

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2023] SGHC 10

Suit No 874 of 2021 (Registrar's Appeals Nos 245, 246 and 247 of 2022)

Between

Systematic Airconditioning Pte
Ltd

... Plaintiff

And

- (1) Ho Seng Ken
- (2) Zheng Xiangxi
- (3) CTE Automobile Pte Ltd
- (4) United SG Automobile Pte Ltd
- (5) Alpha Refrigeration
Engineering Pte Ltd
- (6) Central Automotive Pte Ltd

... Defendants

GROUND OF DECISION

[Evidence — Witnesses — Privilege — Marital privilege]

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Systematic Airconditioning Pte Ltd

v

Ho Seng Ken and others

[2023] SGHC 10

General Division of the High Court — Suit No 874 of 2021 (Registrar's Appeals Nos 245, 246 and 247 of 2022)
Chua Lee Ming J
2, 15 September, 11 October 2022

16 January 2023

Chua Lee Ming J:

Introduction

1 HC/RA 245/2022, HC/RA 246/2022 and HC/RA 247/2022 were appeals against the Assistant Registrar's decisions on two applications for discovery. HC/RA 245/2022 raised questions relating to the scope of:

- (a) s 124(1) of the Evidence Act 1893 (2020 Rev Ed) ("EA"), which protects communications made during marriage against disclosure; and
- (b) s 133 of the EA, which protects documents from production in circumstances in which another person having possession could refuse to produce the same.

Background facts

2 The plaintiff, Systematic Airconditioning Pte Ltd (“SAPL”), has as its primary business the commercial rental of refrigerated trucks, the manufacturing and installation of refrigerated boxes on trucks and the repair and servicing of trucks and refrigerator systems. The first defendant, Mr Ho Seng Ken (“Ho”) is a director of SAPL; the other directors are Ho’s ex-wife, Mdm Ng Ah Geok (“Ng”) and their son, Mr Shawn Ho Meng Cher.

3 Ng and Ho divorced in 2010, but Ho remained a director of the plaintiff; he was also employed as its Managing Director until June 2020. The second defendant, Mdm Zheng Xiangxi (“Zheng”) is Ho’s current wife. Ho and Zheng were married on 20 April 2015. Zheng was employed by the plaintiff from 2002 to 2003.

4 There were four other defendants:

(a) The third defendant, CTE Automobile Pte Ltd (“CTE Automobile”), was incorporated in 2016 and, according to the plaintiff, is in the business of retail sale, installation and maintenance of refrigerated trucks.

(b) The fourth defendant, United SG Automobile Pte Ltd (“United SG”), was incorporated in 2017 and, according to the plaintiff, is in the business of installation, repair, and maintenance of trucks and refrigerator boxes.

(c) The fifth defendant, Alpha Refrigeration Engineering Pte Ltd (“Alpha Refrigeration”), was incorporated in 2019 and is in the business of the sale, installation, maintenance and repairs of refrigerated trucks and refrigerator boxes.

- (d) The sixth defendant, Central Automotive Pte Ltd (“Central Automotive”), was also incorporated in 2019 and, according to the plaintiff, is in the business of the repair and servicing of refrigerated trucks and refrigerator systems on trucks.

In these grounds, I shall refer to these four companies collectively as the “Defendant Companies”.

5 At all material times:

- (a) Zheng was the sole director and shareholder of CTE Automobile, Alpha Refrigeration and Central Automotive; and
- (b) Ho was a director and 60% shareholder of United SG.

6 Two other entities, both sole proprietorships, were relevant although they were not parties to this action:

- (a) CTE Auto – Zheng was its Sales Manager from 2014 to sometime in 2015, and became its sole proprietor in 2015. According to the plaintiff, Ho was its Technical Consultant at all material times.
- (b) Wellux Enterprise (“Wellux”) – Zheng was the sole proprietor.

7 In summary, SAPL’s claims were that:

- (a) Ho breached his fiduciary duties that were owed to SAPL by:
 - (i) giving undue preferential treatment to CTE Auto and/or CTE Automobile;

- (ii) diverting SAPL’s customers and corporate opportunities to CTE Auto and/or the Defendant Companies and/or Wellux;
 - (iii) soliciting SAPL’s employees to join Alpha Refrigeration and Central Automotive; and
 - (iv) using Wellux to collect payment of monies from third-party customers which were due and owing to SAPL.
- (b) Zheng acted dishonestly in assisting Ho in his breaches of fiduciary duties.
 - (c) The Defendant Companies acted dishonestly in assisting Ho in his breaches of fiduciary duties.
 - (d) Ho and/or Zheng and/or the Defendant Companies conspired to injure SAPL.

8 For the purposes of these grounds, the relevant disclosures that the plaintiff sought may be broadly categorised as follows:

- (a) As against Ho – correspondence exchanged between Ho and Zheng in relation to the following matters (the “Disclosure Matters”):
 - (i) the businesses of CTE Automobile, CTE Auto, Alpha Refrigeration, Central Automotive and Wellux;
 - (ii) specific transactions pleaded in the Statement of Claim; and

- (iii) the decision by two employees to leave the employ of the plaintiff to join Alpha Refrigeration and Central Automotive.
- (b) As against Zheng – correspondence exchanged between Zheng and Ho in relation to the Disclosure Matters.
- (c) As against the Defendant Companies – correspondence between Ho and Zheng in relation to the Disclosure Matters.

9 The Assistant Registrar (“AR”) disallowed the plaintiff’s application for the above disclosures in so far as they pertained to communications made between Ho and Zheng during the subsistence of their marriage (*ie*, from 20 April 2015 onwards). The AR held that *all* correspondence between Ho and Zheng during the subsistence of their marriage was protected against disclosure under s 124(1) of the EA. HC/RA 245/2022 was the plaintiff’s appeal against the AR’s decision. I allowed the appeal in part and dismissed it in part.

10 HC/RA 246/2022 and HC/RA 247/2022 were appeals by Zheng, CTE Automobile, Alpha Refrigeration and Central Automotive. The issues in these two appeals did not have anything to do with ss 124(1) and 133 of the EA and I shall not deal with them in these grounds.

Issues

11 The main issues before me in relation to ss 124(1) and 133 of the EA were:

- (a) Whether s 124(1) of the EA protected a person from having to disclose communications made *by* him to his spouse during

marriage (in contrast to communications made *to* him by his spouse)?

- (b) What was the scope of communications between spouses that fell within s 124(1) of the EA?
- (c) Whether the protection under s 124(1) of the EA could be waived?
- (d) Whether one could rely on s 133 of the EA to refuse to disclose communications between spouses?

Whether s 124(1) of the EA protected a person from disclosing communications made *by* him to his spouse during marriage

12 Section 124(1) of the EA provides as follows:

Communications during marriage

124.—(1) No person who is or has been married may be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married; nor may he or she be permitted to disclose any such communication unless the person who made it or his or her representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

13 It was not disputed that s 124(1) of the EA protected a person from having to disclose communications made *to* him by his spouse during marriage. The defendants submitted that s 124(1) also protected a person from having to disclose communications made *by* him to his spouse during marriage.

14 The AR agreed with the defendants that:

... it [was] quite indefensible for the Plaintiff to take the position that it can obtain from [Ho] what he said to [Zheng], regardless of whether he consents, when the Plaintiff cannot obtain from [Zheng] what [Ho] said to her without his consent.

Communications between two persons are mostly two-way communications where there could be a lot of repetition and paraphrasing of what one said to another and vice versa. [I]t is virtually impossible and impractical to ‘*slice and dice*’, as counsel submitted, the communications between two persons to distil the communications from A to B, without also retaining some of what B might have said to A which A paraphrased or repeated to B.

[emphasis in original]

15 The AR also relied on *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd and others* [2017] SGHCR 15 (“*EQ Capital*”) in which a different AR said that “s 124 embraces *all* communications, ranging from the most quotidian of daily banalities to the deepest intimacies, and must include matters relating to the ordinary business affairs of the spouses” [emphasis in original] (at [34]).

16 Before me, the plaintiff submitted that the language in s 124(1) was clear; it expressly referred to communications made *to* the person who had to give disclosure. The defendants, understandably, supported the AR’s decision. The defendants submitted that Parliament does not legislate in vain (*Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 (“*Tan Cheng Bock*”) at [38]) and argued that the plaintiff’s interpretation would render s 124(1) otiose if an applicant sought disclosure against both spouses.

17 I disagreed with the AR and the defendants. In my view, it was unarguable that s 124(1) of the EA only protected a person from being compelled to disclose communications made *to* him by his spouse during marriage; it did not protect communications made *by* him to his spouse during marriage.

18 First, the ordinary meaning of the language in s 124(1) of the EA was clear. The first step in a purposive interpretation of a legislative provision is to

ascertain all the possible interpretations of the provision (*Tan Cheng Bock* at [37]). In my view, the plaintiff's interpretation was the *only* possible interpretation. Section 124(1) referred expressly and specifically to communications made *to* the person who had to give evidence or disclosure. The defendants' interpretation could not be supported without reading additional words into s 124(1) and it was not the court's role to re-write legislative provisions.

19 Second, the plaintiff's interpretation that s 124(1) protected only marital communications made to the person against whom disclosure was sought, was well-supported by authorities. The history of s 124 was discussed in *EQ Capital* at [16]–[22]; in summary, it is as follows:

(a) At common law, a person was not a competent witness either for or against his or her spouse.

(b) The *Second Report of the Commissioners for Inquiring into the Process, Practice and System of Pleading in the Superior Courts of Common Law* (1852) recommended that spouses should be competent and compellable to give evidence for and against each other but there should be a rule of privilege that safeguarded marital communications.

(c) The recommendations were accepted. The Evidence Amendment Act 1853 (c 83) (UK) ("UK Amendment Act 1853") abolished the common law rule and made husbands and wives competent and compellable witnesses in civil proceedings. Section 3 of the UK Amendment Act 1853 provided for marital communications privilege as follows:

III Husbands and Wives not compelled to disclose Communications.

No Husband shall be compellable to disclose any Communication made to him by his Wife during the Marriage, and no Wife shall be compellable to disclose any Communication made to her by the Husband during the Marriage.

- (d) The legislative developments in the UK led to similar reforms in India in 1853, which formed the basis for s 122 of the Indian Evidence Act, 1872 (Act No 1 of 1872) (“Indian Evidence Act”). Section 122 of the Indian Evidence Act provided as follows:

122. Communications during marriage

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

- (e) Section 124(1) of the EA is based on s 122 of the Indian Evidence Act.

20 Both s 3 of the UK Amendment Act 1853 and s 122 of the Indian Evidence Act protected a witness from being compelled to disclose communications made *to* him by his spouse during marriage.

21 UK courts have observed that s 3 of the UK Amendment Act 1853 protected communications made *to* the witness and did not protect those made *by* the witness: *Shenton v Tyler* [1939] Ch 620 (“*Shenton*”) at 628–629; *Rumping v Director of Public Prosecutions* [1964] AC 814 (“*Rumping*”) at 859. A similar observation was made by the Criminal Law Revision Committee in England in its *Eleventh Report: Evidence (General)* (Cmnd 4991, 1972) at para 173 (cited in *Lim Lye Hock v Public Prosecutor* [1994] 3 SLR(R) 649 at

[42]). The plaintiff’s interpretation of s 124(1) was consistent with the interpretation that has been given to s 3 of the UK Amendment Act 1853.

22 The plaintiff’s interpretation was also supported by the view expressed in *Ho Hock Lai*, “Spousal Testimony on Marital Communication as Incriminating Evidence: *Lim Lye Hock v PP*” [1995] SJLS 236 at 240, that “section 124 applies only to communication made *to* the witness and not to communication made *by* the witness” [emphasis in original].

23 There was a distinction between the provisions in the UK Amendment Act 1853 and the Indian Evidence Act. Section 3 of the UK Amendment Act 1853 merely provided that no spouse could be compelled to disclose any communication made to him/her by the other spouse during marriage. This meant that the spouse giving evidence could disclose communications made to him by his spouse if he so wished, whether or not the other spouse objected; the marital communications privilege belonged to the recipient-spouse, not the communicator-spouse (see *Rumping* at 833 and 858). Lord Reid (at 833) found it “a mystery” why this privilege was given to the recipient-spouse, observing that a loyal spouse could use the privilege to help the other spouse, whilst an unfriendly spouse could use the privilege to the detriment of the other spouse.

24 The Indian Evidence Act took a different, and perhaps more coherent, approach. Section 122 of the Indian Evidence Act also provided that a spouse could not be compelled to disclose communications made to him/her during marriage by the other spouse. However, it went further to provide that a spouse was not permitted to disclose such communications without the other spouse’s consent. Thus, under the Indian Evidence Act, the marital communications privilege belonged to the communicator-spouse.

25 Ho and United SG submitted that this distinction meant that *Rumping* was not helpful in interpreting s 124(1) of the EA. I disagreed. The observation in *Rumping* (at 859) that s 3 of the UK Amendment Act 1853 did not protect a communication made by a witness to his/her spouse was not related to the observation that the witness could waive the protection without the other spouse's consent. There was also nothing in *Shenton* to suggest that the observation (that the statutory privilege did not protect communications made *by* the witness) was based on anything other than the fact that that was what the provision stated.

26 Third, I agreed with the plaintiff that the statement in *EQ Capital* that s 124 embraced all communications (which the AR relied on) had to be read in context. The issue in that case was whether the scope of s 124(1) was limited to confidential communications between spouses. *EQ Capital* decided that s 124(1) of the EA was not confined to confidential communications but “embrace[d] *all* communications” (at [34]). Nothing in *EQ Capital* dealt with the question of whether a person could rely on s 124(1) to refuse disclosure of communications made *by* him to his spouse; this was not the issue in that case.

27 Fourth, the defendants' submission that the plaintiff's interpretation of s 124(1) would render it otiose assumed that both spouses would be available as witnesses in court or that disclosure of documents could be sought against both spouses. Obviously, this assumption did not necessarily hold true in every case.

28 As for the argument that it may be virtually impossible and impractical to “slice and dice” communications between two spouses, in my view, the difficulty was not insurmountable and any difficulty in doing so was insufficient to override what s 124(1) of the EA clearly and expressly spelt out to be the law.

29 I therefore found that Ho was not protected by s 124(1) of the EA from being compelled to disclose communications made *by* him to Zheng during their marriage, and Zheng was not protected from being compelled to disclose communications made *by* her to Ho.

The scope of communications between spouses that fell within s 124(1) of the EA

30 As stated earlier, s 124(1) of the EA protected a person from being compelled to disclose communications made *to* him by his spouse during marriage. The plaintiff submitted that this applied only to communications made by the spouse as principal and that communications made by the spouse as agent for a third party were not protected under s 124(1).

31 The plaintiff relied on *Enjin Pte Ltd v Pritchard Lilia* [2022] SGHC 201 (“*Enjin*”), in which the High Court held at [41] that communications between spouses fell within s 124 of the EA only if they were made between them in their capacities as spouses as principals. The High Court explained as follows (at [41]):

... thus, where a spouse communicated with a spouse on behalf of another person, the section would not apply. In such cases, the communication would be by the spouse’s principal, rather than by the spouse. Section 124 EA would not apply because it only applies to communications ‘by any person to whom [the spouse] is or has been married.’ One example of such a case may arise where two spouses work for different companies that do business with each other. If the wife acting for her employer offers to purchase something from the husband’s employer, and conveys this offer to her husband, the conveyance of that offer to her husband is not a marital communication. It is a communication between the spouses’ respective employers that happens to take place via the spouses. Another example arises where two spouses work for, or are officers of, the same company. They may communicate with each other in circumstances where the communication is part of the company’s business and forms part of the company’s record. Take the case where the two spouses are the only directors of

that company. The minute kept by one of them of a board meeting held between them without others present, or a communication between them approving the entry by one of them into a contract with a third party on behalf of the company, would not be protected by marital communications privilege. Those would be records of the company or communications between the company and either spouse.

32 Ho and United SG submitted that the interpretation in *Enjin* should not be adopted because (a) it read additional words into s 124(1) of the EA; and (b) it resulted in an unworkable or impracticable result in that it would be difficult to separate communications between Ho and Zheng in their capacities as spouses, from communications between them made on behalf of other entities. I disagreed with the submissions by Ho and United SG.

33 First, in *Enjin*, the court was interpreting the words “by any person to whom he or she is or has been married” in s 124(1) of the EA (see *Enjin* at [41]). The court held that where a spouse communicated on behalf of another person, that communication would be by the spouse’s principal rather than by the spouse. Such a communication did not fall within s 124(1) of the EA since s 124(1) only applied to communications by a spouse. The decision in *Enjin* did not involve reading additional words into s 124(1) of the EA.

34 Second, I accepted that difficulties may arise in separating communications made between spouses in their capacities as spouses from communications that are made as agents for third parties. However, in my view, any such difficulty was not insurmountable and was not good enough reason not to apply *Enjin*. In this regard, a similar difficulty exists in the case of legal professional privilege. Documents may contain information that is protected by legal professional privilege as well as information that is not so protected. That difficulty has not stopped the courts from allowing disclosure of the information that is not protected by legal professional privilege.

35 The remaining defendants (Zheng, CTE Automobile, Alpha Refrigeration and Central Automotive) accepted that the interpretation in *Enjin* appeared consistent with the rationale behind s 124(1) of the EA as explained in *EQ Capital* at [23], in that it would not jeopardise the frankness and candour in marital communications nor lead to domestic dissension and unhappiness. However, they submitted that *Enjin* applied only where the communicator-spouse *intended* to communicate with the recipient-spouse as an agent on behalf of a third party *and* the recipient-spouse understood the communicator-spouse to be so communicating.

36 *Enjin* excluded spousal communications from s 124(1) of the EA where it could be said that the communication was made as an agent of a third party. I agreed with the submission that for *Enjin* to apply, the communicator-spouse must have intended to make the communication as an agent on behalf of the third party. In almost all cases, this intent would likely have to be inferred. In my judgment, such an inference may be drawn where, for example:

- (a) both spouses were employees, officers or agents of the same company and the communication was on matters relating to the company's business;
- (b) both spouses were employees, officers or agents of different companies and the communication was on matters relating to the business between the companies; or
- (c) the communication had been copied to others in the company or companies that the spouses were employees, officers or agents of; however, the mere fact that a copy of an e-mail may have been kept in the server(s) did not mean that it had been copied to others in the company or companies.

37 I agreed with *Enjin* (at [41]) that records kept by companies (eg, minutes of meetings) fell outside the scope of s 124(1) of the EA. Clearly, such records could not be regarded as spousal communications within the meaning of s 124(1) of the EA.

38 However, in my view, it was irrelevant for purposes of s 124(1) of the EA whether the recipient-spouse understood the communicator-spouse to be communicating as an agent. The question with respect to s 124(1) of the EA was simply whether the communication was made by “any person to whom [the recipient-spouse] is or has been married”. In other words, the question was whether the communicator-spouse was communicating as a spouse or as an agent.

39 I now turn to *EQ Capital*. As seen earlier, the argument in that case was that s 124(1) of the EA applied only to confidential communications between spouses. It was submitted that confidential communications were those which were induced by the marital relationship, and which would not have taken place but for the existence of the marital relationship between the spouses. On this interpretation, s 124(1) of the EA excluded communications which flowed from the business relationship, as opposed to the spousal relationship, between a husband and wife (the “business transaction exception”). The argument relied on three American cases, which the AR distinguished (at [27]–[28]) on the ground that the relevant provisions on marital communications privilege considered in those cases protected the disclosure of “a *confidential communication* made by one [spouse] to the other during marriage” [emphasis in original].

40 The AR in *EQ Capital* noted (at [28]) that commentators who had considered the English, Indian and Singapore provisions were of the view that

the expression “any communication” (in the English and Indian provisions and in s 124(1) of the EA) was wide enough to cover all communications between spouses during the marriage and not just those which were expressed to be confidential. He emphasised (at [30]) that he could not “ignore the determiner ‘any’ in s 124”.

41 I heard the appeal against the AR’s decision in *EQ Capital*. I was troubled that communications between two directors (who were spouses) regarding the affairs of the company should be protected by marital privilege. Nevertheless, I agreed with the AR’s decision that the business transaction exception did not apply to s 124(1) of the EA and that any reform in that regard had to come from Parliament.

42 As can be seen from the above discussion, the approach taken in *Enjin* was somewhat different from the argument made in *EQ Capital*. Having considered the decision in *Enjin* and the parties’ submissions in the present case, I concluded that the interpretation of s 124(1) of the EA in *Enjin* was sound. There was no rule of law or requirement of public policy which precluded the reception in evidence of communications between spouses (*Rumping* at 835, 861 and 865). Marital communications privilege existed only to the extent provided for in s 124(1) of the EA, which existed to secure complete privacy in conjugal communications (*EQ Capital* at [31]). I saw no reason why communications between spouses who work for (or are officers of) the same company or different companies, on matters pertaining to the business/businesses of the company/companies, deserved any protection under s 124(1) of the EA.

43 Accordingly, I decided to adopt the interpretation of s 124(1) of the EA in *Enjin* and concluded that s 124(1) of the EA did not apply to communications

between spouses if the communications were made as agents on behalf of a third party. I agreed with the plaintiff that it was entitled to compel disclosure of communications received by Ho and Zheng, in so far as these communications were made by the communicator-spouse in his/her capacity as an agent rather than as a spouse.

Whether the protection under s 124(1) of the EA could be waived

44 Under s 124(1) of the EA, the recipient-spouse could not disclose marital communications made to him without the communicator-spouse's consent. Clearly, the privilege under s 124(1) of the EA belonged to the communicator-spouse. I agreed with the plaintiff that the protection afforded by s 124(1) of the EA could be waived by the communicator-spouse, such that the recipient-spouse would then be compellable to disclose the communication. Waiver of privilege may be inferred from the communicator-spouse's conduct, for example, where the communicator-spouse voluntarily made, copied or disclosed the communication to a third party. However, I agreed with the defendants that the mere fact that a copy of an e-mail may have been kept in a third-party's server, or given to a third party such as a secretary to perform the administrative task of filing, would not amount to waiver of the protection under s 124(1) of the EA.

Whether one could rely on s 133 of the EA to refuse to disclose communications between spouses

45 Section 133 of the EA states:

Production of documents which another person having possession could refuse to produce

133. No one may be compelled to produce documents in his or her possession which any other person would be entitled to refuse to produce if they were in his or her possession, except for the purpose of identification, unless such last mentioned

person consents to their production, nor may anyone who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.

46 It is not necessary to resort to s 133 of the EA unless the party against whom production of documents is sought has no other ground on which he can refuse production. In addition, s 133 applies only to the production of documents and oral evidence as to the contents of such documents whereas s 124(1) is not so limited.

47 As stated earlier, s 124(1) of the EA did not protect Ho from being compelled to disclose communications made *by* him to Zheng. Similarly, it did not protect Zheng from being compelled to disclose communications made *by* her to Ho. It was not disputed that Ho or Zheng may still have had copies of his/her communications to the other. This was not surprising especially with the prevalent use of e-mails and instant messaging (*eg*, text messages and WhatsApp).

48 The defendants submitted that pursuant to s 133 of the EA:

- (a) Ho could not be compelled to produce communications made *by* him to Zheng since Zheng would be entitled under s 124(1) of the EA to refuse to produce the same if they were in her possession.
- (b) Zheng could not be compelled to produce communications made *by* her to Ho since Ho would be entitled under s 124(1) of the EA to refuse to produce the same if they were in his possession.
- (c) The Defendant Companies could not be compelled to produce communications between Ho and Zheng since each of them would be entitled under s 124(1) of the EA to refuse to produce

communications made to him/her by the other, if they were in his/her possession.

49 The plaintiff submitted that with respect to communications *by* Ho to Zheng, Ho could not rely on s 133 of the EA unless:

- (a) Zheng was the owner of the document in Ho's possession; and
- (b) Zheng had an independent basis to refuse production of the document.

The plaintiff made similar submissions with respect to Zheng's reliance on s 133.

50 The parties' submissions raised the following questions:

- (a) Whether s 133 of the EA applied only to a situation where the person, against whom production was sought, held a privileged document on behalf of the owner of the document?
- (b) Whether a spouse could rely on s 133 of the EA to refuse production of communications made by him to his spouse, which were in his possession?
- (c) Whether a third party could rely on s 133 of the EA to refuse to produce communications made between spouses, which were in its possession?

Whether s 133 of the EA applied only to documents held on behalf of the owner of the document

51 The plaintiff submitted that s 133 of the EA applied only where the person (against whom production of documents was sought) held the documents

as agent for the owner of the documents. The plaintiff relied on the following passage in Sudipto Sarkar and VR Manohar, *Sarkar on Evidence (In India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia and Singapore)* vol 2 (Wadhwa and Company, 15th Ed, 1999) (“*Sarkar on Evidence*”) at p 2056:

... s 131 [of the Indian Evidence Act] refers to documents of another person in the possession of the witness, *ie*, documents which though physically in the possession of the witness are the property of another person who has a right to object to their production. It extends to the agent, *ie*, the possessor of the document, the same privilege which is enjoyed by the person whose property it is. This section is introduced for the protection of person whose title-deeds and other documents happened to be in possession of his attorney, mookhtear, agents or servants, trustees and mortgagees, etc. ...

52 Section 131 of the Indian Evidence Act is similar to s 133 of the EA and provides as follows:

131. Production of documents or electronic records which another person, having possession, could refuse to produce.

No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control, unless such last-mentioned person consents to their production.

53 In Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) (“*Evidence and the Litigation Process*”), the learned author expressed a similar view at para 15.062:

Section 133 of the EA provides that no person can be compelled to produce documents in his possession ‘which any other person would be entitled to refuse to produce if they were in his possession, except for the purpose of identification’. An exception applies when the ‘other person’ consents to the production of the document(s). The section also provides that a person who is entitled to refuse to produce a document under this rule cannot be compelled to give oral evidence of its contents. The scope of this section is considered to be limited to the situation in which a person officially holds a privileged document on behalf of another person; for example, a trustee,

a solicitor and a mortgagee. The effect of the provision is that while the person in possession of a document is not obliged to disclose it, he is not prohibited from revealing it if this is his intention. Section 133 is also considered in the context of privileged documents which fall into the hands of third parties.

54 However, in *Asplenium Land Pte Ltd v Lam Chye Shing and others* [2019] 5 SLR 130 (“*Asplenium*”) at [130], the High Court expressed reservations about the statement in *Evidence and the Litigation Process* that s 133 applied only to a situation where a person officially held a privileged document on behalf of another person. The court observed that no authority was cited for this proposition and reasoned that the opening words of s 133 (“No one ...”) were broad and unqualified. The court applied s 133 even though there was no official entrustment of documents to the person against whom production of the documents was sought. It should be noted however that in that case, the parties did not argue that s 133 was not applicable by virtue of the absence of official entrustment.

55 I agreed with *Asplenium*. Neither *Sarkar on Evidence* nor *Evidence and the Litigation Process* cited any authority for the proposition expressed in those publications. As stated in *Asplenium*, the language in s 133 of the EA was broad and unqualified. Limiting it to situations involving entrustment of documents required reading additional words into the provision.

Whether a spouse could rely on s 133 of the EA to refuse production of communications made by him to his spouse

56 As stated earlier, a communicator-spouse could not rely on s 124(1) of the EA to refuse to disclose communications made *by* him to the recipient-spouse. I was of the view that a communicator-spouse also could not rely on s 133 of the EA to refuse disclosure of such communications based on the argument that the recipient-spouse would be entitled under s 124(1) to refuse

disclosure of such communications. Allowing the communicator-spouse to do so was inconsistent with s 124(1) itself. In effect, it would allow the communicator-spouse to rely on s 124(1) indirectly to refuse disclosure of communications that he could not have refused to disclose under s 124(1). In my view, s 133 of the EA had to be interpreted in a manner that was consistent with s 124(1).

57 Accordingly, Ho could not rely on s 133 of the EA to refuse to produce communications made by him to Zheng, on the ground that Zheng could refuse to disclose such communications under s 124(1). Similarly, Zheng could not rely on s 133 of the EA to refuse to produce communications made by her to Ho, on the ground that Ho could refuse to disclose such communications under s 124(1).

Whether a third party could rely on s 133 of the EA to refuse production of communications made between spouses

58 The need to interpret s 133 of the EA in a manner that was consistent with s 124(1) (see [56] above) did not arise in the case of production of documents by third parties. Thus, the Defendant Companies were entitled to rely on s 133 of the EA to refuse to produce communications between Ho and Zheng *provided* that Ho/Zheng could refuse disclosure of the same under s 124(1).

59 It followed from the interpretation that I had given to s 124(1) of the EA that the Defendant Companies were not entitled to rely on s 133 if the communications between Ho and Zheng were made *by* them to the other spouse, or in their capacities as agents for third parties, or if the protection under s 124(1) had been waived.

Conclusion

60 I allowed HC/RA 245/2022 in part and made orders for the disclosure of documents in line with my interpretation of ss 124(1) and 133 of the EA.

Chua Lee Ming
Judge of the High Court

Lua Wei Liang Wilbur and Lau Chung Kit Darryl (Covenant
Chambers LLC) for the plaintiff;
Loo Chieh Ling Kate, Lee Junyi Morgan and Jerelyn Tay Yee Ying
(Ling Law Corporation) for the first and fourth defendants;
Khoo Ching Shin Shem, Teo Jia Hui Veronica and Genesa Tan Yun
Ru (Focus Law Asia LLC) for the second, third, fifth and sixth
defendants.
