Chew Kim Kee v Kertar and Co
[2004] SGHC 95

Case Number : Suit 1263/2002/Y

Decision Date : 08 May 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Leonard Loo and Edwin Loo (Leonard Loo and Co) for plaintiff; Chelva Rajah SC, Imran H Khwaja and Eusuff Ali (Tan Rajah and Cheah) for defendant

Parties : Chew Kim Kee — Kertar and Co

Legal Profession – Change of solicitor – No order to discharge firm as solicitors on record – Whether retainer between solicitor and client terminated – Rules of Court (Cap 322, S 80, R 5, 2004 Rev Ed) O 64 r 5(1).

Tort – Negligence – Duty of care – Solicitor-client relationship ended – Whether solicitor owed client duty to advise on deadline for appeal.

Tort – Negligence – Causation – Whether loss of opportunity to appeal attributable to failure of solicitor to advise on deadline to appeal.

8 May 2004

Belinda Ang Saw Ean J:

1 The plaintiff in this action is Chew Kim Kee. She claims damages against the defendant, Kertar & Co, for breach of duty as her advocate and solicitor in the conduct of the plaintiff's appeal against the decision of District Judge Kathryn Low. The decision, which was handed down on 21 September 1999, pertains to the division of matrimonial assets ("the Order"). At the material time, the sole proprietor of the defendant firm was Kertar Singh s/o Guljar Singh ("Kertar").

2 As it appears from the terms of the pleadings and Opening Statement, the plaintiff's case was put on a much wider footing than what was, eventually, argued in the closing submissions. A number of particulars of breach of duty in contract and in tort related to matters and events prior to 21 September 1999. In the course of the trial, counsel for the plaintiff, Mr Leonard Loo, confirmed that the complaint is not about the defendant's general conduct as the plaintiff's advocate and solicitor in the divorce proceedings and ancillary matters prior to 21 September 1999. Thereafter, the case proceeded on what I may state broadly as being a failure to advise on an appeal against the Order, and for not filing a notice of appeal, contrary to the plaintiff's instructions.

3 The plaintiff engaged the defendant in September 1997 as her advocate and solicitor to institute matrimonial proceedings against her husband. The husband initially contested the petition and filed a cross-petition. Eventually, a decree *nisi* on the plaintiff's petition was granted, uncontested, on 8 October 1998. The ancillary matters, *ie* maintenance and division of matrimonial assets, were heard before the district judge. Her overall award to the plaintiff was worth $1.6m.

4 The events giving rise to this action occurred in September and October 1999. What transpired on 21 and 22 September 1999, after the district judge handed down her decision, was a matter of dispute at the trial. It is convenient to summarise the respective positions of the parties.

5 I begin with a summary of the plaintiff's position. On the evening of 21 September 1999, Kertar informed the plaintiff, orally and briefly, that she had been awarded $1.6m, which included a

35% share of the matrimonial home. No other details of the Order were told to her. The plaintiff was dissatisfied with the decision of the district judge. She felt that it was not a fair decision as the husband was given the lion's share of the matrimonial assets. In that very same telephone conversation, she informed Kertar that she wished to appeal against the Order. But Kertar tried to impress upon her that the Order was fair and asked that she accept it. She was unwilling to do so, and in her affidavit of evidence-in chief stated that she had "informed him to appeal". She told him, "I want to appeal." Separately, the plaintiff, on 22 September 1999, informed Sharanjit Kaur d/o Sarjit Singh ("Sharanjit"), a legal assistant of the defendant firm who was handling the day-to-day care and conduct of the plaintiff's file, of her dissatisfaction with the decision and that she wanted to appeal against it.

6 On 5 October 1999, the defendant wrote to the plaintiff. She was informed that the firm would be applying to court to be discharged as her solicitor on record. No application for discharge was filed as the plaintiff appointed a new firm of solicitors, Thomas Tham & Co. They notified the defendant, on 19 October 1999, that they had taken over the conduct of the matter. A notice of change of solicitors was filed and served on 22 November 1999. The plaintiff paid the defendant's professional fees on 5 November 1999, but the defendant waited until 17 November 1999 to release the files to Thomas Tham & Co. All files were handed over by 31 December 1999. The handover of files was well after the deadline for filing the appeal.

7 The deadline for the appeal was 5 October 1999, but the defendant had not apprised the plaintiff of it. She learnt about the deadline from Thomas Tham & Co. As a result of the defendant's negligence, the plaintiff lost her right to appeal against the Order.

8 Some of the relevant particulars of breach of duty alleged against the defendant in her pleadings are:

(a) the defendant had not advised the plaintiff whether or not to appeal against the Order;

(b) the defendant was told that the plaintiff wanted to appeal against the Order, but the defendant did not do anything about it;

(c) the defendant did not advise the plaintiff of the deadline for the appeal; and

(d) the defendant caused or permitted the plaintiff's appeal to be time barred under the Rules of Court (Cap 322, R 5, 1997 Rev Ed).

9 I now move on to summarise the defendant's position. The plaintiff was informed of the outcome of the hearing by telephone on 21 September 1999 itself – first by Sharanjit, after the outcome was known, when Sharanjit returned the plaintiff's persistent calls to her handphone even during the hearing and later on, in the evening, when Kertar conveyed the terms of the Order to the plaintiff. The plaintiff had not expressed or given any indication that she was dissatisfied with the outcome of the hearing to any of them. Neither did Kertar nor Sharanjit sense any dissatisfaction on the plaintiff's part when they each spoke to the plaintiff. According to Kertar, she sounded relieved after he had explained the terms of the Order to her. In that conversation, he also informed her of additional legal costs if she were to buy over the husband's share of the matrimonial property. He turned down her suggestion that the conveyancing fees be a part of the agreed fees of $50,000. Under the terms of the Order, the plaintiff was to receive $100,000 within a month of the Order and the plaintiff was concerned that if the defendant deducted the agreed fees and conveyancing fees from that amount, there would hardly be any money left. The plaintiff appeared unhappy with the defendant's proposal to deduct the agreed fees of $50,000 from the $100,000. She did not say she

wanted to appeal or give instructions to appeal.

10 On the following day, 22 September 1999, the plaintiff turned up at the defendant's office without an appointment. In her affidavit of evidence-in-chief, the plaintiff stated that she had gone to the defendant's office at Kertar's request for a meeting at 10.00am. Whilst waiting for Kertar, she flipped through a copy of the husband's fourth affidavit filed on 25 August 1999, used by Sharanjit at the hearing. It was then that she noticed, to her horror, that missing from the copy in hand were tele-banking statements showing some deposits. The defendant said that the plaintiff caused a scene when she walked out of the defendant's office with Sharanjit's copy of the husband's fourth affidavit, despite protests from the defendant's staff. It is not disputed that the plaintiff had, without permission, taken away the affidavit. Neither Kertar nor Sharanjit were in the office at that time.

11 After learning of the incident, Kertar later that same day telephoned the plaintiff. During this telephone conversation, the plaintiff made various scurrilous allegations against Sharanjit. She accused the latter of deliberately removing from the affidavit, tele-banking statements that showed some large deposits. She claimed that she would have obtained a higher award had the statements with those entries not been removed. Kertar told the plaintiff that if she was unhappy, she could appeal against the Order and she had 14 days to do so. She could also engage another firm to act for her if she did not want the defendant to act on her behalf. On hearing that, the plaintiff promptly informed Kertar that she no longer wanted him to be her lawyer.

12 The defendant said that at no time did the plaintiff inform Kertar or Sharanjit that she wanted to appeal against the Order and that the defendant was to appeal on her behalf. As far as the defendant was concerned, the solicitor and client relationship had ended on 22 September 1999. The defendant was under no duty to advise her on the appeal or to file the notice of appeal on her behalf.

13 Under the Rules of Court, a notice of appeal must be filed within 14 days of the order – in this case, by 5 October 1999. It is not disputed that the defendant did not file a notice of appeal by 5 October 1999 or at all.

14 It is common ground that one of the obligations of an advocate and solicitor in carrying out his retainer is to exercise the care and skill of a competent practitioner in the discharge of his duties: *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 at 403. The Court of Appeal in *Chong Yeo & Partners v Guan Ming Hardware & Engineering Pte Ltd* [1997] 2 SLR 729 iterated the principle with reference to the advocate and solicitor's obligation to observe the Rules of Court (at [63]):

> For a breach of that duty of care to have occurred, the appellants must have, on the balance of probabilities, omitted to do a thing which a reasonably competent advocate and solicitor in their position would have done: *Godefroy v Dalton* [(1830) 6 Bing 460; 130 ER 1357]. Such a reasonably competent advocate and solicitor must comply with all rules of court to protect his client's interests.

15 The precise content of the duty of reasonable skill and care will depend on the circumstances of each case. There can be no doubt that an advocate and solicitor will be in breach of duty if he does not carry out, in a timely manner, his client's instructions to appeal. He is also under a duty to warn the client of the deadline for appealing and about the effect of a failure to file a timely notice of appeal. These duties are predicated on there being in existence a solicitor and client relationship stemming from the advocate and solicitor's retainer or, alternatively and independent of the contract, a relationship of proximity brought about by the retainer sufficient to found a duty of care in negligence. In this case, the duties of care in contract and in tort are not only concurrent, they are

co-extensive and hence overlap, so much so that a finding that the retainer had terminated will simultaneously resolve the duty of care question in contract and in tort.

16 I shall categorise the main issue as whether or not the relationship of solicitor and client had ended by 5 October 1999. The defendant's case is that the relationship had ended on 22 September 1999 as the plaintiff had terminated the services of the defendant as her advocate and solicitor in the matter on that day. The plaintiff, in her written testimony, stated that it was the defendant who did not want to act for her and not the other way around. Counsel for the defendant, Mr Chelva Rajah SC, argues that notwithstanding the dispute as to who did the discharging, the fact that the defendant was discharged during the telephone conversation of 22 September 1999 from acting as the plaintiff's advocate and solicitor cannot be disputed. Mr Loo took the point that the withdrawal by Kertar was ineffective as the defendant could only determine the retainer for good reason and upon reasonable notice. Both conditions had not been satisfied and the defendant remained the plaintiff's advocate and solicitor until Thomas Tham & Co filed a notice of change of solicitors and served the notice on 22 November 1999.

17 The outcome of this case is not dependent on whether it was the plaintiff or the defendant who had terminated the retainer. An analysis of whether or not good reason and reasonable notice were given is unnecessary. It is common ground that a client may terminate the retainer at any time and for any reason. It is the defendant's case that the plaintiff discharged the firm on 22 September 1999 and that the retainer, therefore, came to an end immediately on that day. On the plaintiff's evidence, it was the defendant who did not want to act. It is trite law that a repudiation of the retainer will put to an end the defendant's duty if it has been accepted by the other party to the agreement. It is clear from the undisputed evidence that the plaintiff had accepted the repudiation. I find that the plaintiff had by conduct accepted that the relationship of solicitor and client had come to an end on 22 September 1999. Her acceptance brought to a conclusion the contract of retainer and any co-extensive duty of care in tort. On any version of the events argued for by each side, the claim must fail and the action be dismissed.

18 On the same day, *ie* 22 September 1999, the plaintiff contacted the husband's solicitors, Lim & Associates, and expressly informed them that the defendant no longer represented her. She again, on two other separate occasions, namely on 24 and 30 September 1999, contacted them about the same thing. The defendant had received a letter dated 30 September 1999 from Lim & Associates to the same effect. Sharanjit testified that she had taken a call on the evening of 22 September 1999 or the next day, from the lawyer handling the matter for the husband, namely Alvin Sim of Lim & Associates. Mr Sim informed her that the plaintiff had contacted his firm and had told them that the defendant no longer acted for the plaintiff and the $100,000 due to the plaintiff was to be sent to her directly. When they spoke, Sharanjit confirmed with Alvin Sim her understanding that the plaintiff had terminated the defendant's services. Indeed, on 15 October 1999, the sum of $100,000 was sent by Lim & Associates directly to the plaintiff.

19 The plaintiff did not deny contacting Lim & Associates on all three occasions. She admitted that it was only on 30 September 1999 that she told Lim & Associates that the defendant no longer acted for her and to direct future correspondence to her. I reject as incredible and far-fetched her evidence that her two earlier calls to Lim & Associates on 22 and 24 September 1999 were to seek their assistance to get the defendant to handle her appeal properly. The plain truth is that the plaintiff had accepted the end of the solicitor and client relationship, at the very latest on 30 September 1999, and this piece of evidence weighs heavily against her.

20 Consistent with that position, she then took the next step by instructing a new firm of solicitors to represent her. Four days after receipt of the sum of $100,000 due to her under the

Order, on 19 October 1999, the plaintiff's new firm of solicitors, Thomas Tham & Co, wrote to the defendant for the plaintiff's files. Another piece of evidence that is consistent with the plaintiff's acceptance of the termination of services is her own testimony that Kertar had informed her that he would leave her files at the reception counter for her collection. She then enlisted the assistance of her friend, Low Lip Toon, to contact Kertar to collect the files. The omission of the defendant to confirm with Lim & Associates, in writing, that the former no longer acted for the plaintiff is, in my view, not fatal in the light of countervailing evidence before me.

21 The defendant's evidence is that after the telephone conversation on 22 September 1999, the plaintiff dealt directly with her former husband's solicitors; she stopped coming to the defendant's office and did not speak to Kertar or Sharanjit again. The defendant did not receive any instructions from the plaintiff to carry out any act on behalf of the plaintiff. Save for approving the draft order of court prepared by the husband's lawyers and returning it under cover of a letter dated 6 October 1999, the defendant did nothing for the plaintiff. Sharanjit had explained in cross-examination that she had not drawn up the draft order of court as the defendant was no longer representing the plaintiff. Kertar himself said that by then, he had taken over the file from Sharanjit as he was under the impression that the plaintiff would be engaging a new firm of solicitors and was waiting in anticipation to hear from the new firm of solicitors. Subsequently, on 5 October 1999, he sent what appears to be a pre-application letter which explained the breakdown of the relationship and gave notice of the defendant's intention to file the necessary discharge application to remove the firm as solicitor on the record of the court.

22 In the course of the trial, a reason which Mr Loo cited for saying the retainer had not been terminated was that there was no order to discharge the firm as solicitor on record. There is no merit in his submission. The legal position of the advocate and solicitor whose name still remained on the record after termination of the retainer is clearly explained by Goff LJ in *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 1 WLR 614 at 623

> That leaves the third head of the argument which is this: that having regard to the latter part of Ord 67, r 6(1) [our O 64 r 5(1)], the appellants necessarily continued as the solicitors for the defendants for all purposes, no order having been obtained on their summons and, therefore, the steps referred to in the earlier part of the order of necessity not having been taken. Mr Bueno relies on the words
>
> > … shall, subject to the foregoing provisions of this Order, be considered the solicitor of the party till the final conclusion of the cause or matter, whether in the High Court or Court of Appeal.
>
> In my judgment, however, that rule is not dealing with the relationship between the solicitor on the record and his client, but the position as between other parties to the litigation and the client; they being entitled, until the appropriate steps have been taken to change the record, to regard the solicitor as being still the solicitor, and to serve him with pleadings, notices and so forth.
>
> I think that must be the right conclusion for two reasons: first, the opening words of the order refer to a solicitor who has ceased to act, so that the argument would mean that the latter part of the order was inconsistent with the former; and secondly, the qualifications which I have read under the headings (a), (b) and (c) [of Ord 67, r 6(1)] show quite clearly that the order is dealing only with matters of procedure.

23 Templeman LJ (at 626) said:

Mr Bueno submitted that, as a matter of law, the appellants would only have discharged themselves if they had proceeded with the summons and obtained an order under Ord 67, r 6.

That rule [r 6(1)] has been read and analysed by Goff LJ and I agree that it governs the position as between the litigants and third parties but has nothing to do with the position as between a client and his own solicitor. The rule plainly implied that a summons will be taken out and an order will be made after the solicitors have ceased to act, and the provisos to the rule make clear its object, which is to safeguard third parties. It is not a rule which is appropriate to prevent the ending of the relationship of solicitor and client as between them, before an order is made under the rule.

24 For completeness, I would mention that as a matter of law, approving the draft order was something the defendant, as solicitor on the record of the court, was authorised to do: see *Halsbury's Laws of England,* vol 44(1), (4th Ed Reissue, 1995) at para 134. As between the defendant and the plaintiff, the retainer had come to an end on 22 September 1999. The defendant was no longer obliged, assuming the defendant was told that the plaintiff wanted to appeal against the Order, to keep the appeal alive by timely lodgement of a notice of appeal or to protect time in some other manner. It would place an intolerable burden on an advocate and solicitor if it were otherwise. The advocate and solicitor will find himself between a rock and a hard place. The prudent thing to do would be to take steps to remove the firm's name from the court's record as soon as possible.

25 The other issues on breach of duty would only arise if I had reached the opposite conclusion on the main point that the solicitor and client relationship had ended on 22 September 1999. However, I shall only concentrate on findings of fact and avoid unnecessary conclusions of law.

26 The plaintiff is a 63-year-old housewife. She has little formal education. She had, at the trial, the assistance of an interpreter. She understands and reads simple English. Sharanjit does not speak or understand Hokkien and, therefore speaks to the plaintiff in simple English which she clearly understands. I would mention that on a few occasions in cross-examination, the plaintiff answered in English without the questions being translated. The plaintiff tried to portray herself as uneducated or a housewife of limited education who left everything to her lawyer who had let her down. She was, as with any other new divorcee, anxious about the division of matrimonial assets. But she was far from being the helpless housewife. She would drop in at the defendant's office without an appointment almost every other day to see her lawyers. There is evidence from Sharanjit that the plaintiff was able to calculate, and had calculated, the husband's net worth and knew exactly what she wanted out of the failed marriage for herself and even her pet dog. I think she is a shrewd person.

27 The plaintiff is an unsatisfactory and unreliable witness. Her testimony lacked candour. In making this assessment, I have considered her educational background. If matters contained in correspondence were not to her advantage, she would deny receiving the correspondence or deny having given the instructions written by her lawyers to others or contained in her lawyers' letter to her. Her refusal to answer straightforward questions on material aspects of her case did not help her.

28 Kertar was a police officer before he read law and qualified as a lawyer. Kertar is able to converse in Hokkien and spoke to the plaintiff in Hokkien. He was not particularly disciplined and meticulous in keeping attendance notes to record the gist of his conversations with the plaintiff nor did he confirm in writing what was said and agreed in conversation. That sloppiness has exposed his firm to the plaintiff's accusations. In any event, duty of care must not be judged with the benefit of hindsight but in the light of the circumstances at the time the conduct in question occurred.

29 There is little agreement between the parties as to what it was, exactly, that the plaintiff

and Kertar said during the two telephone conversations on 21 and 22 September 1999. However, after observing each of these witnesses give evidence over several days, with substantial cross-examination, I have reached the conclusion that where the evidence conflicts, I prefer the evidence of Kertar. I accepted his version of events only after evaluating the reliability of the testimony in the light of any objective facts, documents, the overall probabilities and other surrounding circumstances. The evidence of Sharanjit also points against the plaintiff's version of events. I shall come to that later.

30 As I have stated, there is conflict in the evidence as to whether the plaintiff had given instructions to appeal. When she suspected that Sharanjit had deliberately removed vital evidence from an affidavit that would, in her mind, have enabled her to obtain a higher award, it would have been natural for her to lose confidence and trust in her solicitor. As a matter of common experience, without trust and confidence, she would not have wanted the defendant to appeal on her behalf. Coupled with what was apparently a confrontational conversation, I find it inherently improbable that she would have asked the defendant to appeal on her behalf.

31 At the same time, Kertar, being quite naturally offended by her scurrilous accusations, which needless to say, was an affront to and slur on the reputation and integrity of his firm and colleague, would not want to continue to act for her. It is his evidence that he told her that if she was unhappy because Sharanjit had deliberately removed evidence, she could engage another lawyer and appeal against the Order. On hearing that, the plaintiff promptly told him that she no longer wanted him to be her lawyer. In my view, it is plausible, judged in the light of the exchanges, the desire to sever the solicitor and client relationship was mutual. Her subsequent conduct, as I have narrated, is consistent with that analysis.

32 Before me, the plaintiff maintained that Sharanjit was lying. This accusation, in my view, has not been made out. She also could not substantiate her allegations or rebut counsel's cross-examination on the missing tele-banking statements. Sharanjit, who left the firm in May 2002, testified on behalf of the defendant. She was the case handler and her knowledge of the matters was precise and definite. I found her to be a steady witness. She gave her evidence in a fair, moderate and convincing way. She testified that she was not in the office the morning of 22 September 1999 and she did not see or speak to the plaintiff. Therefore, the plaintiff could not have met and spoken to her about wanting to appeal against the Order. The last time she spoke to the plaintiff was on 21 September 1999. The first time she heard that the plaintiff had terminated the services of the defendant was when Kertar told her about it on 22 September 1999. The next occasion was when Alvin Sim of Lim & Associates telephoned her on the evening of 22 September 1999 or the next day, to check if there was any truth in the plaintiff's statement to his office that the defendant no longer represented her. Sharanjit confirmed with Alvin Sim her understanding that this would be the case. When questioned why she did not verify what she was told by Kertar, her response was incisive. To her, there was nothing to verify. Kertar was her boss and she regarded his message as her superior's instructions to her.

33 In argument, Mr Loo said that the message book produced by Sharanjit which showed that someone had called when she was out is hearsay and inadmissible evidence as the maker of the note was not called. In my judgment, the message book was relied on not to prove the truth of the contents of the messages, but that the message book was maintained by her secretary and the two messages were typical messages her secretary or receptionist would take down whenever she was out of the office. It is her evidence that she received the two messages.

34 In their letter dated 19 October 1999, Thomas Tham & Co informed the defendant that they had taken over the conduct of the matter. The defendant's letter in reply, dated 20 October 1999,

pointed out that the matter had been concluded in that judgment had been given by District Judge Kathryn Low on 21 September 1999. That statement is significant for the reason that it is consistent with and supports the defendant's version.

35 From my analysis of the evidence, I am convinced that the plaintiff was satisfied with the overall award of $1.6m. The evidence shows that Kertar and Sharanjit were of the view that the Order, which gave her in monetary terms $1.6m, was a favourable outcome for the plaintiff. During mediation, the husband had offered in monetary terms a sum of $1.2m whereas the plaintiff was prepared to accept $1.4m. Contrary to her counsel's submission, in my view, she obtained advice from Thomas Tham & Co on an appeal not because she was plainly dissatisfied with the Order. She saw them to either allay or confirm her suspicion that Sharanjit had deliberately removed crucial evidence from an affidavit. The plaintiff had said to Kertar that if Sharanjit had not removed the evidence, she would have obtained a larger award. It was this suspicion that sparked off the events that followed. Her alleged "dissatisfaction" was borne out of suspicion that something had gone wrong because of what Sharanjit had allegedly done. Kertar had explained in answer to Mr Loo's cross-examination that he raised the topic of an appeal because the plaintiff had complained about Sharanjit's action. He said:[1]

> She made an allegation against Sharanjit and that is why I told her [that] if she is dissatisfied she could appeal against [the] Order of Court and if she wishes she could get another lawyer to do it.

36 She went to Thomas Tham & Co. She wanted them to review the evidence. Thomas Tham & Co went through the evidence put before the court including the husband's fourth affidavit filed on 25 August 1999 and the written submissions presented on her behalf. She was told by Thomas Tham & Co that the alleged missing deposit entries were put before the district judge. This is what Thomas Tham & Co wrote in their letter dated 6 October 1999:

> [I]t appears that all the evidences [*sic*] on the Respondent's financial position during the time that he was working as a partner in Design Link Architects and finally, as a sole proprietor of TAA Architects were brought forth before the courts at the ancillary hearing of 21st September 1999, reasons being that the evidence of TAA Architect's Bank of China's monthly statements from June 1996 to July 1999 were exhibited in the Respondent's affidavit dated 25.8.99 [the fourth affidavit]. Further, the huge sums which you had disputed therein were highlighted by Mr Yap Teong Liang in his written submissions filed to the Court and which we believe were considered by the Court when it arrived at its decision at the said hearing.
>
> As such, we are of the opinion that you may not succeed in appealing against the Order of Court dated 21 September 1999 based on the above reason unless you can prove that the Court has in arriving at its decision erred in law and facts.

Satisfied that there was nothing to her suspicion, the plaintiff decided not to proceed further. Thomas Tham & Co confirmed her instructions in their letter.

37 Mr Rajah submits that the plaintiff's whole case lacks credibility. He pointed out that it was never the plaintiff's case that she had wanted to appeal against the Order and had told the defendant to do so, until she amended her pleadings two weeks before the start of the trial. Prior to that, her case had always been that Kertar had failed to advise her whether or not to appeal against the Order. I agree with Mr Rajah's submission that this late amendment is telling and tended to undermine the veracity of her testimony that she had asked the defendant to appeal on her behalf. If what she says is true, it would have been raised by the plaintiff's new solicitors, Thomas Tham & Co, as early as December 1999 and not several years later. I reject as fanciful her testimony that Thomas

Tham & Co did not sue the defendant because of the friendship between Thomas Tham and Kertar. There is no evidence of such friendship. Neither was there evidence that she gave Thomas Tham & Co those instructions nor that they disobeyed her instructions or had declined to act.

38 I am satisfied and I find on a balance of probabilities that both Kertar and Sharanjit were never told about the plaintiff's intention to appeal or that she wanted the defendant to appeal on her behalf. Moreover, I accept Kertar's evidence that he had informed her on 22 September 1999 that she had 14 days to appeal. I accept his recollection of this conversation. He explained that he could remember his conversation with the plaintiff for two reasons. It was the first time anyone had made the serious allegations, which the plaintiff did, against the firm and a colleague. It was also the first time an incident of the sort described had taken place in his office. The plaintiff had not challenged Kertar's evidence that she was told that she could go elsewhere if she did not want the defendant to act for her. That conversation allowed for a reasonable time for substitution of a new firm of solicitors. It is clear from her subsequent actions that the plaintiff was well aware beforehand that she had to appoint a new firm of solicitors. She had apparently chosen to wait until she received the money due to her first. The plaintiff proffered no explanation as to why she had not done anything earlier.

39 I pause to mention Mr Loo's attempt to make a distinction between oral and written advice. It has been argued that no written advice was given to the plaintiff on whether or not to appeal against the Order. Although it is desirable for an advocate and solicitor to advise in writing rather than orally, it is not necessary as a matter of law to do so: *Harwood v Taylor Vinters* [2003] TLR 191. It seems convenient to communicate the defendant's advice orally in the circumstances of this case where the plaintiff has little formal education and speaks Hokkien.

40 I agree with Mr Rajah that the allegation that the plaintiff was not advised whether or not to appeal turns the allegation on its head, especially with the assertion that the plaintiff had requested the defendant to appeal against the Order. Under cross-examination, the plaintiff admitted that her real complaint is that Kertar did not file the appeal on her behalf. She had to agree with counsel that the absence of an advice on an appeal did not prevent her from deciding whether to appeal.

41 Even if I were to have accepted the plaintiff's version of events, that would not be enough to further the plaintiff's cause. I am not persuaded that there was a causal link between the alleged breach of duty and the alleged loss, *ie* the loss of opportunity to appeal. The loss alleged cannot be made out. There is the matter of the plaintiff not appointing new solicitors on time and her own decision not to appeal.

42 In a letter dated 6 December 1999, Thomas Tham & Co advised the plaintiff that she had little prospect of succeeding if she appealed. They also confirmed her instructions that she did not wish to appeal. Their advice envisaged an appeal on the merits and they proceeded to so advise her based on the evidence before the district judge and written submissions put forward on the plaintiff's behalf. Nowhere in the letter did they suggest making an application to extend time to file a notice of appeal. The plaintiff's allegation that the real reason why Thomas Tham & Co had advised against an appeal was because the time limit to lodge an appeal had expired is not borne out in the letter. She was aware that time to appeal had expired. Yet she did not pursue the matter there and then. Having seen the plaintiff in the witness box, I formed the impression that she was a person with a mind and will of her own. She would have pressed on with an application for extension of time to file a notice of appeal if, indeed, she was as dissatisfied with the decision as she had claimed. She was not the sort of person to give up quietly. I have already said that having allayed her suspicion, she had no reason to re-open the award which she proceeded to act on. It transpired that she exercised the option and bought over the other 65% share of the matrimonial home. She subsequently resold the property in

March 2001 for $1.4m, making a little profit along the way.

43 For all those reasons, the plaintiff's action is dismissed with costs.

---

[1]Notes of Evidence P 390