Regulating Solicitor’s Clients’ Money: A Stitch in Time Saves Nine

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ABSTRACT

In West Malaysia, solicitors are regulated under the Legal Profession Act 1976 (LPA). Pertaining to holding clients' money to perform the clients' instructions, the LPA empowers the Bar Council to enact rules under Section 78. Pursuant to the said power, Solicitors Account Rules 1990 (SAR) is enacted to regulate the the management and maintenance of clients' money hold by solicitors. However, SAR only provides a minimum rule on maintaining clients' money with no fund security and primarily based on trust and confidence in the solicitor's profession. Due to this fact, mismanagement and misappropriation of client's monies are expected, which some resulted in the solicitors charged for criminal breach of trust of clients' money under the Penal Code (Act 574). Nevertheless, no criminal action against a legal firm that misappropriated the client's money as a legal firm is not a legal entity under criminal law. This paper examines the legal firm's compliance in managing the client's money under the SAR. The paper employs a doctrinal method and applies a content analysis approach. The research concludes that there is in dire need of the monitoring and maintenance of clients' money as adopted by other jurisdictions. This paper proposes an amendment to SAR, which incorporates the due diligence process to maintain the client's money and penalty provisions to ensure that solicitors compensate for any misappropriation of clients' money.

Keywords: Clients’ account, Clients’ money, Liability, Misappropriation, Mismanagement.

I. INTRODUCTION

Solicitors hold client's money in various circumstances, including receiving payment for the balance purchase price and advance payment for disbursements in a conveyancing transaction, such as payment for the stamp duty on the instrument of dealings (Rohani, 2013). In Majlis Peguam Malaysia v Krishnasamy a/l Bhaktavatsalu [2020] 12 MJJ 443, the court acknowledged the difficulty faced by lawyers and said that no profession is more exposed to the temptations of a breach of trust than the legal profession. The SAR is enacted to regulate the management and maintenance of clients' money hold by solicitors. The SAR only provides the manner of depositing clients' money and the types of clients' money (Rule 3 & 4 of the SAR), withdrawal of clients' money (Rule 7 of the SAR), method of withdrawal (Rule 8 of the SAR) and keeping of clients' account (Rule 11 & 12 of the SAR) under the SAR without imposing any penalty for non-compliance of the provisions. Hence, mismanagement and misappropriation of client's monies are expected, resulting in the solicitors charged for criminal breach of trust of clients' money under the Penal Code (Act 574). In legal practise managing accounts is one of the vital parts. The SAR is enacted to govern the conduct of solicitors in relation to client's accounts. Despite all the provisions, under SAR, there are still issues of delinquent solicitors misappropriating the clients' money held in their custody.

According the STAR newspaper (2019), 21 lawyers are being sought by police for criminal breach of trust involving RM340 million. A statistic from the Commercial Department, Royal Malaysian Police from 2015 until 2020, 484 cases involving lawyers for criminal breach of trust. Research reflects professional misconduct among lawyers as a growing problem (Arnold & Hagan, 1992; Bartlett, 2017; Baron & Corbin, 2016; Piquero et al., 2016). Bartlett (2017) reviews that delinquent solicitors enjoys common-law immunity from clients they allegedly have victimized. Bartlett (2017) describes how the self-regulation of the profession helps protect its members and makes it difficult for those wanting to confront solicitors who committed the misappropriation of clients' money. From the research conducted by Narayan (2019), the findings reflect that solicitors are capable of commit severe offences of fraud and negligence to get what they desire and they have the opportunity to take advantage of their vulnerable clients because of the selfregulation system.
In Suhani Mat Daud v PP [2001] 1 LNS 504, the accused, a lawyer for the sale and purchase of two lots of land on behalf of the plaintiff had utilised the balance purchase price amounting to RM270,972 belonged to her client to settle the conveyancing files at her former firm where she was a partner to the firm aforementioned before joining Suhani & Partners. The court held that the appellant had misappropriated the clients' money to which the plaintiff is the rightful owner. In Marzaini bte Zainuddin v Majlis Peguam Negara [2007] 8 MLJ 697, the client entered into a sale and purchase agreement to sell her property for the sum of RM161,000 which was later confirmed by the appellant that the said full purchase price had been received from the purchaser's financier's solicitors. The appellant then issued a cheque for the sum of RM145,800 being the balance 90% of the purchase price to her client. The cheque was found to be dishonoured and the client being dissatisfied demanded for the payment due from the appellant. The appellant requested for an extension of the time which was agreed upon. The appellant however failed to honour her undertaking to make the payment. The appellant admitted used the clients' money for other matters and the cheques were dishonoured due to insufficient funds in her clients' accounts. The disciplinary board made an order suspending the appellant from continuing her legal practice as an advocate and solicitor to which she appealed to have it set aside. The appeal was dismissed with costs. The reason for the dismissal is that the legal profession in Malaysia must observe the highest possible standards of conduct in which nothing short of it would suffice and the appellant had clearly not observed such standards of conduct.

In Choong Yik Son v Majlis Peguam Malaysia [2008] 10 CLJ 101, the Disciplinary Board ordered the solicitor to be struck off the Roll of Advocates and Solicitors of the High Court of Malaya for withdrawing clients' money from clients' account to pay the medical bill for himself and his late wife. The High Court dismissed the appeal made by the solicitor because a solicitor is under a legal obligation to keep strict and accurate clients' money in the clients' accounts and the withdrawal and utilization of clients' money for own personal purpose is dishonest and fraudulent conduct. In another case, David Abraham Samson Paul v Syed Shahir Syed Mohamud & Ors [2012] 7 CLJ 830, the client lodged a complaint against the appellant (lawyer) for not accounting for monies received by him in his capacity as their solicitor and in particular to the failure to account for the sum of RM750,000. The appellant had acted for the complainant in the sale of the building and the sum of RM750,000, which represented part of sale of the property, was allegedly retained by the appellant for real property gains tax ('RPGT'). When the complainant was granted exemption from RPGT, it requested for the release of the RM750,000. The appellant failed to release the said amount. The appellant was guilty of professional misconduct consequent to a disciplinary enquiry conducted by the Disciplinary Committee('Committee') and the appellant be struck off the rolls.

In Majlis Peguam Malaysia v Lim Yin Yin [2018] 1 LNS 2003, the solicitor had withdrawn client's money from the clients' account in order to finance the purchase of the family's house. The client lodged a written complaint with Bar Council since the balance purchase price under a sale and purchase agreement was not released within the stipulated period. The Bar Council appealed against the decision of the High Court which set aside the Disciplinary Board's order that the solicitor be struck off the Roll of Advocates and Solicitors of the High Court in Malaya and substituting it with an order of suspension from practice as an Advocate and Solicitor for a period of three years. Despite the fact there was a delay in paying the complainant, the money has been replaced and paid to the complainant accordingly. However, the Court of Appeal allowed the appeal and restored the order made by the Disciplinary Board. In brief the incidences of utilizing and withdrawing clients' money for own personal purpose are rampant that need deterrent penalty to reflect the seriousness of the misconduct.

In M Wealth Z Sdn Bhd (Formerly known as Fantastic Magaway Sdn Bhd) v Chan Tse Yuen & Co (sued as a firm) [2018] 10 MLJ 1, the legal firm was ordered to refund the stamp duty and ordered an exemplary-damages amounting to RM250,000. The court held that the solicitor has acted dishonestly by claiming the refund of stamp duty from an aborted transaction and keep the money, after his legal service was terminated by the client. The solicitor refused to pay the client despite demand made for the refund of the stamp duty money.

In a nutshell, the abovementioned cases recorded in Malaysia reflect the attitude of solicitors in safeguarding clients' money in their custody. As the account holder and the signatories of the said clients' account, the clients' money was utilised for their personal expenditures.

II. METHODOLOGY

The paper employs doctrinal legal research to analyse the law relating to clients' money management in a client account by legal firms. A doctrinal legal research is a research into legal doctrines through analysis of statutory provisions and cases by the application of power of reasoning (Vibhute & Anylem, 2011). It is normally a two-part process, because it involves first locating the sources of the law and then interpreting and analysing the text. It gives emphasis on analysis of legal rules, principles or doctrine. Even though it is
less rigorous, it is in-depth and flexible that provides room for critical analysis of the legal framework on the management of clients' money by lawyers and the impact of on non-compliance of the law. In conducting this legal research, the literature review is carried on both digital and non-digital libraries comprising primary sources which are the original sources such as statutes, codes, regulations, non-legislative texts which include procedures, guidelines, reports, and unreported case law, and secondary sources which consist of textbooks, law journals, law committee reports and the statistics of lawyers involving in the criminal breach of trust according to the States in Malaysia from 2015 to 2020. Besides that, comparative based analysis is employed to facilitate a more effective law reform from other jurisdictions (Gutterridge, 1949).

III. IS THE SAR PROTECTING THE CLIENT’S MONEY?

Rule 3(1) of the SAR laid down the duty on the solicitor who holds or receives money shall, without delay pay it into the clients account. This is to avoid any misuse or misconduct on the clients' money. However, in this provision, the term 'without delay' has not been adequately defined. Such ambiguity may lead to exploitation by solicitors. Describing the time is more objective such as providing that depositing should be done not later than the end of the next banking date after its receipt.

Generally, Rule 7 of the SAR provides that solicitors cannot arbitrarily withdraw money from the client account. Money can only be withdrawn if it is to be used for required payment on behalf of the client, for the execution of trust if it is trust money, debt due to the solicitor, money drawn on clients' authority, towards payment of bills of cost, and money of which is mistakenly deposited. In Re S Fung, [1941] 10 MLJ 142, the court held that, if a solicitor does not keep his clients' money intact and uses it for other purposes, it is misappropriation despite the solicitor having made replacements to the clients' monies.

Rule 7A of the SAR provides that only persons mentioned under the rule can become a signatory. Despite the presence of the provision, the banks where the account is operated are not obliged to comply because it is not a directive to them. The relationship between the solicitor's firm and bank is only governed by the Financial Services Act 2013 not by the SAR. Thus, the banking institution would not have the duty to check and ensure that the signatories named by the firms have complied with Rule 7A of the SAR.

Rule 10 of the SAR prohibits the transfer from the ledger account of one client to that of another except in circumstances in which it is permissible under these Rules to withdraw from client account the sum transferred from the first client and to pay into client account the sum so transferred to the second client. Rule 11(4) of the SAR provides that reconciliation not less than once in every succeeding period of six months, cause the balance of his clients' cash book (or clients' column of his cash book) to be reconciled with his client bank statements. The reconciliation must be shown in the cash book or other appropriate place a statement.

The SAR only imposes obligations on solicitors without any specific penalty provided to ensure that every misappropriation of clients' money committed by the solicitors are being compensated in full. The absence of the penalty reflects that the Bar Council intends to have a self-regulate law relating to clients account. However, using client's money for another purpose is considered as professional misconduct that could be subject to a disciplinary proceeding.

Rule 11 (4) states that reconciliation of clients' account shall be made every six months. No provision for monitoring compliance of this Rule. At the same time, merely auditing the clients' account without a simultaneous audit of the firm's other accounts is meaningless since amounts that should have been paid into the client's account could be diverted into other account. The compulsory retention of the books of accounts is only for six (6) years as provided under Rule 11(5) of the SAR. Lawyers deserve the guidance, instructions, or compliance check to complement the concept of self-regulatory law to ensure protection to both lawyers and clients without the need to increase the use of disciplinary sanctions (Gregory, 1997). A setback to the minimum standard imposed by the SAR, lawyers have the opportunity to take advantage of their vulnerable clients who relied on them (Narayan, 2019).

IV. BENCHMARKING FROM OTHER COMMONWEALTH COUNTRIES

The principles of utmost good faith, undertaking to uphold the profession's integrity and only to use clients' money for that clients' matters are embedded into the Hong Kong Solicitors' Account Rules (Chapter 159F) (Hong Kong SAR) under Rule 1A. Under Rule 9A of Hong Kong SAR, imposes a duty to remedy the breach promptly upon discovery on the lawyers. Sub Rule 2 of the same Rule indicates each principal of a firm shall be jointly and severally liable to perform the duty to remedy any breach of the Hong Kong SAR. Finally, the reconciliation shall be done once a month as provided under Rule 10A of Hong Kong SAR.
In addition to the above, the Law Society of Hong Kong issued a Manual on Solicitors Accounting to its members. The guidelines help demonstrate clients’ money management by legal firms that complement the Hong Kong SAR, especially to newly set-up legal firms. Under the UK Solicitors Account Rules (UK SAR) the Handbook, together with guidance notes of the UK SAR is also issued by the Solicitors Regulation Authority to explain the Rules and providing the examples and rationales of the UK SAR. Complementing the SAR with illustrations through the production of a handbook is a commendable effort by the Law Society to reach and educate its members on the importance of safeguarding client’s money held by lawyers.

In fulfilling lawyers’ professional duty, he should maintain the highest standards of ethical conduct. In brief, the provisions of the SAR from Hong Kong and United Kingdom reflect the seriousness on part of the governing body of lawyers to regulate the management of clients' money (Kamalini, 2015), where the clients' money shall be deposited into clients’ account and can only be utilised for clients’ purpose. The aid of Handbook and Guidelines is useful to ensure better understanding of the SAR.

V. CONCLUSION

The findings of this research are significant in providing evidence of the existence of an apparent weakness of the Rules that regulate solicitors on the management of clients' monies. This issue has placed the lawyers in a vulnerable position where they could be criminally implicated. The absence of apparent law and policy relating to the effect of non-compliance of the law may adversely affect the clients’ interest because no means under the SAR to recover the loss from the solicitors or the legal firms in the event of misappropriation of clients' money.

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