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STATUS OF PRIVILEGED COMMUNICATIONS INADVERTENTLY DISCLOSED IN CIVIL OR CRIMINAL PROCEEDINGS

The status of privileged communications that have been inadvertently disclosed has been a focal point of the law governing legal professional privilege in Singapore during the last decade. It will be shown how the common law, which has essentially stood still for well over a century, has been refined and developed by the Singapore courts even to the extent of adapting it to modern-day technology. Although some uncertainties remain, and there is complexity, the doctrine is now an evolving one.

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I. Introduction

1 The law governing inadvertently disclosed communications to which legal advice privilege or litigation privilege attaches has attracted much judicial attention in the last decade. Indeed, in *Mykytowych, Pamela Jane v V I P Hotel*[1] ("*Mykytowych*"), Chao Hick Tin JA referred to "the amount of ink that has been spilt on this issue".[2] This article has a threefold purpose. Apart from analysing the state of the law, it shows how centuries-old fact-centric judgments can evolve into principled judicial approaches and how the law attunes to modern communication systems such as electronic transmission and the Internet (for example, the legal concept of "public domain"). With the advent of information technology, it has become easier to disclose or access privileged information, resulting in disputes over the use of such evidence in litigation. This trend has necessitated the adaptation of the law.

2 Singapore cases have had a major impact in developing and clarifying the law. After considering the early authorities, this article will address the conceptual underpinnings of the subject including: the effect

1 [2016] 4 SLR 829.
2 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [67].

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of evidential privilege and its relationship the admissibility of evidence; the nature and scope of the court's equitable power to protect privileged communications (including the possible differentiation in approach towards legal advice and litigation privilege); whether the distinctive approach towards originals and copies of privileged documents can be justified; how confidentiality may be retained even though information is electronically accessible; whether the court will grant an injunction or expunge a privileged document which the Prosecution wishes to rely on in a criminal case; and the court's inherent discretion to exclude a document even though it is no longer confidential. Finally, this complicated area of law will be summarised in the form of ten propositions.[3]

II. Origins

3 Almost two centuries ago, in *Lloyd v Mostyn*[4] ("*Lloyd*"), the Court of Exchequer concluded that a party to proceedings who comes into possession of a copy of a privileged document may present that copy in evidence.[5] There is no discussion of principle in this case. Parke B stated: "… surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?"[6] In *Calcraft v Guest*[7] ("*Calcraft*"), Lindley MR (with whom Rigby and Vaughn Williams JJ agreed) regarded *Lloyd* as "a distinct authority that secondary evidence in a case of this kind may be received".[8] In *Calcraft*, a case which involved litigation over fishing rights, it was held by the English Court of Appeal (following *Lloyd*)[9] that the defendant was entitled to adduce copies of proofs of evidence and memoranda relating to litigation pursued by the predecessor in title of the plaintiff in the 18th century.[10] As in *Lloyd*, the judgment in *Calcraft* is devoid of any reasoning underlying the right to tender copies of privileged documents.

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3 See para 48 below. Mistaken disclosure of a document in a list of documents for the inspection of the other party in the course of discovery is not addressed in this article. Order 24 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) addresses these circumstances.

4 (1842) 10 M & W 478.

5 The court decided that a copy of a bond could be adduced in evidence even though the bond itself was privileged. It is not clear how the bond was protected by privilege (even though it was a confidential document because it had been entrusted to a lawyer), as it was not a communication in itself but the very subject matter of the suit.

6 Lord Abinger, Gurney B and Rolfe B concurred.

7 [1898] 1 QB 759.

8 *Calcraft v Guest* [1898] 1 QB 759 at 764.

9 See *Lloyd v Mostyn* (1842) 10 M & W 478.

10 The defendant made copies of these documents (which had been found) and returned the originals to the plaintiff.

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4 The issue of whether the party asserting privilege could restrain the other party from relying on a privileged communication was not considered in *Lloyd* and *Calcraft*. In *Lord Ashburton v Pape*[11] ("*Ashburton*"), which involved Pape improperly obtaining privileged correspondence between Lord Ashburton and his lawyer (through collusion with the latter's clerk), an injunction was granted preventing Pape from relying on the documents in bankruptcy proceedings. The Court of Appeal affirmed the position taken in *Calcraft*, but distinguished it on the basis that it concerned the production of documents in proceedings rather than a specific action for an injunction to prevent the production of documents (the circumstances of *Ashburton*):[12]

> The rule of evidence as explained in *Calcraft v. Guest* merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means. The Court in such an action is not really trying the circumstances under which the document was produced. That is not an issue in the case and the Court simply says 'Here is a copy of a document which cannot be produced; it may have been stolen, it may have been picked up in the street, it may have improperly got into the possession of the person who proposes to produce it, but that is not a matter which the Court in the trial of the action can go into.' But that does not seem to me to have any bearing upon a case where the whole subject-matter of the action is the right to retain the originals or copies of certain documents which are privileged.

5 Therefore, the distinction made by the Court of Appeal in *Ashburton* between the case before it and *Calcraft* was essentially procedural in nature. This is understandable given that *Ashburton* was decided at a time when the party seeking to protect his privileged document had to commence a separate proceeding for an injunction. As will be shown,[13] it is now well established that a separate action for an injunction is no longer necessary (although it may be appropriate in certain cases), as the courts may now simply order that privileged document or part of that document be expunged at the hearing.

6 It may be said that the procedural distinction made in *Ashburton* is no longer valid as that case and *Calcraft* are now regarded as representative of different but relational doctrines. Thus, it was observed in *Webster v James Chapman & Co*[14] ("*James Chapman*") that the two cases provide "examples of two independent and free-standing

11 [1913] 2 Ch 469.
12 *Lord Ashburton v Pape* [1913] 2 Ch 469 at 473.
13 See para 17 below.
14 [1989] 3 All ER 939.

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principles of jurisprudence".[15] While privilege confers protection over a privileged communication subject to waiver by the privilege-holder, equity assists by extending that protection to a communication that has been inadvertently revealed to third parties when it is just to protect its confidentiality. As May LJ stated in *Goddard v Nationwide Building Society*[16] ("*Goddard*"):[17]

> I think that [*Ashburton*] and *Calcraft v. Guest* [1898] 1 Q.B. 759 are good authority for the following proposition. If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them.

7 Judges have often considered the relationship between *Calcraft* and *Ashburton* to be unsatisfactory because the outcome depends on whether the party seeking to protect his privilege manages to apply for relief before the privileged material is presented in court.[18] However, the position taken in *Goddard* is now established.[19] Furthermore, it is clear that the court has the equitable jurisdiction to restrain the production of confidential documents even if they have been innocently acquired. As Nourse LJ observed in *Goddard*,[20] "the right of the party who desires the protection to invoke the equitable jurisdiction does not in any way depend on the conduct of the third party into whose possession the record of the confidential communication has come".[21] In *Goddard*, the plaintiffs bought a house with the aid of a mortgage from a financial institution (the defendant). The plaintiffs' lawyer, who also acted for the defendant concerning the mortgage, sent the defendant a copy of

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15 *Webster v James Chapman & Co* [1989] 3 All ER 939 at 943–944, *per* Scott J.
16 [1987] 1 QB 670.
17 *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 683.
18 See *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 683 and 684; and *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [31].
19 See *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [67] and *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [50].
20 *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 685.
21 Nourse LJ continued at 685:

> Thus, several eminent judges have been of the opinion that an injunction can be granted against a stranger who has come innocently into the possession of confidential information to which he is not entitled: see *Rex Co. v. Muirhead* (1926) 136 L.T. 568, 573, *per* Clauson J; *Printers & Finishers Ltd. v. Holloway* [1965] 1 W.L.R. 1, 7, *per* Cross J; and *Butler v. Board of Trade* [1971] Ch. 680, 690, *per* Goff J. This view seems to give effect to the general rule that equity gives relief against all the world, including the innocent, save only a *bona fide* purchaser for value without notice. It is directly in point in the present case and our decision necessarily affirms it.

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an attendance note that recorded conversations between the lawyer and one of the plaintiffs. The content of the note was relied on by the defence. The plaintiffs objected and applied to strike out the relevant parts of the defence. The Court of Appeal granted the injunction against the defendant even though it had received the note innocently.

III. Conceptual underpinnings and the development of the Singapore doctrine

A. *Effect of evidential privilege and its relationship to the admissibility of evidence*

8 A proper understanding of this area of law necessitates an appreciation of the conceptual underpinnings of the doctrine of evidential privilege. As Andrew Phang JA observed in *ARX v Comptroller of Income Tax*[22] (citing Lord Millet in *B v Auckland District Law Society)*,[23] "privilege is a right to resist the compulsory disclosure of information".[24] It has also been characterised as "the right to decline to disclose or to allow to be disclosed the confidential communication or document in question"[25] or simply as an "immunity" against "the exercise of legal power".[26] As the doctrine does not provide an actionable right, if the privileged communication is unintentionally disclosed to the opposing party, the latter cannot be restrained from relying on it simply on the basis that it is privileged information. Thus, in *B v Auckland District Law Society*,[27] the Privy Council affirmed[28] Hoffmann J's proposition in *Black & Decker Inc v Flymo Ltd*:[29]

> It is not possible to assert a right to refuse to disclose in respect of a document which has already been disclosed. Once the document has passed into the hands of the other party the question is no longer one of privilege but of admissibility.

9 If the privilege is expressly or impliedly waived,[30] it is lost. In the absence of waiver, a privileged document which has been inadvertently

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22 [2016] 5 SLR 590.
23 [2003] 2 AC 736 at [67].
24 *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [51].
25 The House of Lords in *Three Rivers District Council v Bank of England (No 6)* [2005] 1 AC 610 at [26].
26 The High Court of Australia in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [22].
27 [2003] 2 AC 736.
28 *B v Auckland District Law Society* [2003] 2 AC 736 at [67].
29 [1991] 1 WLR 753 at 755.
30 For the relevant provisions on waiver of privilege in the Evidence Act (Cap 97, 1997 Rev Ed), see ss 128(1), 128A(1), 130(2) and 130(3). The common law principles

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disclosed continues to be privileged even though immunity from disclosure has been lost. A cat that has been let out of a bag is still a cat. And although the cat may not itself be able to re-enter the bag (because privilege does not provide an actionable right), it can still be put back in the bag if the document remains confidential and equity decides to restrain the breach of confidence.[31]

10 This is also the position in Singapore. In *Mykytowych*, the Court of Appeal distinguished between the concepts of privilege and admissibility by observing that privilege "allows a party to withhold the disclosure of information which would otherwise be compulsory to disclose", while "[a]dmissibility, on the other hand, relates to the question of whether a particular piece of evidence may be received by the court".[32] Although *Mykytowych* concerned litigation privilege, the Court of Appeal made no distinction between litigation privilege and legal advice privilege and, for the purpose of the principles it articulated, relied on cases concerning legal advice privilege.[33]

11 In determining whether the privileged information is admissible, the court will consider its equitable power to restrain a breach of confidence by granting an injunction (if it is applied for before trial) or expunging the document or the offending part of it at trial prior to its presentation as evidence.[34] The court will also consider the rules of evidence law; in particular, whether privileged material is relevant and is not excluded by the Evidence Act[35] ("EA") and, if it is admissible, whether the court should exercise its discretion to exclude it. These principles will be considered sequentially.

B. *Court's power to restrain a party from relying on privileged communications*

(1) *General principles*

12 In deciding whether or not to grant an interlocutory injunction to restrain a party from relying on confidential information generally, the court will assess whether there is a serious issue to be tried and, if so, where

governing waiver may also apply. See *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [51]–[71] for a detailed discussion of the principles. Also see *Public Prosecutor v Soh Chee Wen* [2019] SGHC 235 in the context of implied waiver of litigation privilege.

31 See *B v Auckland District Law Society* [2003] 2 AC 736 at [69].

32 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [58].

33 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [57]–[69].

34 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [59].

35 Cap 97, 1997 Rev Ed.

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the balance of convenience lies.[36] Where the confidential information is covered by legal professional privilege, the court is more likely to grant an injunction to protect the sanctity of communications between the lawyer and client; particularly if the party seeking to rely on the information has acted iniquitously or irresponsibly. Conversely, if the motive of the party claiming privilege is to conceal evidence of his misconduct (for example, misleading the court) or is guilty of inexcusable delay in making his application, his claim to injunctive relief is likely to be declined. The law has developed incrementally as the following analysis of the authorities will show.

13 *Calcraft* was first considered in *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd*[37] ("*Tentat*"), in which e-mail correspondence between a lawyer and a subsidiary company was forwarded in confidence by that company to the chief investment officer ("CIO") of the holding company for the CIO's comments. (The case shows that e-mail communications raise a significant risk of inadvertent disclosure because they can be so easily forwarded.) In subsequent litigation between the holding company and Multiple Granite Pte Ltd ("MG") concerning an application for summary judgment against MG,[38] MG sought to adduce the affidavit of the CIO to which the privileged e-mail was attached. The subsidiary company intervened in the proceedings to, *inter alia*, restrain MG from relying on the e-mail. Kan Ting Chiu J endorsed the English Court of Appeal's interpretation of *Calcraft* and *Lord Ashburton* in *Goddard*, and ruled that MG could not rely on the e-mail communication in the proceedings against the holding company. This was because although the CIO's affidavit had been filed, it had not been admitted in evidence as the application for summary judgment by the holding company against MG had not yet been heard.[39] As the correspondence had not entered the public domain, it retained its confidentiality.[40] Kan J also held that the privilege had not been waived because the CIO must have known that the e-mail communication had been forwarded to him under a duty of confidentiality.[41]

36 See *ANB v ANC* [2015] 5 SLR 522 at [10] and [25].

37 [2009] 1 SLR(R) 42. There is a very brief reference to *Calcraft v Guest* [1898] 1 QB 759 in *Seet Melvin v Law Society of Singapore* [1995] 2 SLR(R) 186 at [17] concerning disciplinary proceedings and which adds nothing to the current discussion.

38 The holding company had applied for summary judgment against Multiple Granite Pte Ltd for the recovery of a loan.

39 *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2009] 1 SLR(R) 42 at [40]–[42] and [43].

40 The meaning of "public domain" is considered in paras 33–37 below.

41 *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2009] 1 SLR(R) 42 at [23] and [43].

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14 In the case of e-mail communications between a lawyer and a group of clients or between a lawyer and a group consisting of the client and related persons (such as a company and its officers), there is a risk that one of the clients or a related person may (in the event of a dispute between members of the group or because the client or related person is no longer part of the group), breach confidentiality. In *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd*[42] ("*Gelatissimo*"), the plaintiffs (which included a company and four individuals who were the tenants of the defendant), sought pre-action discovery against the defendant for the purpose of commencing proceedings for breach of contract. The plaintiffs jointly retained a solicitor for this purpose. Subsequently, one of the plaintiffs ("J") withdrew from the legal action. J then sent an e-mail to the defendant which contained the e-mail communications between the plaintiffs (J was still one of the plaintiffs at the time) and the solicitor. The defendant filed an affidavit to challenge the plaintiffs' application for pre-action discovery. This affidavit included the e-mail correspondence that J had sent to the defendant. The plaintiffs countered by applying to strike out all references in the affidavit to the e-mail correspondence on the ground that the communications between the lawyer and plaintiffs were protected by legal advice privilege.

15 One of the various issues considered by the court was the effect of inadvertent disclosure of the e-mail communications (the plaintiffs other than J had not intended to disclose this correspondence) on their admissibility. The court followed *Tentat* and ruled that the defendant was not entitled to rely on the e-mail correspondence, which had yet to enter the public domain by being presented in the proceedings.[43] Nor had the privilege been waived as waiver could only have been constituted if all the plaintiffs had agreed to disclose the correspondence.[44] Interestingly, in *Gelatissimo*, the court took the view that the position taken in *Calcraft* (that secondary evidence of an inadvertently disclosed privileged document could be relied on by the opposing party) had been rejected by the court in *Tentat*. However, this was an inaccurate reading of the *Tentat* judgment, as confirmed by the Court of Appeal in *Mykytowych*.[45] In both *Tentat* and *Gelatissimo*, the courts did not discuss the basis on which an inadvertently disclosed privileged communication would continue to be protected; primarily whether a balancing test ought to operate as between the privilege and other considerations that might justify reliance on the

42 [2010] 1 SLR 833.

43 *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 at [26]. The meaning of "public domain" is considered in paras 33–37 below.

44 *Gelatissimo Ventures (S) Pte Ltd v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 at [17].

45 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [65]. For further discussion of this point, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at para 14.100.

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documents in the proceedings. Nor did the courts in those cases consider the scope of the terminology "public domain" and the circumstances in which it can be accurately said that the documents are no longer confidential. These points were addressed by the High Court and Court of Appeal respectively in *HT SRL v Wee Shuo Woon*[46] ("*Wee Shuo Woon* (HC)") and *Wee Shuo Woon v HT SRL*[47] ("*Wee Shuo Woon* (CA)").

16 *Wee Shuo Woon* concerned an employment dispute between the plaintiff company and its employee (the defendant). The plaintiff's computer systems had been hacked by an unidentified person. This data (which included e-mail communications between the plaintiff and its lawyer) was then uploaded to a website (known as "Wikileaks"). There was no evidence that the defendant had played any part in the hacking and the uploading of the data. However, having managed to retrieve the e-mail communications, the defendant applied to strike out most of the plaintiff's statement of claim for abuse of process. The basis of this application was that the plaintiff had brought proceedings against the defendant for the collateral purpose of obtaining evidence to support other proceedings that the plaintiff had commenced or was about to initiate. The defendant filed an affidavit in which he referred to the privileged e-mail communications and exhibited them. The plaintiff then applied, *inter alia*, to expunge the e-mail communications and all references to them. The High Court granted the plaintiff's application and this decision was affirmed by the Court of Appeal.

17 As the case involved affidavit evidence in interlocutory applications, Hoo Sheau Peng JC (as she then was) ruled that the common law rules of evidence applied.[48] This is the effect of s 2(1) of the EA, which states that "Parts I, II and III shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer".[49] Hoo JC considered *Calcraft*, *Ashburton* and *Goddard*, and explained the legal position as follows:[50]

46 [2016] 2 SLR 442.

47 [2017] 2 SLR 94.

48 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [16]. This was confirmed by the Court of Appeal in *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [24]. For a full consideration of the application of the Evidence Act (Cap 97, 1997 Rev Ed) and the common law in different circumstances, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 14.004–14.004B.

49 In *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36 at [32], Belinda Ang J stated: "To my mind, if s 2(1) of the EA disapplies Parts I to III of the EA with regard to affidavits, then it would also necessarily disapply the EA in proceedings where evidence has been led *solely* by affidavit" [emphasis added by the court].

50 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [40].

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> First, the fact that a document is privileged is not a barrier to the admissibility of copies of the same into evidence. Second, the court may, in the exercise of its equitable jurisdiction to restrain breach of confidence, restrict the disclosure and use of privileged documents which have been disclosed to third parties to protect its confidential character. Third, the court may restrain the use of the privileged documents by way of an order to expunge offending portions of pleadings or affidavits. The court is not limited to an order for delivery up or the grant of an injunction. Fourth, such an application must be filed before the privileged documents have been formally admitted into evidence. After the privileged documents have entered into evidence, their exclusion would then fall to be governed by the common law rules on evidence.

18 The learned judge emphasised that "it is confidentiality, and not privilege, which would provide the legal basis for the prayer to expunge".[51] Putting it more expansively, an inadvertently disclosed privileged communication which is still confidential may be protected by the court's equitable jurisdiction to restrain the breach of confidence by injunction (a separate application would normally have to be made in advance of the hearing), or by judicial expunction at the hearing before the evidence is admitted in the proceedings (as was the case in *Tentat*, *Gelatissimo* and *Wee Shuo Woon*). If the communication has already been admitted into evidence or is otherwise in the public domain (in the sense that it is generally accessible and available to the public), there would be no confidentiality to protect. However, the rules governing the admissibility of evidence would operate here. In particular, the court's discretionary power to exclude evidence might be considered where the privileged communication, though no longer confidential, had been obtained in such an improper manner that the court will not consider it. This last point will be revisited later in the article.[52]

19 *Wee Shuo Woon* (HC) is also significant for Hoo JC's consideration of the principles governing the discretion to expunge the privileged documents. If the inadvertently disclosed document is privileged and remains confidential, must the court grant equitable relief (either by injunction or expunction) to restrain its use in the proceedings? The learned judge considered the English case law which stands for the principle that the court should not balance the public interest in upholding privilege against the public interest in permitting all relevant evidence be placed before the court to enable it to accurately adjudicate. The learned judge observed, in line with the English authorities,[53] that "the balance between these two competing imperatives has already been

51 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [41].

52 See paras 43–47 below.

53 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [58]–[59].

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struck in favour of the preservation of legal professional privilege".[54] The reason for this perspective lies in the rationale of legal advice privilege which is that the client must be assured that communications between him and his lawyer will not be disclosed in any circumstances subject to the client's waiver.[55] However, Hoo JC clarified that they "do not go so far as to say that the court's discretion is ousted altogether. They only go so far as to say that it is inappropriate for the court to conduct a balancing exercise between the competing interests of justice and truth". The learned judge added that "[t]here is still scope for the court to refuse relief on the general principles affecting the grant of a discretionary remedy".[56] In the case itself, there were no grounds for the court to refuse relief.[57]

20 The "scope for the court to refuse relief" was considered by the Court of Appeal in *Wee Shuo Woon* (CA) and *Mykytowych*. In *Wee Shuo Woon* (CA), Tay Yong Kwang JA stated:[58]

> Since it is the court's equitable jurisdiction that is being engaged, it remains open to the court to refuse relief on the general principles affecting the grant of a discretionary remedy, *ie*, on such grounds as inordinate delay, a lack of clean hands or general iniquity. Public policy also requires that a litigant should not be permitted to make use of a copy of a privileged document which he has obtained by stealth, trickery or by otherwise acting improperly …

21 Tay JA distinguished between the situation in which a privileged document is disclosed by mistake or through negligence (which is fully or partially attributable to the party claiming privilege) and circumstances in which the party seeking to rely on it has taken improper advantage of the privilege-holder, as when the latter has been the victim of a cyber-attack.[59] The learned judge added: "[T]he equity in favour of restraining the use of privileged documents is even stronger in the case of a party who had its privileged documents accessed and taken through stealth and unlawful means."[60] As the defendant knew that the e-mails were privileged, the Court of Appeal confirmed that it was just that he be restrained from relying on them.[61] Tay JA also considered whether relief should be refused because of the conduct of the plaintiff. Having considered the facts, the

54 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [60]. In *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [62], the Court of Appeal stated: "The balance between the competing imperatives of truth and privilege is therefore struck in favour of the latter for good reasons."

55 Assuming the exceptions to privilege (concerning impropriety) do not apply.

56 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [61].

57 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [61].

58 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [50].

59 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [52].

60 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [52].

61 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [53].

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court agreed with the assistant registrar's finding that this was "far from a case where there [had] been iniquitous conduct, not to mention illegal purpose".[62] Tay JA observed: "There was nothing which could justify the court refusing to exercise its equitable jurisdiction to grant the prayer to expunge."[63]

(2) Public policy considerations

22 Where impropriety offends public policy, the common law position is that the rule of admissibility in *Calcraft* does not apply at all (put another way, this situation constitutes an exception to the rule in *Calcraft*). In these circumstances, the court does not need to exercise its equitable power to prevent reliance on the privileged document (pursuant to the principle in *Ashburton*) because there is no right of reliance in the first place. In *ITC Film Distributors Ltd v Video Exchange Ltd*[64] ("*ITC*"), documents belonging to the plaintiff had been improperly obtained through trickery by the defendant in the precincts of the court. Warner J considered that the defendant's improper conduct was "probably a contempt of court" and added: "[I]t seems to me that, if it is contempt of court, then the court should not countenance it by admitting such documents in evidence."[65] The learned judge ruled that he must balance the public interest that the truth should be ascertained "against the public interest that litigants should be able to bring their documents into court without fear that they may be filched by their opponents, whether by stealth or by a trick, and then used by them in evidence".[66] Therefore, the documents obtained in contravention of public policy that had yet to be used in evidence were excluded.

23 In *Goddard*, Nourse LJ referred to *ITC* and emphasised that the decision "proceeded not on an exercise of the court's discretion but on grounds of public policy".[67] Mention is made of *ITC* because in both *Wee Shuo Woon* (CA)[68] and *Mykytowych*,[69] the Court of Appeal had considered that *ITC* was a case involving the court's equitable power to intervene by exercising its discretion to restrain the use of the evidence. The distinction is important because where the matter involves public policy, it should not be obligatory for the court to consider all the criteria that are necessary to its decision whether to grant an injunction reliance

62 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [59].
63 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [59].
64 [1982] Ch 431.
65 *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431 at 441.
66 *ITC Film Distributors Ltd v Video Exchange Ltd* [1982] Ch 431 at 440.
67 *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 685–686.
68 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [50].
69 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [69].

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on, or expunge, a privileged document. So, for example, if contempt is committed for the purpose of relying on the privileged document, that document must be excluded without further consideration as a matter of policy.

(3) Iniquity on the part of the party claiming privilege

24 Conduct on the part of the party seeking to rely on privileged information was also in issue in *Mykytowych*. The plaintiff sued for personal injuries sustained in an accident at a hotel. By consent, the parties entered into an interlocutory judgment for each party to bear 50% of the liability. The matter went before the High Court for an assessment of damages. Unhappy with the decision of the High Court, the plaintiff appealed to the Court of Appeal and sought to adduce new evidence, including a medical report on her condition that had been made by the doctor engaged by the defendant. The plaintiff had obtained the report from the doctor as a result of her misrepresentation that the case was over and that she wanted to have the report for personal reasons. In fact, the case was not over because the appeal concerning the assessment of damages had yet to take place. The plaintiff's intention was to use the report for the appeal.[70] The defendant decided not to call the doctor and claimed litigation privilege over the report. The Court of Appeal ruled that as the medical report was protected by litigation privilege and remained confidential (the document had not been admitted into evidence), it would exercise its equitable power to restrain the plaintiff from relying on it.[71] The court also took into account the plaintiff's conduct towards the doctor (her deliberate misrepresentation) and observed that this "could possibly be another basis" for the court to refuse to admit the report: "Equity will not permit parties to resort to trickery or deception to circumvent legal rules and safeguards."[72]

25 There has yet to be a reported case in which the Singapore court has refused equitable relief to the party claiming privilege because his intention is to hide iniquity that would be revealed by the privileged documents.[73] However, the unreported and unavailable case of OS 639 which was connected with, and referred to, in *The Law Society of Singapore v Lee Suet Fern*[74] ("*Lee Suet Fern*") does throw some light on this issue (even though the case did not involve inadvertent disclosure). In *Lee Suet Fern*, the disciplinary tribunal ("DT") referred to a previous

70 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [69].
71 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [68].
72 *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 at [69].
73 For an English case on point, see *ISTIL Group Inc v Zahoor* [2003] EWHC 165 (see para 30 below).
74 [2020] SGDT 1.

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application by the Estate of the late Lee Kuan Yew (OS 639) for, *inter alia*, an injunction to restrain the Law Society of Singapore ("the Law Society") from relying on certain wills and related drafts (which were privileged documents)[75] in the upcoming disciplinary hearing. According to the DT's report, Hoo Sheau Peng J considered the admissibility of the documents and declined to grant injunctive relief "on the basis that the interests of justice in disclosure of a third party's iniquity prevail over the privilege of a client". It is assumed that this statement is not to be read as a general principle but as a conclusion justified by the circumstances of the case (that is, the link between the respondent and the Estate).[76]

26 According to the DT, the learned judge observed: "[W]here a sufficient connection can be drawn between the privileged material and the inquiry before the DT, the [Law Society] should not be unduly constrained in how it conducts its prosecution of the DT proceedings."[77] Accordingly, the Law Society was able to rely on the documents at the disciplinary hearing. The significance of OS 639 is that equity will not grant relief to restrain a breach of confidence if to do so would have the effect of concealing iniquity and would interfere with the prosecution of the third party (in this case the respondent, even though the privilege belonged to the Estate). *A fortiori*, a court will not grant injunctive relief or expunge privileged material if the privilege holder's objective is to conceal relevant evidence or his own wrongdoing.

(4) Originals and copies

27 It has been shown that *Lloyd*[78] and *Calcraft*[79] stand for the proposition that a party who comes into possession of a copy of a privileged document may rely on it (subject to the court's equitable jurisdiction to restrain a breach of confidence). The distinction between original documents and copies is unsupportable. Neither *Lloyd* nor *Calcraft* offers any principle for distinguishing between an original and a copy. As privilege is concerned with the content of the privileged communication (not its form), there is no difference between an original and a copy for the purpose of this doctrine. In *Tentat*,[80] the High Court observed that

75 The wills were protected by legal advice privilege because they were documents generated in the course of the lawyer and client relationship. The last will and codicil had been proven in probate and were no longer privileged: *The Law Society of Singapore v Lee Suet Fern* [2020] SGDT 1 at [88].
76 The author makes this assumption without having read the judgment in OS 639 which, as mentioned above, is not available for consideration.
77 *The Law Society of Singapore v Lee Suet Fern* [2020] SGDT 1 at [89].
78 See para 3 above.
79 See para 3 above.
80 *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd* [2009] 1 SLR(R) 42 at [28].

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neither Lindley MR nor Parke B in *Calcraft* explained how privilege is lost through the process of copying. Subsequently, in *Ashburton*, Swinfen-Eady LJ stated that if the original privileged document is inadvertently disclosed to the opposing party, he would be entitled to rely on it subject to the intervention of equity to restrain any breach of confidence.[81] Taken to its logical conclusion, the distinction between originals and copies would mean that the opposing party who had possession of the original document would only be permitted to present a copy in court. This would be inconsistent with the rule governing primary evidence, which requires original documents to be tendered unless they are unavailable in the circumstances set out in the EA.[82]

C. Should legal advice privilege and litigation privilege be distinguished?

28 The Court of Appeal in *Mykytowych* (which concerned litigation privilege)[83] did not distinguish between legal advice privilege and litigation privilege in confirming the common law principles that had been applied in *Wee Shuo Woon* (HC). Similarly, in *Wee Shuo Woon* (CA), which was decided subsequent to *Mykytowych*, Tay JA observed that the principles apply to all privileges.[84] It may be asked whether this view is tenable in the light of the very different rationales of legal advice privilege and litigation privilege, as explained by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*[85] ("*Skandinaviska*"). In *Wee Shuo Woon* (HC), Hoo JC based her decision firmly on the rationale of legal advice privilege as posited in *Skandinaviska*,[86] which is to assure the client that communications between him and his lawyer will not be disclosed; the objective being that the client will be effectively advised and represented. The rationale of litigation privilege, as explained in *Skandinaviska*, is "to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship".[87] In the case of litigation privilege, the concern is to enable

81 *Lord Ashburton v Pape* [1913] 2 Ch 469 at 476–477. Also see *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 682–683.
82 See ss 66 and 67 of the Evidence Act (Cap 97, 1997 Rev Ed).
83 See para 10 above.
84 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [62].
85 [2007] 2 SLR(R) 367 at [23] (citing the relevant authorities).
86 *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [60]. Although the learned judge referred to the expression "legal professional privilege", she was clearly concerned with legal advice privilege. Litigation privilege was not in issue in this case.
87 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [23] (citing the relevant authorities).

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the parties to "prepare their contending positions in private, without adversarial interference and fear of premature disclosure".[88]

29 The question arising from these different rationales is whether a claim to litigation privilege, in the absence of iniquity or impropriety on the part of either party, is less forceful than a claim to legal advice privilege in the court's consideration of whether to restrain or permit disclosure of an inadvertently disclosed document. In contradistinction to legal advice privilege, may one argue that in the case of litigation privilege, a balancing test ought to be applied to determine whether the confidentiality of the inadvertently disclosed document should give way to the interest of the administration of justice in ensuring accurate adjudication based on relevant facts? This would involve an assessment of the importance of maintaining the confidentiality of the document and weighing this against the potential importance of the document as evidence in the case. Both the judgment in *Mykytowych* and the incidental observation in *Wee Shuo Woon* (CA) suggest that both types of privilege are equally forceful, so that a balancing test is not applicable to either legal advice or litigation privilege.[89]

30 The English authorities may assist here. In *ISTIL Group Inc v Zahoor*[90] ("*Zahoor*"), the plaintiff sought an injunction to prevent the defendant from presenting inadvertently disclosed e-mail communications (between the plaintiff and another person) that were covered by litigation privilege. Injunctive relief was refused as the documents revealed an attempt to mislead the court.[91] This case may be distinguished from *James Chapman*,[92] in which an expert report covered by litigation privilege had been mistakenly disclosed in a letter to the opposing party. There was no issue of iniquity or impropriety on the part of either party. Scott J observed that the discretion would be exercised by "balancing the legitimate interests of the plaintiff in seeking to keep the confidential information suppressed and the legitimate interests of the defendant in seeking to make use of it".[93] The balancing exercise is to

88 *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367 at [23] (citing the relevant authorities).

89 See para 19 above.

90 [2003] EWHC 165.

91 Lawrence Collins J observed that where a document is protected by litigation privilege and has yet to be admitted in evidence, the court would ordinarily restrain its use although it may refuse to grant relief on the general principles affecting the grant of a discretionary remedy, for example, on the ground of inordinate delay, the lack of clean hands, or iniquitous conduct. See *ISTIL Group Inc v Zahoor* [2003] EWHC 165 at [74] and [90]–[91] (cited in *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [58]).

92 *Webster v James Chapman & Co* [1989] 3 All ER 939. See para 6 above.

93 *Webster v James Chapman & Co* [1989] 3 All ER 939 at 943–945.

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be carried out by a consideration of such matters as the circumstances in which the document was disclosed, the issues in the action, the significance of the document and the nature of the privilege being claimed. Scott J considered that the approach of the court would be "very different" depending on whether the privileged document is mistakenly disclosed (the balancing test would be applied as in this case) or where it is obtained by deception or other iniquity (in which case, equity would normally preserve its confidentiality).[94]

31 This commentary on the possibility of a balancing test for litigation privilege would be incomplete without a consideration of *Public Prosecutor v Soh Chee Wen*[95] ("*Soh Chee Wen*"). *Soh Chee Wen* is significant for the court's observations on the availability of litigation privilege to the Prosecution, whether this privilege protects communications between a prosecutor or investigator and a witness, the conceptual distinction between legal advice privilege and litigation privilege, and the application of the balancing test to litigation privilege. Hoo Sheau Peng J reiterated the propositions in *Skandinaviska* that legal advice privilege and litigation privilege are conceptually distinct and underpinned by different rationales.[96] The learned judge accepted the Prosecution's submission that, unlike legal advice privilege (which is "absolute" subject to limited exceptions), "litigation privilege may have to be subjected to a balancing operation where there is a competing interest of importance, such as the need of an accused person to rely on evidence for his defence".[97] The Prosecution argued that Singapore law:[98]

> … should be further developed to recognise that litigation privilege should not apply where a party can show that it is necessary that he be allowed to adduce otherwise privileged evidence, because the probative value of the evidence outweighs the interest of the other party in preserving the confidentiality of the information.

32 Hoo J developed the law by holding this to be the necessity exception.[99] Although *Soh Chee Wen* concerned criminal proceedings, the rationale of litigation privilege justifies the application of the balancing test to civil cases as well. There is nothing in the terminology of the judgment extract in the preceding paragraph which limits the balancing test to the criminal sphere.

94 *Webster v James Chapman & Co* [1989] 3 All ER 939 at 946–947.
95 [2019] SGHC 235.
96 *Public Prosecutor v Soh Chee Wen* [2019] SGHC 235 at [3] and [10].
97 *Public Prosecutor v Soh Chee Wen* [2019] SGHC 235 at [7] read with [20].
98 *Public Prosecutor v Soh Chee Wen* [2019] SGHC 235 at [7].
99 *Public Prosecutor v Soh Chee Wen* [2019] SGHC 235 at [7], [20] and [30(c)].

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IV. Loss of confidentiality and "the public domain"

33 Privileged information that enters the public domain loses its confidentiality. As the Court of Appeal stated in *Wee Shuo Woon* (CA):[100]

> If information is known to the public at large, it would generally be both unreal and purposeless to attempt to regard it as confidential. Secondly, where the information has become so accessible and/or accessed that a reasonable person in the position of the parties would not regard it as confidential, it could not be unconscionable for the party who receives such information to treat it as not confidential.

34 Information enters the public domain when it has (a) been presented as evidence so that it enters the court record; or (b) become publicly accessible and accessed to such a degree (for example, through the Internet) that it would be unrealistic to regard it as confidential.[101] *Tentat* and *Gelatissimo* were cases that involved a consideration of category (a),[102] while *Wee Shuo Woon* concerned category (b). A determination of whether the information has entered the public domain via category (a) is relatively straightforward. Category (b) invites more intricate considerations.

35 It will be recalled that in *Wee Shuo Woon*, the plaintiff's computer systems had been hacked by an unidentified person[103] (category (b) situation). The Court of Appeal observed that the "public domain" principle is "not a freestanding rule to be mechanistically applied".[104] Merely because confidential information has been put on the Internet does not necessarily deprive it of its confidential status. Tay JA emphasised that the public domain principle "is merely an aspect of the scope of the duty of confidentiality … it is but one factor to be considered when determining whether a person's conscience ought to require him to treat information as confidential".[105] A critical element is "whether the degree of accessibility of the information is such that, in all the circumstances, it would not be just to require the party against whom a duty of confidentiality is alleged to treat it as confidential".[106] If information is known to the public at large, it would generally be both unreal and purposeless to attempt to regard it as confidential. Furthermore, where the information has become so accessible and/or accessed that a reasonable person in the position of the parties would not regard it as confidential, it could not be unconscionable

100 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [32].
101 See *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 at [64].
102 See paras 13 and 14 above.
103 See para 16 above.
104 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [31].
105 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [31]
106 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [31].

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for the party who receives such information to treat it as not being confidential.[107] Ultimately, it is a matter of common sense as to whether the confidential information "has become so accessible and/or accessed that it would not be just in all the circumstances to require the party against whom confidence is asserted to treat it as confidential".[108] It is not only important for the court to focus "on the extent to which the information in question has become accessible but also on the extent to which it has in fact been accessed by the general public".[109]

36 The Court of Appeal explained: "Potential, abstract accessibility is vastly different from access in fact. This is particularly so, given the proliferation of information in the globalised Internet age of today." Tay JA added: "Paradoxically, much of the information on the Internet, although accessible, is not in fact accessed by the public, whether from lack of interest or time or even ignorance."[110] For this purpose, consideration must be given to such factors as:[111]

> … the likelihood of the information being accessed by the public, the degree to which the information has in fact been accessed and the extent to which the information may be appreciated and/or understood only with the specialised skills or expertise of the party seeking to make use of the information.

37 Therefore, simply because confidential information is made technically available to the public at large does not mean that its confidential character is negated: "Public media, in particular the Internet, must not be the gateway through which all confidentiality is dissolved and destroyed."[112] The Court of Appeal decided that although the e-mails were "theoretically accessible to anyone doing an intense search on WikiLeaks", they were not publicly known. It followed that the e-mails continued to be confidential and the plaintiff was entitled to judicial relief to protect their confidentiality.[113]

V. Whether a court will grant an injunction or expunge a privileged document which the Prosecution needs to rely on in a criminal case

38 In Singapore, no reported case has answered the question posed by the heading above and it remains open for future consideration. In

107 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [32].
108 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [35].
109 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [36].
110 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [36].
111 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [37].
112 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [37].
113 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [43].

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Butler v Board of Trade,[114] the Board of Trade ("BoT") had come into possession of a letter sent by a lawyer to his client (the plaintiff in this case) and intended to use it in the prosecution of the plaintiff. The plaintiff sought a declaration against the BoT that he was entitled to invoke the equitable jurisdiction of the court to restrain the BoT from tendering a copy of the letter in evidence. Goff J ruled that as the public interest in the prosecution of offenders must prevail over the plaintiff's claim to equitable relief, the prosecutor must not be prevented from relying on relevant evidence.[115] The principle was applied in *R v Tompkins*,[116] where a note given by the defendant to his counsel was found on the floor of the court and passed to counsel for the Prosecution. Although the note was privileged and the defendant could have refused to disclose it, the Prosecution was entitled to rely on the content of the note for the purpose of cross-examining the defendant.[117] In giving the judgment of the court, Ormrod LJ observed:[118] "Privilege, in this context, relates only to production of a document; it does not determine its admissibility in evidence. The note, though clearly privileged from production, was admissible in evidence once it was in the possession of the prosecution."[119] The principles underlying the decisions in these cases were subsequently applied and are regarded as representing the state of the law in England.[120]

39 Other jurisdictions have taken a different view. In *R v Uljee*[121] ("*Uljee*"), a conversation between the defendant and his solicitor at the scene of the crime in the defendant's home was overheard by a police officer standing outside the door. In considering but not applying the English authorities, the New Zealand Court of Appeal held that the evidence of the police officer was inadmissible in the face of the privilege that attached to the communications between the lawyer and his client. In *Goddard*, Nourse LJ incidentally expressed favour for the position taken in *Uljee* but acknowledged that it did not represent the law in England.[122] The Hong Kong Court of Appeal took a similar stance to the New Zealand Court of Appeal in *Citic Pacific Ltd v Secretary for Justice*

114 [1971] Ch 680.
115 *Butler v Board of Trade* [1971] Ch 680 at 690–691.
116 (1977) 67 Cr App R 181.
117 The court exercised its discretion to exclude the note so that it could not be admitted into evidence.
118 *R v Tompkins* (1977) 67 Cr App R 181 at 184.
119 That is, evidence of the content of the note was admissible even though the note could not be produced.
120 For example, see *R v Cottrill* [1997] Crim LR 56.
121 [1982] 1 NZLR 561.
122 *Goddard v Nationwide Building Society* [1987] 1 QB 670 at 745–746.

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and Commissioner for Police[123] ("*Citic*"). Hartmann JA (who delivered the judgment of the Court of Appeal) expressed the following principle:[124]

> [I]t seems to me to be inherently contradictory to say that privilege, although a fundamental human right unassailable to competing issues of public interest, may nevertheless be lost in criminal matters without any intention on the part of the holder, indeed on no more than a whim of fate; that is, by accident or inadvertence, or even (at the outer extreme) by the surreptitious conduct of a third party. I do not accept that the Basic Law affords such frail protection. …

40 In *Rahimah bte Mohd Salim v Public Prosecutor*[125] ("*Rahimah*"), Chao Hick Tin JA (sitting in the High Court) observed that Hartmann JA had "succinctly addressed the difficulty with applying the position in *Calcraft* to criminal proceedings".[126] In fact, Chao JA, in citing Hartmann JA's observations, emphasised the words "may nevertheless be lost in criminal matters without any intention on the part of the holder, indeed on no more than a whim of fate; that is, by accident or inadvertence, or even (at the outer extreme) by the surreptitious conduct of a third party". In *Rahimah*, the main question was whether the accused had waived litigation privilege over certain medical reports that she had arranged (for her case) concerning her medical condition. The High Court ruled that she had not waived the privilege and exercised its revisionary power to, *inter alia*, set aside the lower court's decision to order the disclosure of the reports. There was no issue of inadvertent disclosure in *Rahimah*. Chao JA stated: "While I acknowledge the difficulties of the holding in *Butler*, I am of the view that due to the particular facts of the present case, I need not express an opinion on the applicability or validity of its holding to arrive at my conclusion."[127] Although it was not necessary to rely on the cases on inadvertent disclosure for the purpose of the decision in *Rahimah*, it has been shown that Chao JA raised a doubt about the English authorities and offered some support for the position taken in *Uljee* and *Citic*. However, *Rahimah* was concerned with litigation privilege which, as has been explained, is grounded on an entirely different rationale to legal advice privilege with which the courts in *Uljee* and *Citic* were concerned.[128]

41 Whether a Singapore court will follow the English or New Zealand and Hong Kong authorities or take a different view must depend on how it assesses the status of legal advice privilege. In both *Uljee* and *Citic*, the

123 [2012] HKCA 153.
124 *Citic Pacific Ltd v Secretary for Justice and Commissioner for Police* [2012] HKCA 153 at [51].
125 [2016] 5 SLR 1259.
126 *Rahimah bte Mohd Salim v Public Prosecutor* [2016] 5 SLR 1259 at [74].
127 *Rahimah bte Mohd Salim v Public Prosecutor* [2016] 5 SLR 1259 at [78].
128 See paras 28–32 above.

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respective Courts of Appeal treated legal advice privilege as fundamental right that could not be encroached upon by the rule in *Calcraft* (that a copy of an inadvertently disclosed privileged document is admissible). In *Uljee*, McMullin J said of *Calcraft* that "[i]t should not now be allowed to disturb the fundamental nature of the privilege attaching to the relationship of solicitor and client".[129] In *Citic*, Hartmann JA pointed out that the privilege is a constitutionally protected right[130] and stated: "Privilege may have its origins as a rule of evidence; today, however, it is viewed as a substantive legal right."[131]

42 Nevertheless, in Singapore, legal advice privilege is not Constitutionally protected and, pursuant to ss 128 to 131 of the EA, is merely a rule of evidence applicable to trials.[132] Consequently, it is open to the Prosecution to argue that *Uljee* and *Citic* should be distinguished by reason of the legislation in Singapore. Such a view may also be supported Hoo J's statement in the unreported case of OS 639, as recounted by the DT in *Lee Suet Fern*:[133] "[W]here a sufficient connection can be drawn between the privileged material and the inquiry before the DT, the [Law Society] should not be unduly constrained in how it conducts its prosecution of the DT proceedings."[134] It will be recalled that in OS 639, the Estate of the late Lee Kuan Yew sought to prevent the Law Society from relying on privileged documents.[135] The application failed and the documents were admitted as evidence at the disciplinary hearing. As the grounds of decision in OS 639 are not available for public viewing, the court's approach to the issue cannot be discussed. However, it is logical to conclude that if privileged material in the possession of the Law Society can be relied on in quasi-criminal disciplinary proceedings, it may be

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129 *R v Uljee* [1982] 1 NZLR 561 at 574.

130 Pursuant to Art 35 of the Basic Law, which provides that residents "shall have the right to confidential legal advice".

131 *Citic Pacific Ltd v Secretary for Justice and Commissioner for Police* [2012] HKCA 153 at [25]. The Court of Appeal in *Citic* cited (at [23]) Lord Taylor CJ's pronouncement in *R v Derby Magistrates' Court, ex parte B* [1996] AC 487 at 507 that legal advice privilege is "much more than an ordinary rule of evidence … [i]t is a fundamental condition on which the administration of justice as a whole rests".

132 It has been held that in a case involving non-judicial proceedings that legal advice privilege is a substantive legal right at common law, as the Evidence Act (Cap 97, 1997 Rev Ed) does not apply in these circumstances. See *Yap Sing Lee v Management Corporation Strata Title Plan No 1267* [2011] 2 SLR 998 (concerning proceedings before the Strata Titles Board). In *Comptroller of Income Tax v ARW* [2017] SGHC 16 at [34] (a case involving legal advice and litigation privilege), Aedit Abdullah JC, as he then was, stated: "[I]t may be that the rights based approach may not reflect the law in Singapore, and this too would be an issue that requires consideration on another day …"

133 See para 25 above.

134 *Law Society of Singapore v Lee Suet Fern* [2020] SGDT 1 at [89].

135 See paras 25–26 above.

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relied upon for the purpose of a public prosecution subject to the court's common law discretion to exclude evidence.

VI. Discretion to exclude

43 If a privileged document has entered the public domain[136] and is no longer confidential, the court may nevertheless exercise its inherent discretion to exclude the document pursuant to the law of evidence. The Singapore Court of Appeal has referred to the inherent discretion to exclude evidence in civil proceedings in two cases. In the leading case, *ANB v ANC*[137] ("*ANB*"), the Court of Appeal reinstated an interlocutory injunction restraining the respondents from using, disclosing or destroying certain information in their possession which had allegedly been improperly extracted from the appellant's computer in breach of confidence. Andrew Phang JA clarified that the court was concerned with injunctive relief and not with the admissibility of evidence. However, as the subject of discretion to exclude evidence had been addressed by the High Court, the Court of Appeal considered it appropriate to express its views on a tentative basis,[138] leaving a "full and final pronouncement" for a future case.[139]

44 As the observations in *ANB* concerning the inherent discretion of the court to exclude evidence in a civil case have been analysed in another article,[140] it would be sufficient here to state the Court of Appeal's own summary of its position in *ANB* in *Wee Shuo Woon* (CA),[141] a case which also did not require the court to exercise its discretion to exclude:

> … we will go no further than to note that we had in [*ANB*] expressed the "tentative" view that the court has an inherent discretion to exclude evidence in both criminal and civil proceedings and that there are good reasons why this discretion should be exercised in a robust manner in civil proceedings. However, the test employed in criminal proceedings of weighing the probative value against the prejudicial effect of the evidence may need to be adapted for civil proceedings in favour of a different balancing exercise (citing *ANB* at [29]–[30]).

136 See paras 33–37 above.
137 *ANB v ANC* [2015] 5 SLR 522.
138 *ANB v ANC* [2015] 5 SLR 522 at [13], [26] and [31].
139 *ANB v ANC* [2015] 5 SLR 522 at [26].
140 Jeffrey Pinsler, "The Court's Discretion to Exclude Evidence in Civil Cases and Emerging Implications in the Criminal Sphere – The Violet Thread of Justice" (2016) 28 SAcLJ 89.
141 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [60].

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45 The tenor of the observations in *ANB* on the discretion to exclude in civil cases, tentative though they may be, suggest very strongly that such a discretion does exist and that the governing principles will eventually be confirmed. In the context of privileged material which has entered the public domain and lost its confidentiality, it is submitted that a court may exercise its inherent discretion to exclude evidence on the same grounds that equity would operate to restrain the use of a confidential document to prevent a breach of confidence. The reason for this proposition is that both the law of equity and the evidential discretion to exclude have a common basis in achieving justice or preventing injustice. Phang JA opined in *ANB* concerning the evidential discretion to exclude:[142]

> What we would note, however, is 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 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.

46 It is further submitted that if the facts in *ANB* concerned the admissibility of evidence at trial, it is highly likely that a court applying the above principles would have excluded the evidence on the same basis as the Court of Appeal which granted the injunction in that case. Of course, the evidential discretion to exclude is not limited to the circumstances in which an injunction would be granted, and its scope would be pre-determined by the considerations put forward by the Court of Appeal in *ANB*. Phang JA's proposition that a robust discretion to exclude is "especially needful in the context of the sea change in both the quality – as well as the availability of – technology in the modern world"[143] is amply justified by the numerous cases (some of which have already been considered) in which electronic communications and data have been improperly obtained and/or disclosed.

47 Although not authoritative, the disciplinary case of *Lee Suet Fern* (which was addressed earlier in a different context)[144] invites discussion on the point of the discretion to exclude in both civil and criminal cases (even though this case did not involve inadvertent disclosure). The respondent

142 *ANB v ANC* [2015] 5 SLR 522 at [30].
143 See para 45 above.
144 See para 25 above.

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applied to the DT to exclude certain wills and related drafts. The DT decided not to exclude the documents solely on the basis that the High Court had previously dismissed an application for an injunction to restrain the use of the documents in OS 639.[145] Even in the absence of discussion by the DT of the relevant case law governing the discretion to exclude evidence, its decision was correct. As a disciplinary case under the Legal Profession Act[146] and associated subsidiary legislation is quasi-criminal in nature, the probative value/prejudicial effect of the balancing test would have applied.[147] In the circumstances of the case, the evidence was highly probative (indeed, crucial to the determination of the case) and not prejudicial at all. The respondent had no privilege or confidentiality to claim (as these rights belonged to the Estate) and so disclosure was not unjust to her. Furthermore, the exclusion of the documents would have had the effect of concealing the alleged misconduct that was the subject-matter of the disciplinary proceedings. The result would have been the same in civil proceedings as there was no reason for the court to exclude the documents, which were critical to a proper finding on the facts of the case. Furthermore, in the words of the Court of Appeal in *ANB*, there was "no need to protect potential proprietary interests and the public interest in promoting the obtaining of evidence by way of legally prescribed methods".[148]

VII. Summary of the law

48 The following observations may be made about the law in Singapore regarding inadvertently disclosed privileged communications:

> (a) If the privilege is expressly or impliedly waived, it ceases to operate. While a privileged communication that is inadvertently disclosed may continue to be privileged, the privilege is merely a status that does not itself provide the means to bar the admissibility of the evidence.[149]

> (b) Nevertheless, the court has the equitable jurisdiction to prevent the opposing party from relying on the privileged communication by granting an injunction or expunging the privileged material before it is admitted into evidence.[150]

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145 See para 26 above.
146 Cap 161, 2009 Rev Ed.
147 See *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [52], citing *Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 at [27].
148 *ANB v ANC* [2015] 5 SLR 522 at [30].
149 See paras 9–11 above.
150 See paras 12–21 above.

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(c) These principles apply to both legal advice privilege as well as litigation privilege. Although the rationale of legal advice privilege means that a balancing test weighing the importance of preserving the confidentiality of the privileged material against its importance as evidence in the case is inappropriate, the same cannot be said for litigation privilege which is conceptually different. Therefore, it is arguable that the balancing test may be applicable to material covered by litigation privilege.[151]

(d) The privileged material must remain confidential if the court is to restrain its use. Once it is admitted as evidence in the proceedings or is otherwise in the public domain (when the material is generally accessible to the public), it will no longer be confidential.[152]

(e) In exercising this equitable jurisdiction to grant an injunction restraining the use of privileged material or to expunge it at the hearing, the court will consider all the circumstances of the case including the conduct of both parties.[153]

(f) Where the conduct of the party seeking to rely on the privileged communication offends public policy (such as contempt of court), this may be the sole basis for not admitting the document.[154]

(g) The distinction made in the older cases between originals and copies of privileged documents should no longer be a significant consideration.[155]

(h) There is controversy regarding the status of unintentionally disclosed privileged communications in criminal cases.[156]

(i) If the privileged material is no longer confidential, the court may nevertheless exercise its discretion to exclude the same pursuant to its inherent discretion based on principles of justice. This discretion to exclude, while unlimited in its scope, applies particularly to improperly obtained evidence.[157]

(j) A distinction must be made between the use of inadvertently disclosed privileged communications in

151 See paras 28–32 above.
152 See paras 33–37 above.
153 See paras 21–26 above.
154 See paras 22–23 above.
155 See para 27 above.
156 See paras 38–42 above.
157 See paras 43–47 above.

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interlocutory cases and at trial.[158] In interlocutory cases, the common law principles apply.[159] However, a further distinction needs to be made between stand-alone interlocutory applications and interlocutory applications for discovery which concern the evidence to be adduced at trial. In the latter situation, the EA would operate.[160] It is submitted that s 2(1) of the EA, which provides that the statute does not apply to affidavits, is concerned with stand-alone interlocutory applications. If it were otherwise, evidence that is disclosed in an interlocutory discovery application for the purpose of trial would be subject to common law rules giving rise to the possibility of inconsistency with the EA, which (through s 2(1)) declares itself to be the governing source of law in judicial proceedings.[161]

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158 See para 17 above.

159 This was confirmed by the Court of Appeal in *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at [24].

160 For example, see *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367, in which the Court of Appeal considered the Evidence Act (Cap 97, 1997 Rev Ed) (and the common law in the context of that Act) in an interlocutory application for discovery.

161 As provided in s 2(1) of the Evidence Act (Cap 97, 1997 Rev Ed) (see para 17 above). For a consideration of the application of the Evidence Act and the common law in different circumstances, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) at paras 14.004–14.004B.

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