ANB *v* ANC and another
[2014] SGHC 172

Case Number	: Suit No 427 of 2013 (Summons No 2511 of 2013, 5757 of 2013 and Registrar's Appeal No 75 of 2014)
Decision Date	: 10 September 2014
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Edmund Kronenburg and Lynette Zheng Huirong (Braddell Brothers LLP) for the plaintiff; S Suressh and Sunil Nair (Harry Elias Partnership LLP) for the defendants.
Parties	: ANB — ANC — AND

Civil Procedure – Injunctions

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 115 of 2014 and Summons No 3690 of 2014 was allowed by the Court of Appeal on 30 September 2014. See [2015] SGCA 43.]

10 September 2014

Quentin Loh J:

Introduction

1 The substantive causes of action in this suit are conversion, trespass and breach of confidence. However, the proceedings before me did not concern these issues directly but rather three interlocutory matters:

(a) Summons No 2511 of 2013 ("Summons 2511/2013") – the defendants' application to set aside an interim injunction ("the Injunction") which, amongst other things, prohibited the defendants from using certain material in ongoing proceedings relating to the plaintiff;

(b) Summons No 5757 of 2013 ("Summons 5757/2013") – the plaintiff's application to cross-examine the defendants' computer expert and inspect his notebook computer; and

(c) Registrar's Appeal No 75 of 2014 ("RA 75/2014") – the defendants' appeal against the refusal of the assistant registrar ("the AR") to strike out certain portions of the plaintiff's fourth affidavit dated 22 August 2013.

2 On 22 July 2014, I allowed the defendants' application in Summons 2511/2013 in part, thereby setting aside the Injunction (save as to making an order requiring that certain material not be destroyed). I dismissed both the plaintiff's application in Summons 5757/2013 and the defendants' appeal in RA 75/2014. I made no order as to costs.

3 The plaintiff applied, and after hearing the parties, I granted leave to the plaintiff to appeal against my decision as there was a point of law involved, namely, whether the court had the discretion to exclude illegally or improperly obtained evidence in civil proceedings. The defendants wrote in requesting a further hearing, and on 11 August 2014, the defendants sought leave to appeal

against my costs order. I did not accede to defendants' application. The plaintiff duly filed his notice of appeal and I now give my grounds.

Background

4 The plaintiff-husband ("H") is embroiled in acrimonious divorce proceedings before the Family Court with his wife, the first defendant ("W"). The second defendant, AND, is a law firm that represents W. Mr Edmund Kronenburg appears for H in these proceedings but Mr Randolph Khoo of Drew & Napier LLC appears for H before the Family Court. Mr S Suressh appears for W in these proceedings but "FSF", from AND, appears for W before the Family Court. Mr Suressh also appears for AND in these proceedings.

5 These proceedings came about as a result of an alleged surreptitious copying of the contents of H's personal laptop computer ("the Asus Notebook"), which included backed-up data from his iPhone sometime around 18 December 2012 whilst he was on holiday with the two children of the marriage in Hong Kong.

H's case

6 H alleges the following. On 26 September 2012, W left the matrimonial home. On 10 October 2012, W commenced divorce proceedings, Divorce No 4895 of 2012 in the Family Court. H filed a counterclaim on 9 January 2013. W filed and served four affidavits on H around 27 March 2013 and H says he was shocked to see, exhibited in one of those affidavits, short message service (SMS) and WhatsApp Messenger messages between himself and other parties including:

(a) his sister;

(b) his brother-in-law;

(c) a friend named Dr Chua;

(d) his brother;

(e) a woman named Ms Cherlyn Tan (her contact was stored as "Cherlyn Foo" in H's iPhone address book); [note: 1]

(f) a friend who works at KK Hospital; and

(g) a friend named Dr Tan.

7 Also exhibited were voice recordings of:

(a) H, the children of the marriage, H's sister and H's sister's son at a concert;

(b) H's mother, H's nephew and one of the children of the marriage in H's car; and

(c) H and the children discussing their trip to Hong Kong.

8 H did some investigations and then remembered that he had backed up his previous mobile phone, an iPhone 4, on 12 December 2012, onto the Asus Notebook, which was given to him by his sister around October 2012, before transferring all the data to his new mobile phone, an iPhone 5,

through iTunes.

9 H retained the services of a computer forensic expert, Mr Darren Cerasi ("Cerasi") from I-Analysis Pte Ltd, who promptly found all H's backed-up data, as at 12 December 2012, on a back-up file in the Asus Notebook. H was told that the data in the back-up file contained even more documents, information and data from his iPhone than those exhibited in W's affidavit.

10 H deposes that he had left the Asus Notebook either switched off or in sleep mode in the matrimonial home before he left for his trip to Hong Kong. He surmises that whilst he was in Hong Kong with the children from 16 to 20 December 2012, W returned to the matrimonial home, took away the Asus Notebook which had been left on the dining table, and drove away with one of the cars. She had also presumably gone back to the home again before H returned to replace the Asus Notebook in its original position.

11 Cerasi also found that one of the four screws used to mount the hard drive was missing. He surmised that someone had dismantled the computer chassis and removed the hard disc to make a full clone of it. In this regard, Cerasi found activity on the Asus Notebook on 18 December 2012, when H was in Hong Kong. The gravamen of H's complaint was that the entire hard disc was copied; it was not only the iPhone back-up that had been copied. This included information and communication between H and his lawyers and the data in his iPhone such as user identifiers (user IDs), passwords and other email account information which had passed between H and his sister, as he was not familiar with such technical matters.

W's case

12 W denied hacking into the Asus Notebook. She alleges that she was abruptly evicted [note: 2] from the matrimonial home on 26 September 2012. Many of her clothes and belongings were left behind when she left. As such, she went back on 18 December 2012 to retrieve some of these items. When she returned, however, the door was secured with a padlock. To gain entry, she enlisted the assistance of a locksmith. She argued she had the right to enter the house as she was a joint owner. [note: 3]

13 Whilst in the house, she noticed the Asus Notebook, which was on the dining table (in the dining room). She observed that the light on the Asus Notebook, indicating that the Asus Notebook was in sleep mode, was "on". W alleges that the Asus Notebook was in sleep mode and not password protected. She accessed the Asus Notebook, ostensibly to check whether H had deleted the web history, out of concern that the children might inadvertently access the adult sites that H had visited. [note: 4] When she did so, she saw a number of files on the desktop. This included a Microsoft Word document "Facts271012" which she claimed showed, *inter alia*, a plot to frame her. [note: 5] She then became curious about H's iPhone data. This led her to look for, or at, more documents on the Asus Notebook.

14 W then states, "I contacted my private investigator, Mr Dennis Lee, and asked him to make a copy of files and documents relevant to [the divorce proceedings] which showed that [H] had stated various untruths … in his attempt to 'win' at all cost". [note: 6] W also states that Dennis Lee made copies of the files "… on the 'desktop' of [the Asus Notebook] as well as the backup files of [H's] iPhone". [note: 7] Dennis Lee saved a copy on an external hard drive, which he passed to her (on the same day). W then alleges that she returned the Asus Notebook to the matrimonial home, where she found it, and has no idea why the screw was missing (see above at [11]).

High Court proceedings

15 Although parties were in the midst of proceedings before the Family Court, H came to the High Court and commenced an action for conversion, trespass, breach of confidence and asked for, amongst other things, an order for delivery up and damages. H also applied for the Injunction on 10 May 2013. Mr Kronenburg cited *Imerman v Tchenguiz and others* [2011] 2 WLR 592 and *X Pte Ltd and another v CDE* [1992] 2 SLR(R) 575 ("*CDE*") and although I expressed my reservation on the applicability of those authorities, on consideration of the applicable principles, I granted the Injunction knowing that there would be full arguments *inter partes* at a later stage.

16 The defendants duly applied, via Summons 2511/2013 to set aside the Injunction. Numerous affidavits were filed, including those by third parties and lawyers. I saw parties on 26 August 2013, to hear the parties on whether the Injunction should be set aside. I asked Mr Kronenburg why he came to the High Court, instead of possibly arguing this point before the Family Court. He replied that the Family Court does not have jurisdiction to deal with relief sought in a breach of confidence action, and that the Family Court's powers are simply to dissolve marriages and grant ancillary relief. He also added that, notwithstanding that the Family Court is a District Court, there is no provision for a civil and matrimonial suit to be consolidated.

The expert evidence

17 The computer experts, Cerasi and Dennis Lee, filed affidavits. Mr Kronenburg filed Summons 5757/2013 to cross-examine W's expert, Dennis Lee, as he allegedly had to keep changing his position in his later affidavits as each succeeding affidavit of Cerasi in response showed Dennis Lee was not telling the truth in his earlier affidavit. W filed an application to strike out certain statutory declarations and parts of H's fourth affidavit filed on 22 August 2013. This was dismissed and W appealed against this decision in RA 75/2014.

Related proceedings and further fallout

18 The dispute between H and W quickly spread to involve other parties.

19 There were allegations that Dennis Lee was put forward as someone who could hack into computers, notebooks or iPhones, whether protected by a password or not, and that he was recommended to various clients of lawyers practising at the family bar, including FSF. H's sister filed an affidavit on 30 October 2013, citing three other cases she personally knew where parties were involved in divorce proceedings and Dennis Lee was recommended to break or hack into computers, notebooks or iPhones. H's sister telephoned Dennis Lee, pretending to be in need of his services, recorded the conversation, and attached a transcript of the same in her affidavit. [note: 8]

20 I am told that complaints were filed before Singapore Medical Council and applications have been made for personal protection orders ("PPOs") in the State Courts. The grandparents, at least on one side, have become entangled in the fracas and in the PPO proceedings. Most upsetting is that in the middle of this maelstrom are two very young innocent children, aged about 6 and 8 years old.

Attempted mediation

21 As matters were getting increasingly acrimonious, with legal proceedings multiplying and Family Court matters on hold, with the agreement of counsel, I called H and W into chambers on 6 November 2013. I spoke to H with both sets of lawyers in the room. I gave an assessment of how the different

legal proceedings would play out, the likely time and cost involved and emphasised the plight and interests of the two young children. H quite readily agreed to mediation in a bid to stop escalating the proceedings, as he wanted to move on with his life. I then spoke to W with both sets of lawyers in the room with the same message. She too appeared sincere in wanting to mediate and sort things out instead of proceeding through the courts and she was tearful when I mentioned the plight and interests of her two young innocent children. I was heartened as both H and W readily acknowledged they should not hurt the children any further and it was mainly for their children as well as their own sakes that all disputes in relation to their break-up should be mediated and settled. I therefore adjourned the matter, hopeful that the matter could be amicably settled.

22 I was appalled to find the parties before me on 28 May 2014 and to be told that the mediation had failed and the parties needed to go on with the applications.

The statutory declaration

23 Further submissions were made before me on 15 July 2014. There were allegations that Dennis Lee had changed his stand in his latest affidavit and had left a number of questions unanswered. To enable finality to this issue, and as a more efficient alternative to H's application to cross-examine Dennis Lee (in Summons 5757/2013), I asked counsel to agree on the terms of a draft statutory declaration for Dennis Lee to affirm. Parties came to an agreement on this draft, and Mr Suressh said he would present the draft to Dennis Lee, for his confirmation. However, the statutory declaration that Dennis Lee eventually affirmed contained a few additional phrases – phrases which compelled Mr Kronenburg to write a letter dated 18 July 2014 to the court. He submitted on the significance of the deviations from the agreed upon draft, as follows:

(a) W had allowed or caused Dennis Lee to destroy documents, information and data copied from the Asus Notebook in violation of the Injunction, paragraphs 1 and 2 of the 15 May 2013 order of court and W's undertaking to the court to comply with paragraph 1 of the Injunction (as recorded by Vinodh Coomaraswamy JC, as he then was, on 15 May 2013);

(b) W did not disclose that Dennis Lee had saved the copies documents, data and/or information onto his desktop computer; and

(c) Dennis Lee had lied, yet again, on oath as to what he actually did in extracting data from the Asus Notebook.

My decision

24 I gave my decision on the various applications and appeal before me on 22 July 2014 as follows:

(a) The Injunction was discharged and the orders made in the 10 May 2013 order of court were set aside save that:

(i) any affidavits filed pursuant to paragraph 5 of the 10 May 2013 order of court were to remain on the record and could be used by the parties if they deem fit in any other proceedings before any court or tribunal; and

(ii) any documents, information or data or evidence copied from the Asus Notebook and/or comprised in the Exhibited Documents, the Material and the Further Material as defined in paragraph 1 of the 10 May 2013 order of court whether handed over by the first defendant to the second defendant or not shall not be destroyed or altered or disposed of

without an order of court in this action.

(b) The interim orders made by Coomaraswamy JC on 15 May 2013 and the standstill agreement reached by counsel and recorded by Coomaraswamy JC on 28 May 2013 were, subject to paragraphs 24(a)(i) and (ii) above, set aside, and the parties were free to resume any or related proceedings, including but not limited to those before the Family Court.

(c) For the avoidance of doubt, the parties were free to raise any objections, arguments or issues on the admissibility of evidence, whether they have been raised before me in these proceedings or not, when tendering and/or relying on the same before any court or tribunal seized of the various or any disputes between the or related parties to this action and having made no decision or made any orders in relation thereto, any such court or tribunal shall be free to consider and/or decide and/or take any action on the same and/or take into consideration if it thinks fit and to give such weight as it thinks fit to the affidavits and evidence filed and/or placed before me in these proceedings.

(d) For the further avoidance of doubt, solicitors for the first defendant and the second defendant are not absolved from their legal and ethical obligations in relation to documents, communications or evidence whether in electronic form or not, obtained by them that are covered by solicitor-client privilege and in so doing, if the same involves the deletion or destruction of any documents or evidence whether in electronic form or not, not to do so without informing and giving the plaintiff's solicitors at least 14 days' written notice of the same whereupon the plaintiff's solicitors may, if they deem fit, require the first and/or second defendants to retain and not destroy the same pending investigations by the police and/or authorities.

(e) Summons 5757/2013 and RA 75/2014 were dismissed.

(f) Orders as to costs were also made.

25 In my decision on 22 July 2014, I provided brief grounds for my decision to discharge the Injunction, which I will shortly expand upon. I also referred the matter to the Attorney-General's Chambers for investigation into the possible commission of various crimes, including those under the Computer Misuse Act (Cap 50A, 2007 Rev Ed) ("the Computer Misuse Act") and Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code"). There was also possible perjury and breaches of professional ethics and 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. I emphasise the word "possible" as I draw no conclusions or make any accusations other than flag the serious allegations made by the various parties under oath.

26 H applied for leave to appeal against my decisions, the main ground being an important point of law was involved, *viz*, whether material which has been obtained through the commission of an offence or offences or illegally obtained can be used in evidence. As noted above, I granted leave to appeal.

Grounds for decision

27 Before elaborating on my grounds, I highlight two related preliminary issues that arose in this case.

Preliminary issue 1: How the evidence was obtained

28 There was a dispute over whether the Asus Notebook was hacked into or whether it was simply in sleep mode, in which case there was no need to type in a password and if that password was not known, to have to hack into the computer. From the unfolding affidavit evidence, we now know that:

(a) W had surreptitiously taken away the Asus Notebook from the matrimonial home where W was no longer residing whilst H was on holiday in Hong Kong with the two children. She did so without his permission, which was clear from the manner in which she had to resort to a locksmith to gain entry to the house (see above at [12]). She passed the Asus Notebook to Dennis Lee, for him to copy its contents. She then replaced the computer in the matrimonial home, where she had originally found it.

(b) Dennis Lee removed the hard drive from the Asus Notebook and downloaded or copied its contents or part of its contents. Mr Kronenburg alleges that this bypassed the need to use a password to gain access.

(c) Dennis Lee destroyed what he copied onto his own desktop computer, an action which was, at the time, prohibited by an order of court.

In addition, it is quite clear, and I so find, that what was copied included privileged communications between H and his lawyers from Allen & Gledhill LLP, including Ms Bernice Loo.

29 There are a few versions as to where exactly Dennis Lee copied the documents onto:

(a) In Dennis Lee's first affidavit filed on 5 July 2013, at paragraphs 18, 20 and 21, he deposes that he extracted information from H's iPhone back-up and also copied the items on the "desktop" screen of the Asus Notebook, which included video and sound recordings and a word document, and saved it onto W's portable hard drive.

(b) In Dennis Lee's second affidavit filed on 2 October 2013, he deposes that he copied H's "desktop folders" (I pause to note the difference between a file and a folder), "pictures folder", "mobile phone synchronization folder" and "documents folder", and that all the copied material was saved on W's portable hard drive on 18 December 2013.

(c) In Cerasi's second affidavit filed on 30 October 2013, Cerasi deposes that Dennis Lee's account could not be true as W's portable hard drive was completely reformatted on 20 December 2012.

(d) In Dennis Lee's third affidavit filed on 4 November 2013, Dennis Lee confirms, at paragraphs 8–10, that he copied the material from the Asus Notebook onto *his* desktop computer in the interim and then onto W's portable hard drive *after* it was reformatted on 20 December 2012 and he "…retained [W's portable hard drive] for a few days after 18 December 2012 in order to run Oxygen Forensic on the [iTunes backup folder] files". [note: 9]

(e) In Dennis Lee's statutory declaration dated 16 July 2014, at paragraphs 3–5, he now states, on oath, that "*only* the iTunes Backup Folder" [emphasis added] was saved onto his desktop computer during the interim. Dennis Lee does not explain the "desktop folders", the "pictures folder" and "documents folder" which were mentioned in his second affidavit. Neither does he explain his agreement with Cerasi that all of these folders were saved onto his desktop computer *before* they were transferred onto W's portable hard drive. Dennis Lee's statutory declaration states that he ran the Oxygen Forensics on his own desktop computer and not W's portable hard drive.

I also note the recording of H's sister's conversation with Dennis Lee, the thrust of which is not seriously disputed. Although Dennis Lee alleges it is not a complete recording, it contains cogent evidence of what Dennis Lee claims as being able to accomplish for his "clients". These accomplishments include retrieving files from password protected devices. From all of this, although it is as yet unclear what the exact sequence of events was, and how exactly the files were transferred, what is clear is that Dennis Lee was inconsistent in his evidence.

30 I shall *assume* the strongest case for H for the purposes of this judgment, namely that the Asus Notebook was removed from the matrimonial home without his permission and surreptitiously while he was on holiday in Hong Kong, that it was hacked into or had the hard drive removed from the chassis to enable it to be copied without his consent and that an offence or offences were committed under the Computer Misuse Act and under the Penal Code. Can such evidence be placed before a court in matrimonial and related proceedings?

Preliminary issue 2: Admissibility of evidence

31 Although I note that admissibility is primarily an issue to be dealt with by the court hearing the substantive dispute, which in this case would be the Family Court, a point of law that arose in these interlocutory proceedings was whether the material obtained by W would be admissible as evidence, and if so, whether such evidence should be excluded. Mr Kronenburg based H's right to have the evidence rendered inadmissible or excluded by an injunction squarely on this point of law, *viz*, that illegality or improperly obtained evidence is inadmissible and/or should be excluded in civil proceedings. This necessarily invited discussion on whether there was an "exclusionary discretion" when it came to dealing with such evidence. I briefly consider the cases raised by counsel on this point.

Phyllis Tan

32 In *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 ("*Phyllis Tan*"), a solicitor was charged under ss 83(2)(*e*) and 83(2)(*h*) of the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the Legal Profession Act") for touting and for conduct unbefitting of an advocate and solicitor by attempting to procure conveyancing work for herself by promising remuneration by way of shopping vouchers to a real estate agent. It was argued that the evidence came from a private investigator who posed as a real estate agent and the evidence that was obtained was entrapment evidence or illegally obtained evidence and if so, the court had a discretion to exclude such evidence (see *Phyllis Tan* at [20]). The Court of Three Judges stated that:

(a) The Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") was a codifying statute (see *Phyllis Tan* at [117]).

(b) Section 2(2) of the EA provided that any rule of evidence not contained in any written law which is inconsistent with any of the provisions of the EA is repealed. This means all inconsistent rules existing at the date of its enactment were repealed (see *Phyllis Tan* at [117]).

(c) New common law rules of evidence that came about after the enactment of the EA could only be given effect to if they were not inconsistent with the provisions of the EA or their underlying rationale (see *Phyllis Tan* at [117]).

(d) If a fact is relevant, evidence to establish that fact is admissible. The court is given no discretion to exclude evidence which establishes a relevant fact but is bound to admit the evidence. Applying this principle, entrapment evidence is admissible under the EA to prove that the defendant solicitor committed the charged offence, and the court has no discretion to

exclude it (see *Phyllis Tan* at [124], where the court cited with approval *Halsbury's Laws of Singapore* vol 10 (Butterworths Asia, 2000) at para 120.009).

(e) The overarching principle of the EA is that all relevant evidence is admissible unless specifically expressed to be inadmissible. Under the EA, the only kinds of incriminating evidence that have expressly been denied admissibility are admissions and confessions made involuntarily by an accused person to someone in authority (see *Phyllis Tan* at [126]–[127]).

(f) The principle in *Regina v Sang* [1980] AC 402, which is that all relevant evidence – including entrapment evidence – is admissible unless its prejudicial effect outweighs its probative value ("the *Sang* principle"), is consistent with the EA and is therefore applicable in the Singapore context. This is because the probative value of entrapment evidence, by its very definition, must be greater than its prejudicial value in proving the guilt of an accused (see *Phyllis Tan* at [76] and [126]).

33 The Court of Three Judges went on to uphold the reception of the private investigator's evidence by the disciplinary committee as correct. It upheld the findings of the disciplinary committee and suspended the respondent from practice for 15 months.

34 Although *Phyllis Tan* was a High Court decision, it came from a very strong bench which comprised Chan Sek Keong CJ, Andrew Phang JA and Andrew Ang J. With respect, that judgment, delivered by Chan CJ, was an admirably detailed analysis and survey of the relevant law, local case law and comparative case law from other jurisdictions. It clarified and set out the law and was expressed to be "for the guidance of courts in future cases" (see *Phyllis Tan* at [52]).

35 The importance of the decision of *Phyllis Tan* is underscored by statements from two differently composed benches at the Court of Appeal. First, in another case involving disciplinary proceedings brought by the Law Society of Singapore which came up for hearing before *Phyllis Tan*, the Court of Appeal specifically deferred ruling on the admissibility of entrapment evidence and stated that "it would be more convenient for the court of three judges to consider [the] question in the case of *Law Society of Singapore v Tan Guat Neo Phyllis*…" (*Wong Keng Leong Rayney v Law Society of Singapore* [2007] 4 SLR(R) 377 ("*Wong Keng Leong Rayney*") at [27]). Secondly, the Court of Appeal in *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 ("*Kadar*") endorsed the view in *Phyllis Tan* that the *Sang* principle was consistent with the EA (see *Kadar* at [51]–[53]).

36 Given these endorsements by cases from the Court of Appeal, it has been noted that "[a]fter *Phyllis* [*Tan*], the courts were resolute in emphasising the literal application of the EA and the non-applicability of extraneous principles" (see Jeffrey Pinsler SC, "Admissibility and the Discretion to Exclude Evidence: In Search of a Systematic Approach" (2013) 25 SAcLJ 215 ("Pinsler's Article") at paragraph 5).

Lee Chez Kee

37 In the Court of Appeal decision of *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee*"), Rajah JA, in approving *Phyllis Tan*, said that "the court of three judges has … 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 *Lee Chez Kee* at [106]). I note, however, that neither Choo Han Teck J nor Woo Bih Li J, both of whom wrote separate judgments in that case, commented on *Phyllis Tan*.

38 In *Lee Chez Kee*, the Court of Appeal was concerned with the admissibility of the statements of

the co-accused who was not only not party to the proceedings, but had passed away before trial. In considering this, the court analysed the rules on hearsay evidence and confessions, in the context of the EA and the Criminal Procedure Code (Cap 65, 1985 Rev Ed) ("the CPC"), and found that his statements were inadmissible (see *Lee Chez Kee* at [117]).

Kadar

39 In *Kadar*, in delivering the judgment for a unanimous Court of Appeal, Rajah JA referred with approval to the *Sang* principle (see *Kadar* at [51]–[53]). He also considered the general principle of law as stated in *Phyllis Tan* at [127], that probative value is the crucial factor *vis-à-vis* admissibility of statements, to be the "settled position under the EA" (see *Kadar* at [55]). The Court of Appeal held that the court had the discretion to exclude a voluntary statement where its prejudicial effect exceeded its probative value.

40 In *Kadar*, the first two statements from the co-accused were recorded in breach of the procedural requirements set out in s 121(2) of the CPC and the police general orders, the requirements of which were to ensure accuracy and reliability of the statements taken. For this reason, the Court of Appeal held that where such statements had been admitted, the court would not be slow to exclude them (see *Kadar* at [60]). The court's ability to exclude such statements was based on the "common law discretion to exclude voluntary statements that would otherwise be admissible … [but] the prejudicial effect of the evidence exceeds its probative value" (see *Kadar* at [53]).

41 Should the prosecution wish to admit statements that were recorded in breach of procedural requirements, it will bear the burden of establishing that the probative value of the statement outweighs its prejudicial effect, and this burden could be discharged, for instance, by providing some reasonable explanation for the irregularity. Where the breaches were deliberate or reckless, a more cogent explanation would be required (see *Kadar* at [60]–[62]).

42 On the facts, the Court of Appeal held that the prosecution had failed to discharge its burden of proof in explaining the apparently deliberate and manifest irregularities. There was also a major discrepancy between the original recording of the second statement and the senior station inspector's subsequent entry of this statement into his field diary. Accordingly, both statements should have been found "inadmissible" as their prejudicial effect exceeded their probative value (see *Kadar* at [147]). I pause at this juncture to note that the Court of Appeal's exact words in *Kadar* at [147] were "we find that both statements should have been found inadmissible under the exclusionary discretion". This may create some confusion between the two concepts of "inadmissibility" and "exclusion". Nevertheless, as this issue does not arise on these facts, I shall say no more.

43 The Court of Appeal also noted that the co-accused had a low IQ, a malleable personality and was in a vulnerable physical (*ie*, physical symptoms of drug dependency) and mental state when the first two statements were recorded. All these factors combined to render his first two statements unreliable and therefore inadmissible as they had very little probative value.

Comparing the cases – is there an exclusionary discretion?

44 Whilst *Phyllis Tan* dealt with a situation where the impugned entrapment evidence was held to be admissible because its probative value exceeded its prejudicial effect (in the context of disciplinary proceedings against a solicitor) and there was nothing in the EA that prohibited the admissibility of such relevant evidence, *Kadar* held that a court had the discretion to exclude evidence where its probative value was low and its prejudicial effect on the outcome of the trial was high (in the context

of criminal proceedings).

45 Professor Pinsler in his article (referred to above at [36]) makes the following points from these three cases:

(a) Statutory provisions operate to exclude involuntary statements in criminal proceedings but they do not expressly provide the courts with the power to exclude improperly obtained voluntary statements (Pinsler's Article at paragraph 3).

(b) *Kadar* is a significant decision because although it is established law that a voluntary statement is admissible, even if the procedural requirements relating to the manner in which it was recorded have not been complied with, *Kadar* clarified that this is not an absolute rule and it does not prevent the court from excluding admissible evidence if its reliability has been compromised by serious failures to comply with the relevant procedures (Pinsler's Article at paragraph 7).

(c) Although the Court of Appeal in *Kadar* referred to the court's inherent jurisdiction, it classified the court's power to reject evidence as an "exclusionary discretion". If the courts have an inherent jurisdiction to exclude evidence, it should be asked whether this is a general doctrine or one that is subject to the confines set by the case law (such as the probative value/prejudicial effect balancing test affirmed in *Kadar*) (Pinsler's Article at paragraph 1).

46 As noted in *Phyllis Tan*, the *Sang* principle is consistent with the EA in admitting entrapment evidence as its probative value always outweighs its prejudicial effect. But where does the *Sang* principle stand *vis-à-vis* the EA when the reverse applies, *viz*, the prejudicial effect of the evidence sought to be admitted outweighs its probative value (and it is not an involuntary admission or confession by an accused)? This poses a problem because although the Court of Three Judges in *Phyllis Tan* concluded that the *Sang* principle was "in practical terms, consistent with the EA …", it also stated that under the EA, "all relevant evidence is admissible unless specifically expressed to be inadmissible" (see *Phyllis Tan* at [126]). Professor Pinsler's question (see above at [45(c)]) is at the heart of this matter. *Kadar* is, with respect, correct on its facts because there was little or no probative value in his first two statements that were ruled inadmissible, *ie*, it cannot be considered as *relevant* evidence. But what is the position where the impugned evidence has a higher level of probative value than in *Kadar*, but not enough to tip the scales into the realm of clearly outweighing its prejudicial effect?

47 The answer seems to be found in *Kadar* at [51]–[53]. The Court of Appeal stated, after an in-depth discussion, that *Phyllis Tan* ruled that the principle relied on in certain cases – that the court had a discretion to exclude evidence only on the ground that it was obtained in ways unfair to the accused – was incompatible with the EA and in particular with s 2(2). However, the court in *Kadar* also observed that *Phyllis Tan* further held (at [126]) that the *Sang* principle was consistent with the EA and in accordance with the letter and spirit of s 2(2), and therefore applicable in the Singapore context. The court in *Kadar* termed this an "exclusionary discretion". This was recognised in previous cases like *Wong Keng Leong Rayney* at [27], *Public Prosecutor v Dahalan bin Ladaewa* [1995] 2 SLR(R) 124, and the cases cited at [54] of *Kadar*. The Court of Appeal also referred to Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at paragraphs 10.20 and 10.24, (in the 4th Ed, 2013, the equivalent portion – from paragraph 10.24 onwards – has been extended to take into account *Kadar*) that the discretion arises from the inherent jurisdiction of the court to prevent injustice at trial (see *Kadar* at [52]).

48 In *Kadar*, the Court of Appeal stated (at [55]):

> 55 In our view, there is no reason why a discretion to exclude voluntary statements from accused persons should not exist where the prejudicial effect of the evidence exceeds the probative value. For one, where the prejudicial effect exceeds the probative value, the very reliability of the statement sought to be admitted is questionable. It appears to us that this is an area of judicial discretion that Parliament has left to the courts. ...

49 There is also some support for this view from the Minister for Law's Speech in Parliament during the Second Reading of the Evidence (Amendment) Bill 2012 where he referred to the court's inherent jurisdiction to exclude evidence (see *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 at cols 45 and 56). I should add, by way of a postscript, that the 2012 amendments to the EA added discretionary provisions in relation to hearsay and expert opinion evidence. The first, s 32(3), provides that a statement which is otherwise relevant under s 32(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 second, s 47(4), provides that an opinion, which is otherwise relevant under s 47(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.

50 As such, the 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 the inherent discretion of the court to prevent injustice at trial. I am not only bound by these Court of Appeal decisions but I am, with respect, entirely in agreement that an exclusionary discretion exists under the inherent jurisdiction of the court. As has been said time and again, the courts exist to dispense justice and are vigilant to prevent injustice in the cases that come before them. Having said that, resort to the inherent jurisdiction is made sparingly and it must always have, as its essential backdrop, relevant statutory regimes like the EA or established legal principles, through which a door is being sought.

Applicability to civil proceedings

51 Cases like *Kadar* involved criminal proceedings and *Phyllis Tan* involved disciplinary proceedings under the Legal Profession Act. Do the principles enunciated apply equally to commercial cases, matters pertaining to family law and claims in tort? Professor Pinsler opined that a distinction might have to be made between civil and criminal proceedings because of the need for precautions against injustice in the latter (Pinsler's Article at paragraph 2). In support of this, he cited Lord Reading's comments in *R v Christie* [1914] AC 545 at 564 that the principles of the law of evidence "are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action" (Pinsler's Article at paragraph 17). Although the EA governs both civil and criminal proceedings, I agree. This is especially so because 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.

52 In this case, the information obtained by W contained serious allegations against H. These include:

(a) H obtaining a false medical report and using it to support his application for a PPO against W. [note: 10]

(b) H procuring a false medical report from his sister to obtain a refund for a trip to Japan.

[note: 11]

(c) H persuading a fellow doctor, to whom W took the children, to write a letter stating that the children were crying when they visited him. This was presumably in a bid to fabricate evidence against W. [note: 12]

H does not deny the contents of the messages documented. H may say there are other messages or facts that may explain them away or render them innocuous, but that is beside the point. They are prima facie relevant in evidence. In my judgment, applying the principles of evidence discussed above, notwithstanding the existence of an exclusionary discretion which is of no application in these circumstances, there is no rule in our law of evidence *ipso facto requiring* the exclusion of the evidence obtained by W in the manner that she did. In any case, relevance and matters relating to admissibility of evidence are matters that are reserved for the court or tribunal seised of the various issues that have arisen in this case. As such, I make no determination on whether the evidence should be admitted or not and if admitted, what weight it should be accorded; those are matters to be decided by the courts or tribunals who are seised of the various disputes arising from this rather unfortunately acrimonious break up of this marriage.

Setting aside the Injunction (Summons 2511/2013)

53 I now turn to the main issue before this court – the defendants' application to set aside the Injunction that effectively constrained the use of the material obtained by W. The Injunction contained both mandatory and prohibitory elements. It mandated that the defendants deliver up, amongst other things, the material that it obtained from the Asus Notebook. It also prohibited the defendants from using, disclosing or destroying this material. The defendants submit, however, that by prohibiting the defendants from using the material, the order effectively mandates that evidence be excluded from the ongoing divorce proceedings. The difference between mandatory and prohibitory injunctions, although important, may not be as significant in this case for the reasons I shall come to.

54 The requirements for an interlocutory prohibitory injunction are two-fold. First, there must be a serious question to be tried. Second, the court must consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought (see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 ("*American Cyanamid*") at 407–408, recently applied by the High Court in *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] SGHC 153 at [13]–[14] and the Court of Appeal in *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 ("*Maldives Airports*") at [53]).

55 The Court of Appeal in *Maldives Airports* clarified that the court's role in conducting the balance of convenience exercise was to ascertain the course that appears to carry the lower risk of injustice, in the sense of an injunction having been granted when it should have been refused or an injunction having been refused when it should have been granted (*Maldives Airports at* [53], citing *Regina v Secretary of State for Transport, Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 at 683).

56 When it came to mandatory injunctions, the defendants submitted that the court should be more reticent, and should only grant such injunctions where there are special circumstances. As authority for this proposition, counsel cited *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [75], where the Court of Appeal observed that "[c]ase law has established that the courts will only grant an interim mandatory injunction in clear cases where special circumstances exist ...".

57 Having now had the benefit of submissions from both parties, as well as a better understanding

of the facts, I find myself able to set aside the Injunction on the primary ground that there is no serious question to be tried. Even if I am wrong on this, I find that the balance of convenience lies in favour allowing the material to be used in evidence, not least given its relevance to the related proceedings which concern, most importantly, the interests of the two young and vulnerable children.

No serious question

58 The three main causes of action in this suit, Suit No 427 of 2013, are conversion, trespass and breach of confidence. On the limited facts before me, I am unable to rule out a possible case in conversion or trespass. However, when the court confronted with the interlocutory injunction asks if there is a "serious question to be tried", its pursuit is not simply oriented around the viability of each and every one of the plaintiff's pleadings. Rather, the court should be ascertaining if, based on the material before it, the plaintiff has any prospect of succeeding in his claim for a permanent injunction at trial (see *American Cyanamid* at 408). In this case, H's breach of confidence claim is key to his ability to obtain a permanent injunction at trial.

59 In *CDE*, the High Court was confronted with a similar situation – an application by the defendant in that case to discharge the interim injunction granted to the plaintiffs. The defendant was the secretary of the second plaintiff. They engaged in a brief sexual relationship between July and December 1990. The defendant then resigned from the job. In the first half of 1991, the defendant wrote numerous letters and notes to the second plaintiff, seemingly in a bid to get her job back. The letters were initially couched in affectionate terms, but soon turned nasty. She also telephoned him on several occasions, and even wrote to the chairman of the parent company of the second plaintiff's employer, accusing the second plaintiff of, amongst other things, cheating the company. She also wrote to the second plaintiff's wife.

60 In October 1991, the defendant began speaking to the press, and things reached a peak a month later when the second plaintiff received an anonymous letter. The letter contained a draft letter with allegations of his mistreatment of the defendant and his cheating of the company, and a message that the draft was about to be sent to thousands of people (including the second plaintiff's family, his superiors, members of the company, and local authorities). The second plaintiff, together with his employer (the first plaintiff) filed a suit in the High Court. Their causes of action were breach of confidence and the tort of conspiracy to injure. Based on those causes of action, the plaintiffs applied for, and were granted, an interim injunction restraining the defendant from making use of or disclosing to anyone information acquired by her during her employ with the company on the personal affairs of the second plaintiff.

61 The plaintiffs framed their confidence argument in two respects – first relying on the employment contract between the company and the defendant, and second the equitable jurisdiction of the court. The High Court found that the defendant's disclosures related solely to the activities of the second plaintiff, and it was hence not seriously arguable that she had breached any duty of confidentiality owed to the company through her employment contract (*CDE* at [25]). More importantly, coming to the equitable obligation of confidence, the High Court observed that three elements needed to be satisfied in order for the plaintiffs to succeed in an action for breach of confidence (when there is no contract involved). These are:

(a) the information to be protected must have the necessary quality of confidence about it;

(b) that information must have been imparted in circumstances importing an obligation of confidence; and

(c) there must be an unauthorised use of the information to the detriment of the party who originally communicated it;

(see *CDE* at [27], citing *Coco v AN Clarke (Engineers) Ltd* [1969] RPC 41; [1968] FSR 415). With respect, I agree.

62 The High Court also cited, with approval, the words of Wood VC, "there is no confidence as to the disclosure of inquity" (see *CDE* at [39], citing *Gartside v Outram* (1857) 26 LJ Ch 113 at 114). This rule requires, as the High Court noted, balancing between the competing public interests in maintaining confidentiality and ensuring that wrongdoing is not concealed.

63 The High Court in *CDE* eventually found there was a serious question to be tried when it came to the plaintiffs' claims in breach of confidence *vis-à-vis* both the adulterous relationship issue and the second plaintiff's cheating allegation. An important consideration was that the defendant had obtained the information in the course of her employment (as the second plaintiff's secretary). With regard to the cheating allegation, the High Court pointed out that although it was indeed in the public interest for such allegations of wrongdoing to be aired, they only need be aired before the proper fora. The learned judge stated:

> 42 In this case, too, I do not see that public interest requires full-scale publication of [the second plaintiff's] alleged cheating. The only persons who need to know of the information at this stage are the company and the police. The company has already been informed and the first injunction order permitted the defendant to deal with the relevant authorities. In regards to the cheating allegation therefore, no objection can be made to the injunctions on the basis of public interest in disclosure.

64 It should be noted that the injunctions in *CDE* did not prohibit the defendant from disclosing any information to "the relevant authorities, her solicitors and the court". That carve-out, however, is not found in the present case.

65 Returning to the facts in this case, it is clear there was no contractual obligation of confidence between H and the defendants. This brings us to the three-stage approach relied on in *CDE*.

66 First, unlike in *CDE*, one would be hard-pressed to distil any "quality of confidence" about the information obtained by the defendants. The information in this case contained rather serious allegations, most notably of H conspiring to fabricate evidence (see above at [52]). Although information about one's sexual affairs – whether illicit or not – may attract a quality of confidence (see *CDE* at [30], citing *Stephens v Avery* [1988] 1 Ch 449 at 454), the nature of the information in this case is far removed from that. Moreover this is in the context of a dispute between husband and wife who are already engaged in divorce proceedings.

67 Secondly, even if there was a quality of confidence about the information, the circumstances in which the defendants obtained it imported no obligation of confidence. The information in *CDE* was obtained while the defendant was working as the second plaintiff's secretary. In this case, the information was obtained when the marriage had already effectively broken down, and H and W were living apart. Even if it could be argued that a marriage constituted "circumstances importing an obligation of confidence", the reality of the relationship between H and W negated any such obligation.

68 As such, short of even considering if there is overriding public interest that would warrant the disclosure of the information, it is clear that there is no serious question to be tried *vis-à-vis* H's

breach of confidence claim. This case is significantly different from *CDE* not only in the manner in which the information was obtained, but also the nature of the relationship between the parties, as well as the terms of the Injunction (I reiterate that in *CDE*, the injunction did not preclude disclosure of the information to relevant authorities or the court). Furthermore the disputes go beyond just H and W as there are the paramount interests of the two young children of the marriage.

69 I deal now briefly with the remaining causes of action, namely conversion and trespass. The subject matter of both causes of action, as pleaded by H, was the information obtained by the defendants (and for the tort of trespass, it extended to trespass to H's iPhone, backup files of the iPhone and the Asus Notebook).

70 The defendants submit that, when W entered the matrimonial home and used, or removed, the Asus Notebook:

(a) she was within her rights to do so as joint owner of the house; and

(b) the Asus Notebook was a "family computer" and she was entitled to use it.

71 Although I am not prepared to find, at this interlocutory stage, that neither cause of action proffers any serious question to be tried, I have doubts as to whether either, even if successful at the conclusion of this suit, would result in a permanent injunction prohibiting the defendants from using the information obtained. In any case, I consider a further reason for setting aside the Injunction.

Balance of convenience

72 Given the facts of this case, as well as the serious allegations against H which seem to be supported by the information obtained by the defendants, I see no reason not to set aside the Injunction. If H is concerned about being prejudiced in the Family Court proceedings, the Family Court is the right forum to air those grievances and make the appropriate submissions (such as on whether the evidence sought to be admitted by the defendants should be admitted or, if already admitted, excluded). Allowing the Injunction to stand would be tantamount to interfering with another court's fact-finding process and its right to decide on admissibility relevance and weight. That is clearly something I should not do.

73 For the reasons above, I allowed the defendants' application in part, setting aside the Injunction.

The remaining matters

Summons 5757/2013 – the application to cross examine Dennis Lee

74 As mentioned above at [23], I thought it more efficient to adduce further evidence from Dennis Lee by way of a statutory declaration. When parties had agreed upon a draft, which was subsequently signed by Dennis Lee (subject to the amendments and further complications that resulted), the application in Summons 5757/2013 was rendered obsolete. I hence dismissed this application. Any questions H would have wanted Dennis Lee to answer would now be taken over by the referral of these issues to the Attorney-General's Chambers.

RA 75/2014 – the Defendants' attempt to expunge evidence

75 I also dismissed RA 75/2014. This was an appeal against the decision of the AR in Summons No 5626 of 2013. There, the defendants sought to expunge certain material from H's fourth affidavit filed on 22 August 2013. In particular, the defendants sought to expunge portions in H's affidavit relating to: [note: 13]

(a) H's sister's account of Dennis Lee, as well as the recording of her telephone conversation (see above at [19]).

(b) The account of a former client of AND. In her statutory declaration, she recounted AND's advice to her in the midst of divorce proceedings that she had commenced against her ex-husband in July 2006. AND, at that time, was representing her in those proceedings. AND told her that she "could obtain evidence … by handing over [her] ex-husband's mobile phone to 'someone' while he was sleeping, and that the said 'someone' would return it by morning." When she probed further, "[AND] assured [her] that even with the PIN in place, the 'someone' would still be able to retrieve the text messages and call logs".

76 The defendants' main ground was that the contents were protected by privilege. With regard to H's sister's account, the AR dismissed the defendants' application on the ground that, notwithstanding the potentially privileged nature of the communications documented, the evidence was nonetheless admissible pursuant to the "illegal purpose" exception (see s 128(2) of the EA), and "also because the basis upon which [the second defendant was] seeking to exclude such evidence on behalf of its former clients [was] questionable". With regard to the evidence of the former client of AND, the AR similarly dismissed the defendants' application, this time on the ground that any privilege had been waived by the client.

77 I agree with the view of the AR that any privilege that may have once been attached to those documents have either been waived or overridden by more important considerations such as the need to disclose:

(a) a common view between solicitor and client to commit illegal acts (see s 128(2)(*a*) of the EA); or

(b) fraud or crime that may have already been committed (see s 128(2)(*b*) of the EA and *Gelatissimo Ventures (S) Pte Ltd and others v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 at [29]–[81]).

78 For these reasons, I have dismissed the appeal.

Costs

79 Lastly, I have made no order as to costs. Although costs should normally follow the event, I have considered all the circumstances of this case and decided that a deviation from the norm was warranted. The circumstances include the fact that this whole sorry dispute was triggered when W surreptitiously entered the matrimonial home, took the Asus Notebook, and passed it to Dennis Lee. Although W might argue that H had "started it first" by obtaining her private information, that in no way justifies her actions.

80 Further, there were allegations that the second defendant introduced Dennis Lee to W. Dennis Lee is not the usual private investigator in divorce cases. He was clearly retained because of his expertise in computers. There is an apparently evasive silence as to how W came to know of his expertise or how she retained him. No doubt the police or the AGC will get to the bottom of this

matter. I draw no conclusions on this point, save as to say that this court takes a very dim view of solicitors who sanction, let alone encourage, their clients' involvement in such illicit activities as "hacking". In this case, it has exacerbated the acrimony between parties to the extent that it completely overshadowed the interests of the two young children of the marriage.

[note: 1] H's 1st Affidavit dated 9 May 2013 at p 69.

[note: 2] W's 1st Affidavit dated 26 May 2013 at [14].

[note: 3] W's 2nd Affidavit dated 3 July 2013 at [20]–[23].

[note: 4] W's 1st Affidavit dated 26 May 2013 at [16].

[note: 5] W's 1st Affidavit dated 26 May 2013 at [127]–[129] and W's 2nd Affidavit dated 3 July 2013 at [86]–[90].

[note: 6] W's 1st Affidavit dated 26 May 2013 at [36].

[note: 7] W's 1st Affidavit dated 26 May 2013 at [37].

[note: 8] H's sister's 1st Affidavit dated 30 October 2013.

[note: 9] Lee Sing Ling Wendell Dennis' 3rd Affidavit dated 4 November 2013.

[note: 10] W's 1st Affidavit dated 26 May 2013 at [113].

[note: 11] W's 1st Affidavit dated 26 May 2013 at [117].

[note: 12] W's 1st Affidavit dated 26 May 2013 at [134].

[note: 13] H's 4th Affidavit dated 22 August 2013 at pp 7–15.