IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHCR 15

Suit No 17 of 2017 (Summons No 2660 of 2017)

Between

EQ Capital Investments Ltd

… *Plaintiff*

And

(1) Sunbreeze Group Investments Limited
(2) Manoj Mohan Murjani
(3) Kanchan Manoj Murjani
(4) The Wellness Group Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure] — [Discovery of documents]

[Civil Procedure] — [Privileges] — [Marital communications]

Version No 1: 27 Oct 2020 (22:40 hrs)

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND **3**

SUMMARY OF PLEADINGS AND THE PROCEDURAL HISTORY **4**

MARITAL COMMUNICATIONS PRIVILEGE **8**

HISTORY OF MARITAL COMMUNICATIONS PRIVILEGE 10

DOES THE DOCTRINE OF MARITAL COMMUNICATIONS PRIVILEGE APPLY? 14

The American "business transaction exception" *17*

Is the privilege restricted only to confidential communications? *18*

Summary on the ambit of the privilege *21*

CAN EQ CAPITAL OBTAIN THE COMMUNICATIONS FROM WELLNESS? 22

Privilege, copies, and third parties *23*

Privilege and admissibility *26*

MY DECISION ON THE REQUESTED DOCUMENTS **27**

THE LAW IN OUTLINE 28

Must it be shown that the requested documents exist but have not been disclosed? *30*

Who bears the burden of proving necessity? *32*

CATEGORIES 1–4, AND 6 34

CATEGORIES 5, 7, AND 9 36

CATEGORY 8 39

CATEGORIES 10 AND 11 40

CONCLUSION **43**

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

EQ Capital Investments Ltd
v
Sunbreeze Group Investments Ltd and others

[2017] SGHCR 15

High Court — Suit No 17 of 2017 (Summons No 2660 of 2017)
Scott Tan AR
25, 31 July 2017

19 September 2017 Judgment reserved.

Scott Tan AR:

Introduction

1 This is the Plaintiff's application for specific discovery of 11 categories of documents (the "requested documents") under O 24 r 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"). This application arises from Suit No 17 of 2017 ("the present suit"), wherein the Plaintiff claims that the affairs of the 4th Defendant company have been conducted in a manner which is oppressive of and/or prejudicial to its interests as a minority shareholder. Among other things, the Plaintiff has sought discovery of the 4th Defendant's internal documents, including correspondence passing between the 4th Defendant's directors. The 2nd and 3rd Defendants, who are both directors of the 4th Defendant, are husband and wife and they have argued that the correspondence passing between them are protected from disclosure by virtue of the doctrine of marital communications privilege.

Version No 1: 27 Oct 2020 (22:40 hrs)

2 If accepted, this claim to privilege would be a complete answer to a large part of the Plaintiff's requests. It is for this reason that the Plaintiff sought to argue that marital communications privilege does not apply here. Its argument is two-fold. First, it submits that the privilege extends only to communications which "would not have been the subject of discussion *but for the existence of the marital relation between the husband and wife*" [emphasis added] and therefore does not cover communications relating to business matters. Secondly, and in the alternative, it argues that because most of the correspondence (which took the form of emails) passed through the servers of the 4th Defendant, it is entitled to have discovery of the correspondence from the 4th Defendant, even if it cannot not obtain it directly from the 2nd and 3rd Defendants. The crux of this alternative argument is the Plaintiff's claim that marital communications privilege only protects *persons* from being forced to testify against their spouses but does not prevent an applicant from seeking discovery of *communications* that have fallen into the hands of a third party.

3 As against this, the Defendants have submitted that the doctrine of marital communications privilege is not so limited and extends to "all communications made throughout the duration of the marriage", including those relating only to matters of business [emphasis in original omitted]. For this reason, they urged me to reject both of the Plaintiff's arguments. They take issue, in particular, with the Plaintiff's alternative argument, which they argue would have the effect of driving a coach and horses through the doctrine of marital communications privilege since the majority of communications today pass through servers in respect of which third parties could have access.

4 As the present application raised questions concerning the ambit of marital communications privilege which, as far as I am aware, are matters of first impression in Singapore, I reserved judgment. I now give my decision.

Version No 1: 27 Oct 2020 (22:40 hrs)

Background

5 The Plaintiff, EQ Capital Investments Limited ("EQ Capital"), is a company incorporated in the British Virgin Islands ("BVI") and it is an investment company of which Mr Ron Sim Chye Hock ("Mr Ron Sim") is the ultimate sole beneficial owner. EQ Capital was at all material times a minority shareholder in the 4th Defendant, The Wellness Group Pte Ltd ("Wellness"), which is a Singapore incorporated company that is in the health and wellness business. Wellness has three directors: the 2nd Defendant, Mr Manoj Mohan Murjani ("Mr Murjani"); the 3rd Defendant, Mrs Kanchan Manoj Murjani ("Mrs Murjani"); and Dr Finian Tan. Mr and Mrs Murjani are married and they are, in addition to being directors of Wellness, also directors of the 1st Defendant, Sunbreeze Group Investments Limited ("Sunbreeze"), a BVI incorporated company which is the majority shareholder of Wellness.

6 The present suit is intimately related to matters that formed the subject matter of Suits No 187 and 545 of 2014 (which I shall refer to as "Suit 187" and "Suit 545" respectively). Broadly summarised, Suits 187 and 545 arose from disagreements between Mr Murjani and Mr Ron Sim (and the companies of which they were the principals, Wellness and OSIM International Limited ("OSIM")) over the operations of The TWG Tea Company Pte Ltd ("TWG Tea"). TWG Tea is a Singapore incorporated company that sells luxury teas which both Wellness and OSIM have a stake in. The plaintiffs in both suits were Wellness and Mr Murjani and they brought claims for minority oppression, conspiracy, breach of contract, and defamation. OSIM and Mr Ron Sim were named as defendants in both suits and they, together with the rest of the defendants in Suit 187 (save for TWG Tea), brought a counterclaim against Wellness and Mr Murjani for defamation. On 22 April 2016, Chua Lee Ming JC (as he then was) dismissed both the plaintiffs' claims as well as the

Version No 1: 27 Oct 2020 (22:40 hrs)

defendants' counterclaim (see *The Wellness Group Pte Ltd and another v OSIM International Ltd and others and another suit* [2016] 3 SLR 729) ("*Wellness v OSIM*"). Wellness's appeal against the dismissal of its claims in Suit 187 was dismissed by the Court of Appeal on 25 October 2016.

7 It is not necessary to delve into the details of Suits 187 and 545 in any greater level of detail than this save to say that many of the findings made by Chua JC in *Wellness v OSIM* form the factual substratum of the present suit. Shortly after Wellness's appeal was dismissed, EQ Capital, which was not party to either of the two actions, commenced the present suit. In its statement of claim ("SOC"), EQ Capital states clearly that it does not seek any substantive reliefs against Wellness itself, which is present only as a nominal defendant. Instead, its grievances are against Sunbreeze, Mr Murjani, and Mrs Murjani (whom I shall refer to collectively as "the Defendants").

Summary of pleadings and the procedural history

8 EQ Capital filed its SOC on 10 January 2017. Its claim in minority oppression is founded on four principal complaints:

(a) First, it pleads that Mr and Mrs Murjani had wrongfully caused Wellness to breach its contractual and statutory duties to (i) convene annual general meetings ("AGMs"); (ii) prepare and file annual audited accounts; (iii) lay these audited accounts before Wellness's shareholders; (iv) send notices of its general meetings and copies of the reports prepared by its auditors to EQ Capital; and (v) file Wellness's annual returns with the Registrar of Companies.

(b) Secondly, it pleads that the Defendants had caused Wellness's shareholding in TWG Tea to be diluted twice, to the prejudice of its

Version No 1: 27 Oct 2020 (22:40 hrs)

interest as minority shareholder of Wellness:

(i) The first dilution took place because Mr Murjani had mismanaged the affairs of TWG Tea while he was its director (and Wellness's representative on its board) by presenting profit projections which he knew to be unreliable and unsupported to OSIM at the time OSIM was negotiating the terms of its investment in TWG Tea. This effect of this was that OSIM was able – when the profits of TWG Tea came well below Mr Murjani's projections – to invoke the "profit swing clause" in its share and purchase agreement, allowing it acquire 8.4% of Wellness's shares in TWG Tea for nominal consideration.

(ii) The second dilution took place when Mr and Mrs Murjani (in their capacities as directors of Wellness) failed to take steps to have Wellness subscribe to a rights issue announced by TWG Tea in November 2013 ("Rights Issue") despite being prompted to do so. As a result, Wellness's shareholding in TWG Tea further decreased from 46.3% to 30.1%.

(c) Thirdly, it pleads that Mr and Mrs Murjani had given up Wellness's "fundamental right" to be represented on the board of TWG Tea when they elected not to appoint another person to replace Mr Murjani after he resigned as a director of TWG Tea in September 2012.

(d) Lastly, it pleads that Mr and Mrs Murjani had wrongfully exposed Wellness to liability by causing it to commence Suit 187 when they knew or ought to have known that the proceedings were unmeritorious. As a result, Wellness was subjected to a range of liabilities, including adverse costs orders.

Version No 1: 27 Oct 2020 (22:40 hrs)

9 The Defence was first filed on 7 February 2017 and amended on 29 June 2017. In it, the Defendants deny that the EQ Capital is entitled to the reliefs which it seeks for two broad reasons. First, they aver that EQ Capital, which they claim is but the alter ego of Mr Ron Sim, has not suffered any loss or damage. Secondly, they say that even if there were any wrongdoing on the part of the Defendants, EQ Capital is not the proper party and has no standing to commence this action on behalf of Wellness. In response to the various complaints raised by EQ Capital, they plead that:

(a) Mr and Mrs Murjani had not caused Wellness to breach its contractual and statutory duties to its shareholders. In this regard, they specifically plead that Mr Ron Sim and OSIM (which they also say is the alter ego of Mr Ron Sim) had deliberately delayed the finalisation of the audited accounts of TWG Tea for the financial year ("FY") ending 31 March 2011, thereby also delaying the finalisation of the accounts of Wellness for FY 2011 and 2012.

(b) Mr Murjani honestly and reasonably believed that the profit projections he presented were realistic. In any event, when viewed through a wider lens, Mr Ron Sim (and, therefore, EQ Capital) had benefitted from the exercise of the Profit Swing Clause since OSIM had increased its shareholding in Wellness significantly and is therefore not entitled to complain about the exercise of the Profit Swing Clause.

(c) Mr Ron Sim had deliberately engineered the Rights Issue as a form of minority oppression to dilute Wellness's shareholding in TWG Tea. From Wellness's perspective, the Rights Issue was problematic because (i) inadequate notice was given of the extraordinary general meeting at which it was approved; (ii) its legitimate concerns were not

Version No 1: 27 Oct 2020 (22:40 hrs)

addressed; and (iii) Wellness did not have the funds to subscribe to the shares. In the light of this, Mr and Mrs Murjani honestly and reasonably believed that it would not have been in Wellness's best interests to subscribe to the Rights Issue and any default on their part ought fairly to be excused under s 391 of the Companies Act (Cap 50, 2006 Rev Ed).

(d) Wellness and Mr Murjani had refrained from appointing another director to TWG Tea during the pendency of Suit 187 because they honestly and reasonably believed that the Rights Issue was a form of minority oppression. After the disposal of Suit 187, Wellness had twice tried to nominate a director to the board of TWG Tea but both of its attempts were blocked by Mr Ron Sim and OSIM.

(e) EQ Capital has no standing to claim for any of the liabilities incurred by Wellness as a result of Wellness's prosecution of Suit 187. They also plead (though it is not entirely clear what the significance of this is) that "[Sunbreeze] had provided loans to [Wellness] amounting to S$3,100,000 for the purpose of paying the legal fees incurred by [Wellness] in respect of Suit 187."

10 On 16 May 2017, solicitors for EQ Capital wrote to the Defendants to seek specific discovery of the requested documents. On 30 May 2017, the Defendants' solicitors replied to say that their clients would not be providing any of the requested documents because EQ Capital had failed to show that the requested documents were (a) in their possession, custody or power; (b) relevant to the disputed issues; and (c) were necessary for the fair disposal of the matter or for saving costs. They also objected to producing the requested documents on the ground that the requests were framed "extremely widely" and encompassed requests for "confidential and/or privileged documents". On 9

Version No 1: 27 Oct 2020 (22:40 hrs)

June 2017, the Plaintiff filed Summons No 2660 of 2017 to seek specific discovery of the requested documents. This is the application before me.

11 Given the way that the arguments were presented, I propose to deal first with the issue of whether the communications passing between Mr and Mrs Murjani in relation to the affairs of Wellness are protected by marital communications privilege before turning to give my decision in respect of each of the categories of documents in respect of which discovery is sought.

Marital communications privilege

12 In Singapore, marital communications privilege is a statutory right enshrined in s 124 of the Evidence Act (Cap 97, 1997 Rev Ed) (for ease of reference, I will refer to this provision simply as "s 124" and to the statute as "the EA"). The parties agreed that this issue was to be approached as one concerning the proper construction of s 124, which provides as follows:

> **Communications during marriage**
>
> 124. *No person who is or has been married shall be* ***compelled*** to disclose ***any communication*** made to him during marriage by any person to whom he is or has been married; *nor shall he be* ***permitted*** *to disclose any such communication* unless the person who made it or his representative in interest consents , except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. [emphasis added in italics and bold italics]

13 Mr Jaikanth Shankar, counsel for the Plaintiff, argued that because the purpose of marital communications privilege was to protect *private* communications exchanged between husbands and wives, only communications which are "induced by the marital relationship" and would not have taken place "but for the existence of the marital relation between husband and wife" fell within the ambit of the privilege (citing the decision of the Court

Version No 1: 27 Oct 2020 (22:40 hrs)

of Appeals of the State of New York in *Warner v Press Publishing Corporation*, 132 NY 181 (NY, 1892) ("Warner")). During the first hearing, Mr Shankar referred to this as the "business transaction exception" to marital communications privilege. However, he quickly clarified that he did not mean for me to read in *exceptions* to s 124 which did not exist on the face of the statute, but to *construe* the expression "any communications" in such a way as to confine it only to communications which were induced by the marital relation between the spouses. On this basis, he submitted that the requested documents are not privileged because they are communications which flow from the *business* and not *spousal* relationship between Mr and Mrs Murjani and would have taken place irrespective of whether they were married. His alternative argument was that because the purpose of the privilege was to protect persons from having to testify against their spouses at trial (it was, he said, a form of "testimonial privilege"), it cannot be invoked as a defence against orders for discovery directed against third parties (such as Wellness) into whose possession these communications might have come.

14 Mr Kenny Lau, counsel for the Defendants, submitted that the generality of s 124 could not be so limited. He placed great emphasis on the use of the expression "any communications" which he submitted is "wide enough to embrace communications of every nature *including ordinary conversations relating to business affairs which are not of a private or confidential character*" [emphasis added] (citing Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence in India, Pakistan, Bangladesh, Burma & Ceylon* (Wadhwa and Company Nagpur, 16th Ed, 2007) ("*Sarkar*") at 2157). As regards the point about third parties, Mr Lau submitted that marital communications privilege was not just testimonial in nature, but extended more broadly to the protection of all communications exchanged between spouses during a marriage.

Version No 1: 27 Oct 2020 (22:40 hrs)

However, he did not cite any authority to this effect save only to submit that to hold otherwise would be to render the privilege hollow, particularly in cases such as the present, where the holders of the privilege might not even have been aware that copies of their communications would be retained.

15 After careful consideration of the competing arguments, I find that the correspondence passing between Mr and Mrs Murjani in relation to the affairs of Wellness are protected by the doctrine of marital communications privilege. I also hold that Wellness is entitled, as the holders of copies of at least some of these privileged communications, to withhold them from disclosure. I will first discuss the history of the doctrine of marital communications privilege before turning to give the detailed reasons for each of my two holdings.

History of marital communications privilege

16 At common law, a person was not a competent witness either for or against his or her spouse. This was a rule of long standing (see the decision of the House of Lords in *Hoskyn v Metropolitan Police Commissioner* [1979] 1 AC 474 at 484G–485D *per* Lord Wilberforce) and it admitted of few exceptions. It was held to apply even after the death of one of the spouses (see *Monroe v Twistleton* (1802) Peake Add Cas. 250; 170 All ER 250) and to *all* communications passing between the spouses, not just those which were confidential (see the decision of the English Court of Appeal in *Elizabeth O'Connor and another, administratixes of George Garrow, deceased v Marjoribanks and others* (1842) 4 Man & G 435; 134 ER 179 ("*O'Connor v Marjoribanks*"). The reasons given for this rule were various, but a useful summary may be found in the speech of Lord Morris of Borth-y-Gest in the House of Lords decision of *Rumping v Director of Public Prosecutions* [1962] 3 All ER 256 ("*Rumping*") where the learned law lord said (at 273I):

Version No 1: 27 Oct 2020 (22:40 hrs)

> It appears, therefore, that the rule in 1852 was that in civil proceedings the husband or wife of a party was neither competent nor compellable to give evidence. Various reasons were assigned for the policy which sustained that state of law. A husband and wife were regarded as one. Each, it was thought, would be concerned in the outcome of proceedings in which the other was a party and as a consequence would be or might be interested or biased. It *was said that domestic concord might be disrupted if the one gave evidence against the other. Beyond and in addition to these reasons there was a feeling that it is unseemly and impolitic to place a spouse in the position of having to reveal or to discuss the confidences of married life. Furthermore, it was in general recognised that conjugal confidence should be respected.* … [emphasis added]

17 The incompetency of husbands and wives to testify in proceedings involving their spouses was just one of a range of different incapacities that existed in the law at the time. Eventually, it was thought that these incapacities were an obstacle to the inquiry after truth and they were gradually removed. First, the Evidence Act 1843 (c 85) (UK) ("UK EA 1843") was passed to provide that witnesses were not to be excluded from giving evidence only by reason of their having an interest in the matter. This was followed by the Evidence Act 1851 (c 99) (UK) ("UK EA 1851"), which removed the incapacity of parties and rendered them competent witnesses. However, there was nothing in either of those two acts which expressly permitted husbands and wives to testify in suits in which their spouses were involved. In fact, a proviso to the UK EA 1843 expressly preserved the incompetence and non-compellability of husbands and wives in suits in which their spouses were party. This proviso was repealed by the UK EA 1851, but the English Court of Appeal held in *Stapleton v Crofts* (1852) 18 QB 367; 118 ER 137 that this did not have the effect of removing the rule on the incompetency of spouses in civil proceedings (the position in criminal proceedings was clear since s 3 of the UK EA 1851 expressly stated that husbands and wives would continue to be incompetent and non-compellable witnesses in criminal prosecutions against their spouses).

Version No 1: 27 Oct 2020 (22:40 hrs)

18 Reform was precipitated by the publication of the *Second Report of the Commissioners for Inquiring into the Process, Practice and System of Pleading in the Superior Courts of Common Law* (1852) ("the 1852 Commissioners' Report"). The Commissioners made it clear from the outset that their position (which they said to be supported by "plain sense and reason") was that all witnesses who could shed light on a fact in issue should be allowed to testify. It is clear that the rule on the incompetence of spouses ran counter to this basic premise. Of the three bases upon which the rule was said to rest – (a) an identity of interest between husband and wife; (b) the danger of perjury; and (c) the need to guard "the security and confidence of private life" – they quickly dismissed the first two as being untenable. The third, however, gave them pause, as they were concerned with the fact that the admission of spousal testimony might lead to "domestic disunion and unhappiness". Thus, they came up with a *modus vivendi*: husbands and wives should be *competent* and *compellable* to give evidence for and against each other but there would be a rule of *privilege* that safeguarded marital communications. In an oft-cited portion of their report, they said (cited in the speech of Viscount Radcliffe in *Rumping* at 264F–G):

> *So much of the happiness of human life may fairly be said to rest on the inviolability of domestic confidences that the alarm and unhappiness occasioned to society by invading its sanctity*, and compelling the public disclosure of confidential communications between husband and wife, *would be a far greater evil than the disadvantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute.* The conclusion to which the foregoing observations lead us is that husband and wife should be competent and compellable to give evidence for and against one another on matters of fact …; *but that* ***all communications between them should be held to be privileged.*** [emphasis added in italics and bold italics]

19 These recommendations were accepted and found their way into law *vide* the Evidence Amendment Act 1853 (c 99) (UK) ("1853 Amendment Act"). Section 1 made husbands and wives competent and compellable witnesses in

Version No 1: 27 Oct 2020 (22:40 hrs)

civil proceedings involving their spouses. Section 2 carved out exceptions for criminal proceedings and proceedings involving adultery. Section 3 enshrined the doctrine of marital communications privilege as follows:

> No husband shall be compellable to disclose any communications made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by the husband during the marriage.

20 These legislative developments in the UK precipitated similar reform in India (see, generally, Vepa P Sarathi, "Historical Background of the Indian Evidence Act, 1872", (1972) Journal of the Indian Law Institute 1 at 16–17). The incompetency of persons with an interest, the parties to the suit, and, finally, the husbands and wives of the parties were gradually removed by acts passed in 1844, 1852, and 1853 respectively. Marital communications privilege was first introduced *vide* s 4 of Act 19 of 1853 (intituled, "An Act to amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency"), which provided that "any communication made *by husband or wife to the other* shall be deemed a privileged communication and *shall not be disclosed without the consent of the person making the same*, unless such communication shall relate to a matter in dispute in a suit pending between such husband and wife" [emphasis added]. This section was the basis upon which s 122 of the Indian Evidence Act (Act No 1 of 1872) ("Indian EA 1872"), which is *in pari materia* with, and the progenitor of, our own s 124, was drafted.

21 It is useful to note how the scope of the privilege in the Indian enactments differs from that of the English. First, in India, marital communications privilege belongs to the spouse who made the communication (who alone may waive the privilege) rather than the *recipient-spouse*, as was the case in England. Secondly, s 122 of the Indian EA 1872 provides that no "person" shall be compellable to disclose any marital communication. This

Version No 1: 27 Oct 2020 (22:40 hrs)

stands in contrast with s 3 of the 1853 Amendment Act, which refers specifically to husbands and wives. In *MC Verghese v TJ Ponnan and another* (1970) AIR 1876 ("*MC Verghese*"), the Indian Supreme Court held the effect of this was that while s 3 of the 1853 Amendment Act did not cover widows, widowers, or divorcees (see the decision of the English Court of Appeal in *Shenton v Taylor* [1939] Ch 620), s 122 of the Indian Evidence Act does.

22 I am unable to discern the precise reasons for these changes, but it is likely that the Indian Law Commissioners thought that the drafting of s 3 of the 1853 Amendment Act was both problematic (because it gives the recipient-spouse the power whether to decide whether to disclose the communications even though their revelation would most likely be detrimental (if at all) to the maker) and inadequate (because it meant that the protection extended to marital communications under the statute was narrower than that which existed at common law: see [16] above). Be that as it may, what is plain is that the effect of these changes was the expansion, rather than constriction, of the ambit of protection (see the decision of the Singapore Court of Appeal in *Lim Lye Hock v Public Prosecutor* [1994] 3 SLR(R) 649 ("*Lim Lye Hock*") at [46]). Section 122 of the Indian EA 1872 was subsequently enacted in Singapore *vide* Evidence Ordinance (No 3 of 1893), where – save for a minor amendment made in 1895 and a subsequent re-numbering – it has remained to this day.

Does the doctrine of marital communications privilege apply?

23 It is clear from the above that the doctrine of marital communications privilege is rooted in the public interest in the protection of marriages and the preservation of domestic harmony. As can be seen in the extract from the 1852 Commissioners Report cited at [18] above, there are two rationales for the privilege. The first is to promote absolute frankness and candour in marital

Version No 1: 27 Oct 2020 (22:40 hrs)

communications without which, it has historically been thought, marriages would undoubtedly suffer. The second is to avoid the domestic dissension and unhappiness that might arise if one spouse were to reveal matters communicated during the subsistence of the marriage without the other's permission. In G Pitt Lewis, *A Treatise on the Law of Evidence as Administered in England and Ireland with Illustrations from Scotch, Indian, American and other Legal Systems by His Honour the Law Judge Pitt Taylor* Vol 1 (Sweet & Maxwell, 9th Ed, 1895) ("*Taylor on Evidence*"), a previous edition of a leading treatise on the law of evidence, the point was expressed as follows (at 590):

> This enactment [meaning s 3 of the 1853 Amendment Act] rests on the obvious ground, that *the admission of such testimony would have a powerful tendency to* ***disturb the peace of families,*** to promote domestic broils, and *to weaken, if not to* ***destroy, that feeling of mutual confidence,*** *which is the most endearing solace of married life.* The ***protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character****, but* ***the seal of the law is placed upon all communications of whatever nature*** between husband and wife. [emphasis in original removed; emphasis added in italics and bold italics]

24 Although this was a statement about the 1853 Amendment Act, I consider that it is also equally applicable to s 124. An important aspect of the privilege which is highlighted above is that it extends to *all* communications – as Roland Burrows, *Phipson on Evidence* (Sweet & Maxwell, 9th Edition, 1952), another leading treatise on evidence put it, it exists to secure "*unlimited confidence* between husband and wife" [emphasis added]. It is for this reason that s 124 and its legislative precursors have always used the expression "any communications" to emphasise the broad scope of the protection offered.

25 The decision of the District Court in *Nasrat Muzayyin alias Nasrat lucas Muzayyin v Ong Tiong Seng* [2010] SGDC 321, which both parties cited, is helpful. That case concerned an action in defamation arising out of certain

Version No 1: 27 Oct 2020 (22:40 hrs)

remarks made by the defendant at the AGM of a company at which the defendant's wife was in attendance. The court found in favour of the plaintiff and the issue which arose in the course of the quantification of damages was whether the old rule that a communication between spouses is not publication for the purposes of the law of defamation (as held by the English Court of Appeal in *Wennhak v Morgan* (1888) 20 QBD 635) ("*Wennhak*")) applied in that context to preclude consideration of the fact that the defamatory remark was also communicated to defendant's wife. District Judge Loo Ngan Chor held that *Wennhak* did not apply and reasoned as follows (at [80]–[81]):

> 80 … There is no doubt that the sanctity of marital communications *as such* remains a cornerstone of familial trust and confidence. ***The relationship of husband and wife, and the need for them to be able to speak to each other in privacy, safe in the knowledge that the law will not permit a betrayal of such communications,*** *remains at the heart of our law in civil disputes.* … it is apparent that ***social harmony*** *overall would insidiously suffer if* ***trust and confidence within family units, with the spousal relationship at their hearts,*** *were to be eroded.* It may be apropos to remind ourselves of the evidentiary aspect of matrimonial privilege. Section 124 of the Evidence Act (Cap. 97) says:
>
> …
>
> 81 *The clear object of the principle is to protect communications between husband and wife in the privacy of their homes or bedrooms.* I fail to see how the principle that there is no publication in law of a defamation to a spouse, can, should or need to be extended to a commercial setting such as the one before me.
>
> [emphasis added in italics and bold italics]

26 Referring to these paragraphs, Mr Shankar argued that because the object of the privilege was the protection of communications passing between spouses "in the privacy of their homes", it ought not to apply to matters of a business or commercial nature. With respect, I do not agree. DJ Loo's remarks must read in the context of the issue which was before him. His point was that while it was important to preserve the sanctity of marital communications,

Version No 1: 27 Oct 2020 (22:40 hrs)

fidelity to this principle did not require one to hold that a communication made to a spouse did not have the effect of increasing the injury caused by the communication of a defamatory remark. If I may say so, this must be correct. In the eyes of the law, the defendant's wife was just one more person in whose eyes the esteem of the plaintiff was lowered as a consequence of the defamatory remark and neither the principle of the sanctity of marital communications nor marital communications privilege has anything to do with the matter. The purpose of s 124 is to prevent the compulsory disclosure of communications passing between spouses; it says nothing about whether the *fact of the making of these communications* (provided it can be proved otherwise than by compelling one of the spouses to disclose the communication) can be taken into account in the law of defamation (see [42]–[44] below). His remarks about not extending the principle to commercial settings can and must be understood *only* in relation to his holding that the rule in *Wennhak* did not apply.

The American "business transaction exception"

27 I can quickly distinguish the trilogy of American cases – the decisions of the Court of Appeals for the State of New York in *Parkhurst v Berdell*, 110 NY 386 (NY, 1888) ("*Parkhurst*") and *Warner*, as well as the decision of the United States District Court for the Southern District of New York in *Merlin v Aetna Life Insurance Company*, 180 F.Supp 90 (SDNY, 1960) ("*Merlin*") – which Mr Shankar cited in support of his argument for the introduction of a "business transaction exception" because they were decided in a different statutory context. The provisions considered in those cases (s 831 of the Code of Civil Procedure (NY) and s 349 of the Civil Practice Act (NY) state that a "husband or wife shall not be compelled, or without consent of the other if living, allowed to disclose a *confidential communication* made by one to the other during marriage." [emphasis added]

Version No 1: 27 Oct 2020 (22:40 hrs)

28 As I said to Mr Shankar during the hearing, the inclusion of the word "confidential" makes all the difference. That was the sole basis upon which the court in *Parkhurst*, whose decision was followed in *Warner* and *Merlin*, read in the so-called "business transaction exception" into the words of the statute. The court reasoned that marital communications privilege could not possibly extend to all communications between husband and wife because if that were the case, the legislature would have said so "in general and simple terms" by providing that all communications were covered (see *Parkhurst* at 393). It thus concluded that only "communications as are expressly made confidential, or such as are of a confidential nature or induced by the marital relation" are protected (*ibid*). By contrast, however, s 124 is not expressed to apply only to confidential communications. Instead, like the Indian and the English enactments which preceded it, s 124 covers "any communications". It is the uniform view of all the commentators who have considered the English (see *Taylor on Evidence* at 590, cited at [23] above), Indian (see *Sarkar* at 2137, cited at [14] above), and Singapore provisions (see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at para 15.052) that this expression is wide enough to cover *all* communications which pass between the spouses during the marriage, and not just those which are expressed to be confidential.

Is the privilege restricted only to confidential communications?

29 During the hearing, Mr Shankar drew my attention to an influential work – John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada* (Little Brown, 2nd Ed, 1923) ("*Wigmore*") – where a contrary view was expressed. *Wigmore* opined that because "the essence of [marital communications] privilege is to protect *confidences*" [emphasis added], only communications that are intended to be

Version No 1: 27 Oct 2020 (22:40 hrs)

private would be protected (at §2336). He suggested that the expression "any communication" used in some American statutes "originated in inadvertence" and should be read restrictively (*ibid*). Relying on this, Mr Shankar submitted that s 124 should likewise be construed as if confidence were a fundamental element of a claim to marital communications privilege and, thus, the business transaction exception should apply in Singapore. With respect, I cannot agree.

30 First, it is a well-established principle of statutory interpretation that because Parliament shuns tautology and does not legislate in vain, the courts must strive to give significance to every word in an enactment (see the decision of the Singapore Court of Appeal in *Shell Eastern Petroleum Pte Ltd v Chief Assessor* [1998] 3 SLR(R) 874 at [12]). I can no more ignore the determiner "any" in s 124 than I can ignore the existence of the provision entirely. In this regard, I note that there are two Canadian cases (which Mr Shankar very fairly drew to my attention) in which *Wigmore's* argument – that the expression "any communications" should be construed as possessing the implied limitation of confidentiality – was rejected for being contrary to the clear words of the statute (see the decisions of the Ontario High Court in *Connolly v Murrell* [1891] 14 PR 187 and that of the British Columbia Supreme Court in *MacDonald and MacDonald v Bublitz and MacDonald* (1960) 24 DLR (2d) 527)).

31 Secondly, it seems to me to be clear that the purpose of marital communications privilege has never been the protection of *particular confidences*, but the preservation of the relationship *of confidence* that exists between spouses (see [23]–[26] and [28] above). As I explained above, the privilege exists to secure complete privacy in conjugal communications in order that spouses may unburden themselves to each other without fear that what they say to each other might one day be relied on by an opposing party in litigation. The idea, as the Supreme Court of North Carolina put it, is that "[p]ersons

Version No 1: 27 Oct 2020 (22:40 hrs)

connected by the marriage tie have … the right to think aloud in the presence of each other" (see *Benet Hester and others v Zachariah Hester and others* (1833) 15 NC Rep 228 at 230). Any attempt to restrict the ambit of the privilege only to a restricted subset of marital communications would run against the grain of legislative history, and be antithetical to the object of the privilege.

32 Finally, it seems to me that any attempt to confine the scope of the privilege only to confidential communications would be fraught with difficulty. On this, I consider it useful to have regard to the old case of *O'Connor v Marjoribanks*. There, the defendants claimed that the plaintiff had pledged an article of property to them in exchange for certain loans. To prove this, they sought to admit the testimony of the plaintiff's ex-wife. In order to get around the rule on spousal incompetency, they argued – among other things – that the rule should only apply where the communications related to matters of a confidential nature. The English Court of Appeal rejected this argument. Tindal CJ, who delivered the first of the two reasoned speeches, said (at 443):

> … we are asked to confine the rule to cases where the communications between husband and wife are of a confidential nature. But such a limitation of the rule would very often be extremely difficult of application; and would introduce a separate issue in each cause as to whether or not the communications between husband and wife were to be considered of a confidential character.

Maude J put the matter in the following way (at 445–446):

> The text-books generally give, as the reason for the rule as to excluding the testimony of husband or wife, the necessity of preserving the confidence of the conjugal relation; and that may be so. But *it by no means follows that the rule is co-extensive with the reason given in support of it*; and indeed it would be very inconvenient if it were so; as the *question would frequently be raised as to whether or not some particular communication or fact occurring between husband and wife was of a confidential character. … And so the policy of the law (in order to ensure conjugal confidence) has laid down a definite rule, that, in no*

Version No 1: 27 Oct 2020 (22:40 hrs)

> *case, shall husband wife be allowed to give evidence for or against each other.* That rule extends to this case; for, though the husband is dead, the reason for the rule applies as strongly as if he were alive. *It would just as much embarrass married persons if they knew their communications might be divulged after the death of either party.* … [emphasis added]

33 Although this was a case about incompetency rather than privilege, I think that the points made are instructive. The test which Mr Shankar urges me to apply – whether the communications would have taken place "but for the existence of the marital relation between the husband and wife – is simple to state but almost impossible to apply. The fact that two parties are married will have a significant impact not just on *what* they say to each other, but *when* and *how* they say what they do. As Mr Lau argued, a director speaking to his/her spouse on a matter of business might be more frank than he/she would when speaking to a director to whom he/she was not married. The short point is that a court asking the question, "would this have been said but for the fact that the parties were married" can do little better than to guess. It is also important to remember that marital communications privilege can be invoked on the stand where quick decisions on whether it applies will have to be made in the course of the giving of evidence. The difficulty inherent in determining whether something is of a confidential nature, coupled with the fact that an inquiry into the matter would tend to "give rise to endless embarrassment and distrust", which is precisely the thing that the privilege was supposed to prevent, are powerful reasons for Parliament to favour a bright line rule in favour of preventing the disclosure of *all* marital communications.

Summary on the ambit of the privilege

34 In summary, while one might doubt the rationale of marital communications privilege or question the premises upon which it rests, it seems to me to be clear that as it stands, s 124 embraces *all* communications, ranging

Version No 1: 27 Oct 2020 (22:40 hrs)

from the most quotidian of daily banalities to the deepest intimacies, and must include matters relating to the ordinary business affairs of the spouses. For these reasons, I hold that the communications passing between Mr and Mrs Murjani in connection with the affairs of Wellness are privileged.

35 During the hearing, Mr Shankar argued that the application of marital communications privilege in commercial contexts would give rise to "absurdity and abuse", as it would mean that communications between directors of family-owned companies (whose boards are frequently made up of spouses) would always be protected from disclosure, leaving their opponents in litigation at a serious disadvantage. There is some force to this argument, but I consider that the unfairness which he complains of is no more than the unfairness which accompanies the exercise of any privilege, which always entails the postponement of the law's interest in accuracy in adjudication to the special interest it has in the preservation of a particular interest or relationship (see the 1852 Commissioners' Report, cited at [18] above). Whether this trade-off ought to be made is eminently a question of policy and the balance has already been struck by Parliament in favour of the privilege when it passed s 124. If reform is to come, it must come from Parliament. (In this regard, I note that marital communications privilege has been statutorily abrogated in the UK in both the civil and criminal contexts (see s 16(3) of the Civil Evidence Act 1968 (c 64) (UK) and s 80(9) of the Police and Criminal Evidence Act 1984 (c 60) (UK).)

Can EQ Capital obtain the communications from Wellness?

36 I turn to consider whether EQ Capital would be entitled to have discovery of correspondence exchanged between Mr and Mrs Murjani on their company email accounts from Wellness, even though it cannot get discovery of them from Mr and Mrs Murjani directly. For present purposes, I am prepared to

Version No 1: 27 Oct 2020 (22:40 hrs)

assume – as the parties did when they argued this before me – that these documents are properly discoverable (that is to say, the requirements under O 24 r 5 of the Rules have been satisfied: see [46] below) and that the only issue before me is a question of principle relating to the law of privilege. I will also assume that the emails came into the possession of Wellness not by design, but because a copy of all emails are automatically retained in Wellness's servers when they are sent, where they still remain (it seemed to me that this was the shared but unarticulated factual premise of all of the argument presented).

37 The starting point of the inquiry must be the words of the statute. As explained in *Lim Lye Hock*, s 124 comprises two limbs. Under the first limb, persons are *not compellable* to disclose any communication made to them by their spouses during marriage (a "marital communication"). Under the second limb, persons are *enjoined from* revealing any marital communication without the consent of their spouses save in two types of proceedings – (a) suits between married persons and (b) criminal proceedings in which a person is being prosecuted for a crime committed against his/her spouse. On a plain reading, s 124 only covers the parties to the marriage and does not apply to cases in which a *third party* is attempting to resist the disclosure of privileged marital communications. Thus, the question is whether there is a common law rule that would assist Wellness. In my view, there is.

Privilege, copies, and third parties

38 In Paul Matthews & Hodge M Malek QC, *Disclosure* (Sweet & Maxwell: 2012, 4th Ed), the following principle was stated (at para 11.34):

> A copy made of a document already privileged in the hands of one party… for handling over to another party with no intention of waiving privilege as against other parties is privileged in that second party's hands and that second party may himself assert the privilege…

Version No 1: 27 Oct 2020 (22:40 hrs)

39 This proposition of law was recently endorsed by the Singapore High Court in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2017] SGHC 140 ("*Lippo*"). In that case, the plaintiff brought suit against eight parties. Following negotiations, it settled its claims against the second and third defendants. Pursuant to the terms of the settlement agreement, the second defendant deposed to an affidavit in which he detailed the first defendant's involvement in the alleged wrongdoing committed against the plaintiff and extended a copy to the plaintiff. The first defendant sought discovery of the affidavit from the plaintiff, who resisted production on the ground that the affidavit was privileged. The first defendant countered with the argument that the plaintiff had no standing to invoke litigation privilege because it was not the creator of the document. Aedit Abdullah JC upheld the plaintiff's claim to privilege, making the following three important points:

(a) There was a distinction between the voluntary disclosure of a document (which might implicate the doctrine of waiver) and the making of a copy, which did not have the effect of removing the privilege which subsisted therein (at [92]).

(b) Even if the plaintiff were not, on orthodox principles, entitled to assert privilege over the draft affidavit, the law should develop to allow this to be done, for such a development would be congruent with the reality of litigation privilege in a multi-party context, where a plaintiff might lawfully elect to settle his case with one or more of the defendants in order to focus his energies on those who remained (at [84] and [91]).

(c) It would "make a mockery" of litigation privilege if the first defendant were to be able to get from the plaintiff what he would not be able to obtain from the first and second defendants (at [92]).

Version No 1: 27 Oct 2020 (22:40 hrs)

40 Even though *Lippo* was a case about litigation privilege, I consider that the principles enunciated about the subsistence of privilege in copy documents are of general application. On the present facts, the critical point is that the putatively privileged documents in Wellness's hands are not *originals*, but *copies* which are automatically generated each time an email is sent. It is clear that Mr and Mrs Murjani did not intend that their use of the company email system would amount in any way to a waiver of privilege nor, do I think, can there can be any argument that this constituted an implied waiver of privilege as against EQ Capital. This is precisely the sort of case, it seems to me, where a third party ought to be able to stand in the shoes of the privilege-holder to refuse disclosure. If it were otherwise, not only marital communications privilege, but all forms of privilege would be emptied of any content, for parties would be able to obtain copies of privileged correspondence by seeking discovery from the operators of email servers instead of the parties themselves. In some ways, the present case presents a uniquely modern problem, which has only arisen because technology has changed the paradigm of communications in ways that challenge established legal doctrines. I would therefore venture to suggest that even if there were no rule which currently permitted Wellness to refuse disclosure, this is precisely the sort of case where the law should develop to meet the demands of the modern age (see, generally, the decisions of the Singapore High Court in *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 ("*Wee Shuo Woon*") at [56] and *Lippo* at [84]).

41 I consider that the common law principle on privilege in copies set out above is consonant with the rationale underlying marital communications privilege. It is the policy of the law, as embodied in s 124, that marital communications are to be protected in order that the relationship of confidence between husband and wife may be preserved. It is perfectly consistent with this

Version No 1: 27 Oct 2020 (22:40 hrs)

for the law to allow third parties into whose hands copies of such privileged communications have come in circumstances not importing any waiver of privilege to resist the compulsory disclosure of these privileged communications. This is analogous to the way the common law has extended the doctrine of without prejudice privilege beyond the strict confines of s 23 of the EA (which only applies to the parties to the action) by enjoining third parties from adducing without prejudice material in proceedings involving the parties to the settlement (see the decision of the Singapore Court of Appeal in *Mariwu Industrial Co (S) Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 809 at [24]–[28]).

Privilege and admissibility

42 Before I leave this section, I will deal briefly with Mr Shankar's submission. During the hearing, Mr Shankar pointed me to a passage in B M Prasad and Manish Mohan, *Ratanlal & Dhirajlal's The Law of Evidence* (LexisNexis, 25th Ed, 2013) ("*Ratanlal*") where the authors wrote that (at 693):

> A document, even though it contains a communication from a husband to a wife or *vice versa*, in the hands of third persons, is admissible in evidence; for, in producing it, there is no compulsion on or permission to the wife or husband to disclose any communication. The section [that is, s 122 of the Indian EA 1872] protects the individuals, and not the communications if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made.

43 Relying on this, he submitted that s 124 could have no application here because its object was "the protection of the spouse and not the protection of the document" and therefore does not apply where discovery was not being sought from Mr and Mrs Murjani, but against Wellness. I have no quarrel with the proposition that privilege protects persons and not communications, but I do not think, with respect, that that is quite the point here.

Version No 1: 27 Oct 2020 (22:40 hrs)

44 As explained in *Wee Shuo Woon* at [19], a "privilege" is a *right* vested in a *person* to resist the compulsory disclosure of information while "admissibility" relates to a quality of *evidence*, namely, whether it may be received by the court as proof of certain facts. What this means is that a privileged document is admissible in evidence so long as the production of the document is not contingent on any compulsion on part of the holder of the privilege. For instance, in *Queen-Empress v Donoghue* (1898) 22 Mad 1, the court held that a letter sent by the first defendant to his wife which had been obtained by the police during a search of the premises was admissible in evidence (see also, *Ponnan (SC)*). In this sense, I agree with Mr Shankar that marital communications privilege, like *all* forms of privilege, is "testimonial" in nature – that is, it protects persons from being compelled to disclose information, but does not say anything about whether certain documents are admissible in evidence. However, this only goes so far as to show that *if* EQ Capital currently had copies of the correspondence in its possession, it would be entitled to admit them. At present, the correspondence between Mr and Mrs Murjani is not yet in the hands of EQ Capital. Instead, it is seeking discovery of them from Wellness in order that it might, at some future date, seek to admit it into evidence. The effect of my holding is that EQ Capital cannot do so.

My decision on the requested documents

45 Now that I have dealt with the issue of marital communications privilege, I turn to the application proper. In prayer 1, EQ Capital seeks an order that the Defendants file and serve a list accompanied by an affidavit stating whether the requested documents are in their possession, custody or power and if not, what has become of the documents. In prayer 2, it seeks an order that the Defendants provide copies of all the requested documents. Even though I have thus far referred to the present application as one for "specific discovery", it is,

Version No 1: 27 Oct 2020 (22:40 hrs)

to be more precise, an application for specific discovery *and* production for inspection. Each is governed by a different set of legal principles. I will provide a brief outline of the applicable law before turning to the various requests.

The law in outline

46 What is commonly referred to as an order for "specific discovery" is, to use the language of O 24 r 5(1) of the Rules, an order requiring a party to "make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it". The principles which govern such an application may be summarised as follows:

(a) The court's *jurisdiction* to grant an order for specific discovery is enlivened when (i) there is sufficient evidence to show that the requested documents are in the possession, custody or power of the requested party and (ii) the requested documents are relevant: see decision of the Singapore High Court in *The Management Corporation Strata Title Plan No 689 v DTZ Debenham Tie Leung (SEA) Pte Ltd and another* [2008] SGHC 98 ("*DTZ Debenham*") at [29] and [30].

(b) A deposition in an affidavit to the effect that the requested documents are in the possession, custody or power of the requested party is normally sufficient to constitute "sufficient evidence" of the same: see *DTZ Debenham* at [30].

(c) The "relevance" of a document must be determined by reference to the pleaded cases of the parties (see the decision of the Singapore High Court in *Dante Yap Go v Bank Austria Creditanstalt AG* [2007]

Version No 1: 27 Oct 2020 (22:40 hrs)

SGHC 69 ("*Dante Yap Go*") at [20]) and can take one of two forms:

(i) A document is directly relevant if it is one on which the party relies or will rely; where it could adversely affect his own or another party's case; or where it supports another party's case: see O 24 rr 5(3)(*a*) and (*b*) of the Rules and *Dante Yap Go* at [18].

(ii) A document is indirectly relevant if may lead the applicant to a "train of inquiry resulting in his obtaining information which may" adversely affect his or another party's case or which may support another party's case: see O 24 r 5(3)(c) of the Rules and *Dante Go Yap* at [29].

(d) If discovery is sought of a *class* of documents rather than a specific document, relevance must be shown in relation to the entire class described as a class, and not only some parts of the class (see the decision of the Singapore High Court in *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Polimet Pte Ltd and others* [2016] 1 SLR 1382 at [24]).

(e) Even after the court's jurisdiction has been engaged, the court still retains a *discretion* to decide whether or not to make the order for specific discovery. A court may refuse to give the order or make it only in part if it is satisfied that "discovery is not necessary either for disposing fairly of the cause or matter or for saving costs": see O 24 r 7 of the Rules and the decision of the Singapore High Court in *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR(R) 39 ("*Bayerische* ") at [38]).

47 Once an order for specific discovery has been given, the applicant may

Version No 1: 27 Oct 2020 (22:40 hrs)

apply for an order under O 24 r 11(2) of the Rules for the requested party to produce the documents for inspection. In order for such an order to be granted, the following conditions must be satisfied: (a) discovery must have been given of these documents; (b) there must be sufficient evidence that the requested documents are in the possession, custody or power of the requested party; and (c) production must be "necessary either for disposing fairly of the cause or matter or for saving costs": see O 24 rr 11(2), 11(3), and 13(1) of the Rules.

48 The principles which I have set out above are well settled. However, there were two issues of law which divided the parties during the hearing. The first concerns the jurisdictional preconditions for the grant of an order for specific discovery. The second concerns the question of who bears the burden of proving the element of "necessity". I will take each in turn.

Must it be shown that the requested documents exist but have not been disclosed?

49 In the English Court of Appeal decision of *Berkeley Administration Inc and others v McClelland and others* [1990 FSR 381 ("*Berkeley*"), Mustill LJ (as he then was) said that the court has no jurisdiction to make an order for specific discovery under O 24 r 7 of the Rules of the Supreme Court 1965 (SI 1965/1776) (UK) ("UK RSC 1965") unless "there is sufficient evidence that the documents exist which the other party has not disclosed" (at 382). Citing this, Mr Lau argued that on top of the two requirements which I have set out at [46(a)] above (namely, the requested documents must be shown to be in the possession, custody or power of the requested party and are relevant to the action), it must *additionally* be shown that there are documents which have not been disclosed in general discovery before the court has *jurisdiction* to make an order for specific discovery. With respect, I do not agree. In my view, while it is a requirement that there must be sufficient evidence that the documents exist (this

Version No 1: 27 Oct 2020 (22:40 hrs)

is implicit in the requirement that it must be shown that the requested documents are in the possession, custody or power of the requested party – after all, if the applicant does not adduce sufficient evidence that the documents exist, he cannot show that they are in the possession, custody or power of the requested party: see [46(a)] above), there is no requirement that it be shown that the requested documents have not yet been disclosed.

50 Under O 24 r 2(1) UK RSC 1965, all documents "relating to any matter in question between [the parties] in the action" was discoverable. This was a test of relevance that applied irrespective of whether discovery took place under O 24 r 1 of the UK RSC 1965 (which governed the process of mutual discovery) or pursuant to an application for specific discovery under O 24 r 7 of the same. When viewed in this light, one can well understand why the English position was that an applicant must put forward a "*prima facie* case for thinking that relevant documents are being suppressed or withheld by the other side" in order to obtain an order for specific discovery (see the decision of the English High Court in *Coni v Robertson* [1969] 1 WLR 1007 at 1015D). The object of this requirement was prevent parties from abusing the specific discovery process by applying for orders which are duplicative and vexatious.

51 However, the position in Singapore is different. Following amendments made to the Rules in 1996, the tests of relevance under O 24 r 1 and O 24 r 5 of the Rules (which govern the processes of general and specific discovery respectively) have diverged. Pertinently, indirectly relevant documents may now only be obtained in an application for specific discovery, and are no longer discoverable under general discovery. Given this, it cannot be the case that the court's jurisdiction to order specific discovery is only engaged where there is evidence that there are documents which are being suppressed or withheld (or have otherwise not been disclosed) because indirectly relevant documents are

Version No 1: 27 Oct 2020 (22:40 hrs)

not discoverable in general discovery. It is for this reason that while it is still the law that an applicant seeking a further and better list under O 24 r 1 (5) of the Rules "must specify which documents were clearly omitted" (see the decision of the Singapore High Court decision in *Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another v Low Hua Kin alias Loo Wah Kin* [1996] SGHC 195) at [11]), there does not appear to be any equivalent statement of principle which applies to applications for specific discovery.

52 It is for this reason that I agree with Mr Shankar that Mustill LJ's dictum does not fully represent the position in Singapore. It bears repeating that while the old English cases on discovery are still useful, they must be treated with some caution because of the differences in the wording of the provisions in question (see *DTZ Debenham* at [29]). At the end of the day, the court's jurisdiction (in the sense of its *authority*) to make an order for specific discovery must be governed by the express words O 24 r 5, and it is nowhere stated there that the applicant must show that the requested documents have not already been disclosed in general discovery before a court may make an order for specific discovery. This stands in contrast with the other two jurisdictional preconditions which I mentioned at [46(a)] above, both of which arise out of the plain words of O 24 r 5(3) of the Rules (see *DTZ Debenham* at [29]). That being said, it is always open for the court – in the exercise of its *discretion* – to refuse a request for specific discovery on the basis that it is duplicative and/or superfluous (for instance, if it is clear that the documents have already been disclosed or it is clear that the documents do not exist). I will say more of this later.

Who bears the burden of proving necessity?

53 The second issue concerns the question of who bears the burden of proving the element of "necessity". On this, I think it is vital to distinguish

Version No 1: 27 Oct 2020 (22:40 hrs)

between applications for specific discovery and applications for production for inspection. Where the application is one for specific discovery, the burden rests on the party resisting discovery (that is, the *requested party*) to show that disclosure is *not necessary* (see the decision of the Singapore High Court in *UCMI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 ("*UCMI*") at [79]). Where the application is one for production for inspection, the burden rests on the *applicant* to show that it *is necessary* that the requested documents be produced (see the decision of the Singapore High Court in *Alliance Management SA v Pendleton Lane P and another and another suit* [2007] 4 SLR(R) 343 ("*Alliance Management*") at [19]. This distinction emerges from the language used in the Rules. O 24 r 7 of the Rules states that a court *may refuse* an application for specific discovery if it is of the view "of the opinion that discovery is *not* necessary" whereas O 24 r 13 of the Rules states that a court shall not make an order for production *unless* it is "of the opinion that the order *is* necessary" [emphases added].

54 As Sundaresh Menon JC (as he then was) observed, there is a subtle but important difference between being satisfied that discovery is "not necessary" and being satisfied that production "is necessary" (see *UCMI* at [79]). The rationale for this distinction was lucidly explained by the English Court of Appeal in *Dolling-Baker v Merrett and another* [1990] 1 WLR 1205 in the following terms (at 1209E–G *per* Parker LJ):

> … If one is merely at the stage of discovery, it does no harm in most cases for the party against whom discovery is sought merely to list his documents. That discloses that he has them or has power over them. But he can object to produce them on the ground of privilege or, indeed, on any other ground. At that stage not very much has occurred except that the applying party will be enabled to know what documents the objecting party has, and it is right that the burden should be upon the objector in such a case. When, however, one gets to the stage of production and the document is to be produced to the court

Version No 1: 27 Oct 2020 (22:40 hrs)

> or the other side, the position is different, and it should be, and the rules appear to me to state with complete clarity that it is for the party seeking production to satisfy the court that such production is necessary for the purposes specified in rule 13(1), namely, for disposing fairly of the cause or matter or for saving costs.

55 This is not mere pedantry, for there may be cases where a court might consider that discovery of a document should be given in order that it may be placed on record that these documents exist or once existed but decide that production should not be ordered, because it would be prohibitively expensive (see *Alliance Management* at [18] and [19]). That being said, whether the application is one for discovery or production, the test for necessity is the same: an order is only necessary if it is "necessary for disposing fairly of the proceedings or for saving costs" (see *Bayerische* at [37]).

Categories 1–4, and 6

56 Now that I have dealt with the law, I will turn to the various requests. Categories 1–4 relate to the following classes of documents:

> 1. All notices and minutes of [AGMs] of [Wellness] from 15 October 2010 to date.
>
> 2. All annual audited accounts of Wellness from 15 October 2010 to date.
>
> 3. All financial statements and auditors' reports of Wellness from 15 October 2010 to date.
>
> 4. All annual returns of Wellness for the financial years ending 31 March 2011 to date.

57 It will be recalled that the first of the four principal complaints brought by EQ Capital is that the Defendants had wrongfully caused Wellness to fail to convene any AGMs, prepare and file any audited accounts, and lay these accounts before its shareholders, and file annual returns with the Registrar of Companies (see [8(a)] above). In order for the court to dispose of this issue, it

Version No 1: 27 Oct 2020 (22:40 hrs)

has to consider at least three questions. First, whether Wellness had the duties which the EQ Capital says it has; secondly, whether Wellness had failed to discharge these duties; and thirdly, whether the Defendants were responsible for the default. The documents sought in categories 1–4 are plainly relevant to the second of these questions and I am satisfied that their production is necessary for the fair disposal of the action.

58 Mr Lau has attempted to resist discovery on the basis that "[t]he question of whether meetings had been held, or whether the various financial documents had been prepared or provided to the Plaintiff is not in dispute". However, the trouble with this argument is that it is simply not clear from the pleadings that this is so. At para 51 of the Defence, all that is said is that "[p]aragraphs 25 to 27 of the SOC [which deal with the first principal complaint] are denied. [Dr Finian Tan] was also a director of [Wellness]". In the response affidavit filed by Mr Murjani on behalf of the Defendants ("the Defendants' Response Affidavit"), all Mr Murjani says is that he and Mrs Murjani did not cause Wellness to breach any of its obligations. However, it is not explained whether this is because Wellness did in fact discharge its obligations or whether Wellness's shortcomings in this respect are not attributable to their default. Put simply, the issue of whether the AGMs had been convened or the returns had been filed is still at large. The Defendants could easily have put the matter beyond any doubt by pleading that they do not deny that Wellness did not in fact file these returns or convene these meetings and, but they elected not to do so, and I am bound to decide this application on the basis of the pleadings as they stand. For the aforesaid reasons, I am satisfied that discovery and production of categories 1–4 should be given.

59 Category 6 also relates to the first principal complaint. It is a request for "all Documents relating to and/or in connection with the preparation and/or

Version No 1: 27 Oct 2020 (22:40 hrs)

finalisation of Wellness's accounts." Mr Shankar explained that this request arises from para 52 of the Defence, where the Defendants had pleaded that the audited accounts for Wellness for FY 2011 and FY 2012 were delayed because Mr Ron Sim / OSIM had "deliberately delayed" the finalisation of TWG Tea's audited accounts for FY 2011 (see [9(a)] above). During the hearing, Mr Shankar confirmed that even though category 6 was phrased broadly, he was only seeking discovery of documents relating to the finalisation of Wellness's audited accounts for FY 2011 and 2012. As against this, Mr Lau argued that the request should be refused as category 6 was too broadly framed and that it was "oppressive" to expect the Defendants to "trawl through its entire cupboards" for documents which were only of "vestigial relevance".

60 As a starting point, I do not agree that the documents relating to the *preparation* of the accounts are relevant, because it is plain that the only issue in contention is the *finalisation* of the accounts. However, in the light of the position taken by the Defendants, one of the questions that will have to be considered at trial is why the audited accounts for FY 2011 and 2012 were not *finalised*. Far from being only of "vestigial relevance", I consider that documents in category 6 (particularly the correspondence exchanged with Wellness's auditors) are in fact highly probative of the facts in issue and ought to be disclosed and produced. In the absence of an explanation in the Defendants' Response Affidavit for why this is the case, I am unable to agree that complying with this request would be "oppressive". Subject to the proviso that the documents should relate only to (a) FY 2011 and 2012 and (b) the finalisation and not the preparation of the accounts, I order the discovery and production of the documents in category 6.

Categories 5, 7, and 9

Version No 1: 27 Oct 2020 (22:40 hrs)

61 Categories 5, 7, and 9 are requests for "all documents" which support three specific allegations in the Defence (one for each category). I have grouped these requests together not because they relate to the same subject matter, but because of the way they were framed. It suffices to give one example. Category 5, for instance, is a request for:

> All Documents in relation to and/or in connection with and/or in support of the allegation that "*Ron Sim / OSIM had deliberately delayed the finalisation of the audited accounts for TWG Tea for the financial year ended 31 March 2011*". …
>
> [italics in original; footnotes omitted]

62 While it is impossible to be prescriptive, I would venture to suggest that it cannot ever be proper to frame a request for specific discovery in this way, namely, by quoting an averment in a pleading and asking for *all documents* connected with it. There are two problems with such an approach. The first is that it almost inevitably falls foul of the rule that relevance must be established in relation to the class as a whole (see [46(d)] above). As presently framed, the requests in question include within their fold a considerable number of documents which are irrelevant or whose probative value is so slight that their production will not be necessary for determining the issue to which it was said to be relevant to (see, *eg*, the decision of the English High Court in *Fuji Photo Film Co Ltd v Carr's Paper Ltd* [1989] RPC 713 where a similarly wide request was rejected). The compound expression "in relation to and / or in connection with and / or in support of" casts a net which is much wider than that permitted by the tests for relevance set out in the Rules. If the issue is that the classes cannot be defined with any greater level of specificity because the averment itself is vague and nebulous, then the proper course would be to seek particulars before discovery. Without specificity, there cannot be specific discovery.

Version No 1: 27 Oct 2020 (22:40 hrs)

63 The second problem is that such an approach almost inevitably results in the making of a superfluous order. The point is this. All parties are already under an automatic and continuing obligation to disclose all documents which are directly relevant to their pleadings. The Defendants have purported to comply by filing a list of documents verified by an affidavit saying that it has done as it was obligated to. At this interlocutory stage, this verified list is conclusive (see *Oversea-Chinese Banking Corp Ltd v Wright Norman and others* [1989] 1 SLR(R) 551 ("*Wright Norman*") at [20]). There are two qualifications to this. The first is that the court still retains the discretion to make an order for specific discovery despite which is said on affidavit, but the authorities suggest that this will only be done where there is a "reasonable suspicion" that there are other directly relevant documents that have not been disclosed (see *Soh Lup Chee and others v Seow Boon Cheng and another* [2002] 1 SLR(R) 604). The second qualification is that specific discovery can be sought of documents which are *indirectly* relevant. However, in order to get an order for the discovery of indirectly relevant documents, an applicant must show *in what way* the indirectly relevant documents it seeks will lead to the discovery of other directly relevant documents (see the decision of the Singapore Court of Appeal in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2002] 2 SLR(R) 465 at [35] and that of the Singapore High Court in *Surface Stone Pte Ltd v Tay Seng Leon and another* [2011] SGHC 223 at [10(a)]).

64 Presently, there is nothing in the material before me which either raises a suspicion that there are further directly documents which have not been disclosed or suggests that disclosure of the requested documents will lead to the discovery of other directly relevant documents. Instead, the constant refrain in the supporting affidavit is that the *Defendants'* have not denied that the requested documents exist or that they are in their possession, custody or power.

Version No 1: 27 Oct 2020 (22:40 hrs)

With respect, this turns the matter on its head. This is EQ Capital's application, and if it wishes to seek the discovery of further documents despite what has been said on affidavit then it bears the burden of making good its case for such an order. As matters stand, the overall impression that one gets is that EQ Capital is trying to raid the Defendants' cupboards in the hope of stumbling upon something of use. This practice was deprecated by in *Wright Norman*, and is not a proper use of the specific discovery process. I consider that this is a case where I should exercise my discretion to refuse the order for specific discovery.

65 I will, however, allow partial discovery of category 9, which concerns the Plaintiff's complaint is that the Defendants had exposed Wellness to an unnecessary dilution of its shareholding in TWG Tea by failing to subscribe to the Rights Issue (see [8(b)(ii)] above). In their Defence, the Defendants have pleaded, among other things, that Wellness did not subscribe to the Rights Issue because it did not have the funds to do so (see [9(c)] above). To investigate this claim, EQ Capital has sought discovery of Wellness's bank statements, corporate list of assets, and any loan agreements. I agree with Mr Shankar that these documents are relevant and that their production is necessary for a fair trial, since they will provide the most direct evidence of the truth of the Defendants' assertions. I also agree that the documents, being ones which are generated in the ordinary course of business, must be in the possession, custody or power of the Defendants. I therefore order discovery of Wellness's bank statements and corporate list of assets for the year 2013 (when the Rights Issue took place) as well as all loan and/or facility agreements which it had entered into and which were current at the time of the Rights Issue.

Category 8

66 Category 8 relates to "[a]ll Documents relating to and/or in connection

Version No 1: 27 Oct 2020 (22:40 hrs)

with Wellness's decision not to subscribe to the TWG Tea Rights Issue, including but not limited to" internal memoranda, minutes of meetings, correspondence, as well as resolutions passed on the subject. Mr Shankar contended that it *must* be the case that there were internal documents and correspondence relating to the decision not to subscribe to the Rights Issue but noteed that none had been were disclosed. He submitted that the requested documents are plainly relevant and should be produced. In particular, he contended that these documents would probative of whether Mr and Mrs Murjani honestly and reasonably believed that it would be in Wellness's best interests not to subscribe to the Rights Issue (see [9(c)] above). I agree.

67 By pleading that Mr and Mrs Murjani ought fairly to be excused from any liability they might have incurred in relation to the Rights Issue because they had acted honestly and reasonably throughout (see [9(c)] above), the Defendants had placed Mr and Mrs Murjani's state of mind at the time of the Rights Issue directly in issue. In this sense, this category stands on a different footing from the rest, because what is contemplated here is not an inquiry into an objective fact (such as whether the accounts had been delayed) but into the subjective intentions of Mr and Mrs Murjani at the material time. In order to investigate this, all the documents relating to the decision not to subscribe to the Rights Issue (and, in particular, Wellness's *internal* documents in which they might have revealed their thoughts on the subject) are relevant and must necessarily be disclosed in order that a fair trial of this matter might be had. Contrary to what was submitted by Mr Lau, I do not consider this request to be "too broad". This is far from a case where the documents are only of trifling importance such that the cost of their provision far outweighs their probative value. On this basis, I allow the request for the documents in category 8.

Categories 10 and 11

Version No 1: 27 Oct 2020 (22:40 hrs)

68 Finally, I turn to categories 10 and 11, which are requests for:

> 10. All *documents and advices* relating to and/or in connection with *Wellness's decision to* ***commence and continue Suit 187 of 2014*** … and/or appeal to the Court of Appeal against Chua JC's decision dismissing Suit 187 …
>
> …
>
> 11. All Documents relating to and/or in connection with the loans provided by Sunbreeze amounting to S$3,100,000 *for the purpose of* ***paying the legal fees incurred*** *by Wellness in respect* of Suit 187 …
>
> [emphasis added in italics and bold italics]

69 I can deal quite briefly with category 10, for it is clear to me that it relates to documents which are protected by litigation privilege. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367, the Court of Appeal explained that there were two requirements that have to be met for litigation privilege to be claimed: (a) litigation must have been contemplated at the document was prepared or created and (b) the document must have been created for the dominant purpose of litigation (at [71] and [76]). I find, on the plain terms of the wording of the request, that the documents in category 10 *must* be protected by litigation privilege because they were created while litigation was in view and for the dominant purpose thereof. It is also well-settled (and Mr Shankar does not dispute this) that if a document is privileged in one action (in this case, Suit 187) then the party entitled to assert that privilege (Wellness and Mr Murjani) are entitled to assert the same privilege in a subsequent action in which the documents are relevant (see the decision of the English Court of Appeal in *The Aegis Blaze* [1986] 1 Lloyd's Rep 203 at 210).

70 During the hearing, Mr Shankar argued that litigation privilege cannot extend to all the documents in category 10 because the Defendants had – in the

Version No 1: 27 Oct 2020 (22:40 hrs)

part of the part of their response affidavit which dealt specifically with this category – *only* claimed privilege over "the advices given to [Mr Murjani] and/or [Welllness]". With respect, I must reject this submission. First, while it is true that the part of the Defendants' Response Affidavit which deals specifically with category 10 only makes reference to legal advice privilege, there is a general averment at the start of the affidavit that many of the requested documents "are subject to legal advice privilege *and* litigation privilege" [emphasis added]. Secondly, it was held in *Lippo* that privilege can be asserted as long "the circumstances manifest a clear invocation of that privilege", even if no supporting affidavit is filed (at [42]). It is clear to me that the Defendants do, and had always, taken the position that some of the documents are protected by litigation privilege – this much is clear from the correspondence leading up to the present application (see [10] above). I therefore hold that the entirety of category 10 is protected by legal professional privilege.

71 I turn now to category 11. Like category 10, this request relates to EQ Capital's fourth principal complaint in this suit, namely, that the Defendants had wrongfully exposed Wellness to liability by heedlessly causing it to commence Suit 187. Mr Shankar's short point on this was that the loan of US$3.1m extended by Mr Murjani to Wellness for the purposes of paying the legal fees incurred in the prosecution of Suit 187 is (notwithstanding that the loan came from a shareholder) a form of liability that should not have been incurred and all documents connected with the loan should thus be disclosed. The difficulty with this argument, however, is that EQ Capital's pleaded case is framed in somewhat narrower terms. At para 62 of the SOC, it is pleaded that:

> 62 *As a result of Chua JC's and the Court of Appeal's decisions in Suit 187 and Wellness's unsuccessful appeal* against Chua JC's decision dismissing Suit 187, *Wellness has been exposed, among other things, to the following liabilities*:
>
> (a) Chua JC ordered Wellness and Mr Murjani to pay the

Version No 1: 27 Oct 2020 (22:40 hrs)

> costs and disbursements of Suit 187 to the other defendants in Suit 187. The quantum of costs and disbursements which Wellness and Mr Murjani are required to pay has not been fixed as at the time of the filing of this claim; and
>
> (b) The Court of Appeal ordered Wellness to pay the sum of $85,000 in connection with Wellness's unsuccessful appeal against Chua JC's decision dismissing Suit 187. Wellness has paid that sum.

[emphasis added]

72 It is plain from the extract that the only liability which EQ Capital takes issue with in its pleadings is that which arose as a result of the *disposition* of Suit 187 and the appeal which arose therefrom. Precisely *how* EQ Capital went about funding the legal fees it incurred in the prosecution of Suit 187 is not an issue which arises from the pleadings and is therefore irrelevant. On this basis, I refuse the request for the documents in category 11.

Conclusion

73 In summary, I grant an order in the terms of prayers 1 and 2 of the present application save only that I order that (a) the Defendants shall have 21, and not 14, days to disclose and produce the documents and (b) the classes of documents which are covered by the order shall be limited to the following:

(a) The documents in categories 1–4, and 8.

(b) The documents in category 6, save only that I order that only documents which relate to (a) the accounts for FY 2011 and 2012 and (b) concern the *finalisation*, as opposed to the preparation, of the audited accounts need be disclosed and produced.

(c) Wellness's bank statements and corporate list of assets, for the year 2013 as well as all loan and/or facility agreements which it had

Version No 1: 27 Oct 2020 (22:40 hrs)

entered into and which were current at the time of the Rights Issue.

74 Given that I have only ordered discovery of about half of the requested documents, I consider that a fair order would be for each side to bear its own costs. EQ Capital shall have liberty to apply for further orders if necessary.

75 In closing, it remains only for me to thank Mr Shankar and Mr Lau for their extremely helpful and very fair submissions, which greatly assisted me in the preparation of this judgment.

Scott Tan
Assistant Registrar

Jaikanth Shankar, Tan Ruo Yu, and Serena Ng
(Drew & Napier LLC) for the plaintiff;
Koh Swee Yen, Lin Chunlong and Kenny Lau Hui Ming
(WongPartnership LLP) for the defendants.

Version No 1: 27 Oct 2020 (22:40 hrs)