IN THE COURT OF APPEAL MALAYSIA
IN THE FEDERAL TERRITORY OF PUTRAJAYA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: B-01(NCVC)(W)-455-08/2019

BETWEEN

SURESH A/L SUBRAMANIAM …APPELLANT

AND

MAJLIS PERBANDARAN SELAYANG …RESPONDENT

In the High Court of Malaya at Shah Alam, Selangor
Writ of Summons No.: BA-21NCVC-46-06/2016

Between

Majlis Perbandaran Selayang … Plaintiff

And

Suresh a/l Subramaniam
(formerly practising as partner in Messrs.
Suresh Thanabalasingam and now practising
as partner in Messrs. Suresh, Sharvin & Co.) …Defendant

CORAM:

YAACOB BIN HJ MD SAM, JCA
VAZEER ALAM BIN MYDIN MEERA, JCA
LIM CHONG FONG, JCA

GROUNDS OF JUDGMENT

INTRODUCTION

[1] This is an appeal against the trial judgment of the High Court allowing the claim on solicitor's professional negligence.

[2] The learned High Court judge ordered payment of RM6,300,000.00, general damages of RM50,000.00, exemplary damages of RM50,000.00 with interest at 5% per annum on the judgment sums from the date of judgment until full settlement and costs of RM20,000.00.

[3] On 23rd November 2022, we unanimously allowed the appeal and set aside the order of the High Court with costs of RM30,000.00 here and below subject to allocatur.

BACKGROUND

[4] The Respondent, a local authority constituted pursuant to the Local Government Act 1976 was embroiled in civil litigation in Kuala Lumpur High Court Case No. 22NCVC-1205-1205-12/2011 (**"Case"**) brought by Syarikat Liam Beng Brothers Sdn Bhd (**"SLBB"**) against the Respondent.

[5] The subject matter of the Case is trespass on SLBB's land by the Respondent and three other entities wherein SLBB sought general damages of RM5,455,000.00, special damages of RM202,000.00,

exemplary damages of RM1,020,750.00 with interest of 5% from January 2010 till full settlement and costs of RM20,000.00.

[6] As the result, the Respondent appointed Messrs. Suresh Thanabalasingam, a firm of advocates and solicitors wherein the Appellant was then a partner of the firm to represent and defend the Respondent. The Appellant is the solicitor in charge of the Case.

[7] The Respondent was on 30th September 2014 informed by SLBB's solicitors that SLBB has on 4th July 2014 obtained judgment against the Respondent in respect of the Case.

[8] After conducting a court file search, the Respondent discovered that SLBB has in fact initially on 31st July 2013 obtained an interlocutory default judgment for non-compliance of the High Court' s unless order dated 29th April 2013 to file list of witnesses and witness statements for purposes of trial. The Appellant did not attend court proceedings on 31st July 2013.

[9] As the result, SLBB proceeded to have its damages suffered assessed before the deputy registrar of the High Court on 4th July 2014 in which the Appellant also did not attend that court proceedings. Hence, SLBB accordingly obtained final judgment against the Respondent.

[10] The Respondent subsequently on 20th November 2014 and 17th March 2015 paid SLBB as ordered in the final judgment.

[11] As the result, the Respondent commenced Kuala Lumpur High Court Suit No. BA-21NCVC-46-06/2016 (**"Suit"**) against the Appellant.

IN THE HIGH COURT

[12] The Respondent in the Suit contended that the Appellant is negligent in its conduct of duties as the Respondent's solicitor particularly in not complying with the unless order issued by the High Court. This is indisputable according to the Respondent.

[13] However, the Appellant rebutted that its appointment by the Respondent to take conduct of the case is on *pro-bono* basis because the Respondent was aware that the Respondent has no defence against SLBB in the case. There is also no formal letter of appointment of the Appellant by the Respondent. That notwithstanding, the Respondent never relied on the Appellant's advice because the Appellant dealt with the Respondent's legal department at all material times. There was close liaison and updating of the Respondent's legal department by the Appellant. It was made clear that the Respondent's did not intend to call witnesses in defence of the case. As to his failure to attend the High Court hearing on 31st July 2013, the Appellant stated that Messrs. Suresh Thanabalasingam was not notified of that new date.

[14] Be that as it may, the Appellant also contended that the Respondent entered into a joint venture with a developer, Seri Dinar Project Development Sdn Bhd to develop a real estate which involved the

carrying out of earthworks that encroached on SLBB's land. Thus, the Respondent ought to have sought an indemnity of the damages claimed by SLBB from its joint venture partner instead.

[15] The learned High Court judge principally relied on the case of this Court in ***Wong Kiong Hung & Anor v Chang Siew Lan & Anor Appeal*** **[2009] 1 MLRA 381** and found that the Respondent successfully established that the Appellant owed the Respondent a duty of care. There was a breach of that duty by the Appellant. In consequence, the Respondent suffered damage that was not too remote by reason of the breach.

[16] In this respect, the learned High Court judge is satisfied that the Appellant was duly appointed as the Respondent's solicitor. It is irrelevant that it was a pro-bono appointment. He thereafter found that the Appellant without justification failed to attend court proceedings and filed the necessary cause papers. Additionally, he found the Appellant also without justification failed to keep the Respondent informed of the case development as well as to call witnesses to defend the assessment of damages. As the result, he was also satisfied that there is causal link between the breach of duty and damages suffered by the Respondent.

[17] Hence, the learned High Court judge found the Appellant liable to the Respondent for professional negligence and judgment was accordingly entered in the Suit against the Appellant.

FINDINGS OF THIS COURT

[18] We find at the hearing of the appeal that the parties basically re-hashed their respective contentions advanced in the Suit in the High Court.

[19] Consequently we have, in the exercise of our appellate duty and function, carefully reviewed the learned High Court judge's decision. We reminded ourselves of the following dicta of Steve Shim (CJ (Sabah & Sarawak)) in ***Gan Yook Chin & Anor and Lee Ing Chin & Ors*** **[2004] 4 CLJ 309 FC** on appellate intervention:

> *"The Court of Appeal had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process."*

[20] We noted that the learned High Court judge applied the law based on the case of this Court in ***Wong Kiong Hung & Anor v Chang Siew Lan & Anor Appeal*** **(supra)**. However, there is subsequently the case also of this Court in ***Supramaniam Kasia Pillai v Subramaniam Manickam*** **[2017] MLRAU 425** wherein David Wong Dak Wah JCA (later CJSS) held as follows on solicitor's professional negligence:

> *"[14]* ***The primary complaint of the Appellant was the failure on the part of the learned Judge to ask the question whether the appeal has any prospect of success in determining the quantum of damages****. This was how the learned Judge dealt with this issue:-*

"Defendan menghujahkan bahawa Plaintif tidak mempunyai prospek yang munasabah untuk berjaya di dalam rayuannya sekiranya pun jika Rekod Rayuan dibenarkan difailkan.

Atas isu ini, saya dapati bahawa Defendan telah menerima arahan daripada Plaintif untuk merayu, tugas Defendan adalah untuk mengambil tindakan bagi proses rayuan dan tidak dengan sendirinya membuat andaian yang Plaintif tidak mempunyai merit di dalam rayuannya.

Defendan telah bersetuju untuk bertindak bagi pihak Plaintif untuk memfailkan rayuan bagi keputusan kes 242.

Tugas kemahiran profesional Defendan adalah untuk memfailkan tindakan rayuan dan sama ada Plaintif akan berjaya di dalam rayuannya atau tidak adalah untuk ditentukan oleh Mahkamah.

...

Saya dapati Defendan telah melanggar kewajipan berjaga-jaganya terhadap Plaintif."

[15] ***One can see from the above paragraphs that the learned Judge had not considered the prospect of success had the appeal been properly lodged and heard by this Court. On this issue, we can do no better than to refer to the judgment of this Court in Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v. Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLRA 685; [2015] 1 MLJ 490; [2014] 8 CLJ 188, where Hamid Sultan Abu Backer JCA stated the applicable principles at pp 194 - 195, as follows*** *:-*

[7] ***There are authorities to suggest that in a case of this nature the respondent still has to prove his case against the third party on the balance of probabilities****. This was not done in this case. In Sharif & Ors v. Garrett & Company [2002] 1 WLR 3118, the court with similar issues had relied on Lord Justice Simon Brown in Mount v. Barker Austin [1998] PNLR 493 at pp 510/511, where His Lordship had summarised the relevant consideration as follows: -*

(i) ***The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim, he has lost something of value ie, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success****.*

(ii) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

(iii) ***If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors****. It is quite likely that the delay would have caused such difficulty and quite possible, indeed, that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.*

(iv) ***If and when the court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure****.*

These principles are largely taken from the leading cases of Kitchen v. Royal Air Force Association [1958] 1 WLR 563 and Allied Maples Group Ltd v. Simmons and Simmons [1995] 1 WLR 1602 and have been applied in a number of cases to which we were referred...

Prospect of Success

[16] It should be made clear at this juncture that the Respondent's case against Shell Malaysia was dismissed by the trial Judge in the Penang Suit premised on the fact that two reports of Shell Malaysia, namely a report dated 17 July 1995 on the operation (Operation Report) executed by employees of Shell Malaysia to apprehend the drivers of the Respondent and the Inquiry Report on

the theft were placed in Part A of the Bundle of Documents for the trial and hence had allowed Shell Marketing to make its 'no case to answer' after the Respondent's case. Those reports when placed in Part A meant that the Respondent had conceded his complicity in the theft and had provided valid ground for the termination of the transportation contract. That in short was the circumstances in which the appeal of the Respondent was lodged.

[17] ***From the evidence at the trial Court, it was not disputed that the Respondent had not called any legal practitioner, senior or otherwise, to testify on the prospect of success in the appeal. In our view, this was essential in a suit of this nature and failure to do so here was detrimental to the Respondent's claims. To reiterate the obvious, the legal burden was always on the Respondent****."***

(emphasis added)

[21] Thus in ***Tenaga Nasional Bhd v Tetuan Ariff & Co*** **[2014] 1 CLJ 1112**, Vazeer Alam Mydin Meera JC (now JCA) held as follows:

"[18] ***It is settled that in a claim of this nature, in assessing damages arising from professional negligence of solicitors, the question is not whether the plaintiff would have succeeded in its claim against EPE; but rather whether the defendant's negligence has occasioned the plaintiff to lose a valuable right, cause of action, chance or opportunity to claim their loss****. In Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344; [2001] 2 AMR 2001, in a claim for damages against a firm of solicitors for negligence, the Court of Appeal held that negligence of the appellant solicitor by reason of non attendance in court occasioned by the appellant's failure to diarise the respondents' case meant that the respondent in that case had lost a valuable right, which is the opportunity to convince the judge of first instance by way of oral testimony and documentary evidence, that they had a complete answer to the claim that had been brought against them. (See also the cases of Tatab Industries Sdn Bhd (In Receivership) v. Su Thiam Hock @ Su Then Hack [1994] 1 CLJ 544;Kitchen v. Royal Air Forces Association and Others [1958] All ER 241; and Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals [1968] 1 All ER 543 - where similar questions were asked in determining the causal link between the act of negligence and issue of damages).* ***It is the loss of chance of recovery of damages in the dismissed action that determines the issue of damages and not the prospect of success in that dismissed action****. In fact in the case of Sykt Siaw Teck Hwa Realty & Developments Sdn Bhd v. Malek & Joseph Au [1999]*

3 CLJ 184; [1999] 5 MLJ 588 the court held that it was indeed mischievous and unethical of the solicitor to justify his breach of duty of care by raising the question of the merit of the client's appeal and its lack of prospect of success in order to defeat the client's claim for damages in an action for negligence. In Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals [1968] 1 All ER 543 Lord Denning MR speaking for the English Court of Appeal held that when an action is dismissed as a result of a solicitor's negligence, the client:

> *... in a subsequent action for negligence against his solicitor can recover, in addition to the costs of the action which has been dismissed, compensation for the loss of his chances of recovering damages against the defendant in the dismissed action had been properly conducted on his behalf by the solicitor."*

See also ***Muthiah Ramasamy v Muguthan Vadiveloo*** **[2022] 7 CLJ 940**.

[22] It is therefore plain that besides establishing that the Appellant is careless in the conduct and discharge of its professional duty to the Respondent, it is also vital that the Respondent must establish its prospect of success in defending the Case against the Respondent. The burden of proof to demonstrate this prospect of success in the Case is plainly on the Respondent. Although the cases of ***Tenaga Nasional Bhd v Tetuan Ariff & Co*** **(supra)** and ***Muthiah Ramasamy v Muguthan Vadivello*** **(supra)** dealt with loss of prospect of a chance to recover from the plaintiff because of solicitor's carelessness, we hold that this requirement of establishing prospect of success in defeating the claim will likewise apply to the case of a defendant's defence, particularly as in the case of the Respondent here *vis a vis* the Case.

[23] However, we find that the same infirmity that occurred in the case of ***Supramaniam Kasia Pillai v Subramaniam Manickam*** **(supra)** recurred here. In this regard, there is neither pleading nor evidence

adduced on prospect of success *vis a vis* the Case by the Respondent before the learned High Court judge. This led to the learned High Court judge omitting to make any finding on the same that tantamount to a non-direction; hence fatal misdirection of law.

[24] In the premises, we find the learned High Court judge is plainly wrong and appellate intervention is consequently warranted.

CONCLUSION

[25] It is for the foregoing reason that we allowed the appeal as so ordered.

Dated this 17th April, 2023

-sgd-

LIM CHONG FONG

JUDGE

COURT OF APPEAL

MALAYSIA

LIST OF COUNSELS:

Counsels for Appellant	:	1. David Samuel; 2. L.S Leonard; 3. Savreena Kaur; and 4. Sheena Sebastian.
Solicitors for Appellant	:	Messrs. S. Suresh Law Chambers
Counsels for Respondents	:	1. Mohd Faiz Bin Abd Rahim;and 2. Revathy A/P Balachandran
Solicitors for Respondents	:	Messrs. Rastam Singa & Co.

CASES REFERRED TO:

Wong Kiong Hung & Anor v Chang Siew Lan & Anor Appeal [2009] 1 MLRA 381

Gan Yook Chin & Anor and Lee Ing Chin & Ors [2004] 4 CLJ 309

Supramaniam Kasia Pillai v Subramaniam Manickam [2017] MLRAU 425

Tenaga Nasional Bhd v Tetuan Ariff & Co [2014] 1 CLJ

Muthiah Ramasamy v Muguthan Vadiveloo [2022] 7 CLJ 940