IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 23

Civil Appeal No 40 of 2016

Between

WEE SHUO WOON

… Appellant

And

HT S.R.L.

… Respondent

In the matter of Suit No 489 of 2015 (Registrar's Appeal No 3990 of 2015)

Between

HT S.R.L.

… Plaintiff

And

WEE SHUO WOON

… Defendant

GROUNDS OF DECISION

[Civil Procedure] — [Privilege] — [Legal professional privilege]

[Equity] — [Obligation of confidentiality]

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Wee Shuo Woon
v
HT S.R.L.

[2017] SGCA 23

Court of Appeal — Civil Appeal No 40 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Tay Yong Kwang JA
18 November 2016

30 March 2017

Tay Yong Kwang JA (delivering the judgment of the court):

1 The appellant, Wee Shuo Woon ("Wee"), is the defendant in an action brought by the respondent, HT S.R.L. ("HT"). Wee applied to strike out certain portions of HT's Statement of Claim and filed an affidavit referring to and exhibiting copies of certain emails ("the Emails"). The judicial commissioner ("the JC") in *HT S.R.L. v Wee Shuo Woon* [2016] SGHC 15 ("the GD") expunged all references to and copies of the Emails. Wee appealed against the JC's decision. After hearing the parties, we dismissed the appeal. We now give our detailed reasons.

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Facts

2 HT is an Italian company specialising in security technology which it supplied to law enforcement and intelligence agencies. Wee was employed as HT's Security Specialist on 17 August 2012. On 20 January 2015, Wee tendered his notice of resignation, giving the two-month notice required under his employment contract. Accordingly, on 20 March 2015, his employment with HT came to an end.

3 Two months later, on 20 May 2015, HT commenced Suit No 489 of 2015 ("S 489") against Wee for breaches of his employment contract and/or of his duties owed to HT. HT alleged that Wee had, since early 2015 or earlier, breached his duties to HT by, among other things, engaging in the business of a competitor company, ReaQta Ltd ("ReaQta"), without HT's knowledge or prior written consent.[1] HT alleged further that Wee had been holding himself out to be ReaQta's "Asia Pacific representative" and its "co-founder".[2] HT claimed the following relief: (a) an injunction to restrain Wee from seeking employment with any of HT's competitors and from soliciting business from HT's clients; and (b) damages for breach of Wee's employment contract and fiduciary duties.[3]

4 On 15 June 2015, Wee filed his defence and counterclaim. He denied breaching his employment contract and/or his fiduciary duties. He also counterclaimed for unpaid salary amounting to $23,545.45.[4] HT denied Wee's counterclaim and pleaded the defence of set-off.

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1 Statement of Claim at para 9(a), Record of Appeal ("ROA") Vol II at p 19

2 *Ibid* at para 9(b), ROA Vol II at p 19.

3 *Ibid* at para 11, ROA Vol II at p 22.

4 Defence and Counterclaim at para 27, ROA Vol II at p 31.

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5 These were the background facts leading to the present dispute. On or about 7 July 2015, HT's computer systems were hacked by an unknown party ("the Hacking"). There was no evidence that Wee was involved in the hacking. About 500 gigabytes ("GB") of data were extracted from HT's systems. The data was then uploaded onto a website known as "WikiLeaks". Amongst the uploaded information were certain email communications between HT and their lawyers, M/s Morgan Lewis Stamford LLC, *ie*, the Emails. The Emails contained legal advice, as well as specific information and materials pertaining to S 489. They also included express reservations and warnings of privilege and confidentiality. We set out one such reservation:[5]

> This email may contain privileged and confidential information. If you are not the intended recipient of this message, please delete all copies from your computer system and do not circulate or reply to it. Please notify us immediately by return e-mail or at the above telephone or fax number.

6 Wee subsequently accessed WikiLeaks and located the Emails. He then filed Summons No 3852 of 2015 ("SUM 3852") under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") to strike out the bulk of HT's statement of claim in S 489 on the ground of abuse of process and for liberty to enter judgment on his counterclaim under O 14 r 5 of the Rules of Court. Wee alleged that S 489 was initiated for the collateral purpose of obtaining documents and evidence to support other proceedings that HT had commenced or was about to commence. In support of his application, Wee filed an affidavit ("Wee's Affidavit") which made references to and exhibited the Emails.[6]

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5 See *eg*, Core Bundle ("CB") Vol II at pp 29 and 74.

6 ROA Vol III at pp 4-113.

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7 In response, HT filed Summons No 3990 of 2015 ("SUM 3990") seeking, among other matters, the following relief:[7]

> (a) An order pursuant to O 41 r 6 of the Rules of Court to expunge all references to the Emails in Wee's Affidavit as well as copies of the Emails that were exhibited in the affidavit ("the prayer to expunge"); and
>
> (b) An injunction to restrain Wee from further use of the Emails and all other correspondence between HT and its solicitors ("the prayer for an injunction").

The JC found that should the prayer to expunge be allowed, Wee's striking out application would not be sustainable because it was largely premised on the contents of the Emails (GD at [4]).

8 SUM 3990 was heard prior to SUM 3852. At the hearing for SUM 3990 before the Assistant Registrar ("the AR"), counsel for HT, Mr Adrian Tan Gim Hai, indicated that HT was content to proceed only with the prayer to expunge (and not with the prayer for an injunction although HT reserved its right to apply afresh for an injunction at a later stage). The AR granted the prayer to expunge. Dissatisfied with the AR's decision, Wee appealed in Registrar's Appeal No 339 of 2015, which was heard and dismissed by the JC.

The decision of the JC

9 Before the JC, the parties did not dispute that prior to being uploaded onto the Internet, the Emails attracted legal professional privilege and that

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[7] ROA Vol III at p 282.

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such privilege had not been waived by HT. Further, the parties agreed that the Emails were originally confidential in nature (GD at [6]).

10 The JC framed the issues before her as follows(GD at [12]):

(a) Was the matter governed exclusively by the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA")? If it was, then the bulk of HT's submissions, based on the common law, need not be considered.

(b) Did the common law provide HT 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, the JC examined HT's "public domain" arguments.

11 Firstly, the JC found that the matter was not governed by the EA. Section 2(1) of the EA stated that the EA did not apply to affidavits presented to any court. Further, confidentiality was a potential legal basis for relief and the law of confidence fell outside the law of evidence and was not affected by the EA (GD at [15]–[18]).

12 Secondly, the JC sought to clarify the distinction between the concepts of legal professional privilege, admissibility of evidence and the law of confidentiality. She surveyed the cases of *Calcraft v Guest* [1898] 1 QB 759 ("*Calcraft*"), *Lord Ashburton v Pape* [1913] 2 Ch 469 ("*Lord Ashburton*"), *Webster v James Chapman & Co* [1989] 3 All ER 939, *Goddard and another*

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v Nationwide Building Society [1986] 3 WLR 734 ("*Goddard*"), *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR(R) 42 ("*Tentat*") and *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 883. Having done so, she came to the following propositions (GD at [40]):

> (a) the fact that a document is privileged does not preclude the admissibility of copies of the same into evidence;
>
> (b) 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 in order to protect their confidential character;
>
> (c) the court may restrain the use of the privileged documents by way of an order to expunge offending portions of pleadings or affidavits; and
>
> (d) an application to expunge such offending portions of pleadings or affidavits must be filed before the privileged documents have been formally admitted into evidence.

13 Thirdly, the JC found that on the facts, the Emails had not been used in S 489. They had been referred to and exhibited in Wee's Affidavit which was filed in support of SUM 3852 which had yet to be heard. Hence, the Emails had yet to enter into evidence and the court retained the jurisdiction to grant the prayer to expunge to restrain a breach of confidence (GD at [44]).

14 The JC added that the fact that documents were publicly accessible (even on the Internet) would not necessarily stifle an action in confidence. In

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each case, the court was concerned with whether the degree of accessibility to the information was such that, in all the circumstances, it would not be just to require the party against whom a duty of confidentiality is asserted to treat the information as confidential (GD at [47]). The JC held that despite the availability of the Emails on the Internet, it remained just and reasonable to impose an obligation of confidentiality on Wee in respect of the Emails. She reasoned as follows (GD at [51]–[54]):

> (a) the Emails contained discussions between HT and its lawyers regarding S 489 and remained privileged against disclosure;
>
> (b) the Emails were being used against HT in respect of S 489, the very proceedings for which they had been prepared, and HT had a compelling interest in restraining their use in S 489;
>
> (c) HT was the victim of a cybercrime and Wee was well aware of that fact; and
>
> (d) the Emails contained express provisos of privilege and confidentiality which clearly put Wee on notice of their privileged and confidential nature.

15 The JC took the view that it was not open to her to refuse relief on the ground that it would increase the amount of relevant material available to the court. In her view, the balance between the competing policy imperatives of truth and privilege had already been struck in favour of the preservation of legal professional privilege (GD at [60]).

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The parties' respective arguments

Wee

16 Wee submitted that the Emails revealed that HT had been acting in a dishonest and deceitful manner and abused the legal process.[8] He alleged that in the Emails, HT admitted owing him his unpaid salary (which he was claiming in his counterclaim) but yet intentionally withheld payment of the same.[9] Further, HT abused the process of the court by using it to delay rightful payment to Wee.[10] HT commenced the legal proceedings in order to "intimidate" and "pressure" Wee into providing information and/or evidence required to support HT's claims against other parties, as well as to formulate their "antidote" product, and this was improper.[11] Hence, HT had not come to court with clean hands and equity would not intervene to restrain Wee's use of the Emails.[12]

17 Wee submitted further that the Emails were so widely accessible to the public (*ie*, that they had entered the public domain) that they had lost the necessary quality of confidence and consequently, privilege, and there was nothing left for the court to protect.[13] In any event, there was no interest of HT to protect since the leaked Emails revealed HT's dishonesty, deceit, wrongdoing and abuse of process.[14]

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8 Appellant's Case at para 12.

9 *Ibid* at para 13(i).

10 *Ibid* at para 13(ii).

11 *Ibid* at para 13(iii) and (vi).

12 *Ibid* at para 13(vii).

13 *Ibid* at para 38.

14 *Ibid* at para 40(3).

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18 Wee contended that the Emails were relevant to the issues in S 489 and should therefore be admitted into evidence since there was no basis to restrain his use of the Emails under the law of confidence. The courts did not have an inherent discretion to exclude evidence in civil cases. Even if they did, such discretion should not be exercised in the light of HT's iniquitous conduct.[15]

HT

19 HT argued that the prayer to expunge should be granted in order to restrain a breach of confidence.[16] Wee clearly knew that the Emails contained confidential and privileged material and that they became accessible on the Internet only because they had been improperly obtained from HT. In such circumstances, HT was entitled to invoke the equitable jurisdiction of the court to restrain Wee's use of the Emails to prevent a breach of confidence. The fact that the Emails had been uploaded onto WikiLeaks did not defeat a claim in confidence.[17] Material would be taken to have entered the "public domain" not simply when it has become publicly accessible but only when it has actually been made known to the public. Wee had not proved the latter requirement. The Emails thus remained outside the "public domain" and retained their confidential quality.

20 HT submitted further that there was no common law exception to legal professional privilege on grounds of fraudulent conduct.[18] The full ambit of the fraud exception was set out in s 128(2) of the EA which did not apply to

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15 Appellant's Reply at paras 5-15.

16 Respondent's Case at para 59.

17 *Ibid* at para 71.

18 *Ibid* at para 93.

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affidavits. In any event, the Emails did not disclose any fraudulent conduct on the part of HT.[19]

21 HT argued finally that the court had an inherent discretion to exclude evidence when the manner in which the evidence was obtained compromised the integrity of the administration of justice.[20] The court should exercise this discretion to exclude the Emails from evidence because they were privileged and confidential in nature, had been obtained only as a result of the Hacking and Wee was aware of these facts.

Issues

22 Three issues arose for determination in the appeal.

(a) Firstly, whether the prayer to expunge the Emails should be granted on the basis of confidence and/or privilege; specifically, whether the fact that the Emails had been uploaded onto the Internet precluded the court from exercising its equitable jurisdiction to restrain the subsequent use by Wee of the Emails on the grounds of confidence and/or privilege;

(b) Secondly, whether the Emails revealed dishonesty and/or abuse of process on the part of HT and if so, whether this formed a basis for refusing the prayer to expunge; and

(c) Thirdly, whether the court had an inherent discretion to exclude evidence in civil proceedings and if so, whether such discretion should be exercised to exclude the Emails from S 489.

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19 *Ibid* at paras 96-100.

20 *Ibid* at para 19.

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23 We pause to note that the second and third issues were predicated on the determination of whether the court was precluded from exercising its equitable jurisdiction to restrain the use of the Emails in S 489 as a result of the Emails having been uploaded onto the Internet. In his oral submissions before us, counsel for Wee, Mr Nicholas Philip Lazarus, concentrated on the same.

Our decision

Equitable jurisdiction to restrain use of the Emails

24 We agreed with the JC that the issues in these proceedings were governed not by the EA but by the common law (GD at [15]–[18]). In *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 ("*Pamela Jane*"), we affirmed the following principles in respect of legal professional privilege, admissibility of evidence and the law of confidence (at [58]–[59]):

> (a) Privilege allows a party to withhold the disclosure of information that would otherwise be compulsory for it to disclose. Admissibility, on the other hand, relates to the question of whether a particular piece of evidence may be received by the court and is determined by the relevance of that piece of evidence to the matters in issue.
>
> (b) Where the document in respect of which a party asserts privilege is already in the possession of his opponent, the issue is no longer one of withholding disclosure. The question thus becomes one of admissibility rather than privilege.
>
> (c) Equity may, however, through the grant of injunctions, intervene to prevent the unauthorised use in court proceedings of

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> information contained in privileged material. Such information would, in most instances, be of a confidential nature (citing *Lord Ashburton*, *Goddard*, *Tentat*, and the GD). The court's equitable jurisdiction to restrain breaches of confidence is invoked in these instances.

25 There remained a separate issue of whether the court's equitable jurisdiction to restrain the use of the privileged/confidential material had to be invoked prior to the presentation of the material in court as evidence (*Pamela Jane* at [64]). This arose because of Nourse LJ's statement in *Goddard* at 744H–745A that an injunction is available only before the document in question has entered into evidence or has otherwise been relied on at trial. Once the document has entered into evidence, 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 statutory and common law rules on admissibility and, if it goes that far, the court's inherent discretion to exclude otherwise admissible evidence (at [30] of the GD).

26 As we observed in *Pamela Jane* at [67], it is not entirely satisfactory that the question of whether privileged documents will be admitted as evidence is dependent on when applications are brought and steps are taken to restrain their use in the course of litigation. However, this issue was not engaged here. The Emails here had not entered into evidence in S 489. Rather, the Emails had been referred to and exhibited only in Wee's Affidavit filed in support of his striking out application and that had not been heard. As held by Kan Ting Chiu J in *Tentat* at [41], privileged material exhibited in an affidavit filed in respect of an application, which has yet to be heard, has not formally been admitted into evidence. Accordingly, there is no issue of HT being too late to seek the prayer to expunge and the prayer for an injunction.

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Whether the Emails have lost their confidential character

27 The Emails contained information which was, prior to their uploading onto the Internet, undoubtedly privileged and confidential. Wee knew or must have known this. The Emails contained express provisos emphasising their privileged and confidential nature (see [5] above). Further, they contained discussions between HT and its solicitors regarding the very proceedings that HT had brought against Wee. Wee was able to access the Emails only because of the Hacking into HT's systems and Wee was aware of the Hacking even if there was no evidence to show that he was complicit in it. In any case, he would have had to search and sieve through the mass of hacked material in order to locate the Emails.

28 In such circumstances, equity will intervene to import an obligation of confidentiality on the part of Wee in respect of the Emails (R G Toulson and C M Phipps, *Confidentiality* (Sweet & Maxwell, 3rd Ed, 2012) ("*Confidentiality*") at para 3-001). Indeed, the general principle is that equity imposes a duty of confidence whenever a person receives information he knows or ought to know to be fairly and reasonably regarded as confidential. This includes the situation where an obviously confidential document is wafted by an electric fan out of a window into a crowded street or is dropped in a public place and is picked up by a passer-by (*Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109 ("*Spycatcher*") *per* Lord Goff of Chievely at 281; *Campbell v MGN Ltd* [2004] 2 AC 457 *per* Lord Nicholls of Birkenhead at [14]). When such confidential information is also privileged, an application may be made to restrain its use for the purposes of litigation, as shown in *Lord Ashburton*, *Goddard*, *Tentat* and *Pamela Jane*.

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29 We now consider the question whether the fact that the Emails were on the Internet would defeat an application to restrain the use of the otherwise confidential and privileged information therein for the purpose of litigation.

30 In *Spycatcher*, Lord Goff observed (at 282) that the equitable duty of confidentiality is subject to certain limiting principles. One such principle is that information that has entered the "public domain" is, as a general rule, no longer amenable to the protection of the law of confidence:

> The first limiting principle (which is rather an expression of the scope of the duty) is … that the principle of confidentiality only applies to information to the extent that it is confidential. 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.

On this point, Wee's main argument was that the Emails had been placed on the Internet and were freely available for access. They had therefore entered the "public domain" and could not be protected by the law of confidence.

31 We stress, however, that the "public domain" principle as formulated in *Spycatcher* is not a freestanding rule to be mechanistically applied (*Confidentiality* at para 3-110). First, it is expressed as a general and not an absolute rule. This is reflected in the statement of the English Court of Appeal in *Douglas v Hello! Ltd (No 3)* [2006] 1 QB 125 at [105] that "[i]n general, once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence, though this may not always be true". Secondly, the "public domain" principle is merely an aspect of the scope of the duty of confidentiality. In other words, it is but one factor to be considered when determining whether a person's conscience ought to require him to treat information as confidential. Thus, the question for the court in

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each case is whether the degree of accessibility of 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 it as confidential (see *Confidentiality* at para 3-110).

32 There are two related reasons why the public accessibility of a piece of information affects whether it attracts an equitable obligation of confidence. Firstly, as we observed in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 at [64] (citing *Confidentiality* at para 3-112), the law of confidentiality is designed to protect confidences or secrets. The essence of such is that they are not publicly known. If information is known to the public at large, it would generally be both unreal and purposeless to attempt to regard it as confidential. Secondly, where the information has become so accessible and/or accessed that a reasonable person in the position of the parties would not regard it as confidential, it could not be unconscionable for the party who receives such information to treat it as not confidential.

33 The above principles were illustrated by the cases of *Spycatcher* and *Creation Records Ltd and others v News Group Newspapers Ltd* (1997) 39 IPR 1 ("*Creation Records*"), both of which were cited by the JC (GD at [48] and [50]). In *Spycatcher*, the House of Lords upheld a refusal by the Court of Appeal to grant an injunction against further distribution of a book written by an ex-British Secret Service agent describing his work (such information being confidential in nature). The House of Lords upheld the decision of the Court of Appeal that, in the light of the extensive publication of the book abroad and the availability of copies of it in the UK, granting the injunction would be "futile and just plain silly" (at 205, per Dillon LJ). All possible damage had already been done and all confidentiality in the subject matter had effectively been destroyed.

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34 In *Creation Records*, on the other hand, the English High Court granted an injunction against the further publication by a newspaper of a poster bearing images of Oasis, a famous rock band. The images had been taken surreptitiously and in breach of confidence by a photographer commissioned by the newspaper. Although the images had been published in "millions of copies of the newspaper", there remained value in the grant of the injunction because further publication of the images "would seriously impair the ability of the group to exploit the image either by way of an authorised Oasis poster or its use with marketing and merchandising at a later stage" (at [32]). The court stated further at [34] that:

> Of course the picture is in the public domain, having been printed on Thursday, Friday and Saturday of last week in no doubt millions of copies of the newspaper. That is not of itself a reason not to restrain a future publication, in particular an entirely different kind of publication, arising from the poster offer …

The words "public domain", as used in the quotation above, do not appear to connote that the confidential information lost its confidential character because it was so publicly accessible and/or accessed. Indeed, Lloyd J went on to restrain the newspaper from further use of the images on the ground of preventing a further breach of confidence.

35 Ultimately, it is very much a common sense inquiry whether the information has become so accessible and/or accessed that it would not be just in all the circumstances to require the party against whom confidence is asserted to treat it as confidential. This was illustrated in the speech of Bingham LJ in *Spycatcher* (at 215):

> Forty-four years ago there can have been few, if any, national secrets more confidential than the date of the planned invasion of France. Any Crown servant who divulged such information to an unauthorised recipient would plainly have

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> been in flagrant breach of his duty. But it would be absurd to hold such a servant bound to treat the date of the invasion as confidential on or after (say) 9 June 1944 when the date had become known to the world. A purist might say that the Allies, as confiders and owners of the information, had by their own act destroyed its confidentiality and so disabled themselves from enforcing the duty, but the common sense view is that the date, being public knowledge, could no longer be regarded as the subject of confidence.

36 Further, it is important to focus not only on the extent to which the information in question has become accessible but also on the extent to which it has in fact been accessed by the general public. As we have said, the essence of a confidence or secret is that it is not publicly known. Potential, abstract accessibility is vastly different from access in fact. This is particularly so, given the proliferation of information in the globalised Internet age of today. Paradoxically, much of the information on the Internet, although accessible, is not in fact accessed by the public, whether from lack of interest or time or even ignorance.

37 Accordingly, the circumstances of each case must be examined. Consideration must be given to such factors as the likelihood of the information being accessed by the public, the degree to which the information has in fact been accessed and the extent to which the information may be appreciated and/or understood only with the specialised skills or expertise of the party seeking to make use of the information. Merely making confidential information technically available to the public at large does not necessarily destroy its confidential character. Public media, in particular the Internet, must not be the gateway through which all confidentiality is dissolved and destroyed.

38 In the English High Court decision of *Attorney-General v Greater Manchester Newspapers Ltd* [2001] EWHC 530 (QB), a newspaper published

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on its website the place of the Parole Board hearings of two young men who had been detained at secure units in relation to the highly publicised murder of two-year old James Bulger in the 1990s. This publication was in breach of an injunction to protect the physical safety of the two men after their release by restraining the publication of information that was likely to lead to the identification of their whereabouts. The English High Court rejected a contention that the information on the place of the Parole Board hearings was in the public domain even though it had been published in a book released by the government and the book was available at a public library and also on a government website. Dame Elizabeth Butler-Sloss, P, explained (at [32] – [33]):

> 32 [T]here are two separate ways in which this information was said to be available in the public domain before the 8th January 2001 [*ie*, the date on which the injunction was granted]. The first was the publication by the Government Department which was available in libraries. In general, I would agree that information available in the public library was accessible to the public. In the present case, having looked at the [newspaper] publication, in my view it provides detailed and complicated information and statistics not easy to digest by anyone not accustomed to its format or with sufficient background information to know where to look. I do not consider that such information is realistically accessible to the wider public by being on a library shelf, no doubt, under a specialised heading. I would doubt that members of the public, who were not interested in the specialised information, would know such a book existed or that it was placed on a library shelf. Second, the information placed on the website of a Government Department would require some degree of background knowledge and persistence for it to become available to a member of the public and would not be widely recognised as available. It would appear that national and regional newspapers with their greater resources were not aware of these sources of information.
>
> 33 I have come to the conclusion that accessibility to the general public of Government statistical information is, in the present context, theoretical and therefore not generally accessible to the public. This information was not public knowledge. In my judgment therefore the information available in this particular form on the internet or in the publication did

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> not amount to that information having already been placed in the public domain before the 8th January 2001 or at all.

39 Further, the fact that confidential information has in fact been accessed by a limited segment of the public does not necessarily mean that the information has entered into the public domain and thus lost its quality of confidentiality. As observed by Sir John Donaldson MR in the Court of Appeal in *Spycatcher* (at 177):

> As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality: *O. Mustad & Son v Dosen (Note)* [1964] 1 W.L.R. 109. However, this will not necessarily be the case if the information has previously been disclosed to a limited part of the public. It is a question of degree: *Franchi v. Franchi* [1967] R.P.C. 149, 152-153, *per* Cross J.

40 We now turn to the Emails. It was undisputed that the Emails were generated in circumstances importing an obligation of confidentiality. The Emails contained discussions between HT and its lawyers over the conduct of the very proceedings that HT had brought against Wee. The discussions would obviously have been made in an atmosphere of total confidence and the only persons expected to be privy to those discussions would be the authorised persons in HT and its lawyers. Wee would certainly be the very person that HT would not want to reveal the contents of the Emails to and surely Wee knew this.

41 While it is true that the Emails had been uploaded onto WikiLeaks and had become potentially accessible by members of the public, the Emails constituted a minute fraction of the approximately 500GB of data that had been pilfered from HT's computer systems through the Hacking and uploaded onto the website. Trawling through the data to identify the Emails would have

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been time-consuming even for a person who knew or suspected that the Emails were in the hacked material. It was highly probable that few, if any, knew of the existence of the Emails or their presence in the hacked material. Fewer still would have the interest and the inclination to undertake the task of scouring through the voluminous data for the Emails.

42 The appellant argued that the Hacking was widely reported by the news media. However, these news reports went no further than to state that HT had been the subject of a hacking attack and that the hacked information revealed the parties whom HT had allegedly been dealing with. They contained nothing that pointed specifically to or even hinted about the Emails and their contents pertaining to HT's litigation strategy for S 489. The appellant argued further that "simply typing 'Hackingteam Wikileaks' on Google Search would bring one to the leaked Emails".[21] This, however, did not assist him. All that the search would reveal was that millions of emails had been extracted from HT's servers and then uploaded onto WikiLeaks. Again, there was nothing that pointed specifically to the Emails or alluded to their presence.

43 We were therefore of the view that the Emails and their contents were not public knowledge or in the public domain although they were theoretically accessible to anyone doing an intense search on WikiLeaks. The Emails thus retained their confidential status and could still claim the protection of the law of confidence.

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[21] Appellant's Skeletal Arguments at [14].

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Whether the court should restrain the use of the Emails

44 It was undisputed that, prior to their uploading onto the Internet, the Emails attracted legal professional privilege and that HT had not waived such privilege. As a general rule, until and unless privilege has been waived, a document once privileged is always privileged (*Seet Melvin v Law Society of Singapore* [1995] 2 SLR(R) 186 at [17(c)]). When privileged material contains confidential information, equity has typically intervened through the grant of injunctions to prevent its unauthorised use as evidence in court proceedings.

45 As summarised by the JC (GD at [23]), in *Calcraft*, the plaintiff, the owner of a fishery, successfully sued the defendant for trespass. The central question at trial was the limits of the upper boundary of the fishery. After the trial, the defendant came into possession of documents relating to an earlier litigation to which the plaintiff's predecessor-in-title had been party. These documents were relevant to the question of the boundary of the fishery and were in the possession of the grandson of the solicitor who acted for the plaintiff's predecessor-in-title. It was not disputed that the documents were privileged. The defendant's solicitors inspected the documents and made copies of them but subsequently returned the originals to the plaintiff on demand. The English Court of Appeal allowed the defendant to admit copies of the documents in her appeal. Lindley MR (with whom the rest of the court agreed) held that the defendant was entitled to adduce "secondary evidence" (*ie*, copies) of the contents of these documents even though the originals were privileged (at 764).

46 In the subsequent case of *Lord Ashburton* (summarised at GD at [25]), 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

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of collusion, managed to obtain certain letters which had been exchanged between the plaintiff and his late solicitor. The plaintiff applied for the delivery up of the originals and an injunction to restrain the defendant from publishing or making further use of any copies which he might have. At first instance, the judge ordered the delivery up of the originals and granted an injunction against future publication and use of the letters. Thinking himself bound by *Calcraft*, however, the judge added a proviso to preserve the defendant's right to use such copies of the letters as they might have in the bankruptcy proceedings. The plaintiff appealed against the inclusion of this proviso and succeeded. The basis upon which the English Court of Appeal allowed the appeal and granted the injunction 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; and at 475, *per* Swinfen Eady LJ).

47 As the JC explained (GD at [26]), the English Court of Appeal in *Lord Ashburton* rationalised *Calcraft* as standing only for the proposition that secondary evidence of documents may be admissible 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 the documents contained confidential material which had been improperly obtained.

48 May LJ in *Goddard* made the following observations (at 743) which were endorsed by Kan Ting Chiu J in *Tentat* at [34] and this court in *Pamela Jane* at [66]–[67]:

> [*Calcraft* and *Lord Ashburton*] are good authority for the following proposition. If a litigant has in his possession copies

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> 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.

49 As the Emails have not been adduced as evidence or otherwise relied upon in S 489, save in the context of the present appeal, there are no impediments to making an order to restrain the use of the Emails in S 489.

50 Since it is the court's equitable jurisdiction that is being engaged, it remains open to the court to refuse relief on the general principles affecting the grant of a discretionary remedy, *ie*, on such grounds as inordinate delay, a lack of clean hands or general iniquity. Public policy also requires that a litigant should not be permitted to make use of a copy of a privileged document which he has obtained by stealth, trickery or by otherwise acting improperly (*Singapore Civil Procedure 2016* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2016) at para 24/3/32 citing *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431). Such impropriety has been construed broadly to include a party taking advantage of an obvious mistake by his opponent.

51 In *Derby & Co Ltd and others v Weldon and others (No 8)* [1991] 1 WLR 73 ("*Derby v Weldon*"), the plaintiffs' solicitors, in the course of preparing for discovery involving a very large number of documents, appended squares of yellow paper marked "privileged" to documents which were the subject of legal professional privilege, intending to withhold them from inspection by the defendants' solicitors. Some of these squares became detached. The plaintiffs' solicitors inadvertently included among the

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documents disclosed for inspection some which still bore yellow markers or which otherwise appeared to the defendants' solicitors to be privileged. The defendants' solicitors, without intimating any suspicion on their part that there might have been a mistake, asked the plaintiffs' solicitors for copies of a range of documents, including those that were apparently privileged. The copying was done by junior staff of the plaintiffs' solicitors who did not direct their minds to whether any of the documents might be privileged and all the copies requested were delivered. Upon realising the mistake, the plaintiffs applied for an order for delivery up of all copies of the 14 privileged documents that had entered the possession, custody or control of the defendants and to restrain the defendants from relying on any information contained in these documents. At first instance, Vinelott J made the orders in respect of 11 of the 14 documents, holding that it was not evident on the face of the remaining three documents that they were privileged. The English Court of Appeal allowed the plaintiffs' appeal in respect of the three remaining documents. Dillon LJ (with whom the rest of the court agreed) explained (at 97):

> (3) If … the other party or his solicitor either (a) has procured inspection of the relevant document by fraud, or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, *the court has power to intervene for the protection of the mistaken party by the grant of an injunction in exercise of the equitable jurisdiction* illustrated by the *Ashburton*, *Goddard* and *Herbert Smith* cases. Furthermore, in my view ***it should ordinarily intervene in such cases***, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, for example, on the ground of inordinate delay: see *Goddard's* case [1986] 3 W.L.R. 734, 745E-F per Nourse L.J … Save where it is too late to restore the previous status quo (e.g. on facts similar to those of the *Great Atlantic* case [1981] 1 W.L.R. 529) I do not think the law should encourage parties to litigation or their solicitors to take advantage of obvious mistakes made in the course of the process of discovery.
>
> [Emphasis added in italics and bold italics]

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52 We see no reason why the same should not apply to a party taking advantage of an opponent who has been the victim of a cyber-attack, even if there was no evidence linking Wee to the cyber-attack. Indeed, unlike in the case of mistake or negligence where the disclosure of the privileged document is attributable at least in part to the fault of the party in whom the privilege resides or of his legal advisors, the equity in favour of restraining the use of privileged documents is even stronger in the case of a party who had its privileged documents accessed and taken through stealth and unlawful means.

53 There could be little doubt that Wee knew that the Emails were privileged. Not only did the Emails contain warnings of confidentiality and privilege (see [5] above), Wee's Affidavit demonstrated that he knew that the Emails contained legal advice on HT's pursuit of S 489.[22] It was therefore just that Wee should be retrained from using the Emails.

54 Finally, we turn to consider whether we should nevertheless refuse relief on the ground of HT's alleged iniquitous conduct. As Lord Denning MR held in *Initial Services Ltd v Putterill and another* [1968] 1 QB 396 at 405, "there is no confidence as to the disclosure of iniquity". Wee argued that the Emails revealed that HT had been acting in a dishonest and deceitful manner and had abused the legal process. In our view, however, this contention of dishonesty was not borne out by the Emails.

55 To recapitulate, Wee alleged that the Emails showed that (see [16] above):

(a) HT admitted to owing Wee his unpaid salary (that Wee claims in his counterclaim) and yet HT intentionally withheld payment;

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[22] Wee's Affidavit at [8] and [9]

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(b) HT abused the process of the court by using such process to delay payment to Wee;

(c) HT commenced legal proceedings against Wee in order to "intimidate" and "pressure" him into providing information and/or evidence required to support HT's claims against other persons; and

(d) Further, HT commenced S 489 to formulate its "antidote" product and this was an abuse of the process of the court.

56 The issue of Wee's unpaid salary was raised by him only in his counterclaim. HT's claim in S 489 was solely in respect of Wee's alleged breaches of duty during his employment with HT by working with a competitor, ReaQta. HT sought an injunction and damages and the issue of Wee's unpaid salary did not arise until Wee raised it in his counterclaim. According to Wee, the parties had entered into an agreement after Wee tendered his resignation that Wee would be paid until 20 March 2015, resulting in unpaid salary amounting to $23,545.45.[23] In response, HT pleaded that it was not liable to pay Wee's salary because he had breached his employment agreement and his duties owed to HT and, in the alternative, that HT was entitled to set off any of Wee's unpaid salary against the damages that Wee would have to pay HT.[24]

57 It was true that the Emails suggested that HT acknowledged the alleged agreement to pay Wee until 20 March 2015 (*eg*, an email dated 9 April 2015 from HT's lawyers to HT).[25] However, it could not be said that HT had

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23 See Defence and Counterclaim, ROA Vol II at p 26 para 9 and p 31 para 27.

24 See Reply, ROA Vol II at p 35 paras 9 and 11.

25 CB Vol II at p 45.

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acted in a deceitful or iniquitous manner. Firstly, HT was entitled to put Wee to strict proof of the alleged agreement and his entitlement to the unpaid salary. Secondly, HT had a *prima facie* defence to Wee's claim for unpaid salary by virtue of the alleged breaches of his employment agreement and/or fiduciary duties. HT also had a right of set-off. Thirdly, while Wee seemed to suggest that HT's defence was an after-the-fact justification for denying payment, it was HT that first brought its claim for breach of employment agreement and/or fiduciary duties and it was Wee who raised the issue of unpaid salary subsequently in his counterclaim.

58 Wee's allegation that HT had a "collateral purpose" for bringing the suit, namely, to "pressure" him into providing information/evidence to support HT's other proceedings, had to be looked at in context. From the Emails, it could be seen that the whole dispute arose because HT suspected that some of its employees were collaborating with its competitor, ReaQta. Wee was not the only employee that HT was investigating. There was at least one other person, one Velasco, that HT was investigating and considering bringing proceedings against in Italy (*eg*, an email dated 14 February 2015 from HT's lawyers to HT).[26] In fact, HT was still in the process of uncovering the full extent of its employees' partnership with ReaQta. It was in this context that the discussions regarding settling the proceedings against Wee in exchange for Wee's information arose (*eg*, the email exchange between HT and its lawyers beginning from 26 February 2015 to 9 March 2015).[27] The Emails also showed that HT was serious about its claim against Wee. It had considered holding off the suit against Wee until the proceedings against Velasco were underway and then using the information and/or evidence obtained in the Velasco

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[26] *Ibid* at p 26.

[27] *Ibid* at pp 91-102.

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proceedings to bolster its claim against Wee in Singapore.[28] In our view, no deceitful or iniquitous conduct was disclosed. HT had every intention to sue Wee for the alleged breaches of his employment contract and/or fiduciary duties. However, HT was willing to drop the suit and even pay Wee his claimed salary if he cooperated and provided HT with the information that it wanted (email dated 3 June 2015 from HT to its lawyers).[29] After all, the amount that Wee was claiming was not large and it appeared that Wee's involvement with ReaQta was not very extensive. If Wee refused, HT would simply continue its claim against him, something which HT had intended to do all along. This sort of litigation strategy was not impermissible and could not be said to be dishonest and/or an abuse of process of court.

59 In the circumstances, we agree with the AR's finding that this was "far from a case where there [had] been iniquitous conduct, not to mention illegal purpose".[30] There was nothing which could justify the court refusing to exercise its equitable jurisdiction to grant the prayer to expunge.

Inherent discretion to exclude the Emails from evidence

60 There remains the question whether the court has the inherent discretion to exclude otherwise relevant evidence (the "exclusionary discretion") from S 489. HT raised this argument in the present appeal only as a further ground to justify granting its prayer to expunge the Emails. However, HT did not canvass this argument before the JC. Accordingly, we will go no further than to note that we had in *ANB v ANC and another and another matter* [2015] 5 SLR 522 ("*ANB (CA)*") expressed the "tentative" view that

28 *Ibid* at p 99.

29 *Ibid* at p 75.

30 Supplementary Core Bundle at p 52, para 11.

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the court has an inherent discretion to exclude evidence in both criminal and civil proceedings and that there are good reasons why this discretion should be exercised in a robust manner in civil proceedings. However, the test employed in criminal proceedings of weighing the probative value against the prejudicial effect of the evidence may need to be adapted for civil proceedings in favour of a different balancing exercise (*ANB (CA)* at [29]–[30]).

Conclusion

61 We did not think that the confidential character of the information in the Emails had been lost in any way. To hold otherwise on account of the Hacking and the uploading on WikiLeaks is to sanction and to encourage unauthorised access and pilferage of confidential information. The information was also protected by legal professional privilege and there was certainly nothing before the court to suggest that the privilege had been waived by HT.

62 While there is the public interest that all relevant material be made available to the court, there is the countervailing interest that litigants be able to communicate freely and frankly with their solicitors for legal advice. Similar reasoning applies to other privileges conferred by law. The balance between the competing imperatives of truth and privilege is therefore struck in favour of the latter for good reasons.

63 In the circumstances, we dismissed Wee's appeal. We fixed costs at $28,000 (inclusive of reasonable disbursements) to be paid by Wee to HT in respect of this appeal.

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Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Tay Yong Kwang Judge of Appeal

Nicholas Philip Lazarus and Elizabeth Toh (Justicius Law Corporation) for the appellant;
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