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HT S.R.L.

v

Wee Shuo Woon

[2016] SGHC 15

High Court — Suit No 489 of 2015 (Registrar's Appeal No 339 of 2015)

Hoo Sheau Peng JC

21 December 2015; 8 January 2016

Civil procedure — Privileges

Evidence — Admissibility of evidence

Equity — Remedies

15 February 2016

Hoo Sheau Peng JC:

Introduction

1 Party A sues Party B. Subsequently, Party A's computer systems are "hacked", resulting in privileged and confidential communications between Party A and his lawyer which pertain to the pending suit being uploaded onto the internet. Party B has nothing to do with this. Can Party A stop Party B from using these communications in the pending suit? This was the central dispute in this appeal, and it raised interesting questions about the interaction between the concepts of admissibility, privilege, and confidentiality.

The facts

2 The facts are straightforward. The plaintiff, HT S.R.L. (“the Plaintiff”), an Italian company, specialises in security technology which it supplies to law enforcement and intelligence agencies. It commenced the present suit against the defendant, Wee Shuo Woon (“the Defendant”), for breaches of his employment contract.

3 After the commencement of the present suit, the Plaintiff’s computer systems were hacked by an unknown party. There is no evidence that the Defendant was involved in the hacking. Substantial amounts of information obtained from those systems were then uploaded onto the internet, including onto the website known as “WikiLeaks”. The uploaded information included certain email communications exchanged between the Plaintiff and their lawyers, M/s Morgan Lewis Stamford LLC (formerly known as Stamford Law Corporation) (“the Emails”). The Emails contained legal advice, as well as specific information and materials pertaining to the present suit. The Emails included express provisos that they “contain privileged and confidential information”.

4 Subsequently, the Defendant accessed the Emails on the internet. Relying on the contents of the Emails, the Defendant filed Summons No 3852 of 2015 under Order 18 r 19 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) (“Rules of Court”), seeking to strike out the bulk of the Plaintiff’s Statement of Claim on the ground of abuse of process (“the striking out application”). The Defendant alleged that the present suit had been initiated for the collateral purpose of obtaining documents to further the Plaintiff’s interests in other proceedings. In the Defendant’s affidavit in support of the striking out application, he referred to the Emails and exhibited them. In response, the

Plaintiff filed Summons No 3990 of 2015, seeking an order under O 41 r 6 of the Rules of Court for all references to the Emails in the body of the affidavit and the copies of the Emails themselves, which were exhibited in an annexure, to be expunged from the Defendant’s affidavit (“the prayer to expunge”), and for an injunction to restrain the Defendant from further use of the same (“the prayer for an injunction”). Should the prayer to expunge be allowed, the Defendant’s striking out application would not be sustainable as it was largely premised on the contents of the Emails.

5 When the parties appeared before the Assistant Registrar (“AR”), they were informed that injunctions were not routinely granted by ARs. In response, Plaintiff’s Counsel indicated that the Plaintiff was content to proceed only with the prayer to expunge, and not with the prayer for an injunction (while reserving the right to apply afresh for an injunction at a subsequent stage). Subsequently, the AR granted the prayer to expunge. Dissatisfied with the AR’s decision, the Defendant appealed. After hearing the parties, I dismissed the appeal. Given the novelty of the issues, I now provide my reasons.

The parties’ arguments

6 Before me, the parties did not dispute that prior to being uploaded onto the internet, the Emails attracted legal professional privilege, and that the Plaintiff did not waive such privilege. Also, the parties did not dispute that the Emails were originally confidential in nature. However, Counsel for the Defendant, Mr Nicholas Philip Lazarus (“Mr Lazarus”), contended that the AR had erred in proceeding on the basis that privilege continued to subsist in the Emails even after they had entered the “public domain” so as to grant the prayer to expunge. Broadly, Mr Lazarus put his case as follows:

(a) The question of whether the Emails may enter into evidence is a question of admissibility, and not privilege. The Evidence Act (Cap 97, 1997 Rev Ed) (“EA”) exhaustively governs the admissibility of evidence. Relevant evidence is admissible, unless such evidence falls within the exclusionary rules of the EA. All the provisions of the EA concerned with privileged communications, particularly ss 128 and 131, did not apply on the present facts.

(b) Any common law rule concerning privileged communications would not apply. In any event, under common law, the Emails would still be admissible.

(c) Even if the common law were to provide for the exclusion of privileged communications, the court should decline to do so because the Emails had already entered into the “public domain” in that they had been uploaded onto the internet and were freely available to anyone who might wish to access them.

7 I should state that Mr Lazarus’s arguments were different from those which he raised before the AR. Then, Mr Lazarus argued that privilege had been lost because of the Plaintiff’s iniquitous conduct in that the Plaintiff had initiated the present suit for a collateral purpose. This argument was not pursued on appeal, possibly because of the reasons given by the AR, who held that “this is far from a case whether there has been iniquitous conduct”.

8 In response, Counsel for the Plaintiff, Mr Adrian Tan (“Mr Tan”), submitted that the EA did not apply in this case since the EA did not govern the presentation of evidence by way of affidavits.

9 Relying on the position at common law, Mr Tan submitted that there was legal basis to grant the prayer to expunge. The Defendant had confused the concept of privilege with that of confidentiality. These are different legal doctrines with different consequences. The fact that the Emails could be viewed on the internet (and, presumably, that confidentiality has been lost), did not necessarily entail that privilege no longer subsisted. Considering the circumstances leading to the Emails being uploaded onto the internet, there could not be said to have been any waiver of privilege by the Plaintiff.

10 Turning to the “public domain” argument, Mr Tan stated that the expression “public domain” is a term of art which means entry into the court’s record. It is only when this takes place that otherwise privileged documents will lose their privileged status. The inclusion of privileged material in an affidavit, without more, does not constitute an entry into the court’s record if the substantive hearing in respect of which that affidavit has been filed has not taken place. Since the Defendant’s striking out application has yet to be heard, the Emails had yet to enter the “public domain”.

11 As privilege subsisted in the Emails, Mr Tan argued that “they obviously do not belong anywhere in the Court documents.” On a point of policy, he submitted that legal professional privilege would be critically undermined if the appeal were to be allowed because it would set a precedent that “a party can obtain information of the other party, by fair means or foul, and put the information in the public domain and then use it.”

The issues

12 From the foregoing, it is clear that the parties disagreed whether the matter should be examined through the lenses of the admissibility of evidence,

privilege or confidentiality. For clarity, I thought it necessary to reframe the issues as follows:

- (a) Was the matter governed exclusively by the EA? If Mr Lazarus was correct that only the EA need be considered, then the bulk of Mr Tan’s submissions, based on the common law, need not be considered.
- (b) Did the common law provide the Plaintiff any basis to seek the prayer to expunge? The underlying question was whether the matter should be governed by the admissibility of evidence, privilege or confidentiality, or a combination of two or all three.
- (c) Did the fact that the Emails had been uploaded onto the internet and were generally accessible pose a barrier to the grant of the prayer to expunge? In considering this issue, I will examine the “public domain” arguments raised by the parties.

13 Before I turn to the issues, I make one preliminary point. The prayer to expunge was brought under O 41 r 6 of the Rules of Court which provides that the “[c]ourt may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.” The parties did not address me on the ambit of O 41 r 6, and proceeded broadly on the premise that if it were established that this court had any legal basis to restrain the use of the Emails, then the court could grant the prayer to expunge under O 41 r 6. Accordingly, I proceeded on this basis.

Was this matter governed exclusively by the Evidence Act?

14 Mr Lazarus submitted that the EA only protects legal professional privilege as follows: (a) it enjoins advocates and solicitors from disclosing any communications made to them in the course of and for the purpose of their

employment as advocates and solicitors without their client's express consent (s 128(1) of the EA); and (b) it affords persons an immunity from being compelled to disclose confidential communications between them and their legal professional advisors (s 131(1) of the EA). It was clear that neither of these provisions applied in this matter. Mr Lazarus further submitted that the EA exhaustively governs all rules relating to evidence in judicial proceedings, and the absence of any specific provision providing for the exclusion of privileged communications from evidence is therefore fatal to the prayer to expunge. In my view, the Defendant's latter contention was unmeritorious.

15 First, the EA does not go so far as to say that the common law is entirely irrelevant. Section 2(2) says that “[a]ll rules of evidence not contained in any written law, *so far as such rules are inconsistent* with any of the provisions of this Act, are repealed” [emphasis added]. As the High Court explained in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117], this means that the common law rules of evidence (including new rules developed after the EA was passed) can be given effect provided they “are not inconsistent with the provisions of the EA or their underlying rationale.”

16 Second, as Mr Tan rightly pointed out, the EA did not even apply in this case. Section 2(1) of the EA states that it “shall apply to all judicial proceedings in or before any court, *but not to affidavits presented to any court*” [emphasis added]. For example, in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885, the court held that the provisions of the EA which regulate the admissibility of extrinsic evidence did not apply because the matter was one which had been commenced by originating summons and the evidence was contained solely in affidavits. Likewise, the present matter concerned evidence contained in affidavits, and so the EA did not apply.

17 Third, in *Yap Sing Lee v Management Corporation Strata Title Plan No 1267* [2011] 2 SLR 998, the court held that a Management Corporation Strata Title Plan of a development was able to assert legal professional privilege over certain documents in proceedings before a Strata Titles Board even though the provisions of the EA which pertained to “judicial proceedings” did not apply. If the common law rules on legal professional privilege apply outside the judicial context, I am of the view that they may apply in relation to affidavits filed in interlocutory proceedings which precede a trial.

18 Fourth, without pre-empting the analysis that will follow, confidentiality is a potential legal basis for relief. Unlike the notions of admissibility and privilege which form aspects of the law of evidence, the law of confidence falls outside the law of evidence, and is not affected by the EA. With this, I turn to discuss whether the common law provided the Plaintiff any basis for relief.

Did the common law provide basis for relief?

19 To begin, I hope to disentangle the confusion relating to the admissibility of evidence and privilege. A privilege is asserted by a person to say that he or she has “a right to resist the compulsory disclosure of information” (see *B and others v Auckland District Law Society and another* [2003] 3 WLR 859 at [67], *per* Lord Millett). The effect of a successful claim is that the disclosure of information may be withheld. In contrast, “admissibility” describes a particular quality of evidence. It relates to the question of whether that particular piece of evidence may be received by the court as proof of certain facts. Under the common law, evidence is admissible if it is relevant to the matters in issue and the court is not concerned with how the evidence was obtained (see *Kuruma, Son of Kaniu v The Queen* [1955] 2 WLR 223 at 226 and 227, *per* Lord Goddard CJ). For this reason, in *Black & Decker Inc v Flymo Ltd*

[1991] 1 WLR 753 at 755C, Hoffmann J (as he then was) said that once a “document has passed into the hands of the other party the question is no longer one of privilege but of admissibility.”

20 The Plaintiff asserted that much of the Defendant’s affidavit should be struck out because the Emails are “protected by legal professional privilege”, and in relying on them in his affidavit, the Defendant is “misusing privileged information”. Put another way, the Plaintiff was saying that because of legal professional privilege, the Emails should not enter into evidence. The problem with this argument, as the Defendant pointed out, is that it seemed to confuse the concept of privilege with the admissibility of evidence. Legal professional privilege would protect the Plaintiff (and his lawyer) from being compelled to disclose privileged material through compulsory legal process. However, it has nothing to do with whether copies of the Emails, which are already in the possession of the Defendant, may be adduced as evidence. To this extent, I agreed with Mr Lazarus that this is a question of admissibility of evidence, and that the general rule is that the Emails can be adduced as evidence so long as they are relevant.

21 However, that is not the end of the matter. To explain why, I turn to the relationship between the concepts of privilege and confidentiality. It is axiomatic that there can be no privilege without confidentiality. Unless the communication is a confidential one, there can be no question of legal professional privilege attaching thereto (see *Three Rivers District Council v Bank of England (No 6)* [2004] 3 WLR 1274 at [8], [26], *per* Lord Scott of Foscote). However, confidence alone does not confer a right upon persons to resist compulsory disclosure. In *McGuinness v A-G* (1940) 63 CLR 73 at 102–103, Dixon J said, “no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative

necessity of revealing the truth in the witness box.” That is precisely what privilege does. It provides immunity from compulsory disclosure. The Plaintiff is therefore correct in saying that privilege and confidentiality, though intricately linked, are distinct legal concepts which attract different legal consequences.

22 Since the 19th century, equity has intervened to prevent the unauthorised use of the confidential information contained in privileged material as evidence in court proceedings through the grant of injunctions. The question is whether this applies in Singapore and, if so, whether this practice extends to the expunging of portions of an affidavit containing privileged communications. To answer this question, it is perhaps worthwhile to examine in more detail a line of cases beginning with the decision of the English Court of Appeal in *Calcraft v Guest* [1898] 1 QB 759 (“*Calcraft*”).

Calcraft v Guest

23 In *Calcraft*, the plaintiff, the owner of a fishery, successfully sued the defendant for trespass. The central question in the trial was the limits of the upper boundary of the fishery. After the trial, the defendant came into possession of some documents which related to an earlier litigation to which the plaintiff’s predecessor-in-title had been party and which were relevant to the question of the boundary of the fishery. These documents were in the possession of the grandson of the solicitor who had acted for the plaintiff’s predecessor in title. It was not disputed that these documents were privileged. The defendant’s solicitors inspected these documents and made copies of them but subsequently returned the originals to the plaintiff on demand. Nonetheless, the defendant sought to admit copies of these documents in her appeal and the question was whether they were admissible. The court answered the question in the

affirmative. Lindley MR (with whom the rest of the court agreed) held that the defendant was entitled to give “secondary evidence” (*ie*, copies) of the contents of these documents even though the originals were privileged (at 764).

24 Although this decision has been much criticised for the absence of any discussion of the principles underpinning legal professional privilege, it seems to me that it recognises the dichotomy between privilege and admissibility. Privilege would have barred the defendant from demanding the production of the original documents from the plaintiff. However, privilege is no barrier to the admissibility of the secondary evidence of the documents (once they had come into the possession of the defendant), that being an issue governed solely by the question of relevance (see [20] above).

Lord Ashburton v Pape

25 In the later case of *Lord Ashburton v Pape* [1913] 2 Ch 469 (“*Lord Ashburton*”), the defendant was a bankrupt whose discharge was opposed by the plaintiff, a substantial creditor. In the course of proceedings, the defendant, through an act of collusion, managed to obtain certain letters which had been exchanged between the plaintiff and his late solicitor. The plaintiff filed an application to seek the delivery up of the originals and an injunction to restrain the defendant from publishing or making use further use of any copies which he might have. At first instance, the judge ordered the delivery up of the originals and granted the injunction against the future publication and use of the letters but, thinking himself bound by *Calcraft*, added a proviso to preserve the defendant’s right to use such copies of the letters as they might have in the subsisting bankruptcy proceedings. The plaintiff appealed against the inclusion of this proviso and succeeded.

26 From the judgment, it is clear that the basis upon which the injunction was granted was the court's equitable jurisdiction to restrain the publication of confidential information (at 472, *per* Cozens-Hardy MR; at 473–474, *per* Kennedy LJ; at 475, *per* Swinfen Eady LJ). The members of the court were alive to the fact that their decision was in apparent conflict with *Calcraft* and sought to address it in the following way. They said that *Calcraft* merely stood as authority for the proposition that secondary evidence of documents may be admissible into evidence even if the originals were privileged from production. However, the fact that these documents might be admissible did not affect the court's equitable jurisdiction to grant an injunction to order their delivery up or to restrain their publication or copying on the basis that they contained confidential material which had been improperly obtained. This comes through most clearly in the speech of Swinfen Eady LJ where he said (at 476–477):

There is here a confusion between the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production, if the party has such secondary evidence in his possession. The cases are entirely separate and distinct. If a person were to steal a deed, nevertheless in any dispute to which it was relevant the original deed might be given in evidence by him at the trial. It would be no objection to the admissibility of the deed in evidence to say you ought not to have possession of it. His unlawful possession would not affect the admissibility of the deed in evidence if otherwise admissible. So again with regard to any copy he had. If he was unable to obtain or compel production of the original because it was privileged, if he had a copy in his possession it would be admissible as secondary evidence. The fact, however, that a document, whether original or copy, is admissible in evidence is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it from being published or copied. [emphasis added]

27 As explained earlier, *Calcraft* is founded on the dichotomy between privilege (which applies to the original documents) and admissibility (which governs the question of whether secondary evidence of the documents may be

entered into evidence). *Lord Ashburton* is premised on the distinction between the admissibility of the documents into evidence (which is governed by the law of evidence) and the confidential nature of the information within the documents (which is protected by the law of confidence).

Goddard v Nationwide Building Society

28 In *Webster v James Chapman & Co* [1989] 3 All ER 939 at 943j, Scott J (as he then was) explained that *Calcraft* and *Lord Ashburton* represented “two independent and free-standing principles of jurisprudence.” The principle in the former is part of the law of evidence and it relates to the scope of protection afforded by legal professional privilege, while the principle in the latter belongs to the law of confidentiality and it relates to the scope of protection afforded by equity for confidential documents. For this reason, May LJ, in the leading case of *Goddard and another v Nationwide Building Society* [1986] 3 WLR 734 (“*Goddard*”), was able to synthesise the effect of the two decisions in the following way (at 743F–G):

... If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation: however, *if he has not yet used the documents in that way*, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them. [emphasis added]

29 In *Goddard*, a solicitor acted for both the plaintiff buyers and defendant seller in the purchase of a house. The seller, a building society, also extended a mortgage to the buyers and the same solicitor also acted for both parties in the conclusion of the mortgage. In the course of acting for the buyers in respect of the purchase and mortgage transactions, the solicitor took an attendance note in which he recorded one of the buyer’s responses to information he received from

the seller. Subsequently, it transpired that the house was in a dangerous condition and the buyers sued the seller. The solicitor, upon finding out about the proceedings, sent a copy of the attendance note to the seller, which pleaded its contents in their defence. In response, the buyers filed two separate applications. The first was for the passages in the defence which referred to the note to be struck out. The second was for an injunction to restrain the defendant from further use of the attendance note and for delivery up of the note and any copies which may have been made. The buyers succeeded on both applications on appeal.

30 One important point that emerges from the decision in *Goddard* is that an injunction is only available before the documents have entered into evidence or otherwise have been relied upon at trial (744H–745A, *per* Nourse LJ). When the court considers whether to grant the injunction, it decides the matter based on the law on the breach of confidence. However, once the documents have been entered into evidence, then the matter moves to the domain of the law of evidence. Thereafter, whether the evidence may be expunged from the court’s record falls to be governed by the common law rules on admissibility and, if it goes that far, the court’s inherent discretion to exclude otherwise admissible evidence. If a plaintiff desires to seek relief, he must do so before the matter falls out of the reach of equity (and the law of confidence) and passes into the realm of the law of evidence.

31 Thus explained in *Goddard*, the decisions in *Calcraft* and *Lord Ashburton* are compatible. Nonetheless, there is no denying that they sit uncomfortably together. While *Calcraft* leans towards the inclusion of more relevant information, *Lord Ashburton* inclines towards the exclusion of evidence in the interest of protecting the confidential content of privileged communications. Certainly, it does not appear entirely satisfactory that the

question of whether privileged communications will enter into evidence depends on *when* steps are taken to restrain the use thereof (see *Goddard* at 743F, *per* May LJ).

32 Be that as it may, subsequent authorities in England have largely followed *Goddard* (see *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 18th Ed, 2013) at paras 26-42). The modern position in England was neatly summarised in a recent decision of the English High Court in the following terms: “once a privileged document comes into the hands of an opposing party, the law in relation to breach of confidence comes into play and the Court may intervene in its equitable jurisdiction to prevent an actual or threatened breach of confidence” (see *Harry George Kousouros v Richard O’Halloran and another* [2014] EWHC 2294 (Ch) at [65]).

The position in Singapore: Tentat and Gelatissimo

33 *Calcraft* has been considered in two local cases which parties cited before me, the first of which is *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR(R) 42 (“*Tentat*”). There, Tentat Holdings Pte Ltd (“Tentat Holdings”) sued Multiple Granite Pte Ltd (“Multiple Granite”) for the recovery of two loans. Tentat Holdings applied for summary judgment and this was resisted by the Multiple Granite. The latter’s CEO, one “THH”, filed an affidavit in support of Multiple Granite’s defence in which there were exhibited certain email communications exchanged between the applicant (Tentat Holdings’s related company) and their solicitors. THH had come into possession of these emails because he was also the Chief Investment Officer of Tentat Holdings at the time and was therefore copied in the correspondence. The applicant then commenced a separate originating summons seeking a declaration that these emails constituted privileged communications and

seeking also further orders that (a) all references to the emails in THH’s affidavit be struck out and (b) that an injunction be granted to restrain Multiple Granite and THH from future use of these emails. In resisting the application, Multiple Granite and THH argued that the emails in question were not privileged and that, even if they were, secondary evidence of these emails could be given under the rule set out in *Calcraft*.

34 Kan Ting Chiu J first held the emails were privileged. Thereafter, he turned to consider *Calcraft*. After going through the various authorities, Kan J endorsed *Goddard*, observing that a party who sought to restrain the use of his privileged and confidential communications had to do so before the evidence is used. He considered (at [39]–[41]) that the critical question was whether the emails had already been “used”: viz, whether “Multiple Granite and THH... [had] ‘adduced the confidential communication in evidence or otherwise relied on it at trial’” (at [42]). At [34] and [40], Kan J explained the relevance of this inquiry in the following way:

34 ... the right to use the copies is liable to be defeated by timely objection and Nourse LJ affirmed that at 684–685 that:

The crucial point is that the party who desires the protection *must seek it before the other party has adduced the confidential communication in evidence or otherwise relied on it at trial.*

...

40 When a document has become a ***part of the record in any court proceedings***, the information in the document ***enters into the public domain***, and it will be ***too late to preserve the privilege*** in the document. [emphasis in original in italics; emphasis added in bold italics]

35 I will return to the concept of the “public domain” later. For now, the point to be made is that what Kan J meant by entry into the “public domain” is the entry of the documents into evidence in court proceedings. He did not

contemplate any other scenario in which documents could be said to have entered into the public domain. This is made clear from the fact that he cited the portion of Nourse LJ's speech (also reproduced at [34] above) wherein Nourse LJ clarified that recourse to the equitable jurisdiction of the court may only be had "before the other party has adduced the confidential information *or otherwise relied on it at trial*" [emphasis added].

36 On the facts, Kan J held that while the emails had been exhibited in an affidavit filed in respect of the application for summary judgment, the hearing for summary judgment had yet to take place. Thus, the emails had not formally been admitted into evidence and the offending portions of the affidavit could still be expunged and an order could be made to restrain Tentat Holdings and THH from future use of the same (at [41]–[42]). For that reason, he granted the orders. It is worth noting that in granting the application for all references to the emails in THH's affidavit to be struck out, Kan J was following the lead of the court in *Goddard*, which had granted both the application for the offending portions of the defence to be struck out and the application to restrain future use of the emails.

37 The second local case is *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833. In that case, the plaintiffs had employed a solicitor on a joint retainer to sue the defendant for breach of contract. Following the commencement of proceedings, one of the plaintiffs withdrew from the action and forwarded the defendant's manager, one Mr Yeo, a series of emails which had been exchanged between the plaintiffs and their solicitor. The remaining plaintiffs subsequently commenced an application for pre-action discovery and the defendant relied on these emails (which were exhibited in an affidavit filed by Mr Yeo) in resisting the application. The plaintiffs then applied for all references to these emails in Mr Yeo's affidavit to

be expunged. The defendant accepted that the emails were privileged but argued, *inter alia*, that if emails were inadvertently disclosed, secondary evidence could be given of them under the rule in *Calcraft*.

38 Lai Siu Chiu J followed *Tentat* and likewise held that the critical question was whether the emails in question had been used in any court proceedings or had otherwise been released into the public domain (at [24]). Since neither of these had taken place, she held that privilege still subsisted in these communications and that the court could restrain the defendant from using them by granting an order that all references made to them in Mr Yeo’s affidavit be expunged (at [26]).

39 One point to note is that Lai J expressed the view that “it seemed clear that Kan J had actually rejected the principles stated in *Calcraft* in favour of a more protective attitude towards privileged documents” (at [23]). With respect, I do not believe that Kan J rejected the principles stated in *Calcraft*. While he acknowledged that the “rule [in *Calcraft*] has engendered disagreement and controversy” (see *Tentat* at [28]), he subsequently affirmed that “*Calcraft* is established law” (at [38]). Furthermore, by endorsing *Goddard* (see *Tentat* at [34], cited at [34] above), Kan J appears to have implicitly endorsed *Calcraft*. In *Goddard*, the court attempted to reconcile, on a technical level, the operation of *both* the common law rule of evidence articulated in *Calcraft* and the equitable jurisdiction of the court to restrain breaches of confidence, as exemplified in *Lord Ashburton*.

40 In my view, the following propositions may be distilled from the cases, which I adopt and apply. First, the fact that a document is privileged is not a barrier to the admissibility of copies of the same into evidence. Second, the court may, in the exercise of its equitable jurisdiction to restrain breach of confidence,

restrict the disclosure and use of privileged documents which have been disclosed to third parties to protect its confidential character. Third, the court may restrain the use of the privileged documents by way of an order to expunge offending portions of pleadings or affidavits. The court is not limited to an order for delivery up or the grant of an injunction. Fourth, such an application must be filed before the privileged documents have been formally admitted into evidence. After the privileged documents have entered into evidence, their exclusion would then fall to be governed by the common law rules on evidence.

41 My analysis of the law has taken me in a different direction from both parties. On the one hand, while I agreed with Mr Lazarus that privilege is distinct from the admissibility of evidence, I did not find that to be a complete answer to the question of whether the Emails may be expunged from the affidavits. It failed to take into account the confidential character of the information within the Emails, which may be the subject of an action to restrain breach of confidence. On the other hand, while I agreed with Mr Tan that the concepts of privilege and confidentiality were distinct, I disagreed that privilege was the ground on which relief may be granted and that, therefore, the question was simply whether privilege subsisted. Indeed, it was not disputed that privilege had not been waived. However, it is confidentiality, and not privilege, which would provide the legal basis for the prayer to expunge. With that, I turn to the next issue as to whether the Emails may still be the subject of an action to restrain breach of confidence. This requires consideration of the legal effect of the Emails having been placed on the internet.

Should the Emails be expunged?

42 Broadly summarised, the parties' contentions in this area centred on the concept of the "public domain". Mr Lazarus submitted that once privileged

documents have entered the “public domain”, they should no longer be protected by the law. While he accepted, in response to the Plaintiff’s submission, that the cases, especially *Tentat* and *Gelatissimo*, speak of release into the “public domain” in the context of the entry of documents into evidence in court proceedings, he argued that it should not be so restrictively understood but should include material which had been released onto the internet and was freely accessible to all. By contrast, Mr Tan submitted that privileged information would only cease to be protected when it is included in the record in court proceedings as it is only then it may be said that the documents have entered into the “public domain”. In any event, citing policy reasons, he argued that privileged materials could and should still be protected even if publicly accessible.

The public domain argument

43 After examining the arguments more closely, it became apparent to me that the parties were using the expression “public domain” in two different senses. I will refer to these as the “narrow” and “broad” senses respectively, and consider how entry of the materials into the “public domain” in either sense affects the equitable jurisdiction of the court to restrain the use of the materials via the law of confidence.

The narrow sense — entry into the court’s record

44 In the narrow sense, to say that documents have entered into the “public domain” merely means that the documents have entered into evidence (*ie*, entered the court’s record), putting them beyond the reach of equity and the law of confidence. This is the sense in which the expression was used in *Tentat* (see [35] above) and also the sense in which the expression was used by the Plaintiff in its submissions, as the Plaintiff relied primarily on *Tentat* and *Gelatissimo*.

On the facts, the Emails have not been used in the present suit. They have only been referred to and exhibited in the Defendant’s affidavit filed in support of the striking out application, which has yet to be heard. In this regard, the present facts fell squarely within *Tentat* and *Gelatissimo*. I found that the Emails had yet to enter into evidence in the narrow sense, and the court still had the jurisdiction to grant the prayer to expunge.

The broad sense — materials generally known and accessible

45 In the broad sense, to say that the documents have entered into the “public domain” is to say that they have become “public property and public knowledge” (see *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47). This appears to be the sense in which the Defendant was mainly using the expression. To reiterate, Mr Lazarus argues that given that the Emails had been uploaded onto the internet and were freely available for access, they were in the public domain, and could not be protected by the law. In other words, Mr Lazarus’s point could be understood to mean that the law of confidence does not act to protect information which is so widely known that there is no confidentiality to protect.

46 The problem with Mr Lazarus’ argument is that it treats the concept of “public domain” as a rule to be mechanistically applied, as if the fact that documents are publicly accessible alone would be sufficient to defeat a claim for protection. I am unable to agree with the approach. In order to explain why, I think it is important to go back to first principles to understand precisely why the law of confidence does not protect matters which are publicly known and publicly accessible. In *Attorney-General v Observer Ltd and others and other appeals* [1990] 1 AC 109 (the “*Spycatcher*” case), it was observed that the scope of the duty of confidentiality is subject to the limiting principle that

“confidentiality only applies to information to the extent that it is confidential”.

Lord Goff of Chieveley went on to state at 282C that:

In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it.

47 In my view, the “public domain” concept does not appear to be an inflexible rule. Accessibility is but an aspect affecting the scope of the duty of confidentiality. The fact that the documents are publicly accessible (even on the internet) would not on its own necessarily stifle an action in confidence. In each case, the court is really concerned with “whether the degree of accessibility to the information is such that, in all the circumstances, it would not be just to require the party against whom a duty of confidentiality is alleged to treat the information as confidential” (see R G Toulson and C M Phipps, *Confidentiality* (Sweet & Maxwell, 3rd Ed, 2012) (“*Confidentiality*”) at para 3-110).

48 With that in mind, one reason why the law of confidence would not cover documents in the public domain is because generally, there is no *purpose* to grant an injunction when the material is already publicly known and accessible. The facts of the *Spycatcher* case illustrate this. W, a former member of the British Secret Service, in violation of his duty of confidentiality, wrote a book on his experiences. The book was widely published worldwide and was the subject of intense popular interest. Eventually, a number of national newspapers in the UK began serialising extracts from the book. In response, the Attorney-General sought an injunction to prevent further publication. This was refused by the House of Lords, which held that given how widely circulated the book was, all possible damage had been done and there would be no use in ordering an injunction to restrain further publication (at 260E–F, *per* Lord Keith

of Kinkel; at 267D, *per* Lord Brightman; at 277G, *per* Lord Griffith; at 291B–C, *per* Lord Goff of Chieveley).

49 Therefore, the question is not so much the accessibility of the information *per se* but whether the degree of public accessibility is such that it would be senseless, as a practical matter, to try to protect the information as confidential (see *Confidentiality* at para 3-128). This requires a court to examine if there is any *value* to the party claiming confidentiality against the other party and is essentially a question of fact. As Lord Hoffmann put it in *OBG Ltd and another v Allan and others and other appeals* [2007] 2 WLR 920 (“the *Hello!* case”) at [122]:

My Lords, it is certainly the case that once information gets into the public domain, it can no longer be the subject of confidence. Whatever the circumstances in which it was obtained, there is no point in the law providing protection. *But whether this is the case or not depends on the nature of the information. Whether there is still a point in enforcing the obligation of confidence depends on the facts. ...*

[Emphasis in italics]

50 For example, in *Creation Records Ltd and others v News Group Newspapers Ltd* (1997) 39 IPR 1, members of the famous rock band, Oasis, gathered at a hotel to take photographs for the cover of their forthcoming album. The defendant managed, through an act of subterfuge and in breach of confidence, to take pictures of the shoot which were published in three editions of their newspaper, “*The Sun*”. The defendant also invited readers to write in to purchase glossy posters of the shoot. The court granted the plaintiffs’ application for an injunction restraining future publication of the posters, holding that the prior publication of the photos, though widespread (it numbered in the “millions of copies”), was no barrier to the grant of the injunction because the plaintiffs were able to establish that the sale of the poster would impair

Oasis's ability to exploit images of the shoot either by way of the sale of an authorised poster of its own or through marketing and merchandising at a later stage. In other words, there was still a point in granting the injunction because the defendant's continued sale of the posters would have stifled the plaintiffs' legitimate right to use the images for their own commercial purposes.

51 On the present facts, it seemed to me that the Plaintiff continued to have a compelling interest in restraining the use of the Emails. This was his desire to avoid having the contents of his discussions with his lawyer over the conduct of the present suit, which were full, free, frank, and told in an atmosphere of confidence, used against him. One cannot over-emphasise the fact that the Emails concerned the present suit, and that the original documents remained privileged against disclosure (for which privilege has not been waived). On the relevance and significance of the privileged nature of the Emails, I also rely on the discussion below at [60]–[61]. If there were to be any person whom the Plaintiff would have an interest in keeping the information from, it would have been the Defendant, his opposing party. Obviously, that was no longer possible. However, the Plaintiff still has an interest in seeking an order that the documents not be used by the Defendant in the present suit. The prayer to expunge would serve this very purpose.

52 Further, what weighed heavily on my mind was that the Plaintiff was the victim of a cybercrime, and the Defendant was aware of this fact. The numerous news articles annexed to the Defendant's affidavit described the extent and reach of the hacking, which resulted in the publication of more than 500 gigabytes of data (pertaining to client files, financial documents, contracts, and internal communications) on WikiLeaks, which is itself a controversial website associated with the publication of large volumes of leaked information. I do not for a moment suggest that the Defendant was responsible for the hacking.

However, the Defendant was well aware of the circumstances leading to the unauthorised disclosure of the Plaintiff's information on the internet.

53 Thereafter, out of the substantial amount of contents leaked, the Defendant accessed the Emails. Given the express provisos contained within, the Defendant had clearly been put on notice of the "privileged and confidential" nature of the Emails. Notwithstanding this, the Defendant accessed the information contained within, and generated copies of the Emails for use in the present suit.

54 Considering the circumstances surrounding the massive information leak and how the Defendant came to be in possession of the Emails, as well as the nature of the information within the Emails, it seemed to me that an obligation of confidentiality could still be justly and reasonably imposed on the Defendant in respect of the Emails. Given that the Defendant is the opposing party, the Plaintiff would have every interest in restraining the use of the information in the present suit. To sum up, I was of the view that the Emails in question could still be protected by the law of confidence.

55 At this juncture, I pause to observe that neither Mr Lazarus nor Mr Tan specifically submitted on the cases on "public domain" within the law of confidence. This was not surprising, given the confusion over the legal basis for the prayer to expunge. In fact, Mr Tan proceeded on the assumption that public accessibility alone was to be equated with a loss of confidentiality. In the circumstances, I did not think it appropriate to place any weight on the Plaintiff's apparent concession that confidentiality in the Emails had been lost. In adopting the line of reasoning set out, I did not think that any prejudice has been caused to the Defendant. At the end of the day, it was the assessment of the facts and circumstances which mattered in determining whether the Emails

could be protected. These facts and circumstance were not disputed, and both parties had addressed me generally on them.

56 I make a further comment. In the *Hello!* case at [305], Baroness Hale of Richmond explained that one of the great strengths of the common law is that it can be developed on a case by case basis to meet the demands of new factual situations as they arise. In this case, I have felt able to reach my decision based on what I consider to be established principles of the law of confidence. As the parties observed during the hearing, the present situation is not one which would have existed slightly more than ten years ago. Even if I were to be wrong on the law as it stands, this seems to me to be a case where the development of the common law is warranted to offer adequate protection to “privileged and confidential” information. Such development is necessary to meet the needs of the modern age, where the advent of the internet has made information not just more accessible, but also more vulnerable to unauthorised access.

Discretion to refuse relief

57 After I established that the court has jurisdiction to grant relief, the last question to be decided was whether the court had any discretion in the matter and, if so, what the extent of this discretion was. This point arose because of Mr Lazarus’s contention that if information were to be freely available online and anyone may have sight of such information, the court should not blithely ignore a source of relevant material. It “offends common sense”, he said, for the court to behave as an “ostrich in the sand”. Taken at its highest, I understand this to be an argument that this court should not exercise its discretion, if any, in favour of the grant of relief because it would mean the exclusion of relevant material, possibly to the prejudice of the Defendant. In order to answer this question, I had to consider whether the court may balance the public interest in having the

maximum relevant material available to the court (which militates against the grant of relief) and the public interest in the maintenance of confidentiality (which leans in favour of the grant of an injunction).

58 This issue was considered by Lawrence Collins J (as he then was) in *ISTIL Group Inc and another v Mohammad Zahoor and others* [2003] EWHC 165 (Ch) (“*ISTIL*”). In his judgment, Collins J held that where there has been an inadvertent disclosure of a privileged document to a third party, the court should ordinarily intervene unless it is a case where relief can properly be refused on the general principles affecting the grant of a discretionary remedy (eg, on the ground of inordinate delay, the principle of clean hands, or the doctrine of iniquity) (at [74], [90]–[91]). This view was subsequently approved of by the English Court of Appeal in *Imerman v Tchenguiz and others* [2011] 2 WLR 592 at [75] and is supported by the preponderance of the authorities, all of which focus on the nature of the information sought to be protected.

59 In *Goddard* (at 745E–F), Nourse LJ opined that once a case fell within the ambit of the *Lord Ashburton* principles, there was “no discretion for the court to refuse to exercise its equitable jurisdiction according to its view of the materiality of the communication, the justice of admitting or excluding it or the like.” He explained that this was because the injunction was being granted in aid of privilege, which, “unless and until it is waived, is absolute.” In *Derby & Co Ltd and others v Weldon and others (No 8)* [1991] 1 WLR 73 at 84C–E, Vinelott LJ further explained that since the injunction was being sought in aid of privileged material, no weighing of the competing considerations need be called for since the balance between the conflicting policy considerations of truth (which would be served by the admission of all relevant information) and privilege (which would call for the grant of relief) had already been struck by the making of the rule on legal professional privilege.

60 The *raison d'être* of legal professional privilege is that full, free, and frank communication between persons and their legal advisors, without which the effective administration of justice would not be possible, can only take place if such communications can be carried out in confidence (see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 at [23]). There is a tension between this and the competing public policy consideration that all relevant information be placed before the court in order that accurate adjudication can be carried out. However, the balance between these two competing imperatives has already been struck in favour of the preservation of legal professional privilege. For this reason, I did not consider that it was open for me to refuse relief on the ground that it would increase the amount of relevant material available to the court.

61 For avoidance of doubt, I should clarify that the cases do not go so far as to say that the court's discretion is ousted altogether. They only go so far as to say that it is inappropriate for the court to conduct a balancing exercise between the competing interests of justice and truth. There is still scope for the court to refuse relief on the general principles affecting the grant of a discretionary remedy. Before the AR, the Defendant raised certain points regarding the timeliness of the Plaintiff's application and on the allegedly iniquitous nature of his application. On appeal, these points were not pursued. As such, I saw no reason to refuse relief.

Conclusion

62 For the reasons stated, I dismissed the appeal. I fixed costs at \$5,000 (inclusive of disbursements) to be paid by the Defendant to the Plaintiff.

Hoo Sheau Peng
Judicial Commissioner

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