THE COURT'S DISCRETION TO EXCLUDE EVIDENCE IN CIVIL CASES AND EMERGING IMPLICATIONS IN THE CRIMINAL SPHERE

The Violet Thread of Justice

The current state of the law governing the court's discretion to exclude evidence consists of two statutory provisions governing hearsay and expert evidence (introduced in 2012), in addition to a judicially developed discretion to exclude evidence, the prejudicial effect of which overrides its probative value. The latter "exclusionary discretion" was confirmed by the Court of Appeal in 2011 in a criminal case (involving the reliability of admissible statements) despite a series of judicial pronouncements over the preceding four years which entirely rejected it. This year (2015), the Court of Appeal took the view that an "inherent discretion" to exclude evidence might be exercised in civil proceedings. As this case was directly concerned with an action for breach of confidence, the Court of Appeal pointed out that its observations were tentative in the absence of full argument and that this area of law would have to be fully considered at a subsequent time. Nevertheless, the comments of the Court of Appeal are a critical starting point in civil proceedings and, as will be contended, may have a significant impact on the evolution of the law in the criminal sphere. The purpose of this article is twofold. First, it considers what the scope of the discretion ought to be in civil cases given the multiple issues which might arise. Second, it will be argued that the principle of exclusion in criminal cases is not limited to the prejudicial effect of evidence at trial but may extend to circumstances in which the manner of obtaining evidence is so improper that reliance on it by a court would detrimentally compromise the integrity of the judicial process. For this purpose, an important 2008 case which was regarded for some time as closing the door to the discretion to exclude evidence will be revisited for its observations on a balancing test involving the administration of justice, which might now have validity in the light of recent developments. It will be shown that a violet thread was sewn into the fabric of justice more than 50 years ago and that, despite its severing at various points in time, has re-emerged for fuller consideration.

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I. Introduction and background

1 It is now well settled that there is a judicially developed discretion to exclude admissible evidence in criminal cases if the probative value of the evidence is outweighed by its prejudicial effect at trial. In *Muhammad bin Kadar v Public Prosecutor*[1] ("*Kadar*"), the Court of Appeal applied this principle to the statements of the second appellant concerning the offence of murder in the course of robbery. Although the statements were admissible under the Criminal Procedure Code,[2] the circumstances in which they were recorded by the police (and other incidents) had rendered them unreliable.[3] The Court of Appeal concluded that the High Court ought to have exercised its discretion to exclude the statements on the basis that their prejudicial effect outweighed their probative value.[4] The Court of Appeal characterised the court's power to reject admissible evidence as an "exclusionary discretion" based on the common law as represented by *R v Sang*[5] ("*Sang*") and also referred to the court's inherent power to prevent injustice.[6] This power may be exercised in civil proceedings as well although the principles governing its scope have yet to be comprehensively defined. When, at the second reading of the Evidence

1 [2011] 3 SLR 1205.

2 Under s 122(5) of the former Criminal Procedure Code (Cap 68, 1985 Rev Ed). This provision was replaced by ss 258(1)–258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

3 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [139]–[147] and [191]. Much has been written about the discretion to exclude evidence in Singapore. See (in the order of the most recent to the earliest writings): Jeffrey Pinsler, "Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215; Ho Hock Lai, "'National Values on Law and Order' and the Discretion to Exclude Wrongfully Obtained Evidence" [2012] JCCL 232; Chen Siyuan & Nicholas Poon, "Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings: *Muhammad bin Kadar v PP*" (2012) 24 SAcLJ 533 (case note); Ho Hock Lai, "State Entrapment" (2011) 31 Legal Studies 71; Jeffrey Pinsler, "Whether a Singapore Court Has a Discretion to Exclude Evidence Admissible in Criminal Proceedings" (2010) 22 SAcLJ 335; Tan Yock Lin, "Sing a Song of *Sang*, a Pocketful of Woes?" [1992] Sing JLS 365. See also the textbook, Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) ch 10.

4 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [146]–[147] and [191].

5 [1980] AC 402.

6 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [53].

(Amendment) Bill in 2012,[7] the Minister of Law stated that the court has a general power to exclude improperly obtained evidence pursuant to its "inherent jurisdiction" (in addition to the specific statutory powers conferred by the newly introduced ss 32(3) and 47(4) of the Evidence Act[8] ("EA"), he did not make any distinction between criminal and civil cases.[9] The existence of the power to exclude evidence in civil cases was most recently confirmed by the observations of both the High Court and Court of Appeal in *ANB v ANC*.[10]

2 In determining that it had the power to exclude evidence the unreliable statements of the second appellant, the Court of Appeal in *Kadar* considered that it was not developing new law but merely applying a principle that had been endorsed by Chan Sek Keong CJ in *Law Society of Singapore v Tan Guat Neo Phyllis*[11] ("*Phyllis*"). The Court of Appeal held this view despite a series of cases[12] decided after *Phyllis* and before *Kadar* which regarded *Phyllis* as having rejected any notion of a discretion to exclude evidence in the face of the omission of such a principle in the EA. The possible interpretations of Chan CJ's judgment have been considered in previous writings.[13] One view (which was accepted in *Kadar*) is that Chan CJ had endorsed *Sang* as representing an independent principle of exclusion despite its non-recognition by the EA.[14] Another interpretation is that the learned Chief Justice, who was concerned with the manner of obtaining evidence (in this case, the issue

7 See *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at cols 1127–1146.

8 Cap 97, 1997 Rev Ed. See para 22 below.

9 See *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at cols 45 and 56 (K Shanmugam, Minister for Law).

10 [2015] 5 SLR 522.

11 [2008] 2 SLR(R) 239. The impact of *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 has been considered in some of the articles listed in n 3 above.

12 In *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [106], the Court of Appeal declared that the High Court in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 "persuasively ruled that apart from the confines of the EA, there is no residual discretion to exclude evidence which is otherwise rendered legally relevant by the EA". See also *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] 2 SLR(R) 587 at [24] and *Mohamed Emran bin Mohamed Ali v Public Prosecutor* [2008] 4 SLR(R) 411 at [19]. This position was reiterated by the High Court in *Public Prosecutor v Mas Swan bin Adnan* [2011] SGHC 107 at [107] (a case concerning similar fact evidence). These and other cases are considered in Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at paras 6.056–6.059.

13 See n 3 above.

14 This view is also evident in the judgment of the Court of Appeal in *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 at [27]. The Court of Appeal was unable to determine the matter because the parties had not addressed the court on the admissibility provisions in the Evidence Act (Cap 97, 1997 Rev Ed) and the related policy considerations.

of whether there was entrapment),[15] was merely saying that *Sang* is consistent with the EA because evidence obtained by entrapment would always be more probative than prejudicial. Putting it another way, in the case of entrapment evidence, even if the common law discretion applied, the evidence would (by virtue of its overriding probative value) always be admissible. As Chan CJ put it: "the fairness exception [in *R v Sang*] has no practical effect in the case of entrapment evidence since, by definition, the probative value of such evidence must be greater than its prejudicial value in proving the guilt of the accused. … For this reason, the *Sang* formulation[16] is, in practical terms, consistent with the EA and in accordance with the letter and spirit of s 2(2), and is therefore applicable in the Singapore context".[17] Although *Phyllis* was a case involving disciplinary proceedings against a lawyer (and therefore quasi-criminal in nature), the importance of its observations in the context of criminal cases was underlined by the Court of Appeal in the preceding case of *Wong Keng Leong Rayney v Law Society of Singapore*[18] ("*Wong Keng Leong Rayney*"), where it had declared (in the absence of full argument at the time) that a comprehensive review of the law in this area would be undertaken by the High Court in *Phyllis*.

3 An interesting feature of Chan CJ's judgment in *Phyllis* was his apparent favour of certain Australian and English cases which had developed a separate balancing test for determining how to respond to improperly obtained evidence (regardless of effect of the impropriety on the reliability of the evidence at trial). The impression given in *Phyllis* is that if Chan CJ had decided that he could exercise a power to exclude evidence independently of (and unrestricted by) the EA (assuming the exercise of that power was necessary),[19] he might have applied the balancing test (including the factors that would be weighed) which had been approved of by the Australian High Court in *Ridgeway v R*[20] ("*Ridgeway*") and the House of Lords in *R v Looseley*[21] ("*Looseley*").[22] This approach would involve balancing two competing interests of the administration of justice; namely, judicial access to all relevant evidence and the rejection of relevant evidence which has been obtained in a

15 For a consideration of the meaning of entrapment evidence, see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [53] and [61]–[70]. See also *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 at [27].

16 The first limb of which limits the exercise of the discretion to the situation in which the prejudicial effect of the evidence overrides its probative value.

17 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

18 [2007] 4 SLR(R) 377 at [27].

19 It was not necessary because the High Court ruled that the discretionary power did not apply to disciplinary cases.

20 (1995) 184 CLR 19.

21 [2001] 1 WLR 2060.

22 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [113].

manner which compromises the integrity of the judicial process. Where the latter interest overrides the former interest, the court might exclude the evidence after taking all germane factors into account.[23] Although the Court of Appeal in *Kadar* stated that "courts also should refrain from excluding evidence based only on facts indicating unfairness in the way the evidence was obtained (as opposed to unfairness in the sense of contributing to a wrong outcome at trial)",[24] for reasons which will become apparent, this proposition ought not to be construed as an absolute denial of the entitlement of the court to reject evidence no matter how it is procured.

4 There is sufficient authority to mount the argument that the court has a discretion to exclude evidence when the manner in which it has been obtained compromises the integrity of the administration of justice. Indeed, it will be argued that in view of Chan CJ's apparent inclination towards *Ridgeway* and *Looseley* in *Phyllis*, and the acknowledgement by the Court of Appeal in *Kadar* of a discretion to exclude evidence independent of the EA, as well as the latest observations of the Court of Appeal in *ANB v ANC*,[25] there might be a basis for arguing that the discretion to exclude evidence may be considered in circumstances beyond its prejudicial effect at trial (the circumstances before the Court of Appeal in *Kadar*). It will be shown that a "violet thread" has been sewn over a period of 50 years since the judgment of the High Court in *Cheng Swee Tiang v Public Prosecutor*[26] ("*Cheng*").[27] *ANB v ANC* involved an action for breach of confidence in which injunctive relief was sought. Both the High Court and the Court of Appeal in this case considered that the courts have the discretion to exclude evidence in civil cases and that it is rooted in the cases of *Kadar* and *Phyllis*. The Court of Appeal in *ANB v ANC* (which clarified that its observations were "tentative" in the absence of full argument) referred to this power as an "inherent discretion", which could be exercised in civil and criminal cases in accordance with respectively applicable principles. Suffice it to say for the purpose of this introductory segment, the observations in *ANB v ANC* may, apart from their impact in civil cases, lay the ground for the extension of the scope of the discretion in the criminal field.[28]

23 Which was the case in *Ridgeway v R* (1995) 184 CLR 19. In *R v Looseley* [2001] 1 WLR 2060, the House of Lords considered that a stay of proceedings would be appropriate in such circumstances. These cases will be considered in the course of this article.

24 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [68].

25 See n 10 above.

26 [1964] MLJ 291.

27 See paras 35–40 below: "The Violet Thread".

28 See para 23 *ff* below.

II. Genesis of the discretion to exclude evidence in civil cases

A. Significance of the Court of Appeal's observations in ANB v ANC

5 With regard to civil cases, there now appears to be no doubt that the manner in which a party obtains evidence may be a significant factor which would be taken into account by a court in determining whether it should exercise its discretion to exclude. The question as to whether a Singapore court has a discretion to exclude evidence in civil cases was directly addressed for the first time in *ANB v ANC*.[29] In this case, which concerned divorce proceedings, the husband alleged that his wife (who had left the matrimonial home) returned to the padlocked premises[30] while he was overseas, removed and improperly hacked his computer. It was further contended that the wife had engaged a private investigator ("PI") to make copies of the files contained in the hard disk drive and that these files were then passed to her legal representatives (the second respondent in the case) for use in the divorce proceedings. The wife attempted to adduce the information she had obtained from the files in the divorce proceedings, which resulted in the husband's action for breach of confidence and successful application for an *ex parte* interim injunction preventing her from using the information improperly accessed from the husband's computer. Although the High Court judge discharged the injunction, it was reinstated by the Court of Appeal on the basis that the principles governing this relief in an action for breach of confidence had been satisfied.[31]

6 The Court of Appeal's judgment in *ANB v ANC* was thus pivoted on the law of breach of confidence.[32] Nevertheless, as the High Court had stated its position concerning principles governing the discretion to exclude evidence in civil proceedings, the Court of Appeal considered it necessary to respond with "tentative" observations until a full and final judicial pronouncement, based on comprehensive argument, could be made in a future case.[33] In order to understand the full implications of Andrew Phang Boon Leong JA's observations, it is necessary to first consider the statements of the High Court. Having reviewed the state of law, the High Court declared: "[T]he most recent authorities – both from Parliament and the highest court in the land – point to the existence of an exclusionary discretion, one that stems from

29 See n 10 above.
30 She had arranged for a locksmith to unlock the padlock.
31 *ANB v ANC* [2015] 5 SLR 522 at [10] and [26].
32 *ANB v ANC* [2015] 5 SLR 522 at [10] and [26].
33 *ANB v ANC* [2015] 5 SLR 522 at [13], [27] and [31].

the inherent discretion of the court to prevent injustice at trial."[34] The High Court endorsed the view that the manner in which the discretion is to be exercised ought to be different in civil and criminal cases "because of the need for precautions against injustice in the latter":[35]

> … in a criminal trial, the presumption of innocence is paramount, and the court should be wary of evidence that may taint the outcome of proceedings. When applying the probative value/prejudicial effect balancing exercise in civil proceedings, however, the prejudicial effect assumes a far lighter weight and role when put in the balance against the probative value component. In most instances, it boils down to a matter of weight in civil proceedings.

7 It is clear from the High Court's pronouncement that (a) the principles governing the discretion to exclude evidence in criminal proceedings apply to civil cases; and (b) the discretion would not be exercised in civil cases in most circumstances (rather the mechanism of weight attribution would be engaged). The High Court concluded that notwithstanding the existence of an exclusionary discretion, it would not be exercised on the facts. It added that the admissibility of evidence is a matter which should be reserved for the court at trial.[36] In the Court of Appeal, Phang JA expressed his misgivings over the High Court's pronouncement concerning the limited application of the discretion in civil cases: "[I]t was by no means clear, in our view, that the Judge had rendered a correct statement of the legal position as to the exercise of an exclusionary discretion in the context of civil proceedings."[37] His Honour observed:[38]

> Whilst we agree that different societal and policy reasons as well as arguments may apply *vis-à-vis* the inherent discretion of the court to exclude evidence as between criminal and civil proceedings, we do not, with respect, think that this *necessarily* leads to the conclusion arrived at by the Judge, *ie*, that the exclusionary discretion would be exercised with less rigidity such that most evidence would not be excluded in civil proceedings. [emphasis in original]

8 Phang JA gave three main reasons for this proposition:[39]

> First, it may simply be the case that the probative value/prejudicial effect balancing exercise (though well-suited to the nuances of and the values at stake in criminal proceedings) cannot be applied to civil proceedings and that a different balancing exercise should be

34 *ANB v ANC* [2014] 4 SLR 747 at [50].
35 *ANB v ANC* [2014] 4 SLR 747 at [51].
36 *ANB v ANC* [2014] 4 SLR 747 at [52]. See also *Stroude v Beazer* [2005] EWCA Civ 265; The Times (28 April 2005); [2005] NPC 45, in which this point was made.
37 *ANB v ANC* [2015] 5 SLR 522 at [13].
38 *ANB v ANC* [2015] 5 SLR 522 at [29].
39 *ANB v ANC* [2015] 5 SLR 522 at [29].

> conducted in that respect. Secondly, *Phyllis Tan* and *Kadar* related to fact situations which concerned the propriety of the conduct of law enforcement officers and private investigators with regard to the obtaining of the evidence and the effect of that conduct on the quality of the evidence. This is different from cases such as the present which was not only concerned with the propriety of the conduct of the Respondents, but also with the protection of the Appellant's potential pre-existing *proprietary* rights over the evidence as well, the protection of such potential proprietary rights in general being a matter of public interest. Thirdly, whilst the exclusion of the evidence in *Phyllis Tan* and *Kadar* may have deprived the prosecuting parties in both cases of certain evidence which could have been used to convict the defendants (*ie*, that the evidence in question could only have been admitted in the form and manner in which it was obtained), which may weigh against the court excluding the evidence, the same cannot be said of cases such as the case before us. The Respondents had an obvious alternative to obtain the same evidence, but in a lawful manner – that is, by way of discovery. [emphasis in original]

9 Therefore, "too sharp a distinction should not be drawn between criminal and civil proceedings without further analysis of the *precise type* of impropriety or illegality behind the evidence attempted to be adduced – although we hasten to add that nothing we state should detract from the importance of the exclusionary discretion with regard to *criminal* cases because the life or liberty of the accused are at stake" [emphasis in original].[40] Applying the principles to the facts, the Court of Appeal pointed out that "although the [wife] in this case might – looked at from one point of view – be said to have taken the information improperly or illegally, we note (consistently with the views we have just expressed) that this *might* be *a different conception of the concept of 'unlawfully or illegally obtained evidence' which forms the basis of decisions in cases such as Kadar and Phyllis Tan*" [emphasis in original].[41] Phang JA further observed:[42]

> … that there are good reasons why the inherent discretion to exclude evidence may also be needed to be exercised more robustly – or at least more vigorously than what the Judge envisaged in his decision below – in *civil* proceedings in the light of the very different countervailing factors that arise from the need to protect potential proprietary interests and the public interest in promoting the obtaining of evidence by way of legally prescribed methods. Put simply, the respecting of such rights and rules is something which is expected when one is living in a civilised society where the Rule of Law (and not of the jungle) must prevail. This is especially needful in the context of the sea change in both the quality – as well as the

40 *ANB v ANC* [2015] 5 SLR 522 at [30].
41 *ANB v ANC* [2015] 5 SLR 522 at [29].
42 *ANB v ANC* [2015] 5 SLR 522 at [30].

> availability of – technology in the modern world. Much would of course also depend, in the final analysis, on the precise facts as well as context of the case. [emphasis in original]

10 The Court of Appeal expressed these views "for the purpose of highlighting how the inherent discretion to exclude evidence may, contrary to the views of the Judge below, not be exercised as sparingly in civil proceedings as he had envisaged in his decision".[43] And so the question which remains for consideration is: What principle(s) should govern the court's discretion to exclude evidence in civil cases and how is it (are they) to be applied to the variety of circumstances which may arise in litigation?

B. Principles for civil cases

11 Ideally, an independent set of principles governing the discretion to exclude evidence in civil cases should be developed. As the exclusionary discretion stems from the court's inherent power to "make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court",[44] the primary concern of the court is to maintain the integrity of its system of adjudication. Ultimately, the court should consider the significance of the evidence to the issues at trial (essentially its probative value or significance) and balance this against the impact it would have on the fairness of the trial, the legal entitlements of the party against whom the evidence is sought to be adduced (such as his proprietary rights and the protection of his confidential information), the conduct of the parties and, most importantly, the interests of the administration of justice (in particular, when the degree of impropriety in the method by which the evidence is obtained is such that to admit it would doubtlessly compromise the integrity of the judicial process). Correspondingly, if the evidence would reveal a party's intention to present false evidence to the court, its production would normally be compelled in the interest of the administration of justice regardless of other considerations such as confidentiality.[45] The scope of the discretion to exclude must not be so narrow that it would only be exercised in exceptional cases. Therefore, in *ANB v ANC*, the Court of Appeal disagreed with the High Court's view that the exclusionary discretion should be exercised with "less rigidity such that most evidence would not be excluded in civil proceedings".[46] The test in criminal cases of whether the evidence is

43 *ANB v ANC* [2015] 5 SLR 522 at [31].

44 As pointed out in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 and *ANC v ANB* [2015] 5 SLR 522. The wording is from O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

45 *Istil Group Inc v Zahoor* [2003] EWHC 165; [2003] 2 All ER 252.

46 See para 7 above.

more prejudicial than probative may not be entirely appropriate because of the different concerns in criminal and civil proceedings, including the variety of options which are available to the parties for obtaining information and the alternative orders which a court might make in relation to the disclosure and production of evidence. These points will be elaborated upon subsequently.

12 It is suggested that a distinction should be drawn between the more general concept of "fairness" in civil cases and the particular meaning of "prejudice" in criminal cases.[47] As a concept, "fairness" entails any consideration which would affect the court's ability to try the case justly. For example, if a party ("Party A") seeks to introduce evidence at a late stage of the proceedings and its probative value is overridden by the injustice which the other party ("Party B") would suffer at trial by reason of Party A's failure to reveal it in breach of a rule or order of court, such evidence might be excluded.[48] Again, if Party A obtains evidence in an improper manner (as when he unlawfully removes material belonging to Party B) instead of engaging the normal processes for gaining access to the evidence (such as discovery, interrogatories or a search order), the court would need to balance the significance of the evidence against several countervailing factors. In this scenario, the first factor is that Party B's legal rights (relating to his proprietary interests and possibly his entitlement to confidentiality) have been infringed by Party A's conduct. The second factor is the critical importance of legitimacy in the interest of the administration of justice. Party B's conduct may also be in issue if his purpose for resisting the application to exclude evidence is to hide his own iniquity. The concept of fairness will be further considered in the course of this article.[49]

13 Although *ANB v ANC* concerned the matter of whether an interim injunction should be granted pursuant to an action for breach of confidence,[50] the facts of that case provide an opportunity to consider how a court might exercise its discretion to exclude evidence in the event that an application for such relief is made. It will be recalled[51] that the appellant (the husband) had sought an interim injunction to prevent the first and second respondents (the wife and her legal representatives respectively) from using and disclosing information in their possession

47 As pointed out by Lords Phillips and Bingham in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534.

48 See O 24 r 16(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

49 See para 16 *ff* below.

50 The Court of Appeal granted the injunction on the basis that there was a serious issue to be tried and that the balance of convenience lay with the appellant: *ANB v ANC* [2015] 5 SLR 522 at [14] and [26].

51 See para 5 above.

(that had been extracted from the hard disk of the appellant's personal computer) and which, allegedly, had been copied and distributed in breach of confidence. The information had been passed to the second respondent for use in the pending divorce proceedings. Assume that this was not a case involving an injunction but an application by the appellant to the court to exercise its discretion to exclude the information so that it would not be considered at trial. Applying the proposed criteria,[52] the first step is to consider the significance or value of the evidence to the court in adjudicating the case. Clearly, if, as alleged by the first respondent, the information revealed the falsification of evidence by the appellant, this would be critical to the court's assessment of the facts.

14 Having determined the significance of the evidence, the court would then consider the countervailing factors, which would include the alleged improprieties on the part of the first respondent in infringing the appellant's proprietary rights over his computer and his right of confidentiality in relation to the personal information which he had privately produced. The court would also consider whether such information ought to have been obtained through the ordinary process of discovery or procedural mechanisms rather than through iniquity. These factors would weigh heavily against the first respondent in *ANB v ANC*. However, the court would also have to ascertain whether the information revealed the appellant's misconduct in falsifying evidence (as was alleged by the first respondent). It is difficult to see how the court could turn a blind eye to a possible fraud upon itself by excluding the extracted information, even if this would mean disregarding the appellant's rights of property and confidentiality. The integrity of the administration of justice would be at stake in such circumstances.

15 If indeed the information indicated the falsification of evidence, this would substantially raise its value in the process of assessing the merits at the trial, hence tilting the balance (between the significance of the evidence and the countervailing factors) in favour of the first respondent (so that the discretion would not be exercised). Then again, if the court decides not to exclude the evidence, it would have to determine what sanction to impose on the first respondent in respect of the improper manner in which the evidence was obtained and the failure to engage the ordinary rules of procedure for this purpose. Would a penalty in costs be sufficient in such circumstances, particularly if the court considers it necessary to send a signal to potential litigants that the administration of justice will not permit the abuse of its process? This is not merely conjecture. Last year, a report in

52 See paras 11–12 above.

the Straits Times[53] stated: "More people in bitter divorce spats are resorting to hacking computers and mobile phones to obtain evidence against their spouses." Further, "most of the evidence used in divorce cases these days comes from high-tech devices like mobile phones and computers. To get the upper hand, some spouses hire computer experts to hack into e-mail accounts or plant spyware in laptops and smartphones". In *ANB v ANC* itself, the High Court referred the matter of evidence having been improperly obtained to the Attorney-General's Chambers for investigation into the possible commission of various crimes, including those under the Computer Misuse Act[54] and the Penal Code.[55] The judge added: "There was also possible perjury and breaches of professional ethics rules. I was troubled by the allegation that lawyers were putting forward a computer expert to hack into (or access without authority) opposing parties' computers, notebooks or iPhones."[56]

16 The English jurisprudence governing the discretion to exclude evidence in civil cases has developed quite significantly in recent years. Prior to the consideration of the relevant authorities, it is necessary to point out the difference in approach before the introduction of the Civil Procedure Rules[57] ("CPR") in 1998 and thereafter. Until the CPR, the English courts generally disavowed any discretion to exclude evidence in civil cases.[58] Under r 32.1(2) of the CPR, the courts are expressly empowered "to exclude evidence that would otherwise be admissible". Despite the absence of an express provision of this nature in the Singapore Rules of Court,[59] it is clearly arguable that such a discretion exists here as a consequence of the court's inherent power (or "inherent jurisdiction", as it was characterised by the Minister of Law)[60] or, as the

53 Janice Tai, "Snooping in Divorce Cases Goes High-tech" *The Straits Times* (21 September 2014) at p 2.

54 Cap 50A, 2007 Rev Ed.

55 Cap 224, 2008 Rev Ed.

56 *ANB v ANC* [2014] 4 SLR 747 at [25].

57 SI 1998 No 3132 (UK).

58 See *Helliwell v Piggott-Sims* [1980] FSR 356 at 357 and *Arab Monetary Fund v Hashim (No 2)* [1990] 1 All ER 673 at 681. Although note *Marcel v Metropolitan Police Commissioner* [1992] Ch 225 at 265, where Sir Christopher Slade (in the Court of Appeal) considered that the court could exclude evidence in the interests of justice (an observation which was cited by the Court of Appeal in *Imerman v Tchenguiz* [2011] Fam 116; [2010] EWCA Civ 908 at [171]).

59 Although note what is stated later in this paragraph concerning s 32(3) of the Evidence Act (Cap 97, 1997 Rev Ed).

60 See para 1 above. Although the terms "inherent power" and "inherent jurisdiction" have been used interchangeably, the doctrine is concerned with the powers of the court rather than its jurisdiction. This distinction was underlined in *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 ("*Re Nalpon*") at [27]–[40]. As the Court of Appeal pointed out in that case (which concerned the jurisdiction of the Court of Appeal to entertain an appeal), cognisance of the distinction between the

(*cont'd on the next page*)

Court of Appeal put it in *ANB v ANC*, the court's "inherent discretion". If this proposition is correct then the views of the English judges on the scope of r 32.1(2) of the CPR may be helpful to the Singapore courts. In *O'Brien v Chief Constable of South Wales Police*,[61] Lord Bingham pointed out that the overriding concern is "to promote the ends of justice", and to this end, "the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties".[62] This approach is reflected by recent Singapore authorities on the manner in which the court should exercise its discretion to exclude hearsay statements pursuant to s 32(3) of the EA.[63] This provision essentially corresponds to r 32.1(2) of the CPR[64] by stating that hearsay evidence which "is otherwise relevant … shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant".[65]

17 A leading English case on the general discretion to exclude evidence in civil cases is *Jones v University of Warwick*[66] ("*Jones*"), which involved an action by a staff member against the defendant employer claiming damages for personal injury to her right hand. She contended that she was suffering from continuing disability and claimed special damages. The defendant admitted liability but alleged that the claimant had virtually recovered and had no significant ongoing disability. An enquiry agent, acting for the defendant's insurers, obtained access to the claimant's home on two occasions by posing as a market researcher and filmed the claimant (without her knowledge) using a hidden video camera. The recordings were disclosed to the defendant whose expert, having viewed them, concluded that the claimant had essentially recovered. The defendant made an application for directions as to the admissibility in evidence of the video evidence obtained at the appellant's home. The District Judge ordered that the evidence be

"jurisdiction" and "powers" of the court is necessary in the interest of conceptual clarity: *Re Nalpon* at [41].

61 [2005] 2 AC 534.

62 *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 at [6].

63 This provision was first addressed at para 1 above. See also para 22 below.

64 As well as s 47(4) of the Evidence Act (Cap 97, 1997 Rev Ed), which concerns expert opinion evidence.

65 For cases concerning the discretion under s 32(3) of the Evidence Act (Cap 97, 1997 Rev Ed), see *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 (concerning the exclusion of unreliable evidence); *Wan Lai Ting v Kee Kah Kim* [2014] 4 SLR 795 (concerning, *inter alia*, the exclusion of evidence where the deponent is not made available for cross-examination); and *Cheo Yeoh & Associates LLC v AEL* [2015] 4 SLR 325 (concerning the Court of Appeal's observations on the trial court's application of O 38 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) and ss 32(1) and 32(3) of the Evidence Act (Cap 97, 1997 Rev Ed)). These cases are considered in Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at paras 6.056–6.059.

66 [2003] EWCA Civ 151; [2003] 3 All ER 760.

excluded on the basis that the court should not give any approval to the enquiry agent's improper actions in deceptively gaining access to the claimant's home and making surreptitious recordings. The defendant appealed and the High Court decided that the evidence should be admitted as justice and fairness required exaggerated claims to be exposed (in this case, the claimant sought special damages of over £135,000).

18 Although the Court of Appeal upheld the decision of the High Court, it expressed its concern over the illicit method by which the video evidence was obtained. Lord Woolf CJ observed: "If the conduct of the insurers in this case goes uncensured, there would be a significant risk that practices of this type would be encouraged. This would be highly undesirable, particularly as there will be cases in which a claimant's privacy will be infringed[67] and the evidence obtained will confirm that the claimant has not exaggerated the claim in any way. This could still be the result in this case."[68] His Lordship pointed out that in such circumstances, the court must try to give effect to two conflicting public interests: the need for the court to have access to the evidence in the interest of fair and just adjudication and the avoidance of misconduct in the manner of securing evidence. The outcome of the balancing operation depends on the circumstances. In *Jones*, Lord Woolf did not think that the conduct of the insurers (in engaging the agent to undertake the filming) was "so outrageous" that the defence ought to be struck out. Apart from the significance of the evidence, there were other reasons why it should not be excluded. New medical experts would have to be instructed on both sides and they would not have access to the video recordings with the possible result that there would be a misdiagnosis. Furthermore, the cross-examination of the claimant might be less effective in the absence of such evidence.[69]

19 Having decided that the evidence must be presented, the Court of Appeal went on to condemn the conduct of the insurers: "[I]t is appropriate to make clear that the conduct of the insurers was improper and not justified. … The fact that the insurers may have been motivated by a desire to achieve what they considered would be a just result does not justify either the commission of trespass or the contravention of the claimant's privacy which took place."[70] The Court of Appeal also referred to other steps which a court could take in response to such misconduct

67 Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Eur TS No 5; 213 UNTS 221; 1953 UKTS No 71) (4 November 1950; entry into force 3 September 1953) was also considered by the Court of Appeal.

68 *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 3 All ER 760 at [23].

69 *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 3 All ER 760 at [28].

70 *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 3 All ER 760 at [29].

including cost orders to reflect its disapproval. With regard to the case before it, the Court of Appeal proposed that as the conduct of the insurers gave rise to the litigation over admissibility of the evidence, the defendants ought to pay the costs of the proceedings to resolve this issue before the District Judge, the High Court judge and the Court of Appeal. Furthermore, the Court of Appeal indicated that at the completion of the trial, the judge may consider that the costs of the inquiry agent should not be recovered and, if the judge concludes that claimant's ability to control her movements (as evinced by the recordings) can be explained in her favour, then the defendants might be ordered to pay the costs on an indemnity basis. The Court of Appeal concluded by declaring that the interests of the administration of justice demand that apart from fair and proper adjudication, it must "deter [the] improper conduct of a party while conducting litigation. We do not pretend that this is a perfect reconciliation of the conflicting public interests. It is not; but at least the solution does not ignore the insurer's conduct".[71]

20 The facts of *Imerman v Tchenguiz*[72] ("*Imerman*") were closer in context to *ANB v ANC*. Indeed, *Imerman* was cited by the Court of Appeal in *ANB v ANC*, in which it took issue with the argument of the respondents' counsel that *Imerman* has no application in Singapore.[73] Therefore, the case is clearly relevant to the current discussion. As in the case of *ANB v ANC*, *Imerman* involved an action primarily for an injunction for breach of confidence in the course of divorce proceedings. The husband shared office space and computer facilities with the wife's two brothers. After the wife petitioned for divorce, the husband was evicted from the office by one of the brothers. This brother, who was concerned that the husband would conceal his assets in the ancillary relief proceedings, accessed a server in the office and copied information and documents which the husband had stored there. The other brother was aware of what was transpiring and was shown copies of some of the documents. From that material they printed out 11 files and handed them to a solicitor, who arranged for a barrister to sift the documents for those in respect of which the husband could potentially claim legal professional privilege. That process resulted in seven files of documents which were then passed on to the solicitors acting for the wife in the ancillary relief proceedings. Those solicitors sent copies of the seven files to the solicitors acting for the husband. The husband applied for and was granted orders restraining the brothers, as well as two IT managers and a solicitor engaged by one of the brothers, from communicating or disclosing to third parties (including the wife and her solicitors) any information contained in the documents

71 *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 3 All ER 760 at [30].
72 [2010] EWCA Civ 908; [2011] Fam 116.
73 *ANB v ANC* [2015] 5 SLR 522 at [14].

obtained and from copying or using any of the documents or information contained in them. The defendants were also required to deliver all copies of the documents to the husband. The Court of Appeal upheld the decision.[74]

21 Although *Imerman* was not directly concerned with the principles governing the court's discretion to exclude evidence, it made certain observations which it considered to be pertinent to the future reliance on the documentary evidence in the case. Lord Neuberger MR, who delivered the judgment of the Court of Appeal, took the view that at common law a court could exclude evidence if it was in the interest of justice to do so.[75] His Lordship opined that this was "even clearer" under the CPR.[76] In the context of the case, which involved ancillary proceedings, the Master of the Rolls said: "In exercising [the power to exclude evidence], the court will be guided by what is 'necessary for disposing fairly of the application for ancillary relief or for saving costs', and will take into account the importance of the evidence, 'the conduct of the parties', and any other relevant factors, including the normal case management aspects. Ultimately, this requires the court to carry out a balancing exercise, something which, we are well aware, is easy to say in general terms but is often very difficult to effect in individual cases in practice."[77]

22 The Court of Appeal's pronouncements in *ANB v ANC* that "the inherent discretion to exclude evidence may also be needed to be exercised more robustly – or at least more vigorously than what the Judge envisaged in his decision below – in *civil* proceedings" [emphasis added],[78] and that the principles governing the discretion in civil cases should not be any less rigid than in criminal cases,[79] is entirely consistent with the nature of the court's inherent power to prevent injustice and abuse of the court's process in both civil and criminal proceedings. This approach is also evident in ss 32(3) and 47(4) of the EA[80] in relation to hearsay evidence and expert opinion evidence respectively in civil and criminal proceedings. Section 32(3) of the EA provides: "A statement which is otherwise relevant under subsection (1)

74 It also varied the terms of an order made by the Family Division. See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] Fam 116 at [153] read with [4] and [5].

75 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] Fam 116 at [171] (citing *Marcel v Metropolitan Police Commissioner* [1992] Ch 225 at 265).

76 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] Fam 116 at [171] (citing *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 3 All ER 760 to this effect).

77 *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] Fam 116 at [177].

78 *ANB v ANC* [2015] 5 SLR 522 at [30]. See para 9 above.

79 See para 7 above.

80 Both provisions were introduced by the Evidence (Amendment) Act (Act 4 of 2012).

shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant." Section 47(4) of the EA states: "An opinion which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant." The main purpose of these provisions is to control the admission of evidence which could increase as a consequence of the expansion of the rules governing the admissibility of hearsay evidence under s 32 and expert opinion evidence under s 47.[81] In the course of his parliamentary speech, the Minister of Law said that the statutory discretion in both ss 32(3) and 47(4) "ensures that the expanded exceptions are not abused"[82] and that they operate "in addition to the Court's inherent jurisdiction to exclude prejudicial evidence".[83] The two provisions do not provide guidance on how the discretion is to be exercised and so it is for the court to set the scope of its power to exclude evidence in both criminal and civil cases.[84] The broadness of these provisions and the criteria of "interests of justice" enable the court to take into account any factors which could affect its decision-making process in civil and criminal proceedings.[85]

III. Emerging implications in the criminal sphere

23 Interestingly, while the common law principles governing the discretion to exclude evidence developed in respect of criminal cases over the course of more than a century (and in Singapore for more than 50 years),[86] the observations of the Court of Appeal in *ANB v ANC* (tentative though they are) may pave the way for further developments in the criminal sphere. First, it is clear that the Court of Appeal

81 See the Evidence (Amendment) Act (Act 4 of 2012).

82 *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at col 45 (penultimate and final paragraphs) (K Shanmugam, Minister for Law).

83 *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at cols 45 (penultimate and final paragraphs) and 56 (second paragraph) (K Shanmugam, Minister for Law).

84 For proposals as to how the court might exercise its discretion, see Jeffrey Pinsler, "Admissibility and the Discretion to Exclude Admissible Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215 at 236–241, paras 32–37.

85 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [105]–[108]. For example, see *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 (concerning the exclusion of unreliable evidence); *Wan Lai Ting v Kee Kah Kim* [2014] 4 SLR 795 (concerning, *inter alia*, the exclusion of evidence where the deponent is not made available for cross-examination); *Cheo Yeoh & Associates LLC v AEL* [2015] 4 SLR 325 (concerning the Court of Appeal's observations on the trial court's application of O 38 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) and ss 32(1) and 32(3) of the Evidence Act (Cap 97, 1997 Rev Ed)). These cases are considered in Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 5th Ed, 2015) at paras 6.056–6.059.

86 *Ie*, since the judgment of the High Court in *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291 (see para 4 above).

acknowledged the existence of an "inherent discretion" in the context of civil proceedings.[87] Second, this "inherent discretion" was regarded as stemming from the same power which was exercised by the Court of Appeal in *Kadar* (*ie*, the discretion to exclude improperly or illegally obtained evidence if its prejudicial effect exceeded its probative value).[88] Third, the Court of Appeal in *ANB v ANC* equated the expression "exclusionary discretion" (used in *Kadar*) with its own terminology, "inherent discretion", and considered its exercise in the context of improperly obtained evidence.[89] Fourth, the Court of Appeal in *ANB v ANC* stated that "different societal and policy reasons as well as arguments may apply *vis-à-vis* the inherent discretion of the court to exclude evidence as between criminal and civil proceedings".[90] This pronouncement may be construed as justifying an overall inherent discretion which may be exercised by a court in accordance with appropriate principles applicable to the varying considerations and circumstances in criminal and civil cases. Fifth, the main concern of the Court of Appeal in *ANB v ANC* was the effect of the manner of obtaining evidence on the rule of law: "Put simply, the respecting of such rights and rules is something which is expected when one is living in a civilised society where the Rule of Law (and not of the jungle) must prevail."[91] Is there any reason why such a fundamental principle should not apply to criminal cases in respect of egregious conduct on the part of law enforcement officers or other persons? Assume, for example, that the police had unlawfully obtained a laptop computer from the accused person's home and, in the course of doing so, caused criminal damage to his property. The laptop contains highly probative evidence against the accused person and the police could have obtained it by applying for a search warrant. As in the case of *ANB v ANC*, the laptop could (and ought to) have been obtained legitimately. Should the court exclude the evidence on the basis that the rule of law would not prevail if the police could disregard the law at whim and with impunity? Are the concerns of the rule of law not the same in criminal cases as they are in civil cases? With regard to entrapment, the position taken by Chan CJ in *Phyllis*[92] is that there is no discretion to exclude evidence obtained by entrapment because the probative value of such evidence invariably outweighs its prejudicial effect.[93] The absoluteness of this view is not consistent with the rule of law because it does not take into account the integrity of the administration of justice. Assume, for example, that a

87 *ANB v ANC* [2015] 5 SLR 522 at [27]–[31].
88 *ANB v ANC* [2015] 5 SLR 522 at [27]–[31].
89 As is evident from the heading above para 27 and the use of these words in the following paragraphs of the judgment.
90 *ANB v ANC* [2015] 5 SLR 522 at [29].
91 *ANB v ANC* [2015] 5 SLR 522 at [30]. See also para 37 below.
92 See n 2 above.
93 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

person, *X*, is suspected of having supplied drugs in Singapore many years ago, although there was insufficient evidence to bring a case against him.[94] The Central Narcotics Bureau ("CNB") finds out that *X* is now in Malaysia. Although there is no new evidence against *X* in respect of the previous incident, he is enticed by an undercover officer to come to Singapore for a short holiday (all expenses paid) on the pretext that that there is to be a gathering of old friends. After his arrival in Singapore, *X* is given a packet of diamorphine by an "old friend" at the instigation of the CNB. *X* is surprised by the "gift" but nevertheless decides to keep it. Subsequently, he is arrested for drug possession. At *X*'s trial, the issue arises as to whether the "old friend's" evidence ought to be excluded. The unfairness suffered by *X* is considerable given that he had turned his face against crime for many years and would have continued in this vein had he not been enticed. The interests of the administration of justice have also suffered because of the web of deceit by the authorities, the unlawful instigation of one of *X*'s old friends in the sting operation, the unlawful procuration and use of the illegal drug for the purpose of the operation, *X*'s victimisation which was motivated by unrelated circumstances in the distant past, and the absence of any need to apprehend *X* who was no longer a threat to society. It would seem that in this scenario, the conduct of the authorities was more harmful to the public interest than *X*'s offence of possession. Yet, according to *Phyllis*, the entrapment evidence in such a scenario would not be excluded.[95] Nor, according to *Phyllis*, would these circumstances justify a stay of proceedings for abuse of the judicial process.[96] The factors which would be taken into account in determining whether a court should exercise its discretion to exclude in this scenario are addressed subsequently.[97]

24 The Court of Appeal's views in *ANB v ANC* are clearly consistent with the doctrine of inherent power which by its very nature encompasses different principles and approaches according to the nature of the case before the court. We have considered the multiple factors which may face a civil court when deciding whether or not to exercise its discretion to exclude evidence. We have also seen that the

94 *Ie*, the facts did not raise the presumptions of possession, knowledge or trafficking.

95 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [148], where Chan Sek Keong CJ indicated in no uncertain terms that the entrapment evidence would be admissible even if it is obtained in a "particularly egregious manner" which would be "inimically repellent to the integrity of the administration of justice" (disagreeing with V K Rajah J (as he then was) in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934. See also *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [150(a)].

96 This is because *X* is being prosecuted on the basis of evidence presented to the court. See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [130]–[138] and [150(b)]. See also para 28 below.

97 See para 39 below.

"exclusionary discretion" exercised by the Court of Appeal in *Kadar* concerned the reliability of the second appellant's statements to the police.[98] The argument has been made that while the Court of Appeal in *Kadar* endorsed the prejudicial effect/probative value balancing test in relation to the reliability of evidence at trial, the case itself does not prohibit a wider application of the principle (possibly in a different form) to the manner of obtaining evidence regardless of its effect at trial.[99] It is true that V K Rajah JA did say in *Kadar* that "courts also should refrain from excluding evidence based only on facts indicating unfairness in the way the evidence was obtained (as opposed to unfairness in the sense of contributing to a wrong outcome at trial)".[100] However, this pronouncement should not be read as preventing the courts from ever exercising their discretion to exclude improperly obtained evidence. In fact, the same judge had previously stated in *Wong Keng Leong Rayney*[101] that if he had not been "unfettered by any authority, [he] would [have been] persuaded that there will be particularly egregious instances of misconduct where the courts should reject evidence that has been procured in a manner that might be inimically repellent to the integrity of the administration of justice". The courts are no longer fettered after *Kadar* and *ANB v ANC*. Indeed, the legal status of *Cheng*[102] which acknowledged the power to exclude evidence as a mechanism to protect a person "from illegal invasions of his liberties by the authorities"[103] was confirmed by the Court of Appeal in *Chan Chi Pun v Public Prosecutor*[104] ("*Chan Chi Pun*"). The significance of the "violet thread" of cases from *Cheng* to *ANB v ANC* will be considered in the closing segment of this article.[105] Meanwhile, it is apposite to revert in time to the enigmatic case of *Phyllis*, which was intended to be the defining authority on the discretionary power to exclude evidence.[106]

25 *Phyllis* presents a paradox in that although it was regarded in a series of four consecutive cases[107] as shutting the door to the court's discretionary power to exclude evidence, it may yet, after *Kadar* and

98 See para 1 above.
99 See para 4 above.
100 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [68].
101 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 at [64].
102 See para 4 above.
103 *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291 ("*Cheng*") at 292 and 293, although the approach in *Cheng* was criticised by the High Court in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 as being inconsistent with Evidence Act (Cap 97, 1997 Rev Ed).
104 [1994] 1 SLR(R) 654.
105 See paras 35–40 below (under "The Violet Thread").
106 See para 2 above.
107 These are the cases decided prior to *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205. See n 12 above.

ANB v ANC, re-emerge as an authority for the application of a balancing test for weighing the public interest in judicial access to relevant incriminating evidence against the public interest in rejecting improperly obtained evidence which, if relied upon, would offend the integrity of the administration of justice. The significance of *Phyllis* in this respect will be explained shortly. Meanwhile, the reader is asked to keep in mind the observation by the Court of Appeal in *ANB v ANC* that the courts have an "inherent discretion" to exclude evidence in civil and criminal cases and that different principles may apply in the respective spheres. Furthermore, *ANB v ANC* was not concerned with reliability of evidence at the trial but conduct which involved breach of confidence and infringement of proprietary rights. The clear implication is that a civil court will not turn blind eye to a litigant's misconduct and its effect on the other party's legal rights. In the criminal sphere, although law enforcement officers must have the power to seek out and apprehend criminals in the interest of public safety (even to the extent of entrapping them when the policy against the offence so dictates),[108] such licence cannot be unrestricted. The primary question for consideration here is: What principles should govern the exercise of this power in criminal cases? The probative value/prejudicial effect balancing test, which was developed in England in the context of prejudice that might result at the trial, is not a helpful standard to apply where the court is simply concerned about the manner in which the evidence was obtained. This is where we come to the observations of Chan CJ in *Phyllis*.

26 In *Phyllis*, which involved disciplinary proceedings against a lawyer, a PI had been engaged to obtain evidence that the respondent's law practice had been involved in touting for conveyancing work. The investigator represented herself as a real estate agent who might want to engage the respondent to act for her client in the purchase of a property. The investigator made audio and video recordings of a telephone discussion and meeting respectively with the respondent. The High Court found that the investigator's actions did not amount to entrapment and were not unlawful and upheld the finding of the disciplinary committee that the lawyer had offered a referral fee to the investigator for the purpose of securing work. Although the High Court's observations on the principles governing the discretion to exclude evidence were unnecessary to its conclusion on liability, it decided to clarify the law.[109] Chan CJ considered that the courts have no discretion to exclude illegally obtained evidence (including entrapment

108 Primarily in drug trafficking cases.

109 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [52].

evidence)[110] by reason of the provisions of the EA.[111] However, his Honour made the following pronouncement:[112]

> … *if a test under Singapore law were necessary* to determine whether or not entrapment or illegally obtained evidence should be excluded, the appropriate test would be a balancing test that takes into account all the factors identified in *Ridgeway*[113] and *Looseley*.[114] [emphasis in original]

In coming to this conclusion, Chan CJ criticised Yong Pung How CJ's rejection of the balancing test[115] in *SM Summit Holdings v Public Prosecutor*[116] ("*Summit*"), in which the latter Chief Justice preferred to apply a specific qualification to the general rule that there is no discretion to exclude evidence on the basis that it was improperly obtained.[117] If the word "necessary" in Chan CJ's pronouncement is read to mean "possible" in the sense that developments in the law enable the court to give effect to the balancing test, then it may not be too early to suggest that the "inherent discretion" referred to by the Court of Appeal in *ANB v ANC*[118] encapsulates the power of the court to exclude admissible evidence in criminal proceedings, if the manner in which it has been obtained is so offensive to the integrity of the administration of justice that it should not be relied upon despite it probative value. Or, as Lord Nicholls put it in *Looseley*: "Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute."[119] In *Phyllis*, Chan CJ added that "[t]he same

110 For a consideration of the meaning of entrapment evidence, see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [53] and [61]–[70]. See also *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 at [27].

111 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [150].

112 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [113].

113 See para 3 above.

114 See para 3 above. The factors in *R v Looseley* [2001] 1 WLR 2060 and *Ridgeway v R* (1995) 184 CLR 19 are considered in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [60]–[96] and [112]–[113]. See also para 39 below.

115 The High Court in *SM Summit Holdings v Public Prosecutor* [1997] 3 SLR(R) 138 expressly declined to follow *Bunning v Cross* (1978) 141 CLR 54 as authority for the balancing test. See also *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [42], [46] and [112]–[113].

116 [1997] 3 SLR(R) 138.

117 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [112]–[113]: this point will be considered later.

118 *Ie*, in its tentative observations on the power to exclude improperly obtained evidence in civil cases.

119 *R v Looseley* [2001] 1 WLR 2060 at [25]; *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [47] and [63].

consideration would apply to illegal conduct on the part of a private *agent provocateur*".[120]

27 Chan CJ considered that if a balancing test could be applied in Singapore, the factors indicated in *Ridgeway* and *Looseley* ought to be weighed in the scales.[121] Consequently, it would be useful to address the relevant pronouncements in these cases. However, it should be noted that in *Looseley*, the House of Lords considered that evidence obtained by entrapment was an abuse of process which might justify a stay of proceedings. In *Ridgeway*, the majority of the High Court of Australia did not think that entrapment *simpliciter* constituted an abuse of process warranting a stay and preferred (as a general approach) to exclude the evidence if the circumstances justified this outcome.[122] *Ridgeway* involved the illegal actions of the Australian Federal Police which were intended to cause the accused to commit the offence of importing prohibited drugs. The conduct of the police constituted a vital element of the offence. The heroin had been imported unlawfully by an officer from the Malaysian police's anti-narcotics branch as part of an operation involving the "controlled importation" and delivery of heroin for the purpose of arresting the accused in Australia. The accused had initiated and arranged the importation through an informer of the Malaysian police. The informer bought the heroin in Malaysia and flew with a Malaysian police anti-narcotics officer to Australia with the heroin in the latter's custody. The officer was able to clear the heroin through customs as a result of special arrangements made between the Federal Police and Customs in Australia. Some days later, when the Malaysian informer and officer met the accused and handed the heroin to him, he was arrested. At his trial, the accused argued that the evidence ought to be excluded, *inter alia*, because of the activities of the police. The Australian High Court balanced the following public interests in determining how the discretion is to be exercised: "whether in all the circumstances of the case, the considerations of public policy favour[ed] [the] exclusion of the evidence of the [accused's] offence, namely, the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the [accused]".[123] By

120 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [47].

121 The factors in *R v Looseley* [2001] 1 WLR 2060 and *Ridgeway v R* (1995) 184 CLR 19 are considered in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [60]–[96] and [112]–[113]. See also para 39 below.

122 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis*") at [84]–[92]. The minority judges took the same view as the House of Lords in *R v Looseley* [2001] 1 WLR 2060. See *Phyllis* at [93].

123 This appears in the majority judgment of *Ridgeway v R* (1995) 184 CLR 19 ("*Ridgeway*") at 41–42. See also *Bunning v Cross* (1978) 141 CLR 54, which was

(*cont'd on the next page*)

a majority of five to two ("the majority"), the High Court in *Ridgeway* decided that the evidence of the importation of the drugs ought to be excluded. It declared that where "[the] illegal police conduct is itself the principal offence to which the charged offence is ancillary or creates or itself constitutes an essential ingredient of the charged offence[,] … the police illegality and the threat to the rule of law which it involves assume a particularly malignant aspect".[124] It is interesting that this phrase was used by Yong CJ in *Summit*.[125]

28 The majority of the High Court in *Ridgeway* did not follow the path of the House of Lords in *Looseley* (concerning an undercover police officer who instigated the accused into supplying him with heroin), which was to regard a prosecution based on entrapment evidence as an abuse of process that justified a stay of proceedings. The reason given by the majority in *Looseley* was that using the court process to prosecute a defendant who was guilty of a criminal offence could not be an abuse of process.[126] This view was accepted by Chan CJ in *Phyllis*, where his Honour pointed out that a prosecution based on entrapment or illegally obtained evidence is not an abuse of the court's process as long as it has been brought "for the *bona fide* prosecution of criminals".[127] The basis for this view is that any abuse is not directed against the court process, the function of which is to determine the guilt or otherwise of the accused on the basis of the evidence presented.[128] The position would be different where the integrity of the court process is compromised by its use for a function other than which it is intended to serve or which it is incapable of serving.[129] The criminal process would be used for an improper purpose where the Prosecution initiates proceedings against the defendant "in order to harass him or teach him a lesson"[130] in the absence of sufficient evidence to justify the charge. Abuse of process would also arise if criminal proceedings are improperly pursued despite

applied in *Ridgeway*, and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [74] and [87].

124 See *Ridgeway v R* (1995) 184 CLR 19 at 39. See also *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [89]–[90].

125 See para 30 below.

126 See *Ridgeway v R* (1995) 184 CLR 19 at 40–41 and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [87].

127 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [138]–[139] and [132].

128 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis*") at [138]. The court endorsed the majority view in *Ridgeway v R* (1995) 184 CLR 19 (in particular, see the extracts from Brennan J's judgment in *Phyllis* at [85]–[86]). Accordingly, *R v Looseley* [2001] 1 WLR 2060 has no application in Singapore: *Phyllis* at [139].

129 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis*") at [130]. See Brennan J's judgment in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 47–48: cited in *Phyllis* at [86].

130 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [132].

a promise of immunity having been made to the person concerned in exchange for his assistance in police investigations, or where he is unjustifiably charged with a more serious offence in order to force him to plead guilty to a lesser crime. In *Ridgeway*, the High Court decided to rely on the balancing test which had earlier been developed in *Bunning v Cross*[131] ("*Bunning*") and excluded the evidence.[132] The issue for the Singapore court is how it should apply the balancing test in determining whether improperly obtained evidence should be excluded. As mentioned earlier in this article, Chan CJ had stated in *Phyllis* that "the appropriate test would be a balancing test that takes into account all the factors identified in *Ridgeway* and *Looseley*".[133] These factors are usefully set out in the judgment of Chan CJ.[134]

29 It is clear that not every instance of police impropriety will justify exclusion. In *Phyllis*, Chan CJ observed that according to the English and Australian authorities,[135] the mere fact that a law enforcement officer's action is unlawful does not mean that the evidence obtained would be excluded: "It is just one factor which is brought into the balance."[136] Having reviewed the cases, the learned Chief Justice stated that "whether unlawful conduct by state agents in the pursuit of criminals is an abuse of power is ultimately a question of determining which competing interest serves the public welfare more, *ie*, convicting and punishing the guilty on the one hand, or protecting the integrity of the judicial process (by not allowing such conduct by state agents to bring the administration of justice into disrepute) on the other".[137] His Honour also referred to Lord Hoffmann's statement in *Looseley*[138] that once the court considers unlawful police conduct as having crossed the line into the sphere of impropriety and unacceptability constituting "an affront to the conscience of the public", the court must act by staying the proceedings.[139] It was pointed out earlier on[140] that the House of Lords in *Looseley* considered a stay of the proceedings to be the right

131 (1978) 141 CLR 54. See also *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [112].

132 For Chan Sek Keong CJ's consideration of this finding, see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [89]–[92].

133 See para 26 above.

134 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [60]–[96] and [112]–[113]. See also para 39 below.

135 In particular, *Ridgeway v R* (1995) 184 CLR 19; *R v Looseley* [2001] 1 WLR 2060; and *Nottingham City Council v Amin* [2000] 1 WLR 1071. See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [65]–[68].

136 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [65].

137 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [68].

138 *R v Looseley* [2001] 1 WLR 2060 at [41] (endorsing Lord Steyn's proposition in *R v Latif* [1996] 1 WLR 104 at 112).

139 See also *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [68].

140 See para 28 above.

approach in contradistinction to the views of the High Court in *Ridgeway*, which decided to respond through its discretionary power to exclude evidence (also by way of a balancing mechanism).[141] The majority of the High Court in *Ridgeway* decided that staying the proceedings would not be appropriate in view of the separation of powers in Australia's constitutional system, and also that invoking the court's jurisdiction to try an offender for an offence could not be an abuse of the court's process as that was what the court's process was intended for.[142] In *Phyllis*, Chan CJ agreed with the High Court in *Ridgeway*[143] and observed that the factors referred to in both *Ridgeway* and *Looseley* would be appropriate for a Singapore court to take into account if a balancing test could be applied.[144]

30 It is also necessary to consider the standing of *Summit* in the glare of the criticisms of that case by Chan CJ in *Phyllis*.[145] In *Summit*, the plaintiff had arranged for a PI to procure a party[146] to violate copyright and trade mark rights so that legal action could be taken with a view to obtaining search warrants. The PI had stated in his statutory declaration that he had caused the party to replicate eight stampers (counterfeit masters) which contained infringing programmes. The High Court decided his statutory declaration ought to have been excluded from consideration by the court as the illegality of the PI's conduct was unacceptable.[147] Yong CJ stated: "There is a distinction

141 The majority judges decided that staying the proceedings would not be appropriate in view of the separation of powers in Australia's constitutional system, and also that invoking the court's jurisdiction to try an offender for an offence could not be an abuse of the court's process as that was what the court's process was intended for. See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [96] and [112].

142 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [96] and [112].

143 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis*") at [132] and [138]–[139]. The position would be otherwise where the integrity of the court process is compromised by its engagement for a purpose other than which it is intended to serve or which it is incapable of serving: *Phyllis* at [130]. See Brennan J's judgment in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 47–48 (cited in *Phyllis* at [86]). The criminal process would be used for an extraneous purpose where the Prosecution initiates proceedings against the defendant "in order to harass him or teach him a lesson" (*Phyllis* at [132]) in the absence of sufficient evidence to justify the charge. Again, criminal proceedings would be improperly engaged where the defendant has been promised immunity from prosecution in exchange for his assistance in police investigations, or where he is unjustifiably charged with a more serious offence in order to force him to plead guilty to a lesser crime.

144 See para 26 above.

145 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [108]–[113].

146 The party was suspected of copyright and trade mark infringements.

147 *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [52]. See also [57].

between the case where police conduct has merely induced the accused person to commit the offence which he has committed[148] and the case where the illegal police conduct itself constitutes an essential ingredient of the charged offence."[149] His Honour considered that the circumstances of the case were within the latter category (although the illegal conduct was that of a civilian PI and not a law enforcement officer). In an apparent reference to *Ridgeway*, the Chief Justice declared that different tests apply to the two situations. Where the law enforcement officer has merely induced the accused person to commit the offence, the public interest in the conviction and punishment of the guilty person is likely to prevail over other considerations, and the exclusion of evidence would in fact undermine judicial integrity in allowing the acquittal of a guilty person. However, "[w]here the illegal police conduct itself constitutes an essential ingredient of the charged offence … in the latter category, the illegality and the threat to the rule of law which it involves assume a particularly malignant aspect. … The integrity of the administration of criminal justice would require that such evidence be excluded".[150] Nevertheless, Yong CJ rejected the balancing test which had been applied by the Australian courts in *Bunning* and *Ridgeway*.[151] In his view, the approach in those cases was "completely unworkable in practice"[152] and the "disciplinary" approach against law enforcement authorities (which his Honour considered to have been engaged in *Ridgeway*) could not be justified.[153]

31 Although *Summit* was a case involving the issue of whether a party was entitled to retain evidence after the execution of an illegal search warrant (rather a situation which concerned the discretion to exclude admissible evidence), the considerations are relevant to the latter (as evinced by the High Court's consideration of the discretion cases). *Summit* was criticised in *Phyllis* for its factual findings, reasoning and legal conclusions.[154] The following observations of Chan CJ in *Phyllis* on the approach in *Summit* are particularly significant because they set the scope for an extended principle governing the exclusion of

148 "In such a case the illegality is only in relation to the means of proof of the offence already committed": *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [41].

149 "This was a clear case where the illegality preceded the crime and was designed to bring about the commission of the crime": *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [41].

150 *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [52]. See also [57]. Note that this phrase was taken from *Ridgeway v R* (1995) 184 CLR 19. See para 27 above.

151 *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [54]–[56].

152 *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [55].

153 *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [56].

154 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [108]–[113].

improperly obtained evidence even though the reliability of that evidence is not in issue (as it was in *Kadar*). First, Chan CJ disagreed with Yong CJ's view that the High Court in *Ridgeway* was concerned with disciplining the police. The paramount concern of the Australian High Court was to ensure that the administration of justice would not be brought into disrepute.[155] It decided to exclude the evidence because the prosecution of the accused was selective and, in any event, he could still be prosecuted for state offences which did not include the ingredient of illegal importation.[156] In Chan CJ's view, "[b]ut for these two factors, *the majority judges would not have excluded the evidence*" [emphasis in original].[157] His Honour added that "[t]he joint judgment in *Ridgeway* shows that it is only in very exceptional circumstances that the court would exclude illegally obtained evidence under the public policy discretion"[158] and concluded that "*Summit* is not in this class of exceptions".[159]

32 Chan CJ went on to endorse the viability of the balancing process and the factors which a court has to take into account in operating it, as advocated in *Looseley* and *Ridgeway*. This was in contradistinction to Yong CJ's approach in *Summit*, which was simply to consider the preceding unlawful conduct of the PI without any corresponding reference to the charged offence.[160] As was pointed out in *Looseley*[161] and *Ridgeway*,[162] every case of entrapment involves a preceding offence (abetment) which brings about a subsequent offence (the charged offence). However, not all preceding breaches of the law by law enforcement officers amount to abuse of process. Ultimately, it is a question of balancing the gravity of the preceding offence and that of the subsequent offence. As for *Summit*, the rejection of the balancing approach signifies that the case rests solely on its own facts: "It would, in

155 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [112]. The majority judges decided that staying the proceedings would not be appropriate in view of the separation of powers in Australia's constitutional system, and also that invoking the court's jurisdiction to try an offender for an offence could not be an abuse of the court's process as that was what the court's process was intended for. Hence, they fell back on the discretion in *Bunning v Cross* (1978) 141 CLR 54 to decide whether the evidence should be admitted.

156 The facts of *Ridgeway v R* (1995) 184 CLR 19 are set out in para 27 above.

157 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [112].

158 See *Ridgeway v R* (1995) 184 CLR 19 at 39 read with 31. See also *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [90].

159 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [112] (last sentence).

160 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 [113]. The relevant extract is set out in the later part of the paragraph.

161 *R v Looseley* [2001] 1 WLR 2060 at [70] and [102] (referred to in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [65]).

162 *Ridgeway v R* (1995) 184 CLR 19 at 90–91 (referred to in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [66]).

essence, mean that however trivial the preceding unlawful act may be in comparison with the charged offence, the evidence thereby procured of the commission of the charged offence is inadmissible."[163] Chan CJ explained:[164]

> Criminal conduct spans a large number and spectrum of offences in terms of harm to society, and also a vast range of culpability. It is undesirable and inappropriate to treat all preceding illegal conduct as sufficient to exclude the evidence thereby obtained. In our view, focusing solely on the preceding unlawful conduct, without reference to its nature or seriousness and ignoring the gravity of the charged offence, fails to give sufficient weight to the public interest in convicting the guilty. *The very existence of competing or conflicting public interests* requires the court to make a choice as to whether, in a particular case, one interest outweighs the other. The *Summit* exception denies the need to do such a balancing exercise. It also goes further than the decisions in *Bunning v Cross*, *Ridgeway* and even *Looseley*. In our view, the *Summit* decision, in adopting a black-and-white approach to the issue, does not provide the necessary flexibility that would enable the courts to resolve the competing public interests in the cases before them. In our view, *if a test under Singapore law were necessary*[165] to determine whether or not entrapment or illegally obtained evidence should be excluded, the appropriate test would be a balancing test that takes into account all the factors identified in *Ridgeway* and *Looseley*. [emphasis in original]

33 Therefore, it may be said that Chan CJ's observations in *Phyllis* provide a basis for the court to exclude improperly obtained evidence if the balancing test is tilted in favour of the administration of justice. This does not mean that the discretion will be exercised simply because the law enforcement officer has acted unlawfully in procuring the evidence. A primary consideration in the interest of the administration of justice is to balance the gravity of the officer's offence and that subsequent offence with which the accused is charged. Having extensively considered the observations in the English and Australian authorities,[166] Chan CJ concluded: "[W]hether unlawful conduct by state agents in the pursuit of criminals is an abuse of power is ultimately a question of determining which competing interest serves the public welfare more, *ie*, convicting and punishing the guilty on the one hand, or protecting the integrity of the judicial process (by not allowing such conduct by state agents to bring the administration of justice into disrepute) on the

163 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [113].
164 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [113].
165 This phrase is considered in para 26 above.
166 Including *R v Looseley* [2001] 1 WLR 2060; *Ridgeway v R* (1995) 184 CLR 19; and *R v Latif* [1996] 1 WLR 104.

other. It is, in truth, a balancing of relative interests and values."[167] For the sake of completeness, the reader's attention should be drawn to the clarification by Chan CJ that a particular paragraph in the *Summit* judgment[168] should not be interpreted as meaning that although illegal conduct would not be acceptable if undertaken by a private party, it would be acceptable if undertaken by a law enforcement officer: "That would not be correct as the law applies equally to all, and, in our view, that was not what the statement meant."[169] The overall consideration is whether the conduct of the law enforcement officer "was so seriously improper as to bring the administration of justice into disrepute".[170] The point might also be made that although law enforcement authorities must be given sufficient leeway to carry out their duties effectively, they also have the corresponding responsibility as public officers to act in a manner which is consistent with their statutory roles.

34 Although *Summit* and *Phyllis* are of equivalent standing (both cases were decided the High Court and involved a sitting Chief Justice), there are several reasons why *Phyllis* should be regarded as the overriding authority on the common issues involved in the respective judgments. First, *Phyllis* is a later case and the court there had the benefit of hindsight and the opportunity to consider the viability of the approach in *Summit*. Second, the *Phyllis* judgment is extremely comprehensive and was intended by the Court of Appeal in *Wong Keng Leong Rayney*[171] to definitively declare the principles governing the discretion to exclude evidence. Hence, the fact that the observations in *Phyllis* constituted *obiter dicta* should not detract from the forcefulness of this authority. Third, *Summit* was not directly concerned with the discretion to exclude admissible evidence but with the issue of whether evidence should be retained in the face of an illegal search warrant. Fourth, the High Court in *Phyllis* pointed out what it considered to be multiple errors in the *Summit* judgment. Fifth, the cases decided in the aftermath of *Phyllis* (including *Kadar* and *ANB v ANC*) show that *Phyllis* is regarded as primary authority in this area of law.[172]

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167 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis*") at [68]. For additional observations on these competing interests, see *Phyllis* at [71]–[96] and [112]–[113]. See also the discussion in the preceding paragraphs of this article. See also para 39 below.

168 See *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 at [57].

169 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [47]. This was also the view of V K Rajah J (as he then was) in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 at [67]–[68].

170 Chan Sek Keong CJ citing Lord Nicholls in *R v Looseley* [2001] 1 WLR 2060 at [25]: see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis*") at [47]. Chan CJ applied this same consideration to illegal conduct on the part of a private *agent provocateur*: *Phyllis* at [47].

171 See para 2 above.

172 For the other cases, see n 12 above.

IV. The violet thread

35 There is a violet thread[173] of authorities and pronouncements which justify a discretion to exclude admissible evidence (irrespective of its probative value) procured in a manner which is so offensive to the integrity of the administration of justice (whether by reason of egregious conduct or contravention of the law) that it should not be relied upon. It has been argued that although the Court of Appeal in *Kadar* was concerned with unfairness which would result from the admission of unreliable statements at trial, and that it discouraged courts from excluding evidence simply on the basis that it was improperly obtained, the judgment does not close the door to the rejection of evidence in circumstances warranted by the interests of the administration of justice. Indeed, at the second reading of the Evidence (Amendment) Bill in 2012,[174] the Minister of Law indicated that it is for the court to determine how it would exercise its "inherent jurisdiction" to exclude evidence in the interests of justice. Subsequently, in *ANB v ANC*, the Court of Appeal emphasised the importance of the court's "inherent discretion" to protect legal rights and to preserve the authority of the legal infrastructure in a civilised society according to the Rule of Law.[175]

36 To recap, the violet thread passed through the eye of the needle in *Cheng*.[176] In that case, Wee Chong Jin CJ pronounced that it was "undisputed law" that there is a judicial discretion to exclude relevant evidence if its reception "would operate unfairly against the accused".[177] In determining whether its reception would have this effect, the court has to take into account "the interest of the individual to be protected from illegal invasions of his liberties by the authorities [and] the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done".[178] *Cheng* was endorsed by the Court of Appeal in *Chan Chi Pun*[179] as the governing authority with regard to the principles governing the discretion to exclude evidence. Although Wee CJ's observations in *Cheng* were criticised by Chan CJ in *Phyllis* as being inconsistent with the EA,[180] the endorsement of *Cheng* by the Court of Appeal in *Chan Chi Pun* has never been doubted by that court. The interest of the administration of justice was

173 The colour violet is intended to express the spirit of the administration of justice.

174 See *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at cols 1127–1146.

175 See para 9 above.

176 See para 4 above.

177 *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291 at 292.

178 *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291 at 293. The case has been considered extensively in other writings. See n 3 above.

179 See para 24 above.

180 See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

also a critical consideration in *Summit*,[181] in which the High Court decided that evidence obtained illegally prior to the commission of the crime may be excluded in order to maintain judicial integrity. Although the case was concerned with the unlawful conduct of a PI in procuring the evidence,[182] Chan CJ clarified in *Phyllis* that *Summit* should not be interpreted as signifying that the unlawful conduct of a private person would not be acceptable but that the illegal actions of a law enforcement officer would be.[183] His Honour observed that the overall consideration is whether the conduct of the law enforcement officer "was so seriously improper as to bring the administration of justice into disrepute".[184]

37 These sentiments were also reflected by V K Rajah J (as he then was) in *Wong Keng Leong Rayney*: "[T]here will be particularly egregious instances of misconduct where the courts should reject evidence that has been procured in a manner that might be inimically repellent to the integrity of the administration of justice. This will protect those who should not be convicted contrary to the public's sense of justice."[185] Subsequently, in *Kadar*, his Honour let it be known in no uncertain terms that the failure of law enforcement officers to meet the standards required of them hinders the interests of the administration of justice. The violet thread continued through the Court of Appeal's tentative observations in *ANB v ANC*. Although a civil case which directly concerned an action for breach of confidence and injunctive relief, the Court of Appeal indicated that a court may need to exercise its discretion "more robustly – or at least more vigorously" than the High Court in that case contemplated because of the variety of countervailing factors which might arise and the need to protect potential proprietary interests and the public interest in promoting legitimacy in the method of obtaining of evidence.[186] Phang JA went on to state:[187]

> Put simply, the respecting of such rights and rules is something which is expected when one is living in a civilised society where the Rule of Law (and not of the jungle) must prevail.

38 No doubt this pronouncement applies to criminal cases with equal force. Indeed, it explains and justifies the violet thread of judicial pronouncements which were addressed earlier. Although it is generally acknowledged that law enforcement authorities ought to be permitted to

181 See para 26 above.
182 The facts of *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138 are set out in para 30 above.
183 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [47].
184 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [47], Chan Sek Keong CJ citing Lord Nicholls in *R v Looseley* [2001] 1 WLR 2060 at [25].
185 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 at [64].
186 *ANB v ANC* [2015] 5 SLR 522 at [30].
187 *ANB v ANC* [2015] 5 SLR 522 at [30].

have appropriate powers to apprehend criminals in the interest of safeguarding society, the courts should not condone misconduct on the part of law enforcement officers (or private investigators, as in *Summit*) by admitting the evidence obtained in a manner which would denigrate the judicial process in the eyes of reasonable members of the public. The ideal mechanism for determining whether law enforcement officers have "crossed the line" ought to be determined by the balancing test that was favoured by Chan CJ in *Phyllis*. Now that an "exclusionary discretion" or "inherent discretion" to exclude evidence independent of the EA has been confirmed, it would be possible to revisit the balancing test proposed in *Bunning*, *Ridgeway* and *Looseley*,[188] which Chan CJ might have applied if it had been appropriate to do so,[189] and if his Honour had not considered himself as being prevented from exercising discretionary power by the EA.[190] If the courts take this initiative, a new balancing test may be formulated (within the compass of its inherent power) which would take into account the interests of the accused in being judged on the basis of reliable evidence (the circumstances before the Court of Appeal in *Kadar*), and the interests of the administration of justice where evidence has been obtained in a manner which would offend the integrity of the judicial process.

39 This approach would be consistent with balancing test endorsed by the High Court in *Cheng*.[191] The High Court considered it sufficient to apply the two conflicting interests in order to resolve the issue of whether the evidence should be excluded. On the facts (which involved undercover officers obtaining evidence of an illegal lottery), the court was not satisfied that the harm to the public interest was "substantially incontestable" if the improperly obtained evidence were to be admitted. In determining whether the harm to the public interest is "substantially incontestable" the court may take into account any relevant factors the relative weight and importance of which would be determined by the circumstances of the particular case.[192] In a criminal case, these could include: the nature of the offence with which the person is charged;

188 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis*") at [68]. For additional observations on these competing interests, see *Phyllis* at [71]–[96] and [112]–[113]. See also the discussion in the preceding paragraphs of this article.

189 It was not necessary because the High Court ruled that the discretionary power did not apply to disciplinary cases.

190 See paras 26–33 above.

191 See para 36 above.

192 As Wee Chong Jin CJ stated in *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291 at 293: "It seems to me, both on principle and authority, that no absolute rule can be formulated and the question is one depending on the circumstances of each particular case." See also *R v Looseley* [2001] 1 WLR 2060 at [48] for the observations of Lord Hoffmann (cited in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [64]).

whether the manner of obtaining the evidence was justified by underlying statutory policy; the danger the person poses to society if not apprehended (the nature of his criminal record and the potential for continuing criminal activities); whether the police operation is essential to the public interest; the role of the police in the crime (for example, did their conduct constitute an element of the offence or merely provide the accused with the opportunity to commit it);[193] the nature of the improper or unlawful conduct of the police (was it egregious, unnecessarily extreme or did it constitute intentional illegality); whether the evidence could have been obtained by other more reasonable means; if the police acted illegally, whether the illegality was more serious than the offence with which the person is charged (in which case, the conduct of the police may not have been justified); and whether the person was set up for the offence because of an ulterior motive (for example, where a previous unrelated prosecution against him failed).[194] Reference may be made to the example above[195] to illustrate the operation of all these factors.

40 As for the exercise of the discretion to exclude evidence in civil cases,[196] the observations of the Court of Appeal in *ANB v ANC* (tentative though they are until the issue of the discretionary power arises for direct consideration in a future case) forcefully establish the operational necessity of the doctrine. In justifying its position, it referred to *Phyllis* and *Kadar*[197] and suggested that independent principles might apply because of "a different conception of the concept of 'unlawfully or illegally obtained evidence' which forms the basis of [those decisions]".[198] In other words, the considerations which arise in criminal and civil proceedings may require different principles to govern the discretionary power to exclude evidence. This pronouncement by the Court of Appeal is clearly consistent with the nature of the doctrine of inherent power which is intended to enable the courts to operate justly in different circumstances by applying the appropriate precepts. It is hoped that the courts will continue to sew this violet thread by

193 *Ie*, would the accused have committed the offence even if the police had not been involved?

194 Many of these factors are based on the considerations in *Bunning v Cross* (1978) 141 CLR 54; *Ridgeway v R* (1995) 184 CLR 19; and *R v Looseley* [2001] 1 WLR 2060 (addressed in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [60]–[96] and [112]–[113]).

195 See the second half of para 23 above.

196 The potential position in civil proceedings is addressed at paras 5–22 above.

197 As pointed out by the Court of Appeal in *ANB v ANC* [2015] 5 SLR 522 at [28]. The High Court in *ANB v ANC* had also justified the exercise of the discretion to exclude evidence in civil cases on the basis of *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 and *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205.

198 *ANB v ANC* [2015] 5 SLR 522 at [30].

developing the principles in both criminal cases and civil cases and so weave the judicial fabric of justice to the specifications of the rule of law. The final observation of the Court of Appeal in *ANB v ANC*,[199] which refers to academic writings on the state of the law,[200] suggests that this is a real prospect.

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199 *ANB v ANC* [2015] 5 SLR 522 at [31].

200 See Ho Hock Lai, "'National Values on Law and Order' and the Discretion to Exclude Wrongfully Obtained Evidence" [2012] JCCL 232 and Jeffrey Pinsler, "Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215. See also Ho Hock Lai, "State Entrapment" (2011) 31 Legal Studies 71.