A **GURBACHAN SINGH BAGAWAN SINGH & ORS v. VELLASAMY PENNUSAMY & OTHER APPEALS**

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
AHMAD MAAROP FCJ
B HASAN LAH FCJ
ZALEHA ZAHARI FCJ
RAMLY ALI FCJ
[CIVIL APPEALS NO: 02(F)-58-09-2013 (A), 02(F)-59-09-2013 (A), 02(F)-60-09-2013 (A) & 02(F)-61-09-2013 (A)]
C 27 NOVEMBER 2014

LEGAL PROFESSION: *Liability as fiduciary – Breach of fiduciary duty – Circumstances in which fiduciary relationships arise – Whether fiduciary duty arose in solicitor-client relationship – Solicitor purchasing for himself property meant to* D *be purchased on behalf of clients – Whether amounting to breach of fiduciary duty – Whether land to be held in trust for clients – Whether fiduciary accountable for profits made in breach of fiduciary duty – Whether fiduciary entitled to restitution of expenditure incurred*

LEGAL PROFESSION: *Solicitor-client relationship – Whether relationship* E *between first and second appellants and respondents was that of solicitor and client – Elements for determining the existence of and scope of duties in solicitor-client relationship – Express and implied solicitor-client relationship*

COMPANY LAW: *Separate legal entity – Lifting of corporate veil – Situations where corporate veil may be lifted – Solicitor incorporating company as mere façade* F *to evade fiduciary obligations to clients – Whether lifting of corporate veil justified*

CIVIL PROCEDURE: *Pleadings – Parties bound by – Court to decide on matter not pleaded – Opposite party not to be caught by surprise – Whether corporate veil of company may be lifted despite it not being pleaded – Evidence adduced during* G *hearing without opponent's objection – Whether could overcome defects in pleadings*

Nam Bee Rubber Estate Sdn Bhd ('Nam Bee') was the registered proprietor of a large parcel of land ('the estate land'). Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB') proposed to buy the estate land and paid a deposit. Upon inquiry with the Land Office, SPPKB found out that the estate land H could not be transferred to it. 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 transferred to SEP. The directors of SEP were then replaced with the directors of SPPKB. SPPKB then entered into agreements ('SPPKB agreements') with different I purchasers including the respondents to sell plots in the estate land. The purchasers bought a total of about 3000 acres of the estate land and the balance remained with SEP. To raise funds SEP borrowed from MBF

Finance ('the fifth appellant'). A charge and debenture were created by SEP in favour of the fifth appellant without the knowledge of the purchasers. SEP defaulted in the repayment of the loan and the fifth appellant proceeded to auction the estate land. The purchasers becoming aware of the auction, approached the first appellant, an advocate and solicitor. The second appellant was the first appellant's law firm. The first appellant proceeded to act for the purchasers. Subsequently, the first appellant successfully bid at the auction in his own name. At the 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 then invited the purchasers to buy their allotted shares or plots from him. The first appellant told the purchasers that he was not their lawyer and that the estate land was his land and that the purchasers would have to buy back their portions of the estate land from him. The purchasers claimed that 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 by the name of Manjeet as the directors. The first appellant then transferred the ownership of the estate land to the fourth appellant. The first appellant later transferred his shares in the fourth appellant to two other companies. The respondents thus commenced this action against the appellants claiming, *inter alia*, for declarations that: (i) the first and second appellants were at all material times the solicitors acting for the respondents with a fiduciary duty; (ii) the said land was purchased by the first appellant in trust for the respondents; and (iii) the transfer of the said land to the fourth appellant be declared invalid, null and void. The High Court found in favour of the appellants. The Court of Appeal reversed the decision of the High Court and granted the declarations prayed for by the respondents. The Federal Court granted the appellants leave to appeal on the following questions: (i) whether the existence of, and scope of duties in, a solicitor-client relationship is to be determined only by reference to the retainer; (ii) 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; and (iii) 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.

Held (dismissing appeals with costs)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) A solicitor-client relationship may arise either: by an express agreement between a solicitor and a client; or where there is express assertion by a solicitor to act for the client; or it may be implied. Fee arrangement or payment is not determinative of the existence of a

A solicitor-client relationship. Unilateral belief by a purported client that the solicitor would represent him or her would not suffice. It is not necessary for an express retainer to determine the existence of a solicitor-client relationship. (paras 36, 38 & 40)

B **(2)** A 'retainer' in relation to solicitor-client relationship can be in at least 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. (para 42)

C **(3)** There was definitely a solicitor-client relationship between the first appellant and the respondents. The solicitor-client relationship between the first appellant and the purchasers continued to subsist until the first appellant declared or announced to the purchasers that he was no longer their solicitor. (paras 47 & 53)

D **(4)** 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. 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. The categories of fiduciary relationship are not closed.

E Nevertheless, there are two main circumstances in which fiduciary relationships arise, namely, per se fiduciary (status-based fiduciary) and *ad hoc* fiduciary (fact-based fiduciary). A solicitor-client relationship comes within the ambit of per se fiduciary because of 'their inherent purpose or their presumed factual or legal incidents'.

F (paras 54-56)

(5) A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterised as fiduciary. It is not every legal claim arising out of a per se fiduciary relationship, such as that between a solicitor and

G client, that will give rise to a claim for a breach of fiduciary duty. A breach of duty by a solicitor is not necessarily a breach of fiduciary duty, though a claim for negligence may arise. Not every task undertaken in the course of a solicitor-client relationship attracts a fiduciary obligation. It is only those duties that are peculiar to

H fiduciaries that can properly be termed as fiduciary duties. (paras 57 & 58)

(6) The relationship between the first appellant and the purchasers could only be properly characterised as fiduciary. At all material times, there was fiduciary obligation on the part of the first appellant towards

I the purchasers in connection with the estate land. The first appellant should have acted in good faith. He should not have made profit out of his trust. He should not have placed himself in a position where his

duty and his interests conflicted. He should not have acted for his own benefit or the benefit of any third person without the informed consent of his principals, *ie*, the purchasers. In doing what he did, the first appellant breached his fiduciary obligation, thus indicating his disloyalty or infidelity. (paras 62 & 64)

(7) 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. The first appellant thus had to account for the profit and other advantages he acquired while acting in breach of his fiduciary obligations towards the purchasers. However, the expenditure incurred by the first appellant had to be deducted from the assessed damages and profits. (paras 70 & 77 & 78)

(8) 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. 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. (paras 89 & 90)

(9) 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. Such evidence had cured the absence of a specific plea of the aforementioned parties being one and the same entities in the respondents' statement of claim. (paras 92 & 94)

(10) 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. In the present case, there were justifications in the lifting of the corporate veil of the fourth appellant. The fourth appellant was the alter ego of the first appellant. The first appellant established the fourth appellant as a mere façade 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. (paras 96, 100-102)

(11) The estate land although registered in the name of the fourth appellant, was now under the management of two corporate entities having no ties with the first or second appellants. They were 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. 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 was thus inequitable for the

purchasers to take the estate land and/or profit without incurring expenses to obtain them. Accordingly, there was no order to declare as invalid, null and void the transfer of the estate land to the fourth appellant. (para 105)

Bahasa Malaysia *Translation Of Headnotes*

Nam Bee Rubber Estate Sdn Bhd ('Nam Bee') adalah tuan punya berdaftar sebidang tanah luas ('tanah estet'). Syarikat Pembinaan Perusahaan Kemajuan Bhd ('SPPKB') bercadang untuk membeli tanah estet tersebut dan membayar deposit. Selepas siasatan di Pejabat Tanah, SPPKN mendapati bahawa tanah estet itu tidak boleh dipindah milik kepadanya. Selanjutnya, Nam Bee memperbadankan Simpang Empat Plantation Sdn Bhd ('SEP'), perayu ketiga, dengan pengarah-pengarahnya sama dengan pengarah-pengarah Nam Bee. Pengarah-pengarah SEP kemudiannya telah digantikan dengan pengarah-pengarah SPPKB. SPPKB memasuki perjanjian ('perjanjian SPPKB') dengan pembeli-pembeli yang berbeza termasuk responden-responden untuk menjual plot tanah di tanah estet. Pembeli-pembeli membeli 3000 ekar tanah estet dan bakinya kekal dengan SEP. Untuk mengumpul dana, SEP meminjam dari MBF Finance ('perayu kelima'). Caj dan debentur diwujudkan oleh SEP memihak kepada perayu kelima tanpa pengetahuan pembeli-pembeli. SEP gagal dalam pembayaran balik pinjaman dan perayu kelima meneruskan untuk melelongkan tanah estet. Pembeli-pembeli yang menyedari lelongan tersebut telah berjumpa dengan perayu pertama, seorang peguambela dan peguamcara. Perayu kedua adalah firma guaman perayu pertama. Perayu pertama bertindak bagi pihak pembeli-pembeli. Seterusnya, perayu pertama telah berjaya membuat bidaan di lelongan itu atas namanya sendiri. Atas permintaan perayu pertama, sebahagian daripada pembeli membayar jumlah RM276,450 iaitu sumbangan mereka terhadap pembayaran deposit untuk bidaan lelongan. Perayu pertama kemudiannya menjemput pembeli-pembeli untuk membeli saham atau plot yang diperuntukkan kepada mereka daripadanya. Perayu pertama memberitahu pembeli-pembeli bahawa dia bukan peguam mereka dan bahawa tanah estet itu adalah tanah miliknya dan pembeli-pembeli mesti membeli semula bahagian tanah mereka dari tanah estet itu daripadanya. Pembeli-pembeli mendakwa bahawa perayu pertama adalah peguam mereka apabila dia membuat tawaran untuk tanah estet itu. Sementara itu, perayu pertama meneruskan untuk menubuhkan perayu keempat di mana dia, isterinya dan kawannya yang bernama Manjeet adalah pengarah-pengarah. Perayu pertama kemudiannya telah memindahkan hak milik tanah estet kepada perayu keempat. Perayu pertama kemudiannya telah memindahkan saham-sahamnya dalam perayu keempat kepada dua syarikat lain. Responden-responden dengan itu telah memulakan tindakan ini terhadap perayu-perayu dan menuntut, antara lain, pengisytiharan bahawa (i) perayu pertama dan kedua adalah pada setiap waktu material peguamcara yang bertindak bagi pihak responden dengan kewajipan fidusiari; (ii) tanah tersebut telah dibeli perayu pertama sebagai amanah bagi pihak responden;

(iii) pindah milik tanah tersebut kepada perayu keempat adalah diisytiharkan tidak sah dan terbatal. Mahkamah Tinggi telah memihak kepada perayu-perayu. Mahkamah Rayuan pula telah membatalkan keputusan Mahkamah Tinggi dan membenarkan pengisytiharan-pengisytiharan yang telah dituntut oleh responden-responden. Mahkamah Persekutuan telah memberikan kebenaran kepada perayu untuk merayu atas soalan-soalan berikut: (i) sama ada kewujudan, dan skop tanggungjawab, dalam perhubungan antara peguam cara dan anak guam ditentukan hanya oleh rujukan pada retainer; (ii) sama ada fidusiari berhak untuk mendapatkan pengembalian perbelanjaan yang ditanggungnya dalam memperolehi manfaat yang ditentukan kemudiannya menjadi terhutang dan kena dibayar kepada orang-orang yang pemegang amanah berhutang; dan (iii) sama ada mahkamah berhak untuk menyingkap tirai pemerbadanan untuk berlaku adil walaupun ia bukan kes yang diplid atau dihujahkan oleh pihak yang mendakwa bahawa syarikat berkenaan digunakan sebagai memangkin untuk menipu.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Hubungan antara peguamcara dan anak guam boleh berbangkit sama ada: melalui persetujuan nyata di antara peguamcara dan anak guam; atau di mana terdapat penegasan yang nyata oleh peguamcara untuk bertindak bagi pihak anak guam atau ia boleh jadi tersirat. Perkiraan yuran atau bayaran bukan penentu bagi kewujudan hubungan peguamcara dan anak guam. Kepercayaan unilateral oleh anak guam yang dimaksudkan bahawa peguamcara akan mewakilinya tidak mencukupi. Ia tidak perlu untuk retainer dinyatakan bagi menentukan kewujudan hubungan peguamcara dan anak guam.

(2) "Retainer" berkaitan dengan hubungan peguamcara dan anak guam boleh wujud sekurang-kurangnya dalam tiga bentuk, iaitu, pembayaran sejumlah wang kepada peguamcara diletakkan dalam akaun amanah atau hubungan profesional yang wujud di antara peguamcara dan anak guam di bawah fakta dan hal keadaan yang diberikan atau perjanjian yang kewujudannya bergantung kepada fakta dan keadaan setiap kes.

(3) Terdapat hubungan peguamcara dan anak guam antara perayu pertama dan responden-responden. Hubungan peguamcara dan anak guam antara perayu pertama dan pembeli-pembeli terus wujud sehingga perayu pertama mengisytiharkan atau mengumumkan kepada pembeli-pembeli bahawa dia bukan lagi peguamcara mereka.

(4) Untuk seseorang menjadi fidusiari, dia mesti menambatkan dirinya dalam apa cara sekalipun untuk melindungi dan/atau memajukan kepentingan pihak yang lain. Kategori hubungan fidusiari tidak tertutup. Walau bagaimanapun, terdapat dua keadaan utama di mana

A hubungan fidusiari berbangkit, iaitu, fidusiari *per se* (fidusiari berdasarkan status) dan fidusiari *ad hoc* (fidusiari berdasarkan fakta). Hubungan peguamcara dan anak guam tertakluk di bawah bidang kuasa fidusiari *per se* kerana 'tujuan inheren mereka atau anggapan fakta dan kejadian-kejadian yang dianggap nyata atau sah'.

B **(5)** Tuntutan kewajipan fidusiari hanya boleh diasaskan sekiranya berlaku pelanggaran kewajipan tertentu yang dikenakan kerana hubungan tersebut mempunyai ciri fidusiari. Bukan setiap tuntutan undang-undang yang timbul daripada hubungan fidusiari *per se*, seperti yang berlaku antara peguamcara dan anak guam, yang akan menimbulkan C dakwaan pelanggaran kewajipan fidusiari. Pelanggaran kewajipan oleh seorang peguamcara tidak semestinya pelanggaran kewajipan fidusiari walaupun tuntutan kecuaian mungkin timbul. Bukan setiap kewajipan yang dijalankan dalam hubungan peguamcara dan anak guam akan menarik obligasi fidusiari. Hanya tanggungjawab-tanggungjawab yang D khusus kepada fidusiari boleh disebut sebagai kewajipan fidusiari.

(6) Hubungan antara perayu pertama dan pembeli-pembeli hanya boleh dikategorikan sebagai fidusiari. Pada setiap waktu material, terdapat obligasi fidusiari perayu pertama terhadap pembeli-pembeli berkaitan dengan tanah estet. Perayu pertama sepatutnya bertindak dengan suci E hati. Dia tidak sepatutnya meraih keuntungan daripada amanah yang diberikan kepadanya. Dia tidak sepatutnya meletakkan dirinya dalam keadaan di mana tanggungjawab dan kepentingannya berkonflik. Dia tidak sepatutnya bertindak bagi faedahnya sendiri atau faedah pihak ketiga tanpa kebenaran prinsipal-prinsipal iaitu pembeli-pembeli. Dengan F berbuat demikian, perayu pertama telah melanggar kewajipan fidusiari, maka ia adalah petunjuk ketidaktaatan dan ketidakjujurannya.

(7) Rukun ekuiti adalah bahawa jika seseorang memperolehi keuntungan dari kedudukan fidusiari beliau, beliau bertanggungjawab untuk keuntungan itu. Liabiliti timbul daripada fakta keuntungan semata-G mata dan fidusiari itu, walaupun jujur dan berniat baik, tidak boleh lari daripada risiko dipanggil untuk dipersoalkan. Perayu pertama oleh itu mestilah bertanggungjawab untuk keuntungan dan kelebihan-kelebihan lain yang diperolehinya semasa bertindak melanggar kewajipan fidusiari terhadap pembeli-pembeli. Walau bagaimanapun, H perbelanjaan yang ditanggung oleh perayu pertama perlu dipotong dari kerugian-kerugian dan keuntungan-keuntungan yang ditaksir.

(8) Pihak-pihak adalah terikat dengan pliding dan perbicaraan guaman mesti membataskan pliding itu. Mahkamah tidak mempunyai hak untuk memutuskan guaman atas perkara yang tidak diplidkan. Walau I bagaimanapun, dalam keadaan tertentu, keterangan yang dikemukakan semasa perbicaraan boleh mengatasi kecacatan dalam pliding selagi pihak yang satu lagi tidak terkejut.

(9) Keterangan berkaitan dengan isu sama ada perayu ketiga dan SPPKB adalah satu entiti dan sama ada perayu pertama adalah personaliti kedua perayu keempat telah diberikan tanpa bantahan daripada perayu-perayu. Keterangan sebegitu telah menyembuhkan keadaan di mana terdapat ketiadaan pli tertentu daripada pihak-pihak tersebut yang dijadikan satu entiti dalam pernyataan tuntutan responden.

(10) Mahkamah akan menyingkap tirai pemerbadanan jika perbadanan tersebut ditubuhkan bagi tujuan penipuan, atau di mana ia telah ditubuhkan untuk mengelakkan obligasi sedia ada atau untuk mencegah penyalahgunaan keperibadian undang-undang korporat. Dalam kes ini, terdapat justifikasi dalam menyingkap tirai pemerbadanan perayu keempat. Perayu keempat adalah personaliti kedua perayu pertama. Perayu pertama telah menubuhkan perayu keempat sebagai topeng semata-mata untuk memindah milik milikan tanah estet untuk mengelak kewajipan fidusiarinya sebagai peguamcara terhadap anak guamnya, iaitu pembeli-pembeli yang termasuk responden-responden.

(11) Walaupun tanah estet telah didaftarkan atas nama perayu keempat, ia sekarang berada di bawah dua entiti korporat yang tidak mempunyai ikatan dengan perayu pertama atau kedua. Mereka bukan pihak yang terlibat dalam guaman ini. Tiada penegasan oleh responden bahawa kedua-dua entiti korporat tidak memperolehi saham-saham itu dengan suci hati dan untuk balasan bernilai. Tiada juga bantahan kepada fakta bahawa kedua-dua entiti korporat telah membelanjakan wang untuk membangunkan tanah estet sehingga keadaan sekarang. Oleh itu, ia tak saksama untuk pembeli-pembeli mengambil tanah estet dan/atau keuntungan tanpa menanggung perbelanjaan untuk memperolehinya. Sewajarnya, tiada perintah dibuat bagi mengisytiharkan pindah milik tanah estet kepada perayu keempat sebagai tidak sah dan terbatal.

Case(s) referred to:

Adams v. Cape Industries Plc [1990] Ch 433 ***(refd)***
Boardman v. Phipps [1967] 2 AC 46 ***(refd)***
Breen v. Williams [1996] 186 CLR 71 ***(refd)***
Bristol and West Building Society v. Mothew [1998] Ch 1 ***(refd)***
Cawdery Kaye Fireman & Taylor v. Gary Minkin [2012] EWCA Civ 546 ***(refd)***
Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC **(refd)**
Fladgate LLP v. Lee Harrison [2012] EWHC 67 (QB) ***(refd)***
French v. Carter Lemon Camerons LLP [2012] EWCA Civ 1180 ***(refd)***
Galambos v. Perez [2009] SCC 48 ***(refd)***
Gilford Motor Co Ltd v. Horne [1933] Ch 935 ***(refd)***
Guinness Plc v. Saunders [1990] 2 AC 663 ***(refd)***
Gurbachan Singh Bagawan Singh & Anor v. Vellasamy Pennusamy & Ors And Other Applications [2012] 2 CLJ 663 FC ***(refd)***
Hilton v. Barker Booth & Eastwood [2005] UKHL 8 ***(refd)***
Hospital Products Ltd v. United States Surgical Corp & Ors [1984] 58 ALJR 587 ***(refd)***

Hotel Jayapuri Bhd v. National Union of Hotel Bar and Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***
Jones v. Lipman [1962] 1 WLR 832 ***(refd)***
LAC Minerals Ltd v. International Corona Resources Ltd [1989] 2 SCR 574 ***(refd)***
Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***
Lie Hendri Rusli v. Wong Tan & Molly Lim [2004] 4 SLR (R) 594 ***(refd)***
Longstaff & Ors v. Birtles & Ors [2002] 1 WLR 470 ***(refd)***
Mackt Logistics (M) Sdn Bhd v. Malaysia Airline System Bhd [2014] 5 CLJ 851 CA ***(refd)***
Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 FC ***(refd)***
O'Sullivan v. Management Agency & Music Ltd [1985] 1 QB 428 ***(refd)***
Prest v. Prest & Others [2013] UKSC 34 ***(refd)***
Rabiah Bee Mohamed Ibrahim v. Salem Ibrahim [2007] 2 SLR (R) 655 ***(refd)***
Richard Buxton (Solicitors) v. Huw Llewelyn Paul Mills-Owen [2010] EWCA Civ 122 ***(refd)***
Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***
Spector v. Ageda [1973] Ch 30 ***(refd)***
Stephenson Nominees Pty Ltd v. Official Receiver [1987] 76 ALR 485 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***
Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Togstad v. Vesely, Otto, Miller & Keefe, 291 NW 2d 686 (Minn. 1980) ***(refd)***
Underwood, Son & Piper v. Lewis [1894] 2 QB 306 **(refd)**
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***
Vellasamy Ponnusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2006] 1 CLJ 805 HC ***(refd)***
Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
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)

For the 1st & 2nd appellants - Malik Imtiaz Sarwar (Harpal Singh Grewal, Chan Wei June, Pavendeep Singh with him); M/s Bachan & Kartar
For the 3rd appellant - Leong Kok Keong; M/s Kean Chye & Sivalingam
For the 4th appellant - Loh Siew Cheang (Brian Foong Mun Loong, Eolanda Yeoh, Verene Tan Yeen Yi with him); M/s Cheang & Ariff
For the 5th appellant - Ling Hua Keong (Mohamed Khairil Abidin with him); M/s Ling & Mok
For the respondents - Cecil Abraham (DP Vijandran, T Kumar, Amrit Gill, S Ambiga, Ragunath Kesavan with him); M/s DP Vijandran & Assocs

[Editor's note: For the Court of Appeal judgment, please see Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712.]

Reported by Amutha Suppayah

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[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'.[1]

[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:

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;

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

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.

[3] The leave questions may be categorised into two parts. Questions 1 and 2 deal with the relationship between the first and second appellants and the respondents. Questions 3 to 5 deal with the claims of the respondents on the estate land. In our view Questions 1 and 2 may be determined on their own merits. They are not dependent on the determination of Questions 3 to 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 appellant and second appellants after considering Questions 1 and 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:

> (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 30.4.1994 (between the R&M and D1) to include the new trustees appointed by this Court;
>
> (d) To declare certain sale and purchase agreements between DI and some sub-purchasers as null and void and that D1 and D2 refund with 8% p.a. interest, all monies paid under those agreements or alternatively rescission of those agreements;
>
> (e) That the transfer of the said land to D4 (the 4th Appellant) be declared invalid, null and void;
>
> (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;
>
> (h) That there be an inquiry and accounts taken in respect of the usage and profits of the said land by DI and/or D4, and that such profits be paid to the plaintiffs.

Background Facts

[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[2] and the Court of Appeal[3]. We need not regurgitate them in this judgment. Suffice it if we only highlight the pertinent facts and circumstances.

[8] Nam Bee Rubber Estate Sdn Bhd ('Nam Bee') was the registered proprietor of a large parcel of land measuring 3681.165 acres (about 1490 hectares) known as P.N. 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 ('NLC") was applicable to it. A

[9] In December 1979 a company, Syarikat Pembinaan Perusahaan Kemajuan Berhad ('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'). B

[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 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 D

[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 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. E

[12] From 1979 to 1984 SPPKB entered into separate agreements ('SPPKB agreements') with different purchasers including the respondents purportedly 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 3 acres in the estate land. F G

[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 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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

[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.

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

[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.

[26] The first appellant held meetings with the purchasers on 2 and 3 April 1994 (as recorded in D78 and D80 respectively). During 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.

[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.

[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.

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*:

(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) 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 (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 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;

(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;

(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;

(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;

(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;

(n) that the first appellant did not act for the plaintiffs (respondents) when he made his second bid for the estate land. As such he was not a trustee for the plaintiffs (respondents);

(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:

(i) the issue was not pleaded by the plaintiffs (respondents);

(ii) the fourth appellant did not have notice of the beneficial interest of the plaintiffs (respondents) in the estate land;

(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;

(v) it was never shown that the fourth appellant had knowledge of any beneficial interests of the plaintiffs (respondents) in the estate land.

(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'.

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.

[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;

(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;

(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;

(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;

(f) that the first appellant after being consulted as a solicitor by the 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;

(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;

(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;

(iii) the Committee consulted the first appellant as a lawyer.

(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;

(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;

(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;

(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 sub-division. The purchasers became owners of plots that were not sub-divided 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.

Before This Court

Question 1: Whether The Existence Of And Scope Of Duties In, A Solicitor-Client
C *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:

(a) that the solicitor-client relationship between the first appellant and the
D purchasers was a limited retainer because:

(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
E scope of the retainer prior to the majority defining the scope of fiduciary duties.

(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
F 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.

(iii) in coming to his conclusion the learned trial judge depended on his finding that SP8 was not a witness of truth.
G

(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.

H (v) the majority further appeared to have overlooked the significance of the 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"[4]. The majority therefore:
I

(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

(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 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; and

(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.

[34] In response learned counsel for the respondents submitted:

(a) that Question 1 has two parts, namely:

(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.

(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*[5] the trial judge found a 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 (supra)*[6] 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';

(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;

(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;

(f) that fiduciary duties include:

(i) duty not to take any secret advantage whether or not any dishonesty is involved.[7];

(ii) a duty to make full disclosure of any interest in the transaction for which the solicitor is retained[8];

(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

(i) that 'Damages representing the loss sustained includes replacement or restitution of any property improperly obtained from the client or disgorgement of profits'.

Finding For Question 1

[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 the plaintiff-client.[9]

Solicitor-Client Relationship

[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) 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:

(a) that the purported client has sought for advice or assistance from the solicitor;

(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

(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.[10] But unilateral belief by a purported client that the solicitor would represent him or her would not suffice.[11]

[39] In *Yong & Co v. Wee Hood Teck Development (supra)*[12] 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*[13]).

[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.

[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'.[14]

[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.

[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'.[15]

[44] It was also held in *Underwood, Son & Piper v. Lewis*[16]:

> … 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 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.

[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 recognize the SPPKB agreements and for the entry of the caveats on the estate land in anticipation of the public auction sale.

[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.

[49] It is a settled law as stated by the majority that a limited retainer should be reduced in writing to avoid any misunderstanding.[17] 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'.[18]

[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.

[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 acknowledgement 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.

[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.

[53] Contrary to the contention marshalled 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[19] 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.[20] 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.[21]

Fiduciary Duty In Solicitor-Client Relationship

[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'.[22] 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.'[23]

[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.'[24] 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).

[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'.[25] 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.

[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'.[26]

[58] Indeed a breach of duty by a solicitor is not necessarily a breach of fiduciary duty though a claim for negligence may arise.[27] Not every task undertaken in the course of a solicitor-client relationship attracts a fiduciary obligation.[28] It is only those duties that are peculiar to fiduciaries can properly be termed as fiduciary duties.[29]

[59] The distinguishing duty of a fiduciary is the duty of loyalty. Lord Justice Millett said this:[30]

> 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.

[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.

[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.

[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 characterised 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'.[31] 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.[32]

[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.[33]

[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'.[34] 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'.[35]

[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?

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;

(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) 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*[36] was cited as the authority in support of that argument;

(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*[37]. 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:

> 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 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:

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

(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.

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

(a) that restitution was not an issue which arose in the High Court. There was no alternate counter claim 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

(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.

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.

[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 *Phipps and Boardman*[38] 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 advice 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*.[39]
>
> In the later case of *Bray v. Ford*[40] 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 *Phipps v. Boardman*[41] at p. 1060:

> The position of a person in a fiduciary capacity is referred to in *Regal (Hastings) Ltd. v. Gulliver*[42] by Lord Russel 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 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)
>
> Again Lord Russel[43] quotes with approval from the judgment of the Lord Ordinary in *Huntington Copper Co. v. Henderson*[44] 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.
>
> Lord Wright in the same case said[45]:
>
> > 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

A 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[46]:

B 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 C 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 D 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* E *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)

[71] While the Law Lords appeared to have laid down harsh consequences F for breach of fiduciary duties in *Phipps v. Boardman*[47], 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 G 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 H 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*[48] gave his support to an allowance of this kind to trustees for their services in acting as directions of a company. It seems I 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[49] 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[50]: "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).

[73] In a subsequent case of *Guinness Plc v. Saunders*[51] the House of Lords agreed with the proposition of law expounded in *Phipps v. Boardman*[52]. 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*:

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*[53] the solicitor to a trust and one of the beneficiaries were held

A 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
B word and skill.

…

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
C labour which has produced it". …

…

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
D 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
E encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees.

[74] Earlier on, in the case of *O'Sullivan v. Management Agency & Music Ltd*[54] the Court of Appeal applied the principle of recompensing the fiduciaries as propounded in *Phipps v. Boardman*[55].

F **[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*[56] 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*:

G 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
H liberal scale" for their work and skill ...

…

These latter observations (and those of Lord Denning M.R. 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*
I *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 M.R., 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 M.A.M. 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 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)

[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*[57] where there has been dishonesty or 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.

[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 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 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.

[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 respondents' shares.

[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).

[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.

[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

[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.

[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 Jayapuri Bhd v. National Union of Hotel Bar and Restaurant Workers & Anor*[58] was cited in support.

[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.

Contentions Of The Parties

[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 & Ors*[59] and *Adams v. Cape Industries Plc*[60] to support his argument; and

(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 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 façade concealing the true facts.

[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:

(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;

(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. Malaysia Airline System Bhd*[61] was cited in support;

(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. Prest and Others*[62];

(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;

(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;

(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) 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) 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:

(i) *Gilford Motor Co Ltd v. Horne*[63];

(ii) *Jones v. Lipman*[64];

(iii) *Prest v. Prest and Others*[65];

(iv) *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors*[66]; and

(v) *Takako Sakao (f) v. Ng Pek Yuen (f) & Anor*[67].

(c) that the fourth appellant was set up by the first appellant as a mere façade 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

(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.

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.

[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.[68]

[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'.[69]

[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.

[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.

[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.

[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.

[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.

[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.[70]

[97] As to what constitutes fraudulent purposes it has been described as to include actual fraud or fraud in equity.[71] 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 …,[72]

[98] Quite recently this court also discussed on the issue of lifting a corporate veil in the case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381. It said this:

> … 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:
>
> > … 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.
>
> 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.
>
> 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.
>
> [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 façade concealing the true facts.[73]

[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. Prest and Others*[74]. The leading judgment of the court said this:

> 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 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, 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.

[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.

[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 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 directors, a shareholder and the promoter of the fourth appellant.

[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 façade 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.

[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.

[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.

[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.

> 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.
>
> 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

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

The Fifth Appellant

[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 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'.

[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

[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:

(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

(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 to 3:

(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;

(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';

(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

(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

A 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
B 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';

(d) we find as unnecessary in view of our findings in relation to Questions
C 1 to 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';

(e) we find as unnecessary the order of the majority that 'the register
D 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';

(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 and 2;

E (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;

F (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;

G (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;

(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
H 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.

I

Endnotes:

1. See: [2012] 2 CLJ 663; [2012] 2 MLJ 149.
2. See: [2006] 1 CLJ 805; [2006] 2 MLJ 715.
3. See: [2012] 2 CLJ 712; [2012] 5 MLJ 437.
4. per Millet LJ in *Bristol and West Building Society v. Mothew* [1998] Ch 1.
5. [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251; [1984] 2 MLJ 39.
6. [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251; [1984] 2 MLJ 39.
7. *Boardman v. Phipps* [1967] 2 AC 46; *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ 73.
8. McGarry J in *Spector v. Ageda* [1973] Ch 30 at p. 47.
9. See: *Rabiah Bee bte Mohamed Ibrahim v. Salem Ibrahim* [2007] 2 SLR (R) 655.
10. See: *Togstad v. Vesely, Otto, Miller & Keefe*, 291 NW 2d 686 (Minn 1980).
11. *Rabiah Bee bte Mohamed Ibrahim v. Salem Ibrahim (supra).*
12. [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251; [1984] 2 MLJ 39.
13. [1983] 1 LNS 21; [1983] 2 MLJ 196 FC.
14. See: *Fladgate LLP v. Lee Harrison* [2012] EWHC 67 (QB).
15. See: *Yong & Co v. Wee Hood Teck Development (supra).*
16. [1894] 2 QB 306 per Lord Esher MR; (See also: *Cawdery Kaye Fireman & Taylor v. Gary Minkin* [2012] EWCA Civ 546; *Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owen* [2010] EWCA Civ 122).
17. See: *Lie Hendri Rusli v. Wong Tan & Molly Lim* [2004] 4 SLR(R) 594 42.
18. See: *Cawdery Kaye Fireman & Taylor v. Gary Minkin* [2012] EWCA Civ. 546.
19. See: *Cawdery Kaye Fireman & Taylor v. Gary Minkin (supra).*
20. See: *French v. Carter Lemon Camerons LLP* [2012] EWCA Civ 1180 44.
21. See: *Fladgate LLP v. Lee Harrison (supra).*
22. See: Professor PD Finn: Fiduciary Obligations (1977).
23. See: *Bristol and West Building Society v. Mothew (supra).*
24. See: *Hospital Products Ltd v. United States Surgical Corp & Ors* [1984] 58 ALJR 587.

25. See: *LAC Minerals Ltd v. International Corona Resources Ltd* [1989] 2 SCR 574.
26. See: *Galambos v. Perez* [2009] SCC 48.
27. See: *Bristol and West Building Society v. Mothew (supra)*; *Hilton v. Barker Booth & Eastwood* [2005] UKHL 8.
28. See: *Galambos v. Perez (supra).*
29. See: *Breen v. Williams* [1996] 186 CLR 71 at 137.
30. See: *Bristol and West Building Society v. Mothew (supra).*
31. See: J Edelman: "When do fiduciary duties arise?" [2010] 126 Law Quarterly Review 302.
32. See: *Longstaff and Ors v. Birtless and Ors* [2002] 1 WLR 470; See: *Galambos v. Perez (supra).*
33. See: *Cawdery Kaye Fireman & Taylor v. Gary Minkin (supra).*
34. See: *The Law Commission Paper on Fiduciary Duties of Investment Intermediaries* (2014) (Law Com No. 350).
35. See: *Bristol and West Building Society v. Mothew (supra).*
36. *Stephenson Nominees Pty Ltd v. Official Receiver* [1987] 76 ALR 485.
37. *LAC Minerals Ltd v. International Corona Resources Ltd* [1989] 2 SCR 574.
38. *Phipps and Boardman* [1966] 3 WLR 1009.
39. 1 Macq 461, 471.
40. [1896] AC 44.
41. [1966] 3 WLR 1009 at 1060.
42. [1942] 1 All ER 378, 386.
43. [1942] 1 All ER 378, 389.
44. [1877] 4 R 294.
45. [1942] 1 All ER 378, 392.
46. [1942] 1 All ER 378, 392.
47. [1964] 1 WLR 993, 1017.
48. [1946] Ch 73, 82.
49. [1965] 2 WLR 839, 861.
50. [1964] 1 WLR 993, 1018.
51. [1990] 2 AC 663.

52. [1964] 1 WLR 9.
53. [1964] 1 WLR 993 69.
54. [1985] 1 QB 428.
55. [1964] 1 WLR 993.
56. [1964] 1 WLR 993.
57. [1964] 1 WLR 993.
58. [1979] 1 LNS 32; [1980] 1 MLJ 109.
59. [2005] 3 CLJ 355.
60. [1990] Ch 433.
61. [2014] 5 CLJ 851; [2014] 2 MLJ 518.
62. [2013] UKSC 34.
63. [1933] Ch 935.
64. [1962] 1 WLR 832.
65. [2013] UKSC 34.
66. [2005] 3 CLJ 355.
67. [2010] 1 CLJ 381; [2009] 6 MLJ 751;
68. See: *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330
69. See: *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit b Matusin & 6 Ors* [1994] 3 CLJ 567.
70. See: *Prest v. Prest and Others* [2013] UKSC 34.
71. See: *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors (supra).*
72. See: *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529; [1996] 3 MLJ 533 per Chong Siew Fai FCJ (as he then was).
73. See: *Takako Sakao (f) v. Ng Pek Yuen (f) & Anor (supra).*
74. [2013] UKSC 34.