IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 41

Originating Summons No 952 of 2016

Between

Asplenium Land Pte Ltd

… *Applicant*

And

(1) Lam Chye Shing
(2) Rider Levett Bucknall LLP
(3) RLB Consultancy Pte Ltd
(4) CKR Contract Services Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Legal Profession] — [Professional privileges] — [In-house legal counsel]
[Legal Profession] — [Professional privileges] — [Waiver]
[Legal Profession] — [Professional privileges] — [Injunctive relief]

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Asplenium Land Pte Ltd
v
Lam Chye Shing and others

[2019] SGHC 41

High Court — Originating Summons No 952 of 2016
12 January, 8 June, 12 June, 10 July 2017; 29 August 2017

22 February 2019

Pang Khang Chau JC:

Introduction

1 In High Court Originating Summons No 952 of 2016, Asplenium Land Pte Ltd ("Asplenium") applied for orders to:

(a) restrain the defendants in High Court Suit No 37 of 2015 ("Suit 37") from disclosing certain documents which Asplenium claimed to be legally privileged; and

(b) restrain the plaintiff in Suit 37 from receiving and/or using these documents.

2 Having heard the parties' submissions and observed the examination of key witnesses, I granted Asplenium's application. The plaintiff in Suit 37 has appealed, and I now provide my grounds of decision.

Background

Suit 37

3 The plaintiff in Suit 37 is CKR Contract Services Pte Ltd ("CKR"), who is the 4th respondent in this application.

4 The defendants in Suit 37 are Lam Chye Shing ("Lam"), Rider Levett Bucknall LLP ("Rider"), and RLB Consultancy Pte Ltd ("RLB") (collectively, "the RLB Defendants"), who are the 1st, 2nd, and 3rd respondents in this application respectively. Lam is a partner of Rider and a director of RLB.

5 Suit 37 concerns a contract ("the Contract") awarded in 2013 by Asplenium to CKR engaging the latter as the main contractor for a construction project ("the Project"). Lam was the designated quantity surveyor in the Contract, while Rider was engaged by Asplenium to provide quantity surveying and consulting services for the Project.

6 Subsequently, on 24 October 2014, Asplenium purported to terminate the Contract. It then engaged RLB to provide consultancy services for a tender process to engage a replacement contractor ("the Replacement Tender"). The replacement contract was awarded in November 2014 to a company which was not a party to this application or to Suit 37.

7 The dispute between Asplenium and CKR over the proper termination of the Contract has been submitted to arbitration.

8 Suit 37 similarly concerns the termination of the Contract and the conduct of the Replacement Tender. In that suit, CKR claims, amongst other

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things, that the RLB Defendants have been professionally negligent in the following two aspects:

(a) failing to exercise independent judgment and to properly conduct the Replacement Tender; and

(b) failing to exercise independent judgment and to properly calculate the relevant parts of the documents known as "Annex A" and "Revised Annex A" (collectively, "the Annexures"), which were being relied on by Asplenium in its arbitration dispute with CKR.

9 Asplenium is not a party to Suit 37.

CKR's application for specific discovery in Suit 37

10 On 18 March 2016, in Summons No 1311 of 2016, CKR applied for specific discovery in Suit 37 against the RLB Defendants for, among other things:

(a) documents and correspondence relating to Asplenium's instructions to the RLB Defendants regarding the conduct and/or supervision of the Replacement Tender; and

(b) documents and correspondence exchanged between Asplenium and the RLB Defendants relating to the provision of calculations used to prepare the Annexures.

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11 On 18 August 2016, CKR's application was allowed in part by an Assistant Registrar, pursuant to which the RLB Defendants filed a supplementary list of documents dated 13 September 2016 in Suit 37 ("the SLOD") which stated, in para 4, that:

> Asplenium Land Pte Ltd (the "Employer") asserts privilege over the documents listed at item numbers 3 and 4 of Schedule 1 Part 1 below.

12 It was the disclosure of these documents at items 3 and 4 of Part 1 of Schedule 1 of the SLOD that formed the subject matter of the present application. In particular, item 3 referred to e-mails between Sia Wee Long ("Sia"), Mark Hwang Chengsie ("Hwang"), and Lam from the period between 29 October 2014 and 8 October 2014 ("the Item 3 documents"), while item 4 referred to e-mails between Asplenium, WongPartnership LLP, and Lam relating to the preparation of the Annexures from the period between 10 October 2014 and 21 October 2014 ("the Item 4 documents").

13 The RLB Defendants subsequently clarified that the date ranges given in the SLOD were erroneous, and that the correct date ranges were *29 September 2014 to 8 October 2014* for the Item 3 documents, and *10 October 2014 to 31 October 2014* for the Item 4 documents.

The present application

14 On 19 September 2016, Asplenium filed the present application to restrain the parties in Suit 37 from disclosing and/or relying on the Item 3 documents and the Item 4 documents.

15 Before me, Asplenium explained that it had brought the present application in accordance with the directions and guidance given by Kan Ting

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Chiu J (as he then was) in *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR(R) 42. In that case, the applicant had intervened in a suit to which it was not a party for the purpose of applying for a declaration that an e-mail from the plaintiff's solicitors to the plaintiff was legally privileged and that the parties in the suit be restrained from using that e-mail in evidence. Kan J questioned the appropriateness of the intervention and directed the applicant to commence separate proceedings if it wished to raise these issues. Upon the applicant filing an originating summons for that purpose, Kan J, who also heard the application, declared that legal privilege attached to the e-mail and restrained its use in evidence by the parties to the suit. In the present case, no objections were raised by any party to the procedure adopted by Asplenium.

Overview of Asplenium's case

16 Asplenium asserted that the Item 3 documents concerned ongoing discussions on various matters relating to the Project as well as the termination of the Contract. It claimed that it was entitled to assert legal advice privilege under s 128A(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") in respect of these documents because they were communications between Sia, who was Asplenium's project manager for the Project, and Hwang, who was deemed to be Asplenium's in-house legal counsel for the purposes of s 128A(1), in the course of and for the purpose of Hwang's employment as such legal counsel. The fact that Lam was also copied in the e-mails did not preclude or waive such privilege.

17 As for the Item 4 documents, Asplenium explained that these were communications between Asplenium, Lam, and WongPartnership LLP relating to the preparation of the Annexures. According to Asplenium, the Annexures

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were a set of accounts that "basically represent[ed] the estimated amount of loss that [Asplenium] incurred and/or would incur arising from the termination as a result of [CKR's] breach at that time".[1] The Annexures were being relied on by Asplenium for its claim in arbitration against CKR for damages arising from the termination of CKR's engagement under the Contract (see [6] and [10(b)] above). In that context, Asplenium claimed in relation to the Item 4 documents that: (a) legal advice privilege attached as the documents contained legal advice from WongPartnership LLP regarding the collation of evidence for the evaluation and substantiation of Asplenium's claim against CKR; and (b) litigation privilege subsisted as the documents were created for the dominant purpose of contemplated litigation between it and CKR, at a time when there was a reasonable prospect of such litigation.

Overview of CKR's case

18 CKR's position on the Item 3 documents was that s 128A(1) of the EA did not apply because:

(a) Hwang was not a legal counsel of Asplenium for the purposes of s 128A(1) of the EA.

(b) Sia was not an employee of Asplenium and was not authorised to seek and receive legal advice on its behalf.

(c) In any event, privilege could not be asserted by Asplenium because Lam had been copied in the e-mails constituting the Item 3 documents even though he was not an employee of Asplenium, and it was he who was being asked in the specific discovery application to disclose the documents.

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[1] Asplenium's Submissions dated 10 January 2017 at para 46.

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19 As for the Item 4 documents, CKR argued that:

(a) Legal advice privilege did not subsist because Sia was not an employee of Asplenium authorised to seek or receive legal advice from WongPartnership LLP. Further, Lam was also not an employee of Asplenium.

(b) Litigation privilege did not subsist because the Item 4 documents concerned the Annexures, which were routine documents and were not made for the dominant purpose of litigation.

(c) In any event, legal advice privilege and/or litigation privilege were impliedly waived when Lam referred extensively to the Item 4 documents as an expert witness in a related High Court application in Originating Summons No 1025 of 2014 ("OS 1025"). OS 1025 was CKR's application for an interim injunction to restrain Asplenium from calling on a performance bond issued on behalf of CKR.

20 CKR further argued that Asplenium was, in any event, not entitled to the reliefs sought in the present application because, even though the title of Asplenium's originating summons stated that this application was brought pursuant to s 131 of the EA, s 131 was not applicable because it applied only to preclude compulsory disclosure of privileged documents by the client of the legal professional adviser concerned (in this case, Asplenium) and did not preclude compulsory disclosure by any third party from whom those documents may be sought (in this case, the RLB Defendants).

21 No request was made by CKR for the court to inspect either the Item 3 documents or the Item 4 documents, in order to determine their status as to privilege from such inspection. Nor was there any request by CKR for a

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redacted disclosure of the parts of the documents that did not contain privileged material.

The issues to be decided

22 In the light of the foregoing, there were two broad issues to be decided:

(a) whether legal advice privilege subsisted in the Item 3 documents; and

(b) whether legal advice privilege and/or litigation privilege subsisted in the Item 4 documents.

23 An overarching question applicable to both issues was whether the declaratory and injunctive reliefs sought by Asplenium could and should be granted. I will address this question below as part of the analysis on the two broad issues.

Whether legal advice privilege subsisted in the Item 3 documents

24 The broad issue of whether legal advice privilege subsisted in the Item 3 documents necessitated a determination of the following issues:

(a) whether Hwang was a legal counsel of Asplenium for the purposes of s 128A(1) of the EA;

(b) whether Sia was authorised to seek and receive legal advice from Hwang in relation to the Project; and

(c) whether Asplenium was precluded from asserting privilege over these documents because Lam had been copied in the relevant e-mails.

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25 Each of these issues in turn rested on the resolution of several sub-issues, which I will elaborate on as part of the analysis below.

Whether Hwang was a legal counsel of Asplenium for the purposes of s 128A(1) of the EA

The law

26 Section 128A of the EA was introduced in 2012 to extend the provisions in the EA on legal professional privilege to communications with in-house legal counsel. Prior to the enactment of s 128A, it was thought that legal professional privilege already applied at common law to in-house legal counsel (see *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at p 1129 (Hri Kumar Nair SC) and p 1146 (K Shanmugam SC, Minister for Law)). This view was subsequently confirmed by the Court of Appeal in *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 ("*ARX v CIT*").

27 Subject to various caveats in s 128A(2) of the EA, none of which were applicable in the present case, s 128A(1) of the EA provides as follows:

> (1) A legal counsel in an entity shall not at any time be permitted, except with the entity's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal counsel, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his employment as such legal counsel, or to disclose any legal advice given by him to the entity, or to any officer or employee of the entity, in the course and for the purpose of such employment.

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28 Section 128A is complemented by s 131 of the EA, and in particular s 131(2)(*b*) of the EA, which provides as follows:

> **Confidential communications with legal advisers**
>
> 131.—(1) No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.
>
> (2) In subsection (1) and section 129, "legal professional adviser" means —
>
> (*a*) an advocate or solicitor; or
>
> (*b*) in the case of any communication which has taken place between any officer or employee of an entity and a legal counsel employed, or deemed under section 128A(4) or (5) to be employed, by the entity in the course and for the purpose of seeking his legal advice as such legal counsel, that legal counsel.

29 The term "legal counsel" used in both s 128A(1) and s 131(2)(*b*) is defined in s 3(7) of the EA as:

> … a person (by whatever name called) who is an employee of an entity employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes.

30 Where a legal counsel is employed by one of a number of related corporations, s 128A(4) of the EA clarifies as follows:

> (4) Where a legal counsel is employed by one of a number of corporations that are related to each other under section 6 of the Companies Act (Cap. 50), subsection (1) shall apply in relation to the legal counsel and every corporation so related as if the legal counsel were also employed by each of the related corporations.

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31 The concept of "related corporations" referred to in s 128A(4) of the EA is defined in s 6 of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") as follows:

> Where a corporation —
>
> (*a*) is the holding company of another corporation;
>
> (*b*) is a subsidiary of another corporation; or
>
> (*c*) is a subsidiary of the holding company of another corporation,
>
> that first-mentioned corporation and that other corporation shall for the purposes of this Act be deemed to be related to each other.

32 Section 5(1) of the CA in turn defines the term "subsidiary" in the following manner:

> For the purposes of this Act, a corporation shall, subject to subsection (3), be deemed to be a subsidiary of another corporation, if —
>
> (*a*) that other corporation —
>
> (i) controls the composition of the board of directors of the first-mentioned corporation; or
>
> (ii) controls more than half of the voting power of the first-mentioned corporation; or
>
> (iii) [Deleted … wef 01/07/2015]
>
> (*b*) the first-mentioned corporation is a subsidiary of any corporation which is that other corporation's subsidiary.

The analysis

33 As mentioned above (at [18]), CKR's first argument was that Hwang was not a legal counsel of Asplenium for the purposes of s 128A of the EA at the material time. This raised two conceptually distinct sub-issues: (a) whether Hwang was a *legal counsel* within the meaning of that term in s 128A; and (b) whether it could be said that he was a legal counsel *of Asplenium*.

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34 The complication was that Hwang was in fact *not* an employee of Asplenium at the material time. Instead, when the Item 3 documents were communicated, Hwang was formally under the employment of Nuri Holdings (S) Pte Ltd ("Nuri"), which held approximately 46.46% of the shareholding of Tuan Sing Holdings Ltd ("Tuan Sing"). Tuan Sing was, in turn, the holding company of Asplenium. However, Hwang was also performing legal work for Tuan Sing for which Tuan Sing paid Nuri an amount roughly equivalent to half of Hwang's salary under a cost-sharing arrangement between Nuri and Tuan Sing. The following related points were not in dispute:

(a) Nuri and Tuan Sing were considered *related parties* under the applicable financial reporting standards, and were declared as such in Tuan Sing's audited financial statements. The relevant declaration read as follows:

> [Tuan Sing's] major shareholder is [Nuri], incorporated in Singapore. *Related companies* are the companies in which the shareholders of Nuri and their family members have a controlling interest in. Related parties include subsidiaries, associates, joint ventures, related companies, Nuri and directors of the Company and their associates.
>
> Included in amounts due to other related parties, trade and non-trade, are mainly balances with *related companies*. …
>
> [emphasis added]

(b) Notwithstanding the above, Nuri and Tuan Sing were not related corporations as defined in s 6 of the CA. The fact that Nuri held around 46.46% of the shares in Tuan Sing was insufficient to render Tuan Sing a subsidiary of Nuri such as to fall within the scope of s 6(*a*)(ii) of the CA. Nor did any other limb of s 6(1) apply for Tuan Sing and Nuri to be regarded as related corporations.[2]

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(c) In contrast, because Asplenium was a subsidiary of Tuan Sing, Tuan Sing and Asplenium were related corporations within the meaning of s 6 of the CA.

35 Accordingly, so long as Hwang could be regarded as a legal counsel employed by Tuan Sing at the material time, he would also be regarded as a "legal counsel" of Asplenium for the purposes of s 128A(1) of the EA by virtue of s 128A(4) of the EA read with s 6 of the CA.

36 With this in mind, we turn now to examine the two sub-issues.

(1) Whether Hwang was a legal counsel

37 As mentioned, the first sub-issue was whether Hwang was a legal counsel within the meaning of that term in s 128A of the EA.

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[2] CKR's Submissions dated 3 July 2017 at para 19.

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38 Prior to joining Nuri, Hwang had practised law for more than ten years, first in the Attorney-General's Chambers and then in a local law firm and finally in a foreign law firm. At the material time, Hwang's official designation in Nuri was "Director, Legal and Business Development". This connoted a dual role in legal matters and business development. Even though this was an originating summons, Hwang was cross-examined before me on CKR's application. His evidence was that:

(a) although he was first employed by Nuri in 2009 with a dual role in legal affairs and business development in mind, his latter role in business development dwindled after the first two years;

(b) in any event, his business development role was purely in relation to Nuri;

(c) his role at Tuan Sing was of a purely legal nature; and

(d) in particular, his role in relation to Asplenium and the Project was of a purely legal nature.

39 Hwang's evidence in this regard was not seriously challenged, and CKR did not press the point that Hwang was not, at the material time, a legal counsel as defined in s 3(7)(*a*) of the EA (see [29] above). In my view, CKR was right not to press the point, as s 3(7)(*a*) defined "legal counsel" as a person employed to undertake the provision of legal advice, *etc*, and not as a person employed *exclusively* to undertake the provision of legal advice, *etc*. Thus, in the absence of any contrary argument or evidence, I found that Hwang was a legal counsel as statutorily defined at the material time.

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40 Even though some questions regarding Hwang's business development role were put to Hwang during cross-examination, CKR did not seriously challenge the capacity in which Hwang received the Item 3 documents eventually. Hwang's own evidence was that the documents had been sent to him in his capacity as an in-house legal counsel to seek his advice, input, and opinion where necessary.[3] Accordingly, I also found that the Item 3 documents were communications made in the course of and for the purpose of Hwang's employment as legal counsel, rather than in any other capacity.

(2) Whether Hwang was employed by Tuan Sing and therefore deemed legal counsel of Asplenium

41 The more difficult question, however, was whether Hwang was a legal counsel of Tuan Sing. In particular, could Hwang be regarded as employed by Tuan Sing when he was already employed by Nuri? In this regard, Asplenium made two main submissions:

(a) Hwang was an employee of Tuan Sing by virtue of an arrangement under which Nuri seconded him to Tuan Sing in relation to approximately half of Hwang's working hours; and

(b) in any event, Hwang was an employee of Tuan Sing under the common law test of employment.

42 CKR's responses were:

(a) there was no evidence that Hwang had been seconded to or employed by Tuan Sing; and

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[3] Hwang's affidavit dated 19 September 2016 at para 74.

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(b) even if Hwang was seconded to Tuan Sing, Hwang was not Tuan Sing's employee within the meaning of s 128A of the EA.

I understood the thrust of CKR's submission at (b) to be that, even if I were to find that an employment relationship factually existed between Hwang and Tuan Sing, a purposive interpretation of s 128A should lead me to deny recognition of such a relationship for the purposes of s 128A.

43 For convenient reference, I set out the text of the specific statutory provision to be interpreted and applied, namely s 128A(4) of the EA:

> (4) Where a legal counsel is *employed* by one of a number of corporations that are related to each other under section 6 of the Companies Act (Cap. 50), subsection (1) shall apply in relation to the legal counsel and every corporation so related as if the legal counsel were also *employed* by each of the related corporations. [emphasis added]

44 As indicated by the italicised words, the dispute turned on how the term "employed" is to be interpreted and applied in the context of s 128A(4).

45 The term "employed" and its cognate expressions are not defined in either the EA or the Interpretation Act (Cap 1, 2002 Rev Ed). A perusal of the EA reveals that the term "employment" appears to have been used in different senses in different provisions. For example, s 128(1) of the EA refers to "communication made to him in the course and for the purpose of his *employment* as such advocate or solicitor" [emphasis added] while s 128(2) refers to "any fact observed by any advocate or solicitor in the course of his *employment* as such" [emphasis added]. In this context, the term "employment" in ss 128(1) and 128(2) clearly refers to the professional engagement of an advocate and solicitor under a contract for services as an independent

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contractor, and does not connote the existence of a contract for service in a master-servant or employer-employee relationship.

46 Section 128A also contains phrases which are practically identical to those quoted above. Section 128A(1) refers to "communication made to him in the course and for the purpose of his *employment* as such legal counsel" [emphasis added] while s 128A(2) refers to "any fact observed by any legal counsel in any entity in the course of his *employment* as such legal counsel" [emphasis added]. Despite the similarities in wording between these phrases and their counterparts in s 128, it is clear that the term "employment" in ss 128A(1) and 128A(2) does *not* refer to an engagement under a contract for services as an independent contractor, based on the relevant context which includes:

(a) the appearance of the phrase "*employee* of an entity employed to undertake the provision of legal advice or assistance" [emphasis added] in the definition of "legal counsel" in s 3(7) of the EA; and

(b) the fact that s 128A was enacted to provide for legal professional privilege of *in-house counsel*.

47 Given this context, it is clear that the term "employment" and its cognate expressions are used in s 128A to refer to a master-servant or employer-employee relationship. Therefore, the question arising from s 128A(4) in the present case is whether such a master-servant or employer-employee relationship existed between Hwang and Tuan Sing.

48 In relation to Asplenium's submission that "Hwang was an employee of Tuan Sing by virtue of an arrangement under which Nuri seconded him to Tuan Sing", Asplenium cited some cases where a seconded employee was recognised

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as the employee of the company to which he was seconded. The two Singapore cases cited were:

(a) *Kosui Singapore Pte Ltd v Kamigumi Singapore Pte Ltd and another* [2012] SGHC 43, where the High Court referred to a seconded employee as "an employee albeit on secondment" (at [31]); and

(b) *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR(R) 579, where the Court of Appeal found that the "true and effective" employer of the particular employees in question was the company to which they were seconded.

49 Asplenium also cited *FSBM CTech Sdn Bhd v Technitium Sdn Bhd* [2012] 9 MLJ 281, but I agreed with CKR that that case was not relevant as Asplenium had misread the facts of that case.

50 If Asplenium's submission was merely that a seconded employee *could* be regarded as an employee of the organisation to which he is seconded, I would consider that to be uncontroversial. However, insofar as Asplenium's submission was that it could establish the existence of an employment relationship between Hwang and Tuan Sing merely by demonstrating that a secondment arrangement existed between Nuri and Tuan Sing, I had difficulties with the submission.

51 First, unlike the case of public officers of the Singapore Legal Service seconded as legal advisers to statutory bodies, where express provision is made in s 3(7)(*b*)(ii) of the EA to include such seconded legal advisers within the scope of s 128A, no express provision had been made in the EA concerning the effect of the secondment of legal counsel between private sector organisations on the s 128A privilege. Secondly, the cases cited at [48] merely showed that a

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seconded employee *could in certain circumstances* be an employee of the company to which he or she is seconded. Those cases did not stand for the proposition that a seconded employee *would necessarily be* an employee of that company by mere virtue of the secondment without more. Those cases also did not provide guidance on when a seconded employee would be regarded as an employee of the company to which he is seconded. Thirdly, neither party had attempted to particularise a set of criteria for determining the existence of a secondment arrangement for the purpose of the present case. Without such a working set of criteria, any attempt to reason *directly* from the fact of secondment to the existence of an employment relationship would be akin to building on sand.

52 I was therefore of the view that, in the context of the present case, the label "secondment" is no more than a convenient short-hand for describing a situation where a company assigns its employee to another company for the purpose of working for and within the organisation of the latter company. In itself, it does not provide the answer to whether an employment relationship exists between the seconded employee and the company he is seconded to.

53 In the light of the foregoing, I will first examine the working arrangements between Hwang and Tuan Sing as a whole to determine whether an employment relationship existed between Hwang and Tuan. Thereafter, I will turn to CKR's submission concerning purposive interpretation (as alluded to at [42] above) and consider whether a purposive interpretation of s 128A requires the court to deny recognition to any employment relationship which may have existed between Hwang and Tuan Sing.

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(A) WHETHER AN EMPLOYER-EMPLOYEE RELATIONSHIP EXISTED BETWEEN HWANG AND TUAN SING

(I) TEST FOR EXISTENCE OF EMPLOYMENT RELATIONSHIP

54 In Ravi Chandran, *Employment Law in Singapore* (LexisNexis, 5th Ed, 2017) ("*Chandran on Employment*"), the learned author wrote (at para 1.29) under the heading "Who is an Employee?" that:

> 1.29 In common law at various points in time, different tests such as the 'control' test and the 'integration' test held sway, but the current position is that all the relevant factors have to be considered. Some relevant factors are listed below, though the list is not exhaustive. Neither can an exhaustive list ever be drawn. Further, it is not possible to pre-assign relative weights to each of these factors. It is also possible that the very same factors carry different weight in different circumstances. Hence, much depends on the actual facts and essentially the court has to embark on a balancing act. Before looking at some of the relevant factors, it must also be mentioned that due to a change in nature of the work relationship, it is possible for a worker to evolve from being an employee to not being one or vice versa, at some point in time. Further, it is possible that with respect to the same organisation, the worker may do work in two different capacities as an employee and as a non-employee, as for example, the situation where an editor of a newspaper who is not expected to do translations is paid separately to do those translations on some occasions. The burden of proof is likely to be on the person who is alleging that there is an employment relationship, though this could be reversed by statute.

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55 The learned author went on to identify no less than 17 non-exhaustive factors relevant to the identification of an employment relationship. Of these, the parties' submissions highlighted the following factors as relevant:[4]

(a) the extent of control exerted by the putative employer over the putative employee;

(b) the extent of integration by the putative employee into the enterprise of the employer;

(c) the remuneration of the putative employee;

(d) whether the putative employee has an obligation to work for one putative employer only;

(e) whether the putative employer provides tools, equipment and training to the putative employee;

(f) whether the putative employer is obliged to provide work, and the putative employee obliged to accept work; and

(g) whether the putative employer has the right to dismiss, suspend, or evaluate the putative employee.

Item (a) was highlighted by both Asplenium and CKR, while items (b) to (e) were highlighted by Asplenium only, and items (f) and (g) were highlighted by CKR only. I shall now sketch out the working arrangements between Hwang and Tuan Sing before turning to consider each of the foregoing factors.

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4 Asplenium's Submissions dated 3 July 2017 at paras 34-57; CKR's Submissions dated 3 July 2017 at para 15.

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(II) OVERVIEW OF WORKING ARRANGEMENTS

56 Hwang commenced his employment with Nuri in 2009. Clause 1 of Hwang's employment contract with Nuri provides:[5]

> **JOB DESCRIPTION**
>
> 1 You will be employed by our company as Director of Legal and Business Development from 3 August 2009. You will be reporting to the Board of Directors or their designated person/s.
>
> You shall, when requested by the Company, travel between or take up temporary residence in different cities for the purpose of performing duties assigned by the Company. *The Company reserves the right to transfer you to any company within the Group.*
>
> [emphasis added]

From day one, Hwang was expected to provide legal advice and assistance, not only to Nuri and its subsidiaries, but also to Tuan Sing and its subsidiaries. As previously noted (at [34(b)]), although Nuri owned 46.46% of Tuan Sing's shareholding, neither company is a subsidiary or holding company of the other. Nuri and Tuan Sing are each holding companies for separate groups of subsidiaries. Tuan Sing is a listed company while Nuri is not.

57 Nuri and Tuan Sing occupied separate office premises in the same building. Nuri's office was on the second floor while Tuan Sing's was on the third floor. Hwang's office was located within Tuan Sing's premises. Throughout his employment, Hwang was involved, on a daily basis, in providing legal advice to, as well as in reviewing and preparing documents for, Tuan Sing and its subsidiaries.[6]

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5 See Exhibit P1.

6 Hwang's affidavit dated 15 December 2016 at para 24.

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58 Hwang's salary and CPF were paid by Nuri. From July 2014 until Hwang's resignation in February 2017, Tuan Sing reimbursed Nuri, on a monthly basis, an amount equivalent to half of Hwang's salary. This cost-sharing arrangement was initiated by Nuri sometime in 2014, when Nuri indicated to Tuan Sing that, as the amount of work Hwang did for Tuan Sing had been increasing, it was not fair for Nuri to continue bearing the full burden of Hwang's salary.[7] Hwang was asked by Nuri to provide an estimate of the proportion of time he spent on Tuan Sing's work[8] and, pursuant to that estimate, Nuri and Tuan Sing agreed that Tuan Sing should pay for half of Hwang's salary.

(III) EXTENT OF CONTROL

59 The evidence showed that Tuan Sing would assign work directly to Hwang without need for clearance from Nuri. Nor was there evidence that Hwang had the discretion to decline assignments given to him by Tuan Sing. Hwang recounted a transaction in which he acted for Tuan Sing even though the counterparty was one of Nuri's subsidiaries. He took on the assignment from Tuan Sing without needing to seek permission from Nuri. All he did was to inform Nuri that Nuri should be separately represented on that transaction.[9] When it was suggested to Hwang in cross-examination that, in a situation like this, he had to take instructions from Nuri's management as to which side of the transaction he would act for, this suggestion was refuted by Hwang.[10] Instead, Hwang's evidence was that Nuri did not give him directions in relation to the work that he had done for Tuan Sing.[11] In the light of this, CKR's submission

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7 NE 12 June 2017 at p 29, lines 13 to 21; NE 12 June 2017 at p 21, line 12.

8 NE 12 June 2017 at p 20, line 25 to p 21, line 5.

9 NE 12 June 2017 at p 16, line 30 to p 17, line 8.

10 NE 12 June 2017 at p 17, lines 15 to 17.

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that the CEO of Nuri had the ultimate say over which entity Hwang was to advise[12] was not supported by the evidence.

60 CKR submitted that, in the specific context of a person allowing a third party to use the services of his employee, the courts will apply "a more stringent test" as to control to determine whether an employment relationship existed. In this regard, CKR cited the following passage from *Halsbury's Laws of Singapore* vol 9 (LexisNexis, 2017) ("*Halsbury*") at para 100.003:[13]

> In the instances where the services of an employee are hired out by his general employer to a third party, it is a question of fact as to who his employer is *for a particular purpose*. Unless the third party is vested with the *entire and absolute control* of such an employee by the general employer, who engages, pays and regularly employs and can alone dismiss him, the third party will not be regarded as his employer. [emphasis added]

61 The above language is taken from *Raghavan Pillai and another v Indufela Co and others* [1979–1980] SLR(R) 399 ("*Pillai*"), which is the first case cited in the footnote to the foregoing passage. *Pillai* concerned a crane driver who was hired out by his general employer to the main contractor of a particular project for the purpose of that project. The court said, at [31], that:

> It was further held in *Karuppan Bhoomidas*' case that partial control by the hirer is not enough and that entire and absolute control is necessary in order to transfer liability from the shoulders of the employer who engages, pays and regularly employs and can alone dismiss him, on to the shoulders of those who have hired the servant's services from his regular employers.

62 I have three observations to make in this regard:

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11 NE 12 June 2017 at p 18, lines 8 to 19.

12 CKR's Submission dated 3 July 2017 at para 32.

13 CKR's Submission dated 3 July 2017 at para 16.

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(a) The authorities cited by CKR at [60] show that an employee who is hired out could, if the relevant control test is met, be regarded as an employee of the hirer in respect of the specific task or project the employee was hired out for. By the same token, an employee on long-term secondment (not for the purpose of any specific task or project) could also be regarded as an employee of the company to which he is seconded if the relevant control test is met (see *Chandran on Employment* at para 1.78).

(b) If indeed a "more stringent test" of "entire and absolute control" is applicable on the facts of cases such as *Pillai* and *Karuppan Bhoomidas v Port of Singapore Authority* [1977–1978] SLR(R) 204, the impetus for this test probably arose from the recognition that relevant parties would not generally expect a worker who is hired out for only a specific task or project to suddenly become the employee of the hirer for the short duration of that task or project, only to just as suddenly have this employment relationship terminated when the task or project is completed. This consideration would not be present in the context of a long-term secondment where the employee undertakes general assignments for the company accepting the secondment.

(c) Further, *Chandran on Employment* observed (at para 1.75) that "[w]hile the older cases such as *Pillai's* and *Karruppan's* have used the test of *absolute* control, the newer cases have used the test of control" [emphasis in original]. The authorities cited in the footnote as "the newer cases" were dated 1993, 1997, and 2005. This suggested that the notion of a "more stringent test" is outdated. In particular, the 1997 authority cited, *Awang bin Dollah v Shun Shing Construction & Engineering Co*

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Ltd and other appeals [1997] 2 SLR(R) 746, was a decision of the Court of Appeal which is binding on this court.

63 In the light of the foregoing, I did not accept that a more stringent test of control applied in the present case. In my view, the applicable test of control in a case where a person allows a third party to use the services of his employee should be no different from that applicable in any other case where the existence of an employment relationship is in question.

64 In any event, even if CKR was right that a more stringent test of control applied, I was satisfied on the evidence that, in relation to the work undertaken by Hwang for Tuan Sing, Tuan Sing indeed had entire and absolute control of Hwang. As the above quotation from *Halsbury* (at [60]) showed, where an employee is seconded or hired out, the question of whom his employer is should be assessed by reference to the "particular purpose" of that secondment.

(III) EXTENT OF INTEGRATION

65 *Chandran on Employment* (at para 1.32) cited the following passage from *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 (at 111) for the rationale of the integration test:

> One feature which seems to run through the instances is that, under a contract of service, *a man is employed as part of the business and his work is done as an integral part of the business*, whereas, under a contract for service, his work although done for the business, is not integrated into it but is only accessory to it. [emphasis added]

66 As noted above, Hwang was seated in Tuan Sing's premises. He was involved, on a daily basis, in providing legal advice to Tuan Sing and its subsidiaries through various means. Chong Chou Yuen ("Chong"), the Chief Financial Officer of Tuan Sing and a director of Asplenium, gave evidence that

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"[Hwang]'s one of us"[14] and that Hwang would attend Tuan Sing's office functions together with the rest of Tuan Sing's employees.[15] Hwang was Tuan Sing's only in-house legal advisor.[16] His work was thus integral to Tuan Sing's business. In fact, Hwang's work became so integral to Tuan Sing that Nuri proposed in 2014 that Tuan Sing should share the cost of Hwang's salary, and Tuan Sing readily accepted the proposal. When disputes arose with CKR over the Project, it was Hwang who approached and engaged external counsel on behalf of Asplenium.[17] I was therefore of the view that the relationship between Hwang and Tuan Sing met the integration test.

(IV) REMUNERATION

67 *Chandran on Employment* noted (at paras 1.35–1.36) that a person is more likely to be an employee if he was remunerated through a regular salary instead of being paid according to the amount of work done. As noted above, Tuan Sing shared in Hwang's remuneration by making a regular monthly payment to Nuri equivalent to half of Hwang's salary. It was not a payment tied to the actual volume of work done by Hwang for Tuan Sing.

68 On the issue of remuneration, CKR raised two objections. The first was that it was Nuri which had made the actual payments of Hwang's salary and CPF contributions, and Hwang testified also that he looked to Nuri for these payments. In my view, however, the more important point was that all three parties had been aware that there was in place a cost-sharing arrangement between Nuri and Tuan Sing, under which Hwang would provide his legal

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14 NE 12 June 2017 at p 32, line 21.

15 NE 12 June 2017 at p 31, lines 11 to 14.

16 NE 12 June 2017 at p 40, lines 23 to 26.

17 Hwang's affidavit dated 19 September 2016 at para 13.

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services to Tuan Sing, and Tuan Sing would pay Nuri the relevant part of Hwang's salary.

69 The second objection was the fact that Tuan Sing had paid goods and services tax ("GST") to Nuri on Tuan Sing's share of Hwang's salary. CKR submitted that as GST is charged only on the supply of goods and services, the labour of an employee is not subject to GST and "only an independent contractor would charge GST for services".[18] It followed, purportedly, that Hwang must have been an independent contractor to Tuan Sing.

70 In response, Asplenium submitted that the payment of GST by Tuan Sing is in fact evidence of Hwang working for Tuan Sing pursuant to a secondment arrangement under which Tuan Sing was regarded as having employed Hwang as its own legal counsel. In support of this argument, Asplenium pointed to a guideline published by the Inland Revenue Authority of Singapore on 31 May 2013 entitled "GST Guide on Reimbursement and Disbursement of Expenses" ("IRAS Guide"), which stated at paras 6.23 to 6.25 as follows:

> 6.23 Secondment of staff refers to a situation when a staff contractually employed by one company is supplied to another company to perform certain work specifically assigned to them.
>
> 6.24 The secondment of staff is considered to be a supply of services for GST purposes. That being the case, the person seconding the staff ("Seconding Company") has to charge GST on the value of the supply if he is GST-registered; if he is not, he will need to assess his liability to register for GST. The value of the supply is either the amount actually charged by the Seconding Company or, if there is no charge, the amount of remuneration (money or otherwise) that the Seconding Company is obliged to pay the seconded staff.
>
> 6.25 In practice, it is not uncommon for a corporate group to have staff secondment arrangements to meet the operational

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18 CKR's Submissions dated 11 January 2017 at para 44.

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> needs of the companies in the group. *The company receiving the seconded staff ("Recipient Company") generally regards itself to have hired the seconded staff rather than buying the services of the staff from the Seconding Company. …*
>
> [emphasis added]

71 In my view, the IRAS Guide makes clear that GST is payable for the secondment of employees. Consequently, the payment of GST by Tuan Sing to Nuri was not inconsistent with the proposition put forward by Asplenium that Nuri had seconded Hwang to Tuan Sing.

72 CKR may have confused the nature of the GST payment. In the present case, the relevant supply was *by Nuri* to Tuan Sing of services provided by a third party whom Nuri had seconded to Tuan Sing. Hence, it was Nuri who charged Tuan Sing GST. The relevant supply was *not* of services *by Hwang* to Tuan Sing, and the relevant GST was also not charged by Hwang to Tuan Sing. Therefore, the mere fact that GST was charged by Nuri to Tuan Sing did not mean that Hwang must have been an independent contractor to Tuan Sing as opposed to an employee.

73 For the same reason, I was of the view that CKR had cited Norman Selwyn, *Selwyn's Law of Employment* (Oxford University Press, 16th Ed, 2011) out of context when it relied on a passage at para 2.53 which reads: "[a]n independent sub-contractor may have to charge VAT on services supplied, which would not be so if he were an employee". That passage simply meant that if *an individual* charges GST to an "employer" for the services which the individual provides, he is probably an independent contractor and not an "employee" of that "employer". Nothing in the evidence suggested that Hwang had charged Tuan Sing GST for the services provided to it.

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74 On the GST issue, CKR also pointed to a subsequent part of para 6.25 of the IRAS Guide which provided that IRAS would allow an administrative waiver of the obligation to charge GST if the secondment is between related corporations as defined in s 6 of the CA, and where certain other conditions are met. I did not see how this passage supported CKR's case. Even taken at its highest, it merely meant that the payment of GST between Tuan Sing and Nuri amounted to an admission by them that they were not related corporations as defined in s 6 of the CA. But as I mentioned above (at [34]), it was never Asplenium's case that Tuan Sing and Nuri were so related.

75 I therefore concluded that Tuan Sing's monthly payment of its share of Hwang's remuneration to Nuri, and its payment of GST on such sums, were consistent with both the notion that Hwang was seconded by Nuri to Tuan Sing, and the notion that Hwang was treated in fact as an employee of Tuan Sing.

(V) OBLIGATION TO WORK FOR ONLY ONE EMPLOYER

76 *Chandran on Employment* noted at para 1.39 that "an employee is more likely to be subject to an obligation to work only for that employer". There is good sense underlying this observation. If an employer pays a salary for an employee to work on a full-time basis for the employer, the employee would usually be expected to devote all hours of a normal work day in service of that employer. Some employers, having paid an employee's salary on a full-time basis, may even provide expressly in the employment contract that the employee should not work concurrently for anyone else. However, as noted by *Chandran on Employment* later in the same paragraph, "this factor too is not conclusive". In this respect, *Chandran on Employment* cited *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, where the English High Court held (at 186) as follows:

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> Nor is there anything inconsistent with the existence of a contract of service in the fact that Mrs Irving was free to work for others during the relevant period. It is by no means a necessary incident of a contract of service that the servant is prohibited from serving any other employer.

77 In the present case, since Tuan Sing only paid half of Hwang's salary, Hwang could not be expected to work full-time for Tuan Sing to the exclusion of Nuri. The fact that Hwang had continued working for Nuri while serving Tuan Sing was therefore not inconsistent with the existence of an employment relationship between Hwang and Tuan Sing. From Nuri's perspective, even though cl 8 of its employment contract with Hwang prohibited Hwang from working for other employers without Nuri's consent, that prohibition had no application in the present case because Nuri had consented to Hwang working for Tuan Sing. Therefore, this factor did not militate against the existence of an employment relationship between Hwang and Tuan Sing.

(VI) PROVISION OF TOOLS, EQUIPMENT AND TRAINING

78 Asplenium noted that Tuan Sing provided Hwang with his office space and all office equipment needed for the performance of Hwang's work with Tuan Sing. Asplenium submitted that this lent substantial weight to a finding that Hwang was an employee of Tuan Sing. While I agreed that this was a relevant factor and that the evidence did show that Tuan Sing had provided Hwang with office space and equipment, I did not consider this factor conclusive and did not place too much weight on it.

(VII) OBLIGATION TO PROVIDE AND ACCEPT WORK

79 While this factor was highlighted by CKR as relevant, CKR did not develop the point in its submissions. It was therefore not clear whether CKR's position was that this factor militated against a finding that Hwang was Tuan

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Sing's employee. Further, while the evidence showed that Hwang was obliged to accept work from Tuan Sing,[19] no evidence was led on whether Tuan Sing was obliged to provide work for Hwang. Given that Hwang was Tuan Sing's only in-house legal advisor and that Tuan Sing paid half of Hwang's salary, the reality of the situation was that Tuan Sing would have, as a matter of course, provided work to Hwang. In any event, as noted in *Chandran on Employment* (at para 1.47), this again is not a conclusive factor.

(VII) RIGHT TO DISMISS, SUSPEND AND EVALUATE

80 CKR highlighted this as a relevant factor, but again, it did not develop the point in submissions. It was therefore not clear what CKR wished to submit concerning this factor. In my view, although no specific evidence was led on this point, the fact that Hwang had superiors within Tuan Sing to report to (such as the CEO of Tuan Sing, Mr William Liem),[20] suggested that Hwang would be evaluated by the management of Tuan Sing, and consequently, that the possibility existed of Tuan Sing terminating its relationship with Hwang. In any event, this factor was again not conclusive.

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19 NE 12 June 2017 at p 17, lines 6 to 17.

20 NE 12 June 2017 at p 17, lines 21 to 27

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(IX) MISCELLANEOUS

81 CKR raised three other points, which I summarise briefly as follows:

(a) The only documentary evidence which Asplenium could produce of the secondment arrangement was the monthly tax invoices issued by Nuri to Tuan Sing for payments described in the invoices as "Share of legal council [*sic*] costs". No formal agreements were signed between Nuri and Tuan Sing or between Hwang and Tuan Sing in respect of the purported secondment arrangement.

(b) Although Hwang was aware of the cost-sharing arrangement, he was never told by Nuri or Tuan Sing that he was seconded to Tuan Sing or that he was working for Tuan Sing pursuant to a secondment arrangement.

(c) Asplenium's submission concerning secondment must have been an afterthought as the term "secondment" did not appear either in the supporting affidavits filed initially by Asplenium or in Asplenium's initial round of written submissions filed on 10 January 2017. Those submissions only referred to "an arrangement whereby Tuan Sing would contribute to a share of the costs of Hwang's salary for the provision of legal advice and services by him to Tuan Sing"[21] without calling it a secondment arrangement. It was only in Asplenium's rebuttal submission filed on 26 January 2017 that secondment was first mentioned.

82 I did have some concerns about the lack of formal documentation, as well as the fact that the cost-sharing arrangement commenced only in 2014,

[21] Asplenium's Submissions dated 10 January 2017 at para 117(d).

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even though Hwang had been working for Nuri and Tuan Sing since 2009. These concerns prompted me to be more careful in examining the claim as to the secondment arrangement. However, the lack of a formal documentation did not in itself preclude the finding of an employment relationship. Proper documentation would most likely assist, but in the end, it is the court's overall assessment of the reality of the situation and the substance of the relationship that matters.

83 In the present case, I accepted the tax invoices as evidence that a cost-sharing arrangement existed between Nuri and Tuan Sing concerning Hwang's salary. Chong explained that this was the purpose of the payments. Hwang testified that he was aware of the cost-sharing arrangement. The evidence of both Chong and Hwang were tested in cross-examination and I was satisfied that they were both truthful on this issue.

84 Hwang candidly admitted during cross-examination that neither Nuri nor Tuan Sing had any discussion with him about the secondment exercise.[22] Further, when Hwang was asked whether he considered Tuan Sing his employer, Hwang replied in the following manner:[23]

> That's a difficult question to answer in the sense that I'm aware that there was a cost sharing arrangement with Tuan Sing. So, yes, they were partially responsible for the salary that I got from Nuri. So, you know, this is a legal question. I'm not an expert on employment law.

85 In my view, the fact that Hwang was not told that he was on secondment and the fact that Hwang was not sure if Tuan Sing was also his employer were certainly factors which pointed away from the existence of an employment

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22 NE 12 June 2017 at p 21, lines 13 to 15.

23 NE 12 June 2017 at p 16, lines 1 to 4.

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relationship between Hwang and Tuan Sing. Having said that, the existence of such a relationship depended, in the final analysis, less on Hwang's subjective belief than on the objective factors discussed at [59]–[80] above. I therefore did not consider this point to be fatal to Asplenium's case.

86 As for the fact that the secondment point was first raised by Asplenium only in its rebuttal submission of 26 January 2017, the context was that this was raised as a response to CKR's submission on GST (at [69] above). Asplenium responded by referring to the IRAS Guide which required GST to be paid in respect of secondment of employees. I saw this less as an afterthought on the part of Asplenium than an attempt to adopt the language and analytical framework of the IRAS Guide to frame and conceptualise the cost-sharing arrangement between Nuri and Tuan Sing in respect of Hwang's salary. The factual elements underlying the secondment arrangement were already in Asplenium's supporting affidavits and the initial round of written submissions. Further, the tax invoices which evidence the arrangement were issued long before the present dispute arose and there was no suggestion by CKR that these were sham documents. In the light of the foregoing, and having regard the point I made at [52] above, I was not persuaded that the secondment arrangement was an afterthought contrived by Asplenium,

(X) CONCLUSION ON EMPLOYMENT RELATIONSHIP

87 Taking into account the foregoing factors holistically, and especially having regard to my finding that both the control test and integration test had been met, I found that an employment relationship existed between Hwang and Tuan Sing in respect of the work which Hwang did for Tuan Sing.

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(B) WHETHER PURPOSIVE INTERPRETATION REQUIRED NON-RECOGNITION OF EMPLOYMENT RELATIONSHIP BETWEEN HWANG AND TUAN SING

88 CKR submitted that, even if the weight of evidence supported the existence of an employment relationship, Hwang should still not be regarded as an employee of Tuan Sing *for the purpose of s 128A* because that would be contrary to the legislative intent underlying the promulgation of s 128A of the EA. In support, CKR referred to what it described as the "carefully calibrated approach" adopted in s 128A(4) of the EA, which allowed a legal counsel employed by one company in a group to be treated as a legal counsel of another company in the same group *only if* those companies meet the criteria for "related corporations" under s 6 of the CA. CKR also referred to a question from Mr Hri Kumar SC during the second reading of the Evidence (Amendment) Bill 2012 on whether s 128A(4) could be extended to related limited liability partnerships, to which the Minister for Law gave the following reply:

> On Mr Kumar's third issue concerning the scope of section 128A(4), he queried why the privilege for legal counsel is extended to companies and their related corporations but such benefit is not extended to limited liability partnerships and their related entities. These concerns have been raised by accounting firms who feel that they would be disadvantaged by the provisions. We are aware of the accounting firms' concerns. They have written to us. My Ministry is in touch with them. The current extension of privilege to related corporations in section 128(4) [*sic*] is a concession to corporate reality. Many MNCs operate under a group of related companies and the Companies Act has a definition of "related corporation". No similar definition exists in the Limited Liability Partnerships Act.
>
> The suggestion is that there be a definition of direct or indirect ownership to be used to determine legitimate related entities of limited liability partnerships. That goes well beyond the scope of today's amendments and we felt that that needed more careful study. We need to be able to establish a clear nexus between the entity employing the legal counsel and the related entity claiming privilege, or run the risk that the provision will be abused to hide communications or material that should be rightly disclosed, be it for investigation, inspection or transparency. …

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89 CKR also relied on a passage in the *Report of the Law Reform Committee on Reforming Legal Professional Privilege* (October 2011) (Chairman: Harpreet Singh Nehal SC) ("LRC Report") which cautioned (at para 123) against an unrestrained extension of the privilege to communications with in-house legal counsel.[24]

90 In my view, CKR had cited the LRC Report out of context. It was clear from para 122 of the LRC Report that the phrase "unrestrained extension of the privilege to communications with in-house counsel" referred to one of the three options being considered in the LRC Report. The other two options considered were "reject the extension" and "extend the privilege restrictively". Therefore, the content of the "unrestrained extension" option could only be understood by contrasting it with the content of the "extend the privilege restrictively" option, which incidentally was the option eventually recommended in the LRC Report. As explained in paras 125–127 of the LRC Report, the restrictions envisaged under this recommended option were that: (a) privilege should not attach to materials which lack confidentiality; and (b) the in-house legal counsel must have been instructed for his independent advice, as if he were an external counsel.

91 As can be seen from the terms of s 128A, these recommendations were not fully adopted by Parliament. More importantly, there was no discussion at all in the LRC Report of an extension of the privilege to related companies or entities. Therefore, the "unrestrained extension" option discussed in para 123 of the LRC Report could not have referred to an unrestrained extension of the privilege to related entities. Instead, it had merely referred to an extension without restraint regarding the confidentiality of the materials concerned and

[24] CKR's Submissions dated 11 January 2017 at paras 50-51; CKR's Submissions dated 3 July 2017 at para 41.

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the independence of the in-house legal counsel. For this reason, the LRC Report shed no light on the issue before me.

92 As for the passage cited from the Minister's answer to Mr Hri Kumar SC's question in Parliament (at [88] above), the takeaways were as follows:

(a) the Government had considered whether to extend the privilege beyond companies and their related corporations but decided against doing so, partly because a ready definition of "related corporations" already existed in the CA;

(b) any extension beyond that required further study and would have to await future reforms; and

(c) consequently, the court should not take it upon itself to extend the privilege beyond the entities already set out in s 128A(4).

93 In my view, these propositions were uncontroversial. Parliament had enacted s 128A(4) and confined its scope to related corporations as defined in the CA. There was no question that the court must not extend the scope of s 128A(4) beyond the terms upon which it was enacted by Parliament. But I failed to see how these propositions could lead logically to CKR's contention that recognising Hwang as Tuan Sing's employee would amount to an unwarranted extension of the scope of s 128A(4) or be otherwise contrary to Parliament's intention. Hwang was recognised *in fact* as an employee of Tuan Sing because the relationship between Hwang and Tuan Sing met the common law test for the existence of an employment relationship; Hwang was *not* a *deemed* employee of Tuan Sing by operation of s 128A(4) of the EA. On my analysis, s 128A(4) was simply not engaged here.

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94 In the first place, it was unclear from CKR's submissions whether it was contending, when construing the term "employed" and its cognate expressions as used in s 128A, that:

(a) it would be inconsistent with Parliament's intention to recognise a legal counsel seconded to another organisation as a legal counsel of the organisation to which he is seconded; or

(b) it would be inconsistent with Parliament's intention to give such recognition only if the secondment is on a part time basis such that the legal counsel continued to work concurrently both for his original employer and for the organisation to which he is seconded.

95 If CKR's submission was as set out at [94(a)], a complete answer to this is found in the use of the word "seconded" in s 3(7) of the EA, which defines the term "legal counsel" for the purposes of, amongst other things, s 128A. Since Parliament was prepared to recognise that a public officer seconded to a statutory body could be treated as legal counsel of the statutory body, it would appear that there is nothing repugnant in the notion of secondment *per se*. After all, the key words used in s 128A are "employed" and "employment" and, as demonstrated above, there is an established set of criteria for determining when a seconded employee should be considered the employee of the organisation to which he is seconded.

96 A submission in the form set out at [94(b)], on the other hand, was more nuanced and warranted further analysis. Unlike the case of a legal counsel seconded on a full-time basis so that he ceases to work for his original employer, part-time secondment which allows the legal counsel to work concurrently for

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both employers presented a factual matrix which appeared, at least superficially, to come close to allowing a circumvention of the limits of s 128A(4).

97 The fear is this. Pursuant to s 128A(4) of the EA, a legal counsel employed by one company within a group of companies is deemed to be concurrently a legal counsel of all other companies within that group which have a sufficient nexus with the first company to be considered related corporations (as defined in s 6 of the CA). Suppose there is another company which is related to the first company by, for instance, common shareholding or common directorship, but the nexus between these two companies is not sufficient for them to qualify as related corporations. If a legal counsel of the first company could be treated concurrently as a legal counsel of this other company by virtue of a part-time secondment arrangement, would it amount to a circumvention of s 128A(4)?

98 To answer this, we need to consider why s 128A(4) was enacted in the first place. As noted at [88] above, the Minister explained that s 128A(4) is a "concession to corporate reality" and that "[m]any MNCs operate under a group of related companies". Further, in both the press release issued by the Ministry of Law on 30 September 2011 seeking public feedback on the proposed amendments to the EA and the press release issued on 16 January 2012 responding to the public feedback received, it was explained that the extension of the legal professional privilege to an in-house legal counsel would "increase Singapore's attractiveness as a location for MNCs' in-house legal departments and enhance our stature as a hub for legal and commercial services".

99 Thus, one of the purposes of s 128A is to increase Singapore's attractiveness as a location for MNCs' in-house legal departments, while s 128A(4) is a concession to the corporate reality that many of the MNCs

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operate under a group of related companies. In my view, a part of this corporate reality is no doubt the fact that many of the MNCs operate by way of a central in-house legal department providing legal advice and assistance to all or most related companies within the group as opposed to requiring each related company to employ its own in-house legal counsel. Section 128A(4) would therefore allow legal advice given by such central in-house legal departments to related companies to be covered by legal professional privilege, *without the need to prove that the legal counsel concerned is in an employment relationship with each subsidiary receiving such advice*. In the absence of s 128A(4), these MNCs may be compelled to restructure their intra-group legal processes, either by decentralizing their in-house legal departments or by requiring every legal counsel in their central in-house legal departments to enter into separate employment contracts with each and every company within the group.

100 What this means is that the option of a legal counsel being engaged in concurrent employment arrangements with two or more separate companies was always available, whether with or without s 128A(4). It therefore followed that s 128A(4) was intended to be facilitative rather than restrictive. It filled in a gap where no concurrent employment arrangements existed, but did not to prevent the formation of concurrent employment arrangements. Understood in this way, there is clearly no circumvention of s 128A(4) of the EA when concurrent employment arrangements are entered into.

101 There should also be no concern of opening the floodgates if concurrent employment is recognised, as the criteria to be fulfilled would remain the same – that of "employed" or "employment". Thus, a situation of concurrent employment would be recognised only if the test for the existence of an employment relationship is met in relation to both putative employers.

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102 For the reasons given above, I held that it was not inconsistent with Parliament's intention or the purpose of s 128A to recognise that Hwang was employed by Tuan Sing, even though he was concurrently employed by Nuri.

(C) CONCLUSION

103 Consequently, on the basis of my finding that Hwang was a legal counsel employed by Tuan Sing at the material time, he was also:

(a) deemed to be a legal counsel employed by Asplenium by virtue of s 128A(4) of the EA for the purpose of s 128A(1) of the EA; and

(b) regarded as a legal professional adviser of Asplenium within the meaning of s 131(1) of the EA by virtue of s 131(2)(*b*) read with s 128A(4) of the EA.

Whether Sia was authorised to seek and receive legal advice on behalf of Asplenium

104 I turn now to CKR's second objection, which was instead focused on Sia, with whom Hwang had communicated in respect of the Item 3 documents. In particular, it was argued that legal advice privilege could not attach to the Item 3 documents because Sia was (a) not an employee of Asplenium, and/or (b) not authorised to deal with Asplenium's lawyers.

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105 The first limb of CKR's submission was relatively sophisticated. The basis of the submission was s 131(2)(*b*) of the EA which has been reproduced above (at [28]). The material phrase reads:

> … any communication which has taken place *between any officer or employee of an entity and a legal counsel employed*, or deemed under section 128(4) or (5) to be employed, by the entity… [emphasis added]

106 CKR contended that legal advice privilege did not attach to the Item 3 documents because they were not communications between Hwang and "any officer or employee" of Asplenium, as required under s 131(2)(*b*) of the EA. While the same requirement did not appear in the text of s 128A(1), CKR submitted that ss 128A and 131 should be read consistently to require an officer or employee of the company to have been a party to the allegedly privileged communications.

107 I was not persuaded by CKR's submission for a few reasons.

108 First, in my view, CKR's argument placed more weight on s 131(2)(*b*) of the EA than it could bear. Section 131(2) is a definitional provision to define the term "legal professional adviser" as used in s 131(1) of the EA. Its focus and purpose is to identify who the legal counsel is for the purposes of the statutory privilege provided for in s 131(1) of the EA. It would be inappropriate to read phrases in s 131(2)(*b*) as imposing a substantive limit on the scope of s 131(1) in a manner not related to the identification of the legal counsel concerned. As stated in Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) ("*Bennion*") at p 473:

> As a general rule substantive provision will not be incorporated in a definition. This is for the simple reason that the reader approaching a definition would not normally expect it to be more than a definition. Where there is doubt in relation to a provision framed as a definition the courts will tend to construe

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> it restrictively and confine it to the proper function of a definition.

109 This principle is illustrated by the case of *Hrushka v Canada (Minister of Foreign Affairs)* [2009] FC 69 ("*Hrushka*"), which was cited in the footnote to the passage from the above-cited quotation from *Bennion*. The question in *Hrushka* was whether Passport Canada, which was Canada's passport authority, had the power to withhold passport services from an individual for a defined period. While the Canadian Passport Order SI/81-86 (Can) provided Passport Canada with the power to refuse to grant a passport under s 9 and the power to revoke a passport under s 10, there were no substantive provisions conferring on Passport Canada the power to withhold passport services. It was argued by the respondent that this power could be found in s 2, which provided as follows:

> "Passport Canada" means a section of the Department of Foreign Affairs and International Trade, wherever located, that has been charged by the Minister with the issuing, refusing, revoking, *withholding*, recovery and use of passports.
>
> [emphasis added]

110 The Federal Court of Canada rejected the argument and held that:

(a) s 2 of the Canadian Passport Order was simply descriptive of a particular government department that had been charged with certain responsibilities;

(b) it did not confer power on Passport Canada to take any of the actions enumerated in the provision; and

(c) the respondent's argument "r[an] contrary to the use and purpose of statutory definitions and recognised drafting conventions… a statutory definition does not typically have substantive content".

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111 I agreed with this aspect of the reasoning in *Hrushka*, and for the same reason disagreed with the substantive qualification that CKR sought to draw from the definitional provision in s 131(2)(*b*).

112 Secondly, nothing in the text of s 128A itself suggested that, in a situation involving deemed employment pursuant to s 128A(4), privilege under s 128A(1) would not attach to communications between the legal counsel and an employee of the legal counsel's actual (as opposed to deemed) employer. While there is a reference to "any officer or employee of the entity" in s 128A(1), this did not assist CKR because, first, it was in relation to only one of three limbs defining the scope of privilege conferred in s 128A(1), and second , the word "or" which immediately preceded the reference meant that privilege would also attach to advice "given by [the legal counsel] to the entity" even if not communicated through the entity's officers or employees. Both of these points suggested that it was not of significance to the drafter of s 128A whether the allegedly privileged communication was made through an officer or employee of the entity concerned or through someone else. All the more, it could not have been Parliament's intention for the subsistence of privilege under s 128A(1) of the EA to turn on whether the legal counsel had communicated with officers and employees of the legal counsel's actual or deemed employer.

113 Thirdly, I did not agree with CKR's submission that s 128A of the EA should be read consistently with s 131(1) and therefore be subject to the same definitional requirements in s 131(2)(*b*). For one thing, there was no reason or basis for the court to read words into s 128A that does not appear on its face. This is all the more so when s 131(2) is explicitly stated to be a statutory definition applicable to ss 129 and 131 of the EA; in contrast, s 128A is not mentioned and therefore cannot, as a matter of statutory construction, be taken as included within its scope. Thus, whatever impact the statutory definition in

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s 131(2)(*b*) may have on s 131(1), it cannot have any impact on the scope of s 128A. Furthermore, CKR's argument on consistency cut both ways: as much as it could mean that s 128A should be read consistently with s 131(1) to require Sia to be an officer or employee of Asplenium in order for the Item 3 documents to be privileged (assuming that s 131 did in fact impose such a requirement), it could also mean that s 131(1) should be read consistently with s 128A of the EA such that privilege could be sustained whether Sia was employed by Asplenium or Tuan Sing.

114 Fourthly, the logical consequence of CKR's submission was to preclude not only Asplenium from claiming privilege in respect of the Item 3 documents, but also to preclude most special purpose vehicles in corporate groups who have no operational staff of their own from claiming such privilege under ss 128A and 131 of the EA. Such a result cannot be right or intended. As the Minister explained during the second reading of the amendment Bill, "[t]he current extension of privilege to related corporations in section 128(4) [*sic*] is a concession to corporate reality. Many MNCs operate under a group of related companies…" In this case, as highlighted by Asplenium's counsel during oral submissions, Asplenium, being a special purpose vehicle of Tuan Sing, had no staff of its own. The only persons who could act on behalf of Asplenium were therefore employees of Tuan Sing designated to manage Asplenium's projects and affairs. If CKR's submission was correct, then save in the situation where Asplenium employed its own staff to communicate with Hwang, Asplenium would have no entitlement to privilege in respect of any communication with Hwang no matter the legal context or content. This seemed to me wholly unrealistic and contrary to Parliamentary intention.

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115 For these reasons, I did not consider persuasive CKR's argument that the Item 3 documents ought not be considered privileged merely because Sia was an employee of Tuan Sing and not of Asplenium.

116 As for the second limb of CKR's argument – that Sia was not authorised to seek or receive legal advice in relation to the Project – there was clearly no basis for this submission. CKR relied on the Court of Appeal decision in *Scandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 ("*APBS*") in which the Court of Appeal stated, in relation to s 128 of the EA, that "[t]he principle is that if an employee is not authorised to communicate with the company's solicitors for the purpose of obtaining legal advice, then that communication is not protected by legal advice privilege" (at [41]). It is important to bear in mind that *APBS* concerned authorisation to seek and receive advice from *external* counsel, rather than in-house legal counsel. In that context, the Court of Appeal explained (at [41]):

> … The principle is that if an employee is not authorised to communicate with the company's solicitors for the purpose of obtaining legal advice, then that communication is not protected by legal advice privilege. We do not find this principle exceptional. When a company retains solicitors for legal advice, the client must be the company. *But since a company can only act through its employees, communications made by employees who are authorised to do so would be communications made "on behalf of his client". … Authorisation need not be express: it may be implied, if that function is related to or arises out of* [*sic*] *relevant employee's work*. [emphasis added]

117 Insofar as *APBS* may be taken to impose a requirement of specific authorisation of the company's employees in order for communications between such employees and the company's *external* lawyers to come within the terms of s 128, I was doubtful that a similar requirement applied in the context of s 128A of the EA to *in-house* legal counsel. First, as a matter of

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statutory interpretation, there is no phrase "on behalf of his client" in s 128A of the EA, unlike in s 128 of the EA, and it was this phrase on which the Court of Appeal's statement on the requirement of authorisation appeared to be premised. Secondly, it is conceptually and practically difficult to say that a company's employee must be specifically authorised to seek and receive legal advice from the company's own in-house legal counsel, who is in fact simply another of its employees, failing which such communications would be deprived of the protection of privilege.

118 For similar reasons, I placed little weight on the two English authorities cited by CKR: *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2003] 1 QB 1556 ("*Three Rivers*") and *Re RBS (Rights Issue Litigation)* [2017] 1 WLR 1991. Both of these cases involved instructions to seek and receive advice from *external* lawyers and should not be used to define the meaning of our local statute insofar as s 128A and s 131(1) read with s 131(2)(*b*) is concerned. Although the Court of Appeal in *APBS* held that *Three Rivers* was not inconsistent with s 128 of the EA, the court was not contending with s 128A of the EA and, again, was concerned with the situation of a company seeking advice from its *external* lawyers.

119 In any case, the Court of Appeal in *APBS* had expressly and unequivocally accepted as satisfactory *implicit* authorisation to seek or receive legal advice arising by virtue of one's position or role in the company (see [116] above). As the project manager in charge of the Project, I was of the view that Sia must be taken to have been implicitly authorised to seek and receive legal advice regarding the Project from Hwang. This authorisation stemmed from the fact of his appointment as project manager of the Project and as Vice President (Projects) of Tuan Sing. Against this, CKR submitted that it was "unlikely" that Sia would have been given such authority, because he was represented by

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different counsel as Asplenium in subsequent court proceedings. In my view, this was a leap of logic. Even if Sia's interests in the legal proceedings commenced in 2015 were not entirely coincident with Asplenium's (thereby necessitating separate legal representation), that did not mean that Sia had no authority back in September and October 2014 to perform the duties which he was appointed to perform as Asplenium's project manager.

Whether Lam being copied in the e-mails was fatal to Asplenium's assertion of privilege

120 Turning then to the involvement of Lam, he was the quantity surveyor designated in the Contract for the Project. CKR submitted that Asplenium could not assert privilege in the Item 3 documents because (a) Lam was copied in the e-mails even though he was clearly not an employee of Asplenium; and/or (b) it was Lam, and not Asplenium or Sia or Hwang, who was being asked to disclose the documents. Although it did not explicitly state so, the first part of CKR's submission appeared to concern the question of waiver of privilege. Indeed, CKR cited in support of this argument a quotation from *Halsbury* at para 120.396 which came under the heading "When is privilege lost".

121 I was not persuaded by CKR's submission that privilege had been waived in respect of the Item 3 documents, whether explicitly or implicitly.

122 First, on express waiver, s 128A(1) of the EA states that the privilege applies "except with the entity's express consent". Although s 131 does not contain a similar phrase, there is authority that only express waiver is similarly contemplated, to the exclusion of the possibility of implied waiver (see, for instance, Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) ("*Pinsler on Evidence*") at para 14.083). There was no evidence that Asplenium had expressly waived privilege in the Item 3 documents.

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123 Secondly, even assuming that s 128A of the EA could accommodate the doctrine of implied waiver, I did not consider that implied waiver could be inferred from the mere fact that Lam had been copied in the e-mails concerned. In this regard, reference should be made to the Court of Appeal's decision in *ARX v CIT*. That case concerned an allegation that the party claiming privilege had impliedly waived the privilege by referring to the purportedly privileged material during the course of litigation. Nevertheless, several observations by the Court of Appeal are of general application to the doctrine of implied waiver, including this statement of principle at [67]:

> … In every case of implied waiver there must be inconsistency, for the essence of implied waiver is the implicit relinquishment of a right through inconsistent conduct. However, it is not every case of inconsistent conduct that will warrant a finding of implied waiver. …

124 So far as implied waiver by selective disclosure is concerned, the following statement by the High Court in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2018] 4 SLR 391 ("*Lippo*") at [68] was also notable:

> 68 On this premise, in a situation where the privileged document is disclosed to, presented to, or shared with another, what matters is the context and purpose for which this was done. If the document is indeed *supplied in confidence, that act of sharing would not amount to implied waiver*. If the circumstances show that confidence is intended to be surrendered, or disregarded, by that act of sharing, then that act amounts to waiver even if no express words have been used to that effect. The question is whether a shield of confidentiality can reasonably be expected to exist following the sharing of the heretofore privileged document. In this regard, it should be noted that "[g]iven the importance of legal professional privilege, waiver is not to be easily implied" (*ARX* at [69]). [emphasis added]

An appeal from this decision was dismissed by the Court of Appeal without written grounds.

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125 In the present case, there was nothing inconsistent between the fact that Lam was copied in the e-mails which constituted the Item 3 documents, and Asplenium's assertion of privilege over the same documents. At the time the e-mails were written, Lam had a legitimate and not insignificant role in the Project as the designated quantity surveyor. Consequently, copying him in the e-mails was not an act that could be taken as showing an intention to surrender or disregard the confidentiality of the e-mails on the part of Asplenium. In the words of *Lippo*, a shield of confidentiality could reasonably be expected to exist even following the sharing of these e-mails with Lam. These e-mails were also not part of the public domain. Accordingly, there was neither express nor implied wavier of privilege in respect of the Item 3 documents.

126 CKR's second argument regarding Lam was essentially that, even if the Item 3 documents were privileged, Lam was a third party to the deemed employment relationship between Asplenium and Hwang. Therefore, he (as well as the other RLB Defendants) was not precluded from disclosing these documents and, indeed, Lam did not expressly object to doing so as he had referenced the Item 3 documents in Part 1 of Schedule 1 of the SLOD.

127 Asplenium countered that with two submissions. First, the Item 3 documents were not released into the public domain and therefore retained an element of confidentiality such that the Court could and should restrain their use as evidence in Suit 37. Secondly, s 133 of the EA entitled Lam to refuse to disclose the Item 3 documents, and neither of the only two exceptions to the provision, namely, (a) if the production of the document is for the purpose of identification; or (b) where the person entitled to refuse production consents to such production (see *Butterworths' Annotated Statutes of Singapore* vol 5 (Butterworths Asia, 1997 issue) at p 361), applied in the present case.

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128 Section 133 of the EA states as follows:

> **Production of documents which another person having possession could refuse to produce**
>
> 133. No one shall be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession, except for the purpose of identification, unless such last-mentioned person consents to their production, nor shall anyone who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.

129 *Pinsler on Evidence* stated as follows regarding s 133 of the EA (at para 15.062):

> Section 133 of the [EA] provides that no person can be compelled to produce documents in his possession 'which any other person would be entitled to refuse to produce if they were in his possession, except for the purpose of identification'. An exception applies when the 'other person' consents to the production of the document(s). The section also provides that a person who is entitled to refuse to produce a document under this rule cannot be compelled to give oral evidence of its contents. The scope of this section is considered to be limited to the situation in which a person officially holds a privileged document on behalf of another person; for example, a trustee, a solicitor and a mortgagee. *The effect of the provision is that while the person in possession of a document is not obliged to disclose it, he is not prohibited from revealing it if this is his intention***.** Section 133 is also considered in the context of privileged documents which fall into the hands of third parties. [emphasis added]

130 With respect, I had some reservations about Professor Jeffrey Pinsler's statement that s 133 applied only to a situation where a person "officially holds a privileged document on behalf of another person". No authority was cited for this proposition, and indeed, the opening words of s 133 ("No one…"), is broad and unqualified. If the provision were indeed intended to be restricted to situations involving official entrustment of privileged documents, it could easily have been worded as such. Moreover, neither party before me had sought to argue that s 133 was not applicable by virtue of the absence of official

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entrustment between Asplenium and Lam. Thus, I was of the view that s 133 of the EA applied to a person in the situation of Lam: that is, to a person who is a third party to the employment relationship referenced in ss 128A and 131 of the EA even though there was no official entrustment of documents to him.

131 However, a separate question from the applicability of s 133 of the EA was that of its effect. In this regard, I was of the view that this provision does not by its own force *preclude* a third party (such as Lam) from disclosing the privileged documents, even though it does *entitle* such a third party to refuse to do so. To this extent, I agreed with CKR's submission (see [126] above). This conclusion is supported by *Pinsler on Evidence* (see [129] above), and also apparent from the statutory language of s 133 ("No one shall be compelled…"), which stood in contrast to that, for instance, in s 128A(1) of the EA ("… shall not be permitted…"). Therefore, without more, s 133 of the EA only empowered the Court to declare that Lam (as well as Rider and RLB) was *not bound* by the specific discovery order made in relation to the Item 3 documents.

132 Having said that, independently of s 133 of the EA, it is trite law that an injunction may be granted to prevent the unauthorised use in court proceedings of information contained in privileged material which would in most instances be of a confidential nature. This is a facet of the court's equitable jurisdiction to restrain breaches of confidence (see *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 ("*Mykytowych*") at [58]–[67]). In *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 ("*Wee Shuo Woon*"), the Court of Appeal explained as follows (at [28]):

> … 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

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> 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*") at 281, per Lord Goff of Chievely; *Campbell v MGN Ltd* [2004] 2 AC 457 at [14], per Lord Nicholls of Birkenhead). When such confidential information is also privileged, an application may be made to restrain its use for the purposes of litigation…

133 In my view, injunctive relief restraining the RLB Defendants from disclosing the Item 3 documents was in order. Lam had obtained the e-mails containing legal advice provided by Hwang to Sia by virtue of his involvement in the Project, in circumstances where it must have been clear that such e-mails containing legal advice were internal to Asplenium and its related entities, and were not to be disclosed to any other party or for any other purpose. In the words of *Wee Shuo Woon*, Lam had received the e-mails in a context where he knew or ought to have known that they should fairly and reasonably be regarded as confidential. Notably, CKR did not dispute the confidentiality of the e-mails, but rather submitted that "even if Items 3 and 4 are found to be privileged in the first place, and retained its privilege and confidential status, the issue remains how [the RLB Defendants] have exercised their choice under section 133".[25] This was erroneous as a matter of law, since nothing suggested that s 133 of the EA precluded the equitable power of the courts to restrain use in court proceedings of information contained in privileged material of a confidential nature, at least before such information was in fact used.

Whether legal advice privilege and/or litigation privilege subsisted in the Item 4 documents

134 I turn now to the Item 4 documents. These comprised e-mails exchanged between 10 and 31 October 2014 among Asplenium, Lam, and WongPartnership LLP relating to the preparation of the Annexures (see [6] and

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[25] 4th Respondent's Submissions dated 24 July 2017 at para 17.

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[10(b)] above). Asplenium explained that the Annexures were a set of accounts that "basically represent[ed] the estimated amount of loss that [Asplenium] incurred and/or would incur arising from the termination as a result of [CKR's purported] breach at that time".[26] It further explained that these e-mails contained legal advice that it had obtained from WongPartnership LLP as its solicitors regarding the collation of evidence for the evaluation and substantiation of its claim against CKR. On this basis, it claimed both legal advice and litigation privilege in relation to the Item 4 documents. I have outlined Asplenium and CKR's cases in relation to the Item 4 documents above at [17] and [19] respectively.

Whether litigation privilege applied

135 In *Mykytowych*, the Court of Appeal summarised the requirements of litigation privilege in the following terms (at [52]):

> For litigation privilege to apply, two conditions must be satisfied:
>
> > (a) First, as a threshold matter, the party claiming such privilege must show that there is a reasonable prospect of litigation (see *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 and *Hellenic Mutual War Risks Association (Bermuda) Ltd and General Contractors Importing and Services Enterprises v Harrison* [1997] 1 Lloyd's Rep 160 at 166, both of which were cited with approval in *Skandinaviska* at [71]). In this regard, there is no requirement that the chances of litigation must be higher than 50%, nor that there must be a virtual certainty of litigation (see *Skandinaviska* at [71] and [73], disapproving of *Collins v London General Omnibus Company* (1893) 68 LT 831).
> >
> > (b) Second, the dominant purpose for which the advice was sought or obtained must have been for litigation (see *Waugh v British Railways Board* [1980] AC 521, which was similarly cited with approval in *Skandinaviska* at [75]).

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[26] Asplenium's Submissions dated 10 January 2017 at para 46.

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136 In my view, it was clear that both requirements were satisfied in respect of the Item 4 documents. The Item 4 documents were e-mails created in October 2014. From as early as 11 September 2014, however, Asplenium had started to send notices to CKR stating that CKR was "failing to proceed with diligence and due expedition [on the Project]" and giving notice under the Contract for CKR to rectify the errors. These letters also threatened, if CKR continued to proceed "without due diligence or expedition following expiry of this notice", that the Contract may be terminated. The Contract was subsequently formally terminated by Asplenium on 24 October 2014. Soon thereafter, on 4 November 2014, Asplenium called on a performance bond issued on behalf of CKR. The next day, on 5 November 2014, CKR applied for an injunction restraining Asplenium from calling on the performance bond. On 10 November 2014, CKR commenced arbitration proceedings against Asplenium in respect of the termination of the Contract. Clearly, litigation between the parties came swiftly and decisively upon formal termination of the Contract. Against this backdrop, there was clearly more than a reasonable prospect of litigation at the time the Item 4 documents were communicated. Indeed, litigation would have been foremost in the minds of the parties by the time the Contract was formally terminated. Given the timing of the events, including Asplenium's swift decision to call on the performance bond on 4 November 2014 which would most definitely have provoked defensive manoeuvres on CKR's part, I also accepted Asplenium's submission that the Item 4 documents were created for the dominant purpose of litigation, and specifically, to quantify the amount that was to be called on the performance bond.

137 CKR's main argument on the subsistence of litigation privilege was that the Annexures as a set of accounts were "routine documents" and therefore could not be privileged, because they were not created for the dominant purpose

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of litigation. I did not agree. There is no magic to the word "routine". Even if such accounts were routinely prepared during the termination of construction contracts as an industrial norm, there was no reason why that would preclude the particular accounts in question here from being prepared for the dominant purpose of litigation between the parties.

138 CKR also argued that Lam should not have been under the direction or instruction of either Asplenium or CKR in assessing the losses that Asplenium had suffered from the purported breach of the Contract because he was under an obligation, as the quantity surveyor appointed under the Contract, to act fairly and independently. Therefore, he should not be allowed to use privilege to shield his (alleged) breaches of duty as the quantity surveyor. In my view, even assuming that there were duties of impartiality binding on Lam, there was no merit to CKR's submission that this should affect my findings on privilege in respect of the Item 4 documents. Insofar as CKR's allegations concerned the merits of Suit 37, it was not appropriate for me to come to a conclusion on them at this stage. Insofar as CKR was relying on the fraud or illegality exception to privilege, I was of the view that the unsubstantiated allegations made at the present stage were insufficient to invoke the exception.

139 For the foregoing reasons, I was of the view that litigation privilege subsisted in the Item 4 documents.

Whether legal advice privilege applied

140 As regards the subsistence of legal advice privilege, I agreed that such privilege would attach to the Item 4 documents since they contained the advice and input of Asplenium's solicitors, WongPartnership LLP, on the set of accounts that they represented and the manner they were drafted. As I

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mentioned (at [21]), there was no request by CKR for a redacted disclosure of the parts of the documents that did not contain such legal advice, but even if there had been such a request, it was not clear that the documents would have been severable (see, for instance, *APBS* at [98]–[99]).

141 CKR's main rebuttal was that Sia was not an employee of Asplenium authorised to seek or receive legal advice on behalf of Asplenium. There were two aspects to this submission. First, regarding Sia's employment by Asplenium, the points I made at [107]–[115] above apply. Secondly, regarding the requirement of authorisation, I have also discussed this in respect of the Item 3 documents above at [116]–[119]. Similarly here, although Asplenium's solicitors from WongPartnership LLP were not in-house legal counsel unlike Hwang, I was of the view that Sia as the project manager of the Project and Vice President (Projects) of Tuan Sing must also, by virtue of his role and appointment, be taken to have been implicitly authorised to communicate with WongPartnership LLP in preparation for a dispute arising from the termination of the Contract. In particular, the Project was the very basis from which the dispute arose, and Sia in his role as project manager was in all likelihood most familiar with the facts and position of Asplenium and Tuan Sing.

142 For these reasons, I found that legal advice privilege subsisted in the Item 4 documents.

Whether privilege was impliedly waived

143 CKR's final argument was that both legal advice and litigation privilege had been impliedly waived by Asplenium because the latter had put forth Lam as an expert witness in OS 1025, and in that context, Lam had referred extensively to the Item 4 documents in the course of his evidence. On that basis,

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these e-mails could not be privileged because Lam had a duty to produce the documents on which his expert opinion was based.

144 In my view, the premise of CKR's argument – that Lam was an expert witness in OS 1025 – was wholly unmeritorious. Instead, Lam had provided factual evidence in OS 1025 in his role as the quantity surveyor appointed under the Contract for the Project.

145 First, Lam had put himself out as a factual, rather than expert, witness. The first paragraph of his affidavit in OS 1025 stated that he was the "named Quantity Surveyor in the Contract", and the affidavit then went on to list the "facts of matters [which] are within my knowledge…" At no point did he claim or acknowledge to be testifying in OS 1025 as an expert witness.

146 Secondly, O 40A r 3 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides for the requirements that an expert witness's report *must* comply with, including, for instance, details regarding the expert's qualifications and a statement that the expert understands that his duty is to the court and not his appointee. None of these formalities ordinarily required of an expert report were complied with in relation to Lam's evidence in OS 1025, and there was no indication that this had been the case because of CKR's consent or on the court's direction.

147 Thirdly, it was not clear to me how Lam could have served as an expert witness in OS 1025 without any objections or serious questions being raised about his independence or the propriety of his appointment, when the subject matter in dispute was precisely the termination of the Contract which Lam was personally and integrally involved in, and when the nature of that involvement was such as to associate him far more closely with one party (Asplenium) than

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the other (CKR). In this regard, CKR submitted that "it is recognised practice for an expert who advised a party to become an expert witness in the proceedings".[27] Even if this was so in some situations, there was no indication that it was in fact the case *vis-à-vis* Lam. Indeed, if CKR had genuinely believed that Lam was called in OS 1025 as an expert witness, it would surely have made its objections known in order to undermine the weight of Lam's evidence. Yet, there was no indication that CKR had raised any such objections in OS 1025.

148 Fourthly, CKR argued that Lam had given opinion evidence on the parties' rights and liabilities under the Contract.[28] In my view, even if that is true, it did not in itself render Lam an expert witness. Nothing highlighted by CKR showed that Lam, in giving evidence in OS 1025, had gone beyond statements of opinion needed as part and parcel of his effort to justify and explain his factual evidence.

149 In the circumstances, I did not agree that Lam had given evidence in OS 1025 as an expert witness. Rather, CKR's belated claim that Lam was an expert witness in OS 1025 was clearly an afterthought. Consequently, Lam was not obliged to disclose the Item 4 documents on the premise that they formed the basis of his purported expert opinion. There was no other apparent basis for Lam to be obliged to disclose the Item 4 documents by virtue merely of his having testified in OS 1025.

Whether the relief sought should be granted

150 For the same reasons as I mentioned above (see [132]–[133]), although s 133 of the EA did not by its own force preclude the RLB Defendants from

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27 CKR's Submissions dated 3 July 2017 at para 83.

28 See CKR's Submissions dated 3 July 2017 at para 80.

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disclosing the Item 4 documents which were privileged, an injunction may nevertheless be granted to prevent the unauthorised use in court proceedings of confidential information contained in such privileged material.

151 In my view, injunctive relief restraining the RLB Defendants from disclosing the Item 4 documents was clearly justifiable because these documents were created in anticipation of imminent litigation, a fact which was known to Lam. It would have been clear beyond question that these documents ought not to be disclosed to any other party or for any other purpose, but for his relevant advice and input on the Annexures. In the circumstances, Lam must fairly and reasonably have known that these documents should be regarded as confidential, and injunctive relief restraining the unauthorised use of such documents was therefore warranted.

Conclusion

152 For the foregoing reasons, I allowed the application and granted the declaratory and injunctive reliefs sought by Asplenium in respect of the Item 3 documents which were protected by legal advice privilege, and the Item 4 documents which were protected by both litigation and legal advice privilege.

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153 I also ordered that costs of the application and reasonable disbursements be paid by CKR to Asplenium, the quantum of which was to be taxed if not agreed.

Pang Khang Chau
Judicial Commissioner

Chuah Chee Kian Christopher, Kua Lay Theng, Candy Agnes Sutedja, and Liana Chek (WongPartnership LLP) for the plaintiff;
Nicholas Beetsma (Clasis LLC) for the 1st to 3rd defendants;
Vikram Nair, Zhuang Wenxiong, and Ching Meng Hang (Rajah & Tann Singapore LLP) for the 4th defendant.

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