IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 29

Civil Appeal No 20 of 2021

Between

(1) Lim Oon Kuin
(2) Lim Chee Meng
(3) Lim Huey Ching

… *Appellants*

And

Rajah & Tann Singapore LLP

… *Respondent*

In the matter of Originating Summons No 704 of 2020
(Summons No 4417 of 2020)

In the matter of
Rajah & Tann Singapore LLP
acting for the Interim Judicial Managers
of Hin Leong Trading (Pte) Ltd
and/or other relevant parties

Between

Hin Leong Trading (Pte) Ltd
(in liquidation)

… *Applicant*

And

Rajah & Tann Singapore LLP

… *Respondent*

Civil Appeal No 21 of 2021

Between

(1) Lim Oon Kuin
(2) Lim Chee Meng
(3) Lim Huey Ching

… *Appellants*

And

Rajah & Tann Singapore LLP

… *Respondent*

In the matter of Originating Summons No 666 of 2020
(Summons No 4429 of 2020)

In the matter of
Rajah & Tann Singapore LLP
acting for the Interim Judicial Managers
of Ocean Tankers (Pte) Ltd
(under Interim Judicial Management)
and/or other relevant parties

Between

Ocean Tankers (Pte) Ltd
(Under Interim Judicial
Management)

… *Applicant*

And

Rajah & Tann Singapore LLP

… *Respondent*

JUDGMENT

[Civil Procedure — Parties — Joinder]
[Civil Procedure — Injunctions]
[Civil Procedure — Jurisdiction — Inherent jurisdiction to supervise conduct of solicitors]
[Confidence — Breach of confidence]
[Legal Profession — Conflict of interest]

Lim Oon Kuin and others
v
Rajah & Tann Singapore LLP and another appeal

[2022] SGCA 29

Court of Appeal — Civil Appeal Nos 20 and 21 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Belinda Ang Saw Ean JAD and Chao Hick Tin SJ
23 November 2021

4 April 2022 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

Introduction

1 The present appeals arise from the decision of the High Court judge (the "Judge") in *Ocean Tankers (Pte) Ltd (under judicial management) v Rajah & Tann Singapore LLP and another matter* [2021] SGHC 144 (the "Joinder Judgment"), dismissing HC/SUM 4429/2020 ("SUM 4429") and HC/SUM 4417/ 2020 ("SUM 4417") which were the appellants' applications to be joined as parties to certain litigation against the respondent law firm. We shall refer to SUM 4429 and SUM 4417 collectively as the "Joinder Applications". The Judge heard the Joinder Applications together with HC/SUM 4317/2020 ("SUM 4317") and HC/SUM 4318/ 2020 ("SUM 4318") which were the respondent's applications to strike out (the "Striking Out Applications") the said litigation. The Judge allowed the Striking Out

Applications. We employ as shorthand the term "Applications" to refer to both the Joinder Applications and the Striking Out Applications.

2 We heard the present appeals together with CA/CA 202/2020 ("CA 202") and CA/CA 203/2020 ("CA 203"), which are related appeals against the Judge's decision allowing the Striking Out Applications (see *Ocean Tankers (Pte) Ltd (under judicial management) v Rajah & Tann Singapore LLP and another matter* [2021] SGHC 47 (the "Striking Out Judgment")). Our decision in respect of those appeals is *Hin Leong Trading (Pte) Ltd (In Liquidation) v Rajah & Tann Singapore LLP and another appeal* [2022] SGCA 28.

3 We begin with a brief overview of the parties, followed by an account of the events that eventually led to these appeals.

Factual background

The parties

4 The appellants in the present appeals are: (a) Mr Lim Oon Kuin ("Mr OK Lim"); (b) Mr Evan Lim Chee Meng ("Mr CM Lim"); and (c) Ms Lim Huey Ching ("Ms HC Lim"). Mr CM Lim and Ms HC Lim are the children of Mr OK Lim, and we shall refer to the appellants collectively as the "Lims". The Lims were the key management figures in two related companies. The first, Hin Leong Trading (Pte) Ltd ("HLT"), was an oil-trading company. The second, Ocean Tankers (Pte) Ltd ("OTPL"), was a ship management company. We shall, where appropriate, refer to HLT and OTPL together as "the Companies".

5 The Companies were part of a group of companies that are or were owned by some or all of the Lims and were managed by the Lims. The group also included Xihe Holdings (Pte) Ltd ("Xihe Holdings") and Xihe Capital (Pte) Ltd ("Xihe Capital"), which are investment holding companies (together with their subsidiaries, the "Xihe Group"), Universal Group Holdings (Pte) Ltd ("UGH"), another investment holding company, as well as numerous special purpose vehicles ("SPVs") that each owned one or more vessels. We shall refer to them collectively as the "Group Companies".

6 In or around the first quarter of 2020, HLT encountered financial difficulties and was consequently unable to meet its debt obligations. On 8 April 2020, HLT engaged the respondent law firm, Rajah & Tann Singapore LLP ("R&T"), to advise on issues arising from its insolvency. Given the interconnectedness of HLT's and OTPL's businesses, OTPL too engaged R&T to advise on available restructuring options. Up until 17 April 2020, the Lims were the sole directors and shareholders of the Companies. On that date, Mr OK Lim stepped down as a director amidst admissions on affidavit made in support of the Companies' applications for interim moratoriums to be granted under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) (the "Act") for both Companies. These affidavits stated that HLT and OTPL were both in parlous financial positions, owing to, among other things, Mr OK Lim's own conduct in having instructed that HLT's financial statements not disclose approximately US$800m in future losses. Mr CM Lim and Ms HC Lim, however, remained directors of the Companies.

Events leading up to the appointment of Judicial Managers

7 As stated above, on 17 April 2020, HLT and OTPL filed HC/OS 405/2020 ("OS 405") and HC/OS 406/2020 ("OS 406") respectively. Each company sought the grant of an interim moratorium, pending a proposed debt restructuring exercise. Both applications were filed by R&T on behalf of the Companies.

8 On 21 April 2020, HLT sought leave to withdraw OS 405. In place of that proceeding, HLT filed HC/OS 417/2020 ("OS 417") to for it to be placed under judicial management and, pending the hearing of that prayer, for interim judicial managers ("IJMs") to be appointed. This step was in part spurred on by significant creditor resistance to, and the absence of any relevant creditor support for, the proposed debt restructuring. On 27 April 2020, the Judge granted HLT leave to withdraw OS 405 and appointed IJMs over HLT, in the face of significant creditor resistance to a debtor-in-possession restructuring.

9 On 6 May 2020, OTPL took a similar step. It sought leave to withdraw OS 406. In its place, OTPL filed HC/OS 452/2020 ("OS 452") for it to be placed under judicial management and, pending that event, for IJMs to be appointed. On 12 May 2020, the Judge granted OTPL leave to withdraw OS 406 and appointed IJMs over OTPL.

10 On 7 August 2020, the Judge allowed OS 417 and placed HLT under judicial management, appointing the IJMs as judicial managers ("JMs"). On the same day, the Judge allowed OS 452 and placed OTPL under judicial management, appointing the IJMs as JMs.

11 During the period that each of the Companies was under interim judicial management, R&T acted for them on the instructions of the IJMs. At the instance of the JMs, they continued to act for the Companies after 7 August 2020.

The Applications

12 In the meantime, while the interim judicial management orders were still in place, Mr CM Lim and Ms HC Lim, who were still directors of the Companies, had caused legal proceedings to be commenced in the names of the Companies as follows:

(a) On 9 July 2020, OS 666 was taken out in the name of OTPL as applicant against R&T as respondent. OS 666 sought orders to restrain R&T, whether acting by their partners, officers, servants, or agents, from advising and acting for OTPL in OS 452 (OTPL's application to be placed under judicial management), and for the IJMs and JMs of OTPL, should they be so appointed by the court subsequently. The scope of the injunction applied for included prohibitions against advising and acting for OTPL in relation to OTPL's applications to set aside writs filed against vessels owned by the Xihe Group and SPVs that had been chartered by OTPL.

(b) On 21 July 2020, OS 704 was taken out in the name of HLT as applicant against R&T as respondent. OS 704 sought orders to restrain R&T, whether acting by their partners, officers, servants, or agents, from advising, and acting for HLT in OS 417 (HLT's application to be placed under judicial management), and for the IJMs and JMs of HLT, should they be so appointed by the court subsequently.

OS 666 and OS 704 (collectively, "the Injunction Applications") were filed because the IJMs had retained the services of R&T as solicitors for the Companies after their appointment. In Mr CM Lim's and Ms HC Lim's own words, the Injunction Applications were "necessary to restrain R&T from acting for the JMs of [HLT and OTPL] to protect the confidential information, and documents disclosed by the [Lims] and [HLT and OTPL] to R&T".

13 On 5 October 2020, R&T filed the Striking Out Applications. They sought to strike out the Injunction Applications on the ground, among other bases, that Mr CM Lim and Ms HC Lim no longer had the authority to start actions in the names of the Companies as the latter were already under judicial management. Whilst they contested the Striking Out Applications, the response of the Lims was to file the Joinder Applications a week later, on 12 October 2020. The purpose of the Joinder Applications was to procure the joinder of the Lims as applicants to the Injunction Applications.

14 On 4 November 2020, the Judge heard the Striking Out Applications and the Joinder Applications together. He allowed the Striking Out Applications and dismissed the Joinder Applications. On 27 and 30 November 2020, HLT and OTPL filed CA 202 and CA 203 respectively, appealing against the Judge's decision to allow the Striking Out Applications.

15 On 9 April 2021, this court allowed the Lims' applications for leave to appeal against the dismissal of the Joinder Applications. We considered that there was a question of general principle to be decided for the first time, as well as a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. The question was framed as follows:

> Whether one or more parties to a joint retainer can restrain the law firm in the joint retainer from acting against them on the basis that there is a risk of a breach of confidence.

16 On 16 April 2021, and pursuant to the grant of leave, the Lims filed the present appeals, appealing against the Judge's decision to dismiss the Joinder Applications.

Arguments and decision below

The arguments

17 The basis for the Injunction Applications, according to the Lims, was that from the early 1990s onwards, R&T had acted for and/or advised the Lims and the Group Companies, including the Companies. When the Companies faced financial difficulties, R&T were engaged by the Companies and the Lims to advise on how their respective interests could be best protected and on the available restructuring options. Pursuant to the engagement, R&T was provided with confidential information and documents relating to the Lims and the Companies. The Lims claim that such information was potentially relevant to the IJMs and JMs as regards (a) any investigations they might undertake into the conduct of the Lims in the management of the Companies; and (b) any adverse position they might take against the Lims and the management of the Companies. The Injunction Applications ought accordingly to be granted to protect the confidentiality of such information and documents disclosed to R&T. Alternatively, R&T owed an equitable duty of confidence arising from the confidential nature of the information and documents that were disclosed to them, there being a "real and sensible possibility" of such information and documents being misused in breach of the duty of confidence. Further, in any event, in the interests of the proper administration of justice, the court should

exercise its supervisory jurisdiction to regulate the conduct of its officers and restrain R&T from acting against the former clients about whom they had confidential information.

18 R&T's response was that the Injunction Applications were both *factually* and *legally* unsustainable (see the Striking Out Judgment at [13]–[15]):

(a) As to factual unsustainability, there was no such global engagement of R&T by all the companies owned by the Lims for the purpose of a "group restructuring", nor did the Lims engage R&T to protect their personal interests as alleged. Simply, R&T had only been engaged by the Companies. In this regard, R&T asserted that it had only been engaged by HLT since 1998 and that while it had advised members of the Lim family personally in 2003, 2007 and 2015, it had not acted for the Lims in 2020.

(b) As to legal unsustainability, R&T contended, among other things, that (i) the confidential information in issue belonged to the respective Companies and hence there was no basis for R&T to be restrained from sharing it with the JMs and IJMS; (ii) Mr CM Lim was unable to particularise the confidential information in issue; (iii) even assuming that R&T was jointly retained by the Lims and the Companies, the Lims were not entitled to assert that the information was confidential *vis-à-vis* the Companies as information disclosed pursuant to a joint retainer was not confidential as between the parties thereto; and (iv) the Companies' interests were not adverse to the interests of their respective IJMs and JMs in any relevant sense; rather, their interests were aligned.

R&T also asserted that it had put in place effective measures to prevent the improper disclosure of confidential information, such as not acting in matters adverse to the personal rights and liabilities of the Lims, instituting a Chinese wall arrangement, and not acting or advising on any contentious matter which would put them in a position of conflict of interest.

Decision below

19 In the Joinder Judgment, the Judge, proceeding on the basis that there had been a joint retainer by the Companies and the Lims, first turned to the "principal issue" as to whether there was any information disclosed pursuant to the joint retainer that was deemed confidential. In this regard, the relevant case law is found in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 ("*Bolkiah*"), which states that solicitors may be restrained from acting against a former client if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.

20 In this case, two categories of information were identified by the Judge. First, information that was disclosed by the Companies. In respect of this category, the Judge noted that it could not be gainsaid that information disclosed by the Companies was not confidential *vis-à-vis* them; it was also questionable for the Lims to assert confidentiality over information disclosed by the Companies as the Lims had no standing to do so (see the Joinder Judgment at [35]–[36]). It was also not confidential *vis-à-vis* the JMs who, as court appointed officers, had custody and control of "all the property to which the company is or appears to be entitled" under s 227G(1) of the Act; or the IJMs, who were entitled to exercise all the powers and entitlements of the JMs, pursuant to the orders of court under which they were appointed, read with s 227B(10)(*b*) of

the Act (Joinder Judgment at [37]–[39]). The Judge therefore held that, in respect of this category of information, the Lims had "no basis or standing to assert confidentiality" and the JMs were fully entitled to receive such information from R&T (Joinder Judgment at [40]).

21 The second category involved information belonging to the Lims or their other companies that they had disclosed to R&T that could not be shared with the Companies. The Judge examined the English High Court decision in *Winters v Mishcon de Reya* [2008] EWHC 2419 (Ch) ("*Winters*") in detail, considering that the case stood for "the proposition that where information is voluntarily disclosed by one party to his solicitor in circumstances where there was no reasonable expectation of confidence, *eg*, in respect of a matter for which the solicitor was jointly retained, there generally is no confidentiality of such information as between the other party to the joint retainer *unless* the party disclosing has made it clear that the information was to be regarded as confidential between him and the solicitor" [emphasis in original in italics] (see the Joinder Judgment at [44]). Applying the *Winters* proposition, the Judge found that there was no information that the Lims had specifically instructed R&T not to disclose to the Companies; the information in this case also related to the restructuring of the Companies, and would have been disclosed in any case (Joinder Judgment at [45]). The Judge therefore held that the arguments on the equitable duty of confidence also failed (Joinder Judgment at [46]).

22 Finally, the Judge noted that there was no basis for the court to exercise its supervisory jurisdiction to restrain R&T. Since the information was not confidential, restraining R&T was not in the interests of the proper administration of justice (see the Joinder Judgment at [47]). There was,

accordingly, no need to consider the efficacy of the measures taken by R&T to prevent the disclosure of the information (Joinder Judgment at [48]).

Issues to be determined in these appeals

23 Appellate relief is now pursued on substantially the same grounds as taken below. We turn first to the law of joinder.

Our decision

The law of joinder

24 We begin with the law of joinder. The relevant provision is O 15 r 6(2) of the Rules of Court (2014 Rev Ed) (the "Rules") and in particular r 6(2)(*b*). The material part of this rule reads as follows:

> **Misjoinder and nonjoinder of parties (O. 15, r. 6)**
>
> **6.**—(1) …
>
> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —
>
> (*a*) …
>
> (*b*) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between

> him and that party as well as between the parties to the cause or matter.

25 The principles governing an application under O 15 r 6(2)(*b*) of the Rules were stated by this court in *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 ("*ARW*") at [40], [41] and [46]. Joinder of a party is permitted when that party satisfies either of the two limbs of r 6(2)(*b*). In considering the availability of either limb, a two-part inquiry is undertaken. The first involves determining whether the requirements of the particular limb have been met. If so, the court moves on to the second step of considering whether its discretionary power to allow joinder should be exercised in favour of the applicant.

26 When the "necessity" limb in O 15 r 6(2)(*b*)(i) of the Rules is being considered, the first question to be determined is whether "there [is anything] to prevent the action … as originally drawn, from being effectually and completely determined" without the joinder (*ARW* at [41]). In this regard, it is insufficient if it is merely desirable for a third party to be added, such as where a plaintiff might wish to bring a related claim against the third party (*Abdul Gaffer bin Fathil v Chua Kwang Yong* [1994] 3 SLR(R) 1056 at [16]; *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA and others and other appeals* [2018] 1 SLR 894 ("*De La Sala*") at [203]). If this requirement is satisfied, then at the discretionary stage, the court considers "all the factors which are relevant to the balance of justice in a particular case" (*ARW* at [41]).

27 When the "just and convenient" limb in O 15 r 6(2)(*b*)(ii) has been relied on, the court must be satisfied that there exists a question or issue involving the party sought to be joined which relates to an existing question or issue between the existing parties (*De La Sala* at [204]). Thereafter, the court considers

whether, "in the opinion of the [c]ourt", joinder for the purpose of deciding that question or issue would be just and convenient (*De La Sala* at [204]).

28 The key issue in dispute in OS 666 and OS 704 as originally constituted is whether the Companies are entitled to the relief sought of restraining R&T from acting for their IJMs and JMs. As far as the entitlement of the Companies to relief is concerned, we do not think that nonjoinder of the Lims will prevent the actions from being effectually and completely determined such that the non-discretionary element under O 15 r 6(2)(*b*)(i) of the Rules (*ie*, the "necessity" limb) applies. The Lims do not assert an interest on behalf of the Companies that is necessary to the determination of OS 666 and OS 704. Nor is the presence of the Lims necessary to the issue of whether the Companies are entitled to the reliefs sought. Rather, their interest as asserted before us is in preserving the confidence of information belonging to themselves and the other Group Companies, and in invoking the supervisory jurisdiction of the court to prevent R&T from acting for the Companies henceforth. Accordingly, they do not meet the requirements of the first limb.

29 It is, on the other hand, just and convenient to add the Lims under O 15 r 6(2)(*b*)(ii) of the Rules (*ie*, the "just and convenient" limb). In our view, the questions of confidential information and the supervisory jurisdiction of the court as raised by the Lims are undoubtedly linked to the injunctive relief claimed by the Companies on the basis of a breach of confidentiality. The claims substantially arise from the same facts, *ie*, disclosure of information to R&T by the Lims and the Companies, which the Lims claim would not have taken place had they known R&T could subsequently act for the JMs of the Companies in a manner adverse to their interests. The Lims have disclosed some information (see below at [46]–[47]) which appear to have the necessary quality of

confidence though this is subject to further investigation at trial. The question of whether R&T ought to be restrained from acting on the basis of the supervisory jurisdiction of the court is a broader concern that, as we discuss below, arises on the present facts. As for the discretionary requirements of O 15 r 6(2)(*b*), we consider that there are unlikely to be issues of procedural unfairness or prejudice to R&T arising from a joinder, given some overlap in the causes of action, and as the matters have not yet been fully ventilated.

30 R&T argues that O 15 r 6(2)(*b*)(ii) of the Rules does not apply to the present situation where the Lims "are trying to bring themselves into OS 666 and OS 704 in a wholly different capacity, to prevent the actions being struck out" when they had been started without due authority. They argue citing, *inter alia*, *Lim Seng Wah and another v Han Meng Siew and others* [2016] SGHC 177 and *Lee Bee Eng (formerly trading as AFCO East Development) v Cheng William* [2021] 3 SLR 968 ("*Lee Bee Eng*"), that such an effective substitution is only made in circumstances where there is a plainly valid cause of action and the wrong plaintiff has sued, or there is doubt as to which of two plaintiffs is the proper plaintiff. The correct or potentially correct plaintiff therefore merely steps into the shoes of the wrong plaintiff.

31 However, O 15 r 6(2)(*b*)(ii) of the Rules cannot be so confined. It must be remembered that O 15 r 6 is designed to "save rather than to destroy … and to ensure that the right parties are before the court so as to minimise the delay, inconvenience and expense of multiple actions" (*Tan Yow Kon v Tan Swat Ping and others* [2006] 3 SLR(R) 881 at [36]). As long as the Lims have a cause of action which would survive a striking out application, that is, one that is not an abuse of process nor factually or legally unsustainable or frivolous or vexatious or scandalous, at this interlocutory stage their title to sue cannot be impugned

(*cf*, *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck and another* [2007] 2 SLR(R) 869, where joinder was refused as neither the plaintiff nor the party sought to be joined as co-plaintiff possessed title to sue as a statutory exclusive licensee, and the action was struck out). In our view, for the reasons we give below, the Lims do have such a cause of action on the basis of a breach of confidence or the supervisory jurisdiction of the court. Their cause of action may not succeed after all the facts have been determined at trial, but that is not a consideration at this stage. Had the Lims sought to be joined even if the Striking Out Applications were not brought, we consider that they would have been added to OS 666 and OS 704 as applicants. While we have affirmed the Judge's decision to allow the Striking Out Applications as regards the Companies, this is no bar to permitting the Joinder Applications and so, effectively, having the Lims substituted as the suing parties. As held by Lee J in *Lee Bee Eng* (in the context of O 15 r 6(*b*)(i) of the Rules), the power of joinder may cover situations where something remains to be done between an existing party and a new third party seeking to be added to the action, and such power is not extinguished where there has been a striking out of the party sought to be replaced and its claims (at [35]). In this connection it is relevant that were joinder not allowed, there would be nothing to stop the Lims from commencing fresh injunction proceedings on their own behalf.

32 In the following sections of this judgment, we explain why we consider that the Lims cannot at this stage be shut out from pursuing their causes of action. We deal first with confidentiality and then with the supervisory jurisdiction of the court.

Confidentiality

33 The law of confidence has been the subject of much discussion recently, in light of this court's decisions in *LVM Law Chambers LLC v Wan Hoe Keet and another and another matter* [2020] 1 SLR 1083 ("*LVM Law Chambers*") and *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 ("*I-Admin*"). It has been argued that *LVM Law Chambers* and *I-Admin* proffer approaches that appear at odds with each other (see Saw Cheng Lim, Chan Zheng Wen Samuel & Chai Wen Min, "Revisiting the Law of Confidence in Singapore and a Proposal for a New Tort of Misuse of Private Information" (2020) 32 SAcLJ 891). The decisions in *LVM Law Chambers* and *I-Admin* were released within days of one another, with overlapping composition in the *coram*, as Prof Ng-Loy Wee Loon ("Prof Ng-Loy") points out in the *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 3rd Ed, 2021) ("*Law of Intellectual Property*") at para 41.3.12. Since a five-member *coram* has been empanelled in the present case, we take this opportunity to clarify the law in this regard.

The applicable test for breach of confidence

34 An obligation of confidence binding a lawyer may arise either from a contractual relationship to which that lawyer is a party or from certain, limited, circumstances which impose an equitable duty of confidence on the lawyer (*LVM Law Chambers* at [13]–[14]). In this case, the Judge assumed that there was a joint retainer which would, obviously, have meant the existence of a contractual duty of confidence between R&T and the Companies and the Lims. The Judge found, however, that that contractual arrangement did not preclude R&T from continuing to represent the Companies alone. In any event, R&T has steadfastly denied that there was such a joint retainer involving the Lims. While the Lims assert that they and the Group Companies jointly instructed R&T to

act for them in a restructuring exercise, R&T points to evidence showing that from 17 April 2020 onwards the Lims were represented by other law firms. In these circumstances, we had also to consider whether an equitable duty of confidence could have been imposed on R&T even if it was not acting directly for the Lims.

35 We begin with *LVM Law Chambers*. The facts of that case are quite different from those of the present appeals, but the principles established do offer some assistance. The question there was what legal principles apply when deciding whether a lawyer or law firm, which acted for a plaintiff who successfully resolved his dispute with the defendant through mediation or settlement negotiations, can represent another plaintiff against the same defendant (at [12]). The following points were decided (at [14]–[23]):

> (a) First, the starting point for the test for breach of confidence was that laid down in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 ("*Coco v Clark*") (albeit modified slightly having regard to the precise issue in *LVM Law Chambers*), as follows:
>
> > (i) the information concerned must have the necessary quality of confidence about it;
> >
> > (ii) that information must have been received by the lawyer (or law firm) concerned in circumstances importing an obligation of confidence; and
> >
> > (iii) there is a real and sensible possibility of the information being misused.

(b) The first requirement was to be applied logically and in accordance with common sense. If the information was common or public knowledge, there cannot possibly arise a duty of confidence, equitable or otherwise.

(c) The second requirement was closely linked to the first. In the particular context of the settlement agreements, recourse must first be had to that particular agreement to determine the precise contours of the obligation of confidence. Much would also depend on the precise nature and circumstances, but there was case law suggesting that a lawyer may be restrained even if there was an *unconscious or subconscious* misuse of the confidential information concerned (*LVM Law Chambers* at [19]).

(d) As for the third requirement, the "real and sensible possibility" test was an objective one that would be satisfied in a wide range of situations. This ranged from cases where the risk of misuse was patently obvious, such as where there was clear evidence of an intention to use information contrary to the obligation of confidence; but the requirement might also be satisfied in circumstances falling short of this high threshold.

(e) Finally, the burden is on the party seeking the relevant relief to show that the information in question was confidential in nature and that the lawyer was subject to an obligation in equity to uphold the confidentiality (*LVM Law Chambers* at [18] and [23]). Mere or vague assertions would not suffice as an innocent third-party ought to have a solicitor of his own choice. The court, however, went further to observe (at [24]):

> We do note, however, that in *Carter Holt* ([13] *supra*), the court was of the view (at [26]) that whilst the burden of proof lay on the party seeking the exclusion of the other party's lawyer to demonstrate that there was 'an appearance of risk, going beyond the remote or merely fanciful, of conscious or unconscious use or disclosure by the lawyer of something relevant to the current dispute of which the lawyer gained knowledge as a result of participation in an earlier mediation', upon that threshold being reached it would then be for the lawyer 'to demonstrate that in fact no such risk exists or that, if it does, no damage, other than de minimis, could possibly result from use or disclosure'. In our view, these observations merely relate to a shift in the *evidential burden*, and do not detract from the fact that the overall *legal* burden of proof lies on the party seeking an injunction preventing the lawyer concerned from acting for the other party …

36 *LVM Law Chambers* was quickly followed by the decision of *I-Admin*. In *I-Admin*, the appellant's source code was copied by two former employees (the first and second respondents), who later left to set up a rival company (the third respondent). In the High Court, the first two elements of the test in *Coco v Clark* (*ie*, that the information possessed the quality of confidence, and was imparted in circumstances importing an obligation of confidence) were found to have been established. This was not challenged on appeal. While the High Court found that the appellant had not discharged its burden of proving the third element (*ie*, that there was an unauthorised use of the information), this court disagreed, finding that the third element had been satisfied in the case. In particular, this court first observed that the equity-based action for breach of confidence protects two interests (at [46]–[53]):

> (a) First, the wrongful gain interest, where the defendant made unauthorised use or disclosure of confidential information and thereby gained a benefit.

(b) Secondly, the wrongful loss interest, where the plaintiff is seeking protection for the confidentiality of the information *per se*, which loss is suffered so long as a defendant's conscience has been impacted in the breach of the obligation of confidentiality.

37 Prior to *I-Admin*, the law did not adequately safeguard the wrongful loss interest or offer recourse where this was affected; in fact, as this court observed, the "requirement of unauthorised use and detriment has held back the development of the law by overemphasising the wrongful gain interest at the expense of the wrongful loss interest" (*I-Admin* at [58]). This court thus set out a modified approach as follows (at [61]):

> … Preserving the first two requirements in *Coco* ([20] *supra*), a court should consider whether the information in question 'has the necessary quality of confidence about it' and if it has been 'imparted in circumstances importing an obligation of confidence'. An obligation of confidence will also be found where confidential information has been accessed or acquired without a plaintiff's knowledge or consent. Upon the satisfaction of these prerequisites, an action for breach of confidence is presumed. This might be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it. Whatever the explanation, the burden will be on *the defendant* to prove that its conscience was unaffected.
>
> [emphasis in original in italics]

We refer to this as the "*I-Admin* approach".

38 The critical difference between the *I-Admin* approach and the previous framework thus lies in the shifting of the burden onto the defendant at the third stage of the inquiry. Under the *I-Admin* approach, it is on the *defendant* to prove that its conscience had not been affected because it is the defendant who is comparatively better positioned to account for suspected wrongdoing in such

instances (*I-Admin* at [62]). This, in turn, serves to protect the plaintiff's right to preserve the confidentiality of its information, echoing the substance of the wrongful loss interest (*I-Admin* at [58], drawing on the observations in *Imerman v Tchenguiz and others* [2011] 2 WLR 592 at [69] and *Smith Kline & French Laboratories (Australia) Ltd and others v Secretary, Department of Community Services and Health* (1990) 17 IPR 545 at 593).

39 Three critical points bear clarifying. Firstly, this court in *I-Admin* clearly did *not* set out to turn the law on breach of confidence on its head by replacing the traditional *Coco v Clark* approach in its entirety. As this court observed, "[t]he elements of breach of confidence set out in [*Coco v Clark*] *explicitly protect the wrongful gain interest*" [emphasis added]: *I-Admin* at [54]. The *I-Admin* approach was thus intended to specifically fill the lacuna in the law in so far as the legitimate objective of protecting the wrongful *loss* interest was concerned. Indeed, as Prof Ng-Loy observed (*Law of Intellectual Property* at para 41.3.9):

> Fourth, significant as it may be, the 'modified approach' is not intended to replace the traditional approach (where it is the plaintiff who bears the burden of proving actual misuse or a 'serious and reasonable possibility' of misuse) completely. The 'modified approach' was devised by the Court of Appeal specifically to deal with cases involving alleged harm to the plaintiff's 'wrongful loss interest'. Therefore, for cases involving alleged harm to the plaintiff's 'wrongful gain interest', the traditional approach should be applied.

40 Secondly, in respect of the *I-Admin* approach itself, the burden on the defendant at the third limb of the test is a *legal* burden. In situations of a wrongful loss interest, once the first two limbs of the test are satisfied, the conscience of the defendant is presumed to have been impinged. Indeed, the

severity of the threat to the wrongful loss interest was explained by this court (*I-Admin* at [55]) as follows:

> This illustrates a significant and unchecked threat to the wrongful loss interest. The vulnerability of this interest is magnified when considered against the backdrop of advances in modern technology. It is now significantly easier to access, copy and disseminate vast amounts of confidential information. This can be done almost instantaneously, often without the knowledge of plaintiffs. As in the present case, employees will often have access to large volumes of confidential business material for the purposes of their employment. If at some point they were to proceed to surreptitiously download this information for their personal use or to start a competing business, employers are likely to be none the wiser for a considerable time. It is nearly impossible in these situations to safeguard information from all potential wrongdoing. The fragility of such confidential information suggests the need for stronger measures to protect owners from loss. An undue focus on the wrongful gain interest to the exclusion or diminution of the wrongful loss interest, under the current law of confidence, would mean that those measures are lacking.

An evidential burden would, in our view, be insufficient to protect the plaintiff's interest in the confidential information.

41 Thirdly, we also take this opportunity to endorse the following observation made by Prof Ng-Loy (*Law of Intellectual Property* at paras 41.3.10–41.3.11):

> It is also likely that the Court of Appeal intended to further limit the application of the 'modified approach' to cases involving unauthorised acquisition of the confidential information, that is, the 'taker' cases. This conjecture is based on the fact that the court placed a fair amount of emphasis on the defendants' acquisition (via [the former employees]) of the confidential information without the plaintiff's knowledge, and more generally, how technology had made it much easier for a person to access and download confidential information without consent.
>
> There is another reason for this conjecture. Three days before the issuance of the judgment in *I-Admin*, the Court of Appeal

> issued a judgment in *LVM Law Chambers LLC v Wan Hoe Keet*, where breach of confidence was raised as a cause of action. The defendant in this case was *not* a 'taker' of confidential information. The defendant was a lawyer who had acted for a party in a dispute against the plaintiffs arising out of a Ponzi scheme. After negotiations conducted by the parties' solicitors, this dispute was eventually settled. When the defendant was engaged to act for another party *ABC* in a suit against the plaintiffs in relation to the same Ponzi scheme, the plaintiffs sought an injunction to prevent the defendant from acting for *ABC* in this second suit. The plaintiffs claimed that there was confidential information arising out of the circumstances surrounding the settlement of the first dispute, and that the defendant being privy to this confidential information was bound by an equitable obligation of confidence. On the third element (misuse of the confidential information), the Court of Appeal held that this element would be satisfied if there was a 'serious and reasonable possibility' of misuse of the confidential information by the defendant. Significantly, the appellate court placed the burden of proving the existence of such possibility of misuse squarely on *the plaintiff*s. In this case, the plaintiffs failed to discharge this burden and, accordingly, the Court of Appeal refused to grant the injunction sought by the plaintiffs.
>
> [emphasis added]

42 While this point was not specifically argued by counsel in *I-Admin*, this is evident on the facts of *I-Admin* itself. In fact, the court observed that the appellant's materials had been "specifically acquired to be reviewed and potentially used for the third respondent's benefit" (at [64]). The first respondent had also "retained and abused confidential log-in credentials to surreptitiously access [one of the appellant's platforms] on multiple occasions", thereby downloading confidential information (at [65]).

The elements of confidence in this case

43 As a preliminary point, we note that, in general, a claim for breach of confidence requires that the party seeking to injunct another be specific about the confidential information in question (*Chiarapurk Jack and others v Haw Par Brothers International Ltd and another and another appeal* [1993] 2 SLR(R) 620

at [24]; *LVM Law Chambers* at [18]). This is a threshold issue that R&T raises in this case. While that would, ordinarily, present a difficulty, the view taken here has to be understood in light of the fact that the current proceedings are at an interlocutory stage. As we highlighted above, in our view, all that is required at this juncture is for the Lims to put forward a claim of confidence which is not obviously factually or legally unsustainable.

44 The Lims' primary allegation is that R&T has had a long history of representing them. R&T advised and acted for the Lims and the Group Companies from the 1990s.

45 Flowing from this relationship that R&T had with the Lims, they allege that R&T had "accumulated knowledge of the personalities in, and cultivated and built up relationships with the [Lims] and also built up knowledge of the companies in which the [Lims] had interests". In this regard, R&T argues that these are not allegations of information, let alone confidential information, and are far too nebulous and ambiguous to constitute such. We agree with this submission in so far as it goes towards the first limb of the test, namely, the information concerned must have the necessary quality of confidence about it. Even on a *prima facie* basis, a party alleging a breach of confidence must at least be able to particularise the information that is alleged to be confidential. It does not suffice to point to a general class of information that cannot be specifically identified.

46 The second, and more concrete, point is that R&T was asked to advise on the restructuring of the Group Companies. The Lims point to certain documents and information, for instance:

(a) On 8 April 2020, Mr V Bala, a partner in R&T's Shipping &

International Trade department, sent an e-mail to OTPL's in-house legal counsel at the time, Mr Nathanael Lin ("Mr Lin"), requesting "documents and information, including the list of banking facilities and any related security for each of the '*Group Companies*', the latest management accounts for the '*group*' and the '*individual Group Companies*' and a write-up on the background information of each company and its financial difficulties, including why the '*group*' (and in particular which entities) faced liquidity issues" [emphasis in original]. Mr Lin replied stating that he would "send the documents across as and when [he] receive[d] them." It is alleged that the information and documents requested were sent to R&T, and included:

(i) A copy of the Shareholders' Agreement between UGH, PetroChina International (Singapore) Pte Ltd, MAIF Investments Singapore Pte Ltd and Universal Terminal (S) Pte Ltd.

(ii) A Loan Agreement between Hua An Shipping Pte Ltd and DVB Bank SE Singapore Branch.

(iii) A letter dated 29 January 2020 from Standard Chartered Bank (Singapore) Limited to Xihe Holdings regarding Foreign Exchange Transactions.

(b) On 9 April 2020, Mr Lin sent R&T an excel spreadsheet with the list of vessels owned by various subsidiaries of Xihe Holdings and Xihe Capital, as well as other companies owned by the Lims.

(c) On 10 April 2020, Mr Davis Tan from R&T sent an e-mail to the other lawyers involved in the restructuring, copying Mr Lin, stating that

he had received financial statements and management accounts, including the audited financial statements of OTPL, HLT, and the Xihe Group. He had also stated that "we are instructed to keep [the documents] confidential for now. The documents cannot be shared with anyone else including PwC".

(d) On 14 April 2020, summaries of Universal Group Holdings (Pte) Ltd's dividend declarations for the years 2016 and 2017 were also sent to R&T.

47 In our view, the items listed above are examples of information that, even on a *prima facie* basis, strongly possess the requisite quality of confidence. Although this information was provided in the context of the group restructuring, it cannot be said that such information would therefore necessarily belong to the Companies. Indeed, the information often related to individual companies in the Group Companies that were *distinct* from HLT and OTPL. It is also worth noting that, at the time all this information was provided, the interests of the Lims and those of the Companies were aligned and all parties were hoping for a solution that would leave the Companies under the control of the Lims.

48 This overlaps neatly with second limb of the test, as to whether the information had been received in circumstances importing an obligation of confidence. It is at this point that the relationship between the Lims and R&T, and any associated "accumulated knowledge" becomes relevant. Such a long-standing client-solicitor relationship must necessarily form the backdrop against which we understand the allegations of breach of confidence. In such situations, the trust reposed in each other that has been built up over the years – in this case

decades – naturally leads to more open communication, and a willingness to share documents and information.

49 R&T does not dispute that such a relationship existed and was built up over the years. Instead, it emphasises the fact that from 17 April 2020 onwards, the Lims in their personal capacities were at all times represented by different law firms, indeed by a succession of firms. The Lims' perspective was very different. They suggest that at the relevant time, when the Companies began facing financial difficulties, R&T was engaged to represent the Companies precisely because R&T was trusted to act in the best interests of the Lims. This very point was set out in the affidavit of Mr CM Lim dated 9 July 2020. We reproduce the relevant extracts in full:

> 23 On or about 8 April 2020, as a result of the financial difficulties which had arisen and their possible effect on each of the Group Companies as well as the Lim Family's interests in them, Mr OK Lim instructed one of the employees of the Group Companies to reach out to Mr Toh Kian Sing of Rajah & Tann to ask if he could advise the Lim Family and the Group Companies on the steps that we should take to protect our and the Group Companies' interests.
>
> 24 On or about 8 or 9 April 2020, the Lim Family met Mr Patrick Ang, Mr Toh Kian Sing and Mr Lee Eng Beng from Rajah & Tann at the offices of HLT at 37 Tuas Road, Singapore. Mr Goh Thien Phong and Mr Lie Kok Keong of PricewaterhouseCoopers ('**PWC**') attended the meeting at Rajah & Tann's invitation. Mr Patrick Ang introduced Mr Goh and Mr Lie to the Lim Family as financial advisers.
>
> 25 At that meeting, the Lim Family asked Mr Patrick Ang, and Mr Toh Kian Sing, on behalf of Rajah & Tann, which the Lim Family had long used as their lawyers and the lawyers for the Group Companies and had come to trust, to advise and act for the Lim Family and the Group Companies in connection with how the Lim Family's and each of the Group Companies' interests can be protected (the '**Group Restructuring**'). Mr Patrick Ang and Mr Toh Kian Sing, on behalf of Rajah & Tann, agreed.

26 At the time, the Lim Family understood that Rajah & Tann would advise the Lim Family and the Group Companies on at least the following matters as part of the Group Restructuring:

(a) The steps to be taken in connection with the Group restructuring;

(b) The restructuring options that were available to the Lim Family and the Group Companies;

(c) The type of applications that could be made to Court by the Lim Family and any Group Company; and

(d) The risks and implications to the Lim Family and the Group Companies of any step referred to in (a) above, any of the options referred to in (b) above and/or the applications referred to in (c) above, before any such step was taken, option was selected or application was made, so that the Lim Family and the Group Companies would have the opportunity to consider the risks and implications to them of each such step, option and application and to take such action as is necessary to protect themselves and their interests against those risks and implications.

27 On or about 8 or 9 April 2020, Rajah & Tann advised that HLT apply for a statutory moratorium under Section 211B of the Companies Act and that the Lim Family should arrange for HLT to appoint PwC as HLT's financial adviser.

28 Relying on Rajah & Tann's advice, the Lim Family instructed Rajah & Tann to prepare the papers for HLT's application for a statutory moratorium under Section 211B of the Companies Act.

…

48 Rajah & Tann also recommended that the Lim Family engage JLex LLC to provide advice to the Lim Family in connection with legal proceedings that may be brought against us as directors and shareholders of HLT. On or around 13 April 2020, Rajah & Tann recommended that the Lim Family engage JLex LLC to advise the Lim Family for those purposes. Rajah & Tann did not explain why there was a need for the Lim Family to appoint a separate set of lawyers to advise the Lim Family in our personal capacities. We trusted Rajah & Tann and accepted their advice. Relying on Rajah & Tann's advice, the Lim Family agreed. …

…

59 In reliance on Rajah & Tann's advice that HLT apply for a statutory moratorium under Section 211B of the Companies Act (see paragraph 27) above, sometime between 14 and 17 April 2020, the Lim Family agreed. Rajah & Tann prepared a draft of the affidavit that was to be filed by Mr OK Lim in support of the application.

…

62 Sometime between 13 April 2020 and 17 April 2020, Rajah & Tann also advised that OTPL apply for a statutory moratorium under Section 211B of the Companies Act.

…

65 By an email dated 17 April 2020 at 1.29pm from Mr Nathanael Lin to Mr Toh Kian Sing, a copy of which is annexed hereto and marked LCM-12, Mr Lin said that '*We would be grateful if R&T could act for [OTPL] in a restructuring exercise. In that connection, please could R&T assist to file a s. 211B application for [OTPL]*'.

66 We understood that just as in the case of HLT, Rajah & Tann was engaged by OTPL in connection with its own restructuring and the Section 211B application and that was over and above their role as the Lim Family's and the Group Companies' lawyers in connection with the Group Restructuring. In fact, before 17 April 2020, Rajah & Tann had already prepared my affidavit in support of OTPL's application for its Section 211B application.

67 In the afternoon of 17 April 2020, Mr Davis Tan and Ms Sheila Ng of Rajah & Tann came to my office with copies of Mr OK Lim's and my affidavits. We signed the affidavits.

…

70. Later, in the evening of 17 April 2020, Rajah & Tann filed HC/OS 405/2020 ('**OS 405**') and HC/OS 406/2020 ('**OS 406**'), which were HLT and OTPL's applications for a moratorium of 6 months under section 211B of the Companies Act (Cap. 50). Copies of the originating summonses and supporting affidavits are collectively annexed hereto and marked LCM-14.

71. In the afternoon of 18 April 2020, Mr Patrick Ang and Mr Toh Kian Sing met Mr OK Lim, Ms Lim Huey Ching and me in the board room of OTPL's offices. Mr Nathanael Lim was present. They informed us that the HLT lenders were not in favour of the moratorium and instead wanted to place HLT in judicial management.

72. According to Rajah & Tann, the lawyers for the Informal Steering Committee ('**ISC**'), Drew & Napier LLC ('**Drew & Napier**'), had told Rajah & Tann that the ISC did not agree that HLT should be allowed to conduct a restructuring on its own, and that it should be placed into judicial management as soon as possible. Rajah & Tann also said that Drew & Napier had told them that if HLT were put into interim judicial management or judicial management, the ISC wanted PwC to be appointed as the IJMs and the JMs. According to Rajah & Tann, Drew & Napier also said to them that in that event, the ISC wanted Rajah & Tann to act for the IJMs and the JMs of HLT, and Rajah & Tann wanted to act for the IJMs.

73. Rajah & Tann then explained to us that having regard to the ISC's position, the Lim Family and HLT had three options, i.e. (a) to oppose the ISC and fight for a moratorium; (b) to apply for judicial management; or (c) to liquidate HLT, which according to Rajah & Tann was not an attractive option.

74. Rajah & Tann advised the Lim Family and HLT that the best option was for HLT to withdraw its section 211B application and apply for judicial management as soon as possible.

75. Mr OK Lim, Ms Lim Huey Ching and I were taken aback. Rajah & Tann did not before the section 211B applications were filed advise the Lim Family and the Group Companies of the risk that the HLT lenders might react in that way or that the section 211B application would precipitate a judicial management application.

76. We also never imagined that they would not be our lawyers and would act for the IJMs and JMs if we agreed with the ISC's suggestion to put HLT into judicial management and apply for IJMs to be appointed. They had been the Lim Family's lawyers for so many years. Ms Lim Huey Ching then asked Rajah & Tann whether, if they acted for the IJMs, that meant that Rajah & Tann would act against the Lim Family. Mr Toh Kian Sing immediately replied to say that Rajah & Tann would of course not act against the Lim Family. We felt assured.

77. Mr Patrick Ang then said that it would be in the Lim Family's interests for Rajah & Tann to act for the IJMs because that would allow Rajah & Tann to be a '*bridge*' (he used that word) between the Lim Family and the HLT creditors, and that that would be to the benefit of the Lim Family. We took comfort from what Mr Toh Kian Sing and Mr Patrick Ang had told us.

78 We needed time to think about this sudden development. The discussion ended with us not making a

> decision on which option to choose. We wanted to give these matters some thought.
>
> [emphasis in original in italics and bold]

50 What these extracts demonstrate is that, from the point of view of the Lims, the appointment of R&T as the solicitors for the Companies was made on the basis that R&T, in seeking to resolve the financial predicament that the Companies were in, would have regard to the interests of their longstanding clients, the Lims, as well. No doubt R&T did, as early as 13 April 2020 (as stated in para 48 of the cited affidavit), advise the Lims to obtain separate representation. But that advice may not have been read as a warning that R&T might eventually act against the Lims or that they might act for the Companies in a situation in which the Lims were no longer calling the shots. Any information, including that identified above at [46], was imparted in this specific set of circumstances – where the Lims and the Companies were considering a moratorium and a scheme; and where R&T would act in accordance with those wishes as communicated by the Lims as directors of the Companies. Having obtained the information on that basis, the Lims contend that it should not be permissible for R&T to take on the representation of the Companies when they later came under the control of third parties through the agency of the IJMs and, later, the JMs. It cannot be gainsaid that the interests of the creditors of a financially strapped company are usually irreconcilably opposed to the interests of the shareholders and officeholders of that company.

51 Our observations in this regard are, in fact, bolstered by the role Mr Lin played in all of these moves. Mr Lin was OTPL's in-house legal counsel during the period leading up to the appointment of the JMs. It appears that he played an active role throughout the entire course of events. Mr CM Lim said as much

in his affidavit:

> 79 Later that night, Mr Nathanael Lin, who was at the meeting with Rajah & Tann earlier that evening, sent Ms Lim Huey Ching and me an email to ask that we make a decision. By an email dated 18 April 2020 at 10.11pm from Mr Nathanael Lin to Ms Lim Huey Ching and me, a copy of which is annexed hereto and marked LCM-15, Mr Lin recommended that HLT '*follow R&T's advice*' and '*apply for leave to withdraw its S. 211B application, and concurrently apply for judicial management, as soon as possible*'. Mr Nathanael Lin also said that he understood from Rajah & Tann that '*virtually all the bank lenders want to place Hin Leong in judicial management*', and that it was his view that if HLT was not prepared to follow Rajah & Tann's recommendation, there was a '*significant possibility that R&T will discharge themselves*'. That came as a shock to us.
>
> 80 I understood from what Mr Lin said that he had spoken to Rajah & Tann, who Mr Lin had been communicating with. He would not have said this without discussing it with Rajah & Tann. He would not say that Rajah & Tann may walk just because their advice to file an application was not followed, and would have spoken to them.
>
> [emphasis in original in italics]

52 It appears to us that Mr Lin had, at all times, played a material role in the transmission of information and documents from the Lims and/or the Companies to R&T. Yet, as we understand it, after leaving the employ of OTPL, Mr Lin is now a partner at R&T, in the Shipping and International Trade department – the very same department that had consistently acted for the Lims before this. This state of affairs points to the *distinct possibility* of a breach of confidence, for no Chinese wall arrangement can conceivably be useful where it is the very same lawyer who acts for both sides.

53 These considerations also tie in with the third and final limb. The information imparted related to the overall organisational structure of the entire network of the Group Companies. It also involved in-depth details of the

workings of each of the Group Companies, all of which were connected to the Lims. Further, the information was transmitted at a time when the interests of the Lims were aligned with those of the Companies, with respect to the potential restructuring of the Group Companies. In the circumstances, that very same information could potentially be utilised against the Lims by the JMs who were appointed thereafter. It remains open for the Lims to adopt either the *I-Admin* approach or the *LVM Law Chambers* approach. In any case, we consider that *prima facie* the circumstances in which the information was imparted imposed an obligation of confidence in relation to the Lims even if there was no joint retainer. No doubt much of the information related to the Companies alone and belonged to them, a point that resonated with the Judge. However, even then there might have been details which the Lims would not have disclosed, had they anticipated the same being made available to third parties with interests adverse to theirs.

54 In so far as it may be found that there was a joint retainer, we note the proposition in *Winters* as stated by the Judge. As restated by Rix J in *The "Sagheera"* [1997] 1 Lloyd's Rep 160, "[p]arties who grant a joint retainer to solicitors … retain no confidence as against one another: if they subsequently fall out and sue one another, they cannot claim privilege" (at 165; similarly in *Winters* at [81]). Such privilege would relate to documents and communications generated in respect of the joint retainer (*Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 19th Ed, 2018) at para 24-01; *The Law of Privilege* (Bankim Thanki ed) (Oxford University Press, 3rd Ed, 2018) at para 6.02). However, the situation here has the special feature that although legally the Companies remain the same persons they were previously, they are now controlled for the benefit of persons whose interests are substantially adverse to those of their previous controllers, namely, the Lims. The *Winters* proposition

may be found, upon further consideration, to be inapplicable in this situation. It has also been recognised that this rule does not cover communications that are made by one party to the solicitor in his exclusive capacity (*Re Konigsberg (A Bankrupt)* [1989] 1 WLR 1257 at 1265–1266; *Re Doran Constructions Pty Ltd (in liq)* (2002) 194 ALR 101 ("*Re Doran*") at [64], citing John Huxley Buzzard, Richard May & M N Howard, *Phipson on Evidence* (Sweet & Maxwell, 13th Ed, 1982) at para 15-11). Further, whether there is a communication made to a solicitor in his joint capacity is determined by objective evidence about whether the communication was an occasion where the solicitor was "being asked to advance the purpose for which he or she was jointly consulted"; in other words, whether the communication was "fairly referable to the relationship" (*Re Doran* at [72]).

55 To the extent that the Lims provided information and documents relating to companies distinct from OTPL and HLT, we think it arguable that such information was provided apart from the purposes of the joint retainer (if any), involving a restructuring of the Companies. We of course leave open the point of whether R&T ought ultimately to be restrained on this basis, but consider that the proposition in *Winters* does not necessarily preclude claims of confidence on the part of the Lims.

The Supervisory Jurisdiction

The arguments

56 As noted above, the second basis on which it is asserted that R&T should be restrained from acting for the JMs is the invocation of the supervisory jurisdiction of the court to ensure the proper administration of justice. The Lims argue that this separate basis for restraining a law firm or lawyers from acting

was recognised in *Harsha Rajkumar Mirpuri (Mrs) née Subita Shewakram Samtani v Shanti Shewakram Samtani Mrs Shanti Haresh Chugani* [2018] 5 SLR 894 ("*Harsha Mirpuri*") at [73].

57 The Lims argue that as R&T continued to act for the IJMs, JMs and liquidators of the Companies although it previously acted for the Lims and the Group Companies, it had breached rr 5, 6, 20 and 21 of the Legal Profession (Professional Conduct) Rules 2015 (2010 Rev Ed) ("PCR") relating to confidentiality and conflicts of interest. Such breaches of the PCR have been held to be a possible "analytical tool" in deciding whether the court should exercise its supervisory jurisdiction to restrain a lawyer from acting, in order to prevent confidence in the administration of justice from being undermined (*Harsha Mirpuri* at [78] and [81]). For example, r 20(1) of the PCR provides that a legal practitioner owes duties of loyalty and confidentiality to each of his clients and must act prudently to avoid any compromise of the lawyer-client relationship by reason of a conflict or potential conflict between the interests of two or more of his clients. These duties are, equally, owed by a law practice. Furthermore, rr 20(2) to 20(4) of the PCR provide that where a legal practitioner or law practice intends to act for two or more different parties to a matter or transaction and a diversity of interests exists or may reasonably be expected to exist between them, the legal practitioner or law practice has certain obligations to communicate with the parties on how their interests might diverge, and advise them to obtain independent legal advice before accepting any instructions.

58 The Lims submit that R&T should have, among other things, disclosed to them the possibility that their interests might diverge from those of the Group Companies, when they approached R&T to act for them and the Group Companies in restructuring the latter. They argue that R&T ought to have

advised them to obtain independent legal advice. If this was done, the Lims would not have disclosed or caused the Group Companies to disclose confidential information to R&T. But R&T had failed to do so. R&T had also failed to evaluate the conflicts of interest or potential conflicts of interest and inform them of the same where it came to preparing a statement for Mr OK Lim on the Lims' assets which Mr CM Lim read to the creditors of HLT on 14 April 2020, and the affidavits filed in the Companies' moratorium applications under s 211B of the Act, which had contained inculpatory statements. Nor had the Lims provided informed consent in writing for R&T to continue to act for the IJMs and JMs of the Companies. The Lims argue that the court should exercise its supervisory jurisdiction to restrain R&T from acting in light of these breaches of the PCR.

59 The Lims additionally point to the fact that R&T had interacted with them since the 1990s and had therefore gained "crucial knowledge about [them] personally". They argue that R&T is thus in a position of "unfair superiority" as it may use such information in acting against them for the IJMs and JMs of HLT and OTPL (*Black v Taylor* [1993] 3 NZLR 403 ("*Taylor*") at 406).

60 In response to this ground, R&T argues that the Lims' case as originally pleaded was on the basis of confidentiality asserted over information disclosed for the purposes of the restructuring of the Group Companies, pursuant to an alleged joint retainer. Any information acquired in the course of an alleged long history between R&T and the Lims was not part of their case. Rather, their claim for relief was based on the same facts and circumstances as their claim in confidence. They had also not identified any risks to the administration of justice, apart from the alleged risk of R&T's improper disclosure of confidential information. As their claim in confidence could not succeed by virtue of the

proposition in *Winters*, their claim based on the supervisory jurisdiction of the court must fail.

61 R&T further submits that, in any event, the Lims' allegations of a conflict of interest cannot succeed. R&T had suggested to the Lims that they obtain their own legal representation. As a result, from about 17 April 2020, the Lims had engaged JLex LLC, Kenneth Tan Partnership and Tan Rajah & Cheah to represent them. R&T also did not unacceptably "change sides" by acting for the JMs of the Companies. It continued to act for the Companies, the only change being that control was no longer vested in the Lims as directors by virtue of the judicial management regime. The JMs were, at law, fully entitled to HLT's and OTPL's information. The Lims had been informed in advance that R&T had been asked by the creditors and the potential IJMs to act for the Companies' IJMs, and the Lims did not object. They were also advised by R&T on the effect of interim judicial management.

The test for restraining a lawyer on the basis of the supervisory jurisdiction of the court

62 The exercise of the court's supervisory jurisdiction to restrain a law firm or lawyer from acting, such power being exercised in aid of the administration of justice, is a separate basis from its jurisdiction arising from the law on breach of confidence, on which a law firm or lawyer may be restrained (*Harsha Mirpuri* at [73] and [75]). The power of the court to restrain a lawyer from acting arising from the inherent jurisdiction of the court over its officers has been recognised in England (see, *eg*, *Davies v Clough* (1837) 8 Sim 262), Australia (see, *eg*, *Spincode Pty Ltd v Look Software Pty Ltd and others* (2001) 4 VR 501), New Zealand (see, *eg*, *Taylor*) and Canada (see, *eg*, *Everingham v Ontario* (1992) 88 DLR (4th) 755 ("*Everingham*")).

63 *Harsha Mirpuri* and *Then Khek Khoon and another v Arjun Permanand Samtani and another* [2012] 2 SLR 451 ("*Then Khek Khoon*") are the local authorities on the point. In *Then Khek Khoon*, Loh J (as he then was) expressed the view that there could be "special or exceptional circumstances where the nature of the complaint is such that on an objective view, a reasonable, fair minded observer would think that a fair trial would not be possible without the court's intervention and restraint of the advocate or solicitor from continuing to act" (at [22]). There, an injunction had been sought to restrain a law firm from acting on the basis of alleged breaches of the PCR concerning, *inter alia*, conflicts of interest between the advocate and solicitor and client. However, Loh J opined that the proper forum for investigating and determining the breaches ought to be the Law Society, in the absence of any apparent concurrent breach of legal obligations owed by the counsel to the court or the client at common law. The case was therefore not one which demonstrated a clear need for the invocation of the court's inherent jurisdiction under O 92 r 4 of the Rules of Court (2006 Rev Ed).

64 In *Harsha Mirpuri*, an injunction was sought on the basis that a law firm was allegedly in breach of its obligation under r 21 of the PCR not to act against a former client. Thean J noted that this jurisdiction had been contemplated in *Then Khek Khoon*, the test being "whether there is an actual or reasonably perceived risk that the proper administration of justice would be prejudiced unless the lawyer in question is removed" (at [78] and [81]). In her view, while the standards set out in the PCR could be analytically relevant in deciding whether the court should exercise this power, it was imperative that the court did not express any final opinion on whether any particular rule had been breached, as the proper forum for such a determination is the Law Society (at [83]). At the same time, she cautioned against an expansive view of the

supervisory jurisdiction of the court as: (a) such applications to restrain a lawyer from acting could be used for "purely tactical reasons" and inevitably cause a delay in proceedings; and (b) there is an interest in respecting the freedom of lawyers to obtain instructions from any member of the public and *vice versa* (at [82]). There, it was fatal to the plaintiff's case on supervisory jurisdiction that its claim in confidence failed, as the factual allegation supporting both arguments were similar and there was no suggestion that the proper administration of justice would otherwise be prejudiced (at [84]).

65 The test to determine whether the supervisory jurisdiction of the court ought to be invoked is accordingly an objective one. It is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the legal practitioner be restrained from acting, in the interests of the protection of the integrity of the judicial process including the appearance of justice. This test is broadly similar across the other jurisdictions previously mentioned. Yet, the cases have also emphasised the exceptional nature of this jurisdiction. Due weight must be given to the public interest that a litigant should not be deprived of the solicitor of his choice without due cause (*Grimwade v Meagher and others* [1995] 1 VR 446 at 452; *Re Recover Ltd (in liquidation)* [2003] 2 BCLC 186 at [15]; *Geelong School Supplies Pty Ltd and another v Dean and others* (2006) 237 ALR 612 at [35]). We note that this jurisdiction is also distinct from that based on a breach of a lawyer's fiduciary duty of loyalty, which may also lead to a court to restrain a lawyer from acting. That duty is not in play here, as it is generally accepted that such duty comes to an end with the termination of the retainer (*Bolkiah* at 235).

66 Several cases where the lawyers in question may be perceived to have "changed sides", in seeking to act against a former client, are relevant. In

Cleveland Investments Global Ltd v Evans [2010] NSWSC 567 ("*Cleveland Investments*"), where a solicitor had previously acted for a company and received instructions from its sole director who was later removed from that company, it was held that an injunction should be granted to prevent the solicitor from acting for the former director in respect of that same claim. This was although the plaintiff company was unable to identify particular information which had previously passed between the former director and the solicitor to which the obligation of confidence attached. As observed by Ward J in the Supreme Court of New South Wales, citing *D & J Constructions Pty Ltd v Head and others (trading as Clayton Utz)* (1987) 9 NSWLR 118 ("*D & J*"), "the readiness with which [the lawyer] has changed sides on the very same claim in the very same proceedings is something very subversive of the appearance to a reasonable and fair-minded observer that justice is being done" (at [8]; *D & J* at 123).

67 Similarly, in *Re IPM Group Pty Ltd* [2015] NSWSC 240, where a law firm had represented at various times, among several related parties, a company as well as its two directors and shareholders, Black J in the Supreme Court of New South Wales accepted that it could potentially be inconsistent with the administration of justice for the law firm to continue to act for one of the camps against the other. A solicitor from the law firm who had previously assisted the latter in a family law dispute was also now acting for the former camp. Black J stated that although he was not satisfied as to a real and sensible possibility of misuse of information provided by the latter, there was force in the submission that a fair-minded, reasonably informed member of the public might well conclude that the proper administration of justice required that the lawyers be restrained and could well see their continuing to act as "inherently unfair" (at [56]). However, the application was ultimately refused as it had been sought

late in the day after substantive evidence had been filed in the proceedings, and the lawyers had given undertakings directed to preserving the claimed confidentiality of certain documents.

68 Furthermore, in the context of liquidation, an injunction was granted in *Williamson and another v Nilant* [2002] WASC 225 to restrain solicitors from further acting for the liquidator of a company, where its three shareholders were divided into two camps, and one of those persons was also a client of the same solicitors. The liquidation had been brought by the latter person on the basis of, *inter alia*, oppression. McKechnie J in the Supreme Court of Western Australia was of the view that the "conflict which may arise between the interests of [the latter person], which the solicitor must legitimately advance, and the necessity to give impartial advice and representation to the liquidator of [the company] is such that the interests of justice require the solicitor be restrained from acting for the liquidator" (at [26]). Although the case concerned a conflict of interests between existing clients, it illustrates the possibility for interests to diverge in a situation such as the present, where the Companies had been placed under judicial management with a view to achieving the survival of the whole or part of the Companies, or a scheme of arrangement under which they could continue to trade. That being the case, the interests of the JMs could well be adverse to those of the Lims. Even if certain information that the Lims had caused the Group Companies to provide to R&T may not in the final analysis be found to be confidential, a fair-minded and reasonably informed observer could potentially apprehend that R&T would be in a position to use such information for the benefit of the Companies against the Lims.

69 We acknowledge, in fairness to the Judge, that the Lims' case for joinder at the proceedings below focused on purported breaches of confidence. In this

regard, they had confirmed in the course of the hearing of the Striking Out Applications that their position was that R&T was jointly retained by the Companies and the Lims, and that this was for the purpose of the restructuring of the Companies arising from their insolvency. They also stated that the information disclosed to R&T in respect of which they asserted confidence was for the purpose of the joint retainer. It was on that footing that *Winters* was found to apply, so as to preclude any action for an injunction on the basis of a breach of confidence.

70 Yet, while the Lims may have made certain concessions before the Judge that would appear to have confined their cause of action to one based in confidence, there was nevertheless, arguably, a broader case engaging the supervisory jurisdiction of the court, which was supported by affidavits filed by the Lims. As set out in the affidavit of Mr CM Lim and reproduced above, the Lims had sought advice from R&T on "the steps that [the Lims] should take to protect [their] and the Group Companies' interests." It was envisioned that such advice would include, amongst other things, the restructuring options and type of applications that were available "to the [Lims] and the Group Companies" and the risks and implications thereof. Mr CM Lim further deposed that after the Lims agreed to appoint R&T in connection with the group restructuring, R&T had requested, and the Lims had provided to it, information and documents relating to the Group Companies, in the belief that "they would use that information and documents to advise and protect the [Lims] and the Group Companies". It was only on 12 May 2020, after the OTPL IJMs were appointed, that R&T informed the Lims that they would not be able to continue acting for other Group Companies whereupon, according to Mr CM Lim and Ms HC Lim:

> 127 To say that we were taken aback and felt cheated is an understatement. We had given [R&T] so much work beginning

> from the early 1990s and had grown so close to their partners. We confided in them on so many matters, placed our trust in them and paid them substantial fees. We naturally turned to them to help us, advise and protect us in this our hour of greatest need. There was no question in our minds that they would loyally and faithfully work with us to find a way out of what had become a nightmare. Even though they said they would act for the HLT IJMs, it was on the basis that they would not act against us and that that would be for our benefit.

71 R&T's position as stated earlier is that it was not engaged in relation to any such group restructuring and that it had never advised or acted for any of the Lims in their personal capacities in relation to the financial distress of HLT, OTPL or any of the Group Companies. The truth of that assertion will have to be established at a trial during which the amount of confidential information disclosed about individual Group Companies other than HLT and OTPL can be assessed. The point to note for the time being is that if any receipt by R&T of such information is proven, that may be sufficient of itself to give rise to the apprehension by a fair-minded and reasonably informed observer that R&T would be in a position to make use of it for the benefit of the JMs of the Companies. The spectacle that they may have "change[d] sides" in the course of the restructuring of the Companies and potentially advise the Companies on claims against its directors may indeed be "subversive of the appearance … that justice is being done" (*Cleveland Investments* at [8]; *D & J* at 123).

72 Likewise, the long history between R&T and the Lims may also be relevant in assessing whether an injunction should be granted. The appellants rely on *Taylor* where, in a claim by the plaintiff against the estate of his late uncle, the Court of Appeal of New Zealand held that the solicitor would be restrained from acting as counsel for the estate in the proceeding. This was as he had acted for decades as solicitor, counsel or both, for members of the Taylor family, including the plaintiff and his late uncle. The court found relevant the

lower court's findings that, *inter alia*, a considerable quantity of information covering most aspects of the family affairs would have been given by the Taylor family as a whole to the solicitor over the years, and that he would have gotten to know their personalities over time. As such, the court was of the view that "reasonable members of the public knowing of [the solicitor's] association with [the plaintiff] would consider that justice would not be seen to be done if, when dissension developed within the Taylor family, [the solicitor] acting as counsel took sides and acted against [the plaintiff]" (at 412).

73 The Lims likewise claim that R&T had advised and acted for them and the Group Companies since the 1990s, thereby accumulating knowledge about them as well as the companies in which they had interests. Although such information may not possess the necessary quality of confidence, it may be relevant in an assessment of an exercise of the court's supervisory jurisdiction. Such knowledge of the Lims' activities or financial circumstances acquired by virtue of their close relationship with R&T may be considered in deciding whether the supervisory jurisdiction of the court ought to be invoked to "ensure that in the justice system there is an unqualified perception of fairness in the eyes of the public" (*Jasper Johannes Raats and another v Gascoigne Wicks* [2006] NZHC 598 at [27] and [29]; *Taylor* at 406).

74 Accordingly, we consider that the question of the court's supervisory jurisdiction is one that is relevant to OS 666 and OS 704. For the avoidance of doubt, we are not holding that the court's supervisory jurisdiction should be invoked in this case but only that the circumstances disclosed thus far indicate that the Lims' ground to invoke this jurisdiction is not wholly unsustainable or devoid of basis.

Conclusion

75 For the reasons set out above, we allow the appeals. Having regard to the parties' respective costs submissions, in respect of these appeals, we award the Lims the total sum of $40,000, inclusive of disbursements, payable by R&T to the Lims. The usual consequential orders shall apply.

76 As for the costs below, the Judge made an order in favour of the respondent in all the Applications. We set aside that order in so far as it relates to the Joinder Applications. We direct the parties to file their submission on what costs' order should be made in respect of the hearing below (including as to quantum). The submissions shall be filed within ten days of the date of this judgment and shall be limited to six pages.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Chao Hick Tin
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