

LEGAL PROFESSION

Evidence – Legal professional privilege – Contempt proceedings – Communication between solicitor and client – Whether the averments and exhibits deemed privileged communication – Evidence Act 1950, section 126

Gideon Tan v Tey Por Yee and another appeal

[2017] 1 MLJ 352, Court of Appeal

Facts The appellant is an advocate and solicitor of the High Court of Malaya while the respondents are the appellant's former clients. In a separate suit, the plaintiff, Protasco Bhd ("the Plaintiff"), commenced an action against the respondents. The appellant was engaged as their solicitor. The appellant and the respondents went to Jakarta to investigate a claim that one Tjoe Yudhis Gathrie, a potential witness in the suit, had affirmed several statutory declarations (SDs) under coercion. The appellant's firm subsequently filed to withdraw as the respondents' solicitor. The Plaintiff then obtained leave to initiate committal proceedings against the appellant and respondents for contempt of court. The appellant applied to set it aside and affirmed an affidavit in support, containing exhibits of communication between the appellant and the respondents ("the averments and exhibits"). The respondents sought to expunge the averments and exhibits on the ground that it was a breach of client-solicitor confidentiality privilege under section 126¹ of the Evidence Act 1950 ("the Act"), and that the privilege had not been waived. The High Court allowed the application. The appellant appealed claiming that the legal professional privilege is not applicable as such communication was made in furtherance to an illegal purpose².

Issue The main issue was whether the averments and exhibits are deemed privileged communication under the Act and is thus protected from being disclosed.

Held In dismissing the appeals, the Court of Appeal held that the averments and exhibits were deemed privileged communication and must not be disclosed. The claim that the legal professional privilege was not applicable as it was made in furtherance to an illegal purpose was also dismissed, as it was held that the communication and/or information had no nexus to any criminal activity and that even if it did, all the impugned averments and exhibits were in relation to past matters and was not a case of seeking advice on a future unlawful act.

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{FEBRUARY 2017\01425263}

¹ Professional communications

² Section 126(1) (a) and (b) of the Evidence Act 1950