s 7 of our Partnership Act 1961) … since every agent is the agent of all the others, the firm is liable when a partner in the ordinary course of business gives an undertaking (*Alliance Bank Ltd v Tucker* (1867) 17 LT 13) is negligent (*Rew v Lane* (1856) 5 WR 110; *Clarke v Couchman* (1885) 20 L Jo 318), is guilty of fraud (*Phosphate Sewage Co v Hartmont* (1877) 5 Ch D 394 at p 433) or misconduct (*Norton v Cooper, Re Manby and Hawksford, ex parte Bittlestone* (1856) 3 Sm & G 375)' (*The Law, Practice and Conduct of Solicitors* by Peter MK Bird and J Bruce Weir at p 66). 'In a partnership, an undertaking given by a partner in the course of practice binds all the partners. A partner remains liable on undertakings given while he was a partner, even after he has left the firm or the firm is dissolved. An incoming partner is not liable on undertakings given before he became a partner' (*Butterworth's Corderey on Solicitors* para 945); see also *United Bank of Kuwait Ltd v Hammoud and others* [1988] 1 WLR 1951, *Biggs v Bree* (1882) 51 LJ Ch 263). Where the offending partner had the apparent authority to act on behalf of the partnership, the other partners would be liable for his actions (see *McDonic Estate v Hetherington (Litigation Guardian of)* [1997] OJ No 51, where the negligent lawyer, who was retained by clients to invest their money, did so with the use of his firm's trust account and his firm's letterhead. The trial judge held that the negligent lawyer was not acting as a lawyer but as an investment adviser. On appeal, it was held that the law firm was also in the business of investing funds for clients in loans arranged by other partners of the firm, that the negligent lawyer's activities were not out of the normal scope of the law firm's business, and that even if the negligent lawyer's

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activities were not within the ordinary course of the firm's business, the partners were liable on the basis that the negligent lawyer was acting within the scope of his apparent authority).

[42] In *Re Howard E Cashin*, the disciplinary committee decided that each partner had the joint responsibility to ensure that there was no breach of the Solicitors' Account Rules. Wee Chong Jin CJ however said that the disciplinary committee failed to distinguish between 'joint and

several responsibility', a civil responsibility, on the one hand; and a disciplinary responsibility, on the other, and that the exercise of the disciplinary power is essentially punitive and penal and is exercised in appropriate cases only where there is personal complicity by the solicitor charged:

> It is common ground that the respondent was not in Singapore at the time of payment in and had nothing to do with the payment of the taxed costs into the office account. The committee, however, concluded that, because there was 'a personal duty' on every solicitor, or 'joint responsibility' in the case of partnership, to ensure strict compliance with the account rules, each and every partner is responsible and liable for every breach. In arriving at this conclusion, the disciplinary committee failed to distinguish between 'joint and several responsibility', a civil responsibility, on the one hand; and a disciplinary responsibility, on the other. The confusion appears to have arisen because of the failure to appreciate that the exercise of the disciplinary power is essentially punitive and penal and is exercised in appropriate cases only where there is personal complicity by the solicitor charged. It is apposite, in this connection, to quote the words of Lord Atkin in *Myers v Elman* [1940] AC 282 at p 302:
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> > Misconduct of course may be such as to indicate personal turpitude on the part of the person committing it and to lead to the conclusion that the party committing it, if an officer of the court, is no longer fit to act as such. Over conduct such as that, punitive jurisdiction will be exercised, *but it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated.* (Emphasis added.)
>
> It is true that in certain appropriate circumstances, the negligence of the solicitor in relation to a client account (eg failure to exercise adequate supervision) may amount to professional misconduct, 'if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession': per Lord Denning in *Re A Solicitor* [1972] 2 All ER 811 at p 815. But no one would dispute — and it has not been suggested otherwise — that such cases involve an element of personal neglect or misdoing on the part of the solicitor charged.

[43] That excerpt from the judgment of Lord Atkin was cited by the first appellant to support his argument that he was not complicit and that he could not therefore be the subject of disciplinary proceedings. But the above excerpt was cited in isolation, quite without regard to context. Wee Chong Jin CJ did

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not say that personal punishment could not be inflicted on partners not personally implicated. And for that matter, the House of Lords in *Myers v Elman* did not say that misconduct could not be found where the solicitor was not personally at fault (see *Ridehalgh v Horsefield and another; and other appeals* [1994] 3 All ER 848, where Sir Thomas Bingham MR, Rose and Waite LJJ observed that the House of Lord in *Myers v Elman* was unanimous in rejecting the Court of Appeal's majority view that misconduct could not be found where the solicitor was not personally at fault).

[44] In *Myers v Elman*, it appeared that the legal work in question had been very largely delegated to a well-qualified managing clerk and the conduct complained of had been his, not Mr Elman's. By a majority, the Court of Appeal (reported sub nom *Myers v Rothfield* [1939] 1 KB 109) held that to make a wasted costs order the court must find professional misconduct established against the solicitor, and such a finding could not be made where the solicitor was not personally at fault. '… it was held by Greer and Slesser LJJ, MacKinnon LJ dissenting, that, assuming that the acts in question, if done by a solicitor personally, would constitute professional misconduct on his part, the solicitor was not liable in this case, inasmuch as he had appointed a fully qualified clerk to do such business, and the acts had been done, not by the solicitor himself, but by the clerk; and further, that, even if the solicitor himself had prepared and delivered the defences, he would not by so doing have been liable, since it was not professional misconduct in a solicitor to prepare and deliver on behalf of his client a defence which he might himself suspect contained misstatements or raised false issues and put the plaintiff to the proof of his case' (*Myers v Elman* at p 283).

[45] That proposition of the Court of Appeal was roundly rejected by the House of Lords, with Lord Russell disagreeing on the facts. At pp 288 and 291 of the report, Viscount Maugham said:

> My Lords, as I understand the judgments of Greer and Slesser LJJ., those learned judges were of opinion that the jurisdiction of the Court to order a solicitor to pay the costs of proceedings is a punitive power resting on the personal misconduct of the solicitor and precisely similar to the power of striking a solicitor off the rolls or suspending him from practice. If this is a correct view no doubt it would follow that the solicitor ought not to be ordered to pay costs unless he has himself been guilty of disgraceful conduct; and it would follow that however negligent or obstructive or improper his conduct of the proceedings as solicitor has seemed to be, whatever injury has been inflicted on the other party or parties to the litigation, he has only to show that he left the whole matter in the hands of a clerk and he will then escape the jurisdiction of the Court in relation to costs. It would also seem to follow that if instead of a single solicitor a firm with two or more members is acting for the client it will be necessary in such a case to inquire into their several responsibilities and an

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> order can only be made against those partners who can be shown to be personally involved. I am unable to agree with the main proposition, for which I may add there seems to be no authority.
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> …
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> If then as I think the authorities show that the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk, for whose actions within the scope of his authority he is liable. That a partner in a firm of solicitors cannot escape from such an order on the ground that he took no active part in the proceedings seems to me to be clear. If authority is needed I think the case of *Norton v. Cooper (1)* may be referred to. A firm of solicitors having instituted a suit without a satisfactory retainer and the suit having failed, Sir John Stuart V.-C. ordered the firm to pay the costs incurred by the plaintiff in the suit. One partner alone was concerned in the suit and the other partner contended that he was in no degree liable. The Vice-Chancellor observed: 'The safety of the public and the rules of Court are to be satisfied only by holding, in a case of this kind, that, so long as Mr. Hawksford (the innocent partner) continued to appear as one of the solicitors of the plaintiff on the records of the Court, he is responsible for what took place in the conduct of the cause.' If this is true of an innocent partner it must be equally true if a person being solicitor on the record in an action or other legal proceedings chooses to leave the actual conduct of the matter to a managing clerk. The other parties have no means of knowing what particular part the solicitor, as distinguished from his clerk or his partner, has taken in the matter. If we rely on the principle laid down by Lord Hatherley, it is clear that the principle would be to a large extent useless if a solicitor on the record has merely to leave everything to a clerk.

[46] At p 301 of the report, Lord Atkin pronounced:

> The majority of the Court of Appeal (Greer and Slesser LJJ) were of opinion that the learned judge could not exercise his punitive jurisdiction over a solicitor unless the solicitor personally had been guilty of misconduct and discharged the order. MacKinnon LJ. dissented. My Lords, I believe that all your Lordships are of opinion that the view taken by the majority of the Court of Appeal was incorrect.

[47] In the next page of the report, Lord Atkins then said the following, from which the excerpt was cited by the first appellant:

> The duty owed to the Court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties whether they be carrying on the profession alone or as a firm. They cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by them to a clerk. Such delegation is inevitable, and there is no one in the profession, whether in practice or as a judge, who will not bear ungrudging tribute to the efficiency and integrity with which, in general, managing clerks, whether admitted or unadmitted, perform their duties. The machinery of justice would not work without them. But as far as the interests of the Court and the other litigants are concerned it is a matter of no moment whether the work is actually done

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> by the solicitor on the record or his servant or agent. If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case. Misconduct of course may be such as to

> indicate personal turpitude on the part of the person committing it and to lead to the conclusion that the party committing it, if an officer of the Court, is no longer fit to act as such. Over conduct such as that, punitive jurisdiction will be exercised, but it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated.

[48] It was in the context of personal turpitude that Lord Atkin said that 'no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated'. Lord Atkin was otherwise unqualified that a solicitor cannot evade the consequences of breach of duty by showing that the performance of the particular duty of which breach is alleged was delegated by him — 'but the words 'professional misconduct' themselves are not necessarily confined to cases where the solicitor himself is personally guilty. After all they only mean misconduct in the exercise of the profession …'.

[49] Lord Wright also disagreed (see p 321 of the report) that punitive powers could only be exercised when the solicitor was guilty personally of misconduct:

> It is no doubt true that a solicitor will not be struck off the Rolls or suspended, unless he is personally implicated, but with the greatest respect I can find neither reason nor authority for the view of the Court of Appeal that the discretionary and remedial jurisdiction of the Court to order reimbursement of costs or expenses thrown away owing to his improper conduct in a case cannot be exercised unless the solicitor is personally implicated. I agree on this point with the judgment of MacKinnon L.J., who upheld Singleton J.

[50] Lord Porter also disagreed with the Court of Appeal:

> Whether one regards the liability of the solicitor as arising from a failure to exercise due supervision over his representatives or because he is responsible as the solicitor upon the record, the result is the same.
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> It is misconduct in the way in which the work entrusted to his firm is carried on, not the personal misdoing of the individual, which gives rise to the exercise of the jurisdiction. No doubt the penalty imposed will vary according to the circumstances of the case, and it may be that the more serious cases involving such personal misconduct as would result in the penalty of suspension or expulsion …'

[51] *Myers v Elman* is clearly no authority for the proposition that misconduct could not be found where the solicitor was not personally

implicated. As we see it, the law is this. The professional misconduct of one member does not render other members of the firm liable for disciplinary action in respect of that misconduct, and punitive action could not be taken against a solicitor without personal misconduct (see *Re; McCaughey and Walsh* [1883] OJ No 192, where Proudfoot J held that 'To justify an order to strike a solicitor off the Rolls, there must be personal misconduct; it is not enough to shew that his partner has been guilty of fraudulent conduct from which a constructive liability to pay money may perhaps arise'; *Rowe v Lindsay* [2001] EWHC Admin 783, where Stanley Burton J, delivering the judgment of the court, held that 'the vicarious liability of a partner for the acts of his partners, referred to in the skeleton, cannot of itself justify a finding of misconduct by a Solicitors' Disciplinary Tribunal'). But that would no longer be so in the case of fault on the part of the innocent partners (see *Re Mayes and the Legal Practitioners Act* (1974) 1 NSWLR 19). In *Re Johnston and Re Legal Practitioners Ordinance 1970* (1979) 32 ACTR 37, where the innocent partner was unaware of the defalcations as they took place, it was held by Blackburn CJ, Connor and Davies JJ that the fault of the innocent partner laid in failing to investigate further the matter disclosed in the auditor's letter and in failing to see that his partner invested his clients' moneys. In the same vein, in *A Solicitor v The Law Society of Hong Kong* [1996]

HKCU 0528, it was held by Litton V-P, giving the judgment of the court, that a solicitor must be found personally culpable in some respects before he could be convicted as charged:

> The tribunal was entitled of course to expect high professional standards from solicitors generally; but at the end of the day the appellant must be found personally culpable in some respects before he could be convicted as charged. There is a distinction between civil liability as the proprietor of a one-man firm, and professional misconduct. The chairman appears, from the passage cited above, to have lost sight of this point. His earlier suggestion that 'in a firm 80 partners' all would be responsible is valid of course in terms of civil liability, but it would be absurd to suggest that all 80 partners could be found guilty of professional misconduct. The blurring of this distinction, a theme throughout the proceedings, was never corrected by the prosecutor.

[52] In the *Law Society of Singapore v Tan Chwee Wan Allan* [2007] 4 SLR 699, VK Rajah JA, delivering the judgment of the court, referred to *Corderey on Solicitors* (LexisNexis Butterworths, (9th Ed), Issue 25: November 2004 release) Division G (Allan Gore & Andrew Hopper eds) at paras 207–208, to illustrate the rationale behind the need for effective supervision of the maintenance of solicitors' accounts. As luck would have it, the underlined portion of those paragraphs also explained that fault on the part of a solicitor not personally implicated does not mean that a solicitor is vicariously liable for misconduct:

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> It is an express requirement in conduct that solicitors exercise proper supervision over both solicitor and non-solicitor employees. … It follows that if the actions of an unadmitted clerk fall below accepted standards, the employing solicitor, usually the principal or partner most directly responsible for supervision of that employee, may be liable to disciplinary action. *Where, for example, there has been serious delay in the conduct of a client's affairs on the part of the clerk, disciplinary action against the supervising partner may follow if there was inadequate supervision, and if, had there been adequate supervision, the delay would have been identified and corrected. This does not mean that a solicitor is vicariously responsible for misconduct;* a solicitor has a liability in conduct to ensure that the staff for whom he is responsible maintain adequate standards. This principle is particularly important in the context of the care of clients' money and compliance with the Solicitors' Accounts Rules, because accounts functions are in all but the smallest offices delegated to non-qualified accounts staff. Nevertheless, a principal or the partners are strictly liable for breaches of the Accounts Rules, and effective supervision must therefore be maintained. (Emphasis added.)

[53] It should be seen from the foregoing that 'no fault' is a plausible defence to misconduct. That will depend on the facts of the individual case. But in the instant case, there was not a strand of evidence that the first appellant was not complicit or was not at fault. The complaint of the respondent was against the partners of Blanche Kayveas & Co (see 100AR). In their joint explanation (see 163–166AR), the appellants were mum as to their roles. Instead, both the appellants admitted that 'we had inadvertently released the sum of RM195,199.94', and 'we have released the said monies to our client' (see 164AR). The disciplinary committee was also not told that the first appellant was not complicit. That the first appellant was not complicit was also not an issue at the disciplinary hearing. The only issues before the disciplinary hearing was that the purchaser's complaint had been settled, that consent judgment had been entered against them, that there was no dishonesty or fraud, and that the Bar Council's Conveyancing Practice Ruling of 1997 was not there in 1996 (see 178AR and 185AR). And the finding of the DC was that both the appellants were involved (see 185AR). That finding of joint complicity was not challenged in the intermediate appeals. Now given further that there was no evidence on 'no fault', we do not see how it could even be argued, let alone held, that the first appellant was not at fault.

[54] The result would still be the same, even if the first appellant had delegated all conduct of the business of Blanche Kayveas & Co to the second appellant. In *Cleather v Twisden* (1884) 28 Ch D 340 at p 350, where Bowen LJ said '… it is not enough for a principal to shew that he did

not know what his agent was doing, for he may have consented to leave the matter in his agent's hands'. Liability would still attach, as was illustrated in the following two cases. In the *Law Society of Singapore v Zulkifli bin Mohd Amin and another matter* [2011] 2 SLR 631, where disciplinary proceedings resulted from the

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misappropriation of clients' monies by Zulkifli in 2007. The Law Society brought a total of 211 charges against Zulkifli. Three charges were brought against the equity partner, Sadique, none of which imputed any personal dishonesty on the part of Sadique. The third charge was that Sadique had breached his duty by failing to adequately supervise the transactions involving the clients' account, such that unauthorized transactions were made from it. It was alleged that the breach amounted to misconduct unbefitting an advocate and solicitors within the meaning of s 83(2) of the Legal Profession Act (Cap 161, 2009 Rev Ed). For Sadique, it was argued that Zulkifli had forged the signatures of the co-signatories, and that Sadique could not have breached his duty as a co-signatory, as the documents were never placed before him in the first place. The Singapore Court of Appeal per Chan Sek Keong CJ, giving the grounds of decision of the court, rejected that argument:

> The very fact that Zulkifli was able to abscond with more than $11m showed that Sadique breached his duty as a co-signatory to supervise the client account. Sadique's cavalier attitude towards supervising the firm's accounts facilitated Zulkifli's crime. His argument that he had agreed with Zulkifli to divide responsibilities between themselves and was thus not liable for his failure to supervise the accounts as this task fell under Zulkifli's purview, was completely without merit. Equity partners have a special responsibility to safeguard clients' monies and not to abdicate such responsibility by delegating it to one or two partners, without any adequate system of periodic checks. On the facts of the present case, Sadique had abdicated such responsibility entirely to Zulkifli. Sadique failed to put in place an adequate system of periodic checks, as a result of which Zulkifli was able, over a comparatively short period of time, to commit a massive fraud. Sadique's blatant contravention of the SAR undoubtedly amounted to grossly improper conduct within the meaning of s 83(2)(b) of the Act.
>
> …
>
> Equity partners of law firms who leave the management of clients' monies entirely to one or two partners without any kind of checking mechanism must answer for their omission, if it facilitated the misappropriation of clients' monies by the other partner(s). In the present case, Sadique's dereliction of duty was a serious breach of professional responsibility as it facilitated the loss to more than 80 clients of a sum in excess of $11m. The loss cannot be fully compensated. As such, we were of the view that the most severe sanction had to be imposed on Sadique.

[55] And in *Keith Sellar v Lee Kwang Tennakoon v Lee Kwang* [1980] 2 MLJ 191, a complaint was made that money was paid to the chief clerk of the appellants' firm, which was not returned or accounted for. The appellants admitted that it was the practice of their firm that both chief clerk and cashier could receive moneys and issue valid and binding receipts on behalf of the firm. The disciplinary committee concluded that in so doing both the appellants were bound by the actions of the persons they so authorised.

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> Solicitors in the course of practising their profession continually receive moneys on behalf of clients which places them in a position of trust but the very foundation of such trust would be completely destroyed if a solicitor is able to absolve himself from liability to account for any such moneys by contending that although an official receipt was issued by him or his firm he is able to claim that no such moneys were received by him or his servants or employees and that no record of such moneys appears in his or his firm's books of account. The committee cannot and does not accept such a contention and would be derelict in its duty if it did so.

[56] In the appeal, which was dismissed, it was held by Hashim Yeop A Sani J, as he then was, delivering the judgment of the former Federal Court, that the appellants were guilty of misconduct in their practice as advocates and solicitors.

[57] A very straightforward case of grave misconduct was not answered by 'civil liability is not misconduct', 'no dishonesty', 'negligence' and 'no fault'. Settlement with the purchaser and withdrawal of the complaint by the purchaser was no defence (*Re Shan Rajagopal* [1994] 3 SLR 524). The consent judgment was also no bar to disciplinary action (*In re HA Grey* [1892] 2 QB 440 at p 443).

[58] Section 94(3) of the Acts provides:

> (3) For the purposes 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 —
>
> (a) conviction of a criminal offence which makes him unfit to be a member of his profession;
>
> (b) breach of duty to a court including any failure by him to comply with an undertaking given to a court;
>
> (c) dishonest or fraudulent conduct in the discharge of his duties;
>
> (d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise;
>
> (e) being adjudicated a bankrupt and being found guilty of any of the acts or omissions mentioned in paragraph 33(6) (a), (b), (c), (e), (f), (h), (k) or (l) of the Bankruptcy Act 1967;
>
> (f) the tendering or giving of any gratification to any person for having procured the employment in any legal business of himself or any other advocate and solicitor;
>
> (g) directly or indirectly procuring or attempting to procure the employment of himself or any other advocate and solicitor through or by the instruction of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given;

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> (h) accepting employment in any legal business through a tout;
>
> (i) allowing any unauthorized person to carry on legal business in his name without his direct and immediate control as principal or without proper supervision;
>
> (j) the carrying on by himself, directly or indirectly, of any profession, trade, business or calling which is incompatible with the legal profession or being employed for reward or otherwise in any such profession, trade, business or calling;
>
> (k) the breach of any provision of this Act or of any rules made thereunder or any direction or ruling of the Bar Council;
>
> (l) the disbarment, striking off, suspension or censure in his capacity as a legal practitioner in any other country or being guilty of conduct which would render him to be punished in any other country;
>
> (m) the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances;
>
> (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.

[59] 'There are no closed categories of professional misconduct' (*Au Kong Weng v Bar Committee, Pahang*, per Raja Azlan Shah CJ (Malaya), as HRH then was). And s 94(3), which provides that misconduct includes (a)–(o), not excludes, has kept other categories open (see

also *Law Society of Singapore v Arjan Chotrani Bisham* [2001] 1 SLR 684, where it was held by Yong Pung How CJ, delivering the judgment of the court, that s 83(2)(h) of the Singapore Legal Profession Act (Cap 161), which was the provision on misconduct unbefitting an advocate and solicitor, 'is a catch-all provision which can be invoked when the solicitor's conduct does not fall within any of the other grounds but is nevertheless unacceptable'). But really, in the instant case, there was no need for the DC to resort to categories (a)–(o). On the basis of all propounded in the foregoing on the subject, the breach of the undertaking and stakeholding by the appellants was clearly conducted in a professional capacity that amounted to grave impropriety. Undoubtedly, the appellants were guilty of misconduct within the meaning of s 94(3) of the Act.

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[60] For the aforesaid reasons, we unanimously dismiss this appeal. By consent there is no order as to costs.

Appeal dismissed.
Reported by Ashok Kumar