

**A Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o
Pennusamy & Ors (on their behalf and for the 213
sub-purchasers of plots of land known as PN35553, Lot 9108,
Mukim Hutan Melintang, Hilir Perak) and other appeals**

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-58–09
OF 2013 (A), 02(f)-59–09 OF 2013 (A), 02(f)-60–09 OF 2013 (A) AND
02(f)-61–09 OF 2013 (A)

C RICHARD MALANJUM CJ (SABAH AND SARAWAK), AHMAD
MAAROP, HASAN LAH, ZALEHA ZAHARI AND RAMLY ALI FCJJ
27 NOVEMBER 2014

D *Legal Profession — Duties — Client — Dispute over estate land — Allegation
that respondent had agreed to purchase land and had made deposit payments
— Solicitor bid for land under own name and succeeded — Claim that land was
his and transferred ownership into new company — Solicitor informed purchasers
that he was not their solicitor — Suggested purchasers to buy back their portions of
estate land — Solicitor-client relationship — Whether to be determined only by
reference to retainer — Whether fiduciary entitled to restitution — Whether
court entitled to lift corporate veil of company in order to do justice*

F This appeal involved a dispute between clients (‘the respondents’) and their
erstwhile solicitor, the first and second appellants. The subject matter was over
an estate land which the respondents claimed to have agreed to purchase and
had made some deposit payments. An auction was scheduled and the
purchasers became aware that the estate land was going to be put up for sale by
tender. The purchasers set up a pro-tem committee (‘the committee’) which in
G turn approached the second appellant through the first appellant in his capacity
as an advocate and solicitor. The first appellant was briefly informed of the
matter regarding the sale of the estate land. In view of the perceived urgency of
the matter, the first appellant applied for a registrar’s caveat to be entered on the
estate land. The first appellant also entered and assisted in the entry of private
H caveats on the estate land by a few of the purchasers. When the auction of the
estate land proceeded, the first appellant came to bid for it in his own name at
the price of RM4,000,000 and his bid was accepted. However, the sale could
not go through as an injunction was obtained to stop the sale. After the
injunction was set aside, once again the R&M called for the sale by tender of
I the estate land. SD7 and the first respondent together with some other
purchasers went to see the first appellant. Arising from that meeting the first
appellant went again to bid for the estate land for RM4,850,000. At request of
the first appellant, some of the purchasers paid the sum of RM276,450 being
their contributions towards the deposit payment for the auction bid. The first

appellant was later informed that his second bid was successful and he therefore invited the purchasers to buy their allotted shares or plots from him. During a meeting the first appellant for the first time told the purchasers that he was not their lawyer and that the estate land was his land. The genuine purchasers would have to buy back their portions of the estate land from the first appellant on the basis of the supposed balances due to SPPKB. He suggested to the purchasers that they purchased their allotted shares or plots from him and he drew up a proposed sale and purchase agreement to be entered by them with him. On hearing this, the purchasers were not too pleased. They alleged that to their understanding the first appellant was their solicitor when he made the bid for the estate land. Meanwhile, the first appellant proceeded to set up the fourth appellant with him, his wife and a friend as the directors. The first appellant then transferred the ownership of the estate land to the fourth appellant. As there was no agreement reached between the purchasers and the first appellant the respondents proceeded to file this case at the High Court which adjudged for the appellants. The Court of Appeal reversed the decision of the trial judge. The issues that arose were in the present appeal were whether the existence of, and scope of duties in, a solicitor-client relationship was to be determined only by reference to the retainer; whether a fiduciary was entitled to restitution of expenditure incurred in securing a benefit subsequently determined to be due and payable to persons whom the fiduciary owes duties; and whether a court was entitled to lift the corporate veil of a company in order to do justice despite it not being the pleaded or argued case of the claimants that the company concerned was used as an engine of fraud.

Held:

- (1) In an action against a solicitor by his or her erstwhile client the threshold issue is whether a solicitor-client relationship exists between the plaintiff-client and the defendant-solicitor. In the absence of such relationship the defendant-solicitor in his professional capacity owes no duty to the plaintiff-client. Where the evidence adduced including the words and conduct that transpired between a solicitor and a client determines that a solicitor-client relationship has come about, a retainer can then be said to exist, express or by implication. It is therefore not necessarily the existence of an express retainer that determines the existence of a solicitor-client relationship (see paras 35 & 40).
- (2) There was definitely a solicitor-client relationship between the first appellant and the purchasers including the respondents. The relationship was not limited for those purposes as mentioned by the first and second appellants. If indeed the first appellant wanted to limit the solicitor-client relationship he could have easily indicated it to the purchasers or to any of the members of the committee (see paras 47–48).

- A (3) The purchasers entrusted the first appellant to get their portions of the estate land for them. Instead, the first appellant took advantage of his position as a fiduciary and having obtained the whole estate land, he transferred it to his company, the fourth appellant. The first appellant was in breach of his fiduciary duty. In so doing he had unjustly enriched himself. Hence, the first appellant must account for the profit and other advantages he acquired while acting in breach of his fiduciary obligations towards the purchasers (see para 77).
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- C (4) It would be unconscionable to allow the first appellant to keep the profit and other advantages he made as a result of his acquisition of the estate land. However, it would be inequitable for the purchasers to take the whole of the estate land and/or profit without incurring expenses to obtain them. The first appellant obtained the whole estate land, including the portions identified to be the plots or as represented in the form of shares to which the purchasers laid their claims to be beneficially entitled. Since not all the purchasers were parties in this case only the plots and shares claimed by the respondents were therefore relevant in this judgment. The estate land cannot be subdivided to enable separate titles to be given as the respondents' shares (see paras 77–78).
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- E (5) The first appellant must pay to the respondents damages to be assessed. When doing the assessment, the value of the respondents' shares must be taken into account. Indeed the respondents would have acquired their shares if not for the act of 'disloyalty or infidelity' on the part of the first appellant. Further to be taken into account when assessing the damages were the profits flowing from the sale of the estate land. However, the expenditure incurred by the first appellant had to be deducted from the assessed damages and profits. To ascertain the damages and profits payable to the respondents, an enquiry or assessment would have to be conducted by a High Court judge preferably stationed in the High Court (see paras 79–80).
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- G (6) Evidence relating to the issue of whether the third appellant and SPPKB were one and same entity and whether the first appellant was the alter ego of the fourth appellant had been given without any objection from the appellants. It could not be said that such evidence had departed radically from their pleaded case. Such evidence, had cured the absence of a specific plea of the aforementioned parties being one and same entities in the respondents' statement of claim. The trial judge should not have dismissed the issue on account of it being not pleaded (see paras 92 & 94).
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[Bahasa Malaysia summary

Rayuan ini melibatkan pertikaian antara anak guam ('responden-responden') dan bekas peguamcara mereka, perayu-perayu pertama dan kedua. Hal perkara

adalah berkenaan tanah estet yang mana responden-responden mendakwa telah bersetuju untuk membeli dan telah membuat bayaran deposit. Satu lelongan telah dijadualkan dan pembeli-pembeli mendapat tahu bahawa tanah estet itu akan dijual melalui tender. Pembeli-pembeli telah menubuhkan jawatankuasa sementara ('jawatankuasa itu') yang telah menghubungi perayu kedua melalui perayu pertama dalam kapasitinya sebagai peguambela dan peguamcara. Perayu pertama secara ringkas telah diberitahu tentang perkara berkaitan jualan tanah estet itu. Berdasarkan tanggapan kesegeraan perkara itu, perayu pertama telah memohon untuk kaveat pendaftar dimasukkan ke atas tanah estet tersebut. Perayu pertama juga telah memasuki dan membantu dalam kemasukan kaveat-kaveat persendirian ke atas tanah estet itu oleh beberapa pembeli. Apabila lelongan tanah estet itu dijalankan, perayu pertama telah membuat bidaan untuknya atas namanya sendiri pada harga RM4,000,000 dan bidaannya telah diterima. Walau bagaimanapun, jualan itu tidak berjaya kerana injunksi telah diperolehi untuk menghalang jualan itu. Selepas injunksi itu diketepikan, penerima dan pengurus telah dipanggil sekali lagi untuk jualan melalui tender tanah estet. SD7 dan responden pertama bersama dengan beberapa pembeli lain telah pergi berjumpa perayu pertama. Berdasarkan mesyuarat tersebut perayu pertama telah pergi sekali lagi untuk membuat bidaan ke atas tanah estet itu untuk RM4,850,000. Atas permintaan perayu pertama, beberapa pembeli telah membayar jumlah RM276,450 sebagai sumbangan mereka terhadap bayaran deposit untuk bidaan lelongan itu. Perayu pertama kemudian telah memberitahu bahawa bidaan keduanya telah berjaya dan oleh itu dia telah menjemput pembeli-pembeli itu untuk membeli saham atau plot mereka yang diperuntukkan daripadanya. Dalam satu mesyuarat perayu pertama untuk kali pertama telah memberitahu pembeli-pembeli bahawa dia bukan peguam mereka dan bahawa tanah estet itu adalah tanahnya. Pembeli-pembeli sebenar perlu membeli balik bahagian tanah estet mereka daripada perayu pertama berdasarkan baki yang sepatutnya kena dibayar kepada SPPKB. Dia mencadangkan kepada pembeli-pembeli bahawa mereka telah membeli saham atau plot mereka yang diperuntukkan daripadanya dan dia telah membuat perjanjian jual beli yang dicadangkan untuk dimasuki oleh mereka bersama dengannya. Setelah mendengar ini, pembeli-pembeli tidak begitu gembira. Mereka mendakwa bahawa berdasarkan pemahaman mereka perayu pertama adalah peguamcara mereka apabila dia membuat bidaan untuk tanah estet itu. Sementara itu, perayu pertama telah meneruskan dengan menyediakan perayu keempat bersama dengannya, isterinya dan seorang kawan sebagai pengarah-pengarah. Perayu pertama kemudian telah memindah pemilikan tanah estet itu kepada perayu keempat. Oleh kerana tiada perjanjian yang tercapai antara pembeli-pembeli dan perayu pertama maka responden-responden telah meneruskan dengan pemfailan kes ini di Mahkamah Tinggi yang membuat keputusan berpihak kepada perayu-perayu. Mahkamah Rayuan telah mengakas keputusan hakim perbicaraan. Isu-isu yang timbul dalam rayuan ini adalah sama ada kewujudan, dan skop kewajipan dalam hubungan peguamcara-anak guam perlu

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- A ditentukan hanya melalui rujukan kepada retainer; sama ada fidusiari berhak untuk restitusi perbelanjaan yang ditanggung dalam mendapat manfaat yang kemudiannya ditentukan adalah terhutang dan kena dibayar kepada orang yang mana fidusiari itu mempunyai kewajipan; dan sama ada mahkamah berhak mengangkat tabir korporat syarikat bagi tujuan melaksanakan keadilan
- B meskipun ia bukan kes yang dipli atau dihujah oleh penuntut-penuntut bahawa syarikat berkenaan telah digunakan sebagai jentera penipuan.

Diputuskan:

- C (1) Dalam tindakan terhadap peguamcara oleh anak guam atau bekas anak guamnya isu utama adalah sama ada hubungan peguamcara-anak guam wujud antara plaintif-anak guam dan defendan-peguam. Tanpa kewujudan hubungan sebegini defendan-peguam dalam kapasiti profesionalnya tidak mempunyai kewajipan kepada plaintif-anak guam.
- D Di mana keterangan dikemukakan termasuk perkataan-perkataan dan perlakuan yang berlaku antara peguamcara dan anak guam menentukan bahawa hubungan peguamcara-anak guam wujud, retainer bolehlah dikatakan wujud, jelas atau tersirat. Oleh itu adalah tidak perlu kewujudan retainer nyata yang menentukan kewujudan hubungan peguamcara-anak guam (lihat perenggan 35 & 40).
- E (2) Adalah pasti terdapat hubungan peguamcara-anak guam antara perayu pertama dan pembeli-pembeli termasuk responden-responden. Hubungan itu tidak terhad bagi tujuan yang dinyatakan oleh perayu-perayu pertama dan kedua. Jika sememangnya perayu pertama ingin menghadkan hubungan peguamcara-anak guam dia boleh dengan mudah menunjukkannya kepada pembeli atau kepada mana-mana anggota jawatankuasa (lihat perenggan 47–48).
- F (3) Pembeli-pembeli telah mengamanahkan perayu pertama untuk memperolehi bahagian tanah estet mereka untuk mereka. Sebaliknya, perayu pertama mengambil peluang daripada kedudukannya sebagai fidusiari dan setelah memperolehi keseluruhan tanah estet, dia telah memindahkannya kepada syarikatnya, perayu keempat. Perayu pertama telah melanggar kewajipan fidusiarinya. Dengan berbuat demikian dia secara tidak adil telah mengayakan dirinya. Oleh itu, perayu pertama perlu mengambil kira keuntungan dan kelebihan lain yang diperolehi semasa bertindak dalam pelanggaran kewajipan fidusiarinya terhadap pembeli (lihat perenggan 77).
- G (4) Adalah tidak berpatutan untuk membenarkan perayu pertama menyimpan keuntungan dan lain-lain kelebihan yang diperolehi olehnya hasil daripada pengambilalihannya ke atas tanah estet itu. Walau bagaimanapun, adalah tidak saksama untuk pembeli-pembeli mengambil keseluruhan tanah estet itu dan/atau keuntungan tanpa menanggung perbelanjaan untuk memperolehinya. Perayu pertama
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memperolehi keseluruhan tanah estet, termasuk bahagian yang dikenal pasti sebagai plot-plot atau sebagaimana dinyatakan dalam borang saham di mana pembeli-pembeli telah meletakkan tuntutan mereka yang berhak diperolehi secara benefisial. Oleh kerana bukan semua pembeli-pembeli adalah pihak-pihak dalam kes ini hanya plot-plot dan saham-saham yang dituntut oleh responden-responden dengan itu adalah relevan dalam penghakiman ini. Tanah estet itu tidak boleh dipecah bahagikan bagi membolehkan hak milik berasingan diberikan sebagai syer responden-responden (lihat perenggan 77–78).

- (5) Perayu pertama perlu membayar responden-responden ganti rugi yang ditaksirkan. Apabila membuat taksiran, nilai saham responden-responden hendaklah diambil kira. Sememangnya responden-responden akan memperolehi saham mereka jika bukan kerana tindakan ‘disloyalty or infidelity’ di pihak perayu pertama. Selanjutnya apa yang perlu diambil kira apabila menaksir ganti rugi adalah keuntungan yang mengalir daripada jualan tanah estet itu. Walau bagaimanapun, perbelanjaan yang ditanggung oleh perayu pertama hendaklah dipotong daripada ganti rugi dan keuntungan yang ditaksirkan. Untuk memastikan ganti rugi dan keuntungan yang perlu dibayar kepada responden-responden, satu siasatan atau taksiran perlu dilakukan oleh hakim Mahkamah Tinggi yang sebaik-baiknya bertempat di Mahkamah Tinggi (lihat perenggan 79–80).
- (6) Keterangan berkaitan isu sama ada perayu ketiga dan SPPKB adalah entiti yang satu dan sama ada perayu pertama adalah alter ego perayu keempat telah diberikan tanpa apa-apa bantahan daripada perayu-perayu. Tidak boleh dikatakan bahawa keterangan tersebut berbeza daripada kes yang dipli oleh mereka. Keterangan tersebut telah memulihkan ketiadaan pli spesifik pihak-pihak yang dinyatakan sebagai entiti yang satu dan sama dalam pernyataan tuntutan responden-responden. Hakim perbicaraan tidak patut menolak isu tersebut disebabkan ia tidak dipli (lihat perenggan 92 & 94).]

Notes

For cases on client, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1521–1523.

Cases referred to

- Adams v Cape Industries plc* [1990] Ch 433, Ch D (refd)
Boardman v Phipps [1966] 3 WLR 1009, HL (refd)
Boardman v Phipps [1967] 2 AC 46, HL (refd)
Breen v Williams (1996) 186 CLR 71, HC (refd)
Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)
Cawdery Kaye Fireman & Taylor v Minkin [2012] EWCA Civ 546, CA (refd)
Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196, FC (refd)

- A** *Fladgate LLP v Harrison* [2012] EWHC 67, QBD (refd)
French v Carter Lemon Camerons LLP [2012] EWCA Civ 1180, CA (refd)
Galambos and Another v Perez 2009 SCC 48, SC (refd)
Gilford Motor Co Ltd v Horne and another [1933] Ch 935, CA (refd)
Guinness Plc v Saunders [1990] 2 AC 663, HL (refd)
- B** *Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149, FC (refd)
Hilton v Barker Booth and Eastwood (a firm) [2005] UKHL 8, HL (refd)
Hospital Products Limited v US Surgical Corporation (1984) 58 ALJR 587, HC (refd)
- C** *Hotel Jaya Puri Bhd v National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109 (refd)
Jones v Lipman [1962] 1 WLR 832, Ch D (refd)
Lac Minerals Ltd v International Corona Resources Ltd [1989] 2 SCR 574, SC (refd)
- D** *Law Kam Loy & Anor v Boltex Sdn Bhd and others* [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)
Lie Hendri Rusli v Wong Tan & Molly Lim (a firm) [2004] 4 SLR 594, HC (refd)
- E** *Longstaff v Birtless* [2002] 1 WLR 470, CA (refd)
Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd [2014] 2 MLJ 518, CA (refd)
O'Sullivan v Management Agency and Music Ltd [1985] QB 428, CA (refd)
Phipps v Boardman [1964] 1 WLR 993, Ch D (refd)
- F** *Phipps v Boardman* [1965] 2 WLR 839, CA (refd)
Prest v Petrodel Resources Limited and others [2013] UKSC 34, SC (refd)
Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim [2007] 2 SLR 655, HC (refd)
Richard Buxton (a firm) v Mills-Owen [2010] EWCA Civ 122 (refd)
- G** *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd* [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
Spector v Ageda [1973] Ch 30, Ch D (refd)
Stephenson Nominees Pty Ltd v Official Receiver (on behalf of Official Trustee in Bankruptcy; Ex parte Roberts and another) (1987) 76 ALR 485, FC (refd)
- H** *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533, FC (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 CLJ 567, SC (refd)
- I** *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751, FC (refd)
Togstad v Vesely, Otto, Miller & Keefe and Jerre Miller 291 NW2d 686, SC (refd)
Underwood, Son and Piper v Lewis [1894] 2 QB 306, CA (refd)
Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir

- Perak) v Gurbachan Singh s/o Bagawan Singh & Ors* [2010] 5 MLJ 437, CA (refd) **A**
- Vellasamy s/o Pennusamy & Ors v Gurbachan Singh s/o Bagawan Singh & Ors* [2006] 2 MLJ 715, HC (refd)
- Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330, SC (refd) **B**
- Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39, FC (refd)

Legislation referred to

- Contracts Act 1950 s 24 **C**
- Courts of Judicature Act 1964 s 96(1)
- National Land Code s 214A
- Rules of the Federal Court 1995 r 137
- Stamp Act 1949 s 52(1) **D**

Appeal from: Civil Appeal No A-02–91 of 2006 (Court of Appeal, Putrajaya)

- Malik Imtiaz Sarwar (Harpal Singh Grewal, Chan Wei June and Pavendeep Singh with him) (Bachan & Kartar) for the first and second appellants.*
- Leong Kok Keong (Kean Chye & Sivalingam) for the third appellant.* **E**
- Loh Siew Cheang (Brian Foong Mun Loong, Eolanda Yeoh and Verene Tan Yeen Yi with him) (Cheang & Ariff) for the fourth appellant.*
- Ling Hua Keong (Mohamed Khairil bin Abidin with him) (Ling & Mok) for the fifth appellant.*
- Cecil Abraham (DP Vijandran, T Kumar, Amrit Gill, S Ambiga and Ragunath Kesavan with him) (DP Vijandran & Assoc) for the respondents.* **F**

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION **G**

[1] This case has a checkered history. It first came before this court for leave to appeal pursuant to s 96(1) of the Courts of Judicature Act 1964 ('the Act'). It was refused. The appellants applied for a review under r 137 of the Rules of the Federal Court 1995. Despite being sparingly exercised this court ruled 'that this is another rare but an appropriate case for the exercise of the inherent power of this court as envisaged in r 137' (see *Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149). **H**

[2] Upon re-hearing of the leave application this court granted leave and allowed five leave questions for consideration ('the leave questions'). They are as follows: **I**

- A** Question 1: Whether the existence of, and scope of duties in, a solicitor-client relationship is to be determined only by reference to the retainer;
- Question 2: Whether a fiduciary is entitled to restitution of expenditure incurred in securing a benefit subsequently determined to be due and payable to persons whom the fiduciary owes duties;
- B** Question 3: Whether a Court is entitled to lift the corporate veil of a company in order to do justice despite it not being the pleaded or argued case of the claimants that the company concerned was used as an engine of fraud;
- Question 4: Whether a trust could be imposed to allow the Respondents to acquire equitable interests in the land prior to receivership when the Respondents acknowledge that their claim is limited to only a portion of the total 3681 acres of undivided interest in the land; and
- C** Question 5: Whether claimed beneficial interest in fragmented portions of Estate Land contingent upon obtaining approval from the estate land board under Section 214A of the National Land Code 1965 and/or the consent of transfer from the Menteri Besar entitles the Court to declare beneficial interest for the purpose of an immediate equitable remedy.
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[3] The leave questions may be categorised into two parts. Questions 1–2 deal with the relationship between the first and second appellants and the respondents. Questions 3–5 deal with the claims of the respondents on the estate land. In our view Questions 1–2 may be determined on their own merits. They are not dependent on the determination of Questions 3–5. Nevertheless the status of the estate land at all material times may be relevant in the assessment of damages should liability be found against the first and second appellants after considering Questions 1–2.

[4] In this judgment, unless stated otherwise, any reference to purchasers includes the respondents but not vice versa.

[5] This case involves a dispute between clients, the respondents and their erstwhile solicitor, the first appellant and his firm, the second appellant. The other three appellants may be conveniently described as incidentals to the dispute. The subject matter was over an estate land which the respondents claimed to have agreed to purchase and had made some deposit payments.

[6] In their action filed in July 1994 the respondents prayed for the following relief as summarised by the learned trial judge:

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- (a) that D1 (the first appellant) and D2 (the second appellant) were at all material times the solicitors acting for the plaintiffs (the respondents) with a fiduciary duty in all the benefits and interests held by them to the plaintiffs in the purchase of the said land (the estate land) by way of tender;
 - (b) that D1 held the said land which D1 purchased from the R&M, in trust for the plaintiffs;

- (c) that the four named plaintiffs or other fit and proper persons be now declared as new trustees in place of D1 and that the R&M make rectifications to the agreement dated 30 April 1994 (between the R&M and D1) to include the new trustees appointed by this court; A
- (d) to declare certain sale and purchase agreements between D1 and some sub-purchasers as null and void and that D1 and D2 refund with 8%pa interest, all monies paid under those agreements or alternatively rescission of those agreements; B
- (e) that the transfer of the said land to D4 (the fourth appellant) be declared invalid, null and void; C
- (f) that the said land be held under trust for the plaintiffs on terms determined by this court;
- (g) that the plaintiffs be declared as either the lawful or beneficial owners according to the plots they held under their agreements with SPPKB; and D
- (h) That there be an inquiry and accounts taken in respect of the usage and profits of the said land by D1 and/or D4, and that such profits be paid to the plaintiffs.

BACKGROUND FACTS E

[7] The facts and the chronology of events including the relevant documentary evidence in this case have already been succinctly elaborated, analysed and reproduced in the judgments of the trial High Court (see *Vellasamy s/o Pennusamy & Ors v Gurbachan Singh s/o Bagawan Singh & Ors* [2006] 2 MLJ 715) and the Court of Appeal (see *Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) v Gurbachan Singh s/o Bagawan Singh & Ors* [2010] 5 MLJ 437). We need not regurgitate them in this judgment. Suffice it if we only highlight the pertinent facts and circumstances. F

[8] Nam Bee Rubber Estate Sdn Bhd ('Nam Bee') was the registered proprietor of a large parcel of land measuring 3,681.165 acres (about 1,490 hectares) known as PN 35553 Lot 9108, Mukim Hutan Melintang, Hilir Perak ('the estate land'). Since it was a rubber estate land s 214A of the National Land Code ('the NLC') was applicable to it. G

[9] In December 1979 a company, Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB') proposed to buy the estate land. The agreed sale price was RM3,204,080 (subsequently it was agreed at RM3,520,000 as seen in 'P41'). It paid a deposit of RM51,000 to Tan Ann Loong ('Tan') a Director of Nam Bee (the receipt of payment 'P38'). H

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- A** [10] Upon inquiry with the Land Office SPPKB found out that the estate land could not be transferred to it. SPPKB and Nam Bee did not have common directors. Meanwhile, on 18 December 1981 Tan signed a declaration of trust ('P40') that bound and declared him as a trustee for all the monies paid by SPPKB to acquire the estate land. At that point in time SPPKB had already
- B** paid a sum of RM1,161,224 to Nam Bee towards the purchase price. However no evidence was adduced to show that SPPKB had paid the balance of the purchase price to Nam Bee. In any event SPPKB was never registered as the owner of the estate land.
- C** [11] Subsequently, Nam Bee incorporated Simpang Empat Plantation Sdn Bhd ('SEP'), the third appellant, with its initial directors common with Nam Bee's. The estate land was thus transferred to SEP on or about 29
- D** October 1984. The directors of SEP were then replaced with the directors of SPPKB. Mr Renganathan ('SP8') assumed the position as the managing director of SEP.
- [12] From 1979–1984 SPPKB entered into separate agreements ('SPPKB agreements') with different purchasers including the respondents purportedly
- E** to sell either in the form of shares or plots in the estate land at a purchase price ranging from RM3,500 to RM5,000 per acre. In order to meet the obligations under the SPPKB agreements the estate land was supposed to be subdivided. In respect of the sale of shares, each share was pegged to the size of three acres in
- F** the estate land.
- [13] Under the SPPKB agreements, SPPKB as the vendor agreed to develop the infrastructure and to develop and manage the estate land into a palm oil
- G** estate within 48 months with the purchasers sharing in the produce based on their respective shares or plots. On their part, the purchasers were required to pay the deposits for their purchase prices and that the balance sums would have to be settled within 48 months partly in cash and partly in kind, namely, by deducting 60% of 'the sale of produce harvested each time'.
- H** [14] Of the many purchasers involved in the SPPKB agreements only 217 are listed as the respondents in this case. Neither Nam Bee nor SEP were parties to the SPPKB agreements. Further, the purchasers only bought a total of about 3,000 acres of the estate land. The balance remained with SEP.
- I** [15] To raise funds SEP borrowed from Maybank a sum RM500,000 in 1985 and an overdraft facility of RM500,000. However, it was still not sufficient. In December 1990 SEP borrowed from MBF Finance ('the fifth appellant') a sum of RM2,500,000 to enable the rehabilitation of the estate land and to repay the loan with Maybank. In order to secure the new loan a

charge and a debenture were created by SEP in favour of the fifth appellant without the knowledge of the purchasers. A

[16] Unfortunately, SEP defaulted in the repayment of the loan with the fifth appellant. As a result the fifth appellant, in the exercise of its rights under the debenture appointed Messrs Ernst & Young as the R&M to manage the affairs of SEP with Dato' Robert Lim ('SD12') as the person in charge. SD12 then appointed Suppiah ('SP13') to assist him. The R&M found out that SEP had no business activities and thus had no income to pay its debt which was by then about RM3,800,000 or RM3,900,000. B
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[17] Furthermore, SP13 reported to SD12 that there were a few squatters on the estate land. SD12 decided to sell the estate land by way of auction pursuant to the powers under the debenture. A notice to that effect was published in the newspapers. The auction was scheduled on 8 September 1992. D

[18] In August 1992 the purchasers became aware that the estate land was going to be put up for sale by tender. They also knew that an R&M had been appointed. In order to address their predicament the purchasers set up a pro-tem committee ('the committee'). The committee approached the second appellant through the first appellant in his capacity as an advocate and solicitor. The first appellant contacted SP13 and was briefly informed of the matter regarding the sale of the estate land. SP13 assured the first appellant that he would obtain the necessary documents on the same and revert to him. E
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[19] In view of the perceived urgency of the matter, the first appellant applied for a registrar's caveat to be entered on the estate land. The registrar's caveat was entered on 28 August 1992. The first appellant also entered and assisted in the entry of private caveats on the estate land by a few of the purchasers. SP13 subsequently reverted to the first appellant. It became apparent to the first appellant that the sale by tender scheduled for 8 September 1992 could not be stopped and he duly informed the committee. G

[20] On 30 August 1992 the first appellant was invited to attend a meeting at Simpang Empat in the office of SP8 by Tan Tang Seong ('SD7') a member of the committee. During that meeting the first appellant met SP8 and inquired about the auction. SP8 assured the first appellant and those present that the sale would not go on as he had procured the necessary funds to pay the fifth appellant. SP8 showed the first appellant and those present a cheque drawn in favour of the fifth appellant for the amount of RM3,500,000. On the request of the first appellant SP8 issued a letter drafted by the first appellant that SEP would recognise the SPPKB agreements. The first appellant also told the purchasers not to worry and that the sale would not go on. H
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A [21] Shortly before the auction was to take place it became clear to the purchasers that SP8 had failed to settle the outstanding loan of the third appellant with the fifth appellant and that the sale of the estate land would therefore go on as scheduled. The committee again approached the first appellant and informed him of what they had learnt.

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C [22] On 8 September 1992 the auction of the estate land proceeded. The first appellant came to bid for it in his own name at the price of RM4,000,000. His bid was accepted. The 10% deposit amounting to RM400,000 was duly paid by the first appellant with the assistance from his friends. However, the sale could not go through as an injunction was obtained by SEP through SP8 to stop the sale. The deposit paid was therefore refunded to the first appellant. On 23 December 1993 the injunction was set aside. Once again the R&M called for the sale by tender of the estate land.

D [23] On 30 January 1994 SD7 and the first respondent together with some other purchasers went to see the first appellant. Arising from that meeting the first appellant went again to bid for the estate land for RM4,850,000. It was not in dispute that at request of the first appellant some of the purchasers paid the sum of RM276,450 being their contributions towards the deposit payment for the auction bid.

E [24] On 7 March 1994 the first appellant was informed that his second bid was successful.

F [25] On 17 March 1994 the first appellant wrote to all the purchasers (listed in P42) informing them of the successful bid. The first appellant therefore invited the purchasers to buy their allotted shares or plots from him.

G [26] The first appellant held meetings with the purchasers on the 2–3 April 1994 (as recorded in D78 and D80 respectively). During the 3 April meeting the first appellant for the first time told the purchasers that he was not their lawyer and that the estate land was his land. The genuine purchasers would have to buy back their portions of the estate land from the first appellant on the basis of the supposed balances due to SPPKB. He suggested to the purchasers that they purchased their allotted shares or plots from him and he drew up a proposed sale and purchase agreement to be entered by them with him. On hearing this, the purchasers were not too pleased. They alleged that to their understanding the first appellant was their solicitor when he made the bid for the estate land.

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I [27] Meanwhile, the first appellant proceeded to set up the fourth appellant with him, his wife and a friend by the name of Manjeet as the directors. The first appellant then transferred the ownership of the estate land to the fourth

appellant on 15 October 1994. The first appellant had since transferred his shares in the fourth appellant to two companies, namely, Lien Hoe Xing Sdn Bhd and Jugra Palm Oil Mill Sdn Bhd.

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[28] As there was no agreement reached between the purchasers and the first appellant the respondents proceeded to file this case at the Ipoh High Court.

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IN THE HIGH COURT

[29] After a full trial the learned High Court trial judge adjudged for the appellants. The learned trial judge held, inter alia,:

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- (a) that the claim of SPPKB and the purchasers were based on P38 and P40 but since there was no evidence that the balance of the purchase price was ever paid to complete the sale cl 4 of P40 came into effect thus terminating the whole proposed sale of the estate land to SPPKB;
- (b) that in any event the SPPKB agreements were void being unlawful under s 24 of the Contracts Act 1950 in view of s 214A of the NLC and the requirement of consent from the *Menteri Besar*. Further, being an estate land approval from the estate land board was also required for such transaction. Accordingly SPPKB never had any title to the estate land, legal or beneficial;
- (c) that there was also no evidence whether Tan the Director of Nam Bee, was acting personally or on behalf of Nam Bee when he executed the trust deed (D40). Although D40 made reference to the money being held on trust until a further proper agreement was made, there was no such agreement tendered in court;
- (d) that there was no basis to lift the corporate veil of the third appellant in order to show that SEP was merely a vehicle to transfer the estate land from Nam Bee;
- (e) that in this case the sale of the estate land was a force sale and thus the consent of the *Menteri Besar* was not required for the transfer to the fourth appellant;
- (f) that P45 (the agreement between Nam Bee and SPPKB) was not stamped as required under s 52(1) of the Stamp Act 1949 and thus it was inadmissible. Further, even if admitted little weight should be given to it since it was produced by surprise during the re-examination of SP8. Moreover, P45 did not have the signatories and common seal of Nam Bee. Hence the plaintiffs (the respondents) could not be said to have acquired the equitable or beneficial interests in the estate land;
- (g) that even for the first auction the committee set up by the purchasers did not appoint the first appellant as their solicitor. There was no warrant to

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- A** act produced or that fees were paid to the first appellant. The court accepted the denial by the first appellant that he had ever told the purchasers during the meeting in August 1992 at PW8's office that he was their lawyer and that he would do anything to stop the auction;
- B** (h) that the documentary evidence (D71 and D72A) and the evidence of SD12 indicated that the first appellant made the bid for the estate land in his own capacity;
- (i) that the evidence of SP14 who was not even a member of the committee could not be relied upon due to discrepancies with the other evidence, including the documentary evidence available;
- C** (j) that SD7 Tan Tang Seong, a member of the committee, testified that during the meeting on 30 August 1992 the first appellant never represented himself as the lawyer for the purchasers;
- D** (k) that after the successful second bid only 43 of the purchasers entered into the fresh sale agreements with the first appellant and were willing to pay the balance of the purchase prices for their plots or shares in the estate land;
- E** (l) that the first appellant only acted for the purchasers to enter caveats on the estate land. Thereafter his fiduciary relationship with the purchasers ceased;
- (m) that whilst it could be shown that the first appellant had acted as the lawyer for the purchasers as shown from the several letters written by him as well as some documents such as D69, D70, D111 and D128, at best it was a limited retainer;
- F** (n) that the first appellant did not act for the plaintiffs (the respondents) when he made his second bid for the estate land. As such he was not a trustee for the plaintiffs (the respondents);
- G** (o) that the fourth appellant was not the alter ego of the first appellant;
- (p) that the fourth appellant was a bona fide purchaser for the following reasons:
- H** (i) the issue was not pleaded by the plaintiffs (the respondents);
- (ii) the fourth appellant did not have notice of the beneficial interest of the plaintiffs (the respondents) in the estate land;
- I** (iii) the first appellant bought the estate land by way of personal bid in a valid and proper public auction called by the R&M of the third appellant;
- (iv) the evidence of SD14 was accepted when he testified that the fourth appellant bought the estate land from the first appellant

- notwithstanding that he was informed earlier about the 43 purchasers who acquired 360 acres of the estate land; and **A**
- (v) it was never shown that the fourth appellant had knowledge of any beneficial interests of the plaintiffs (the respondents) in the estate land, **B**
- (q) that the allegation of the fifth appellant having the 'actual knowledge of the presence of the sub-purchasers on the said land was mere conjecture, not founded on any factual basis.' As such, the fifth appellant 'did not have any notice of the plaintiffs' alleged beneficial interest even if it had been proven that they had such an interest in the said land. **C**

IN THE COURT OF APPEAL

[30] The Court of Appeal was split in its decision with the majority ('the majority') in favour of the respondents. It reversed the decision of the learned trial judge and granted the declarations prayed for by the respondents. The court also awarded RM50,000 costs to the respondents and ordered for an account and inquiry to be held on to the use of the estate land by the first and/or the fourth appellants, the profits thereby derived and such profits to be paid to the respondents. **D**
E

[31] The majority found, inter alia:

- (a) that the transfer of the ownership of the estate land to the third appellant was legitimately done to enable SPPKB to own it; **F**
- (b) that D14 showed that the third appellant took the estate land subject to the beneficial rights of the purchasers. D14 was drafted by the first appellant and signed by SP8;
- (c) that being mostly illiterate the purchasers did not know the transfer of the estate land to the third appellant. The purchasers were also not informed of the loan taken by the third appellant from the fifth appellant and the consequences of the default by the third appellant; **G**
- (d) that it could not be said that the fifth appellant was a bona fide purchaser for value without notice. The fifth appellant had prior knowledge of the existence of the purchasers before the loan to the third appellant was approved. This was apparent from the evidence of SD17 the credit manager of the fifth appellant; **H**
- (e) that the purchasers after knowing of the pending auction formed the committee to meet SD12. Upon being advised by SD12 to bid in the auction the committee approached the first appellant to be their solicitor on the matter; **I**
- (f) that the first appellant after being consulted as a solicitor by the

- A** purchasers came to know of the pending auction of the estate land. He then proceeded to gather information from the purchasers and those associated with the auction and thereafter utilised such information for his own benefit;
- B** (g) that there was definitely a solicitor-client relationship between the first appellant and the purchasers for the following reasons:
- (i) the first appellant never denied that he acted as the solicitor for the purchasers albeit with some reservation;
- C** (ii) the representations and conduct including the many letters written by the first appellant and by others to the first appellant all categorically established a solicitor-client relationship. For instance, he was consulted as a lawyer, he attended the meeting at Simpang Empat and negotiated with SP8 on behalf of the purchasers and that he communicated with SP8 who in turn was made to believe that the first appellant was representing the purchasers; and
- D**
- (iii) the committee consulted the first appellant as a lawyer,
- E** (h) that the first appellant had a fiduciary duty towards the purchasers;
- (i) that the title to the estate land remained with the third appellant because the auction was conducted by R&M based on their power under the debenture that is not recognised under the NLC. A chargor cannot confer any power of sale to the chargee by way of a debenture as in this case. As such the rights of the purchasers must be held to be valid and subsisting as against the third appellant and all those who took the title from it;
- F**
- G** (j) that the sale to the first appellant did not extinguish the equitable rights of the purchasers;
- (k) that the transfer of the estate land to the fourth appellant did not extinguish the equity of the purchasers because the fourth appellant through the first appellant had full knowledge of the equitable rights of the purchasers on the estate land. The fourth appellant was the alter ego of the first appellant. Thus, it justified the lifting of the corporate veil of the fourth appellant;
- H**
- (l) that the prior equitable rights of the purchasers emanating from their contractual agreements with SPPKB must prevail over all subsequent dealings in the estate land;
- I**
- (m) that the third appellant was a constructive trustee for SPPKB and the purchasers. There were therefore compelling reasons to lift its corporate veil;

- (n) that s 214A of the NLC does not prohibit the making of contractual agreement of sale. The consent from the estate land board is only needed when the individual buyer wants his or her name to be registered in the title; and **A**
- (o) that at any rate the SPPKB agreements did not provide for subdivision. The purchasers became owners of plots that were not subdivided or what is commonly known as a 'ground partition'. In such situation s 214A of the NLC would not be applicable. The appellants' reliance on the provision was therefore totally misconceived. **B**

[32] The minority judgment ('the minority') found in favour of the appellants and upheld the decision of the High Court. **C**

BEFORE THIS COURT **D**

Question 1: Whether the existence of, and scope of duties in, a solicitor-client relationship is to be determined only by reference to the retainer

- [33]** In respect of Question 1 it was contended by learned counsel for the first appellant: **E**
- (a) that the solicitor-client relationship between the first appellant and the purchasers was a limited retainer because: **F**
- (i) 'the retainer of a solicitor was to be determined by reference to the circumstances of the particular case and not by the application of any presumption. This is particularly so where fiduciary duties are concerned'. Yet the majority went on to determine the contractual scope of the retainer prior to the majority defining the scope of fiduciary duties; **G**
- (ii) the majority had therefore erroneously relied on the perceived fiduciary duties to enlarge the scope of the retainer. In doing so, the majority failed to sufficiently appreciate the significance of the learned trial judge having found as a matter of fact that at the time of the first and second bids by the first appellant there was no solicitor-client relationship; **H**
- (iii) in coming to his conclusion the learned trial judge depended on his finding that SP8 was not a witness of truth; **I**
- (iv) the majority however erroneously relied on SP8's version of events without addressing the specific finding of fact as to his credibility. An appellate court is less ready to interfere with a trial judge's finding of fact that depends on the credibility of a witness; and
- (v) the majority further appeared to have overlooked the significance of the

- A contemporaneous documentary evidence, in particular D71, D72A, D78 and D80,
- (b) that ‘not every breach of duty by a fiduciary is a breach of a fiduciary duty’ (per Millet LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1). The majority therefore:
- B (i) failed to sufficiently appreciate that there is no general rule that a solicitor should never act where a conflict of interest arises. As to what is informed consent in any given circumstances, it is crucial to determine precisely what services were required of the solicitor in addition to what had been agreed to; and
- C (ii) failed to consider that not all information derived from such an agency is property as to warrant the imposition by law of a duty upon the solicitor to account. Yet the reasoning of the majority on the breach of fiduciary duties by the first and second appellants was grounded on the D first appellant having come to know from the purchasers about the estate land and its intended sale. The majority appeared to have viewed this as a determinative factor in concluding that there was a breach on the part of the first and second appellants,
- E (c) that the contemporaneous evidence is overwhelming and singularly points to the auction bid having been made by the first appellant in his personal capacity. The foundation of the claim against the appellants by the respondents was on the existence of a purported solicitor-client relationship.
- F [34] In response learned counsel for the respondents submitted:
- (a) that Question 1 has two parts, namely:
- G (i) whether the existence of a solicitor-client relationship is to be determined only by reference to the retainer; and
- (ii) whether in a solicitor-client relationship the scope of duties is determined only by reference to the retainer,
- H (b) that for the first part of the question it is factual. There must be evidence adduced upon which a factual finding could be made that there existed a retainer of the first appellant as a solicitor for the purchasers to act for them in the bid for the estate land. In the case of *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 the trial judge found a I retainer of the appellants as solicitors for the respondents based on documentary evidence and subsequent conduct ‘showing a course of dealings which might give rise to legal obligations’. In this case there was evidence of retainer found by the majority thus a solicitor-client relationship existed between the first appellant and the purchasers;

- (c) that in respect of the second part of the question, it was also held in *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 that a retainer puts ‘into operation the normal terms of the contractual relationship including in particular the duty of, solicitors ‘to protect the interests’ of their clients ‘in matters to which the retainer relates by all proper means’; A
- (d) that in view of the first part of Question 1 being factual and accepting the factual finding of the majority and ‘the subsequent principle of law that follows in answer to the second part of the question, it matters not whether the answer to Question 1 be in the negative or affirmative’. The fact remains that the finding of the majority was not in favour of the appellants; B
- (e) that the majority found there was a full-fledged solicitor-client relationship between the first appellant and the purchasers. Such relationship gave rise to fiduciary duties of the first appellant as a solicitor towards the purchasers as his clients; C
- (f) that fiduciary duties include: D
- (i) ‘duty not to take any secret advantage whether or not any dishonesty is involved’ (*Boardman v Phipps* [1967] 2 AC 46; *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd* (previously known as *Alcatel Network Systems (M) Sdn Bhd* [2014] 3 MLJ 785; [2014] 3 CLJ 73); and E
- (ii) ‘a duty to make full disclosure of any interest in the transaction for which the solicitor is retained’ (McGarry J in *Spector v Ageda* [1973] Ch 30 at p 47), F
- (g) that ‘Intentional conduct in breach of fiduciary duty even if not dishonest will result in liability arising’;
- (h) that where ‘breach of fiduciary duty of a solicitor is established, the Courts of Equity have jurisdiction to direct (1) accounts to be taken; (2) in proper cases, to order the solicitor to replace the property improperly acquired from the client; and (3) to make compensation if he has lost it when acting in breach of his duty’; and G
- (i) that ‘Damages representing the loss sustained includes replacement or restitution of any property improperly obtained from the client or disgorgement of profits’. H

Finding for Question 1 I

[35] It is trite law that in an action against a solicitor by his or her erstwhile client the threshold issue is whether a solicitor-client relationship exists between the plaintiff-client and the defendant-solicitor. In the absence of such relationship the defendant-solicitor in his professional capacity owes no duty to

A the plaintiff-client (see *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR 655).

Solicitor-client relationship

B [36] A solicitor-client relationship may arise either:

- (a) by an express agreement between a solicitor and a client; or
- (b) where there is express assertion by a solicitor to act for the client; or

C (c) it may be implied.

[37] Where it is to be implied it is for the purported client in an action against a solicitor to prove the existence of a solicitor-client relationship between them. Proof of such relationship requires an objective consideration of all the facts and circumstances in order to come to a reasonable conclusion:

- D** (a) that the purported client has sought for advice or assistance from the solicitor;
- E** (b) that the assistance sought for was within the professional competence of the solicitor;
- (c) that the solicitor expressly or impliedly agreed to provide such assistance or reasonably should know that the purported client would reasonably rely on him to provide the assistance; and
- F** (d) that it was reasonable for the purported client to believe that the solicitor was representing him.

[38] It is therefore a matter of evidence to determine whether a solicitor-client relationship exists. Hence, it is essential to consider such evidence adduced including the words and conduct of the parties towards each other. It is also to be noted that fee arrangement or payment is not determinative of the existence of a solicitor-client relationship. Take for instance the case of the Minnesota woman who met a lawyer for less than an hour to consult on a possible claim for medical negligence. At that point in time only ten months was left before limitation would set in. No fee arrangement or authorisation to act was discussed. But the woman was left with the impression that her case was weak and that the lawyer would consult with others to discuss the case, only getting back to her if she had a viable claim. The woman did not hear from the lawyer even after a year past. So she consulted another lawyer but only to find that the statute of limitation had set in. The first lawyer was ultimately found liable and was ordered to pay a sum that the woman would have received if she had timely proceeded with her case (see *Togstad v Vesely, Otto, Miller & Keefe and Jerre Miller* 291 NW2d 686 (Minn 1980)). But unilateral belief by a purported client that the solicitor

would represent him or her would not suffice (*Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim*). A

[39] In *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39 the then Federal Court agreed with the approach taken by the learned trial judge and held that 'there was ample evidence on record for the learned judge to conclude that a retainer came into existence by implication and as amplified by the conduct of the parties which showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client' (see also *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1983] 2 MLJ 196 (FC)). B C

[40] Accordingly, where the evidence adduced including the words and conduct that transpired between a solicitor and a client determines that a solicitor-client relationship has come about, a retainer can then be said to exist, express or by implication. It is therefore not necessarily the existence of an express retainer that determines the existence of a solicitor-client relationship. D

[41] It has been held that 'the giving of instructions by a client to a solicitor constitutes the solicitor's retainer by that client. It is not essential that the retainer must be in writing. It may be oral. It may be implied by the conduct of the parties in the particular case' (see *Fladgate LLP v Harrison* [2012] EWHC 67 (QB)). E

[42] Indeed it should be noted that a 'retainer' in relation to solicitor-client relationship can be at least in three forms, namely, the payment of certain amount of money to the solicitor to be placed in trust accounts or a professional relationship that culminated between a solicitor and a client under given facts and circumstances or an agreement the existence of which depends on the facts and circumstances of each case. F G

[43] Once a solicitor-client relationship exists and thus a retainer, it 'put into operation the normal terms of the contractual relationship including in particular the duty' of the solicitor 'to protect the interests' of his client 'in matters to which the retainer relates by all proper means' (see *Yong & Co v Wee Hood Teck Development Corporation*). H

[44] It was also held in *Underwood, Son and Piper v Lewis* [1894] 2 QB 306 per Lord Esher MR; (see also *Cawdery Kaye Fireman & Taylor v Gary Minkin* [2012] EWCA Civ 546; *Richard Buxton (a firm) v Mills-Owen* [2010] EWCA Civ 122): I

... that the law must imply that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action till the end. When a man goes to a solicitor and instructs him for the purpose of bringing or defending such an

A action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled man to act for him in the action, to take all the necessary steps in it, and to carry it on till the end. If the meaning of the retainer is that the solicitor is to carry on the action to the end, it necessarily follows that the contract of the solicitor is an entire contract — that is, a contract to take all steps which are necessary to bring the action to a conclusion.

[45] There is no reason why the foregoing principle cannot be applied with equal force to other services rendered by a solicitor.

C [46] Reverting to the present case, in his submission before this court learned counsel for the first and second appellants did not dispute that there was solicitor-client relationship between the first appellant and the purchasers. However, he went on to say that the purchasers through the committee only retained the first appellant for a limited purpose, namely, to secure the letter from the third appellant to recognise the SPPKB agreements and for the entry of the caveats on the estate land in anticipation of the public auction sale.

D [47] With respect, having considered the evidence adduced in this case and the submissions of learned counsel for the parties, we are inclined to agree with the majority that there was definitely a solicitor-client relationship between the first appellant and the purchasers including the respondents. And the relationship was not limited for those purposes as mentioned by learned counsel for the first and second appellants.

[48] If indeed the first appellant wanted to limit the solicitor-client relationship he could have easily indicated it to the purchasers or to any of the members of the committee.

G [49] It is a settled law as stated by the majority that a limited retainer should be reduced in writing to avoid any misunderstanding (see *Lie Hendri Rusli v Wong Tan & Molly Lim (a firm)* [2004] 4 SLR 594). Otherwise a solicitor upon being retained expressly or impliedly is expected, unless earlier and properly discharged, 'to take all the necessary steps' 'to carry it on till the end' (see *Cawdery Kaye Fireman & Taylor v Minkin* [2012] EWCA Civ 546).

H [50] If it was true that the relationship between the first appellant and the purchasers stopped on or just before the first bid, there was no reasonable explanation given by the first appellant why he continued to have any dealing with SD7 who was a member of the committee even past the second bid. He also required the purchasers to contribute to the required deposit for the second auction bid.

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[51] The learned trial judge opined that D71 and D72A indicated that the first appellant made the second bid for the estate land on his own accord. With respect D71 and D72A should be read in the context that the first appellant did not deny that the committee first approached him on the basis of his status as an advocate and solicitor. And while the first appellant claimed that he was only the solicitor for the purchasers to secure the acknowledgment by SEP of the SPPKB agreements and the entry of caveats, it was only in D80 that he declared to the purchasers that he was not their solicitor.

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[52] As such there is thus no merit in the submission by learned counsel for the first and second appellants that had the majority considered the contemporaneous documents D71, D72A, D78 and D80, they would have come to a different conclusion.

C

[53] Contrary to the contention marshaled for the first appellant, the earlier documents D71, D72A and even D78 did not indicate any suspension or termination of the solicitor-client relationship between the first appellant and the purchasers. Any suspension or termination of a solicitor-client relationship should have been expressly stated (see *Cawdery Kaye Fireman & Taylor v Minkin*) or could be implied from the evidence adduced. There was none in this case. In fact it was to the contrary as discussed above. Thus, it would therefore be reasonable to consider that the solicitor-client relationship between the first appellant and the purchasers continued to subsist until the first appellant declared or announced to the purchasers as recorded in D80 that he was no longer their solicitor (see *French v Carter Lemon Camerons LLP* [2012] EWCA Civ 1180). At any rate even assuming that his denial of being the solicitor of the purchasers has any validity despite the facts and circumstances indicating to the contrary, his late denial should not have any retrospective effect (see *Fladgate LLP v Harrison*).

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Fiduciary duty in solicitor-client relationship

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[54] 'For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter' (see Professor PD Finn: *Fiduciary Obligations* (1977)). Thus, the essential element is that there must be some undertaking on the part of the fiduciary to act with loyalty in the interest of the other party. 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence' (see *Bristol and West Building Society v Mothew*).

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A [55] The categories of fiduciary relationship are not closed. Indeed it was said that it was doubtful 'if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose. For example, the relation of physician and patient, and priest and penitent, may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question. Moreover, different fiduciary relationships may entail different consequences, as is shown by the discussion of the respective positions of a trustee and a partner in relation to the renewal of a lease' (see *Hospital Products Limited v US Surgical Corporation* (1984) 58 ALJR 587). Nevertheless, it is generally accepted that there are two main circumstances in which fiduciary relationships arise, namely, per se fiduciary (status-based fiduciary) and *ad hoc* fiduciary (fact-based fiduciary).

E [56] A solicitor-client relationship comes within the ambit of per se fiduciary because of 'their inherent purpose or their presumed factual or legal incidents' (see *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574). However, as alluded to above, all fiduciary relationships, whether *ad hoc* or per se, must depend on the fiduciary agreeing to act loyally in the interest of the beneficiary.

F [57] A 'claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary'. It is 'not every legal claim arising out of a per se fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty' (see *Galambos and Another v Perez* 2009 SCC 48).

H [58] Indeed a breach of duty by a solicitor is not necessarily a breach of fiduciary duty though a claim for negligence may arise (see *Bristol and West Building Society v Mothew*; *Hilton v Barker Booth and Eastwood (a firm)* [2005] UKHL 8). Not every task undertaken in the course of a solicitor-client relationship attracts a fiduciary obligation (see *Galambos and Another v Perez*). It is only those duties that are peculiar to fiduciaries can properly be termed as fiduciary duties (see *Breen v Williams* (1996) 186 CLR 71 at 137).

I [59] The distinguishing duty of a fiduciary is the duty of loyalty. Lord Justice Millett said this (see *Bristol and West Building Society v Mothew*):

The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his

interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

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[60] In the present case the gist of the submission of learned counsel for the first and second appellants is that due to the limited retainer that defined the solicitor-client relationship between the first appellant and the purchasers, the biddings for the estate land by the first appellant were outside the scope of the retainer. As such the issue of any fiduciary obligation did not arise.

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[61] With respect, such submission completely ignored the basic fact that the committee approached the first appellant as an advocate and solicitor. The committee on behalf of the purchasers required the professional services of the first appellant in relation to the estate land. The first appellant agreed to render his professional services.

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[62] The sole objective of the committee in seeking for the professional services of the first appellant was to ensure that the claims of the purchasers in the estate land were secured. The SPPKB agreements gave the purchasers their claims over a substantial portion of the estate land. This was affirmed in D14. Such claims in relation to the fiduciary duties of the first appellants towards the purchasers were not entirely dependent on them being holders of legal or equitable interests over the estate land. As stated earlier a 'claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary'. In this case the evidence adduced and on the given facts and circumstances the relationship between the first appellant and the purchasers could only be properly characterised as fiduciary. The first appellant also acknowledged such claims of the purchasers on the estate land. In fact the first appellant took steps to meet the legitimate expectation of the purchasers such as drafting D14 and had it signed by SP8. The first appellant also caused caveats to be entered on the estate land. Obviously, the first appellant, being the solicitor, recognised and accepted that the purchasers had caveatable interest on the estate land. Thus, it was clear that the first appellant carried out his undertaking in a way that gave 'rise to an understanding or expectation in a reasonable person' that he 'would behave in a particular way' (see J Edelman: *When do fiduciary duties arise?* (2010) 126 Law Quarterly Review 302). In other words, there was a legitimate expectation by the vulnerable purchasers that the first appellant, while armed with the power to act and discretion, would act in their interests. At no time the committee approached the first appellant for some entirely different transaction (see *Longstaff v Birtless* [2002] 1 WLR 470; see *Galambos and Another v Perez*) purchasers. And, as determined earlier, there was no evidence adduced express or even implied that the solicitor-client relationship was

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A terminated or even suspended when the first appellant made his auction bids for the estate land (see *Cawdery Kaye Fireman & Taylor v Minkin*).

B [63] The first appellant first obtained his information about the estate land from his clients, the committee that represented the purchasers. And, as determined earlier, there was no evidence adduced express or even implied that the solicitor-client relationship was terminated or even suspended when the first appellant made his auction bids for the estate land (see *Cawdery Kaye Fireman & Taylor v Minkin*).

C [64] Accordingly, at all material times there was fiduciary obligation of the first appellant towards the purchasers in connection with the estate land. As such the issue of a limited retainer between him and the purchasers did not arise. The first appellant should have acted in good faith. He should not have made profit out of his trust. Being a fiduciary the first appellant should not have made 'an unauthorised profit by reason or in virtue of the fiduciary office or otherwise within the scope of that fiduciary office' (see *The Law Commission Paper on Fiduciary Duties of Investment Intermediaries* (2014), (Law Com No 350)). He should not have placed himself in a position where his duty and his interest conflicted. He should not have acted for his own benefit or the benefit of any third person without the informed consent of his principals, in this case the purchasers. In doing what he did the first appellant breached his fiduciary obligation thus an indication of his 'disloyalty or infidelity' (see *Bristol and West Building Society v Mothew*).

D [65] For the foregoing reasons our answer to Question 1 is therefore in the negative if it relates to an assertion that the existence of a solicitor-client relationship is to be determined only by reference to an express retainer. For the reasons given above we find in this case that there was a solicitor-client relationship and thus a retainer between the first appellant as a solicitor, and by extension, the second appellant as the solicitor's firm, and the purchasers as the clients. And arising from such relationship and for the reasons given above as well we also find that there was fiduciary duty of the first appellant, and by extension the second appellant, towards the purchasers.

Question 2: Whether a fiduciary is entitled to restitution of expenditure incurred in securing a benefit subsequently determined to be due and payable to persons whom the fiduciary owes duties

I Contentions of the parties

[66] In respect of Question 2 learned counsel for the first appellant submitted the following:

- (a) that in the event of a finding of fiduciary duty of the first appellant towards the purchasers arising from the solicitor-client relationship and that he had breached such duty, in the circumstances of this case the first appellant should be entitled to counter-restitution. Learned counsel reasoned that while a wrong doer may be stripped of the unjust enrichment derived from the wrong, it did not follow that there may not be appropriate restitution the other way; A
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- (b) that the circumstances of this case warranted such a restitution because without the first appellant's funds, the purchasers could not have purchased the estate land. Notwithstanding this, the majority ordered the title to the estate land be transferred to the purchasers; C
- (c) that in making the order as it did, the majority in effect ordered the enrichment of the purchasers at the expense of the first appellant and this ran counter to the underlying rationale of equitable remedies and restitution which should not be intended to be of a punitive character. The constructive trust and associated remedies is intended only to strip a defendant of any enrichment flowing unjustly from the wrong, or, where no enrichment has occurred, to enforce observance of a fiduciary duty. The case of *Stephenson Nominees Pty Ltd v Official Receiver (on behalf of Official Trustee in Bankruptcy; Ex parte Roberts and another)* (1987) 76 ALR 485 was cited as the authority in support of that argument; D
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- (d) that the principle of counter-restitution has been recognised by the Supreme Court of Canada in *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574. It was held that the defendant was entitled to a lien over the subject property to secure repayment of expenses incurred by it in wrongfully exploring the opportunity to mine the subject property in breach of confidence. Quote from La Forest J was reproduced thus: F
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- LAC has been enriched at the expense of Corona by acquiring the Williams property. Having acquired that property in breach of a duty of confidence and in breach of a fiduciary obligation, that enrichment is unjustified. Likewise, however, Corona will receive an enrichment when LAC hands over the property, in the amount of the value of the improvement of the land to Corona. That value is equal to what would have been spent by Corona to develop both properties, less what Corona in fact spent. The trial judge made a \$50,000,000 downward adjustment to the amount LAC spent, directing a reference to determine the exact amount in the event the parties disputed the adjustment. I would affirm that award. The three elements of a claim for restitution are made out, namely there is an enrichment (the mine), that enrichment accrued to Corona at LAC's expense, and the enrichment is unjustified. The enrichment is not justified since, on the assumption that Corona had acquired the Williams property, it would of necessity have had to expend funds to develop the mine. In these circumstances, LAC is entitled to H
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A a restitutionary remedy, namely a lien on the Williams property to the extent that Corona was saved a necessary expenditure,

(e) that the aforesaid position was in fact conceded by learned counsel for the respondents in his submission in the Court of Appeal when he said this:

B The said land should therefore be vested in the sub-purchasers with consequence orders as to payment of the purchase price,

C (f) that the majority should have ordered the purchasers to repay the first appellant the amount paid by him to purchase the estate land and molded a relief accordingly. Instead, the purchasers was given a windfall; and

(g) that Question 2 ought to be answered in the affirmative and that appropriate orders be made.

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[67] In response, learned counsel for the respondents submitted thus:

E (a) that restitution was not an issue which arose in the High Court. There was no alternate counterclaim by the first appellant that he was entitled to be reimbursed if it was found that he had breached his fiduciary responsibility;

(b) that the first appellant made no such claim in the Court of Appeal; and

F (c) that in any case, in view of the extensive orders made on remedies in this case by the majority, both parties applied for and were granted liberty by the Court of Appeal to apply for any further directions or orders. There was thus an avenue provided in the judgment itself for the appellants to pursue the claim for an order as to restitution. The appropriate forum to take up this issue is still the Court of Appeal and that because of the 'liberty to apply' provision, the Court of Appeal is not functus officio in respect of further orders such as the claim for fiduciary expenses. If the Court of Appeal refuses such ancillary order then the appellants can come to the Federal Court. At this stage, the issue of reimbursement is premature.

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Finding for Question 2

[68] As found earlier we agree with the majority that the first appellant was in a fiduciary position in relation to the purchasers.

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[69] It is trite law that a person in a fiduciary position is not entitled to make a profit and he is not allowed to put himself in a position where his interest and duty are in conflict. In *Boardman v Phipps* [1966] 3 WLR 1009 Lord Hodson explained the rule as follows:

Whether this aspect is properly to be regarded as part of the trust assets is, in my judgment, immaterial. The appellants obtained knowledge by reason of their fiduciary position and they cannot escape liability by saying that they were acting for themselves and not as agents of the trustees. Whether or not the trust or the beneficiaries in their stead could have taken advantage of the information is immaterial, as the authorities clearly show. No doubt it was but a remote possibility that Mr Boardman would ever be asked by the trustees to advise on the desirability of an application to the court in order that the trustees might avail themselves of the information obtained. Nevertheless, even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied. This appears from the observations of Lord Cranworth LC in *Aberdeen Railway Co v Blaikie* 1 Macq 461, 471

In the later case of *Bray v Ford* [1896] AC 44 Lord Herschell stated the rule in a way which has peculiar application to the facts of this case, when he said:

It is an inflexible rule of a Court of Equity *that a person in a fiduciary position, such as the respondent's is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.* It does not appear to me that this rule is, as has been said, founded upon principles of morality. *I regard it rather as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.* It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services. (Emphasis added.)

[70] Thus, the rule of equity is that if a person obtains a profit from his fiduciary position he is accountable for that profit. The liability arises from the mere fact of a profit having been made and that the fiduciary, however honest and well intentioned, cannot escape the risk of being called upon to account. This is how Lord Guest put it in *Boardman v Phipps* [1966] 3 WLR 1009 at p 1060:

The position of a person in a fiduciary capacity is referred to in *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, 386 by Lord Russell of Killowen where he said:

My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. *The liability arises from the mere fact*

A *of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.* (Emphasis added.)

B Again Lord Russel quotes with approval from the judgment of the Lord Ordinary in *Huntington Copper Co v Henderson* [1877] 4 R 294 to the following effect:

Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage whether in money or money's worth to himself personally through the execution of his trust, he will not be permitted to retain, but be compelled to make it over to his constituent.

C Lord Wright in the same case said:

D That question can be briefly stated to be whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person.

Again Lord Wright said:

E The courts below have held that it does not apply in the present case, for the reason that the purchase of the shares by the respondents, though made for their own advantage, and though the knowledge and opportunity which enabled them to take the advantage came to them solely by reason of their being directors of the appellant company, was a purchase which, in the circumstances, the respondents were under no duty to the appellant to make, and was a purchase which it was beyond the appellant's ability to make, so that, if the respondents had not made it, the appellant would have been no better off by reason of the respondents abstaining from reaping the advantage for themselves. With the question so stated, it was said that any other decision than that of the courts below would involve a dog-in-the-manger policy. What the respondents did, it was said, caused no damage to the appellant and involved no neglect of the appellant's interests or similar breach of duty. However, *I think the answer to this reasoning is that both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship.* Nor can the court adequately investigate the matter in most cases. (Emphasis added.)

I [71] While the Law Lords appeared to have laid down harsh consequences for breach of fiduciary duties in *Phipps v Boardman* [1964] 1 WLR 993 at p 1017, the qualified orders made by the learned trial judge (Wilberforce J (as he then was)) were maintained. The learned trial judge ordered the defendants to account for the profit earned. But at the same time the learned trial judge ordered that the expenditure that was necessary to enable the profit to be

realised and the allowance or credit for the work and skill of the defendants must also be taken into account. This is what the learned trial judge said:

In my judgment, therefore, the plaintiff succeeds in his claim that Boardman and Phipps must account for the proportionate profit they made on the shares. The measure of their liability, so far as this action is concerned, must of course be related to the plaintiff's own interest in the trust fund, ie, 5/18ths. Moreover, *account must naturally be taken of the expenditure which was necessary to enable the profit to be realised. But, in addition to expenditure, should not the defendants be given an allowance or credit for their work and skill?* This is a subject on which authority is scanty; but Cohen J in *In Re Macadam* [1946] Ch 7382 gave his support to an allowance of this kind to trustees for their services in acting as directors of a company. It seems to me that this transaction, ie, the acquisition of a controlling interest in the company, was one of a special character calling for the exercise of a particular kind of professional skill. If Mr Boardman had not assumed the role of seeing it through, the beneficiaries would have had to employ (and would, had they been well advised, have employed) an expert to do it for them. If the trustees had come to the court asking for liberty to employ such a person, they would in all probability have been authorised to do so, and to remunerate the person in question. It seems to me that it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it.

I cannot now form any opinion what sum would be appropriate, but I shall direct an inquiry what sum is proper to be allowed to the first and second defendants in respect of their work and skill in obtaining the shares in the company mentioned in the statement of claim and the profit in respect thereof. I shall direct that such inquiry is to be taken before the judge, but refer it to chambers for directions as to evidence and other preparatory matters. Without in any way binding the court as to what it should do on the evidence that may be presented, *I think that I thought from the knowledge gained in the course of this trial, to express the opinion that payment should be on a liberal scale.* (Emphasis added.)

[72] The Court of Appeal and the House of Lords upheld the decision of the learned trial judge including the orders he made. However, Lord Denning MR in *Phipps v Boardman* [1965] 2 WLR 839 at p 861 in the Court of Appeal made this passing remark, inter alia:

The gist of it is that the defendant has unjustly enriched himself, and it is against conscience that he should be allowed to keep the money. The claim for repayment cannot however, be allowed to extend further than the justice of the case demands. If the defendant has done valuable work in making the profit then the court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of any dishonesty or bad faith or surreptitious dealing, he might not be allowed any remuneration or reward; but when, as in this case, the agents acted openly and above board, but mistakenly, then it would be only just that they should be allowed remuneration. As the judge said: It seems to me that it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it. (Emphasis added.)

A [73] In a subsequent case of *Guinness Plc v Saunders* [1990] 2 AC 663 the House of Lords agreed with the proposition of law expounded in *Phipps v Boardman* [1964] 1 WLR 993. Lord Goff of Chieveley while endorsing the rule that fiduciaries must not put themselves in a position where there is a conflict between their personal interests and their duties as fiduciaries, made reference to the decision of Wilberforce J with reservation. He said this, inter alia:

C Plainly, it would be inconsistent with this long-established principle to award remuneration in such circumstances as of right on the basis of a quantum meruit claim. But the principle does not altogether exclude the possibility that an equitable allowance might be made in respect to a trustee for work performed by him for the benefit of the trust, even though he was not in the circumstances entitled to remuneration under the terms of the trust deed, is now well established. In *Phipps v Boardman* [1964] 1 WLR 993 the solicitor to a trust and one of the beneficiaries were held accountable to another beneficiary for a proportion of the profits made by them from the sale of shares bought by them with the aid of information gained by the solicitor when acting for the trust. Wilberforce J directed that, when accounting for such profits, not merely should a deduction be made for expenditure which was necessary to enable the profit to be realised, but also a liberal allowance or credit should be made for their word and skill.

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It will be observed that the decision to make the allowance was founded upon the simple proposition that 'it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it'.

F ...

G The decision has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided in the trust deed. Strictly speaking, it is irreconcilable with the rule as so stated. It seems to me therefore that it can only be reconciled with it to do the extent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule. And, as I see it, such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees. (Emphasis added.)

H [74] Earlier on, in the case of *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 the Court of Appeal applied the principle of recompensing the fiduciaries as propounded in *Phipps v Boardman* [1964] 1 WLR 993.

I [75] In his judgment, with Dunn LJ in agreement, Fox LJ in dealing with the question of recompensing the defendants referred to the decision in *Phipps v Boardman* [1964] 1 WLR 993 and held that there was in existence a necessary power in the court to make an allowance to the fiduciary without which

substantial injustice might result. He said this, inter alia:

The next question is, it seems to me, the recompensing of the defendants. The rules of equity against the retention of benefits by fiduciaries have been applied with severity. In *Phipps v Boardman* [1967] 2 AC 46, where the fiduciaries though in breach of the equitable rules, acted with complete honesty throughout, only succeeded in obtaining an allowance 'on a liberal scale' for their work and skill ...

...

These latter observations (and those of Lord Denning MR and the judgment of Wilberforce J at first instance) *accept the existence of a power in the court to make an allowance to the fiduciary. And I think it is clear necessary that such a power should exist. Substantial injustice may result without it. A hard and fast rule that the beneficiary can demand the whole profit without an allowance for the work without which it could not have been created is unduly severe.* Nor do I think that the principle is only applicable in cases where the personal conduct of the fiduciary cannot be criticised. I think that the justice of the individual case must be considered on the facts of that case. Accordingly, *where there has been dishonesty or surreptitious dealing or other improper conduct then, as indicated by Lord Denning MR, it might be appropriate to refuse relief; but that will depend upon the circumstances.*

...

Once it is accepted that the court can make an appropriate allowance to a fiduciary for his skill and labour I do not see why, in principle, it should not be able to give him some part of the profit of the venture if it was thought that justice as between the parties demanded that.

...

But be that as it may, it would be one thing to permit a substantial sharing of profits in a case such as *Phipps v Boardman* [1967] 2 AC 46 where the conduct of the fiduciaries could not be criticised and quite another to permit it in a case such as the present where, though fraud was not alleged, *there was an abuse of personal trust and confidence.* I am not satisfied that it would be proper to exclude Mr Mills and the MAM companies from all reward for their efforts. I find it impossible to believe that they did not make a significant contribution to Mr O'Sullivan's success. It would be unjust to deny them a recompense for that. I would, therefore, be prepared as was done in *Phipps v Boardman* to authorise the payment (over and above out of pocket expenses) of an allowance for the skill and labour of the first five defendants in promoting the compositions and performances and managing the business affairs of Mr O'Sullivan, and that an inquiry (the terms of which would need to be considered with counsel) should be ordered for that purpose. *Such an allowance could include a profit element in the way that solicitors' costs do.*

In my view this would achieve substantial justice between the parties because it would take account of the contribution made by the defendants to Mr O'Sullivan success. It would not take full account of it in that the allowance would not be at all as much as the defendants might have obtained if the contracts had been properly negotiated between fully advised parties. But the defendants must suffer that because of the circumstances in which the contracts were procured. On the basis

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- A** that the first five defendants are remunerated as I have mentioned I see no reason in equity why the agreements and the assignments of copyright should not be set aside, the master recordings transferred to Mr O’Sullivan and an account of profits ordered. (Emphasis added.)
- B** [76] We find the approach employed by Fox FJ very useful and would apply it with appropriate modifications to the facts of this case before us. What we seek to do in this case is to give, within the court’s discretion, relief to parties that is fair and just in the circumstances. As indicated by Lord Denning MR in *Phipps v Boardman* [1964] 1 WLR 993 where there has been dishonesty or
- C** surreptitious dealing or other improper conduct, it might be appropriate to refuse but that will depend on the circumstances. In other words, the exercise of the discretion to refuse allowance to the fiduciary depends on the facts and circumstances of each case.
- D** [77] In this case the purchasers entrusted the first appellant to get their portions of the estate land for them. Instead the first appellant took advantage of his position as a fiduciary. He was entrusted, after he managed to convince the purchasers during the meeting before the second auction, to bid for the
- E** estate land in his own name but only to subsequently claim that he did it on his own accord. Having obtained the whole estate land he transferred it to his company, the fourth appellant. The first appellant was in breach of his fiduciary duty. In so doing he had unjustly enriched himself. Hence, we hold that the first appellant must account for the profit and other advantages he acquired
- F** while acting in breach of his fiduciary obligations towards the purchasers. It would be unconscionable to allow him to keep the profit and other advantages he made as a result of his acquisition of the estate land.
- G** [78] However, it would be inequitable for the purchasers to take the whole of the estate land and/or profit without incurring expenses to obtain them. The first appellant obtained the whole estate land, including the portions identified to be the plots or as represented in the form of shares to which the purchasers laid their claims to be beneficially entitled. Since not all the purchasers are parties in this case only the plots and shares claimed by the respondents (‘the respondents’ shares’) are therefore relevant in this judgment. The balance of 1,500 hectares is also as well. It was not within the SPPKB agreements. But the estate land cannot be subdivided to enable separate titles to be given as the
- H** respondents’ shares.
- I** [79] The first appellant must therefore pay to the respondents damages to be assessed. When doing the assessment, the value of the respondents’ shares must be taken into account. Indeed the respondents would have acquired their shares if not for the act of ‘disloyalty or infidelity’ on the part of the first appellant. Further to be taken into account when assessing the damages are the

profits flowing from the sale of the estate land (to be adjusted according to acreage representing the respondents' shares). A

[80] However, the expenditure incurred by the first appellant has to be deducted from the assessed damages and profits. To ascertain the damages and profits payable to the respondents an enquiry or assessment would have to be conducted by a High Court judge preferably stationed in Ipoh High Court. B

[81] In the upshot our answer to Question 2 is therefore in the affirmative.

Question 3: Whether a court is entitled to lift the corporate veil of a company in order to do justice despite it not being the pleaded or argued case of the claimants that the company concerned was used as an engine of fraud. C

[82] In considering Question 3 it should be noted that the majority, on the ground of doing justice, exercised the power to lift the corporate veil of the third and fourth appellants. The majority disagreed with the learned trial judge who declined to do so. D

[83] In respect of the third appellant, the majority held that it was incorporated solely for the purpose of enabling the transfer of the estate land from Nam Bee since the law did not allow a direct transfer from Nam Bee to SPPKB. As such there were compelling reasons to lift the corporate veil 'where the justice of the case so demands'. The majority thus held that the third appellant and SPPKB should be treated as one and the same entity. The case of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109 was cited in support. E F

[84] As for the fourth appellant the majority held that it was the alter ego of the first appellant since it was incorporated to hold the estate land from the first appellant who had successfully bid for it. Meanwhile the first appellant knew all along the interests of the purchasers over a substantial portion of the estate land. G

Contentions of the parties H

[85] Learned counsel for the first appellant submitted that the lifting of the corporate veil by the majority was wrong in law for the following reasons:

- (a) that it was against decided cases. He cited *Law Kam Loy & Anor v Boltex Sdn Bhd and others* [2005] MLJU 225; [2005] 3 CLJ 355 and *Adams v Cape Industries plc* [1990] Ch 433 to support his argument; and I
- (b) that the first appellant was neither a shareholder nor a director of either SPPKB or the third appellant. He did not use either company as a mask

A or cloak to hide himself from the eyes of equity. He was not managing the third appellant at all. He was therefore not the alter ego of either company. The respondents did not rely on any special circumstances to show that either company in question was a mere facade concealing the true facts.

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[86] Meanwhile learned counsel for the fourth appellant contended that the respondents should not be allowed to rely on the issue of corporate veil for the following reasons:

C

(a) that the matter was not pleaded as part of the respondents' case. Even in their memorandum of appeal to the Court of Appeal the corporate veil issue was not a ground of appeal;

D

(b) that the 'interest of justice' test was not the correct test to be applied in piercing the corporate veil. The case of *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518 was cited in support;

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(c) that the corporate veil should only be pierced for the sole purpose of making the controllers of the company liable in cases where a person is under an existing legal obligation or liability or subject to an existing legal restriction yet he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. Reference was made to the recent case of *Prest v Petrodel Resources Limited and others* [2013] UKSC 34;

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(d) that on the facts of the present case there was no concealment by the first appellant. The formation of the fourth appellant and the transfer of the estate land to the fourth appellant were disclosed by the first appellant prior to him agreeing to bid at the second auction. The disclosures included (i) formation of the fourth appellant to take the transfer of estate land; (ii) issue of shares to genuine purchasers; (iii) appointment of purchasers to office; and (iv) share cancellation and resignation from office upon successful fragmentation;

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(e) that as found by the learned trial judge there was no evasion of legal obligations by the first appellant through interposition of the fourth appellant. The interposition of the fourth appellant was necessary in the circumstances and done openly;

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(f) that lifting a corporate veil is not for the purpose of confiscating property but to hold somebody to a legal bargain which he had made with another; and

(g) that there was no justification to lift the corporate veil of the third appellant and identifying the third appellant as being synonymous with SPPKB and extending it onwards to the respondents.

- [87] In reply learned counsel for the respondents submitted thus: A
- (a) that even though the issue of lifting the corporate veil of the fourth appellants was not pleaded by the respondents, evidence was given on the subject during trial and it was not objected to by the appellants. As such the fourth appellant was not taken by surprise as the matter was raised in the evidence and contemporaneous documents; B
- (b) that on the facts of the present case there was concealment by the first appellant of fiduciary relationship and the equitable rights of the purchasers and an evasion of his legal obligations towards them. The following cases were cited in support: C
- (i) *Gilford Motor Co Ltd v Horne and another* [1933] Ch 935;
- (ii) *Jones v Lipman* [1962] 1 WLR 832;
- (iii) *Prest v Petrodel Resources Limited and others* [2013] UKSC 34; D
- (iv) *Law Kam Loy & Anor v Boltex Sdn Bhd and others* [2005] 3 CLJ 355; and
- (v) *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751,
- (c) that the fourth appellant was set up by the first appellant as a mere facade to transfer the estate land in order to evade his liabilities and obligations as a trustee of the estate land purchased by the purchasers; and E
- (d) that the first appellant was the controller of the fourth appellant and he evaded his duties to the purchasers and concealed his true intentions with the aim to commit fraud. He was a director, shareholder and promoter of the fourth appellant and he formed it with the express purpose of transferring the estate land to it. The fourth appellant was therefore the alter ego of the first appellant. When the transfer of the estate land to the fourth appellant took place the first appellant had full knowledge of the equitable rights of the purchasers. F
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Finding on Question 3

[88] At the outset we note that Question 3 as posed is only on pleadings issue. It does not extend to the issue of whether the majority rightly lifted the corporate veil of the third and fourth appellants. Thus, it would suffice for us to confine our answer to the pleadings issue. H

[89] It is trite law that the parties are bound by their pleadings and the trial of a suit must confine to the pleadings. The court is not entitled to decide a suit on a matter that has not been pleaded (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330). I

A [90] However, in some instances, evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise. More so if 'Such evidence when given without any objection by the opposing party will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading' (see *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567).

C [91] In this case the respondents while conceding that issue on lifting the corporate veil of the companies was not pleaded argued that the evidence relating to the issue was adduced. As such the learned trial judge had erred in dismissing the issue on the ground that it was not pleaded.

D [92] We find the majority has dealt with the point quite succinctly. Having considered the evidence adduced by the respondents as highlighted by the majority, we are satisfied that evidence relating to the issue of whether the third appellant and SPPKB were one and same entity and whether the first appellant was the alter ego of the fourth appellant had been given without any objection from the appellants.

E [93] For instance, it was not a disputed fact and indeed evidence was adduced that the directors of SPPKB replaced the directors of Nam Bee as the directors of the third appellant. That occurred soon after the estate land was transferred to the third appellant. and in respect of the fourth appellant there was no denial and in fact the first appellant admitted that he was its director for a while.

G [94] Hence, having considered the case for the respondents as a whole it could not be said that such evidence had departed radically from their pleaded case. Such evidence, in our view, had cured the absence of a specific plea of the aforementioned parties being one and same entities in the respondents' statement of claim. With respect we are therefore of the view that the learned trial judge should not have dismissed the issue on account of it being not pleaded.

H [95] Accordingly on the facts and circumstances of this case our answer to Question 3 as we understand it is in the affirmative. Anyway, we do not think it is necessary for us to deal with the issue of the actual lifting of the corporate veil as done by the majority.

I [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal

personality (see *Prest v Petrodel Resources Limited and others* [2013] UKSC 34). A

[97] As to what constitutes fraudulent purposes it has been described as to include actual fraud or fraud in equity (see *Law Kam Loy & Anor v Boltex Sdn Bhd and others*). And fraud in equity occurred in ‘... cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ...’ (see *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 per Chong Siew Fai FCJ (as he then was)). B

[98] Quite recently this court also discussed on the issue of lifting a corporate veil. It said this: C

... As for principle, the starting point is no doubt the doctrine of corporate personality. The general rule is that a company has an existence that is separate and distinct from its shareholders. It finds expression in the seminal case on the subject, *Salomon v A Salomon & Co Ltd* [1897] AC 22. Lord Halsbury LC there stated the rule thus: D

... once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are. E

The Lord Chancellor however provided for cases in which the veil of incorporation may be lifted. He said:

If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of. F

The proposition when inverted states that if there is fraud or an agency relationship or if the company is a myth or fiction, the doctrine of corporate personality does not insulate the shareholders or directors from being assailed directly. G

[22] A more recent statement of the doctrine of corporate personality is to be found in the case of *Woolfson v Strathclyde Regional Council* 1978 SLT 159 which is authority for the proposition that a litigant who seeks the court’s intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts (see *Takako Sakao (f) v Ng Pek Yuan (f) & Anor*). H

[99] The phrase ‘a mere façade concealing the true facts’ was recently elaborated by the Supreme Court of the United Kingdom in the case of *Prest v Petrodel Resources Limited and others* [2013] UKSC 34. The leading judgment of the court said this: I

The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is the imposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from

A identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'façade' but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, B and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

C [100] Reverting therefore to the facts and circumstances in the present case, and bearing in mind the foregoing principles, we are inclined to agree with the majority that there were justifications in the lifting of the corporate veil of the fourth appellant.

D [101] It was not in dispute that the first appellant made the bids for the estate land in his own name. But the respondents had adduced evidence that the purchasers only agreed to the arrangement after the first appellant managed to convince them during the meeting before the second auction. Further, it is also E a fact that part of the money for the deposit for the second auction was paid by some of the purchasers. After having successfully bid for the estate land the first appellant proceeded to incorporate the fourth appellant with the sole intention of transferring the estate land to it. But at the same time he was one of the F directors, a shareholder and the promoter of the fourth appellant.

G [102] As such, on the facts as found, we agree with the finding of the majority that the fourth appellant was the alter ego of the first appellant. The first appellant established the fourth appellant as a mere facade to transfer the ownership of the estate land in order to evade his fiduciary obligations as the solicitor towards his clients, the purchasers including the respondents.

H [103] Be that as it may, as we have intimated earlier on in this judgment, liabilities may be imposed against the first and second appellants but excluding the other appellants. Thus, the lifting of the corporate veil of the fourth appellant does not necessarily mean that liability must be attached to it.

I [104] In this case the fourth appellant is no longer under the control of the first appellant. He had unloaded his shares in the fourth appellant as well as the shares of those who were closely associated with him after the estate land was transferred to the fourth appellant.

[105] And it is not in dispute that the estate land although registered in the name of the fourth appellant is now under the management of two corporate

entities having no ties with the first or second appellants. They are not parties to this action. There was no assertion by the respondents that these two corporate entities did not acquire those shares in good faith and for valuable consideration from the first appellant and the other shareholders. There was also no challenge to the fact that these two corporate entities had expended monies to develop the estate land up to the present condition. It would be 'inequitable for the purchasers to take the estate land and/or profit without incurring expenses to obtain them'. Accordingly, we make no order to declare as invalid, null and void the transfer of the estate land to the fourth appellant.

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[106] In respect of the third appellant, it is now in liquidation. Further, it lost the estate land not on its own volition but on force sale by auction being the consequence of its default in servicing its loan with the fifth appellant. It would serve no purpose to lift its corporate veil or to make any order against it. As for the R&M, it was only exercising the powers contained in the debenture. It had done its duties and there was no allegation of misconduct on its part. Further, as we have found, the estate land is now under the control of two corporate entities that had no link to the scheme of the first appellant when he acquired the estate land. It would therefore be inequitable and unconscionable to now order the two corporate entities through the R&M to relinquish their interests in the estate land after expending monies to develop it.

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Question 4: Whether a trust could be imposed to allow the respondents to acquire equitable interests in the land prior to receivership when the respondents acknowledge that their claim is limited to only a portion of the total 3,681 acres of undivided interest in the land,

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Question 5: Whether claimed beneficial interest in fragmented portions of estate land contingent upon obtaining approval from the estate land board under s 214A of the National Land Code and/or the consent of transfer from the Menteri Besar entitles the court to declare beneficial interest for the purpose of an immediate equitable remedy

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[107] In view of the findings we arrived at for Questions 1–3, we are of the opinion that we need not answer Questions 4 and 5. As we have said above, Questions 1–2 may be determined on their own merits. They are not dependent on the determination of Questions 3–5. We therefore decline to answer Questions 4–5.

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THE FIFTH APPELLANT

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[108] In the case of the fifth appellant we have perused the evidence adduced and the submissions of learned counsel for the respective parties. We are inclined to agree with the finding of the learned trial judge that 'the allegation

A made' that the fifth appellant 'had actual knowledge of the presence' of the purchasers on the estate land 'was mere conjecture, not founded on any factual basis'. As such, the fifth appellant 'did not have any notice' of the purchasers 'alleged beneficial interest'.

B [109] In any event the loan with the fifth appellant had been settled with the auction of the estate land. As such the fifth appellant may at worse be liable on the basis of indemnity. However that is not an issue before us.

CONCLUSIONS AND ORDERS

C [110] For the reasons above we dismiss the appeals by the first and second appellants with costs to be taxed unless agreed by the parties. Accordingly:

(a) we *affirm*:

D (i) the declaration granted by the majority that at all material times the first and second appellants were the solicitors of the respondents and 'are therefore under a fiduciary duty and accountable' to the respondents 'for any benefits that they have obtained under the 'sale by tender' of the estate land'; and

E (ii) the order of the majority that the first appellant be declared a trustee for the respondents 'with respect to the purchase by sale by tender' of the estate land from the R&M of the third appellant,

(b) we *decline to affirm* in view of our findings in relation to Questions 1–3:

F (i) the order of the majority that the respondents 'be declared new trustees of the aforesaid declaration of trust in place of the' first appellant;

G (ii) the order of the majority that the R&M of the third appellant 'do make the necessary rectifications and variations to the agreement dated 30 March 1994 with' the first appellant 'to incorporate the declaration of trust aforesaid and the inclusion of the new trustees';

H (iii) the order of the majority that 'the transfer of property known as PN 35553, Lot 9108 Mukim of Hutan Melintang, Hilir Perak' to the fourth appellant '(Regal) be declared null and void'; and

I (iv) the order of the majority that the estate land 'be vested in the first four' respondents 'who are the new trustees and who will hold' the estate land 'in trust and who will administer' the estate land and 'who will distribute the same on a just basis. The new trustees too will have to draw up a scheme for the implementation of a just distribution' of the estate land which will be transferred and registered in the names of the numerous sub-purchasers subject to the consent of the estate land board,

- (c) we *decline to affirm* in view of (d) below the order of the majority that the first and second appellants do ‘refund all moneys paid by some’ of the purchasers (including the respondents) under the sale and purchase agreement’ stated therein ‘together with interest at 8%pa from the date of filing of this writ’; A
- (d) we find as *unnecessary* in view of our findings in relation to Questions 1–3 the order by the majority that ‘the ‘sale and purchase agreement entered into by some’ of the purchasers with the first appellant be declared null and void’; B
- (e) we find as *unnecessary* the order of the majority that ‘the register document of title and the issue document of title’ to the estate land ‘be rectified ...’ and ‘subject to the consent of the estate land board’; C
- (f) we *hold* that the first and second appellants are *liable* to the respondents for the reasons given in this judgment with particular reference to our findings for Questions 1–2; D
- (g) we hereby order that there shall be *assessment for damages* to be paid by the first and second appellants to the respondents which is to be held before a High Court judge preferably stationed in the High Court Ipoh, Perak. Thus to that extent we vary the order of the majority that the assessment is to done by a Senior Assistant Registrar, Ipoh Perak; E
- (h) we further order that when doing the assessment the value of the respondents’ shares or plots in the estate land and the *profits flowing* from the sale of the estate land (to be adjusted according to acreage representing the respondents’ shares) must be taken into account; F
- (i) we further order that in the exercise of our discretion the *expenditure incurred* by the first appellant is *to be deducted* from the assessed damages and profits; G
- (j) we *allow* the appeal by the fifth appellants with costs to be taxed unless agreed by parties. We also hereby order that such costs shall be borne by the first appellant; and
- (k) we *allow* the appeals by the third and fourth appellants with no order as to costs and only to the extent that it is not inconsistent with the finding of liability against the first and second appellants. H

Order accordingly.

Reported by Afiq Mohamad Noor I